

Submission in the UPR review of: Sri Lanka

Bearing in mind that all humans are born free and equal in dignity and in rights and that all human beings are entitled to the enjoyment of their human rights without distinction of any kind, and that states have a duty to respect, protect and fulfil these rights, we, the undersigned Non Governmental Organisations of this report, are gravely concerned by the wide-spread human rights violations that Lesbian, Gay, Bisexual, Trans gender, Intersex persons and those who Question their sexual orientation and/or gender identity (LGBTIQ) are currently facing in Sri Lanka. In spite of the human rights obligations that the Sri Lankan state has voluntarily agreed to be bound by, LGBTIQ persons in Sri Lanka are currently facing systematic stigma and discrimination amounting to human rights violations, due to their sexual orientation and/or gender identity and state actors often ignore or fuel the discrimination and abuse of LGBTIQ individuals. As such the Sri Lankan state often fails to respect, protect and/or fulfil the human rights of the LGBTIQ individuals in the country.

Legal and Statutory framework:

Sri Lanka maintains **criminal sanctions against sexual activity between consenting adults**. Sri Lanka's Penal Code of 1883 No 2 (Cap. 19) provides:

Article 365 – “Voluntarily carnal intercourse with man, woman or animal against the order of nature - imprisonment for a term which may extend ten years.”

Article 365A (as introduced by the “Penal Code (Amendment) Act, No. 22 of 1995”)
“Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of any act of gross indecency with another person, shall be guilty of an offence and shall be punished with imprisonment of either description for a term which may extend to two years or with a fine, or with both and where the offence is committed by a person over eighteen (18) years of age in respect of any person under sixteen (16) years of age shall be punished with rigorous imprisonment for a term not less than 10 years and not exceeding 20 years and with a fine and shall also be ordered to pay compensation of amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such a person.”

Effects of the criminal sanctions against sexual activity between consenting adults

The law that criminalises same sex sexual relations between consenting adults has severe consequences. Even when the law is not uniformly enforced, its mere existence leads to wide spread impunity for crimes committed against LGBTIQ individuals. Abuse against LGBTIQ people is frequently not reported as members of the LGBTIQ community are aware that they have no legal recourse. In the rare event that such a crime is reported to the police, the sexual orientation or gender identity of the complainant is often hidden due to fear of further stigmatization and discrimination by the police. Persecution of LGBTIQ people in the hands of the police is wide-spread. It builds on stigma and discrimination of LGBTIQ individuals and is fuelled by the criminalization of same sex sexual relations between consenting adults. Furthermore, the Police periodically detain persons who are or who are perceived to be LGBTIQ and extort money from them through blackmail and threats of exposure or of legal sanctions. The Sri Lankan non-governmental organisation EQUAL GROUND has experience from working with people who have been subjected to such treatment from the police and have assisted in several such cases.¹ In their experience, LGBTIQ individuals are often beaten and sometimes raped at the hands of the police. They are often incarcerated, at least over night, in order to frighten and shame the individual.

The law against same sex sexual activity between consenting adults fuels stigma and discrimination against LGBTIQ individuals, makes them appear to be legitimate targets for abuse and increases impunity for crimes committed against them. The law is also used to harass human rights defenders working to increase the recognition and implementation of the

¹ EQUAL GROUND, *Annual Narrative Report June 2004 to September 2005*, October 2005, p. 4.

human rights of LGBTIQ people, thereby undermining their right to participation in public life as well as the promotion of human rights.

Sri Lanka's international human rights obligations:

Provisions against sexual activity between consenting adults have been found to constitute **a clear violation of international human rights law**.

In *Toonen v Australia*, the **UN Human Rights Committee** in March 1994 confirmed that laws criminalizing consensual same-sex activity violate both the right to privacy and the right to equality before the law without any discrimination, contrary to articles 17(1) and 26 of the International Covenant on Civil and Political Rights.²

The Committee further considered that such laws interfere with privacy rights, whether or not they are actively enforced, and "run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention" by driving marginalised communities underground.

The UN Human Rights Committee has affirmed this position on many occasions, either urging States to repeal laws which criminalize consensual same-sex activity or commending them for bringing their legislation into conformity with the Covenant by repealing such provisions.³

This position is consistent with other **regional and national jurisprudence**, including decisions of the European Court of Human Rights⁴ and of the Constitutional Court of South Africa.⁵

States' international obligations to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were recently articulated in the "**Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity**". The Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including Asia. These experts included judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, members of civil society and others.

Principle 2 of the Yogyakarta Principles affirms the right of all persons to equality before the law without discrimination on the basis of sexual orientation or gender identity, and specifically confirms the obligation of States to "repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."

Principle 6 of the Yogyakarta Principles affirms the right of all persons, regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms States' obligation to "repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."⁶ The Principles also call on States to "ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent."

² *Toonen v Australia*, CCPR/C/50/D/488/1992, April 4, 1994.

³ See Human Rights Committee Concluding Observations: United States of America, A/50/40, October 3, 1995; Cyprus, CCPR/C/79/Add.88, April 6, 1998; Ecuador, CCPR/C/79/Add.92, August 18, 1998; Chile, CCPR/C/79/Add.104, March 30, 1999; Lesotho, CCPR/C/79/Add.106, April 8, 1999; Romania CCPR/C/79/Add.111, July 28, 1999; Australia, A/55/40, July 24, 2000; Egypt, CCPR/CO/76/EGY, November 28, 2002; Kenya, CCPR/CO/83/KEN, March 28, 2005; United States of America, CCPR/C/USA/CO/3, September 15, 2006; Barbados, CCPR/C/BRB/CO/3, May 11, 2007; Chile, CCPR/C/CHL/CO/5, May 18, 2007.

⁴ *Dudgeon v United Kingdom*, Series A no. 45., 1981; *Norris v Ireland*, 1991; *Modinos v Cyprus*, 1993.

⁵ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*, 1998.

⁶ Available in all 6 UN languages at: www.yogyakartaprinciples.org.

The **UN High Commissioner for Human Rights** has welcomed the Yogyakarta Principles as a “timely reminder” of the basic tenets of universality and non-discrimination, and noted that “respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental rights to life, security and privacy by criminalizing harmless private relations between consenting adults.”⁷

Recommendation:

We therefore recommend that the Human Rights Council, in its upcoming review, urge Sri Lanka to bring its legislation into conformity with its international human rights obligations by repealing all provisions which criminalise sodomy or other sexual activity between consenting adults. The same age of consent should apply to sexual activities between persons of the same sex and persons of a different sex. Furthermore the State of Sri Lanka should take all necessary measures to ensure equality and non-discrimination in relation to sexual orientation and gender identity.

This information is submitted jointly by:

- **ILGA** (International Lesbian and Gay Association), a global federation of over 600 lesbian, gay, bisexual, transgender and intersex (“LGBTI”) groups in over 90 countries – including 20 in Asia ;
- **ILGA-Europe**, an NGO with ECOSOC consultative status that is recognized by the EU, COE and OSCE;
- **EQUAL GROUND, Sri Lanka**, is a non profit organization seeking human and political rights for the Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning (LGBTIQ) community of Sri Lanka.
- **International Gay and Lesbian Human Rights Commission**, a non-profit NGO which seeks to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status;
- **ARC International**, an NGO with a full-time presence in Geneva which engages with the UN Human Rights Council and related mechanisms to advance respect for human rights, including on the grounds of sexual orientation and gender identity.

⁷ Statement of UN High Commissioner for Human Rights, Launch of the Yogyakarta Principles, 7 November, 2007, United Nations, New York.