



# Laws and Policies

affecting LGBT+ people

## MODULE 3

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*Laws & Policies affecting LGBT+ persons in Sri Lanka*



## Overview

Discrimination on the basis of Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) violates right to equality and non-discrimination. However, in Sri Lanka one finds laws and practices that discriminate against LGBT+ people.

Laws that discriminate against LGBT+ people in Sri Lanka include s.365 and s.365A of the Penal Code which are titled 'Unnatural offences' and 'Acts of gross indecency between persons' respectively. These laws discriminate against people with diverse sexual orientations. Section 399 of the Penal Code, 'Cheating by personation' is used to arrest transgender people. Vagrants Ordinance is also used to arrest people of LGBT+ communities, particularly people in sex work. Despite guaranteeing right to equality and non-discrimination, the Constitution of 1978, in Article 16, retains all written and unwritten laws that existed by the time the Constitution came into force, even when such laws violate fundamental rights. At the same time Sri Lanka does not recognise judicial review of legislation. As a result, laws that discriminate against LGBT+ people can only be changed by the Parliament.

This module discusses laws that are relevant to LGBT+ people, including those that discriminate. The module covers laws on sex and sexual violence, laws that discriminate against LGBT+ people, laws relating to sex work, and laws on arrest in Sri Lanka.





## Online Reference

To access the Online Version of the Module 03 and the Presentation,  
SCAN THE QR CODE BELOW:



Or simply type the below URL on your web browser:

**[www.shorturl.at/nYZ45](http://www.shorturl.at/nYZ45)**



## Session Plan

Time: 09:00 AM- 05:00 PM (6 hours)

START TIME	TIME ALLOCATION	SESSION
09:00 AM	15 minutes	Recap / introduction
09:15 AM	20 minutes	Session 01: Making of the Law A discussion on purpose of law, nature of law, and sources of law
09:35 AM	1 hour 40 minutes	Session 02: Laws on sex and sexual violence Presentation and Q&A
11:15 AM	15 minutes	Break
11:30 AM	1 hour	Session 03: Activity – Laws on sex and sexual violence A matching game and a discussion
12:30 PM	1 hour	Mid-day break
01:30 PM	30 minutes	Session 04: Vagrants Ordinance and other laws used to harass LGBT+ people A discussion in a circle
02:00 PM	30 minutes	Session 05: Laws relating to sex work in Sri Lanka Presentation and Q&A
02:30 PM	1 hour	Session 06: What happens next? Two short plays and a discussion
03:30 PM	15 minutes	Break
03:45 PM	30 mins	Session 07: Laws and practices relating to arrest Presentation and Q&A
04:15 PM	30 mins	Session 08: Agree or disagree? Activity and discussion
04:45 PM	15 minutes	Closing and final thoughts

## Session 01: Making of the Law

*Groups report back on their discussions on purpose of law, nature of law, and sources of law.*

### Time

20 minutes

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Understand that law is a man-made system that is in place to protect rights of people.
- Understand that law evolves over time, differs across contexts, and that law can be changed.
- Identify sources of law.

### Tools needed

- Pen and paper for each group.
- The Constitution and key statutes (Penal Code, Civil and Criminal Procedure Codes, Case law compilations, Related statutes) to show the participants.

### Preparation

- Slides

### Steps

- Begin by explaining that as human beings we are governed by the law of the land from birth to death. There is a law that explains how to register our birth and our death. Laws describe traffic rules, food safety, rules around education, employment, property ownership, etc. Law also affects our private lives, our bodies, and our relationships. Therefore, it is important to be aware of the law.
- Explain that this activity is an effort to understand some basic concepts about law.
- Divide the participants in to 5 groups (approximately 6 participants in a group). Invite each group to discuss among themselves and note down the answers to one of the questions listed below:
  1. What happens if there was no law?
  2. Where can you find the law?
  3. Who makes the law?
  4. Are there any activities that were legal in the past which are now illegal anywhere in the world?
  5. Are there any actions that you can think of which were illegal in the past, but are now legal anywhere in the world?
- Invite the participants to share notes from their discussion.



## Summarise

If there was no law, there would be nothing to protect us from crimes such as murder, theft, and rape. There will be chaos and every person will be left to protect themselves. In such a society, only the fittest would survive. Those who are vulnerable will have no protection. There would be no way to tell who should be able to lead or make decisions on behalf of others; people would fight for power. There would also be no consequences if someone were to murder our family, or steal our things.

Therefore, **societies have evolved to have legal systems to protect rights and liberties of people** from other people, organizations, and even the government. Law also explains how the government should function. To enforce the law, the law accompanies punishments for those who break the law. Through punishing the perpetrators, and other remedial actions such as compensation, the law gives the survivors of crimes a sense of justice.

The Constitution, statutes, judicial precedents, and sometimes even customs form **sources of law** in Sri Lanka. The Constitution primarily explains how the country should be governed: It sets down relationships between different organs of the government (executive, legislature, and judiciary), fundamental rights, and principles of the state. Statutes are written laws that are passed by the parliament: The Penal Code, Evidence Ordinance, and Muslim Marriage and Divorce Act are examples of statutes. (Note - *At this point, the facilitator may pass around hard copies of the Constitution and statutes among the participants. You may collect the copies at the end of the session*). What is the difference between an Ordinance and an Act? An Ordinance is a written law that was passed during the British rule and an Act is a law that was passed more recently. Unlike in some countries, in Sri Lanka judges cannot make or change laws, even when they feel the law is incorrect or outdated. But they are bound to follow previous decisions of courts with higher authority. This is called judicial precedent. The 1978 Constitution states that all laws that existed when the constitution came into power continue to be laws, even the unwritten laws. This is how customs remain a source of law in Sri Lanka.

In Sri Lanka, **it is primarily the parliament that makes the law**. It is the parliament that has the power to make, change, or repeal the whole or part of the Constitution, or any statute. To change some important parts of the constitution, a referendum maybe needed. The members of the parliament are elected through democratic process. In Sri Lanka, every capable adult gets to vote to elect the members of the parliament. The members are then required to represent their electorate and make decisions on behalf of the citizens. This is called an indirect democracy. In this model of government, through electing members of the parliament, citizens contribute to the law making process.

**Law constantly evolves** to address challenges of the constantly evolving world. Before the Internet, there were no laws governing cyber-crime or cyber-exploitation. Laws also change from country to country. There are things that were once legal but are now illegal. For instance, beating your spouse was legal before domestic violence laws. Slavery and the slave trade were legal. Racial discrimination was legal during the Apartheid. Torture and killing of Jews was legal during the Holocaust. When a society's understanding of something changes, laws evolve.

In Sri Lanka it was legal for a Kandyan woman to marry two husbands. When Sri Lanka was colonised, many liberal laws were changed to match the values of the colonial rulers. It was also the colonial rulers, the British, that made sex between same-sex adults illegal in Sri Lanka.

Similarly, things that were once illegal are now legal. In the UK, sex between same-sex adults is now legal. It used to be illegal for women to vote. In the United States, alcohol was illegal during the 1920s prohibition, and interracial marriage was illegal until 1967.

Since laws should evolve to accommodate our deepening understanding of human beings and modern challenges, existing laws should be looked at through a critical lens. Laws are standards set by people, and can also be changed by people.

## Session 02: Laws on sex and Sexual Violence

*In groups, the participants list questions for the facilitator and the facilitator proceeds to answer the questions in a short lecture.*

### Time

1 hour 40 minutes

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Identify laws relating to sex between same-sex partners, transgender people, and sexual violence.
- Distinguish between sex and sexual violence.

### Tools needed

- Flipchart paper and markers for each group.

