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The status of the Human Rights of Lesbian, Gay,
Bisexual, Transgender and Intersex people

Presented by:

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Introduction

Since the 2006 Democracy Movement, Nepal has consistently expressed an intention to protect LGBTI rights and has taken steps to ratify key human rights treaties and to implement domestic reforms to recognise third gender rights. Nepal decriminalised consensual same-sex activity as a result of a 2007 Supreme Court decision (*Pant*), and has recognised third gender options on a number of state issued identification documents.

Nepal should be acknowledged for positive steps towards the recognition of LGBTI rights; however there remains scope for improvement in the protection of LGBTI persons from discrimination and gendered violence. There are reports of ongoing discrimination against LGBTI persons including by State entities, exacerbated by the failure of the State to enact specific anti-discrimination legislation. Further, the gendered definitions of marriage and family have resulted in a denial of civil rights for persons in same-sex relationships and indirect discrimination by the State. Recent reports have suggested there may be a move towards re-criminalisation of same-sex activities in the draft proposed *Criminal Code*. Any moves by Nepal towards re-criminalisation should be strongly discouraged.

1. Discrimination against LGBTI persons

Despite Nepal's positive steps, the lack of adequate legal protections against discrimination on the basis of sexual orientation and gender identity, the continuing arrests of LGBTI persons for nominal offences and the failure to legally recognise same-sex relationships, demonstrate a number of violations of Nepal's international obligations (and consequently, domestic obligations).

Nepal has yet to implement a number of recommendations from the previous periodic review in respect of LGBTI rights and from the decision in *Pant*. Recent commentaries suggest there may be some revision of the legal status of LGBTI persons as discussed below.

Failure to specifically recognise discrimination on the basis of sexual orientation and gender identity

Under its international and domestic obligations Nepal is required to provide effective legal protection against discrimination against LGBTI persons. Article 13 of the Interim Constitution grants all persons equality before the law but does not specifically address discrimination on the basis of sexual orientation and gender identity and does not specify other areas of potential discrimination such as education, health, employment and the provision of goods and services.

While the decision in *Pant* is such that LGBTI persons are protected by the equality obligation under Article 13 of the Interim Constitution, reports suggest that LGBTI persons continue to be the subject of discriminatory practices both by private and State entities. As there is no law specifically prohibiting discrimination on the basis of sexual orientation and gender identity, victims of discrimination have limited legal recourse or remedies for breaches of their human rights.

A 2012 study found that 60% of LGBTI persons experienced discrimination in areas including work, education and health care. There have been numerous testimonies evidencing denial of health care, arbitrary arrest and restrictions of civil liberties by authorities, as well as continuing social stigma for LGBTI persons in Nepal. The failure to enact legislation specifically prohibiting discrimination on the basis of sexual orientation and gender identity is contrary to Nepal's obligations as a signatory to CEDAW, CRC and the ICCPR, together with the

directions issued by its Supreme Court. This failure also limits the ability of LGBTI persons to obtain adequate remedies for breaches of their rights as required by Article 2(3) of the ICCPR.

Examples of discrimination by State authorities

There is evidence that State authorities are complicit in a number of discriminatory actions against LGBTI people. For instance, in 2013 the Chief District Office refused to renew a prominent LGBTI activist group's periodic registration to allow it to continue its operations and it has been reported that the Chief District Office has sought higher bail fees for LGBTI persons than heterosexual persons in similar circumstances.

2. Re-criminalisation of certain sexual acts

Recent reports have suggested that Nepal may be taking steps to re-criminalise certain sexual acts that specify same-sex activity, qualifying all acts of oral sex and sodomy as "unnatural", and therefore as an offence, under the draft proposed Criminal Code.

This would be a significant regression in respect of LGBTI human rights and would erode any progressive steps taken by the Nepalese Government in the past decade, by effectively criminalising LGBTI persons' private, consensual activities. Any moves towards criminalisation should be strongly condemned.

3. Legalisation of same-sex marriage

Marriage is currently defined in Nepal's *Muluki Ain* (General Code) 2020 as specific to a union between a man and a woman. The Court in *Pant* ordered that the State establish a committee to determine the best way to implement changes to Nepalese domestic laws to allow same-sex marriage. Despite announcing in January 2014 that the committee had finalised its findings, no report has been presented to the parliament and no laws legalising same-sex marriage have been submitted to the Nepalese parliament.

Reports suggest that some LGBTI persons are coerced into marriages in order to relieve economic stress on families and comply with expected social norms. Participants in a 2009 study identified conservative social approaches to marriage as a key driver of the stigmatisation of LGBTI persons in Nepal, exacerbated by the traditional importance of marriage as a way to address economic concerns. As same-sex marriages or relationships are not afforded legal recognition in Nepal, some LGBTI persons are obligated to marry in order to access civil economic rights afforded to those in heterosexual relationships. In some instances, marriages may be at odds with the principles enshrined in the Universal Declaration of Human Rights and ICCPR specifically that marriage must be entered into with the "free and full" consent of both parties.

