



Vidhi

Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE

COMMENTS ON THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016

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EXECUTIVE SUMMARY

The Transgender Persons (Protection of Rights) Bill, 2016 seeks to introduce anti-discriminatory and welfare measures for transgender persons in India. The Bill comes two years after the landmark *NALSA* judgment of 2014 which recognized the fundamental rights of transgender persons and gave broad directives to the government to facilitate the realization of these rights. For centuries, transgender persons have faced harassment and discrimination. Transgender identities continue to be invisibilised, criminalised and pathologised, on account of the stigma and ignorance attached to them. As a result, transgender persons have been deprived of basic entitlements such as education, healthcare, housing and employment. This Bill is a critical opportunity to correct the historical wrongs perpetrated on transgender persons, and to guarantee them a life of dignity and equal opportunity.

Upon close examination, we find that there are several counts on which this Bill fails to deliver.

- First, the Bill significantly deviates from the *NALSA* judgment in the four following ways: (i) it distorts the definition of ‘transgender’ laid out in the judgment, (ii) it does not adopt a rights-based approach (iii) it does not include provisions on reservations, and (iv) it does not identify specific duties for different actors.
- Second, the anti-discrimination provisions in the Bill are weak and limited in scope. For instance, the Bill fails to define the key term “discrimination”
- Third, the Bill lacks adequate accountability mechanisms. The obligations of various actors are drafted in vague and broad language, there are no timelines prescribed for implementation, no penalties are prescribed for non-implementation, the National Council is rendered a toothless body and there is complete silence on the enforcement mechanism.
- Fourth, the Bill sets up a Screening Committee to certify transgender persons, which runs against the right to self-identification recognised in *NALSA*. Moreover, the Committee includes a medical professional, which serves no purpose other than further pathologising transgender identities.
- Fifth, the duties imposed on appropriate governments to ensure the welfare of transgender persons are broad and vague. Further, the welfare provisions on health, education and social security fail to address many identified concerns of transgender persons.
- Sixth, the list of defined offences is incomplete and arbitrary, and offences and penalties have not been graded.

In sum, this Bill appears to be an unsatisfactory attempt to achieve its stated purpose: the protection of rights of transgender persons. The Bill has diluted, and in some cases,

eliminated, provisions contained in the previous two bills on this subject (The Rights of Transgender Persons Bill, 2014 and The Rights of Transgender Persons Bill, 2015), which were more comprehensive in comparison. Additionally, it has not incorporated the recommendations made by the Ministry of Social Justice and Empowerment Expert Committee Report. This reflects a flawed, discontinuous legislative process.

It is recommended that the Bill be redrafted and brought in line with the directions of NALSA, as well as the recommendations of the Expert Committee Report. This would imply changes in the definition of 'transgender', use of rights-based language, a provision on reservations, clear delineation of obligations of different governments and relevant stakeholders, introduction of an effective National Council, a powerful enforcement mechanism, and crafting of comprehensive welfare measures, including measures for creating awareness and sensitizing stakeholders about concerns of transgender persons. In keeping with the rights-based approach, it is further recommended that the sections on anti-discrimination, and offences and penalties, be strengthened, so that effective remedies are available whenever rights are violated. It is also recommended that the provision on the screening be carefully scrutinised. In order to aid implementation, it is recommended that all positive obligations be made time-bound. The Bill should be further bolstered by assimilating best practices on protection of transgender rights from international jurisdictions such as UK, Malta, Argentina and Norway. Most importantly, the process of redrafting must be in conjunction with extensive consultations with transgender persons including marginalized voices such as transmen and intersex persons.

INTRODUCTION

The Transgender Persons (Protection of Rights) Bill, 2016 suffers from various shortcomings that dilute its capacity to serve as a tool of empowerment for transgender persons. Many of the positions we present have already been voiced by various transgender groups and persons, both in relation to the present Bill, and previous versions. With our submission, we seek to reiterate these arguments in support, and to focus on other legal inadequacies of the Bill. Our comments include general recommendations (Part I), followed by a clause-by-clause critique of the existing provisions (Part II), as well as relevant Annexures.

I. GENERAL SUGGESTIONS FOR THE BILL

1. Consultations

For the present Bill to address the barriers to justice faced by transgender persons, consultation with them is indispensable. Further, consultations must not be limited to prominent voices within transgender communities, but must also account for less visible voices such as those of transmen, to ensure that certain gender identities and expressions are not privileged at the expense of others.

