



Kaleidoscope  
Australia  
Human Rights Foundation

**Submission to the UN Universal Periodic  
Review regarding the protection of the  
rights of LGBTI persons in Nepal**

21st session of the Universal Periodic Review

March 2015

## 1. Executive Summary

- 1.1 Kaleidoscope Human Rights Foundation (**Kaleidoscope**) is a non-governmental organisation that works with local activists to protect and promote the rights of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) persons in the Asia-Pacific Region. In conjunction with local community members, in particular the Blue Diamond Society, Kaleidoscope has prepared this report for the United Nations Human Rights Council (**UNHRC**) in respect of Nepal.
- 1.2 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, and has recognised third gender options on a number of state issued identification documents.
- 1.3 Nepal should be commended for these 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 has resulted in a denial of civil rights for persons in same-sex relationships and indirect discrimination by the State.
- 1.4 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.
- 1.5 We urge the UNHRC to recommend that Nepal:
  - (a) abandons any steps to re-criminalise certain sexual activities between consenting adults;
  - (b) 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;
  - (c) introduces legislation to legalise same-sex marriage or civil unions and make consequential amendments to utilise gender neutral definitions in family and inheritance laws;
  - (d) 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; and
  - (e) 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.

## 2. Positive steps taken by Nepal

- 2.1 Nepal should be commended for the positive steps it has taken towards the recognition and protection of LGBTI rights. The State has ratified a number of major treaties and continues to work towards the promotion and protection of LGBTI rights through its Supreme Court and the reforms it has undertaken to recognise third gender rights.

- 2.2 The first major steps by Nepal to recognise LGBTI rights came following the Supreme Court decision *Pant & Ors et al v the Nepal Government*<sup>1</sup> in which the Court found that the State cannot deprive homosexuals and third gendered persons from "enjoying the fundamental rights provided under Part III of the Constitution"<sup>2</sup> and ordered the State to enact laws to protect LGBTI rights and to amend any existing laws which were tantamount to discrimination. It also ordered that the Nepalese Government establish a committee to consider legalising same-sex marriage.
- 2.3 Following this decision, Nepal amended its domestic laws to recognise a third gender option on state documents including census, voting and citizenship documentation.<sup>3</sup> The Nepalese Government has also taken steps to educate the public about LGBTI rights including the introduction of a secondary school syllabus which addresses sexual and gender minorities and the introduction of third gender public toilets.<sup>4</sup> In addition the Nepal Human Rights Commission has actively participated in the protection of LGBTI rights including where rights have been impinged upon by State authorities.<sup>5</sup>
- 2.4 The Supreme Court of Nepal (**Supreme Court**) has continued to be progressive in the protection of LGBTI rights. In 2012 it recognised the legitimacy of a lesbian relationship and rights to self determination in respect of sexual orientation<sup>6</sup> and, in 2013, it ruled that the Nepalese Government was to issue passports with third gender options.<sup>7</sup> The Court also found in 2013 that persons had a right to self determination and privacy in respect of their appearance and ordered police not to harass citizens according to their personal interests and appearance.<sup>8</sup>

### 3. Obligations under international law to protect LGBTI persons from discrimination

- 3.1 Nepal is a signatory to *International Covenant on Civil and Political Rights*<sup>9</sup> (ICCPR) and the First Optional Protocol to the ICCPR<sup>10</sup>, the *International Covenant on Economic, Social and*

<sup>1</sup> *Pant v Nepal* writ No. 917 of the year 2064 BS (2007 AD) translated to English in NLA Law Journal 2008;

<sup>2</sup> *Pant v Nepal* writ No. 917 of the year 2064 BS (2007 AD) translated to English in NLA Law Journal 2008 p. 278;

<sup>3</sup> M Bochenek and K Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis* Emory International Law Review, Vol 26, Issue 2012, available at <http://law.emory.edu/eilr/content/volume-26/issue-1/recent-developments/establishing-a-third-gender-in-nepal.html>;

UNDP, *Nepal census recognizes third gender for the first time*, available at [http://www.undp.org/content/undp/en/home/ourwork/hiv-aids/successstories/Nepal\\_third\\_gender\\_census\\_recognition/](http://www.undp.org/content/undp/en/home/ourwork/hiv-aids/successstories/Nepal_third_gender_census_recognition/).