### Preparation

- Slides

### Steps

- Explain that in this session, you will attempt to make the participants aware of laws that affect people with diverse SOGIESC. Note that the participants must be curious about laws and this is an opportunity to ask these questions in a safe space.
- Divide the participants into 6 groups (approximately 5 participants in a group), and provide each group with flipchart paper and markers.
- Invite each group to discuss among themselves and write down 4 questions relating to one of the following themes, answers to which they would like to know. Note that considering the limited time you have, each group can prioritize the 4 questions that they are most curious about, but if there are more questions the answers to which they still wish to know, they can write down additional questions as well. Give the participants **10 minutes** for this exercise.
- Themes:
  1. Laws affecting same-sex couple
  2. Laws affecting transgender people
  3. Laws on sexual violence
- Two groups will work on the same topic. Invite the first two groups to present the questions that they listed and why they listed those questions. Explain that in the short lecture afterwards, you will attempt to answer these questions. Conduct the short lecture on Theme 1 assisted by the slides.

- Then invite the next two group to present their questions, and so on. Potential questions for each theme and responses can be found in 'Notes' below.
- Note that there may be questions that you have not prepared for. If you're unable to answer these questions from your knowledge, let the participants know that you're uncertain about the exact answer and you will find them the answer within the day.

## Notes

Following are the notes for the short lecture on law relating to same-sex couples and potential questions you may be asked.

### *Is same-sex sexual activity illegal in Sri Lanka?*

Sex between same sex couples is illegal in Sri Lanka. In Sri Lanka, the law on sex between same sex couples is stated under s.365 and s.365A of the Penal Code. Penal Code was changed in 1995 by the Penal Code (Amendment) Act No. 22 of 1995. Before this change, the law applied only to gay men. The amendment changed the language of law to make it gender neutral and therefore, now the law applies to same sex couples who are men as well as women. The law is rarely enforced. But it is a constant reminder of the second-class nature of treatment received by LGBT+ people in the country.

### **Section 365: 'Unnatural offence'**

The Penal Code states as follows:

*"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment..."*

The Penal Code also provides a higher punishment for having sex with a person below the age 16 years of age – legal age of consent.

### **What is meant by age of consent?**

The age at which a child becomes capable to give consent to sex. In Sri Lanka currently this age is 16. This means, someone below 16 is not old enough to give consent to sex. Therefore, having sex with a child below 16 constitutes rape even if the child said that they want to have sex. This is because the child is considered not old enough to understand the nature and consequences of sex and is legally incapable to give consent.

Although "carnal intercourse against the order of nature" theoretically can be interpreted to include sexual intercourse that do not lead to reproduction such as anal intercourse – and thus includes sex acts between heterosexual couples as well – this term is widely understood to apply to sexual acts between same-sex individuals.

'Carnal intercourse' is not defined in the statute. 'Intercourse' is generally understood as an insertive or 'penetrative' sexual act.

## Section 365A: Acts of gross indecency between persons

In this section, the Penal Code notes as follows:

*“Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence”*

This section can be used to punish a same-sex couple for engaging in sexual activities that fall short of sexual ‘intercourse’. This can be interpreted to include various activities such as kissing or touching sexual organs.

Both these sections (that is s.365 and s.365A) criminalise sexual activities between consenting adults even in private.

### Do sections 365 and 365A apply to straight people?

In theory these laws do apply to consensual sexual behaviours of all people irrespective of sexual orientation. However, in practice these laws are only applied against same-sex couples.

### *Does the law on fundamental rights protect people with diverse sexual orientations?*

Fundamental rights apply to all people in Sri Lanka. Article 12 of the Constitution states that ‘All persons are equal before the law and are entitled to the equal protection of the law’ and that ‘No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds’. Therefore, fundamental rights such as freedom from arbitrary arrest, freedom of speech, assembly, association, occupation, and movement etc apply to LGBT+ people as well.

Article 12 does not expressly mention sexual orientation and gender identity as grounds for non-discrimination, but it is implied in the words ‘or any one of such grounds’. However, in a progressive step, the right not to be discriminated based on sexual orientation and gender identity was recognized by the Government of Sri Lanka at the 112<sup>th</sup> session of Human Rights Committee in Geneva in 2014, where the Government of Sri Lanka stated:

*“Article 12 of the Constitution recognizes non-discrimination based on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds as a Fundamental Right. This measure protects persons from stigmatization and discrimination on the basis of sexual orientation and gender identities”*

### Note to facilitator

Highlight how the Penal Code, by criminalising same-sex sexual activity, discriminates against people with diverse sexual orientations in violation of Article 12. Ensure that the participants understand this paradox and understand why we need to work with the legislature to change these laws that violate fundamental rights.

One may argue that provisions of the Penal Code discussed above such as s.365 and s.365A violate right to equality guaranteed under the Constitution. This is in fact a correct articulation.

However, the current Constitution states that all laws that existed by the time the Constitution came in to effect in 1978 are valid even if such laws violate fundamental rights (See Article 16 of the Constitution). The Constitution does not allow judges to review laws to see if they are

unconstitutional for violating fundamental rights. In other words, judicial review of legislation is not allowed. Therefore, laws that violate fundamental rights are still operational in Sri Lanka. These laws can only be changed by the Parliament. This is why it is crucial that we work with people's representatives and the general public.

***Is there a legal protection against intimate partner violence for someone who has a same-sex partner?***

A survivor of intimate partner violence can obtain a Protection Order under the Prevention of Domestic Violence Act, No. 34 Of 2005 (PDVA). Under this act, 'A person, in respect of whom an act of domestic violence has been, is, or is likely to be, committed ("an aggrieved person") may make an application to the Magistrate's Court for a Protection Order, for the prevention of such act of domestic violence'.

The Magistrate's Court can issue an Interim Protection Order valid for 14 days on receiving an application under the Act before the case is judged based on evidence. This is in consideration of the urgent need to prevent any act of domestic violence, and the need to ensure the safety of the aggrieved person. After the Court has examined the evidence, the Court can issue a Protection Order valid for 12 months.

While this Act focuses on ensuring the safety of the aggrieved person by providing a civil remedy, the Act preserves their right to initiate separate additional civil or criminal action.

The PDVA uses gender neutral terminology. Therefore, any person regardless of their gender identity and sexual orientation, can file an application seeking protection from any person who is their 'spouse', 'ex-spouse', or 'cohabiting partner'. Under this act both physical violence and emotional abuse constitute 'domestic violence'.

However, people in same-sex relationships rarely resort to the PDVA due to fear of discrimination or persecution by the Police.

***Can same-sex couples get married in Sri Lanka?***

Under Sri Lankan law same-sex couples cannot get legally married.

***Is it illegal for a same-sex couple to live together?***

Even though s.365 and s.365A criminalise sex between same-sex partners, there is no law preventing same-sex couples (or heterosexual couples) from living together.

***Can same-sex couples adopt children in Sri Lanka?***

Since Sri Lanka does not yet recognize a union of same-sex partners, a couple cannot adopt a child. However, the Sri Lankan law allows an individual to adopt a child. Therefore, one partner can legally adopt a child.

According to the Adoption of Children Ordinance No 24 of 1941, adoption by single parents is allowed. However, the law prevents an adoption of a female child by a male applicant. This is only allowed if there are special circumstances.

### ***How will property pass to a surviving partner after the death of their same-sex partner?***

Since Sri Lanka does not yet recognize a union of same-sex partners, the law does not consider same sex partners when it comes to intestate succession – that is devolving of property after a person is deceased where there is no will. Therefore, ensuring that property rights pass to the surviving partner requires that a will is made prior to the person's passing.

