

**Shadow Report to the UN Human Rights
Committee regarding Nepal's protection
of the Rights of LGBTI Persons**

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Blue Diamond Society

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1. EXECUTIVE SUMMARY

1.1 Blue Diamond Society (BDS) is an community based NGO that works with local activists and communities to protect and promote the rights of Lesbian, Gay, Bisexual, Transgendered and Intersex (**LGBTI**) persons tackle stigma, discrimination, lack opportunities and problems like education, employment health including HIV/AIDS in Nepal. Blue Diamond Society has prepared this report to inform the UN Human Rights Committee of areas where Nepal is failing to comply with its obligations under the ICCPR to respect the human rights of LGBTI individuals.

1.2 Whilst Nepal should be commended for the pro-active steps it has taken to better protect the rights of LGBTI persons, there are still areas where further work is required, including:

1.2.1 Absence of any anti-discrimination laws that protect LGBTI persons;

1.2.2 Attempt to criminalisation of homosexual activity and same-sex relationships, which was never criminalized in the past.

(We are more worried about the fact that government have drafted (about 3 years ago) both civil code and criminal code separately to replace the old “Muliki Ain, that’s where provision of criminalization of homosexual activity and same sex relationship has been proposed and its not in one place but in several places with several articles that are attempting to criminalization of homosexuality and same sex relationship including same sex marriage).

1.2.3 Failure to take positive steps to counter stigma, stereotypes, prejudice and violence against LGBTI persons.

These matters constitute violations of Articles 2, 6, 7, 14, 17 and 26 of the ICCPR. However this submission will primarily focus on Articles 2 and 26 (non-discrimination) and Article 17 (privacy).

1.3 We urge the Committee to include in its Concluding Observations, recommendations that Nepal repeal all discriminatory legislation, recognise same-sex unions, enact anti-discrimination legislation and take positive steps to counter prejudice, vilification and stigma directed at LGBTI persons.

2. POSITIVE STEPS TAKEN BY THE STATE PARTY

2.1 The Nepalese government is to be commended for its pro-active stance regarding sexual orientation and gender equality and its attempts to ensure LGBTI rights are protected under Nepalese law, in accordance with Nepal's obligations under international treaties.

2.2 Following the signing of the Comprehensive Peace Accord in 2006, Nepal has increasingly sought to be at the forefront of ensuring equality for all minorities including on the basis of sexual orientation.

- 2.3 The initial step by Nepal to recognise equality for LGBTI persons occurred in December 2007 when the Supreme Court of Nepal, in *Pant v Nepal*,¹ declared:

full, fundamental human rights for all sexual and gender minorities - lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.

- 2.4 In this case, the Court ordered the government to repeal all discriminatory laws. The Court also legally established a third gender category: ‘other’ for the purposes of legal recognition. The creation of a third legal gender or sex was at the behest of transgender individuals who wished to have a third identity option.² Court also issued directive order to scrap or amend all discriminatory laws and policies against LGBT, and court issued order to the government to form 7 members committee to study same sex marriage issues locally and internationally and make recommendations for same sex marriage law. The legal ID policy for third genders has been done by Nepal government but the Chief District officer who issue these IDs are giving hard to Nepali Third genders and not issuing it, always coming with different excuses and asking to produce unnecessary document like medial proof of the person applying of id is a third gender person which is impossible to obtain. Ministry of Women Children and Social Welfare have audited the existing laws and came up with proposal to amend the discriminatory laws, but government have yet to take it forward. ‘Same sex marriage committee’ is also yet to send its report and recommendation to government. So the implementation of the Supreme Court decision has not going well at all.
- 2.5 Following this recognition of a third gender and the protection of LGBTI persons by the Supreme Court of Nepal, the Nepalese Parliament introduced the right to equality in the interim constitution (although only before the law and without specific reference to LGBTI persons) and gradually began recognising a third gender on legal documents. The third gender encompassed persons who wished to identify as a third gender, be it transgender persons, same-sex attracted persons or intersex persons. In this regard, Nepal can be regarded as a progressive state.

3. FAILURE TO LEGALISE HOMOSEXUALITY

- 3.1 In the landmark case of *Toonen v Australia*, this Committee held that criminalisation of homosexuality breach the ICCPR and recommended that such discriminatory criminal laws be repealed.
- 3.2 BDS documented several hundreds of cases of Nepalese authorities have taken advantage of the lack of anti-discriminations laws and absence of protection laws on the ground of sexual orientations and gender identity; the police widely used the law called “public nuisance” because of their visible gender expression, identity or the people simple know some one is gay or lesbian.

This is a clear violation of the right to privacy in Article 17.

¹ Writ No. 917 of the Year 2064 BS (2007 AD).

