

# **Submission to the Independent Expert on Sexual Orientation and Gender Identity**

## **Report on Colonialism and Sexual Orientation and Gender Identity Submission Relates to: Sri Lanka**

**Author:** Dr Scott Robert Hearnden

**Institution:** Affiliate with University of Sydney, Australia

Contact Addresses: [scotthearnden@hotmail.com](mailto:scotthearnden@hotmail.com) and [s.hearnden@sydney.edu.au](mailto:s.hearnden@sydney.edu.au)

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### **Background to Responses to Independent Expert's Questions**

The following responses are informed by the author's:

a) principal doctoral research on peace, human rights, civil society and marginalised communities in Sri Lanka, between 2011 and 2019 at the University of Sydney; and,

b) other research contributions, as a member of the Regional Advisory Group (RAG) executive committee of the Asia Pacific Coalition on Men's Sexual Health (APCOM) in Bangkok between 2017 and 2020.

The principal doctoral research examined the experiences of 22 interviewed participants, most of whom were Sri Lankan whose names were changed for reasons of anonymity. Most participants identified with one or more marginalised communities in Sri Lanka, including the LGBTIQ community. The research recognised multiple marginalisations of people and examined people's experiences through an intersectional lens. The APCOM research arose in the context of the organisation strengthening its repository of knowledge in relation to laws and socio-political circumstances affecting people whose:

- A) sexual orientation and gender identities and expression (SOGIE) fell outside normative frameworks, including the LGBTIQ community; and,
- B) key affected populations to HIV and AIDS.

Recognising that the questions are meant to guide the formulation of inputs, only those questions where the author has gleaned either theoretical or experiential data, are discussed.

**1. Did the imposition and/or enforcement of colonial laws or policies on sex, gender and sexuality change pre-colonial treatment of sexual orientation and gender identity? What historical or anecdotal evidence is there available about the treatment of gender and sexual diversity before past or present experiences of colonization?**

Robert, a Sinhala/Buddhist heterosexual male with a medical qualification, spoke with conviction of Sri Lanka's traditional society, lost through colonialism. He blamed the imposition of colonial value-systems in the shift he believed had occurred from 'communal' to 'competitive' approaches to life.

*In pre-colonial society was much more of a communal society...In a communal society, there is hardly any competition between people. There was more resources for more people to share...Sexually, people were much more liberal. People were more liberal and people were not stuck in a conservative mindset.*

Robert believed that in 'traditional communal society' freedoms existed with greater cooperation, including sexual freedoms. He suggested that Western attitudes, rather than providing 'freedoms', had imported constraints on people's lives. He pointed to what he saw as shifts from a pre-colonial past that offered greater sexual and relational 'permissiveness', including a less constrained marital environment.

He lamented about the impact on the people of Sri Lanka who had endured three periods of colonial subjugation across 500 years which he believed translated into grave challenges requiring repair and recovery following significant 'economic and cultural exploitation'. He said:

*I feel is that the British did a lot of good things, but they exploited us economically. But more, they exploited us culturally; because their bad things are still embedded in Sri Lankan society, in current Sri Lankan culture; even the criminalisation of sex work, the criminalisation of same sex relationships, all were done by the British people.*

**2. What laws, policies, and practices regulated or influenced the shaping of or the socio-normative perception of sexual orientation and gender identity in colonial times? How were they introduced, promoted, administered or enforced? Examples could include prohibition of certain sexual acts, but also regulation of sexual or gender identities and expressions (such as bans on cross-dressing).**

The current circumstances criminalise and enable the persecution of, and discrimination against, LGBTIQ people.

- Male to Male Sex: Illegal
- Female to Female Sex: Illegal
- Transgender Recognition: Legal recognition allowing change to gender identification on formal documentation.
- Intersex: Unclear -- no recognition within current legal framework

Due to the criminal/penal codes introduced by the British under its own 1883 laws and then imported into Sri Lankan state law by promulgation of the Soulbury Constitution (1948) members of the LGBTIQ community are criminalised for same-sex behaviours. The Penal Code Article 365 makes 'carnal intercourse' a matter which is defined as being 'against the order of nature' and defined to include consenting adults, either male or female, in same-sex relations; convictions carry a maximum imprisonment of 10 years. Article 365A - (introduced by the "Penal Code Amendment) Act, No. 22 of 1995" – makes 'gross indecency' a crime for which imprisonment may extend to two years and/or a fine. There are no laws that specifically protect the rights of People Living with HIV. Ongoing criminalisation and lack of protections means that LGBTIQ people are therefore unable to seek remedies through institutions, such as the Human Rights Commission, which are established to ensure that all Sri Lankans enjoy equality and dignity.

