

**The Sri Lankan Report on Public Representations on Constitutional Reform:
An Opening for Constitutional Protections for LGBT People?**

3 June 2016

1. INTRODUCTION

- 1.1. This note contains a summary of the parts of the recently issued Sri Lankan *Report on Public Representations on Constitutional Reform* that recommend the recognition and implementation of the rights of LGBT people. It considers the implications of this Report for the decriminalisation of same-sex relationships in the country and wider protections against persecution of and discrimination against LGBT people. In Sri Lanka, homosexuality is criminalised under the *Penal Code*, under both Section 365 ('Unnatural Offences') and Section 365A ('Gross Indecency').
- 1.2. In December 2015, the Cabinet of Ministers appointed the Public Representations Committee (PRC) on Constitutional Reform in order to undertake public consultation as part of the process of changing the country's Constitution. The 20-member Committee began meeting in January 2016. The Head of the Committee is attorney Mr Lal Wijenayake, and the Secretary to the Committee is Mr S Winston Pathiraja.
- 1.3. In March 2016, the Sri Lanka Parliament became the country's 'Constitutional Assembly' for the purpose of deliberating and drafting a new Constitution, incorporating the views of the citizens of Sri Lanka.
- 1.4. The Committee asked for the public's views on 20 subjects, including fundamental rights and non-discrimination. It accepted written and oral submissions. Provisionally, there were 3,655 public submissions.
- 1.5. On 10 May 2016, the Committee presented a report to the Constitutional Assembly, comprising public representations and its own recommendations in light of these representations. On 31 May, the Committee presented its final report to Prime Minister Ranil Wickremesinghe. The Cabinet Sub-Committee on Constitutional Reforms will now consider these recommendations.
- 1.6. The Committee speaks of its desire that politicians will '*truly make this Constitution one that is owned by all the peoples of this country*' (Chapter 1: Introduction, p. 5). Submissions stated that '*the Constitution should conceptualise mutual acceptance and self-respect of various communities,*' and that '*the State is duty bound to assure equal access to opportunities and take adequate measures to protect the weaker and marginalised communities of the country*' (Chapter 2: Preamble to the Constitution, p. 9 & p. 8).

2. DIRECTIVE PRINCIPLES OF STATE POLICY

- 2.1. Chapter 11 sets out the submissions and recommendations in respect of the principles that the State, at all levels, must follow while governing. Sri Lanka's current Constitution contains Directive Principles of State Policy, but these apply only to the top tiers of the State.
- 2.2. There are two recommendations in this Chapter that are particularly relevant to the protection and promotion of the rights of LGBT persons.
- 2.3. One principle is that, *'No person or group shall be discriminated on the basis of race, ethnicity, caste, class, religion, language, belief, gender, sexual or gender orientation and identities, marital status, mental or physical disability, political opinion or affiliations, occupation, past conduct including insurrection against the State excluding conviction for grave offences. It should be the responsibility of the State to accord due protection to all vulnerable groups including persons with diverse sexual and gender orientations'* (paragraph 6). The existing Directive Principles (comprising Chapter VI of the Constitution) make no reference to sexual orientation or gender identity.
- 2.4. Another principle is that, *'The State shall recognize and act in accordance with its international treaty commitments in economic, social, cultural, civil and political rights, in particular the human rights of women, children and people with disabilities'* (paragraph 40). The current Constitution refers to treaty commitments in the context of *'dealings among nations'* only (Chapter VI, 27 (15)). Although there is no explicit reference in paragraph 40 of the Report to treaty commitments that oblige Sri Lanka to uphold the rights of LGBT people, such rights do fall within the broad purpose of this paragraph. Among others, Sri Lanka has ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention Against Torture (CAT). The criminalisation of homosexuality breaches many rights contained in these instruments, for example the rights to non-discrimination and privacy guaranteed by Articles 2(1) and 17 of the ICCPR, as held by the UN Human Rights Committee in *Toonen v Australia*. In January 2016, the [UN Special Rapporteur on Torture](#) called for the decriminalisation of same-sex relationships. The [UN CEDAW Committee](#) has urged Sri Lanka to decriminalise sexual relationships between consenting adults of the same sex, recognising that such criminalisation 'results in women being completely excluded from legal protection' and that law enforcement officials arbitrarily detain women suspected of being lesbian.
- 2.5. While the Committee notes that, *'There were strong submissions from people requesting that the Directive Principles should be justiciable'*, it does not put forward this recommendation. Instead, it proposes that, *'The provisions contained in this Chapter shall not be enforceable in any Court or Tribunal.'*

3. FUNDAMENTAL RIGHTS

3.1. In Chapter 12, the Committee recommends the creation of a new Bill of Rights, containing many substantial and enforceable human rights which guarantee, among other things:

- Right to equality
- Human dignity
- Freedom and security of the person
- Right to privacy and family life
- Freedom of expression, assembly, demonstration, picket, petition, association
- Citizenship
- Right to health
- Access to justice
- Equity and equality of opportunity in public employment

3.2. Most significantly, the Chapter contains a section on the 'Rights of People with Diverse Sexual and Gender Identities'. The Committee states that, *'The rights of the LGBTIQ community to equality, dignity and non-discrimination should be provided for in the new Constitution. Along with race, religion, caste, sex – sexual and gender orientations should be included in the clauses on equality and non-discrimination. The specific inclusion of the terms 'sexual and gender orientation' will help minimise any ambiguities in relation to equal treatment and non-discrimination of this community.'*

3.3. It acknowledges the State's obligations under international human rights law and recommends that, *'Section 363 [sic: 365] and 365A of the Penal Code should be repealed or amended to ensure full compliance with Article 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).'*

3.4. It also restates the rights held by LGBT people and the common ways in which these are infringed. These rights must be guaranteed in the new Constitution. For example, the Committee acknowledges the risk of torture in the course of criminal investigations or in custody, '[t]he right to privacy denied by the existence of sodomy laws' and the 'prejudices' which undermine the right to a fair trial.

3.5. The other significant rights set out include the following:

Right to Equality

No person or group shall be discriminated against on the grounds of race, religion, caste, marital status, maternity, age, language, mental or physical disability, pregnancy, civil status, widowhood, social origin, sexual orientation, or sexual and gender identities.

Right to Privacy and Family Life

All persons of full age without any limitation due to race, nationality or religion, gender identity or gender and sexual orientation have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and its dissolution.

Citizenship

There shall be no discrimination against citizenship status on the grounds of race, religion, caste, marital status, maternity, age, language, mental or physical disability, pregnancy, civil status, widowhood, sexual orientation, or sexual and gender identities.

Equity and Equality of Opportunity in Public Employment

There shall be equity and equality of opportunity for all citizens in matters relating to employment and appointment to any office under the State.

4. AFFIRMATIVE ACTION AND RECONCILIATION

- 4.1. In Chapter 20, submissions were set out that highlighted '*the discriminatory practices that [LGB people] face due to their orientation and its subtle nature which requires special protection*'.
- 4.2. The Committee points to its recommendations in respect of Directive Principles and Fundamental Rights as evidence of taking action to protect '*marginalised and vulnerable groups*'.

5. COMMISSION ON ANTI-DISCRIMINATION

- 5.1. In Chapter 21, the Committee recommends the establishment of a Committee on Discrimination to make recommendations to reform traditional or customary laws that discriminate against certain groups.
- 5.2. This took account of the '*Representations on discrimination, exclusion and marginalisation on the basis of ethnicity, religion, caste, gender, sexual orientation, social origin, disability etc., [which] were made from all parts of the country.*'