2. Inclusion of Intersex Persons

The Bill should address the concerns of intersex persons, and should hence be renamed the *Transgender and Intersex Persons (Protection of Rights) Bill, 2016*. Despite some overlap, the concerns of transgender persons and intersex persons continue to be different. Thus, intersex voices must be heard such that the Bill can be crafted to address their concerns.

3. Dilution of NALSA

The landmark judgement of ***NALSA vs. Union of India***¹ (*'NALSA'*) speaks of gender in relation to self-expression, equality and dignity, and locates these rights within the golden trinity of Article 19, Article 14, and Article 21 of the Constitution. The Court issued nine directions (para 129) which form the operative part of the judgement, and also directed that the recommendations of the Ministry of Social Justice and Empowerment Expert Committee Report (*'Expert Committee Report'*) be examined on the basis of the judgement and be implemented. However, the 2016 Bill deviates both from the word and spirit of *NALSA*. The lapses include the distortion of the term “transgender,” the complete absence of rights-language in its text, the absence of provisions on reservations, and the vague and broad duties it imposes on various actors.

4. Implementation Concerns

The Bill suffers from a complete lack of accountability mechanisms. There are no timelines for implementation, nor monitoring provisions such as requirements to submit reports, nor penalties for non-implementation, nor concrete provisions for judicial redressal and appeals against the Screening Committee. Further, Clause 9 lists welfare measures to be undertaken by the “appropriate government,” without clarifying the duties of different agencies. The unclear division of responsibilities between the Central and State Government(s) allows each to pass the responsibility to the other, causing delays in implementation and further diluting accountability. Vague language employed in various

¹ Writ Petition (Civil) No. 400 of 2012

clauses of the Bill, discussed in Part II, additionally reduces the accountability of actors. Given all these factors, the Bill as it stands, risks being toothless, and remaining merely on paper.

In contrast, other rights-based legislations such as the Rights of Persons with Disabilities Bill, 2014 (Chapter VIII) and the Mental Healthcare Bill, 2016 (Chapter VI) employ precise language, which allows for greater accountability of the government/appropriate authority. We thus recommend that:

- a) such drafting language be employed in clause 9; and
- b) all authorities have prescribed timelines against which their progress may be measured.

5. Self-Determination

NALSA recognises one's gender identity as being "integral to a person's personality and one of the most basic aspects of self-determination, dignity and freedom"², thus locating the **right in the golden trinity of Articles 14, 19, and 21 of the Constitution**. Direction two upholds the right to self-identified gender i.e. male, female or third gender (para 129). The 2016 Bill however envisages a screening process (Chapter III) thereby making this right conditional.

The following concerns have been raised by several transgender persons concerning the District Screening Committee:

- Persons should be able to determine their own gender identity, and such right should not be subject to the discretion of a Screening Committee, since it creates an unreasonable barrier to the exercise of one's fundamental right.
- A Screening Committee which comprises of medical officers implies that being transgender is a pathological condition. Further, despite sensitisation, medical officers and social welfare officials may not possess the necessary credentials and sensitivity to do justice to a process which is inherently fraught with a continuing history of harassment.

In addition, other issues that must be kept in mind include:

- Ideally, the certification process for transgender persons should not be more onerous or intrusive than it is for other disadvantaged groups similarly eligible for affirmative action, such as Scheduled Castes/Scheduled Tribes. The procedure to obtain a caste certificate, for instance, involves submission of the following documents for verification: attested application form, residence proof, birth

² NALSA v. Union of India Writ Petition (Civil) No. 400 of 2012 (Para 20)

certificate, a notarised affidavit specifying the father's identity, and caste certificates of family members.³ Transgender persons should be able to acquire a certificate by submitting comparably relevant documents to the appropriate authority, including a notarised affidavit which affirms their self-determined gender identity. Further, the insistence on a screening committee seems to mainly stem from an anxiety around people misusing the process, to gain access to benefits they are not entitled to. But certification as a transgender person, unlike caste certificates, would appear on every identity document possessed by the individual, such as their ration card, driver's license, passport, etc. It is unlikely that persons would submit false documents to publicly identify as transgender, merely to access affirmative action measures.

