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Center for International Human Rights
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**Violations by Sri Lanka
of the rights of lesbian, bisexual, transgender,
and queer (LBTQ) women
under the Convention on the Elimination
of All Forms of Discrimination Against Women**

Submitted for consideration at the 90th Session of
the Committee on the Elimination of
Discrimination Against Women (CEDAW)

Submitted by:

EQUAL GROUND, Sri Lanka

Center for International Human Rights (CIHR)
of Northwestern Pritzker School of Law

EQUAL GROUND
and
Center for International Human Rights (CIHR)
of Northwestern Pritzker School of Law

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1. INTRODUCTION

1.1 This report is submitted to CEDAW by EQUAL GROUND¹ and the Center for International Human Rights (CIHR) of Northwestern Pritzker School of Law,² to direct the Committee's attention to the serious and ongoing violations of the rights of Sri Lanka's LGBTQ women. These violations include, notably, the following:

- Sri Lanka continues to criminalize consensual same-sex relations.
- Sri Lanka has failed to comply with the 2022 CEDAW decision in the case of *Rosanna Flamer-Caldera v. Sri Lanka*,³ a case filed by Rosanna Flamer-Caldera in 2018 to challenge the criminalization of consensual same-sex relations.
- Sri Lanka has failed to address the additional issues faced by LGBTQ women listed in our 2023 report to CEDAW's Pre-Sessional Working Group.

1.2 As a consequence of these violations, lesbian, bisexual, transgender, and queer (LBTQ) women in Sri Lanka are extremely vulnerable to harassment, violence and discrimination by State actors and by society at large. The continued criminalization of same-sex sexual relations leads directly to arbitrary arrest, violence and other abuses by the Sri Lanka Police. At the same time, it perpetuates and reinforces the widespread societal stigma against LGBTQ women, giving license to harassment and discrimination in employment, housing, education, health care and family relations. The barriers to obtaining legal recognition of gender expose transgender individuals to further humiliation and discrimination. All this results in the gross marginalization of LGBTQ women, many of whom feel forced to hide their identities.

¹ EQUAL GROUND is a Sri Lankan non-profit organization seeking economic, social, cultural, civil and political rights for the Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning/Queer (LGBTIQ) community of Sri Lanka. Founded in 2004, EQUAL GROUND is the oldest organization of this nature functioning in the country.

² The Center for International Human Rights (CIHR) of Northwestern University's Pritzker School of Law (Chicago, USA) is dedicated to human rights education and legal and policy-focused human rights advocacy within the United States and worldwide. CIHR is in special consultative status with the United Nations Economic and Social Council (ECOSOC). CIHR has worked in collaboration with EQUAL GROUND since 2013.

³ Committee for the Elimination of Discrimination against Women (CEDAW), Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 134/2018, U.N. Doc. No. CEDAW/C/81/134/2018 (21 Feb. 2022), <https://undocs.org/Home/Mobile?FinalSymbol=CEDAW%2FC%2F81%2FD%2F134%2F2018&Language=E&DeviceType=Desktop&LangRequested=False>.

- 1.3 This report has been prepared to inform the Committee of areas of concern with respect to Sri Lanka's obligations under the Convention on the Elimination of All Forms of Discrimination against Women ("Convention") to respect the rights of LGBTQ women. It focuses in particular on the State's ongoing criminalization of consensual same-sex relations and its related failure to implement the recommendations called for by this Committee in *Flamer-Caldera v. Sri Lanka*, because without decriminalization it will be impossible to adequately combat the stigma and discrimination that flow from criminalization. We refer the Committee to our earlier report to the Pre-Sessional Working Group (PSWG) for information about discrimination in all walks of life against LGBTQ women and barriers faced by transgender women seeking legal recognition of their gender identity.
- 1.4 We respectfully ask the Committee to address the issues raised in this report and in our prior report to the PSWG during its upcoming review of Sri Lanka's compliance with its obligations under the Convention.