Despite the guarantees of a general right to equality in the 1978 Constitution, the current legal landscape marginalises several minority groups of people. The current legal situation exposes the LGBTIQ community to greater degrees of vulnerability than many non-LGBTIQ people who are also from marginalised or minority groups, for example, the criminalisation of certain sexual behaviours.

The 1978 Constitution does address fundamental rights and provides that 'every citizen is entitled to' the freedoms of speech, expression (including publication), assembly and

association, amongst other freedoms. It also proscribes discrimination, for reasons of race, religion, language, caste, sex, political opinion, place of birth 'or any such grounds'.<sup>1</sup>

The inadequacies of the legal environment surrounding these so-called protections mean that people who are discriminated against because of their sexual orientation are unlikely to find remedies in the courts. They therefore remain invisible in the formality of their social, political and economic public life arrangements (employment, access to accommodation and in the provision of goods and services etc) and vulnerable to exploitation, extortion, blackmail, and persecution, in their private lives.

Dilshan is a young gay Sinhala Buddhist male working in an NGO who has had to justify his existence to the authorities. He spoke about his 'invisibility' in Sri Lankan society. When he had sought support from the authorities, including the Human Rights Commission of Sri Lanka (HRCSL), to help him respond to the needs of the LGBTIQ community, he was reduced to having to prove his own existence. He said:

*You can go to the HRC and you go and try to talk to the Ministry of Justice and say that we as a community face problems. But then they say, who? Where is the community? Where are they? How many? So, that's where the invisibility comes in.*

**3. What colonial laws regulating sexual orientation and gender identity are still in place today? How are they enforced? How are they being interpreted by national jurisprudence and customary law? What legal, moral, or socio-cultural explanations have been provided, if any, for their continued existence?**

Same-sex sexual activity remains illegal in Sri Lanka according to the Sri Lanka Penal Code of 1883 discussed in Q2.

**Use of Laws By Authorities – Formally & Informally**

Although formal prosecutions of people engaged in non-normative sexual behaviours in Sri Lanka are rare, the law is used informally by individuals vested with formal authority, such as those in the uniformed services, to persecute, blackmail, harassment, and discriminate against the LGBTIQ community. The continuation of these laws therefore fosters an ongoing hidden and dire environment for people who identify with the LGBTIQ community. Moreover, the practice of stigmatising and criminalizing LGBTIQ people significantly impacts upon this community's abilities to access goods and services, employment and education, as well as

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<sup>1</sup> Constitution of the Democratic Socialist Republic of Sri Lanka, Chapter III, Fundamental Rights, articles 14 and 15

negatively impacts upon HIV rates in the country. UNAIDS has noted, for example, that stigma against men who have sex with men (MSM), stemming from criminalization is psychologically harmful and exacerbates HIV epidemics.

### **Avenues of Legal Redress**

Marginalised communities have sought human rights protections through Sri Lanka's judicial system by calling upon the courts to uphold its obligations under international law. However, despite Sri Lanka's international commitments, neither the government nor the Supreme Court has been prepared to entertain such applications.

Unable to secure justice within Sri Lanka, members of the LGBTIQ community have occasionally sought remedies by invoking Sri Lanka's international obligations; although with limited successes.<sup>2</sup> The LGBTIQ/SOGIE community has also sought to rely upon support at the Universal Periodic Reviews (UPR) at the UN Human Rights Council. Notably at Sri Lanka's second and third UPRs in November 2012, and March 2017 Canada (including Argentina in 2012) made specific recommendations for the repeal of provisions in the Penal Code, amending personal laws by removing all discriminatory provisions against women as well as the removal to barriers which prevent engagement in the political process.<sup>3</sup>

In 2018 however Rosanna Flamer-Caldera successfully challenged the Sri Lankan government's criminalisation of same-sex relations with regards to women. The challenge was made in accordance with the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It was the first time that the CEDAW Committee considered an individual complaint relating specifically to the criminalisation of lesbian and bisexual women.