- Further, if the main rationale behind issuing a certificate of identity is to regulate access to government benefits, then it follows that holding such a certificate should not be mandatory to make a claim of discrimination, or to file a complaint against offences. Safeguard provisions should be added to prohibit medical, physical, or psychological exams to determine someone's trans identity during trials. Medical proof should not be required in any such determination. (**See comments on Clauses 3 and 19**).
- The requirement of a screening process runs counter to progressive international jurisprudence. For instance, Argentina's Gender Identity Law, 2012, which is upheld as a model law, recognises the right to self determination as absolute and does not require any screening process as a precondition to the exercise of such right. Other jurisdictions have also followed suit. (**See Annexure 1**).

However, as has been expressed by several transgender groups and persons, in the event that a Screening Committee is retained:

- the process for obtaining the certificate should be a mere formality;
- medical officers must be removed from the Screening Committee;
- a strict and reasonable timeline must be put in place for issuance of a certificate of identity;
- a strict code of guidelines must be introduced to ensure that the screening process does not become an arbitrary affair, nor a source of further harassment against transgender persons;
- the decisions of the Screening Committee must be recorded with reasons and made available to the applicant;
- the right to appeal the decision of the Screening Committee must be incorporated in the Bill itself.

³ See the application process for obtaining a caste certificate in Delhi:
<http://delhigovt.nic.in/newdelhi/dept/district/da3d.asp>

6. Rights-based Approach

While the *NALSA* judgement is couched in a ‘rights-based’ language, and the title of the Bill uses the word “Rights,” the Bill itself deviates from a rights-based approach and adopts a welfare-oriented approach. Adopting a rights-based approach is important because it accords an agency to rights holders, and automatically allows for greater access to justice since their denial amounts to a violation. Further, neglecting a rights-based approach deviates from recent rights-based legislations such as the Rights of Persons with Disabilities Bill, 2014 (Chapter II) and the Mental Healthcare Bill, 2016 (Chapter V). Earlier versions of the Bill i.e. The Rights of Transgender Persons Bill, 2014 (Chapter II) and The Rights of Transgender Persons Bill, 2015 (Chapter III) also incorporated a Chapter on the rights of transgender persons.

We thus recommend that:

- A Chapter on the Rights of Transgender Persons be incorporated into the Bill.
- In-depth consultations with transgender persons be carried out.
- A careful study of *NALSA*, the Expert Committee Report, and rights documents and legislations such as the Yogyakarta Principles, International Bill of Gender Rights, the Persons with Disabilities Bill, 2014, the Mental Healthcare Bill, 2016, and the 2014 and 2015 versions of the Rights of Transgender Persons Bill etc. be carried out.

7. Section 377

Further, the full realization of rights for transgender persons requires repealing section 377 of the Indian Penal Code. As is pointed out in both the 2014 Ondede Report on the Human Rights Violations against Transgenders in Karnataka,⁴ and the 2003 People’s Union of Civil Liberties report on Human Rights Violations against the Transgender Community,⁵ Section 377 is often used by the police to harass transgender persons, especially those engaged in sex work. Further, *NALSA* has acknowledged that section 377 is used as an “instrument of harassment and physical abuse against Hijras and transgender persons” (para 18).

⁴ See <http://orinam.net/content/wp-content/uploads/2015/08/FINAL-REPORT-ON-HUMAN-RIGHTS-VIOLATIONS-OF-TRANSGENDER-PERSONS.pdf>

⁵ See <http://www.pucl.org/Topics/Gender/2004/transgender.htm>

8. Other Laws

Certain laws, such as family laws (marriage, adoption, succession etc.), continue to recognise only male and female persons. Further, laws punishing sexual offences (ex. section 375 of the Indian Penal Code, 1860) continue to be gendered. These laws discriminate against transgender persons by preventing them from seeking relief against sexual violence, and from accessing several core societal institutions. The *NALSA* judgement has also acknowledged the need to make civil rights **meaningfully** accessible to transgender persons (para 113).

Exemplifying a progressive practice, other jurisdictions that recognise rights for all genders clarify the impact of a gender change on legal institutions that are inaccessible to transgender persons (***See Annexure 2***). Thus, we recommend that this Bill endeavours to do the same. Its objective should go beyond a formal equality framework, to a substantive equality framework.