2. LEGAL CONTEXT IN SRI LANKA

Criminal Laws

- 2.1 Sexual acts between same-sex individuals remain a criminal offense under sections 365 and 365A of the Sri Lankan Penal Code (as amended by the Penal Code (Amendment) Act, No. 22 of 1995) (the "Code").⁴

(a) Section 365 criminalizes "carnal intercourse against the order of nature."⁵ Although the law does not explain what constitutes "against the order of nature," it is widely understood to apply only to sexual acts between two individuals of the same sex. The penalty for violation of Section 365 is up to ten years' imprisonment and a fine.⁶

(b) Section 365A criminalizes "any act of gross indecency with another person."⁷ Violations are punishable by up to two years' imprisonment, a fine, or both. Although "gross indecency" is not defined, this law is understood to target not only sexual acts but also any displays of romantic affection between two individuals of the same sex. The breadth and ambiguity of this provision invites abuse, as what constitutes "gross indecency" is left open to interpretation by police officers, prosecutors, and judges.⁸

⁴ Penal Code § 365, <https://www.lawnet.gov.lk/penal-code-consolidated-2/> [hereinafter Penal Code].

⁵ Penal Code § 365, <https://www.lawnet.gov.lk/penal-code-consolidated-2/>.

⁶ *Id.*

⁷ *Id.* § 365A.

⁸ United Kingdom, Home Office, *Country Policy and Information Note Sri Lanka: Sexual Orientation and Gender Identity and Expression* (Nov. 2021), ¶ 3.1.8, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1039053/Sri_Lanka_Final_PDF.pdf [hereinafter UK Home Office].

(c) Section 399 of the Penal Code makes it a criminal offense to “cheat by personation.”⁹ It is also used by the police to target transgender persons on the purported basis that they are pretending to be a different gender with the intent of cheating others.¹⁰

- 2.2 Efforts to win repeal of these laws have not been successful. In January 2017, the Government of Sri Lanka (GoSL) dropped a proposal to decriminalize same-sex sexual conduct from the Human Rights Action Plan. The State Minister of Finance at the time, Lakshman Yapa Abeywardena, stated that the President had decided to abandon “culturally inappropriate” proposals.¹¹ In November 2017, after Sri Lanka’s UPR review, then-Deputy Solicitor General Nerin Pulle pledged to change the Penal Code in Sri Lanka, stating “[t]he government is committed to ensuring that no provision in the law would be applied to persons of the LGBTIQ community in a discriminatory manner.”¹² However, to date, the penal code has not been changed.
- 2.3 See paragraphs 4.1-4.8, for additional information about the ongoing failure to repeal the laws criminalizing same-sex sexual relations.
- 2.4 The consequence of these laws is that LBTQ women do not have legal recognition and their rights are not protected. Sri Lanka does not provide adequate support to these individuals and there continue to be reports of arbitrary arrests by police, violence, and discrimination directed towards LBTQ women in Sri Lanka.

Impact of Laws

- 2.5 A report done by the U.S. Department of State in 2020 stated that while in its view prosecutions were rare, the threat of arrest was used by police to assault, harass, and sexually and monetarily extort LBTQ people. Transgender people faced societal discrimination, including arbitrary detention, mistreatment, and discrimination in accessing employment, housing, and healthcare.¹³

⁹ Penal Code, *supra* note 4, § 399.

¹⁰ Amnesty International, *Sri Lanka: End discrimination against LGBTI people* (Dec. 7, 2019), <https://www.amnesty.org/en/latest/news/2019/12/spectrum-sri-lanka-lgbti/>.

¹¹ Human Dignity Trust, *Sri Lanka Country Profile* (2022), <https://www.humandignitytrust.org/country-profile/sri-lanka/>.

¹² Brandon Voss, *Sri Lanka Vows To Decriminalize Homosexuality, Protect LGBT Citizens*, LOGOTV (Nov. 25, 2017), <https://www.logotv.com/news/hoj55q/sri-lanka-decriminalizing-homosexuality>.

¹³ United States Department of State, *2020 Country Reports on Human Rights Practices: Sri Lanka*, sec. 6 (Mar. 30, 2021), <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/sri-lanka/>. *See also*, United States Department of State, *2023 Country Reports on Human Rights Practices: Sri Lanka*, sec. 6, Discrimination and Societal Abuses, subsection on Acts of Violence, Criminalization, and Other Abuses Based on Sexual Orientation, Gender Identity or Expression, or Sex Characteristics, <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/sri-lanka/>.