**Following are the notes for the short lecture on law relating to transgender peoples and potential questions you may be asked.**

### ***Can a transgender person legally change gender in Sri Lanka?***

Yes. In 2016 the Ministry of health issued a circular requesting state institutions to assist the process of obtaining a Gender Recognition Certificate for transgender people.<sup>1</sup> This administrative process of obtaining Gender Recognition Certificate forms part of the process of changing gender and name on the birth certificate according to Section 27 and 52(1) of Birth and Death Registration Ordinance. A transgender person can obtain new identity documents such as National Identity Cards that correctly indicate their gender after the birth certificate has been changed.

### ***Can a transgender person be arrested by the Police in Sri Lanka?***

No. A transgender person can legally change gender in Sri Lanka. However, section 399 of the Penal Code is often used to harass, intimidate, and even wrongfully arrest transgender people (and people whose gender expressions do not align with their sex in a traditional sense- for example, masculine presenting women or 'butch lesbians').

### **Section 399: 'Cheating by personation'**

The Penal Code states as follows:

*"A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is... The offence is committed whether the individual personated is a real or imaginary person"*

The section provides illustrations:

- "(a) A cheats 'by pretending to be a certain rich merchant of the same name. A cheats by personation.*
- *(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation"*
- This section is used by the Police merely on the basis that a person's gender expression is 'misleading to the public'.

### ***Can transgender people get married?***

A transgender person who has obtained identity documents indicating their true gender can marry a person of the opposite gender. For example, a transgender woman, who was assigned male at birth, but now has obtained identity documents as a woman, can legally marry a man.

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<sup>1</sup><https://www.aidscontrol.gov.lk/images/pdfs/circulars/Issuing-of-Gender-Recognition-certificate-for-TG-community-1.pdf>

***Is there a law to protect a transgender person from intimate partner violence?***

A transgender person can seek protection from intimate partner violence under the Prevention of Domestic Violence Act, No. 34 Of 2005 (PDVA).

The PDVA uses gender neutral terminology. Therefore, any person regardless of their gender, gender identity and sexual orientation, can file an application seeking protection from any person who is their 'spouse', 'ex-spouse', or 'cohabiting partner'. Under this act both physical violence and emotional abuse constitute 'domestic violence'.

However, many transgender people do not seek remedies through the Act due to the fear of more violence.

Women in Need ([0112 671 411](tel:0112671411)/ <https://www.winsl.net>) provides free legal support for women and transwomen who seeks protection using the PDVA.

**Is it necessary to undergo the sex reassignment surgery to obtain a Gender Recognition Certificate in Sri Lanka?**

No. According to the 2016 Circular, the transgender person needs to have 'a desire to live and be accepted as a person of [a different] sex', and have 'a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex'<sup>2</sup>.

However, going through some form of gender transformation process according to the internationally recognized and accepted standards of care published by the World Professionals Association for Transgender Health (WPATH) is required<sup>3</sup>. This includes taking hormone therapy, for example. The person also needs to complete 'the social gender role transition' which can be understood as gender expression to align with their gender.

**Note to Facilitator**

At the time of writing i.e. August 2021, there are numerous practical challenges with regard to obtaining the Gender Recognition Certificate. The 2016 Circular does not prescribe the number of sittings with the psychiatrist or provide clear instructions to the psychiatrist. As a result, the issuing of the Certificate is entirely at the discretion of the psychiatrist. At the same time, hospitals where this service can be obtained are limited. Currently, only 5 government institutes offer this service, and 4 institutes claim that this service is provided exclusively to people from the relevant district. Only National Institute of Mental Health, Angoda accepts people from around the country. However, unavailability of doctors remains a challenge at this hospital.

**Following are the notes for the short lecture on law relating to sexual violence and potential questions you may be asked.**

Begin by explaining that consent and the lack of it is the key difference between sex and sexual violence. You may play this video (only available in English) to explain consent:

<https://www.youtube.com/watch?v=oQbei5JGiT8>

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<sup>2</sup> F64 in World Health Organization- International Classification of Diseases 10th version (ICD 10)  
<https://icd.who.int/browse10/2016/en#!/F64.0>

<sup>3</sup> [https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7\\_English2012.pdf? t=1613669341](https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf? t=1613669341)



### ***Can the rape of a man be punished under Sri Lanka's Law?***

Rape of a man or a transgender person is punishable under Sri Lanka's law, but not under the offence termed 'rape'.

#### **Section 363: 'Rape'**

This section states:

*"A man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the following descriptions..."*

There are 5 circumstances listed under this section. These 5 circumstances have been broken down as follows for ease of understanding.

1. Without a woman's consent.
2. If the woman is the man's wife, sexual intercourse without her consent if the wife is judicially separated.
3. With her consent while she was in lawful or unlawful detention.
4. With her consent when her consent has been obtained by use of force or intimidation, or by threat of detention or by putting her in fear of death or hurt.
5. With her consent when her consent has been obtained at a time when she was of unsound mind.
6. With her consent when she was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person.
7. With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is her lawfully married husband.
8. With or without her consent when she is under sixteen years of age (unless the woman is his wife, for instance under Muslim Marriages and Divorces Act, who is over twelve years of age).

The section explains that penetration is sufficient to constitute sexual intercourse. It is explained further that evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.

This section only applies to a situation where a man vaginally rapes a woman.

#### **Section 365B: 'Grave Sexual Abuse'**

Section 365B states as follows:

*"Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363, in circumstances falling under any of the following descriptions..."*

The section described 4 circumstances. These 4 circumstances have been broken down as follows for ease of understanding.

1. Without the person's consent.

2. With or without the consent of the other person when the other person is under sixteen years of age.
3. With the consent of the other person while such other person was in lawful or unlawful detention.
4. With the consent where that consent has been obtained, by use of force, or intimidation or threat of detention or by putting such other person in fear of death or hurt.
5. With the consent of the other person where such consent has been obtained at a time the other person was of unsound mind.
6. With the consent of the other person where such person was in a state of intoxication induced by alcohol or drugs.

This section uses gender neutral terminology. Any person can commit this crime against another person regardless of their gender.

If a woman is sexually assaulted in the form of anal rape, forced fellatio, forced intercrural sex ('thigh sex'), or insertion of an object or part of the body into her body, such act will constitute the offence in section Grave Sexual Abuse described under s.365B.

The same section applies where a man or a transgender person is raped. This includes, sexually assault in the form of anal rape, forced fellatio, forced intercrural sex ('thigh sex'), or insertion of an object or part of the body into another person's body without consent.

*Invite the participants to spot the differences between s. 363 and s.365B.*

Note that the offence of rape carries a higher punishment in certain 'aggravating circumstances' under s.364 – that is circumstances where the offence is considered more serious. For example, rape committed by a public officer against a woman in his custody, rape by a staff member or management of a hospital against a woman in the hospital, rape of a pregnant woman, a child under the age of 18, a woman who is mentally and physically disabled, and gang rape are considered to be more serious offences. There is no similar section that identifies 'aggravating circumstances' with regard to s.365B.

### ***Can a person be charged for showing their genitals in public transport?***

This amounts to sexual harassment under s.345 of the Penal Code.

### **Section 345: 'Sexual Harassment'**

*"Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment..."*

This section uses gender neutral terminology. Any person can be charged under this section for sexual harassment of any person regardless of their gender identity. This section provides two explanations:

*Explanation:*

- *Unwelcome sexual advance by words or action used by a person in authority, in a working place or any other place, shall constitute the offence of sexual harassment.*
- *For the purposes of this section an assault may include any act that does not amount to rape under section 363 or grave sexual abuse under section 365B.*

If an action does not amount to rape or grave sexual abuse, such action comes under this section. You may ask the participants of what actions may be charged under this section?