² Michael Bochenek and Kyle Knight ‘Establishing a third gender category in Nepal: process and prognosis’ (2012) 26 *Emory International Law Review* 12.

- 3.3 Although the Supreme Court of Nepal has requested that Parliament enact legislation regarding same-sex marriage and ensure that same-sex conduct is not criminalised,³ political indecision has hampered this process.
- 3.4 The Committee should therefore **recommend** that Nepal must not attempt criminalizing LGBTI but formulate and/or amend laws that protect from discriminations and violence and ensures equality for all regardless of sexual orientation and gender identity.

4. LACK OF RECOGNITION OF SAME-SEX UNIONS

Same-sex marriage and protection for sexual minorities were to be included in the new Nepalese Constitution, required to be completed by 31 May 2012. However, as the Parliament was unable to agree on the constitution, this has not occurred. The result is that Nepal has no form of legal recognition of same-sex relationships. However according to supreme court's decision on Dec 2007, the government of Nepal was ordered to form a 7 members committee to study and make report as well recommend for same sex marriage law, the committee has completed their task 2 year ago but the chairmen of the committee (secretary of health ministry then) is not signing on and sending the report to government.

- 4.1 As such, individuals who are same-sex attracted risk being discriminated against on the basis of marital status and sexuality, in violation of Articles 2(1) and 26, particularly in regards to the following:
 - 4.1.1 adoption of children by same-sex couples;
 - 4.1.2 access to IVF for lesbian couples; and
- 4.2 Regardless of the underlying cause of the non-recognition of same-sex marriage in Nepal, this is an issue that needs to be addressed. It is encouraging that Nepal has progressed to the point of discussing such matters in a relatively short timeframe, and that there appears to be political willingness to address this issue.
- 4.3 We urge the Committee to include in its Concluding Observations, a **recommendation** that Parliament enact legislation permitting same-sex marriage or civil unions, pending the formulation of a new constitutional framework.

5. FAILURE TO PROTECT FROM DISCRIMINATION

- 5.1 Under Articles 2(1) and 26, Nepal has an obligation to provide effective legal protection against discrimination to LGBTI persons. While the Interim Constitution guaranteed equality before the law without discrimination on the basis of sex, it does not protect against discrimination in other areas of life, nor does it specifically mention LGBTI persons. As discussed above, the new Constitution was to have included protections for LGBTI persons.

³ See, *Pant v Nepal* translated in NJA Law Journal 2008 at page 276.

As it currently stands, there is no legal protection from discrimination for LGBTI persons. Nepal also lacks any hate crime or anti-discrimination legislation to protect sexual and gender minorities from discrimination.

- 5.2 Nepal's failure to legislate against discrimination has meant that goods and service providers, such as transport and health providers,⁴ are able to discriminate on the basis of a person's sexual orientation or gender identity with impunity, and LGBTI persons are often discriminated against in the provision of health care services.⁵ A report submitted by the Blue Diamond Society, an LGBTI NGO in Nepal, details how the widespread belief that an LGBTI person is a sex-worker and/or is HIV positive often leads to that person being denied access to public health care facilities.⁶ Additionally, fear of discrimination has prevented LGBTI persons from seeking medical treatment when needed.
- 5.3 Many LGBTI persons have found it difficult to gain employment. This has resulted in transgendered, or third gendered, persons engaging in work in the sex industry, the only form of paid work available to them. Not only does discrimination create an underclass of LGBTI persons, but it also has the potential to increase sexual and other related risks, including HIV.
- 5.4 Furthermore, such employment has the potential to perpetuate stereotypes regarding LGBTI persons amongst the broader community (discussed in further detail below). As these discriminatory attitudes become more entrenched, it becomes more difficult for LGBTI persons to find and undertake suitable employment.
- 5.5 We urge the Committee to include in its Concluding Observations, a **recommendation** that Nepal enact comprehensive anti-discrimination legislation that prohibits discrimination on the basis of sexual orientation and gender identity, including intersex, in the areas of employment, education, political activities, and the provision of accommodation, goods and services.

6. FAILURE TO COMBAT NEGATIVE ATTITUDES TOWARDS LGBTI PERSONS

- 6.1 In addition to enacting legislation to protect the rights of LGBTI persons in Nepal, the Government has an obligation to take positive steps, including through awareness raising campaigns, education and training, to ensure the positive enjoyment of rights by LGBTI persons. This should include tackling harmful stereotypical perceptions of LGBTI persons.⁷
- 6.2 Anecdotal evidence supplied by individuals and other CBOs as well as from our own direct documentation, suggests that LGBTI persons continue to be subject to discrimination and harassment. The enactment of anti-discrimination legislation is not enough to combat negative stereotypes which can lead to breaches of:

⁴ Blue Diamond Society, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal* (2013) http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GlobalInitiativeForSexualityAndHumanRights_Nepal108.pdf.