9. Pronouns and Language

As many have reiterated,⁶ it is especially important that this Bill refrain from using gendered pronouns, which exclude many of the individuals the Bill aims to empower. When referring to themselves in English, transgender persons do not necessarily use the pronouns “he” or “his” or even “she” or “her;” many might prefer “they” or different words altogether. Since it is impossible to include an exhaustive list of possible pronouns each time a pronoun is used in the Bill, we recommend refraining from singular pronouns and repeating the noun “transgender individual(s)/person(s)” or “trans individual(s)/person(s)” wherever necessary. Further, the Bill should refrain from using phrases such as “a transgender,” where “transgender” is used as a noun by itself, and clause 13 (3) should be amended accordingly.

⁶ See <http://orinam.net/labia-response-msje-trans-rights-bill/>; <http://orinam.net/insaaf-delhi-nlu-response-msje-trans-rights-bill/>; <http://thewire.in/56299/failures-of-the-new-transgender-bill/>

II. CLAUSE-BY-CLAUSE CRITIQUE

Part II: Clause by Clause Critique of the Transgender Persons (Protection of Rights) Bill, 2016

Clause No.	Clause Text	Comment	Suggestions for Alternative Provisions
1	(1) This Act may be called the Transgender Persons (Protection of Rights) Act, 2016 ...	As expressed by various transgender and intersex persons, the Bill should address the concerns of intersex persons as well.	The Bill should be renamed the <i>Transgender and Intersex Persons (Protection of Rights) Bill, 2016</i> .
2(a)	In this Act, unless the context otherwise requires, — (a) "appropriate Government" mean ...	(-)	(-)
2(b)	"establishment" means ...	(-)	(-)
2(c)	"inclusive education" means a system of education wherein transgender students along with other students learn together and the system of teaching and learning is suitably	As laid down in UNESCO guidelines, "inclusive education" does not merely mean adapting systems for marginalized students, but changing the system for everyone--by including material on transgender rights in curricula, ensuring that all curricula is gender-sensitive, and other measures included in the Yogyakarta Principles. ⁷	The Bill should incorporate UNESCO guidelines on inclusive education, and Yogyakarta Principles on the Right to Education, since they outline specific measures to include students marginalized on the basis of their gender identity (Principle 16) (See Annexure 3 and comment on clause

⁷ UNESCO Guidelines for Inclusion: Ensuring Access to Education for All, 2005, Available at : <http://unesdoc.unesco.org/images/0014/001402/140224e.pdf>; UNESCO Policy Guidelines on Inclusion in Education, 2009, <http://unesdoc.unesco.org/images/0017/001778/177849e.pdf>.

	adapted to meet the learning needs of such students;		14).
2(d)	"institution" means ...	(-)	(-)
2(e)	"local authority" means ...	(-)	(-)
2(f)	"National Council" means ...	(-)	(-)
2(g)	"notification" means ...	(-)	(-)
2(h)	"prescribed" means ...	(-)	(-)
2(i)	<p>"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-</p>	<p>The existing definition is inadequate because:</p> <ol style="list-style-type: none"> 1. It does not conform with the definition prescribed by the Supreme Court in <i>NALSA</i>, the Expert Committee Report,⁸ or the Clarification Petition filed by the Government⁹ ('Clarification Petition'). • <i>NALSA</i> broadly defines "transgender" (para 11) as including persons who do not identify with the sex assigned to them at birth. (We note, though, that "gender" is a more accurate term than "sex" here.) • Further, the <i>NALSA</i> judgement (para 44, 46); Expert Committee Report (p. 6-9); and Clarification Petition (p. 	<ol style="list-style-type: none"> 1. "Transgender person" should be re-defined, for reasons explained in the left column. 2. The definition of transgender in The rights of Transgender Persons, 2015 may be considered: <i>"'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</i>

⁸ See, <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>

⁹ See, http://orinam.net/content/wp-content/uploads/2014/09/NALSA_UOI.pdf.