Note that actions that does not involve sexual contact, such as an unwelcome sexual comment or a gesture, showing a sexual image without consent, pulling someone’s pants down or removing their clothing, watching someone remove clothes or having sex without their consent can be charged under s.345. Note further that by virtue of the second explanation, any form of sexual violence, such as touching genitals or part of the body without consent or kissing by force also come under this section.

Comparing this section to s.365B is useful.

Section 365B: ‘Grave Sexual Abuse’	Section 345: ‘Sexual Harassment’
<p><i>“Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363, in circumstances falling under any of the following descriptions...”</i></p>	<p><i>“Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment...”</i></p>

***Is workplace sexual harassment a crime in Sri Lanka?***

Workplace sexual harassment is expressly referred to in the explanation to s.345.

***Is sharing of intimate photos without consent a crime?***

Sharing of intimate photos of an adult without consent is a crime under s.345. There are laws on obscene publications that can also be used where relevant.

Sharing intimate photos of someone under the age of 18 is a crime under s.286A titled obscene publication, and exhibition relating to children which carries a punishment of 2-10 years.

***Can a woman who sexually assaults a woman be punished under Sri Lanka’s law?***

A woman who sexually assaults a woman can be charged under s.345 or s.365B depending on the degree of sexual violence involved.

## Session 03: Activity: Laws on Sex and Sexual violence

*In groups participants attempt to identify the law that applies in given scenarios. Two groups attempt to match the applicable law with 12 scenarios- divided as two sets of 6 scenarios. The groups also identify the punishment that they would like to give for this offence. First group is invited to present the first six matches and the second group is invited to present the next six matches. The participants gather around the board and have a discussion with the facilitator. Facilitator explains the punishment prescribed under the existing law.*

### Time

1 hour

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Identify specific laws that apply in specific scenarios

### Tools needed

- Ideally, printed cards, repositionable adhesive spray, and board.
- Cards to be printed can be found in the [annexes](#).
- If unavailable 2X (large size) sticky notes with handwritten notes can be used.

### Preparation

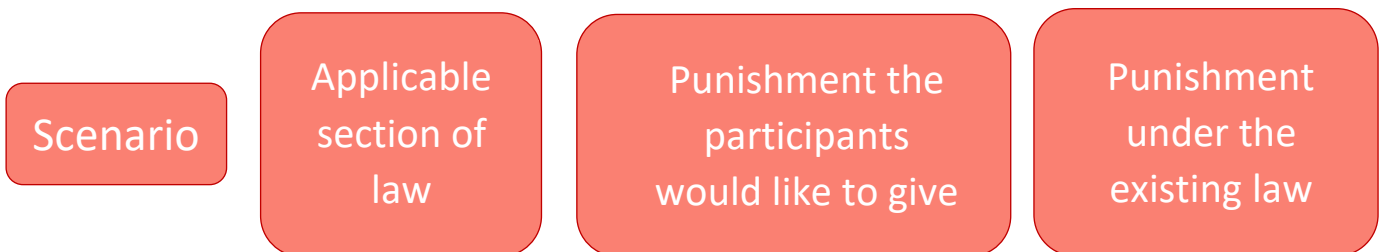
- Printed cards

### Steps

- Divide the participants into 4 groups with 5-8 participants in each group.
- Explain that in this activity, we will try to identify which law applies to a given scenario.
- Distribute the four sets of cards among the four groups and ask them to match the cards on the table. Once they are certain of the order, request them to paste the sticky notes or cards (using repositionable adhesive spray) on a board or a flip chart in the order shown below. Give participants 20 minutes for this group exercise. Assist the groups by answering questions they may have.
- Once the activity is completed ask each team to present.
- Allow the participants from the other group to ask questions or comment.
- At the very end of the discussion, paste cards indicating the punishment under the existing law in the order shown below and note what are the biggest differences between the existing law and what the participants wished were the law.
- **Note to the facilitator:** Be cautious of instances where the participants say that they would give any punishment for consensual sex. Value clarification and addressing attitudes may be required here.

**CARD SET ONE**

Scenario	Law	Punishment decided by the respondents	Punishment under the existing law
Amali and Sarani are lovers. They are both 19 years old women. At a party, while they are kissing passionately, the police comes and arrests them both and threatens to charge them.	Section 365A: Acts of gross indecency between persons "Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence"	(blank card)	0-2 years imprisonment or fine or both.  If one person is under 16, 10-20 years with fine and compensation.
Steven and Amal are lovers. They are both men in their 20s. On the way home after a date, they park the car in an empty road to talk. One thing leads to the other and they are having sex in the car. Two police officers walk by and arrest them both.	Section 365: 'Unnatural offence' "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment..."	(blank card)	0-10 years imprisonment with fine. If one person is under 16, 10-20 years imprisonment with fine and compensation.
Thimal is a 25 year old man. He is in a relationship with Jake who is 19 years old. Thimal and Jake exchange nudes. Thimal breaks up with Jake. Jake gets very sad and angry. Then Jake uploads Thimal's nudes to a webpage and shares the link to Thimal's Facebook page.	Section 345: 'Sexual Harassment' "Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment..."	(blank card)	0-5 years imprisonment or fine or both. Court may give compensation to the survivor.



**CARD SET TWO**

Scenario	Law	Punishment decided by the respondents	Punishment under the existing law
<p>Sue is a lesbian. She is 19 years old and has a girlfriend. Her older brother is very angry about this. He asks his best friend Harin who is a local thug to 'teach a lesson' to Sue. Harin rapes her using a broomstick.</p>	<p>Section 365B: 'Grave Sexual Abuse'            "Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person..."            Without the person's consent</p>	(blank card)	7-20 imprisonment years with fine and compensation.
<p>Shehan is a 15 year old boy. He falls in love with his older brother's handsome best friend Malik – a 22 year old young man. They gradually become friends and one day when there is no one else at home Shehan invites Malik. They have sex. Suddenly Shehan's parents come home and they are very angry. They complain to the police. Police arrest Malik.</p>	<p>Section 365B: 'Grave Sexual Abuse'            "Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person..."            With or without the consent of the other person when the other person is under sixteen years of age</p>	(blank card)	10-20 imprisonment years with fine and compensation
<p>Shani is a transgender sex-worker. One day when Shani was going to the shop, two police officers arrest her and take her to the Police station. The Police knows that she is a sex worker because she has been arrested two-three times before. They put her in a cell and tell her that they will let her go if she performs oral sex on two police officers in civilian clothing. She agrees. Afterwards the Police officers pay her 5000 rupees and lets her go.</p>	<p>Section 365B: 'Grave Sexual Abuse'            "Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person, being an act which does not amount to rape under section 363, in circumstances falling under any of the following descriptions..."            With the consent of the other person while such other person was in lawful or unlawful detention</p>	(blank card)	<p>7-20 imprisonment years with fine and compensation.</p> <p>Note: this is a violation of the Fundamental Right to Freedom from Torture as well.</p>

**CARD SET THREE**

Scenario	Law	Punishment decided by the respondents	Punishment under the existing law
A transgender woman is arrested by the police. The Police tries to charge her for appearing as a woman while having an ID card that indicates 'male' as the sex assigned at birth.	Section 399: 'Cheating by personation' "A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is... The offence is committed whether the individual personated is a real or imaginary person"	(blank card)	0-1 years imprisonment or fine or both.
A man goes to a clothing shop looking to steal branded clothes. But to not be caught in security cameras he wears a burqa and a handbag and pretends to be a woman.	Section 399: 'Cheating by personation' "A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is... The offence is committed whether the individual personated is a real or imaginary person"	(blank card)	0-1 years imprisonment or fine or both.
Malan and Richard are gay lovers. They have been living together for 3 years. Malan is a professional model and Richard is very suspicious of Malan and constantly scolds him. One day when Malan came home after a party, Richard became very angry and beat him.	Prevention of Domestic Violence Act, No. 34 Of 2005 (PDVA) 'A person, in respect of whom an act of domestic violence has been, is, or is likely to be, committed ("an aggrieved person") may make an application to the Magistrate's Court for a Protection Order, for the prevention of such act of domestic violence'.	(blank card)	No punishment under PDVA only a Protection Order can be issued. Under s.310 of the Penal Code 'Hurt' can be punished 0-1 year imprisonment or fine.