<sup>4</sup> Blue Diamond Society Annual Report published 5 September 2014, available at <http://bds.org.np/annual-report-2014/>;

<sup>5</sup> National Human Rights Commission of Nepal – Report to the Regional National Human Rights Institutions Project on Inclusion, the Right to Health and Sexual Orientation and Gender Identity at p. 7, available at [http://www.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv\\_aids/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf](http://www.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv_aids/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf);

<sup>6</sup> Manesh Shrestha, *Nepal court allows lesbian live-in relationship*, Times of India, 6 November 2012, available at <http://timesofindia.indiatimes.com/world/south-asia/Nepal-court-allows-lesbian-live-in-relationship/articleshow/17116724.cms?referral=PM>;

Nepal Monitor, *Adults free to live together: SC*, 5 November 2012, available at <https://www.nepalmonitor.org/index.php/reports/view/1007>.

<sup>7</sup> Rawstory, *Nepal court orders passport change for transgender citizens*, 11 June 2013, available at <http://www.rawstory.com/rs/2013/06/nepal-court-orders-passport-change-for-transgender-citizens/>.

<sup>8</sup> Himalayan Times, *SC verdict lifts taboo on long hair, ear jewellery*, 8 April 2013, available at <http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+je+wellery&NewsID=372083>.

<sup>9</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

<sup>10</sup> UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

*Cultural Rights*<sup>11</sup> (ICESCR), the *Convention on the Elimination of All Forms of Discrimination Against Women*<sup>12</sup> (CEDAW) and the *Convention on the Rights of the Child*<sup>13</sup> (CRC).

- 3.2 Representatives from Nepal have participated in the development of the Yogyakarta Principles, which outline the International Commission of Jurists and International Service for Human Rights' legal principles and recommendations on the application of international human rights law in relation to sexual orientation and gender identity. In 2011, the joint statement "*Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity*" was issued during the general debate of the UNHRC with the Nepal as a signatory.<sup>14</sup>
- 3.3 The United Nations Human Rights Committee has recognised that rights under Article 2, 17 and 26 of the ICCPR confer a number of protections on LGBTI persons including obligation on State Parties to ensure laws and policies do not discriminate against a person on the grounds of sexual orientation or gender identity, and the protection of adult consensual sexual activity from arbitrary intervention by the State.<sup>15</sup> The Committee has also found Article 26 of the ICCPR establishes a right for all persons to marriage and to found a family regardless of gender identity or sexual orientation.<sup>16</sup> This is supported by the ICESCR which establishes equal rights to self determination, access to health care, education, family and inheritance rights and cultural participation for all persons.<sup>17</sup>
- 3.4 Article 2 of CEDAW obliges State Parties to prevent discrimination against a person on the grounds of sex or gender identity and Article 8 requires State Parties to take positive steps to reduce cultural and social prejudices in respect of gender stereotypes.<sup>18</sup> Similarly, Article 2 of the CRC requires State Parties to take all appropriate measures to ensure that children are protected against all forms of discrimination, including on the ground of sex. Significantly, the obligations on State Parties in Article 2 of the CRC extend to a child's parent or legal guardian, and accordingly a State Party cannot discriminate against a child on the basis of their parent's or legal guardian's sex.<sup>19</sup>
- 3.5 Article 9 of the *Nepal Treaty Act, 2047* (1990) provides that international treaties are given full domestic effect once ratified. Further, to the extent of any inconsistency between domestic law and a treaty, the treaty shall prevail. Accordingly Nepal's international commitments also confer domestic obligations on the Nepalese Government.

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<sup>11</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>12</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>13</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>14</sup> United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 19th sess, UN Doc A/HRC/19/41 (17 November 2011).

<sup>15</sup> UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92 (1992).

<sup>16</sup> UN Human Rights Committee, *Young v Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003)

<sup>17</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

<sup>18</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>19</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

- 3.6 Domestically, the Supreme Court in *Pant* found that LGBTI persons were entitled to the fundamental protections under the *Interim Constitution of Nepal, 2063 (2007) (Interim Constitution)* including equality before the law. The Court also found that there was a positive obligation on the State to recognise third gendered persons and to enact legislation to protect LGBTI persons from discrimination.
- 3.7 In light of the above, Nepal must adhere to significant obligations both under domestic and international law in respect of the recognition and protection of LGBTI rights.