In addition, there is a suggestion that family members utilise heterosexual marriages as a way to combat or cure suspected homosexual identity. The lack of legal recognition contributes to the ongoing reproduction of such social practices and the conservative attitudes faced by LGBTI persons in Nepal, particularly in respect of family structures. The failure to legalise same-sex marriage or equivalent is contrary to Nepal's obligations under international and domestic law, and coupled with the current drafting of succession and family law that has significant negative repercussions for the civil and economic rights of LGBTI people in Nepal.

4. Failure to utilise gender neutral legislation

Family and succession laws

The terms "wife", "husband" and "family" (which is defined with reference to 'wife' or 'husband' rather than gender neutral 'spouse') are used throughout the *Muluki Ain* as well as in a number of legislative instruments establishing civil rights. As these terms are not defined in a gender neutral way or with any recognition of de-facto relationships, persons in same-sex relationships are denied rights including property inheritance, family law rights, domestic violence crimes, and next of kin rights.

As a result of the use of gendered terms in Nepalese legislative instruments LGBTI persons are denied significant social and economic rights afforded to heterosexual couples. This amounts to discrimination by the State against LGBTI persons and is contrary to Articles 2 and 26 of ICCPR.

Rape law

The *Muluki Ain* currently defines rape with reference to women only. Reports suggest that the draft proposed Criminal Code will retain this definition of rape. As a result, men or transgendered persons may not have legal recourse if they are subjected to sexual violence.

There is evidence to suggest that gay men and transgendered persons in Nepal are subject to significant levels of sexual violence, including by authorities, to the extent that LGBTI persons in Nepal have expressed fear of carrying condoms, which are seen to invite rape. Accordingly LGBTI persons are disadvantaged and discriminated against by the narrow definition of rape currently employed by the Nepalese criminal code and do not have access to an effective remedy as required by Article 2(3) of the ICCPR.

5. Right to Citizenship

The Supreme Court of Nepal has issued a directive order to provide citizenship ID to transgender people, and repeal all discriminatory laws as well as provide laws for same sex marriage. The Government has amended the Regulation related to Citizenship in order to provide Third Gender Citizens with an identity conforming to their gender. In this regard, the Government also enacted Guidelines to manage Citizenship distribution procedures. Now, Third Gender Citizens have been provided with Citizenship in accordance with their identity. However, Nepal government has drafted a civil and criminal code to replace the current code, that has regressive provisions against LGBTI people. The right to citizenship is linked to a person's legal identity and existence.

In addition, The lack of citizenship deprives a person from state's protection, socio-economic, political and basic rights. Around 23.65% of the population aged 16 and above (or 4.3 million individuals) lack a citizenship certificate in Nepal. The present draft constitution has a provision that states 'An individual whose father and mother were Nepalese citizens at his/her birth or at the time of acquiring citizenship....'

The customary practise regarding citizenship is not based on the citizenship criteria of both parents rather it is based on the nationality of either of the parents and intention to domicile. The proposed provision requiring that both the father and mother must be Nepalese citizens to acquire citizenship by descent is more regressive and can create many stateless individuals. It is in contrary to the customary notion that reduction of statelessness has to be achieved through national legislation.

The proposed provisions are also contrary to Nepal's international human rights obligations. Nepal's obligations under human rights law state: Article 15 of the Universal Declaration on Human Rights affirms that "everyone

has the right to a nationality” and that “no one should be arbitrarily deprived of his nationality”. Nepal is a State party to several international human rights treaties that require that all children have the right to a nationality, and that this right should be enjoyed without discrimination, including on the basis of gender, race, ethnicity or national origin and implemented with the child’s best interests as the primary consideration. In March 2014 the Human Rights Committee noted with regret that “the current legislation does not provide for the granting of nationality to children born in the territory who would otherwise be stateless” and recommended that “the State party should ensure that citizenship provisions of the new Constitution guarantee the equal right of women to acquire, transfer and retain citizenship.”

6. Conclusion and recommendation

We strongly encourage the United Nation Human Rights Council to make the following recommendations that Nepal:

- Abandons any steps to re-criminalise certain sexual activities between consenting adults; amends its criminal law to explicitly legalise sexual and social relationships between consenting adults, regardless of sex or gender and to recognise rape on a gender neutral basis;
- Introduces legislation to legalise same-sex marriage or civil unions and make consequential amendments to utilise gender neutral definitions in family and inheritance laws;
- Enacts comprehensive anti-discrimination legislation that prohibits discrimination on the basis of sexual orientation or gender identity in the areas of employment, education, political activities, and the provision of accommodation, goods and services;
- Undertakes measures to increase education and the understanding of LGBTI rights, and to combat the social stigmatization of, and violence against, LGBTI persons, particularly in respect of State entities and health services, and
- Enacts legislation to ensure members of the lesbian, gay bisexual, transgender and intersex (LGBTI) have access to citizenship rights, consistent with the equal rights enumerated in the Nepali Supreme Court's 2008 decision.

The government of Nepal should additionally:

- Amend all discriminatory and LGBTI unfriendly laws and legal provisions and adopt affirmative action to ensure proportional participation in public sector;
- Draft civil and criminal codes to replace the existing code in cooperation with the LGBTI community before they get passed as law; as of now, the government has proposed a regressive and criminalizing legislation in relation to LGBTI peoples into the drafts civil and criminal code;
- Ensure that sexual orientation and gender diversity are included as grounds for protection in the new constitution and in legislation;

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