**CARD SET FOUR**

Scenario	Law	Punishment decided by the respondents	Punishment under the existing law
Nalin is a 24 year old gay man. One day when he is going to work in the bus, an older man sitting next to him takes out his penis, signals at Nalin to look, and begins to masturbate.	Section 345: 'Sexual Harassment' "Whoever, by assault or use of criminal force, sexually harasses another person, or by the use of words or actions, causes sexual annoyance or harassment to such other person commits the offence of sexual harassment..."	(blank card)	0-5 years imprisonment or fine or both. Court may give compensation to the survivor.
Michelle is a 24 year old transwoman. At a house party Kamal a 35 year old man is following her and asking to dance with her. Later Michelle becomes very drunk and she is almost passing out. She is unable to think clearly. Kamal takes her to the bedroom. They have sex. In the morning, Michelle realises what happened and is very upset because she never wanted to have sex with Kamal.	Section 365B: 'Grave Sexual Abuse' "Grave sexual abuse is committed by any person who, for sexual gratification, does any act, by the use of his genitals or any other part of the human body or any Instrument on any orifice or part of the body of any other person..." With the consent of the other person where such person was in a state of intoxication induced by alcohol or drugs	(blank card)	7-20 imprisonment years with fine and compensation.
Leena is a 35 year old woman. Mike is her 45 year old neighbour. They are friends. One day Mike drops by a bit drunk. Leena makes him a cup of tea. They talk for a while and Mike says that he is very lonely and tries to have sex with her. Leena says no and tries to push Mike away but he forces his penis in to her vagina and rapes her.	Section 363: 'Rape' "A man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the following descriptions..."  Without a woman's consent	(blank card)	7-20 imprisonment years with fine and compensation.

**Notes**

- Note that sex between same-sex partners should not be a crime and should not be punished.
- Highlight that consent is the factor determines whether it is sex, or sexual violence.
- Note that the existing law requires reforms to end discrimination against people with diverse sexual orientations and gender identities.



## Session 04: Vagrants Ordinance and other laws used to harass LGBT+ people

*This session is a discussion in a circle. There is a line in the middle of the room marking either sides 'yes' and 'no'. Participants move to 'yes' or 'no' based on their responses to the facilitator's questions. A short discussion follows.*

### Time

30 minutes

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Articulate offences under the Vagrants Ordinance
- Understand the laws that are used to harass and intimidate LGBT+ people

### Tools needed

- Painters' tape

### Preparation

- Mark a middle line of the room / circle with painters tape
- Mark 'yes' and 'no' on either sides of the line
- Handouts to be given at the end of the discussion

### Steps

- Explain that this activity is an effort to learn about some of the laws that are used harass LGBT+ people.
- Explain that you are going to read out some activities and ask the participants to move to 'yes' or 'no' side depending on whether or not they think such activity should be punished. Ask 1-2 respondents to share why they think this activity should be punished or not.
- Read out these statements:
  1. Begging in public
  2. A same-sex couple kissing in public
  3. Living on earnings from sex work
  4. Making a family member to beg in public
  5. Drawing something indecent on a public wall
  6. Following someone in public
  7. Exposing private parts of the body in public
  8. A woman walking without a shirt in public
  9. Begging by showing some a deformed arm in public
  10. Resisting arrest by a police officer
  11. A sex worker looking for a client in public

## 12. A gay man looking for someone in public to have sex

- Explain that all these activities are recognised as coming under the Vagrants Ordinance.
- Also explain that the Vagrants Ordinance expresses colonial values. Note that this Ordinance labels people as 'disorderly persons', 'rogues', 'vagabonds', and 'incorrigible rogues', criminalising the person and not the activity.
- Explain that House of Detention Ordinance No. 05 of 1907 and Section 451 of the Penal Code titled "Loitering about by reputed thief" are also used to harass LGBT+ people.
- Distribute the handout and encourage the participants to read it to learn more about these laws that are used to harass LGBT+ people.

### Handout

## LAWS USED TO ARREST LGBT+ PEOPLE IN SRI LANKA

### The Vagrants Ordinance No. 04 of 1841

This is the main law in Sri Lanka that criminalises loitering, disorderly conduct, 'public indecency', and the soliciting for sex work.

Section 3 of the Ordinance classifies certain people as idle and disorderly persons:

- "Every person being able to maintain himself by work or other means, but who shall wilfully refuse or neglect so to do, and shall wander abroad or place himself in any public place, street, highway, court, or passage to beg or gather alms, or cause, or procure, or encourage any of his family so to do, excepting priests and pilgrims in performance of their religious vows..."*
- Every common prostitute wandering in the public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner*
- Every person wandering abroad or lodging in any verandah, outhouse, shed, or unoccupied building, or in any cart, vehicle, or other receptacle, without leave of the owner thereof, and not having any visible means of subsistence, and not giving a good account of himself*
- Every person, without leave of the owner, defacing the side of any house or building or wall by fixing any placard or notice, or by any indecent or insulting writing or drawing thereon*
- Every person who in or upon any wharf, jetty, street, road, walk, passage, verandah, or other place situated within any proclaimed area and used by or accessible to the public, persistently and without lawful excuse follows, accosts, or addresses by words or signs any person against his will and to his annoyance"*

A police officer may arrest any person deemed to be "idle and disorderly" without a warrant.

Section 7 of the Vagrants Ordinance No. 4 of 1841 is used against, mainly transgender persons and gay men, to charge for soliciting and acts of indecency in public places.

Section 07 states as follows:

*"7. (1) The following persons, that is to say-*

- any person in or about any public place soliciting any person for the purpose of the commission of any act of illicit sexual intercourse or indecency, whether with the person soliciting or with any other person, whether specified or not;*

*(b) any person found committing any act of gross indecency, or found behaving with gross indecency, in or about any public place ;*

*(c) any person found –*

*(i) in any public enclosure contrary to any local by-laws or regulations prescribing the use of such enclosures ; or*

*(ii) in any enclosure belonging to the State , without the permission of the person in charge thereof; or*

*(iii) within any private enclosure attached to any dwelling house, except upon the invitation of any inmate of the premises,*

*under such circumstances that it is reasonable to infer that he is there present for immoral purposes, unless he is able to explain his presence to the satisfaction of the court by which he is tried, shall be guilty of an offence, and shall be liable on summary conviction to imprisonment of either description for a period not exceeding six months, or to a fine not exceeding one hundred rupees, or to both”*

The Punishment foreseen in the Vagrants Ordinance varies depending on the severity and the number of offences committed.

It is imperative to note that the Ordinance does not only effect marginalised communities but heterosexual persons as well. Particularly young couples who chose to express affection publicly. There are reported incidents where women who carried condoms in their purse were charged under this act. More on this will be discussed in the later sections on sex work.

In addition to the Vagrants Ordinance, House of Detention Ordinance No. 05 of 1907 and Section 451 of the Penal Code titled “Loitering about by reputed thief” are also used to harass LGBT+ people.

