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Human Rights Commission of Sri Lanka

**REPORT TO THE REGIONAL NATIONAL HUMAN RIGHTS  
INSTITUTIONS PROJECT ON INCLUSION, THE RIGHT TO  
HEALTH AND SEXUAL ORIENTATION AND GENDER IDENTITY**

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This Report was prepared for the Regional National Human Rights Institutions Project on Inclusion, the Right to Health, and Sexual Orientation and Gender Identity (SOGI), implemented by the International Development Law Organization (IDLO) and the United Nations Development Program (UNDP) in partnership with the Asia Pacific Forum and SAARCLAW (the Regional NHRI SOGI Project). The Project was designed to build an understanding of the response of National Human Rights Institutions (NHRIs) in South Asia and Southeast Asia to SOGI-related human rights issues.

The Project advocates for greater employment of the Yogyakarta Principles; builds upon the outcomes of the South Asia Roundtable Dialogue: Legal and Policy Barriers to the HIV Response (Kathmandu, 2011); and supports the commitments of the Economic and Social Commission for Asia and the Pacific (ESCAP) under Resolutions 66/10 and 67/9.

The Project is a direct response to the recommendations of the Report of the Asia Pacific Forum (APF) Advisory Council of Jurists: Human Rights, Sexual Orientation and Gender Identity, 2010 (ACJ Report). Specifically, the ACJ Report recommends that NHRIs:

- undertake an internal dialogue on issues relating to the human rights of people of diverse SOGI and build the capacity of the institution to understand the issues and to react appropriately;
- build relationships with people of diverse SOGI, including civil society organizations, in order to inform the work of the NHRI; and
- research, identify and document human rights violations against people of diverse SOGI, and the impact of discriminatory laws and practices.

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*This independent report has been compiled through a desk review of HRC annual reports, the HRCSL website and publicly available documents. The author also conducted three informal meetings with HRC staff. This report does not represent the position of the Human Rights Commission of Sri Lanka. The Human Rights Commission of Sri Lanka SL was not involved in the drafting of this report.*

## 1. INTRODUCTION

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The Human Rights Commission of Sri Lanka (HRCSL or Commission) is tasked with the difficult mandate of addressing human rights issues in a country emerging from decades of intrastate conflict. While HRCSL data indicates that since the end of the civil war in May 2009, complaints related to violations of civil liberties have decreased;<sup>1</sup> there is still considerable pressure from national and international human rights advocates, for Sri Lanka to address rights violations that occurred during the conflict. In post-conflict Sri Lanka, the HRCSL faces an increasing number of complaints regarding school admissions, land problems and government inactivity.<sup>2</sup>

## 2. BACKGROUND

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The HRCSL operates under a complex legal system based on a mixture of English Common Law, Roman-Dutch, Sinhalese, Muslim and customary law. The Constitution of the Democratic Socialist Republic of Sri Lanka (Constitution) enshrines the fundamental rights of the people of Sri Lanka, including the freedom of thought, conscience and religion; freedom from torture; right to equality; freedom from arbitrary arrest, detention and punishment; and freedom of speech, assembly, association, and movement. Article 12 of the Constitution - the right to equality, includes a guarantee of the right to non-discrimination. Article 12 stipulates that: 'No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds.'

This Constitutional right of non-discrimination sits in contrast with the provisions of the Sri Lankan Penal Code which criminalize same sex sexual relations, effectively discriminating against persons on the bases of sexual orientation and gender identity (SOGI).<sup>3</sup> Section 365 of the Penal Code was originally drafted to refer to men only, but was amended in 1995 to employ gender neutral terms. This amendment means that the law has since explicitly encompassed both men and women engaged in same sex sexual relations.

The latest HRCSL Strategic Plan (2006-2009) states that HRCSL wishes to protect and promote 'equality and dignity of rights of all the people in the country resulting from respecting and protecting fundamental and human rights of all in Sri Lanka.'