#### 4. Discrimination against LGBTI persons

- 4.1 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).<sup>20</sup>
- 4.2 Nepal has yet to implement a number of recommendations from the previous periodic review in respect of LGBTI rights or and from the decision in *Pant*. Recent commentary suggests there may be some revision of the legal status of LGBTI persons as discussed below.<sup>21</sup>

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

- 5.1 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.
- 5.2 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

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<sup>20</sup> See Article 2, 17, and 26 of the *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171;

Article 1(1), 2(2) and 3 of the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3;

Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13; and

Article 2, of the *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>21</sup> Blue Diamond Society Annual Report published 5 September 2014, at p. 31 available at <http://bds.org.np/annual-report-2014/>;

Human Rights Campaign Blog LGBT Pride and Volatility in Nepal, 13 August 2014, available at <http://www.hrc.org/blog/entry/lgbt-pride-and-volatility-in-nepal>;

Jim Redmond, Nepal to Consider Re-criminalising Homosexuality, 4 August 2014 available at <http://www.towleroad.com/2014/08/nepal-to-consider-re-criminalizing-homosexuality.html>;

Sunil Babu Pant Nothing about us, without us, Nepali Times, 1 – 7 August 2014 available at <http://nepalitimes.com/regular-columns/Comment/right-of-equality-of-gender-and-other-minorities-under-threat,335>;

Bibek Bhandari Draft marriage law hangs over Nepal's LGBT community ahead of rights parade, South China Morning Post, 10 August 2014 available at <http://www.scmp.com/news/asia/article/1570300/draft-marriage-law-hangs-over-nepals-lgbt-community-ahead-rights-parade>.

continue to be the subject of discriminatory practices both by private and State entities.<sup>22</sup> 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.

- 5.3 A 2012 study found that 60% of LGBTI persons experienced discrimination in areas including work, education and health care.<sup>23</sup> 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.
- 5.4 The failure to enact legislation specifically prohibiting discrimination on the basis on 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 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*

- 5.5 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.<sup>24</sup>
- 5.6 In addition, there have been a number of reports of police violence against LGBTI persons including accusations of rape,<sup>25</sup> torture<sup>26</sup> and arbitrary arrest.<sup>27</sup> There is evidence to suggest

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<sup>22</sup> See for instance, Singh et al, *Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation*, BCM International Health and Human Rights 2012, available at <http://www.biomedcentral.com/1472-698X/12/7>;

National Human Rights Commission of Nepal – Report to the Regional National Human Rights Institutions Project on Inclusion, the Right to Health and Sexual Orientation and Gender Identity at p. 7, available at [http://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv\\_aids/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf](http://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf);

Human Rights Watch World Report 2014 at p. 358, available at [http://www.hrw.org/sites/default/files/wr2014\\_web\\_0.pdf](http://www.hrw.org/sites/default/files/wr2014_web_0.pdf);

Blue Diamond Society Annual Report published 5 September 2014, available at <http://bds.org.np/annual-report-2014/>;

Wilson et al, Stigma and HIV risk among Metis in Nepal Culture Health and Sexuality, Vol. 13, No. 3, March 2011 at p. 260 and 262, available at <http://www.tandfonline.com/doi/abs/10.1080/13691058.2010.524247?journalCode=tchs20#preview>;

Pathak et al, *Gender Identity: Challenges to Accessing Social and Health Care Services for Lesbians in Nepal*, Global Journal of Health Science, Vol. 2, No. 2; October 2010 available at <http://www.ccsenet.org/journal/index.php/gjhs/article/view/6667>;

Singh et al, *Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation*, BCM International Health and Human Rights 2012, <http://www.biomedcentral.com/1472-698X/12/7>.

<sup>23</sup> Singh et al, *Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation*, BCM International Health and Human Rights 2012, <http://www.biomedcentral.com/1472-698X/12/7>.

<sup>24</sup> National Human Rights Commission of Nepal – Report to the Regional National Human Rights Institutions Project on Inclusion, the Right to Health and Sexual Orientation and Gender Identity at p. 7, available at [http://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv\\_aids/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf](http://www.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aids/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf);

Blue Diamond Society Annual Report published 5 September 2014, available at <http://bds.org.np/annual-report-2014/>.

<sup>25</sup> Singh et al, *Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation*, BCM International Health and Human Rights 2012, available at <http://www.biomedcentral.com/1472-698X/12/7>.