- 2.6 Incidents of police abuse against LGBTQ women, including wrongful arrest, violence, and harassment, are quite common in Sri Lanka. In a nationwide survey of Sri Lankan public opinion commissioned by the Westminster Foundation for Democracy, 69.2% of respondents agreed that LGBT people “are subjected to discrimination by the Police because they are LGBT persons.”¹⁴ In another survey, conducted by EQUAL GROUND, the LGBTIQ respondents shared that “[t]heir main fear was getting identified and being arrested by the police.”¹⁵

3. FAILURE TO IMPLEMENT RECOMMENDATIONS MADE BY CEDAW IN INDIVIDUAL CASE OF ROSANNA FLAMER-CALDERA v. SRI LANKA¹⁶

- 3.1 Rosanna Flamer-Caldera, Executive Director of EQUAL GROUND, challenged the criminalization of lesbians and bisexual women in Sri Lanka by submitting a communication to CEDAW under the Optional Protocol in August 2018. This ground-breaking case was the first time CEDAW considered an individual complaint relating specifically to the criminalization of lesbian and bisexual women.

Rosanna Flamer-Caldera sought a wide range of remedies, beginning with the repeal of criminalization of same-sex consensual relationships between adult women which is contrary to the Convention. She also sought amongst other things, the wider decriminalization of consensual same-sex activity in private between adults and effective protection from gender-based violence against women based on the intersection of their sex and sexual orientation.

The Committee decided that Rosanna Flamer-Caldera’s rights had been violated by the criminalization of same-sex sexual intimacy in Sri Lanka. Specifically, the Committee found that s365A violated her right to non-discrimination (Article 2 (a) and (d)-(g)), her right to be protected from gender-based violence (Article 2(c)-(f), Article 5(a)), her right to participate in the public and political life of the country (Article 7(c)), her right to equality before the law (Article 15(1), and her family rights (Article 16). It also found that in maintaining criminalization, Sri Lanka was failing to meet its obligations to counter gender stereotypes and prejudices (Article 5(a)).

¹⁴ See Pradeep Peiris, *Knowledge, Attitudes and Perceptions Survey Report: Sri Lankan society's views about sexuality and LGBT people's experiences in Sri Lanka*, p. 23, Table 3.10 (2021) (reporting results of a survey by the Social Scientists’ Association, commissioned by the Westminster Foundation for Democracy under the Commonwealth Equality Project), <https://www.wfd.org/sites/default/files/2022-03/Final%20Report%20-%2012th%20Jan%202022.pdf> [hereinafter Survey of Sri Lankan society’s views].

¹⁵ EQUAL GROUND, *Mapping LGBTIQ Identities in Sri Lanka*, p. 9 (2021), https://www.equal-ground.org/wp-content/uploads/Report_EG-edited.pdf.

¹⁶ See Committee for the Elimination of Discrimination against Women (CEDAW), Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 134/2018, U.N. Doc. No. CEDAW/C/81/134/2018 (21 Feb. 2022), <https://undocs.org/Home/Mobile?FinalSymbol=CEDAW%2FC%2F81%2FD%2F134%2F2018&Language=E&DeviceType=Desktop&LangRequested=False>.

3.2 The Committee made the following recommendations:

“11 (a) Concerning the author of the communication:

- (i) Take immediate and effective action against the threats, harassment and abuse to which the author has been subjected, including through the adoption of preventative and protective measures and, where appropriate, initiate criminal procedures to hold those responsible to account;
- (ii) Take all appropriate measures to ensure that the author and her organisation can carry out their activism safely and freely;
- (iii) Provide the author with appropriate reparation, including adequate compensation, commensurate with the gravity and the ongoing consequences of the violations of her rights;

(b) Generally:

- (i) With respect to section 365A of the Penal Code of 1883, decriminalize consensual same-sex sexual conduct between women having passed the age of consent;
- (ii) Provide effective protection against gender-based violence against women, including by adopting comprehensive legislation prohibiting discrimination against [LBTI] women;
- (iii) Provide adequate protection, support systems and remedies, including reparation, to [LBTI] women who are victims of discrimination;
- (iv) Ensure that victims of gender-based violence against women, including [LBTI] women, have access to effective civil and criminal remedies and protection, including counselling, health services and financial support, in line with the guidance provided in the Committee’s general recommendation No. 33;
- (v) Collect statistics on cases of hate crimes and gender-based violence against [LBTI] women;
- (vi) Effectively address discrimination against [LBTI] women in the workplace
- (vii) Take specific and effective measures to ensure a safe and favourable environment for women human rights defenders and female activists;
- (viii) Provide training to law enforcement agencies on the Convention, the Optional Protocol thereto and the Committee’s general recommendations, in particular general recommendations Nos. 19, 21, 28, 33 and 35, to raise awareness of the human rights of [LBTI] women and so that crimes with homophobic undertones committed against [LBTI] women will be understood as gender-based violence or hate crimes requiring active State intervention.”¹⁷

