

# **THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016**

## **Responses From the Trans & Intersex Communities**

THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016 has been introduced by the Government in Lok Sabha this session. While we have all been waiting for legislation for protection of trans rights, this draft bill is a massively diluted, criminalizing and pathologising text while standing on distorted premises that amount to human rights violations. In fact, far from protecting the rights of the trans community, this bill, if passed, will end up curtailing the very rights already granted by the Supreme Court in the NALSA verdict. The bill in fact threatens to destroy the fabric of the transgender community and the frail mechanism of mutual housing support and livelihood generation by begging that the transgender community has evolved for itself in the absence of family support. The kind of deletions the government has made from the 2015 draft bill, especially after the community recommendations that were made in January this year, only goes to show that the government has made no provisions to ensure alternative livelihood and other support for the trans community. This bill is a dangerous form of tokenism.

This document details some of the issue in the bill that need to be addressed.

### **Right to Self Determination of Gender Identity & Expression**

The current bill continues to use the 'Rehabilitation' framework that has been opposed by many trans groups as part of the recommendations and meeting/s with the MSJE in January earlier this year. This framework has lead the government to come up with definitions of transgender, as mentioned below. This definition is a gross violation of human rights and is against the very ruling of Supreme Court's NALSA judgement.

The definition of 'transgender person' in the 2016 draft bill is:

“transgender person” means a person who is—

(A) neither wholly female nor wholly male; or

(B) a combination of female or male; or

(C) neither female nor male; and

whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.

The 2015 draft bill on the other hand, gives the following definition of 'Transgender Person':

Transgender Person' means a person, whose gender does not match with the gender assigned to that person at birth and includes trans-men and trans-women (whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.), gender-queers and a number of socio-cultural identities such as — kinnars, hijras, aravanis, jogtas etc. A transgender person should have the option to choose either 'man', 'woman' or 'transgender' as well as have the right to choose any of the options independent of surgery/ hormones.

As is clear, the 2015 version of the draft bill honored the right of transgender people to self-determine their gender identity as any of, male, female or transgender, and very strongly iterated that transgender identity is not dependent on any medical/surgical intervention. Not only is this lost in the 2016 version, but a totally pathologising and scientifically incorrect definition has replaced the earlier one. In addition to this, traditional trans feminine communities like Jogappas and Shiv Shaktis have been dropped all together in the new bill.

In the current bill, a committee of gatekeepers have been entrusted with the right to determine who can or cannot be transgender. Such a move will adversely affect significant parts of the transgender population - especially pre-op/non-op transmen and transwomen, gender fluid, gender neutral, and intergender persons.

By defining trans identity as a conflict with the binary male or female identity, this bill has negated every bit of progress the transgender community has achieved in the last few years. This is also in stark contrast to global developments, where transgender persons have been granted the right to self-determine and to seek benefits

according to such identity/expression.

**The bill will create a system of Gatekeepers and Policing by the suggested District Screening Committee.** The current bill mentions:

4. (2) A person recognised as transgender under sub-section (1) shall have a right to self- perceived gender identity

6. (1) On the receipt of an application under section 5, the District Magistrate shall refer such application to the District Screening Committee to be constituted by the appropriate Government for the purpose of recognition of transgender persons

8. (2) The District Magistrate shall, on receipt of an application under sub-section (1), and on the recommendation made by the District Screening Committee, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

This is in direct contradiction to the rights granted by Supreme Court in terms of self identification, as already mentioned earlier.

Further **Section 4. (2) conflicts with Sections 6. (1) and 8. (2).** The NALSA verdict and the later Private members bill of Tiruchi Siva, and the draft bill of 2015 by MSJE recognized a trans person's rights to self identify as either male, female or transgender, but this current bill mentions both self identification, as well as, determination by a committee: If a person can self-identify, why is a committee needed?

**Even if a committee is established, what is the purpose of having a medical doctor on it?** NALSA is clear that there should not be medical/physical assessment or any surgical or hormonal procedure as a prerequisite for transgender identification. "At most", a psychological assessment is needed.

