Laws Concerning Commercial Sex and HIV AIDS Prevention











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Introduction

HIV/AIDS has been identified as a sexual transmitted disease due to unprotected sex. In addition to HIV/AIDS, there are other diseases such as Syphilis, Gonorrhea and Herpes etc. At present, implementation of laws in respect of commercial sex and morality is not an easy task to Police because on one hand we should consider the measures that have been introduced to prevent spreading HIV and on the other hand we should respect the rights of wrong doers.

According to Sri Lankan Law, sex in private is not an offence. Adultery is also not a criminal offence whereas it is a marital offence. Adultery means the spouse practices sexual activities with another person besides his or her legal partner. But our law provides provisions to deal with offences of sex workers where money or a consideration is exchanged. New laws in respect of providing persons for sex were introduced by the amendments of Penal Code that were brought in 1995, 1998 and 2006. All these amendments were trilingual and anybody could access the contents.

Nevertheless before these amendments, the law related to sex was embodied in Brothels Ordinance and Vagrants Ordinance which were only in English and this article endeavors to explain the legal provisions and their applications accordingly.

Transgender people faces various social economical and legal problems in access to public places. Thus, on the intervention of the Human Rights Commission, the Ministry of Health and the Registrar General's Department have published circulars in 2016 to address the issues faces by transgender people

Vagrants Ordinance

The ordinance was enacted in 1841 and it is one of the oldest ordinances that were introduced by the colonial rulers. The long title of the ordinance states "an Ordinance to amend and consolidate the law relating to vagrancy".

In terms of the provisions of Vagrants Ordinance there are certain sections pertinent to commercial sex workers and connected offences.

Section 03

- (1) Persons who are deemed idle and disorderly persons
 - (a) Every person being able to maintain himself by work or other means, but who shall willfully refuse or neglect so to do, and shall wander abroad or place himself in any public place, street, high-way, court, or passage to beg or gather alms, or cause, or procure, or encourage any of his family to do so, excepting priests and pilgrims in performance of their religious vows, not being mendicants of the description mentioned in the paragraph (d) of the next succeeding section
 - (b) 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;
 - (c) 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;
 - (d) 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;

- (e) 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, shall be deemed an idle and disorderly person within the true intent and meaning of this Ordinance, and shall be liable upon the first conviction to be imprisoned, with or without hard labour, for any term not exceeding fourteen days, or to a fine not exceeding ten rupees.
- (2) A police officer may arrest without a warrant every person deemed to be an idle and disorderly person.
- (3) In this section, "proclaimed area" means any area declared by the Minister by Order published in the Gazette, to be a proclaimed area for the purposes of this section.(*Primary Court has exclusive jurisdiction under section 33 of the Judicature Act read with Gazette Extry. No. 43/4 of 1979. 07. 02.)

Sisilihamy vs Zoysa 47 N.L.R 311 the court held that the prosecution should prove that the accused doesn't have any revenue to defend himself. Therefore if we arrest a person under this section, we should be capable of proving the facts.

Section 04

(c) every person willfully exposing his person in an indecent manner, or exhibiting any obscene print, picture, or other indecent exhibition, in any street, road, highway, or public place or elsewhere, to the annoyance and disgust of others;

Charls Appuhamy vs Seneviratne 65 N.L.R 455, the court held that elsewhere means any place except a public place. According to this interpretation no offence could be committed in any place even though it is not a public place.

Section 07

Soliciting and acts of indecency in public places

- (1) The following persons, that is to say -
 - (a) 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 -
 - 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.

Dharmadasa vs Thiadoman 56 N.L.R 278, the Court gives very wide interpretation for the word of soliciting. The court held that it is not required to solicit willingly or forcibly. But if someone indirectly solicits, it is sufficient for the commission of offence.

Accordingly, if a woman invites somebody to have sex at a public place expressly or impliedly, the legal ingredients are fulfilled.

Leembragan vs Silva 34 N.L.R 56, the court held that illicit sexual intercourse is subjected to indecency.

Section 09

Punishment of certain classes of incorrigible rogues

- (1) Any person who -
 - (a) knowingly lives wholly or in part on the earnings of prostitution;
 - (b) systematically procures persons for the purpose of illicit or unnatural intercourse, shall be deemed to be an incorrigible rogue within the true intent and meaning of this Ordinance, and shall be liable -
 - (i) 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; or
 - (ii) on conviction on indictment to imprisonment of either description for a period not exceeding two years, and if a male, in addition to any such imprisonment, if the court in its discretion directs, to be whipped.
- (2) Every male person who is proved to live with, or to be habitually in the company of, a prostitute, and every person, whether male or female, who is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that he or she is aiding, abetting, or compelling the prostitution of such person with any other person or generally, shall, unless the court is satisfied by evidence to the contrary, be deemed to be knowingly living on the earnings of prostitution.