¹⁷ *Id.* ¶ 11; See also, United Nations, *Sri Lanka: Criminalisation of same-sex sexual activity breached rights of a LGBTI activist, UN women’s rights committee finds* (Mar. 23, 2022), <https://www.ohchr.org/en/press->

- 3.3 **Although it has now been nearly three years since the February 2022 CEDAW decision, thus far, none of the CEDAW recommendations have been implemented by the GoSL.**

4. SRI LANKA CONTINUES TO CRIMINALISE SAME-SEX RELATIONS

Failed attempt to repeal section 365 and 365A of the Penal Code.

- 4.1 In February 2023, then Foreign Minister Ali Sabry speaking to the media stated that the Government would decriminalise same-sex relationships.¹⁸
- 4.2 The private member's bill brought to the Parliament in 2022, which would have decriminalized consensual same-sex relations, was read for the first time in the Parliament in April, 2023. It was challenged by 3 petitioners who claimed that the bill violates the constitution of Sri Lanka.
- 4.3 In May 2023, in a landmark case, the Supreme Court of Sri Lanka determined that the Private Member's Bill is not in violation of the constitution.
- 4.4 A revised version of the Bill was gazetted in March 2023.
- 4.5 The Bill was presented to Parliament on 4 April 2023.
- 4.6 After its first reading the bill was sent to the Department of Attorney General for necessary changes. The bill did not come back to the parliament for its second and third readings. As a result, the bill has never been enacted into law.
- 4.7 The policy statement of the new (November 2023) GoSL¹⁹ includes the following under the heading *Impartial Human Identity, Gender Equality in Social Life*:

Principles

- Domestic laws with the standards set by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

Activities

- Revising laws and procedures to guarantee protection from gender-based violence and harassment in workplaces, public transport, and other places.

releases/2022/03/sri-lanka-criminalisation-same-sex-sexual-activity-breached-rights-lgbti; Human Dignity Trust, *Sri Lanka: Case before UN Committee on the Elimination of Discrimination against Women (CEDAW)* (2022), <https://www.humandignitytrust.org/what-we-do/cases/sri-lanka-case-before-un-committee-on-the-elimination-of-discrimination-against-women-cedaw/>; Kyle Knight, *UN Body Condemns Sri Lanka's Criminalization of Same-Sex Acts*, HUMAN RIGHTS WATCH (Mar. 23, 2022), <https://www.hrw.org/news/2022/03/23/un-body-condemns-sri-lankas-criminalization-same-sex-acts>.

¹⁸ *Homosexuality to be Decriminalised*, <https://www.themorning.lk/articles/DTIRaTHSwT1O8hESDdqF>.

¹⁹ *A Thriving Nation A Beautiful Life*, pg 43-45, <https://www.npp.lk/en/policies/npppolicystatement>.

- Revising discriminatory laws, including penal code 364 and 365 (a) that oppress women, children and other marginalised groups.
- Expanding constitutional protections to ensure no discrimination based on gender identity or sexual orientation.
- Increasing access to state services, including healthcare, legal assistance, social protection and justice for the LGBTIQ+ communities.
- Implementing legal and institutional reforms in relevant bodies, such as the Human Rights Commission and Legal Aid Commission, to safeguard the rights of marginalised groups.
- Developing a code of conduct and establishing standards for state officials, including law enforcement, on interacting with gender identity groups.
- Creating a dedicated secretariat to protect the rights of marginalized groups.

4.8 Despite these words, **as of yet, none of the mentioned policy activities has been initiated by the government.**

5. ABSENCE OF CONSTITUTIONAL OR STATUTORY PROVISIONS

5.1 Although Sri Lanka acceded to the Convention in 1981, it has no enabling legislation that gives effect to the rights embodied in the treaty.

5.2 Sri Lanka has not adopted or implemented measures to eliminate discriminatory treatment based on SOGIE. Neither the Sri Lankan Constitution nor any law expressly prohibits discrimination based on SOGIE. Efforts to amend the Constitution to include such a prohibition have, as of this date, been unsuccessful.

