PROTECTIVE LAWS RELATED TO HIV, MEN WHO HAVE SEX WITH MEN AND TRANSGENDER PEOPLE

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**ABSTRACT:** This Legal Reference Brief is an output of the South Asian Roundtable on Legal and Policy Barriers to HIV, held in Kathmandu from 8-10 November 2011 (Roundtable Dialogue).

The Reference Brief reports on the results of research on key protective laws focused on HIV, men who have sex with men (MSM) and transgender people. This Reference Brief is not intended to be a complete analysis of the country’s legal and policy framework or social environment. The objective of this Reference Brief is to provide an entry point for discussion on protective laws in Sri Lanka.

Reference Briefs were prepared by legal researchers in Bangladesh, India, Nepal, Pakistan and Sri Lanka to support the development of Regional Legal Reference Resource.

The Regional Legal Reference Resource documents key protective laws focused on HIV, men who have sex with men (MSM) and transgender people in the abovementioned five countries in South Asia. The two primary objectives of the Regional Legal Reference Resource were to build the capacity of legal professionals to analyze protective laws (focusing on people living with HIV, MSM and transgender people); and develop a resource to support legislative drafting, law reform and advocacy initiatives.

The Roundtable Dialogue was a joint initiative of SAARCLAW, the International Development Law Organization (IDLO), the United Nations Development Program (UNDP), the Joint United Nations Program on HIV/AIDS (UNAIDS) and the World Bank; under an overarching goal to promote an enabling legal environment and strengthen the legal response to HIV in South Asia. The Roundtable built upon the momentum of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law (February 2011) and supports the human rights commitments of the Economic and Social Commission for Asia and the Pacific (ESCAP) under Resolution 66/10 and 67/9.

1 This objective was advanced in the process of researching and drafting national legal reference briefs.
INTRODUCTION

Since the first reported case of HIV in 1987, Sri Lanka has had a low prevalence of HIV with less than 0.1% of its adult population living with HIV as of December 2009. As of the end of 2011, Sri Lanka has reported a cumulative total of 1,463 HIV cases with 146 new cases being reported in 2011.2

Based on information gathered by National STD/AIDS Control Programme (NSACP), the highest proportion of transmissions comes from heterosexual activity, contributing to 82.8% of the total number of transmissions. Transmission via sex between men represents the second highest mode of transmission at 12.3%. Mother-to-child transmission accounts for 4.4% of transmissions. Transmission through blood and blood products was 0.4%. Injecting drug use accounted for around 0.5% of transmissions.3

Despite the current low prevalence rate, Sri Lanka is vulnerable to HIV due to a number of underlying risk factors. Sri Lanka has large numbers of key affected populations, including sex workers, men who have sex with men, transgender persons, migrant workers, military personnel, internally displaced persons, refugees and people who use drugs; as well as a high incidence of unsafe sexual practices, which include low condom use and escalating rates of sexually transmitted infections.4

Acknowledging the need to identify and understand legal and policy barriers to HIV prevention, treatment, support and care services in South Asia, the International Development Law Organization (IDLO), the United National Development Programme (UNDP), SAARCLAW, the World Bank, and the Joint United Nations Programme on HIV/AIDS (UNAIDS) convened the South Asia Roundtable Dialogue: Legal and Policy Barriers to the HIV Response from 8-10 November 2011 in Kathmandu, Nepal (the Roundtable Dialogue). The Roundtable Dialogue was a follow-up to the Asia-Pacific Regional Dialogue of the Global Commission on HIV and Law held during February 2011 in Bangkok.

Following the Roundtable Dialogue, a national workshop was co-hosted in Sri Lanka on 10 February 2012 by IDLO, UNDP and UNAIDS in Colombo, on HIV and the law. The objectives of the national workshop were to: (a) share and disseminate Roundtable recommendations and outcomes with stakeholders in Sri Lanka; (b) advance Roundtable recommendations at national level through follow up activities; and (c) develop an ‘Action Matrix’ tool, to guide and support implementation of follow up activities.

The Action Matrix tool focused on key issues, and contains recommendations and commitments of representatives from the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community, people who use drugs, people living with HIV, and matters for consideration of the sex worker community.