Section 11

Causing, &c, the seduction or prostitution or unlawful carnal knowledge of a girl

(1) Every person, having the custody, charge, or care of a girl, who causes or encourages the seduction or prostitution or unlawful carnal knowledge of the said girl, shall be guilty of an offence and shall be liable on summary conviction thereof to a fine not exceeding one hundred rupees, or to imprisonment of either description for any term not exceeding six months or to both such fine and imprisonment.

(2) Without prejudice to the generality of subsection (1), a person shall, for the purposes of this section, be deemed to have caused or encouraged the seduction or prostitution or unlawful carnal knowledge (as the case may be) of a girl who has been seduced or become a prostitute or been unlawfully carnally known, if he has knowingly allowed the girl to associate with, or to enter or continue in the employment of, any prostitute or person of known immoral character.

According to the contents of Vagrants Ordinance, the sections 3, 4, 7, 9 and 11 are relevant to the offences of commercial sex workers. If police conduct raids and operations on the provisions of the Ordinance, the arrest should be made in terms of the above sections. Especially the Sec. 3 (b) states that every common prostitute wandering in public street or highway could be arrested. However, the ordinance does not define 'every common prostitute'.

Therefore, if a prostitute is arrested, it should not be practiced on mere suspicion or belief and also the arresting officer should have specifics to prove that the woman is a prostitute

Brothels Ordinance

Brothels Ordinance was introduced in 1889, 48 years after the enactment of Vagrant Ordinance.

Section 2

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

Thusen vs Sisilia 37 N.L.R 308 Justice Suits stated that the prosecution should prove that males visit the place constantly to have sexual intercourse with women.

The Ordinance does not interpret the word 'Brothel House'. Nevertheless **Dhorati Silva vs OIC Vice Branch Pettah 78 NLR 433** gave a definition on this issue. In this case, the place is a flower shop named 'Salmal' which was in Wellawatta area. Despite the fact that it appeared to sell flowers, the Manageress Dhorati Silva did not sell flowers. Males had access to this place to select women by means of a photo album. Thereafter the fee for the woman and hire for the Taxi was paid and the room number of the hotel was informed to the Manageress by the customer. Then the selected woman is sent to the Hotel at the time requested by the customer.

Officer in Charge of Pettah Police conducted a successful raid. However, the lower court held that the raid did not cover the scope of the sec. 2 of the Brothels Ordinance, because the Manageress did not provide women at the place while money was paid.

However in the appeal, the court held that the whole procedure elaborated the function of a Brothels house and it was further held that the Manageress has committed an offence within the scope of Brothels Ordinance.

Deny Vs. Sirimal Silva SC App. No. 488/98, the Supreme Court held that prosecution should prove with evidence that the particular place is managed by the person within the scope of Section 2 by providing women.

The fact of the case is as follows. A group of police officers conducted a raid in Dankotuwa on 23rd of July 1998 in respect of a guest house called Sirisevana.

The petitioner of this case was arrested with her partner along with four other couples and charges were leveled under Brothels Ordinance. The petitioner had filed a FR Application, challenging the arrest. The court held that a guest house or a Rest House cannot be included as a Brothels House.

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. According to the Judgment, he further stated that the accused should have managed the place and it should be proven by the prosecution beyond reasonable doubt. Hence a person going to a guest house along with his fiancée or partner is not an offence.

Both of above mentioned ordinances were enacted in 19th century and subsequently various types of declarations conventions and protocols have been introduced in respect of arrest and detention which embodied in Chapter 3 of the Sri Lanka Constitution 1978. If police officers deal with Vagrants Ordinance and Brothels Ordinance, they should respect the Supreme Law, specially article 11, 13(1), and 13(2) of the Constitution.

Condoms

Arrest of a woman in a public place with a condom will be an issue and it will be questionable. Therefore, possession of a condom does not illustrate in commission of any offence. Condoms are considered as a medical device and not a tool to prove prostitution. A condom is listed as a medical device in the list of essential medicines of Ministry of Health. Therefore, the possession of condoms is not an item that can or should be presented to the court to prove that any offense has been committed.

Gender

Sex at birth determined by person's genitals is called biological sex. Thus at birth they are divided into male or female. Society expects different behaviors from males and females. The term gender refers to the social roles traditionally assigned to biological sexes in accordance with norms and expectations.