## 3. MANDATE AND POWERS

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The Human Rights Commission of Sri Lanka was established in 1996 through the *Human Rights Commission of Sri Lanka Act No 21* (HRCSL Act), as an independent and financially viable institution. The HRCSL was created to protect and promote the human rights of the people of Sri Lanka. Prior to the establishment of the HRCSL, two separate bodies oversaw human rights related matters, the Human Rights Task Force and the Commission for the Elimination of Discrimination and Human Rights Monitoring.

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1 Sri Lanka Human Rights Commission, Annual Report, 2011, pg 1

2 Ibid., pg 2

3 Section 365 and 365A Penal Code, Sri Lanka



The Commission was established for the purpose of undertaking the following functions:<sup>4</sup>

- i. to ensure compliance with the provisions of the Constitution relating to
- ii. fundamental rights and to promoting respect for, and observance of, fundamental rights;<sup>5</sup>
- iii. to inquire into and investigate, complaints regarding infringements or imminent infringements of fundamental rights, and to provide for resolution thereof by conciliation and mediation;
- iv. to advise and assist the government in formulating legislation... in furtherance of, the promotion and protection of fundamental rights;
- v. to make recommendations to the government regarding measures which should be taken to ensure that national laws ... are in accordance with international human rights norms and standards;
- vi. to make recommendations to the government on the need to subscribe or accede to treaties and other international instruments in the field of human rights; and
- vii. to promote awareness of, and provide education in relation to, human rights.

The HRCSL's authority to make recommendations to the government regarding measures which should be taken to ensure that national laws are in accordance with international human rights norms and standards, has the potential to be utilized to promote the rights of the SOGI community.<sup>6</sup> For example, Sri Lanka is a signatory to the International Covenant on Economic, Social and Cultural Rights (1980) and the International Covenant on Civil and Political Rights (1980); the Yogyakarta Principles clarify and affirm the application of these conventions, amongst others, to people of diverse SOGI.

In order to carry out its (abovementioned) functions, the Commission is empowered to:<sup>7</sup>

- i. investigate, any infringement or imminent infringement of fundamental rights...;
- ii. intervene in any proceedings relating to the infringement or imminent infringement of fundamental rights, pending before any court, with the permission of such court;
- iii. award compensation to any complainant or person related to them, for costs incurred in submitting complaint to the Commission.
- iv. undertake research in new areas and disseminate results of this research through seminars or workshops; and
- v. conduct inquiries and report on matters referred to it by the Supreme Court; amongst other powers.

The Commission is headquartered in Colombo with a strong presence across the country through ten regional offices. More than 200 people are employed by the Commission on a full time, part time and casual basis.

<sup>4</sup> Section 10 of Act 21

<sup>5</sup> Note – Article 15 the Constitution states: the exercise and operation of fundamental rights enshrined in the Constitution of Sri Lanka 'shall be subject to such restrictions as may be prescribed by law' in the interests of national security, racial and religious harmony, public order, in the interests of the national economy and/or the protection of public health or morality. Article 15 the Constitution of the Democratic Socialist Republic of Sri Lanka.

<sup>6</sup> Coalition For Sexual Rights, *Joint UPR Submission*, Sri Lanka (November 2012)

<sup>7</sup> Section 11 of Act 21

## 4. AFFILIATIONS

In 2007, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)<sup>8</sup> downgraded the HRCSL to the status of an observer, on the basis of non-compliance with the Paris Principles; specifically government encroachment on the independence of the HRCSL. As a result, the Commission no longer has the right to vote in international meetings and is not eligible to stand for election to the International Coordinating Committee.

HRCSL is an Associate Member of the Asia Pacific Forum of National Human Rights Institutions (APF). APF adopts the accreditation decisions of the ICC to determine membership status (full or associate membership).