The key outcomes of the Roundtable were the identification of law and policy issues that act as barriers to effective HIV responses, and the development of recommendations linked to these issues. One of such recommendations was the strengthening of the enabling legal environment for PLHIV and high-risk populations that (i) protects them from stigma and discrimination, (ii) enables them to access critical services, and (iii) ensures accessible and affordable recourse to the law.

Pursuant to this recommendation, review and analysis of laws protecting people with diverse sexual orientation and gender identity (SOGI) and PLHIV in Bangladesh, India, Nepal, Pakistan and Sri Lanka, was undertaken. This Legal Reference Brief is the Sri Lankan chapter of the legal study. It is proposed that this document will serve as a reference resource for future legislative drafting, law reform initiatives and advocacy initiatives with respect to PLHIV and people with diverse SOGI in Sri Lanka.

1. LEGAL ENVIRONMENT IN SRI LANKA – OVERVIEW

The Sri Lankan legal system is influenced by English common law and Roman-Dutch law as a result of its colonial history. The customary and personal laws such as Kandyan, Thesawalamai law and Muslim law also prevail over

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various ethnicities and geographical locations. Today the Roman - Dutch Law of Sri Lanka’s general and common law is generally applicable when statutes and customary laws do not regulate the issue at hand. Common law has been modified by statutory laws and by judicial decisions.

Sri Lankan laws are enacted by the legislature and interpreted by the courts. The Supreme Court has the sole and exclusive jurisdiction to hear and determine any question relating to (i) interpretation of Constitution, and (ii) infringement or imminent infringement of any fundamental right by the executive or administrative action. However, courts do not have the power to void legislation that conflicts with human rights or the Constitution.

Sri Lanka is a party to a number of international conventions that are directly and/or indirectly relevant to protection of the rights of PLHIV and people with diverse SOGI. Sri Lanka has a dualist approach to international law. Where international treaties have not been transformed to domestic law, the courts have used international treaties as interpretive guides.

Sri Lanka prohibits same-sex activities and relations under Articles 365 and 365a of the Penal Code.

Sri Lanka does not have laws that specifically protect the rights of PLHIV and people with diverse SOGI. There are policies in place, however they are inadequate to effectively address the gap created by the absence of legislation and constitutional protections. There is a dearth of documented legal cases relating to the protection of PLHIV and high risk populations.

2. INTERNATIONAL LAW AND CONVENTIONS RELATING TO HIV/AIDS

a. Relevant Provisions

Sri Lanka is a signatory to the following international conventions and treaties relevant to the human rights of PLHIV, MSM and transgender individuals:

• The International Covenant on Civil and Political Rights (ICCPR) – acceded to 11 June, 1980;
• The International Covenant on Economic, Social and Cultural Rights (ICESCR) – acceded to 11 June, 1980;
• The Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) – ratified 5 October, 1981; and

Provisions against discrimination: Article 7 of the Universal Declaration of Human Rights (UDHR) provides that all are equal before law and are entitled without discrimination to equal protection of the law. All of the above international instruments provide that the rights and freedoms set forth within shall be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The CRC provides that the state parties shall respect and ensure the rights
set forth therein without discrimination on the basis of any disability. These provisions may be invoked against any form of discrimination towards PLHIV and people with diverse SOGI. Although the terms ‘gender orientation’ or ‘sexual preference’ or ‘disability’ or ‘disease’ are not covered (other than in case of the CRC which covers ‘disability’); such terms may be read into the relevant provisions as the provisions are inclusive in nature.

Right to physical and mental health: Article 25 of the UDHR, Article 12 of the ICESCR and Articles 24 and 25 of the CRC, provide for right to highest attainable standards of physical and mental health. These provisions may be used to ensure that HIV prevention and control services are available along with necessary infrastructure and personnel.

Right to information and education: Article 19 of the UDHR and Article 19 of the ICCPR provide for freedom to receive and impart information and ideas through any media. Further, Article 17 of the CRC provides for obligation on the part of the State Parties to ensure that the child has access to information aimed at promoting his or her physical and mental health. These provisions can be invoked to ensure that the State provides information and education on HIV prevention and sexual health.

Right to privacy: Article 12 of the UDHR, Article 16 of the CRC and Article 17 of the ICCPR provide that no one shall be subjected to arbitrary interference with his privacy and shall have legal protection against such interferences. These provisions guarantee the right of non-disclosure to third parties and confidentiality regarding a person’s gender orientation, sexual preference and HIV test results.