### **Progress on Transgender Rights**

In June 2016, the Ministry of Health, Nutrition and Indigenous Medicine issued a General Circular (No: 01-34/2016) directing Health Services on the procedure for Issuing of Gender Recognition Certificates for Transgender People and establishing services for transgender communities. The Circular sets out the establishment of a Transgender Notification Register

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<sup>2</sup> R K W Goonesekere, *Fundamental Rights and The Constitution – II: A Case Book*, Colombo: Law & Society Trust, 2003. [www.lawandsocietytrust.org](http://www.lawandsocietytrust.org) 2003; Singarasa (Nallarathnam) v Attorney General of Sri Lanka, Application for judicial review, SC Spl (LA) No, 182/99, ILDC 518 (LK 2006), 15 September 2006, Sri Lanka, Supreme Court Decision on Optional Protocol. See <http://www.lawnet.gov.lk/wp-content/uploads/2016/12/Law-Report-part-10-2013.pdf>  
<http://oxfordindex.oup.com/view/10.1093/law/ildc/518lk06.case.1>

<sup>3</sup> Universal Periodic Review Sri Lanka 2017, Third Cycle 28<sup>th</sup> Session 2017, <https://www.ohchr.org/Documents/Issues/Disability/RightAccessJusticeArticle13/CSO/DisabilityOrganizationsJointFrontSriLanka.pdf>

as well as steps for medical practitioners to issue Gender Recognition Certificates. There are no laws or policies that recognise intersex people.

**4. How, if at all, has the protection against violence and discrimination based on sexual orientation and gender identity been transformed and positively or negatively impacted by processes of decolonization?**

Protection against violence and discrimination has not improved. Aditya Bondyopathyay, a legal activist from India has worked closely with Sri Lankan LGBTIQ community-based groups and summarised the quotidian experiences of people of diverse sexual and gender identities and the dilemmas they face in Sri Lanka. He asserted that:

*...the everyday lives of Sri Lanka's sexual minorities remains difficult...and are exemplified by confusion and loneliness of having to keep one's identity hidden and engage in only furtive sexual activities with the constant fear of police harassment at every step. There is a great deal of internalised homophobia and trauma due to this existence.<sup>4</sup>*

The violence that is perpetrated against marginalised or vulnerable people for reasons beyond issues of race and religion is, according to the participants in the principal research, widespread and although is sometimes reported is largely ignored by authorities.

The lack of protections permeates all aspects of marginalised people's lives. For example, beyond law there are social, political and economic considerations. For example, violence and discrimination can also be understood through a health and human security paradigm and continues to be directed at gay men by the police and security forces. They suffer significant sexual abuse including violence and rape, blackmail and threats and that as a result of such ongoing treatment many members of the LGBTIQ community experienced insecurity, loneliness, fear, isolation, low self-esteem and shame brought on by social attitudes producing stigma and discrimination and social exclusion.<sup>5</sup>

Participants linked violence with a highly militarised culture that has continued in Sri Lanka for decades. It particularly impacts upon the 'vulnerability' of the LGBTIQ community. Hilol referred to the treatment of LGBTIQ people under the LTTE, in which he revealed the

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<sup>4</sup> Aditya Bondyopathyay, *Sri Lanka Laws Affecting LGBT Persons in South Asia: A Desk Review*, 78

<sup>5</sup> Aditya Bondyopathyay, 'Sri Lanka' *Laws Affecting LGBT Persons in South Asia: A desk review*, RFSU & SIDA, 2011, 80-81. RFSU is 'Riksförbundet för sexuell upplysning' ('Swedish Association for Sexual Education') and 'SIDA' is the Swedish International Development Agency.

consequences of a potent mix of unaccountable politics with military power and the disposability of people who are deemed worthless. In the case of the LTTE, their vulnerability arose due to, as Hilol recalls, a *'traditional far leftist ideology...in a traditional political sense...being useless as productive entities within the State'*.

But Hilol also highlighted the Sri Lankan military's behaviour more generally, relating it to 'nationalism' and the manner that it is used to secure divisions, entrench stigma and discrimination and violate human rights. He pointed, for example, to:

*...reported cases of a lot of sexual violence against trans-women and other LGBT people by people in the military service [because] they [the military] could act with impunity and without any possibility of redress – such reports against the military were considered and labelled anti-national acts.*

- 5. If no longer in place, when were colonial laws regulating sexual orientation and gender identity repealed? In what pretext were they abolished and what was the rational/explanation for their abolishment?**

No response submitted.