### **House of Detention Ordinance No. 05 of 1907**

Section 02 of this Ordinance describes a ‘vagrant’ as follows:

*“(a) any person found asking for alms” or*

*“(b) any person not being physically able to earn, or being unwilling to work for, his own livelihood and having no visible means of subsistence” excluding priests and pilgrims gathering arms in performance of any religious vow or obligation”.*

Section 10 of this Ordinance states that any person who appears to be a vagrant and *“refuses or fails to accompany a police officer, or to appear before a Magistrate’s Court when required to do so, for the purposes of this Ordinance, may be arrested without warrant, and shall on conviction before a Magistrate’s Court be liable to imprisonment of either description for any term not exceeding three months.”*

Section 4 of the Ordinance provides for the Magistrate, if it is of the opinion *“that the person convicted or appearing or brought before the court is a vagrant within the meaning of [the]*

*Ordinance*”, to order such person to be detained in a house of detention, “*in addition to or in substitution for any punishment which it has the power to inflict*”.

**Section 451 Penal Code (Ordinance No. 2 of 1883): “Loitering about by reputed thief”**

This section states that a person who is “*a reputed thief, loiters or lurks about any public place or any wharf or warehouse or any vessel in any harbour or other water with intent to commit theft or any other unlawful act shall be punished with imprisonment of either description for a term which may extend to three months, or with a fine not exceeding fifty rupees, or with both.*”

## Session 05: Law relating to Sex work in Sri Lanka

*This is a brief lecture assisted by slides.*

### Time

30 minutes

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Articulate the law relating to sex work in Sri Lanka

### Preparation

- Slides

### Steps

- Begin by asking what the participants understand by 'sex work'.
- Explain that this is a short presentation on laws relating to sex work in Sri Lanka.
- Conduct the lecture assisted by the slides.
- Give participants an opportunity to ask questions.

### Notes

Sex work means the provision of sexual services in exchange for money (or some other good or benefit). A sex worker is someone who willingly provides sexual services for money (or some other good or benefit). Sex workers make a living out of sex work.

In some countries, sex work is legal and labour rights that apply to workers apply to sex workers as well. However, in Sri Lanka, though freedom to engage in a lawful occupation guaranteed under the Constitution, this protection does not apply to sex workers due to the restrictive legal environment.

Note that sex work should be distinguished from trafficking or sexual exploitation. Sex worker engages in the occupation by choice whereas in sexual exploitation, the survivor is forced to perform sexual acts.

Despite the restrictive legal setting with regard to sex work in Sri Lanka, all fundamental rights still apply to sex workers. For instance, a sex worker cannot be arbitrarily arrested or tortured (See Articles 11 and 13 of the Constitution). Their children cannot be discriminated against in public schools or the sex workers themselves cannot be discriminated against at a Police station, hospital, or another government institute.

In Sri Lanka sex work itself is not criminalised. The Vagrants Ordinance makes it an offence to make a living out of sex work and solicit in public. The Brothels Ordinance prohibits maintaining a brothel. However, often using the Vagrants Ordinance, sex workers are harassed, intimidated by the Police, and discriminated against in Sri Lanka.

The following is an examination of these relevant laws in detail:

### Penal Code S360A (1) – ‘procuring a person to become a prostitute’

*“Whoever- procures or attempts to procure, any person, whether male or female of whatever age (whether with or without the consent of such person) to become, within or outside Sri Lanka, a prostitute; commits the offence of procuration.”*

Punishment: 2-10 years imprisonment and maybe fine.

### Brothels Ordinance

Brothels Ordinance was introduced in 1889.

Section 2 states as follows:

*Any person who-*

- (a) keeps or manages or acts or assists in the management of a brothel; or (b) being the tenant, lessee, occupier or owner of any premises, knowingly permits such premises or any part thereof to be used as a brothel, or for the purpose of habitual prostitution; or (c) being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same, or any part thereof, with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is willfully a party to the continued use of such premises or any part thereof as a brothel, shall be guilty of an offence.*

- Punishment: 0-6 months imprisonment or fine

The Ordinance does not interpret the word ‘Brothel House’. In *Kusen vs. Sisilia* (37 NLR 308) Justice Suits stated that the prosecution should prove that males visit the place constantly to have sexual intercourse with women.

In *Abeykoon vs. Kulatunga*, Justice Nagalingam stated that having sexual intercourse by a man and a woman in a place is not sufficient to prove an offence under the Brothels Ordinance.

### Vagrants Ordinance

#### Section 9 (1) (a) states:

Any person who “knowingly lives wholly or in part on the earnings of prostitution”

Punishment:

- Imprisonment for 0-6 months or fine (Summary procedure)
- Imprisonment for 0-2 years

In the case of *Saibo vs. Chellam* (1923) 25 NLR 251

*“Prostitution is not an offence per se under our law...what the subsection penalizes is “the making of a living out of the corruption and degradation of others.” ... This would apply when another person is charged with the living on the earnings of a prostitute but in the case of the prostitute herself it would be meaningless. Both according to the intention of the Ordinance and the words of*

*the sub-section itself the latter has no application to prostitutes who live on their own earnings as prostitution."*

**Section 3 (1) (b) states:**

'Every common prostitute wandering in the public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner' is deemed to be an idle and disorderly person.

Punishment:

- If it is the first conviction – imprisonment for 0-14 days or a fine.
- If it is the second conviction – imprisonment for 0-30 days or a fine. [s. 4 (b)]
- If it is the third conviction – imprisonment for 0-4 months [s. 4 (b)]

In February 2020, a magistrate, citing the aforementioned judgement (*Saibo vs. Chellam*), ruled that a sex worker can only be arrested under Section 3 of the ordinance only if she behaves in a "riotous or disorderly manner in any public street or highway" and not merely for engaging in commercial sex.

Despite, court judgments pronouncing that sex work per se cannot be penalized, the Vagrants Ordinance is routinely used to incriminate sex workers in Sri Lanka. Especially, street sex workers who are most vulnerable to violence and exploitation.

**Section 7 (1) (a) states:**

*"Any person in or about any public place soliciting any person for the purpose of the commission of any act of illicit sexual intercourse or indecency, whether with the person soliciting or with any other person, whether specified or not"*

Punishment:

- Imprisonment for 0-14 days or fine
- In practice only a fine is given
- 

S.360A of the Penal Code, the Brothels Ordinance and the Vagrants Ordinance can be used to punish sex workers who are men, women, or transgender people. Apart from male sex workers as traditionally understood, in Sri Lanka 'beach boys' who engage in transactional sex also come under the category of male sex workers.

The CEDAW Committee in its concluding observations on Sri Lanka (2017) raised concerns about the use of the Vagrants Ordinance *"by the police to arbitrarily arrest women in prostitution, using their possession of condoms as evidence of engaging in prostitution, and to subject these women to harassment, sexual bribery and extortion."*

It is also reported that sex workers are sometimes arrested when they are engaged in day-to-day activities such as marketing, taking their children to school etc. merely because they are identified as a sex worker by the police.

Faced with the constant threat of criminal action, sex workers in Sri Lanka are unable to benefit from Sri Lanka's labour framework such as demanding safe and dignified working conditions or obtain social security benefits.

In the past there were instances where women were arrested under Vagrants Ordinance and the fact that they had condoms in their purse was used as proof by the Police to say that they were soliciting for sex in public. However, carrying a condom is not a crime under this law. A condom is a medical device and cannot be used as proof of sex work.