⁵ The right to health is recognised in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was ratified by Nepal in 1991.

⁶ Blue Diamond Society, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal* (2013) http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GlobalInitiativeForSexualityAndHumanRights_Nepal108.pdf.

⁷ UN Human Rights Committee General Comment 4 at [2].

- 6.2.1 Article 7: Freedom from torture, inhuman and degrading treatment or punishment; and
- 6.2.2 Article 17: Freedom from arbitrary and unlawful interference with privacy, home, family and correspondence and unlawful attacks on honour and reputation.
- 6.3 Of particular concern is evidence of violence towards LGBTI persons in Nepal. LGBTI persons in Nepal have received an increased number of threatening text messages and phone calls, have been kidnapped and beaten, and followed by people wearing masks.⁸
- 6.4 Further, there are reports that some of this violence is perpetrated by Nepalese law enforcement officers. The *Public Offences Act 1970* (POA) confers broad powers on law enforcement offices as the Act does not define what constitutes a public offence.⁹ Navi Pillay, the High Commissioner for Human Rights, in her letter of 2 April 2013, to the Nepalese Minister for Foreign Affairs, voiced concerns regarding allegations that approximately 50 LGBTI activists had been detained by the police under the POA. The detainees had complained of 'verbal abuse, severe beatings and indiscriminate body searches'.¹⁰
- 6.5 Shortly after the High Commissioner's letter, and following further reports that the POA was being misused to arrest men with long hair, the Supreme Court ordered that law enforcement officials cease harassing and arresting individuals on the grounds of their 'personal interest or appearance', reaffirming a LGBTI individual's right to privacy and security.¹¹ However, this ruling does not repeal or re-define the POA, but merely asks law enforcement officials to discontinue misusing the POA to unfairly target, arbitrarily arrest and detain LGBTI persons.
- 6.6 We urge the Committee to include in its Concluding Observations, a **recommendation** that the Nepalese legislature re-draft the *Public Offences Act* to define public nuisance more narrowly, so that this legislation cannot be used to legitimise targeting individuals on the basis of their sexual orientation, gender identity or appearance.
- 6.7 A lack of awareness and education can also have a direct impact on the right to privacy, particularly for persons who identify as a third gender. As stated above, Nepal must be commended for creating a third gender for inter-sex and transgender persons. In order to implement such a third gender, the Nepalese government needs to provide identification cards for such persons. Such national identification cards are required in Nepal for many everyday activities, such as opening bank accounts, buying and selling properties, applying for a job or acquiring a passport and voting. Unfortunately, anecdotal evidence has suggested that the vast majority of people looking to be recognised as third gendered have been unable to obtain their identification card in their gender. In fact, the Blue Diamond Society has estimated that only three out of a potential 200,000 transgendered Nepalese (Nepal has a population of approximately 23 million) have been able to change their identification card to reflect a third gender. Although identification cards providing for a third gender have been issued to some

⁸ LGBT Tensions Rise in Nepal, *One Equal World* (10 April 2013) <http://www.oneequalworld.com/2013/04/10/lgbt-tensions-rise-nepal/>.

⁹ Blue Diamond Society, *The Violations of the Rights of Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Nepal* (2013) http://www2.ohchr.org/english/bodies/hrc/docs/ngos/GlobalInitiativeForSexualityAndHumanRights_Nepal108.pdf.

¹⁰ Ibid. Note that Human Rights Watch in their recent World Report 2014 has expressed concern regarding these recent threats, attacks and arrests, at page 358, available at http://www.hrw.org/sites/default/files/wr2014_web_0.pdf.

¹¹ SC Verdict lifts Taboo on Long Hair, Ear Jewellery, *The Himalayan*, (8 April 2013), <http://www.thehimalayantimes.com/fullNews.php?headline=SC+verdict+lifts+taboo+on+long+hair%26sbquo%3B+ear+jewellery&NewsID=372083>.

third gender persons, third gender individuals have been subjected to unlawful searches or have had to undress in an effort to verify their identity.¹² Forcing an individual to reveal their sex in this manner impinges upon their right to privacy.

- 6.8 The disparity between the legal framework and social attitudes towards sexual minorities in Nepal can be attributed to the broader cultural environment and lack of understanding regarding LGBTI issues. Whilst there has been significant progress on these issues, Ruben Del Prado, the Nepalese Country Director of UNAIDS, has noted that:

I think there's a bit of a lag between what has been accomplished at upstream level and society's readiness to accept sexual minorities. I am very concerned about the way officials deal with sexual minorities.