- 6. How has the legal and social regulation of gender, sexual orientation and gender identity been relevant for imposing and maintaining colonial power?**

No response submitted.

- 7. What is the ongoing impact of gender- and sex-regulating colonial laws on the enjoyment of human rights by LGBT persons? How did the imposition of colonial laws on sex and gender shape social and moral ideas about sexual orientation and gender diversity?**

The enjoyment of human rights can be understood at multiple levels. The ongoing impact of gender and sex regulating colonial laws impact upon people in multiple ways including:

- a) By denying people their democratic entitlement and their human rights;
- b) By creating hierarchies of power.

The enjoyment of human rights relies not only upon the availability of protective systems of justice but the expression of commitment in the attitudes of people across a society. One glaring example of an attitudinal conflict amongst the participants of the principal research was that articulated by Henry who was a retired heterosexual Tamil male journalist /academic who

had immigrated abroad. Somewhat like the commentaries articulated under Question 1, Henry sought to reflect upon his belief that contemporary rights-based environments are compatible with traditional customs and values. He sought to harmonise his own cultural histories with contemporary attitudes to human rights which he believed was commonplace amongst his Sri Lankan peers. He seemed to embrace the axioms of universality, inalienability, inabrogability and indivisibility.<sup>6</sup> To affirm this, he juxtaposed human rights against his belief in traditional values and said: *'There are no barriers that frustrate the recognition and application of human rights by traditional cultural values'*.<sup>7</sup>

Yet when pressed on the inclusion of specific rights for LGLBTIQ people, Henry's response shifted. His self-identification also seemed to shift away from his sense of Tamil identity, towards a sense of a collective Sri Lankan identity. He reconciled the tensions that arose between what he understood were his traditional values with what he embraced as contemporary human rights and continued to defend the need for rights-based protections. But, when asked to apply such principles to the LGBTIQ community in Sri Lanka, his views became unreconcilably conflicted, and he was overwhelmingly negative in his response to the LGBTIQ community. He replied:

*They will never have a place. They may need protection, but in Sri Lanka society they are hated and discarded, they are considered not acceptable by the culture of the community.*

**8. Was there a relationship between colonial laws and policies that created unequal treatment and power relations affecting LGBT persons, paving the way to intersecting forms of discrimination, exclusion, racism, xenophobia and related intolerance, patriarchy, and other forms of discrimination and oppression? How did these laws and policies impact persons with multiple and intersecting identities such as LGBT persons with disabilities, older LGBT persons, LGBT children, LGBT persons of African descent, among others.**

Hilol, a gay Indian Brahmin Hindu lawyer spoke of violence, including murders, by the LTTE directed at people discovered expressing non-heterosexual practices. Ramaya and Margaret, a lesbian couple working in civil society in Sri Lanka, said they faced barriers, including being summoned to appear before military-controlled investigations, regarding the registration of their non-governmental organisation (NGO) which focused on women's and lesbian issues. In one Focus Group participants spoke of imposed governmental censorship in their film and

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<sup>6</sup> Jim Ife, *Human Rights and Social Work: Towards rights-based practice*, 24

<sup>7</sup> Henry is a retired academic who broadcasts a national radio programme for Tamils outside of Sri Lanka. <sup>333</sup> Jim Ife, *Human Rights and Social Work: Towards rights-based practice*, 24



performance art, because its contents included issues related to diverse sexuality, gender, sex work and HIV/AIDS.

The participant Kasun, a young gay Sinhala Buddhist male studying at university, identified a link between politics and culture but more specifically, he linked violence and political oppression to a culture of patriarchy:

*Still, we fail to [recognise this]. I think still we are suffering most problems...most of the wars situation, conflict situation most of the things happen because of this patriarchal system...it's kind of politics behind that scene'...So I think we can approach men and boys it will help 99% to change this structure...*

### **Contextualising the LGBTIQ Experience Across Marginalised Spaces**

The experiences of the LGBTIQ participants confirmed that the popular political narrative, which limits the contested spaces involving identity in Sri Lanka to race and religious nationalism, does not reflect the entirety of their lived experiences nor does it amply reflect the experiences and knowledges of other marginalised community members. Rather, in seeking to participate in Sri Lankan civil society, the participants attested to a much broader hidden conflicted space in which they experience both direct and structural violence.