	<p>men and trans-women, persons with intersex variations and gender-queers.</p>	<p>14-17) all define transgender inclusively, as accommodating transmen and transwomen independent of medical procedure; and socio-cultural identities such as jogappas, hijras, kinnars, kothis, aravanis, and shiv-shakthis etc. While previous versions of the Bill made this explicit, the current Bill does not.</p> <p>2. It appears that the present definition of “transgender” has been borrowed from the Australian Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, particularly subsection 4(1) which defines intersex as:</p> <p>“intersex status means the status of having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male; or (b) a combination of female and male; or (c) neither female nor male.”</p> <p>Regardless of where this definition originated, there are <i>fundamental</i> issues with it, since it conflates intersex and transgender persons, even though “intersex” and “transgender” are not the</p>	<p><i>and a number of socio-cultural identities such as — kinnars, hijras, aravanis, jogtas etc.</i></p> <p><i>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”</i></p> <p>3. However, wide-ranging consultations with transgender individuals must be mandatorily carried out before adopting a definition. The <i>NALSA</i> judgement, Expert Committee Report, and Clarification Petition should be consulted.</p> <p>4. The definition must expressly provide that medical intervention or procedure (such as Sex Reassignment Surgery (‘SRS’), hormone therapy, psychiatric analysis etc.) is not a mandatory precondition for identifying as a transgender person. This is in line with the Supreme Court’s declaration in <i>NALSA</i> (Direction 5, para 129).</p>
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		<p>same in any jurisprudence.</p> <p>Various public documents and submissions to the Ministry have explained the difference between these terms, including the Expert Committee Report (p. 7-8).¹⁰ These should be consulted, since it would be impossible and repetitive to fully explain the difference between the terms here.</p> <p>By conflating these definitions, the Bill completely misunderstands trans identities and severely restricts the constitutionally guaranteed right of transgender persons to self-identify, which <i>NALSA</i> upheld. Even a transgender person who identifies as a woman, for instance, would be seen under this Bill as a combination of male or female, or as neither of the two. The law would thus completely fail to recognise her self-perceived identity as ‘female’.</p>	<p>5. Consultations should also be carried out with intersex persons to determine how to address their specific concerns in this Bill.</p>
3	No person shall discriminate against a transgender person on any of the following grounds, namely:—	<p>1. Definition of discrimination</p> <p>This clause prohibits discrimination against transgender persons in the listed contexts. However, the prohibited act i.e. discrimination has not been defined.</p>	<p>The following amendments are recommended to the clause:</p> <p>In clause 2, the following sub-clause <u>may be</u> added: <i>“discrimination” means any act, omission,</i></p>

¹⁰ See, <http://orinam.net/insaaf-delhi-nlu-response-msje-trans-rights-bill/>
<http://orinam.net/content/wp-content/uploads/2016/01/TG-Bill-Queer-Campus.pdf>.