The HRCSL is led by a Chairman and four Commissioners, each in office for a term of three years; the current members have been in office since February 2011.<sup>9</sup> Members of the Commission are appointed by the President on the recommendation of the Constitutional Council.<sup>10</sup> This appointment process has the potential to impact upon the independence of the Commission.

## 5. THE HRCSL AND INTERNATIONAL HUMAN RIGHTS MECHANISMS

In 2008, the Government of Sri Lanka accepted recommendations under the Universal Periodic Review (UPR) process, to strengthen and ensure the independence of its National Human Rights Commission. Notwithstanding this, in September 2010, the 18th amendment to the Constitution brought the Commission under executive control. This amendment has the potential to further compromise the independence of the HRCSL.<sup>11</sup>

The Government of Sri Lanka took part in the 2<sup>nd</sup> (2008) and 14<sup>th</sup> (2012) Sessions of the UPR process. The HRCSL submitted reports on both occasions. Neither HRCSL report mentioned the human rights of people of diverse SOGI.<sup>12</sup> The 2008 report includes one mention of HIV in the context of the control of communicable diseases.<sup>13</sup>

The 2012 report for the UPR process explains that Sri Lanka continues to actively engage with the Office of the High Commissioner for Human Rights (OHCHR) in Geneva, and that in 2011, an invitation was extended to the UN High Commissioner for Human Rights to visit Sri Lanka.<sup>14</sup>

## 6. THE NHRCSL AND DOMESTIC MECHANISMS

Article 29 of the HRCSL Act requires the state to provide the Commission with adequate funds to enable the Commission to discharge the functions assigned to it by this Act.

Notably, the HRCSL Act provides, at Article 3(3) that, 'in making recommendations... the Constitutional Council and the Prime Minister shall have regard to the necessity of the minorities being represented on the

<sup>8</sup> The ICC is the international body that regulates national human rights institutions

<sup>9</sup> Human Rights Commission of Sri Lanka, Annual Report, 2011. Members are eligible for reappointment unless previously removed from office.

<sup>10</sup> Article 3(2) of the HRCSL Act places a proviso upon this power of appointment, stating that: 'provided however, that during the period commencing on the appointed date and ending on the date when the Constitutional Council is established, members of the Commission shall be appointed by the President on the recommendation of the Prime Minister in consultation with the Speaker and the Leader of the Opposition.'

<sup>11</sup> <http://www.hrw.org/news/2012/10/29/sri-lanka-address-rights-rollback-review>

<sup>12</sup> For National Report at the Human Rights Council for UPR Second Cycle (2012) please see: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/LKSession14.aspx>. For the National Report at the Human Rights Council for UPR First Cycle (2008), Please see <http://www.ohchr.org/EN/HRBodies/UPR/Pages/LKSession2.aspx>

<sup>13</sup> National Report, HRC for UPR First Cycle (2008), <http://www.ohchr.org/EN/HRBodies/UPR/Pages/LKSession2.aspx>, pg 10

<sup>14</sup> National Report at the Human Rights Council for UPR Second Cycle (2012)

Commission.’ While it is not anticipated that this provision is currently constructed to encompass the rights of sexual minorities, it is a provision which may support efforts to advocate for sexual minority representation on the Commission in the future.

Article 30 of the HRCSL Act requires the Commission to submit an annual report to Parliament of all its activities; documenting action taken and recommendations of the Commission in respect of each matter. The Commission may also submit periodic or special reports to Parliament in respect of any particular matter.

The *Education and Special Programmes Division* of the HRCSL conducted several training programs in 2011. These included training for the Sri Lankan Corps of Military Police on fundamental rights, human rights, the Human Rights Commission and remedies. Newly recruited police constables were also provided training on the above issues.<sup>15</sup>

The HRCSL works closely with and has received support from UNDP, UNFPA, UNHCR and Unicef. The UN Joint Human Rights Program, supported by UNDP, has the aim of strengthening the capacity and functionality of the Commission so that it is able to fulfill its mandate more effectively. One purpose of the UN Joint Human Rights Program is to support the HRCSL to regain ‘A’ status accreditation with the ICC.<sup>16</sup> The UN Joint Human Rights Program also supports engagement with civil society.

