

## **Memorandum from the transgender, hijra, intersex and gender non conforming communities.**

3<sup>rd</sup> November, 2019

Dear Minister,

We ask for your support in sending the Transgender Persons (Protection of Rights) Bill, 2019, to a **Parliamentary Select Committee for key amendments**.

The Bill, contrary to Supreme Court NALSA verdict, violates right to self-identity and constitutional rights, encodes discrimination by prescribing station-bailable punishments for sexual and physical violence against transgender persons, offers no reservations or affirmative action or anti-discrimination measures, denying any opportunities in education, employment, healthcare, housing, etc.

**The bill has come up before the Rajya Sabha on 20th November 2019, and we would like to urge the members of the Rajya Sabha to not pass the bills in this form, but rather, refer them to a Select Committee.**

The Government of India's Transgender persons (Protection of Rights) Bill, 2019 which was passed on 17th December 2018 in the Lok Sabha should be more appropriately retitled the Transgender Persons (Violation of Rights) Bill, since it violates more rights than it protects. **A detailed analysis is on the following page.**

### **The following are the main objections to the bill :**

1. This Bill upholds the humiliating process of submitting an application to District Magistrate for a legal recognition of one's transgender identity, and it makes getting an ID as male or female dependent on first registering as transgender, and then supplying proof of surgery. This contradicts the NALSA judgment of the Supreme Court.
2. The Bill postulates that sexual violence against trans persons will face punishment from 6 months to 2 years, in comparison with the 7 years of imprisonment for sexual violence against women. In this way, the Bill directly discriminates against the Trans, Intersex and GNC communities and strips us of dignity and equality
3. The Trans Bill 2018 also denies reservations and affirmative action for trans, intersex and gender nonconforming people in employment, education, and healthcare. Its provisions around discrimination have no penalties whatsoever, making them pointless. Thus between not preventing discrimination and failing to provide any affirmative action on reservations, it puts our very lives and livelihoods at stake.
4. The Bill requires Transgender people, to reside with their birth family or in rehabilitation homes - even though birth families are often the first site of violence against these individuals. If trans people are aided by other Trans community members in escaping such conditions at home, the community members can be imprisoned for up to 4 years
5. We need a comprehensive anti-atrocities, anti discrimination legislation, that upholds and ensures equal access to all civil rights and spaces of housing, employment, education and medical care for transgender persons, not this watered down and dangerous piece of legislation.
6. Lack of appropriate institutional Mechanism: The bill lacks clarity in the institutional mechanism for the implementation of the bill. Though the Min. of Social Justice and Empowerment (MoSJE) is the nodal ministry for the implementation of the provision of the Act, no specific authority has been designated in the bill. In addition, there is no Grievance Redressal body specified. There is no Transgender commission or fast track courts.

7. **Rights based approach is missing** : The bill fails to provide for a chapter on Rights and entitlements, social security for transgender persons, provisions for rights to marriage, family, adoption, inheritance and additional rights, rights against being misrepresented in the media, provisions to revisit definition of 'persons' in General Clauses Act and various other acts and protection of fundamental rights under article 14, 15, 16, 19, 21.

The GOI Bill is in stark violation of the fundamental rights of transgender persons enshrined in the Constitution as equal citizens, judgement of the Apex Court in NALSA vs UoI in 2014 and has also disregarded most recommendations of the Parliamentary Standing Committee. It has been passed despite quite a few Parliamentarians raising serious concerns about fundamental flaws and seeking deferral of the Bill, pending broad based community consultations.

The amended Bill is the latest in a series of Bills drafted after the landmark Supreme Court verdict in National Legal Services Authority vs. Union of India (NALSA, 2014) - see background section. It has completely ignored the critiques of the 2016 Bill, and subsequent recommendations of the Parliamentary Standing Committee. It stands in stark violation of the fundamental rights of transgender persons enshrined in the Constitution as equal citizens, judgement of the Apex Court in NALSA vs UoI in 2014. **For example, the amended Bill has created a two-tier system within the transgender community, wherein persons who have not had sex reassignment surgery (SRS) can only identify as transgender and not as male or female, and the identification as transgender depends on scrutiny and certification by a District Magistrate; those seeking to identify as male or female need to have had SRS. This is completely contrary to the NALSA verdict.** It has been noted in Tamil Nadu that the district screening committees result in individuals being physically groped for "evidence" that they are transgender, a clear case of human rights violations.