<p>(a) the denial, or discontinuation of, or unfair treatment in, educational establishments and services thereof;</p> <p>(b) the unfair treatment in, or in relation to, employment or occupation;</p> <p>(c) the denial of, or termination from, employment or occupation;</p> <p>(d) the denial or discontinuation of, or unfair treatment in, healthcare services;</p> <p>(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general</p>	<p>Prohibiting an act necessarily requires defining the act, and the burdens that prohibition imposes. Leaving the term undefined would make it very difficult for affected persons to bring and enforce a claim of discrimination before a court of law.</p> <p>2. Extending the application of prohibited acts to public 'establishments'</p> <p>Clause 3 of the Bill prohibits acts of discrimination by 'persons'. Read with section 3 of the General Clauses Act, 1897, the term 'person' would include natural persons and private establishments i.e. companies, associations and bodies of individuals (whether incorporated or not). However, <u>public establishments</u> are excluded from the purview of this provision. Discrimination on the grounds listed in the provision may be faced not just from private individuals and establishments, but also from the State itself. It is thus important to extend the scope of the provision to apply not just to 'persons' but to all establishments (public and private) as defined in clause</p>	<p><i>policy, criterion or practice which directly or indirectly, expressly or by effect, immediately or over a period of time:</i></p> <p><i>(i) Imposes any burden, obligation, liability, disability or disadvantage; or</i></p> <p><i>(ii) Denies or withholds any benefits, opportunity or advantage from any person or category of persons</i></p> <p><i>Related to the gender identity of a transgender person.</i></p> <p><i>Explanation: For the purposes of this section, grounds of gender identity include being a self-identified transgender person who does not possess a certificate of identity.</i></p> <p>The above provisions have been adapted from the HIV/Aids Bill, 2014, and international best practices (for instance, the UK Equality Act, 2010 and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 of South Africa).</p> <p>.</p> <p>Further, holding a certificate of identity should not be mandatory to make a claim of discrimination. In keeping with</p>
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	<p>public or customarily available to the public;</p> <p>(f) the denial, or, discontinuation of, unfair treatment with regard to the right of movement;</p> <p>(g) the denial or discontinuation of, or unfair treatment with regard to the right to reside, purchase, rent, or otherwise occupy any property;</p> <p>(h) the denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office;</p> <p>(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a transgender person may be.</p>	<p>2(b) of the Bill. This would also require harmonising clause 3 with clause 10 (non-discrimination in employment) since both provisions currently apply to private establishments but impose inconsistent obligations.</p> <p>3. Ensuring the application of the clause to non-certified transgender persons and family members etc. of transgender persons:</p> <p>The anti-discrimination provisions in the Bill currently apply only to transgender persons. However, not all persons to whom the Bill is intended to apply might possess a certificate of identity. This is especially important in the context of educational institutions, where children may be discriminated against on the basis of perceived gender identity rather than on the grounds of their status as a transgender person. Further, children, other family members, friends etc. of transgender persons are also subjected to discriminatory behaviour. The section should thus be extended to apply to non-certified transgender persons, and to family members, friends etc. of</p>	<p>NALSA, appropriate safeguards should be framed for transgender persons during trials: a provision should be inserted which prohibits the carrying out of any physical/medical/psychological examination to determine whether a person is a transgender person or not. The adducing of medical proof should not be mandatory.</p> <p>In Clause 3, the word ‘or establishment’ should be added after the words “No person”.</p> <p>See Annexure 4 for the non-exhaustive elements of discrimination that are recognised in previous versions of the Bill, other domestic legislation, international documents and other jurisdictions.</p> <p>Further, see Annexure 5 for the relevant provisions under the Anti-Discrimination Act, 1977 of New South Wales that outline the elements of discriminatory behaviour against transgender persons in the context of</p>
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		<p>transgender persons. Precedent for this may be found in the HIV/AIDS Bill, 2014, which extends the anti-discrimination provisions not just to persons who are HIV-positive but also to anyone who is currently or has in the past 'ordinarily lived, resided or cohabited' with a person who is HIV-positive (clause 2(d)).</p> <p>Further, <u>we strongly recommend</u> that the that the definition of discrimination contained in the Draft Equality Bill, 2016 be consulted to craft as inclusive a definition as possible. (See Annexure 6)</p>	<p>employment, education, access to education, access to public spaces, provision of goods and services and accommodation.</p> <p>We strongly recommend that the definition of discrimination contained in the Draft Equality Bill, 2016 be consulted to craft as inclusive a definition as possible. (See Annexure 6)</p>
4	<p>Recognition of identity of transgender persons:</p> <p>(1) A transgender person shall have a right to be recognised as such, in accordance with the provisions of this Act.</p> <p>(2) A person recognised as transgender under sub-section (1) shall have a right to self- perceived gender identity</p>	<p><i>NALSA</i> recognises that gender identity lies at the core of one's personal identity, and gender expression and presentation are protected under Article 19(1)(a) of the Constitution. (para 66).</p> <p>It is thus important for the Bill to expressly define the terms gender identity and gender expression since the right to self determination has been recognised as a fundamental right by <i>NALSA</i>.</p> <p>Further, Direction two contained in the</p>	<p>The internationally endorsed Yogyakarta Principles, which have been recognised as applicable in India in the <i>NALSA</i> judgement (para 53) provides the definition of the key term 'gender identity'. The Gender Identity, Gender Expression and Sex Characteristics Act, 2015 of Malta has borrowed its definition from these principles. Based on Malta's law, one potential definition is as follows:</p> <p><i>""gender expression" refers to each</i></p>

		operational part of the judgement upholds the right to self-identified gender i.e. male, female or third gender in absolute terms (para 129) and subjecting it to the provisions of this Chapter has the effect of diluting such right.	<p><i>person's manifestation of their gender identity, and/or the one that is perceived by others;</i></p> <p><i>"gender identity"</i> <i>refers to each person's internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and/or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms"</i></p> <p>Such key definitions, of course, should only be adopted after widespread consultations of the kind suggested in Part I.</p>
5	<p>Application for certificate of identity:</p> <p>A transgender person may make an application to the District Magistrate for issuing a certificate of identity as a transgender person, in such form and manner, and</p>	See comments on clause 6.	See comments on clause 6.