<sup>26</sup> National Human Rights Commission of Nepal – Report to the Regional National Human Rights Institutions Project on Inclusion, the Right to Health and Sexual Orientation and Gender Identity at p. 7, available at

that the 'public nuisance' offence has been used in a discriminatory manner to detain LGBTI persons, such as a February 2013 incident where four transgendered women were arrested and detained for up to 25 days without further charge.<sup>28</sup>

*Discrimination in access to health services*

- 5.7 Commentary suggests LGBTI persons in Nepal feel marginalised in accessing health services, in particular in relation to HIV/AIDS transmissions and sexual health services.<sup>29</sup> Given that the LGBTI community in Nepal records disproportionately high rates of HIV/AIDS infections,<sup>30</sup> access to adequate healthcare is of key importance to the LGBTI community. Around a third of LGBTI persons interviewed in a 2012 study expressed having experienced discrimination by health care workers<sup>31</sup> and a 2010 study found '*doctors were commonly perceived to regularly discriminate...on the basis of [participants'] sexual orientation*'.<sup>32</sup>
- 5.8 Recent reports have suggested the draft proposed Criminal Code proposes to introduce criminal sanctions for the transmission of HIV/AIDS even unknowingly, which is contrary to UN guidance<sup>33</sup> and would disproportionately affect the LGBTI community. Criminalising

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[http://www.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv\\_aid/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf](http://www.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv_aid/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf);

<sup>27</sup> Angel L Martinez Cantera *Nepal's 'third gender'* Al Jazeera, 12 March 2014, available at <http://www.aljazeera.com/indepth/features/2014/03/nepal-third-gender-201431181229222617.html>;

Human Rights Watch World Report 2014 at p. 358, available at [http://www.hrw.org/sites/default/files/wr2014\\_web\\_0.pdf](http://www.hrw.org/sites/default/files/wr2014_web_0.pdf);

Blue Diamond Society Annual Report published 5 September 2014, available at <http://bds.org.np/annual-report-2014/>;

Himalayan Times, 711 youths held, 22 February 2013, <http://www.thehimalayantimes.com/fullNews.php?headline=711+youth+held&NewsID=367413>;

<sup>28</sup> Human Rights Watch World Report 2014 at p. 358, available at [http://www.hrw.org/sites/default/files/wr2014\\_web\\_0.pdf](http://www.hrw.org/sites/default/files/wr2014_web_0.pdf);

National Human Rights Commission of Nepal – Report to the Regional National Human Rights Institutions Project on Inclusion, the Right to Health and Sexual Orientation and Gender Identity at p. 7, available at [http://www.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv\\_aid/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf](http://www.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv_aid/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf);

Blue Diamond Society Annual Report published 5 September 2014, at p. 31 available at <http://bds.org.np/annual-report-2014/>.

<sup>29</sup> UNDP et al., “Country Snapshots: Nepal HIV and Men Having Sex with Men”, 2012: <http://www.aidsdatahub.org/sites/default/files/documents/MSMSnapshots-Nepal.pdf>;

UNDP, USAID, Being LGBT In Asia: Nepal Country Report, 2014 available at [http://europe.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv\\_aid/rbap-hhd-2014-blia-nepal-country-report.pdf](http://europe.undp.org/content/dam/rbap/docs/Research%20%20Publications/hiv_aid/rbap-hhd-2014-blia-nepal-country-report.pdf);

Wilson et al, Stigma and HIV risk among Metis in Nepal Culture Health and Sexuality, Vol. 13, No. 3, March 2011 at p. 260 and 262, available at <http://www.tandfonline.com/doi/abs/10.1080/13691058.2010.524247?journalCode=tchs20#preview>;

Pathak et al, *Gender Identity: Challenges to Accessing Social and Health Care Services for Lesbians in Nepal*, Global Journal of Health Science, Vol. 2, No. 2; October 2010 available at <http://www.ccsenet.org/journal/index.php/gjhs/article/view/6667>;

Singh et al, *Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation*, BCM International Health and Human Rights 2012, <http://www.biomedcentral.com/1472-698X/12/7>.

<sup>30</sup> Ibid.

<sup>31</sup> Singh et al, Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation, BCM International Health and Human Rights 2012, <http://www.biomedcentral.com/1472-698X/12/7>..

<sup>32</sup> Pathak et al, *Gender Identity: Challenges to Accessing Social and Health Care Services for Lesbians in Nepal*, Global Journal of Health Science, Vol. 2, No. 2; October 2010 available at <http://www.ccsenet.org/journal/index.php/gjhs/article/view/6667>.

<sup>33</sup> UNAIDS Guidance Note 2013: Ending overly broad criminalization of HIV non-disclosure, exposure and transmission: Critical scientific, medical and legal considerations available at

unknowing transmission of HIV/AIDS risks increases both health concerns and stigmatisation of the LGBTI community and therefore, should be avoided.