The Government of Sri Lanka has also made international commitments as a Member State of the Health Assembly of the World Health Organisation (WHO). These commitments make the state responsible for providing health care to all citizens without discrimination.

Sri Lanka has also committed to the International Guidelines on HIV/AIDS and Human Rights (1997 & 2006); the SAARC Regional Strategic Framework for Protection, Care and Support of Children Affected by HIV/AIDS (CABA); the United Nations General Assembly Special Session on HIV/AIDS Declaration of Commitment (2001); the International Conference on Population and Development (ICPD) Programme of Action; and the United Nations Millennium Declaration.

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8 Article 25 of the UDHR states “(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” Articles 12 of the ICESCR provides “The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: …. (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.” Articles 24 of the CRC provides “(1) States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.”

9 Article 19 of the UDHR states “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 19 of the ICCPR provides “(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 17 of the CRC states “States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.”

10 Article 12 of the UDHR states “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Article 16 of the CRC provides “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. (2) The child has the right to the protection of the law against such interference or attacks.” Article 17 of the ICCPR provides “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.”
3. DOMESTIC LAWS RELATING TO HIV/AIDS


Under the present Sri Lankan Constitution, Article 12(1) ensures that all people are equal before the law and are entitled to the equal protection of the law. Article 12(3) states that no person shall be subject to any disability, liability, restriction or condition on the grounds of race, religion, language, caste or sex.

b. Legislation

i. Anti-discrimination laws

There is no anti-discrimination legislation that specifically protects PLHIV or people with diverse SOGI in Sri Lanka. Research failed to identify further cases filed in Sri Lankan courts in relation to PLHIV or people with diverse SOGI. Anecdotally, the researcher of this paper was advised that in 2011, a person living with HIV filed a claim at the Labour Tribunal for wrongful dismissal by his employer. In this case, the plaintiff argued that he was dismissed from service when his employer discovered his HIV status. The plaintiff was successful in his claim. In 2011, the Tribunal awarded reinstatement or costs to the plaintiff, declaring it a wrongful termination under the Industrial Disputes Act No 43 of 1950.

4. GOVERNMENT INITIATIVES AND POLICIES RELATING TO HIV/AIDS

a. National Strategic Plan on HIV/AIDS

The National STD/AIDS Control Programme of the Ministry of Health with the involvement of relevant governmental, non-governmental, international, civil society and professional organisations, business sector, media and PLHIV communities; develops and implements the National Strategic Plan. The 2007-11 National Strategic Plan is now under review and the Strategic Plan for the next 5-year cycle will be launched in 2012. The 2007-2011 National Strategic Plan recognizes the role of the enabling legal environment.


An important milestone was achieved through the adoption of the National HIV/AIDS Policy in 2011. The implementation of the National HIV/AIDS Policy is a result of many years of advocacy by civil society.\footnote{The adoption of the National AIDS Policy was an action point in the National Strategic Plan on HIV and AIDS (2007-2011).}

The adoption of the National HIV/AIDS Policy provides a rights-based framework with which laws and policies are intended to comply. Relevantly Section 3.11 ‘Human rights’ of the National HIV/AIDS Policy states:

"The Government of Sri Lanka will ensure that the human rights of people living with HIV/AIDS are promoted, protected and respected and measures taken to eliminate discrimination and combat stigma which will provide an enabling environment to seek relevant services. These include the rights of everyone to life, liberty and security of person, freedom from inhuman or degrading treatment or punishment, equality before law, absence of discrimination, freedom from arbitrary interference with privacy or family life, freedom of movement, the right to work (rights of the people living with HIV in the workplace) and to a standard of living adequate for health and well-being including housing, food and clothing, the right to the highest attainable standard of physical and mental health, the right to education, the right to information which includes the right to knowledge about HIV/AIDS/STI related issues and safer sexual practices, the right to capacity building of the individual in dealing with this condition, the right to participate in the cultural life of the community and to share in scientific advancement and it’s benefit.

...
However, steps shall be taken to prevent persons from willfully and knowingly infecting HIV to other persons.

The responsibility and behavior of the media as stated in Article 28 of the Constitution of Sri Lanka which casts a duty to respect the rights of others on reporting on matters related to HIV/AIDS are emphasized.  