Having a single representative of transgender community can lead to gate-keeping, favouring a politically well-connected or privileged transgender person. It may lead to exclusion of non-operative trans persons, exclusion of trans men, etc., as the diversity of trans identities and expressions may not be represented on the committee.

It is possible that trans men willing to be on the committee would be hard to find.

### **Trans Healthcare**

The current bill gives no guidelines for the setting up of Transhealthcare Centres in Government Hospitals. In the 2015 draft, there was a clear mention of the state's obligation to provide this, e.g free sex reassignment procedures. The provision of separate wards for trans people in hospitals, clearly mentioned in the Private Member's Bill of Truchi Shiva, has also been dropped.

Transhealthcare is absolutely critical for trans people to go on living their lives. Key services like counseling, hormone therapy, various gender affirming procedures have to be made mandatory services that are accessible to all underprivileged sections of the trans communities.

### **Confusing intersex variations with transgender identity**

The current bill includes persons with intersex variations under the transgender umbrella. This is deeply problematic on many levels.

**Sex and Gender are not the same.** They are separate concepts. **Sex and gender are not binary concepts.** Both are large continuous spectrums.

While sex is a biological/medical term to denote male, female and intersex, gender is a deep sense of oneself as a gendered being and may not have a one-to-one co-relation with sex. E.g. someone assigned 'sex female' at birth, even when supported by all physical, physiological and chromosomal evidence of being female, may not self-identify as 'gender female'. And vice-versa.

On the other hand, intersex variation refers to the ways in which one's sex is seen to be different from the binary idea of sex as Male or Female - a function of one's chromosomes, hormones, and external genitalia. **Not all intersex persons may identify as transgender.** And not all transgender persons need to be intersex. In fact, there are many intersex variations that do not manifest physically, and often those with intersex variations may not be aware of this themselves; they may identify exclusively with the gender they were assigned at birth.

People with intersex variations will need access to medical care in the event they chose to seek it, and employment and non-discriminatory treatment. These are where transgender persons and those with intersex variations need policy overlaps.

The bill needs to expand scope for intersex persons' rights, and have separate clauses that cover areas and concerns that Intersex community have. For instance, it must be strictly enforced that no doctor or hospital perform medical and surgical intervention to assign either the female or male gender, for intersex infants and children. Further, it must be ensured that sex/gender markers are not recorded on birth certificates of intersex infants.

However, the current bill has glossed over these points of differences and have lumped transgender and intersex persons into one category. This could lead to future problems, especially an over-emphasis on medicalisation of identities and expressions.

We ask that the Bill be renamed **Rights of Transgender and Intersex Persons Bill**.

### **Unnecessary and extraordinary medicalisation and pathologization of one's intrinsic sense of self**

One's gender identity is not a medical condition or situation that needs a doctor's clean chit. Gender identity and gender expressions are intrinsic to one's sense of self, and one's experience of life. **This bill, by placing the onus of determination of gender identity on a Chief Medical Officer and other medical professionals, has created a medical problem where none exists. What can a CMO determine that an individual person can't, about their own bodies and sense of self?**

**The involvement of a Chief Medical Officer and other medical professionals to determine whether one is transgender or not, is a human rights violations.**

The trans community is already subjected to such violations by the uninitiated medical professionals and arms of the state, where trans, gender-queer, gender-fluid, non-binary, intergender and pre-op trans persons are subjected to intrusive body searches, stripping, feeling

up of breasts and genitalia. With this bill, such acts will have the sanction of the state and will be in contradiction to the NALSA verdict, where they have been expressly prohibited.

### **Caste based reservation**

The Supreme Court's NALSA ruling had indicated that transgender people would be included in the OBC category, and had further clarified that, if familial caste were SC or ST, the transgender individuals would be able to claim benefits and protections under reservation, on account of being both OBC and trans. **Unfortunately there is no provision for OBC or caste-based reservations in the present Bill, which is a big lacuna.** This is despite the clarification that the Supreme Court has provided on the matter and therefore is in violation of that. Transgender individuals continue to be denied educational and employment opportunities because of their gender identity and/or expression, and reservations are extremely critical to addressing systemic inequalities & barriers.