Transgender

Transgender is an umbrella term applied to all people whose internal sense of their gender is differs from the sex they were assign at birth. Transgender men and transgender women mainly belong to this transgender community. Transgender women are the most common of the transgender community. Transgender woman is a person who assign male at birth who identifies as a woman.

It is medically accepted that transgenderism is not a disease.

Transgender people often face social, economic, political and legal marginalization and discrimination. They are discriminated and vulnerable to physical and sexual abuse. They are discriminated when entering places like rest rooms and public toilets.

Gender Recognition Certificate

Ministry of Health and the Registrar General's Department have issued circulars to legally and correctly record the gender identity of the person concerned in the birth certificate. By revising the sex determination in the birth certificate assists to obtain other identities and legal documents.

According to the circular document No. 01-34/2016 of the Director General of Health Services (annex 01), specialist psychiatric services are conducted in government hospitals for the services required for transgender people. When a person requests the service the responsible psychiatrist will provide the care services which includes assessment, counselling and issuing the "Gender Recognition Certificate" (H 1257) to assist the process of changing the sex on the birth certificate (annex 02). For this complete clinical process takes about 6 months to one year.

The relevant departments/authorities have been informed by the Registrar General's Circular No. 06/2016 (annex 03) to file this Certificate for Gender Recognition (H 1257) as a written witness and amend the name and sex of the transgender's birth certificate.

After amending the name and gender of the birth certificate, they can apply for necessary procedures for amendment of national identity cards, educational certificates, etc.

Annex 01

General Circular No: $OI = 3\frac{4}{2016}$

My Number: DMH/A/18/2016 Ministry of Health, Nutrition and Indigenous Medicine 385, Ven. Baddegama Wimalawansa Thero Mawatha Colombo 10. tb.06.2016.

ΑII·

Provincial Health Secretaries,
Provincial Directors of Health Services,
Regional Directors of Health Services,
Directors of Teaching Hospitals,
Medical Superintendents of Hospitals,
Heads of Specialized Campaigns,
Heads of Health Institutions,
Deans of Medical Faculties,

Issuing of Gender Recognition Certificate for Transgender Community

Transgender is an umbrella term for all people whose internal sense of their gender (their gender identity) is different from the sex they were assigned at birth. For example, a transgender woman is someone assigned male at birth wha identifies as female (WHO 2015).

Transgender people are often socially, economically, politically and legally marginalized. Discrimination and vulnerable to harassment, violence and sexual assault and discrimination in access to public spaces like restaurants, cinemas, public toilets are common. Therefore amending the sex designation on a birth certificate is an extremely impartant step for a transgender person, to accurately reflect on this legal document the sex with which the individual identifies, and as required proof of sex to obtain other identity and legal documents.

Considering above facts, Ministry of Health, Nutrition and Indigenous Medicine has decided to establish services for transgender communities in every institution, with capacity of specialist psychiatric care (Consultant Psychiatrist).

When a person requests service, the responsible consultant psychiatrist will provide the care which includes assessment, counseling and issuing a Gender Recognition Certificate (GRC) to assist with the process of changing the sex on a birth certificate. The certificate could be issued only to those above 16 years of age and it will indicate the desired gender as to be shown in birth certificate. This document has to be certified by a Consultant Psychiatrist and then the Head of the Institution working under the Ministry of Health.

When a person in the private sector requests it, he should be referred to the closet government hospital with a Consultant Psychiatrist to obtain the certificate.

A system is established on Transgender information management; maintain a register at the institution for effective monitoring of the services. The Directorate of Mental Health is currently taking steps to set up process for transgender information management. Two main documents need

- Transgender Notification Register (TNR); When a person is issued GRC, information such as name, date of birth, birth sex, desired gender, National Identity Card number, bed-head ticket/clinic number should be entered in the TNR. Register will be maintained in the Psychiatric unit of the
- Gender Recognition Certificate will be prepared in triplicate with one to be issued to the person concerned, the second to be retained at the hospital and third to the Directorate of Mental Health, Ministry of Health.

Kindly make arrangements to make aware all the Consultant Psychiatrists and other relevant officers in your institution on the above to stream line services for transgender persons and issuing the Gender Recognition Certificate. A copy of the certificate and sample of the register is attached herewith for your information. More details can be obtained from the Directorate of Mental Health, Ministry of Health, Nutrition and Indigenous Medicine.