The National HIV/AIDS Policy outlines the purpose of the National AIDS Committee (chaired by H.E the President of Sri Lanka), and states that it will include representation from relevant stakeholders which will monitor the implementation of the HIV response. Furthermore, provincial AIDS committees and district AIDS committees will serve as the multi-sectoral advisory bodies at provincial and district levels. The NAC sub-committee on Policy, Law and Ethics consists of government, civil society and development partners and is a unique mechanism for coordinating a change process.

c. National Policy on HIV/AIDS in the World of Work

The Government of Sri Lanka has ratified the ILO Discrimination (Employment and Occupation) Convention, 1958 (111), is a signatory to the 2001 UNGASS Special Session on HIV/AIDS and has endorsed the achievement of the Millennium Development Goals (MDGs). These have formed the basis for the adoption of the National Policy on HIV/AIDS in the World of Work in Sri Lanka (HIV/AIDS Workplace Policy) that was launched by the Sri Lankan Ministry of Labour and Labour Relations in 2010.

The rationale for the policy dealing with safe guarding the rights of PLHIV are provided in section 6.4 of the HIV Workplace Policy: “All employees will have equal opportunities to enjoy healthy living at workplaces. The workplace will ensure full and equal human rights through the promotion of an active and visible policy of non-stigmatization and non-discrimination of employees infected or affected by HIV and AIDs. Employers will need to take steps to ensure workers rights, confidentiality of information regarding health issues including HIV and AIDS, treatment, care and support.”

A strategy has been developed for the implementation of the HIV Workplace Policy. The policy is currently being ratified by selected companies. It is too early to observe the effectiveness of the policy.

d. National STI/AIDS Control Programme Partnerships and Initiatives

In November 2010, the National STI/AIDS Control Programme and the Family Planning Association of Sri Lanka undertook the ‘People Living with HIV Stigma Index Sri Lanka.’ The Stigma Index reports instances of violation of rights of PLHIV and steps taken for redress:

“13% of respondents claimed that they had their rights abused, but only 38% of these (5 respondents) attempted to get legal redress, of which 3 respondents indicated that nothing happened and 2 claimed that the matter was still being dealt with. The research team in discussing issues around laws and policies spoke of how HIV positive people have had poor experiences with HIV and law. They also underlined that people had no confidence in the system and were afraid of being subject to further stigma and discrimination in seeking legal redress for violation of their rights.”

The Stigma Index Report makes the following recommendations to strengthen the legal rights of PLHIV:

- document cases of violations towards PLHIV;
- establish legal aid services for people living with HIV that include expertise on inheritance property rights, discrimination within healthcare settings and wrongful dismissal under existing laws and policies;


strengthen partnerships and referral systems with government and civil society agencies that provide legal aid services to people living with HIV;

develop more effective information, education and communication approaches around existing laws, policies and services so that people living with HIV know and understand their rights and seek legal redress in the event their rights are violated; and

ensure the rights and confidentiality of potential migrant workers in relation to voluntary counseling and testing (Ministry of External Affairs).15

e. UNGASS Country Progress Report Sri Lanka 2008-2009:

The UNGASS report makes the following observations:

“1. Although, the relevant penal provisions are rarely used, their existence contributes to the ongoing stigma and discrimination these groups face in the community and harassment in the hands of law enforcement agents.

2. Legal provisions drive the MSM community and sex workers underground.

3. The sweeping statements of the penal code address alleged ‘indecency’ of ‘unnatural’ sex leads to criminalize the LBTIQ community.

4. As sex workers find ‘quick and easy’ ways to avoid the police, they do not want to keep condoms with them as it proves their status. It de-motivates condom use among sex workers.

5. If one is found to be HIV positive during the testing process she/he is terminated from employment in the Gulf and that prevents a person to motivate for VCCT.”

CONCLUSION

The Government of Sri Lanka has focused on the prevention of transmission of HIV among various groups through national strategies and policies. It has created space to approach people with diverse SOGI despite the fact that homosexuality is criminalized. However, there is a pressing need to provide legal support to PLHIV and LGBTI populations in order to increase their ability to access basic services and to reduce the stigma levels that they face. In the absence of protective legislation, it is important to file cases to establish precedents which entrench the rights of PLHIV, LGBTI populations and key affected populations.

The efforts underway with Round 9 of the GFATM, both regionally and within Sri Lanka, may open the door of opportunity to support efforts to decriminalize homosexuality.

15 Ibid, at 33-35.