### **Discrimination in employment not addressed**

The bill says that *“no establishment shall discriminate against any transgender person in any matter relating to employment including, but not limited to, recruitment, promotion and other related issues.”* (**Chapter V, Section 10**).

They have also set up a redressal system (**Chapter V, Section 12**) — *Every establishment consisting of one hundred or more persons shall designate a person to be a complaint officer to deal with the complaints relating to violation of the provisions of this Act.*

Establishment is defined as (**Chapter I, Section 2(b)**) –

*“establishment” means—*

*(i) any body or authority established by or under a Central Act or a State Act or an authority or a body owned or controlled or aided by the Government or a local authority, or a Government company as defined in section 2 of the Companies Act, 2013, and includes a Department of the Government; or*

*(ii) any company or body corporate or association or body of individuals, firm, cooperative or other society, association, trust, agency, institution;*

This definition of establishment leaves out scores of unorganised sector workers, and trans persons in organisations with less than 100 employees. There is discrimination in the process of addressing discrimination between women and trans persons. In comparison to this bill, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has broad definitions of employee, workplace and specifies that women should compulsorily head workplace harassment committees. Local complaints committee can be approached by women working in organisations with less than 10 people, and unorganised sector workers including domestic workers. This broad and inclusive definition of workplace/establishment should be adopted in the current bill as well.

### **Discrimination/unfair treatment in general hasn't been expanded/defined**

As described in detail by the MSJE Transgender Experts' Committee report (2014), *Chapter 7 Addressing Stigma, Discrimination and Violence faced by Transgender People*, human rights violations against transgender people pervade families, educational institutions, workplaces, institutions such as law-enforcement, healthcare, media, and society at large. **The Bill does not adequately address means for prevention and redressal against such violence.**

Examples include:

- **Violence perpetrated within biological families:**

Punishment inflicted on children and adolescents for gender-nonconforming behavior, attempts to force unethical and unscientific conversation therapies, forced marriage, physical and sexual assault.

- **Educational institutions:**

Harassment and bullying transgender and gender non-conforming children by classmates and teachers, physical and sexual assault; all collectively leading to increased risk of suicide, higher rates of dropping out which has a lifelong impact on employment and livelihood opportunities.

- **Health-care establishments:**

Refusal to provide services, humiliation inflicted by forcing transgender clients to expose their private parts to doctors and students, prejudicial comments on gender or presumed sexual behavior, unscientific and unethical practices such as electro-

shock therapy to “cure” gender-nonconforming behavior

- **Short-stay homes and shelters for children:**

Failure to provide appropriate care and protection to gender-nonconforming children implicated under the Juvenile Justice Act, such as placing them in shelters inappropriate to their gender, leading to bullying and violence and increased risk of suicide.

- **Workplaces:**

Workplace sexual harassment and hostile environments, stigma and discrimination in recruitment practices, absence of gender-appropriate rest rooms, are among the kinds of violence faced by transgender people in workplaces, assuming they have actually been able to survive the educational system and acquired employable skills.

- **Police:**

Transgender people face much violence from the law-enforcement including violence in public places, custodial violence and rape, use of IPC sections such as 377, Extortion, kidnapping, public nuisance and beggary Acts to harass and intimidate trans and intersex individuals.

The Bill in effect provides negligible protection for trans people against various hate crimes, atrocities and offenses. Much of the violence that trans people face comes from law enforcement agencies, including violence in public places, custodial violence and rape, use of IPC sections such as 377 and public nuisance to extort and harass individuals.

Chapter VII of the current draft : Offenses and Penalties mentions the following:

19. Whoever,—

(a) compels or entices a transgender person to indulge in the act of begging or other similar forms of forced or bonded labour other than any compulsory service for 20 public purposes imposed by Government;

shall be punishable with imprisonment for a term which shall not be less than six months but 30 which may extend to two years and with fine.