The 2011 Annual Report of the HRCSL acknowledges that ‘civil society organizations play an important role in the protection of human rights....it is very necessary for the HRCSL to have a regular interaction and discussion with these organizations in order to fulfill its mission more effectively.’<sup>17</sup> In recognition of this, HRCSL has undertaken the following initiatives:

- with the support of the UN Joint Human Rights Program, HRCSL has conducted 12 two-day residential trainings (through the HRCSL regional offices) for civil society actors; approximately 50 advocates have participated in each training;
- the HRCSL has created a committee to support regular consultation with civil society;<sup>18</sup> and
- in July and December 2011 (after the appointment of the new board in February 2011); HRCSL invited civil society organizations to meet the new members of the Commission and discuss their work and concerns.<sup>19</sup> These meetings were held in Colombo.

## 7. POLICIES AND INITIATIVES RELATED TO SOGI AND HIV

In informal meetings with IDLO, representatives of the Commission indicated that the HRCSL has no existing policy on SOGI or HIV; nor does it have focal points or initiatives for this work. Representatives of the Commission also noted that there was no specific plan to prioritize SOGI-related rights in the immediate future. Previously the HRCSL worked on the right to health, but has not addressed HIV.

Representatives of the Commission who participated in meetings with IDLO were clear that there was a significant lack of awareness and understanding about sexual orientation and gender identity amongst HRCSL staff. They further identified that raising awareness and building internal capacity would be the first step towards addressing SOGI-related rights issues. Representatives of the HRCSL also indicated that they would be willing to conduct an awareness raising session on HRC procedures for community advocates.

<sup>15</sup> Human Rights Commission of Sri Lanka, Annual Report, 2011, pg 15

<sup>16</sup> Human Rights Commission of Sri Lanka, Annual Report, 2011, pg 44

<sup>17</sup> Human Rights Commission of Sri Lanka, Annual Report, 2011, pg 41

<sup>18</sup> Ibid., pg 44

<sup>19</sup> Ibid., pg 41



Desk review research of HRCSL Annual Reports, the Strategic Plan (2006-2009) and relevant publications confirmed that the HRCSL has not addressed SOGI-related rights issues in public documents. Additionally, as mentioned above, HRCSL did not highlight SOGI-related rights in either of its submissions to the UPR.

Interestingly, during a meeting with the community of people of diverse SOGI in January 2013, community members shared anecdotal evidence of HRCSL provincial offices engaging on SOGI-related issues. Specifically:

- Community representatives from Anuradhapura reported that two Human Rights Officers posted at the HRC Anuradhapura office had been active in supporting the community of people of diverse SOGI. One officer, who has since been transferred, acted as intermediary to resolve issues between the community and the police.
- Community representatives also shared that the HRC Anuradhapura office had agreed to conduct a workshop on lesbian, gay, bisexual and transgender (LGBT) issues with a consortium of human rights NGOs.

## 8. THE COMPLAINTS SYSTEM AND RIGHTS REPORTING MECHANISMS

Complaints may be lodged with the HRCSL by submission of an application form.<sup>20</sup> Complaints should be submitted in person at a HRCSL office. Applications forms are made more accessible by having them available in English, Tamil and Sinhala. There is also a telephone hotline that can be called for immediate action but anecdotal evidence suggests that this may not always be operational.

A complainant may be the aggrieved person, an aggrieved group of persons, or a person or group of persons acting on behalf of the aggrieved. Complaints must include information relating to what and whose rights have been violated, who is considered responsible, how these rights were violated, where and when the incident took place and remedies being sought. There is no necessity for complainants to have legal representation and all submissions are free of charge.

In meetings with IDLO, representatives of the Commission were not aware of the HRCSL receiving any complaints related to SOGI or HIV.