It may be noted that on the same issue, **in 2015, the Rajya Sabha passed the much more progressive Private Member's Bill drafted by Tiruchi Siva, DMK member of the Rajya Sabha**, which had been drawn up in consultation with the community, and which has since then been pending before the Lok Sabha. Tiruchi Siva's bill had several progressive positions such as reservation rights, employment and education opportunities, right to self determination, special courts, a Transgender Rights Commission and more.

**The GOI Transgender Persons (Protection of Rights) 2018 bill, is itself discriminatory with lower penalties for sexual and physical violence against transgender people. Women's groups have rejected this and demanded equal punishment for sexual violence against transgender people, as for the same crimes committed upon women.**

**We ask the GOI's bill be completely overhauled through referral to a Select Committee, where they must be made compliant with the NALSA verdict and incorporate the community feedback given via the Parliamentary Standing Committee process.**

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## RECOMMENDATIONS

| Problematic features of the bill  | Recommended change by the community   |
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| <p><b>III.5, 6. Screening committee:</b><br/>           “5. A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person<br/>           6. If a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which the person has undergone surgery, to the District Magistrate for revised certificate..”</p> | <p><b>Self identification in any gender should be upheld and extended to all forms of ID and educational documents, especially for runaway children; remove provision of district screening committees.</b> Uphold NALSA vs. UOI Supreme Court Judgement direction that it is “immoral and illegal for governments to insist” on surgery or hormones for declaring gender, and the Standing Committee recommendation “that any procedure for 'identification of transgender persons' which goes beyond self-identification, and is likely to involve an element of medical, biological or mental assessment, would violate transgender persons' rights under Article 19 and 21 of the Constitution”</p>   |
| <p><b>VIII. 19 (d) Low punishments for violence against trans people:</b> “Whoever harms or injures or endangers the life, safety, health, or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.”</p>   | <p>Penalties for sexual violence upon all transgender persons should be equivalent to existing penalties for sexual violence against women, while penalties for physical, verbal, emotional and economic abuse should be similarly <b>commensurate with the punishments for such acts under existing laws. Specific atrocities that transgender and intersex people face must be defined and strictly penalized</b>, including forced gender conformism, hormonal treatment and/or surgeries, aversion based pseudo-psychotherapies, forced marriages, stripping, etc., as well as custodial violence, dereliction of duty by state and medical authorities, and violence in educational, residential, medical and employment. All trans people should have the right to be handled by women police as per their choice and should be held in separate cells with access to gender affirming healthcare, legal aid and education.</p> |
| <p><b>V. 13 Family and residence:</b>(3) “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”.</p>  | <p><b>This provision violates the Constitutional Rights of trans persons to freedom of residence.</b> This provision does not understand violence in familial homes and rehabilitation centers. <b>The definition of family should also be expanded to legally recognize families of choice, partnership, marriage, friendship and, as per the Committee’s recommendation, “Hijra or Aravani community elders, who adopt young transgender children”</b> who provide shelter, medical care, and gender-affirming inheritance and burial norms.</p>  |
| <p><b>VI. 16. Medical care</b></p>  | <p><b>Free access to gender affirming medical procedures, full insurance coverage, choice of m/f/separate wards for trans people in hospitals</b></p>   |
| <p><b>VII. 17. National Council for Transgender persons</b></p>   | <p><b>National and State Trans Rights Commissions</b> with appropriate powers, with majority trans members from a variety of gender and other identities, to tackle atrocities, grievances and welfare/benefits.</p>  |

## BACKGROUND OF 2019 BILL

The landmark Supreme Court NALSA (2014) verdict accorded transgender individuals the right to self-identify as third gender or within the binary, as male or female; and ruled that insistence on sex reassignment surgery, hormone therapy, or other procedures to legally declare gender was illegal and immoral. The verdict directed the Centre and State Governments to provide the community various social welfare schemes and to treat the community as socially and economically backward classes. It asked for the transgender community to be extended reservation in educational institutions and for public appointments, proper medical care and separate public toilets. It also asked for the recommendations of the Expert Committee Report on Transgender persons (released February 2014) to be reviewed in light of the verdict and be implemented within six months, i.e. by October 2014.