## 6. Re-criminalisation of certain sexual acts

- 6.1 Recent reports have suggested that Nepal may be taking steps to re-criminalise certain sexual acts that specifying same-sex activity, all acts of oral sex and sodomy are "unnatural", and therefore an offence, under the draft proposed Criminal Code.<sup>34</sup>
- 6.2 This would be a significant regression on LGBTI 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.

## 7. Legalisation of same-sex marriage

- 7.1 Despite the decision in *Joslin v New Zealand*<sup>35</sup>, there is growing support in the international community that international human rights law can and should be interpreted to include a right for same-sex couples to marry.<sup>36</sup>
- 7.2 Marriage is currently defined in Nepal's *Muluki Ain* (General Code) 2020 as specific to a union between a man and a woman.<sup>37</sup> 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 for same-sex marriage.<sup>38</sup> Despite announcing in January 2014 that the committee had finalised its findings, no report has been tabled in parliament and no laws legalising same-sex marriage have been submitted to the Nepalese parliament.<sup>39</sup>
- 7.3 Reports suggest that some LGBTI persons are coerced into marriages in order to relieve economic stress on families and comply with expected social norms.<sup>40</sup> Participants in a

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[http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/document/2013/05/20130530\\_Guidance\\_Ending\\_Criminalisation.pdf](http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/document/2013/05/20130530_Guidance_Ending_Criminalisation.pdf)

<sup>34</sup> Blue Diamond Society Annual Report published 5 September 2014, at p. 31 available at <http://bds.org.np/annual-report-2014/>;

Human Rights Campaign Blog *LGBT Pride and Volatility in Nepal*, 13 August 2014, available at <http://www.hrc.org/blog/entry/lgbt-pride-and-volatility-in-nepal>;

Jim Redmond, *Nepal to Consider Re-criminalising Homosexuality*, 4 August 2014 available at <http://www.towleroad.com/2014/08/nepal-to-consider-re-criminalizing-homosexuality.html>;

Sunil Babu Pant *Nothing about us, without us*, Nepali Times, 1 – 7 August 2014 available at [http://nepalitimes.com/regular-columns/Comment/right-of-equality-of-gender-and-other-minorities-under-threat\\_335](http://nepalitimes.com/regular-columns/Comment/right-of-equality-of-gender-and-other-minorities-under-threat_335);

Bibek Bhandari *Draft marriage law hangs over Nepal's LGBT community ahead of rights parade*, South China Morning Post, 10 August 2014 available at <http://www.scmp.com/news/asia/article/1570300/draft-marriage-law-hangs-over-nepals-lgbt-community-ahead-rights-parade>.

<sup>35</sup> Human Rights Committee, Views: Communication No 902/1999, 75th sess, UN Doc CCPR/C/75/D/902/1999 (17 July 2002) ('*Joslin v New Zealand*').

<sup>36</sup> Paula Gerber, Kristine Tay and Adiva Sifris, *Marriage: A Human Right*, Sydney Law Review (Vol. 36:643)

<sup>37</sup> Part 3, Chapter 12 'On Husband and Wife', and Part 4, Chapter 17 'On Marriage', *Muluki Ain* (General Code) 2020.

<sup>38</sup> *Pant v Nepal* writ No. 917 of the year 2064 BS (2007 AD) translated to English in NLA Law Journal 2008 at p. 276.

<sup>39</sup> Angel L Martinez Cantera *Nepal's 'third gender'* Al Jazeera, 12 March 2014, available at <http://www.aljazeera.com/indepth/features/2014/03/nepal-third-gender-201431181229222617.html>; Blue Diamond Society Annual Report published 5 September 2014, available at <http://bds.org.np/annual-report-2014/>.

<sup>40</sup> Wilson et al *Stigma and HIV risk among Metis in Nepal* Culture Health and Sexuality, Vol. 13, No. 3, March 2011 p. 258 available at <http://www.tandfonline.com/doi/abs/10.1080/13691058.2010.524247?journalCode=tchs20#preview>;

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.<sup>41</sup> 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 the ICCPR, specifically that marriage must be entered into with the "free and full" consent of both parties.

- 7.4 In addition, there is a suggestion that family members utilise heterosexual marriages as a way to combat or cure suspected homosexual identity.<sup>42</sup> The lack of legal recognition contributes such practices and the ongoing socially conservative attitudes faced by LGBTI persons in Nepal, particularly in respect of family structures.
- 7.5 The failure to legalise same-sex marriage is potentially contrary to Nepal's obligations under international and domestic law, and coupled with the current drafting of succession and family law has significant negative repercussions for the civil and economic rights of LGBTI people in Nepal.