## 9. ALTERNATIVE MECHANISMS FOR ADDRESSING ISSUES RELATED TO SOGI AND HIV

In 2011-12, the political and social climate in Sri Lanka was not conducive to great advances in the protection and promotion of the rights of people of diverse SOGI. Community representatives report that most media coverage on issues of sexuality is negative or sensationalized, and that LGBT individuals commonly experience police harassment.

There are a number of small initiatives underway in Sri Lanka designed to engage law and justice sector stakeholders, and strategically advance LGBT rights and access to justice mechanisms. The below examples are not intended to represent a conclusive list of such initiatives.

- Anecdotal reports from the LGBT community advise that there is a lawyer working to identify and create a body of LGBT-friendly lawyers, to support the LGBT community as required.
- A delegation of Sri Lankan law and justice sector representatives participated in the SAARCLAW Roundtable on Legal and Policy Barriers to HIV, held in Kathmandu in November 2011. The

20 [http://hrctl.lk/english/?page\\_id=149](http://hrctl.lk/english/?page_id=149)

delegation included a Supreme Court Judge, the Senior Assistant Secretary of the Ministry of Justice, a representative of the Police Headquarters Legal Division, a consultant from the HRCSL and three representatives from key populations at higher risk of HIV. In January 2012, IDLO, UNDP and UNAIDS brought this delegation back together in Colombo, with other key stakeholders, to support plans to follow up the Roundtable Recommendations. Stakeholders developed an Action Matrix to support communities with efforts to engage partners on rights-based issues.<sup>21</sup>

- In November 2012, UNAIDS brought together law and justice sector representatives to discuss legal issues related to people living with HIV and other vulnerable groups. A key outcome from that meeting was the formation of a high-level core group who plan to map out a strategy, including litigation, to catalyse change. UNAIDS effectively uses the public health issue of HIV to address the rights of people of diverse SOGI and other key populations at higher risk.

Notably, the HRCSL established some practical methodologies in building internal capacity and scaling up involvement in a new rights issue through their work on reproductive rights. These methodologies may be transferable to the process of sensitizing HRCSL officers to SOGI-related issues. For example, in 2011, the HRCSL participated in a consultation on strengthening NHRI capacities to work with reproductive rights. During this meeting they committed to briefing Commissioners, ensuring that reproductive rights were included in the training manual on women's rights and gender equality that was under development at the time, convening a roundtable on reproductive rights, and building upon ongoing collaboration with Muslim religious leaders in the area of customary law and cultural practices.<sup>22</sup>

The HRCSL have also been building capacity of their staff on women's rights and gender. They have created a staff-training manual that addresses gender stereotyping, mainstreaming, gender based violence, gender equity, discrimination and a rights based approach. This is an important initiative for the commission and in consonance with the Sri Lankan Government's *National Plan of Action for the Promotion and Protection of Human Rights* (2011-2016), which has a special chapter devoted to women's rights.

## 10. CONCLUSION

Although the HRCSL has not specific focus on SOGI or HIV, the scope of the HRCSL's mandate is to protect and promote 'equality and dignity of rights of all the people in the country resulting from respecting and protecting fundamental and human rights of all in Sri Lanka.'

IDLO informal meetings with the HRCSL indicate that the HRCSL may be open to engaging on SOGI and HIV-related issues, as they are presented to them, however, it is important not to understate the challenges in pursuing this agenda within the socio-cultural context of Sri Lanka. Notably, the Commission's upcoming change of members and the increased government involvement (since the 2010 Constitutional amendment) may impact upon the Commission's position on SOGI-related rights.

21 <http://www.idlo.int/english/WhatWeDo/Programs/Health/Pages/DetailsEvent.aspx?IDEVENT=224>.

22 Integrating Reproductive Rights Into The Work Of National Human Rights Institutions: 'Report on the Consultation between Member and Observer Institutions of the Asia Pacific Forum of National Human Rights Institutions' (APF), 2011



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