> Cr. P. G. Mahipala Director General of Health Services Unector General of Heath Services
> Ministry of Heath, Nutrition & Indiganous Medicine
> "Suwashipaya",
> 365, Rev. Baddegama Yumalawansa Thero Mawatha,

Colombo 10.

Dr. P.G. Mahipala

Director General of Health Services

Secretary/Ministry of Health, Nutrition and indigenous Medicine

Deputy Director General (MS) I

Deputy Director General (MS) II

Deputy Director General (NCD)

Director/Mental Health

President/Sri Lanka College of Psychiatrists

Annex 02

H 1257

Gender Recognition Certificate

Ministry of Health- Sri Lanka

This certificate is issued for the purpose of change the gender and name on Birth Certificate by the Section 27 and 52(1) of Birth and Death Registration Ordinance

A) General Information	
1. Name in Full:	
2. Name of the Father:	
3. Name of the Mother:	
4. Home Address:	
5. National Identity Card number:	
6. Birth sex : MALE/FEMALE (Underline the appropriate)	
7. Date of Birth: Birth Place:	
8. Registered No: Date: Date:	
B) Declaration of Gender	
•	
l	(Full name) of Profession)
declare that the above mentioned person was assessed by me for his/her p	sychological status
for gender reassignment. Based on the assessment I am able to mal male/female to female/male transsexualism according to the criteria of	-
Organization- International Classification of Diseases 10 th version.	
The afore mentioned person was educated on identified concerns in the ove	rall treatment plan
in order to facilitate the process to provide the best available care in acc clinical needs and goals for gender expression.	ordance with their
Following the required procedure the afore mentioned person was refetherapy and the necessary surgical treatment.	erred for hormone

derwent the gender transformation process
ccepted standards of care published by the Health (WPATH) and completed the social
changed the gender from to the change of gender and name in the birth
(Head of the Institution)
(Official seal)

Annex 03

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E mail rg@rgd.gov.lk	eed අවදිය ളക്കപട്ടെ ണ്ട് Web site	දිනය / இகழி / Date:

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<u>සංකාන්තික ලිංගික පුජාවගේ උප්පැන්න සහකිකවල</u> නම සහ ස්තී/පුරුෂ භාවය සංශෝධනය කිරීම

සංනාන්තික ලිංගිකයන් යනු ස්ත් පුරුෂ සමාජභාවය පිළිබඳ ඔවුන්ගේ අභාන්තර සංවේදිතාවය. තමන් උපතින් ලැබූ ලිංගිකභාවයෙන් වෙනස්ව දැනෙන සියළුම පුද්ගලයන් සඳහා යොදනු ලබන පුළුල් යෙදුවක් ලෙස සැලකේ. මෙවැනි පුද්ගලයන්ට සමාජීය වශයෙන් ඇතිවන වීවිධ ගැටළු අවම කරනුවස්, වානව හිමිකම් කොමිනේ සභාවේ මැදිහක්වීම මක, පොබො පෝණේ හා දේශීය මෙවදා අමාතාහංගය මගින් "ස්ත් පුරුෂ සමාජභාවය පිළිගැනීම සඳහා වූ සහතිකය", යො - 1257 ආකෘතියෙන් නිකුත් කිරීමට සෞඛ්‍ය යේවා අධාක්ෂ ජනරාල්ගේ අංක 01-34/2016 හා 2016/06/16 දිනු දරණ වනු ලේඛය මගින් උපදෙස් දී ඇත. එම සෞ - 1257 ආකෘතියේ පිවසකක් ඔබගේ දැන ගැනීම සඳහා මේ සමග අමුණා එවමි.

2. එබැවින් සංපාන්තික ලිංගිකයන් විසින් කම උප්පැන්න ලේඛනයේ ස්තී/පුරුෂ භාවය සහ නම සංශෝධනය කිරීමට 52(i) වගන්තිය සහ 27 වගන්තිය යටතේ පුකාශ පතු ඉදිරිපත් කිරීමේදී සහ - 1257 දරණ ස්තී පුරුෂ සමාජභාවය පිළිගැනීම සඳහා වූ සහතිකය ලිබින සාක්ෂියක් ලෙස ගොනුකර, අදාල සංශෝධනය නිර්දේශ කිරීමටත්, එම සහතිකය මත අදාල සංශෝධනය නිර්දේශ කිරීමටත්, එම සහතිකය මත අදාල සංශෝධනය කිදු කිරීමට බලය දෙන ලෙසත් දන්වම්. අදාල පුකාශ පතුය සමග සෙ - 1257 දරණ සහතිකය උප්පැන්න ලේඛනයේ දෙවන පිටපතට අමුණා තැබීමටද පියවර ගන්නා ලෙස කාරුණිකව දන්වම්.