Points of intersectional relevance to the marginality experienced by participants in the principal research was conducive to discovering several common themes. These themes negatively affected the marginalisation of communities in Sri Lanka. Some can be linked back to the colonial period and several included issues of: leadership; recognition of vulnerable communities; the relationship between traditional and contemporary values through caste, class and human rights; and, transitional justice and constitutional review. In the background to each of these themes, the effects of heteronormativity and the patriarchal system remained evident.

#### **9. Have any laws, policies, or psycho-social support or legal remedies been put in place to recognize and provide reparations and redress for the legacy of colonialism in relation to the enjoyment of human rights? Do these take into account violence and discrimination based on sexual orientation and gender identity?**

The state has not put in place any specific laws, policies or psycho-social support for legal remedies with respect to the LGBTIQ community to directly recognise the legacy of colonialism, nor to provide reparations or any redress.

Several commissions, committees and/or institutional structures ultimately failed to achieve the confidence of the participants in the principal research. Some 18 committees of inquiry, including the Lessons Learnt and Reconciliation Commission (LLRC 2010-2011), were established by the first Rajapaksa government between 2005 and 2013 to inquire into a range of egregious human rights matters.<sup>8</sup> None appear to have reached satisfactory outcomes leading to reparations or redress.<sup>9</sup> The participants also held little confidence in the Ministry of National Languages and Social Integration (MNLISI), the Human Rights Commission of Sri Lanka (HRCSL) and the now defunct Public Representations Committee on Constitutional Reform (PRCCR) (2016-19), largely due to their lack of independence and lacklustre functionality. The PRCCR is defunct.

The election of a new president, Maithripala Sirisena, during late 2015 was widely, albeit cautiously, believed by participants to be able to change the face of politics in Sri Lanka, he ultimately proved unsuccessful. Anurupa, a Tamil Hindu woman, offered comments which paralleled many of the other participants. Her sentiments reflected the mood of progress during the incipient stages of the PRCCR in 2016. Her views exemplified what, for many participants, proved to be misguided optimism.

*It's not really a blueprint. What we have is just the statement made by the Minister in September where he said we will have these four mechanisms: one is a Special Court for Accountability; the second one is the Truth Telling Mechanism; the third is the Office of Missing Persons; and, the fourth one is the Office for Reparations. And we only have statements. It's not like we have a white paper or anything like that. But since then what happen since last October, they have had these various informal secret groups, drafting various things and nobody knows what's going on there.*

Anurupa, attested to this with a demonstrated sense of hope and enthusiastic optimism in her responses to research questions about the constitutional reforms process. She pointed, for example, to submissions made by the HRCSL to the PRCCR, recommending the broadening of the non-discrimination clause in the Constitution to include sexual orientation [and] identity, calling for any new constitution to include a Bill of Rights and, to incorporate what they said

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<sup>8</sup> [A list of Commissions and Committees appointed by GoSL since 2005 December 2013.pdf \(cl.ly\)](#)

<sup>9</sup> [The Final Report of the Lessons Learnt and Reconciliation Commission: A Response – Groundviews](#)

were 'two critically important dimensions' being: a) the 'guaranteeing of a sound system of separation of powers and checks and balances; and, b) strong regulation of the public security regime'.<sup>10</sup>

**10. How, if at all, should reparatory justice for the lasting consequences of colonialism include measures to address discrimination and violence based on gender, gender identity and sexual orientation?**

The author has not sufficiently researched this question at this time.

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<sup>10</sup> The HRCSL's submission to the 2016 Public Representations Committee on Constitutional Reform is annexed to its submission to the Review of Fifth Periodic Report of Sri Lanka Under the International Covenant on Economic, Social and Cultural Rights to the UN Economic, Social and Cultural Rights Committee, dated May 2017 at [http://hrctl.lk/english/wpcontent/uploads/2017/06/Report\\_to\\_ESCR\\_Committee-2017-by-HRCSL.pdf](http://hrctl.lk/english/wpcontent/uploads/2017/06/Report_to_ESCR_Committee-2017-by-HRCSL.pdf)

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