In 2015, the “Rights of Transgender Persons Bill 2014” was passed by the Rajya Sabha on 24th April 2015 unanimously, with cross-party support. A private member’s bill introduced by the MP from Tamilnadu, Tiruchi Siva, the Bill had been drawn up in consultation with the community, and has since then been pending before the Lok Sabha. Tiruchi Siva’s bill was largely reflective of the NALSA verdict and had several progressive positions such as reservation rights, employment and education opportunities, right to self determination, special courts, a Transgender Rights Commission and more.

Later in 2015, the Ministry of Social Justice and Empowerment drafted a Rights of Transgender Persons Bill (2015), and sought public input, with comments to be submitted by 14th January, 2016. The MSJE Bill had borrowed several concepts such as ‘inclusive education’, ‘reasonable accommodation’, and ‘barriers’ etc. from the Rights of Persons with Disabilities Bill 2013; harboured problematic notions of rehabilitation, lacked clarity on sexual offences committed against transgender persons, etc. The draft bill received substantial input from transgender and intersex led groups, as well as from LGBTIQ and ally groups.

The Transgender Persons (Protection of Rights) Bill 2016 was then introduced in the Lok Sabha on August 2, 2016. However it did not incorporate any of the community feedback given to previous versions of the Bill. In October 2016, the Lok Sabha Standing Committee sought, through a newspaper ad, feedback on the bill, with a last date that was eventually extended to November 5, 2016. Subsequently, community feedback was given to the Parliamentary Standing Committee, which submitted its report in July 2017. Except for the revised definition of ‘transgender’, progressive amendments made by the Standing Committee have been largely ignored in the amendments resulting in the 2018 bill. The 2019 amendment eliminated the words “standing committee”, but continued to uphold the anti-NALSA two tier process making IDs contingent upon surgery. It also upholds lower sentences for violence upon transgender persons.

### WHO ARE WE?

1. Transgender persons have a strong physical and/or cognitive discomfort with the gender which is socially, legally and medically unambiguously assigned to our bodies at birth. Persons who don’t identify as transgender are cisgender.
2. Intersex: Persons with intersex variations have bodies that do not conform to medical, legal and social categories of male and female, in various ways [anatomical, chromosomal, hormonal etc]. Some intersex persons are uncomfortable with the gender they were assigned, in which case they may be transgender and intersex; but if not, they can be cisgender and intersex.
3. Hijra: The Hijra community is a sociocultural group whereby some members of the transgender and intersex communities formally enter a traditional system of living together and mutual support. They may take on different identities and names in various local languages: kinnar in Hindi, tirunagai in Tamil, aravani in Tamil, mangalamukhi in Kannada. Some kinnars may identify as Triteeya prakriti or third gender while others do not.
4. Transgender woman: Transgender women are transgender persons who identify as women, regardless of how they look, or dress. Some transgender women are also hijra identified while others are not.
5. Transgender man: Transgender men are transgender persons who identify as men, regardless of how they look, or dress. In Tamil Nadu some transmen may also identify as thirunambi.
6. Shivashaktis and Jogtas/Jogappas: These are culturally specific groups who are socially permitted a feminine gender expression in the context of specific religious roles.
7. Genderqueer/Gender non-binary/Gender fluid/Agender/Intergender: Persons who do not identify within the gender binary may have a variety of gender identities including but not limited to these categories above.

## **REFERENCES**

FULL TEXT OF 2019 BILL

<http://orinam.net/resources-for/law-and-enforcement/the-transgender-persons-protection-of-rights-bill-2019/>

FULL TEXT OF 2018 BILL, 27 AMENDMENTS, UPDATES

<http://orinam.net/resources-for/law-and-enforcement/trans-persons-protection-rights-bill-2018/>

FULL TEXT OF 2016 BILL

[http://orinam.net/content/wp-content/uploads/2016/08/TGBill\\_LS\\_Eng-1.pdf](http://orinam.net/content/wp-content/uploads/2016/08/TGBill_LS_Eng-1.pdf)

OVERVIEW of 2016 INCLUDING CRITIQUES GIVEN TO STANDING COMMITTEE

<http://orinam.net/resources-for/law-and-enforcement/trans-persons-protection-rights-bill-2016/>

TIRUCHI SIVA BILL 2014 - passed RS in 2015

<http://orinam.net/resources-for/law-and-enforcement/rights-of-transgender-persons-bill-2014/>

MSJE 2015 BILL (AFTER SIVA BEFORE 2016 BILL)

<http://orinam.net/resources-for/law-and-enforcement/msje-rights-of-transgender-persons-bill-2015/>