

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

**Compiled by the Kaleidoscope Human Rights Foundation, with
the assistance of DLA Piper and Nepalese LGBTI Advocacy
Groups**

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1. EXECUTIVE SUMMARY

- 1.1 Kaleidoscope Human Rights Foundation is an NGO that works with local activists to protect and promote the rights of Lesbian, Gay, Bisexual, Transgendered and Intersex (**LGBTI**) persons in the Asia Pacific region. Kaleidoscope has prepared this report, with the assistance of members of the Nepalese LGBTI community, 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 further work required, including:
- 1.2.1 enacting of anti-discrimination laws that protect LGBTI persons;
 - 1.2.2 addressing the continual harassment of LGBTI persons through discriminatory application of general criminal laws, such as the *Public Offences Act*;
 - 1.2.3 ensuring that proposals to criminalise homosexual activity and same-sex relationships do not proceed; and
 - 1.2.4 taking positive steps to counter stigma, stereotypes, prejudice and violence against LGBTI persons.

Failing to address these matters is a violation of Articles 2, 6, 7, 14, 17 and 26 of the ICCPR. However, this submission primarily focuses 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 the ICCPR.
- 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 taken 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.

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

- 2.4 In that 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
- 2.5 The Court also issued a directive to the Government of Nepal to form a seven member committee to study same-sex marriages locally and internationally, with the view of making recommendations for same-sex marriage laws in Nepal.³ Issues regarding the implementation of this scheme are addressed further below.
- 2.6 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 all 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 breached the ICCPR and recommended that such discriminatory criminal laws be repealed.
- 3.2 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,⁴ political indecision has hampered this process. While there is no specific law criminalising homosexual activity, there are reports that Police utilise more generic laws such as the *Public Offences Act* to harass individuals, (discussed further below). We also understand that there is a proposal to replace the current civil and criminal laws (*Muluki Ain*) and that potentially, homosexual activity and same-sex relationships will be criminalised under these new laws.
- 3.3 The failure to legally recognise all consenting sex between adults, regardless of gender, also affects the protection people can obtain under sexual assault laws.⁵ The current sexual assault laws only cover non-consensual sexual intercourse where the perpetrator is male and the victim/survivor is female. As such, sexual assault of a man or a third gender person is not considered to be rape, but is treated as a lesser offence.
- 3.4 The Committee should therefore **recommend** that Nepal amend its criminal law to explicitly legalise sexual activity between consenting adults, regardless of sex or gender, and ensure sexual assault laws protect *all* victims of non-consensual sexual activity.
- 3.5 The Committee should also **recommend** that Nepal review the proposed new civil and criminal codes to remove any provisions that may discriminate against LGBTI persons or criminalise homosexual activity.

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

³ See, *Pant v Nepal* translated in *NJA Law Journal* 2008 at page 286.

⁴ See, *Pant v Nepal* translated in *NJA Law Journal* 2008 at page 276.

⁵ *Muluki Ain Chapter 14*.

4. LACK OF RECOGNITION OF SAME-SEX UNIONS

- 4.1 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 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.
- 4.2 According to the Supreme Court decision in *Pant v Nepal*, the Government of Nepal was ordered to form a committee to study same-sex marriage issues both locally and abroad with the view of recommending same-sex marriage legislation in Nepal. Anecdotal evidence indicates that the committee completed its task a few years ago, however the Chairmen of the Committee is refusing to sign, or provide the Government with, the committee's findings.
- 4.3 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:
- 4.3.1 adoption of children by same-sex couples; and
 - 4.3.2 access to IVF for lesbian couples.
- 4.4 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.
- 4.5 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 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. We understand that the Ministry of Women, Children and Social Welfare have audited the existing laws and provided a proposal to amend discriminatory laws, but the government is yet to implement the proposal.
- 5.2 Nepal's failure to enact legislation against discrimination has meant that providers of goods and services, such as transport and health,⁶ are able to discriminate on the basis of a person's sexual orientation or gender identity with impunity. Indeed, LGBTI persons are often

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.

discriminated against in the provision of health care services.⁷ 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.⁸ 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 health 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 increasingly 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, so as to protect the human rights of LGBTI persons, particularly 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 anti-discrimination 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.⁹
- 6.2 Anecdotal evidence supplied by individuals and NGOs, including the Blue Diamond Society, 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.
- 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.¹⁰ Authorities have done very little to protect LGBTI people from harm. According to Human Rights Watch, when members of the Blue Diamond Society received threatening phone calls and were continually harassed, the Government launched an investigation into the organisation for

⁷ 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.

⁸ 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.

⁹ UN Human Rights Committee General Comment 4 at [2].

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

alleged corruption, delaying their license renewal process, freezing accounts and halting health and human rights work.¹¹

- 6.4 Further, there are reports that some of the harassment and violence is perpetrated by Nepalese law enforcement officers. The *Public Offences Act 1970* (POA) confers broad powers on law enforcement offices, as the Act fails to define what constitutes a public offence.¹² Navi Pillay, the High Commissioner for Human Rights, in a letter to the Nepalese Minister for Foreign Affairs dated 2 April 2013, 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'.¹³
- 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.¹⁴ 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 POA 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 intersex 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, applying for a job or acquiring a passport and voting. Unfortunately, anecdotal evidence suggests 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 third gender persons, third gender individuals have been subjected to unlawful searches or have had to undress in an effort to verify their identity.¹⁵ Individuals have been asked to produce unnecessary documentation, such as medical proof that the person is of a third gender, proof that is difficult, if not impossible to obtain. Forcing an individual to reveal their sex in this manner impinges upon their right to privacy.

¹¹ Human Rights Watch *World Report 2014* available at http://www.hrw.org/sites/default/files/wr2014_web_0.pdf p358.

¹² 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.

¹³ Ibid.

¹⁴ 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>.

¹⁵ 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>.

- 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 stigmatisation of, and violence against, LGBTI persons.

7. REMEDIES

- 7.1 Under the ICCPR, Nepal is obliged to provide an effective remedy for violations of human rights.
- 7.2 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 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.¹⁶
- 7.4 However, without anti-discrimination laws that protect LGBTI persons, and with 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.

¹⁶ 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. 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 LGBTI persons and the failure to legally recognise same-sex relationships constitute violations 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 activity between consenting adults, regardless of sex or gender, and ensure sexual assault laws protect all victims of non-consensual sexual activity; review the proposed new civil and criminal codes to remove any laws that may discriminate against LGBTI persons or criminalise consensual homosexual activity;
 - 8.2.2 enact legislation permitting same-sex marriage or civil unions, pending the formulation of a new constitutional framework;
 - 8.2.3 enact comprehensive anti-discrimination legislation that prohibits discrimination on the basis of sexual orientation, gender identity or intersex, protecting the human rights of LGBTI persons, particularly 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 stigmatisation of, and violence against, LGBTI persons.