For more on laws relating to sex work in Sri Lanka see this publication: Laws Concerning Commercial Sex and HIV/AIDS Prevention (Sri Lanka Police, National STD/AIDS Control Programme, & UNFPA)

[https://www.aidscontrol.gov.lk/images/pdfs/books/Laws\\_Concerning\\_en.pdf](https://www.aidscontrol.gov.lk/images/pdfs/books/Laws_Concerning_en.pdf)



## Session 06: What happens next?

*Two case studies are given to two groups of participants. They develop and act out a 5-minute play based on the case study. The act is based on what they think will happen in the given case study. Once the acts are performed the facilitator shares about two similar stories and the outcomes.*

### Time

1 hour

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Explain two key cases from Sri Lanka

### Preparation

- Slides
- Print outs of scenarios

### Steps

- Explain that this is time for some creative acting.
- Invite the participants, in two groups (10-15 participants in a group) to act out what happens next in the given scenario. Explain that they are not expected to act out the right outcome or the wrong outcome – merely what they think would have happened. Explain that it can even be something funny.
- Note that the play itself should be about 5-10 minutes long and that they will get 30 minutes to prepare.
- Share that not everyone in the team needs to act – only if you feel up to it. There can be many players in developing a play not only actors- script developers, directors, extras and one may take any of these roles.
- Explain also that a team can have police officers, a judge – perhaps even 2-3 judges who disagree with each other, the accused person and any real or imaginary characters.
- Explain that the story should have a beginning, a middle, and an end.
- Once the two plays are concluded give each team a round of applause and appreciate the participation.
- Highlight key points about the participant's understanding of how sex workers are treated by the law enforcement and the justice system.
- After the plays, explain briefly what happened when the actual cases went to the Court.
- Note to the facilitator: In case 02 facts have not been proved, but in the scenario it has been assumed that they had oral sex to make the case more relevant.

### Notes

### Scenario 01

Rose has 2 apartments in Liberty Plaza Apartments. One apartment is above the other. She gets a bright business idea to provide a convenient place for sex workers and clients, but she would keep a commission. The Police hears about this and suspects the situation. They dress Constable Douglas as a client and send Douglas to check it out. Douglas goes to the first floor. Rose greets him and calls a few women sex workers and asks Douglas to choose one of them. Douglas chooses Nalini and Rose says to give Rs. 3000. He gives Rs. 3000. Then Nalini accompanies him to the apartment below. Douglas calls the Police who raid Rose's apartments. The case goes to the Court. What happens next?

### Scenario 02

Vijay is a Police Officer. One day after work, he takes a small drink, and drives home. On his way, Vijay picks up Lihan who gets in the back seat. Vijay drives for a bit, parks the car in a parking lot, gets in the back seat with Lihan. They have oral sex. Then Lihan gets down from the car and walks away. Two police officers passing by 'get a feeling' that Lihan may be gay. When approaching the van, the police officers see that Vijay is in the backseat and quickly getting dressed. They ask Vijay to come out. Vijay says 'how dare you treat me this way' and they get in to a fight. Officers arrest Vijay. Police officers ask an older man who runs a small tea boutique nearby to give a statement that he saw Lihan and Vijay having oral sex and it was him who reported this to the Police. The case goes to Court. What happens next?

### Case 01: Rosemary Judy Perera vs. State

#### Case Facts:

The officers of the Colombo Crime Division (CCD) had arrested the Accused-Appellant, for providing women for sexual intercourse for a payment. She had been arrested together with eight other women in an apartment of the Liberty Plaza Shopping Complex in Kollupitiya.

#### SC Judgement:

The Supreme Court has ordered to set aside the conviction and the sentence imposed on Rosemary Felicia Perera alias Jeena Madam by the Colombo High Court. A majority of a divided three-judge-Supreme Court Bench acquitted Rosemary Felicia Perera from the case filed against her for the offence of 'procuration' under Section 360A (1) of the Penal Code by judgement dated 9th November 2012. The accused-appellant had been convicted by the High Court and a sentence of 3 years simple imprisonment and a fine of Rs. 25,000.

**Take Away:** Justice Buwaneka Aluwihare and Justice L.T.B. Dehideniya observed that the offence of procuration cannot be committed with regard to a person who is already a sex worker.

*'When analysing Section 360A (1), it appears to me that the desire of the legislature had been in safeguarding the public interest in morality than the chastity of the individual. The objective (of the Legislature) is to impose Penal sanctions, to discourage people from luring or inducing persons who are hitherto not engaged as prostitutes to join the profession of prostitution,'* Justice Aluwihare further observed.

See full case: [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_154\\_2014.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_154_2014.pdf)

## Case 02: Wimalasiri vs. Officer-in-Charge (OIC), Police Station, Maradana, and Another (2016)

### Case Facts:

Wimalasiri was initially charged along with another (R. Jeganathan) before the Maligakanda Magistrate's Court by the Maradana OIC over allegedly committing an act of gross indecency in terms of Section 365A of the Penal Code as Amended. In the instant case, the alleged act of gross indecency was one of oral sex between two consenting (as determined by the SC) adult males, inside a van (in the rear seat) parked at a vehicle park.

The trial Magistrate having found the accused parties guilty had convicted the duo and imposed a term of imprisonment (one year and a default sentence of six months) and a fine (Rs 1,500).

### On Supreme Court Appeal:

Regarding the offence in Section 365A, Aluwihare J. explained that it *"deals with the offences of sodomy and buggery which were a part of the law in England and is based on public morality. The Sexual Offence Act repealed the sexual offences of gross indecency and buggery in 2004 and not an offence in England now. The contemporary thinking, that consensual sex between adults should not be policed by the State nor should it be grounds for criminalisation appears to have developed over the years and may be the rationale that led to repealing of the offence of gross indecency and buggery in England."*; adding however that *"The offence however remains very much a part of our law"*.

Returning to the instant case, Aluwihare J. though affirming the conviction of the Magistrate which was upheld by the High Court Judge, added that since Wimalasiri and the other accused do not have any prior conviction or criminal history, to impose *"a custodial term of imprisonment does not appear to be commensurate with the offence, considering the fact that the act was consensual"*, and that therefore such is unwarranted. The SC thus *"set aside the sentence of the one year term of imprisonment and substituted the same with a sentence of two years of rigorous imprisonment"* and *"suspended the operation of the term of imprisonment for a period of five years effective from the date the sentence was pronounced by the Magistrate."* At the time of deciding the case, it had been 13 years since the incident took place. The SC then dismissed Wimalasiri's appeal.

### Take Away:

Aluwihare J.'s perceptive observation that *"The contemporary thinking, that consensual sex between adults should not be policed by the State nor should it be grounds for criminalisation appears to have developed over the years and may be the rationale that led to repealing of the offence of gross indecency and buggery in England"*.

Saliya Pieris PC who appeared for Wimalasiri, said that even though the SC cannot strike down laws, Aluwihare J.'s observation of the changes that have taken place in England – that the act in question is no longer a crime as long as it is between consenting adults – is a pointer to the direction that should rightly be taken in this regard. Citing the Report of the Departmental Committee on Homosexual Offences and Prostitution also known as the Wolfenden Report as evidence, he pointed out that the State should not intervene if it doesn't affect public order or doesn't bring harm to people. The Report recommended that's since *"It is not the function of the law to intervene in the private life of citizens or to seek to enforce any particular pattern of*

*behaviour”, “homosexual behaviour between consenting adults in private should no longer be a criminal offence”. Pieris PC also advanced the novel argument as to whether what is meant by “against the order of nature” as stated in Section 365, could be scientifically established. When pointed out that “against the order of nature” involved a fallacious moral presupposition, he concurred, adding that “Individuals have different orientations.”*

See full case: [http://www.supremecourt.lk/images/documents/sc\\_appeal\\_32\\_11.pdf](http://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf)

It needs to be noted that many gay, bisexual, and transgender people are intimidated, arrested, and subjected to extortion using these laws. It is very rarely that individuals who face intimidation or extortion seek justice. There are anecdotes where the Police arrested people under these laws and forced them to provide sexual services, money or other valuables in order to release them. In the case of sex workers and trans women, there are anecdotes of the Police asking those arrested to sing, dance, or remove clothes in front of the Police officers. In some cases, people arrested are severely beaten. This type of violence while in police custody amounts to torture, freedom from which is a fundamental right in Sri Lanka. However, in most cases, violence goes unreported and the perpetrators go free.