## 8. Failure to utilise gender neutral legislation

### *Family and succession laws*

- 8.1 The terms "wife", "husband" and "family" (which is defined with reference to wife or husband rather than gender neutral 'spouse') are used in 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,<sup>43</sup> family law rights,<sup>44</sup> domestic violence crimes,<sup>45</sup> and next of kin rights.<sup>46</sup>

Pathak et al, *Gender Identity: Challenges to Accessing Social and Health Care Services for Lesbians in Nepal*, Global Journal of Health Science, Vol. 2, No. 2; October 2010 available at <http://www.ccsenet.org/journal/index.php/gjhs/article/view/6667>;

Singh et al, *Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation*, BCM International Health and Human Rights 2012, available at <http://www.biomedcentral.com/1472-698X/12/7>;

Jim Redmond, *Nepal to Consider Re-criminalising Homosexuality*, 4 August 2014 available at <http://www.towleroad.com/2014/08/nepal-to-consider-re-criminalizing-homosexuality.html>;

Nepal Monitor *WHRD's Receive Threats for Work on Behalf of Lesbian Couple* available at <https://www.nepalmonitor.org/reports/view/903>.

<sup>41</sup> Wilson et al Stigma and HIV risk among Metis in Nepal Culture Health and Sexuality, Vol. 13, No. 3, March 2011 p. 258 available at <http://www.tandfonline.com/doi/abs/10.1080/13691058.2010.524247?journalCode=tchs20#preview>;

<sup>42</sup> Pathak et al, *Gender Identity: Challenges to Accessing Social and Health Care Services for Lesbians in Nepal*, Global Journal of Health Science, Vol. 2, No. 2; October 2010 available at <http://www.ccsenet.org/journal/index.php/gjhs/article/view/6667>;

Nepal Monitor *WHRD's Receive Threats for Work on Behalf of Lesbian Couple* available at <https://www.nepalmonitor.org/reports/view/903>.

<sup>43</sup> Part 3 Chapter 13 'On Partition', Chapter 14 'On Women's Share and Property' and Chapter 16 'On Inheritance' *Muluki Ain* (General Code) 2020.

<sup>44</sup> Part 3 Chapter 12 'On Husband and Wife' and Chapter 15 'On Adoption', and Part 4 Chapter 17 'On Marriage' and Chapter 18 'On Adultery', *Muluki Ain* (General Code) 2020.

<sup>45</sup> *Domestic Violence (Crime and Punishment) Act*, 2066 (2009).

<sup>46</sup> See generally *Muluki Ain* (General Code) 2020.

- 8.2 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*

- 8.3 The *Muluki Ain* currently defines rape with reference to women only.<sup>47</sup> Reports suggest that the draft proposed Criminal Code will retain this definition of rape.<sup>48</sup> As a result, men or transgendered persons may not have legal recourse if they are subjected to sexual violence.
- 8.4 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.<sup>49</sup> 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.

## 9. Conclusion and recommendation

- 9.1 We strongly encourage the UNHRC to make the following recommendations that Nepal:
- (a) abandons any steps to re-criminalise certain sexual activities between consenting adults;
  - (b) 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;
  - (c) introduces legislation to legalise same-sex marriage or civil unions and make consequential amendments to utilise gender neutral definitions in family and inheritance laws;
  - (d) 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; and
  - (e) undertakes measures to increase education and understanding of LGBTI rights, and to combat the social stigmatization of, and violence against, LGBTI persons, particularly in respect of government organisations and health services.

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<sup>47</sup> Part 4, Chapter 14 'On Rape' *Muluki Ain* (General Code) 2020.

<sup>48</sup> Sunil Babu Pant *Nothing about us, without us*, Nepali Times, 1 – 7 August 2014 available at <http://nepalitimes.com/regular-columns/Comment/right-of-equality-of-gender-and-other-minorities-under-threat,335>.

<sup>49</sup> Wilson et al *Stigma and HIV risk among Metis in Nepal* Culture Health and Sexuality, Vol. 13, No. 3, March 2011 p. 260 and 262, available at <http://www.tandfonline.com/doi/abs/10.1080/13691058.2010.524247?journalCode=tchs20#preview>;

Singh et al, Human rights violations among sexual and gender minorities in Kathmandu, Nepal: a qualitative investigation, BCM International Health and Human Rights 2012, available at <http://www.biomedcentral.com/1472-698X/12/7>.