5.3 The GoSL has previously claimed that Article 12 of the Constitution²⁰, on equality and non-discrimination, does protect persons from stigmatization and discrimination on the basis of sexual orientation and gender identities. In practice, however, other provisions of the Constitution nullify the effectiveness of this provision. Article 15(7) provides that the Constitution's fundamental rights provisions (which include Article 12) can be made subject to restrictions in the name of "morality."²¹ Article 16(1) states that laws existing at the time of the Constitution's adoption (both written and unwritten) shall remain valid even if inconsistent with the Constitution's fundamental rights provisions,²² making it impossible to challenge the constitutionality of the laws criminalizing same-sex sexual relations.

5.4 During a December 2022 meeting held at the Sri Lanka Police Headquarters between the Inspector General of Police (IGP), senior police officials and representatives of

²⁰ Parliament Secretariat, *The Constitution of the Democratic Socialist Republic of Sri Lanka* (As amended up to 29 October 2020), Revised Edition – 2021, Art. 12(7), <https://www.parliament.lk/files/pdf/constitution.pdf> [hereinafter Constitution].

²¹ *Id.* at Art. 15(7).

²² *Id.* at Art. 16(1).

LGBTIQ organisations, IGP C.D. Wickramaratne apologised for the longstanding harassment faced by the LGBTIQ community at the hands of the police. The meeting, organized by the Ministry of Women, Child Affairs and Social Empowerment and the Sri Lanka Police, discussed the way forward towards treating all human beings equally and without discrimination.²³ This was an encouraging development, but unfortunately, the GoSL has failed to follow through on this in practice.

- 5.5 LBTQ women face economic inequality both because of employment discrimination against them as LBTQ women, discussed in our earlier report to the PSWG, and because women in general do not enjoy full equality in employment in Sri Lanka. This lack of economic equality for women further prevents LBTQ women from attaining economic independence and is also likely to be a factor that forces women to enter unwanted marriages.

6. IMPEDIMENTS TO LEGAL RECOGNITION OF GENDER IDENTITY

- 6.1 In the Sept. 2023 written replies to the List of Issues, the GoSL claimed (at para 135) that “Legal gender recognition could be obtained by transgender persons in 3-5 days per existing regulations.”
- 6.2 However, the reality is contrastingly different to their claims. As per the circular issued by the Ministry of Health²⁴ the Gender Recognition Certificate (GRC) will be issued by a psychiatrist. This evaluation process differs from each psychiatrist, which at times the process would take months to be completed. This directly hinders the Transgender women from changing their legal documents such as the National Identity Card as the GRC is required for them to change their other legal documents.

7. CONCLUSION

- 7.1 We urge the Committee to raise these issues during its upcoming review and to make the following recommendations to the State:
- Sri Lanka should decriminalize adult, consensual same-sex sexual conduct by repealing Penal Code sections 365 and 365A and by reviewing the application of Penal Code § 399 and the Vagrants Ordinance, to clarify that they do not apply to adult, consensual same-sex sexual conduct, displays of affection or transgender persons.
 - Sri Lanka should promptly and fully comply with the recommendations made by this Committee in *Rosanna Flamer-Caldera v. Sri Lanka*;

²³ Kaushalya Sendanayaka Arachchi, *The outcomes of LGBTIQ organisations' meeting with IGP* (Dec. 2022), <https://www.themorning.lk/articles/344oKNsMZLdO3BwrR4MJ>.

²⁴ Director General of Health Services, General Circular No. 01-34/2016, *Issuing of Gender Recognition Certificate for Transgender Community* (16 June 2016), <http://www.previousmoh.health.gov.lk/CMS/cmsmoh1/viewcircular.php?cno=01-34/2016&med=english>.

- Sri Lanka should amend its Constitution and adopt comprehensive anti-discrimination legislation to explicitly include sexual orientation and gender identity and expression among the prohibited grounds of discrimination. It should also amend its Constitution to provide that any legislation, subsidiary legislation, executive decision or administrative policy that is inconsistent with the Constitution can be reviewed and invalidated by an independent judiciary.
- Sri Lanka should take all necessary steps to combat and prevent discrimination and violence against persons of diverse sexual orientations and gender identities and expressions, and to ensure their equal enjoyment of all human rights. In this regard, Sri Lanka should develop, implement, and intensify training programs and public awareness efforts to educate law enforcement officers, public employees and the general public in order to combat discriminatory stereotypes against LGBTIQ persons. Sri Lanka should also revise its procedures for legal recognition of gender identity to remove barriers that in practice can cause long delays.