In November 2014, many trans women in Bangalore were randomly picked up from public places and illegally detained in the infamous



“Beggar’s Colony”, a “rehabilitation” centre for beggars where unnatural deaths and deplorable living conditions have been reported. They were taken under the Karnataka Prohibition of Beggary Act, 1975 [which interestingly, exempts “religious mendicants” who beg, from criminalization].

It has to be understood that begging arises out of structural inequalities in our societies which have lead to lack of education and employment opportunities, which then have co-relations with activities like begging. Not only is this provision a human rights violation, but it will also be used with impunity by parts of the state like the Police, [as in the above mentioned case] to criminalise trans women who beg on the streets and their trans gurus/mothers.

Some important provisions from the earlier version of Bill, that are missing now are:

- Necessary amendments in IPC to cover the cases of sexual assault on Transgender Persons
- Criminal and disciplinary action against delinquent police official in cases of violation of human rights of Transgender Persons

### **Hijra families at risk**

The Transgender Persons (Protection of Rights) Bill 2016 says,

13 (1) No transgender person shall be separated from parents or immediate family on the ground of being a transgender, except on an order of a competent court, in the interest of such person.

The bill also says that,

“Where any parent or a member of his immediate family is unable to take care of a transgender, the competent court shall by an order direct such person to be placed in a rehabilitation centre”.

**The earlier MSJE draft bill of 2015** which was much more progressive in comparison reads-

13 (1) No child who is a transgender shall be separated from his or her parents on grounds of being a transgender except

on an order of competent Court, if required in the best interest of the child.

#### Right to Home and Family

9 (2) Where the immediate family is unable to care for a transgender child, the competent Court shall make every effort to place such child within his or her extended family, or within the community in a family setting.

Explanation—‘Family’ means a group of people related by blood, marriage or adoption to the Transgender Person

So “child” becomes “person” in the latest bill and a broad definition of family which recognized adoptive families is done away with.

**This is a direct attack on the hijra family system and the right of trans people to live with family/lovers of their choice.** In many instances, it is the family that is the seat of violence, abuse and a denial of identity for a young trans person. For transgender children, and minors, the family and the natal home become places where the right to self-determine gender, and to express that gender through various means, are severely curtailed. Young transgender girls are compulsorily made to conform to the male gender they were assigned to, often with verbal and physical abuse. Young transgender boys have their movements restricted, the full weight of patriarchy descending on them to keep them in their place – the house. **The only recourse for such transgender children, is to run away from the natal home.** More transgender children are homeless, and at risk of sexual and physical abuse. For them, **the Hijra families, the Jamaats or dormitories are places of refuge, the hijra elders their adoptive parents, the hijra community their family and friends.**

This clause puts Hijra and Aravani community elders – the adoptive parents of young transgender persons – under undue risk. The Hijra family system becomes unnecessarily and unfairly criminalised in this bill. This bill – contrary to protecting transgender persons’ rights, ends up severely curtailing them and even harming the lives of members of the community.

We hope you take a strong stand against the bill in its current shape, and advocate for taking the bill to a standing committee for further discussion.

## **SIGNATORIES**

### **TRANS-LED NETWORKS/GROUPS/ORGANISATIONS/INDIVIDUALS**

1. All Assam Transgender Association
2. All Manipur Nupi Maanbi Association [Amana]
3. Ani Dutta, Assistant Professor, University of Iowa
4. Bonita Pebam, Manipur
5. Empowering Trans Ability [ETA], Manipur
6. Nirangal, Tamil Nadu
7. Orinam, Tamil Nadu
8. Sampurna Working Group, A Network of Trans\* and Intersex Indians
9. Telangana Hijra Intersex Transgender Samithi
10. Umesh Lourembam, Amana, Manipur

### **ALLIES**

1. Bishakha Dutta, Women's Rights Activist, Mumbai
2. Centre for Health, Law, Ethics and Technology, Jindal Global Law School, Sonapat, NCR, India
3. Partners for Law in Development, New Delhi
4. Point Of View, Women's Rights Organisation, Mumbai
5. R. Meera, Secretary, WINS [Women's Initiatives, Andhra Pradesh & Kerala]
6. Rakhi Sehgal, New Delhi
7. Renu Khanna, Vadodara, Gujarat