- 6.9 The urbanisation and modernisation of Nepal, particularly in Kathmandu, has promoted the rights of sexual minorities, and a burgeoning middle class is making it easier for individuals to express their own sexual identity. However, there is still much to be done to change attitudes across the entire Nepalese culture.
- 6.10 We urge the Committee to include in its Concluding Observations, a **recommendation** that the Government take steps, including awareness raising campaigns, to combat the social stigmatization of, and violence against, LGBTI persons.

The Chief District officer of Kathmandu refused to renew Blue Diamond Society's operating licence in 2012 and 2013, despite their own investigation did not find any financial mismanagement, the long delay on renewing operating licence of Blue Diamond Society caused sever gap in terms of vitals services to HIV affected/infected population and human rights support to LGBTI in Nepal. Please refer to Human Rights Watch report for this: <http://www.hrw.org/world-report/2014/country-chapters/nepal>

The government has advanced transgender and intersex rights in the last decade by recognizing a third category on official documents. Nevertheless, the government failed to prevent an escalation in threats and violent attacks on LGBTI rights activists in 2013. In early February, four transgender women were arrested under the Public Offense Act, a vaguely worded law that can result in up to 25 days in detention and a fine amounting to more than US\$300.

Authorities did little to investigate threatening phone calls and harassment of members of the Blue Diamond Society, the national LGBTI umbrella organization. It instead launched an investigation into the organization for alleged corruption, despite the fact it had passed third party

¹² International Gay and Lesbian Human Rights Commission, *Nepal Supreme Court Case on Relief for Sexual and Gender Minorities: Observers' Report*, (December 2007) <http://iglhrc.org/sites/default/files/111-1.pdf>.

audits and inspections. The group's 2012-2013 license renewal process was delayed and its bank accounts frozen, temporarily halting its health and human rights work.)

7. REMEDIES

- 7.1 Under the ICCPR, Nepal is obliged to provide an effective remedy for violations of human rights.
- 7.2 It is clear that Nepal is endeavouring to protect the rights of LGBTI persons and provide a remedy when their human rights have been violated. To this end, Nepal has established the National Human Rights Commission which is responsible for conducting investigations, monitoring agencies and hearing complaints relating to violations of human rights. Either the victim or support person of the victim may make a complaint to the Human Rights Commission, however such a complaint must be lodged within six months after the violation took place. Once a complaint is received the Commission investigates the complaint and issues a report detailing its findings. The Commission has broad powers to refer the matter to a court, award compensation, make an order requiring the violation to stop, or conduct a conciliation.
- 7.3 The National Human Rights Commission has been active in investigating and responding to complaints made by LGBTI persons. As at October 2012, the Commission had received seven complaints relating to LGBTI rights. The complaints concerned allegations of discrimination, torture, inhumane and degrading treatment, illegal detention, infringement upon the right to freedom of association, and rights related to citizenship and identification.¹³
- 7.4 However, without anti-discrimination laws that protect LGBTI persons, and with gay men still subject to arrest for consensual, same-sex sexual conduct, persecution and discrimination can continue. There is a need for law reform as well as cultural change to ensure law enforcement officials can investigate and prosecute vilification and harassment of LGBTI persons.

8. CONCLUSIONS AND RECOMMENDATIONS

- 8.1 The recognition of a third gender by the State Party, and attempts to include protection against LGBTI discrimination, are to be applauded. However, failure to provide adequate protection against discrimination, the continuing arrest of homosexual persons and the failure to legally recognise same-sex relationships constitute a violation of a number of rights under the ICCPR.
- 8.2 We therefore encourage the Committee to include in its Concluding Observations, **recommendations** that the State Party:
- 8.2.1 amend its criminal law to explicitly legalise sexual and or social relationship between consenting adults, regardless of sex or gender;

¹³ 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' (5 October 2012) <http://www.aidsdatahub.org/sites/default/files/publication/rbap-hhd-2013-nhri-project-on-right-to-health-sogi-nepal.pdf>.

- 8.2.2 legislate regarding same-sex marriage or civil unions, as ordered by the supreme court of Nepal in 2007;
- 8.2.3 enact comprehensive anti-discrimination legislation that prohibits discrimination on the basis of sexual orientation, gender identity or intersex in the areas of employment, education, political activities, and the provision of accommodation, goods and services;
- 8.2.4 re-draft the *Public Offences Act* to define public nuisance more narrowly so as to avoid LGBTI persons being targeted based on their sexual orientation, gender identity or appearance; and
- 8.2.5 take steps, including awareness raising campaigns, to combat the social stigmatization of, and violence against, LGBTI persons.