## Session 07: Laws and practices relating to arrest

*This is a brief lecture assisted by slides.*

### Time

30 minutes

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Articulate some laws on arrest in Sri Lanka

### Preparation

- Slides

### Steps

- Explain that this is a short presentation on laws relating to arrest in Sri Lanka.
- Conduct the lecture assisted by the slides.
- Give participants an opportunity to ask questions.

### Notes

It was noted above that under the Vagrants Ordinance, a police officer can arrest a person without a warrant. The Code of Criminal Procedure Act No.15 of 1979 also provides for arresting a person without a warrant.

However, there are certain protections provided to the person arrested if such person was arrested without a warrant.

#### **Code of Criminal Procedure Act (No. 15 Of 1979)**

In s.37 it is provided as follows:

B—Arrest Without a Warrant

#### **Section 37: 'Person arrested not to be detained more than twenty-four hours'**

*"Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate".*

#### **Police Ordinance No. 07 of 1866**

The Police Ordinance states as follows:

**Section 65: 'Persons arrested without warrant to be taken to police station until brought before Magistrate or bailed'**

*“Every person taken into custody by any police officer without warrant (except persons detained for the mere purpose of ascertaining their name and residence) shall forthwith be delivered into the custody of the officer in charge of a station in order that such person may be secured until he can be brought before a Magistrate to be dealt with according to law, or may give bail for his appearance before a Magistrate, if the officer in charge shall deem it prudent to take bail as hereinafter mentioned: Provided always that where bail is not taken, the prisoner shall be brought before a Magistrate within twenty-four hours, unless circumstances render delay unavoidable.”*

Despite the law providing these protections in case of arrests without a warrant, in practice marginalised communities tend to be targeted/subjected to malpractice of procedure.

As explained in a previous session, any person arrested in Sri Lanka has the following protections:

1. Freedom from arbitrary arrest, detention and punishment guaranteed under Article 13 of the Constitution.

Some provisions under this article include:

- No person shall be arrested except according to procedure established by law.
- Any person arrested shall be informed of the reason for his arrest.
- Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.
- Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

2. Freedom from torture guaranteed under Article 11 of the Constitution

- This means that any form of severe pain- whether physical or mental- cannot be induced on a person while in custody, for instance to obtain any information or confession. This includes hitting, not giving food or water, or inducing mental trauma.
- Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment Act No. 22 of 1994 also deals with torture prescribing a 7-10 year term imprisonment for anyone convicted of perpetrating torture.

### Conclusion

Conclude this session by showing two videos developed on freedom from torture. The videos can be found at:

## Session 08: Agree or Disagree?

*Participants get the opportunity to reflect and decide if they agree or disagree with a given statement. Those who agree and disagree get the opportunity to respond to each other.*

### Time

30 minutes

### Target group

Approximately 30 participants in a session

### Objectives

At the end of this session, the participants will be able to:

- Explore attitudes, values, and prejudices that may be remaining.
- Question their own biases.
- Counter arguments against equality for people with diverse SOGIESC.

### Tools needed

- Painters' tape

### Preparation

- Mark a middle line of the room/ circle with painters' tape.
- Mark 'yes' and 'no' on either sides of the line.

### Steps

- Explain that in this final exercise you will look at some statements, and the participants get to decide whether they agree or disagree. Ask the participants to move to 'yes' or 'no' side of the room depending on whether they agree or disagree with the statement.
- Read the statements found in Notes section below, and allow the participants to move themselves.
- If one side does not have any participants, encourage the participants to move to that side to ensure a balanced discussion.
- Ask 2-3 participants to explain their reasons for agreeing or disagreeing. After each response allow someone from the other side to respond. Encourage valid arguments from both sides.
- During the activity, remain neutral unless the discussion is heavily dominated by negative attitudes, values, and biases. In such a case you may use arguments found in the *Notes* section below to conclude the discussion under each statement.

## Notes

Statements	Arguments
Trying to change laws in Sri Lanka with regard to LGBT+ people is a waste of time because it's never going to happen.	The process of bringing about legal reforms is a long-term commitment. This requires continued efforts over a long period of time. Mobilization of communities and increasing public awareness contribute to this process.
Sex work should be decriminalised.	The criminalisation of sex work is a reflection of Victorian morality. Sex workers engage in their occupation willingly. The existing laws lead to harassment of sex workers. Decriminalisation of sex work, allows sex workers to realize their human rights including those relating to labour.
Sections 365 and 365A of the Penal Code which criminalise 'unnatural offences' and 'acts of gross indecency between persons' need not be changed because they are rarely used.	These laws continue to marginalise LGBT+ people, and the anxiety around prosecution affects everyday life. LGBT+ people are also made invisible by this law. The state should not interfere in intimate affairs between consenting adults. Despite its rare use this law discriminates against LGBT+ people and violate their right to equality.
Repealing sections 365 and 365A – that is 'unnatural offences' and 'acts of gross indecency between persons', may lead to increased vulnerability of children.	Children are protected under several laws on child sexual abuse. These laws relate to sexual activity between consenting same-sex partners who are adults.
Law on 'rape' should apply in cases where any person is raped- regardless of their gender.	This is a valid suggestion, because gender equality means that all people should be treated equally, regardless of gender. There is no reason why rape of men and transgender people should not be called 'rape' in law. The existing law on rape reinforces gender binary.
Changing gender should be allowed based on self-recognition of gender alone. Psych evaluations are unnecessary.	Gender identity is part of self-awareness, and therefore one's own understanding should be sufficient. Requiring a psych evaluation is a vestige of pathologizing non-normative gender identities.
Sometimes it is okay to beat a suspect in Police custody to obtain information.	National and international laws criminalize torture in all instances. This law is in place to protect people from abuse of power.
Adoption of children should be allowed for lesbian couples, but not gay couples.	Adoption should be made available to all prospective parents regardless of their gender. A policy that excludes men is discriminatory.
Sex reassignment surgery should be necessary to get a gender recognition certificate.	Gender identity relates to much more than sexual organs. Sex reassignment surgery is a complex procedure that some transgender people may want to opt out of. That should not be a reason to deny their true gender.
If a husband and wife are married, and if the wife doesn't want to have sex but the husband goes ahead, it should be considered rape	The factor that distinguishes sexual violence from sex is the absence of consent. If there is no consent, it should be considered rape.



## ABBREVIATIONS

SOGIESC	Sexual Orientation, Gender Identity and Expression, and Sex Characteristics
PDVA	Protection Order under the Prevention of Domestic Violence
CCD	Colombo Crime Division







BRIDGE to Equality - BRIDGE project which aims to improve the protection of human rights for LGBTQ people in Sri Lanka through the use of international human rights law to enable justice actors (judges, lawyers and other legal professionals), activists and human rights defenders to improve justice outcomes for the LGBTQ community; with a focus on overcoming challenges imposed by the current legal framework, as well as the overall promotion and protection of human rights of LGBTI people.

BRIDGE is jointly implemented by DAST, National Transgender Network and Young Out Here in partnership with the International Commission of Jurists since 2021.

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