පිටපත්:-

- l. ලේකම්, ස්වදේශ කටයුතු අමාත**හංශ**ය
- 2. ලේකම්, මානව හිමිකම් කොමිෂන් සභාව
- 3. සෞඛ්‍ය සේවා අධ්‍යක්ෂ ජනරාල්
- 4. සියළුම දිස්තුික් ලේකම්වරුන්/අතිරේක රෙජිස්ටුාර් ජනරාල්වරුන් කරු, දැ.ගැ.ස.
- 5. සහකාර රෙජිස්ටුාර් ජනරාල්, මධාාම ලේඛනාගාරය
- 6. කලාප භාර සියළුම සහකාර රෙජිස්ටුාර් ජනරාල්වරුන්
- කරු, දැ.ගැ.ස.
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- කරු, දැ.ගැ.ස.
- කරු, දැ.ගැ.ස.
- ----
- අවශා කටයුතු සඳහා

What is HIV?

HIV stands for "Human Immunodeficiency Virus". The virus attacks cells of the immune system of the human body. When the HIV enters the body, that person becomes "HIV infected". As HIV progressively damages these cells, the body becomes more vulnerable to infections.

What is AIDS?

AIDS stands for "Acquired Immunodeficiency Syndrome" When the immune system weakens to a very low level, a person is said to have AIDS. It can be years before HIV has damaged the immune system enough for AIDS to develop.

Where is HIV found?

HIV is found in the body fluids of a person who has been infected - blood, semen, vaginal fluids and breast milk.

How is HIV transmitted?

Through:

- Unprotected sex (vaginal, anal and oral sex) with an infected person
- HIV infected blood and blood products
- Sharing contaminated syringes, needles or other sharp instruments
- From HIV infected mother to child during pregnancy, childbirth or breast feeding

Can I tell whether someone has HIV just by looking at them?

No. A person living with HIV may look healthy and feel good just like you. A blood test is the only way a person can find out if he or she is infected with HIV.

Can I get HIV from shaking hands or through other forms of social contact?

No. HIV is not transmitted through non-sexual day-to-day contact. You cannot be infected by shaking someone's hand, by hugging someone, by using the same toilet or by drinking from the same glass as a person living with HIV. HIV is not transmitted through coughing or sneezing. There is no need to fear social interaction with people living with HIV.

Do mosquito bites carry a risk of infecting a person with HIV?

HIV is not spread by mosquitoes or other biting insects. Because it cannot reproduce in insects.

What is post-exposure prophylaxis?

Post-exposure prophylaxis is a course of antiretroviral drugs prescribed within 48 hours of exposure to HIV to protect against infection.

How can you limit your risk of getting HIV through sex?

- Delay sexual activities until marriage
- Limit your sexual activities to only one faithful partner
- Always use condoms correctly, when having sex with a person other than your faithful partner.

How effective are condoms in preventing HIV?

Condoms are highly effective in protecting against sexual transmitted infections including HIV. In order to achieve the maximum protective effect condoms must be used correctly all the time. Incorrect use can lead to condom slippage or breakage, thus diminishing their protective effect.

How can mother-to-child transmission be prevented?

Effective treatments are available during pregnancy to prevent HIV infection of the new born.

What is a HIV test?

A HIV test is a test that reveals whether HIV is present in the body. Commonly-used HIV tests detect the antibodies produced by the immune system in response to HIV. It takes six weeks to three months to detect antibodies. This period is called the "window period". Although the HIV tests show negative results, during the window period, person having HIV infection can transmit.

Why should I get a HIV test?

Knowing your HIV status has three vital benefits.

If you are HIV positive,

- You can take necessary steps before symptoms appear to access treatment, care and support services, thereby potentially prolonging your life for many years and improve quality of life.
- You can take all the necessary precautions to prevent the spread of HIV to others.
- Can get necessary health advice to protect unborn child, if you are pregnant

Where can I get tested?

Sexual transmitted disease (STD) clinics which are attached to the government base and general hospitals. Referral system is not necessary to attend the STD clinics.

Are my test results confidential?

The results of the HIV test are absolutely confidential.

HIV Self-test

HIV self-testing allows people to take an HIV test and find out their result in their own home or other private location. It provide results within 20 minutes. HIV self-test facility available at STD clinics and can also be ordered online by calling to 071 637 9192.

Know4sure.lk website

Know4sure.lk website helps people to assess the risk for HIV and book a safe, confidential and anonymous HIV test as well as time slots to attend the STD clinic.