	<p>accompanied with such documents, as may be prescribed:</p> <p>Provided that in the case of a minor child, such application shall be made by a parent or guardian of such child.</p>		
6	<p>District Screening Committee:</p> <p>(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.</p> <p>(2) The District Screening Committee referred to in sub-section (1) shall comprise—</p> <p>(a) the Chief Medical</p>	<p>As expressed in Point 5, Part I, subjecting the right to self determination to screening gives rise to the following concerns:</p> <ol style="list-style-type: none"> 1. Dilution of the right to self-identified gender identity which has been recognised in absolute terms in the operational part of <i>NALSA</i>. (Direction 2, para 129). 2. Pathologisation of the transgender identity. 3. Possibility of harassment of applicants during screening process. 4. Arbitrariness in screening process based on bias of the majority on the Committee. 5. Process being more intrusive than for other disadvantaged communities such as SC/ST. 6. Going against progressive 	<p>We recommend a careful scrutiny of this clause while keeping in mind the concerns pointed out in Point 5, Part I and summarised in the left column.</p> <p>However, if screening is retained the clause be re-crafted keeping the following in mind:</p> <ol style="list-style-type: none"> 1. The process for obtaining the certificate should be a mere formality; 2. Medical officers must be removed from the Screening Committee; 3. A strict and reasonable timeline must be put in place for issuance of a certificate of identity; 4. A strict code of guidelines must be introduced to ensure that the screening process does not

	<p>Officer;</p> <p>(b) District Social Welfare Officer;</p> <p>(c) a Psychologist or Psychiatrist;</p> <p>(d) a representative of transgender community; and</p> <p>(e) an officer of the appropriate Government to be nominated by that Government</p>	<p>international jurisprudence.</p> <p>Further, the underlying rationale of screening being the misuse by persons who are not transgender to gain access to benefits does not stand since unlike caste certificates, gender appears on every identity document. Thus, it is unlikely that persons would submit false documents to publicly identify as transgender, merely to access affirmative action measures.</p>	<p>become an arbitrary affair, nor a source of further harassment against transgender persons;</p> <p>5. The decisions of the Screening Committee must be recorded with reasons and made available to the applicant;</p> <p>6. The right to appeal the decision of the Screening Committee must be incorporated in the Bill itself.</p>
7	<p>Issue of Certificate of Identity:</p> <p>1) The District Magistrate shall issue to the applicant under section 5 a certificate of identity as transgender person on the basis of the recommendations made by the District Screening Committee in such form and manner, within such time, as may be prescribed, indicating the gender of such person as transgender.</p>	<p>See comments on clause 6.</p>	<p>See comments on clause 6.</p>

	<p>(2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (1).</p> <p>(3) A certificate issued to a person under sub-section (1) shall confer rights and be a proof of recognition of his identity as a transgender person.</p>		
8	<p>Change in gender:</p> <p>(1) After the issue of a certificate under sub-section (1) of section 7, if there is any change in the gender of a transgender person, he shall make an application to the District Magistrate for revised certificate.</p> <p>(2) The District Magistrate shall, on receipt of an application under sub-section (1),</p>	See comments on clause 6.	<p>The <i>NALSA</i> judgement has made it clear that the right to self-determination is independent of medical intervention or SRS (Direction 5, para 129).</p> <p>We suggest that, in the event a screening process is retained, the following clause be added after clause 8:</p> <p><i>“Demand of certain information for purpose of certification prohibited: The District Screening Committee shall not require an applicant to furnish proof of: a. Gender affirming surgery</i></p>

	<p>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.</p> <p>(3) The person who has been issued revised certificate shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:</p> <p>Provided that such change in gender and the issue of revised certificate under subsection (1) shall not affect the rights and entitlements of such person under this Act.</p>		<p><i>b. hormonal replacement therapy, or</i> <i>c. any other psychiatric, psychological or medical treatment</i> <i>as a condition for grant of a certificate."</i></p> <p>We further recommend that "first name" in clause 8(3) be substituted by "name."</p>
9	(1) The appropriate Government shall take	1. The NALSA judgment directs the Central and State governments to	The following factors should be kept in mind while drafting the provision:

<p>steps to secure full and effective participation of transgender persons and their inclusion in society.</p> <p>(2) The appropriate Government shall take such measures as may be necessary to protect the rights and interests of the transgender person, and facilitate their access to welfare schemes framed by that Government.</p> <p>(3) The appropriate Government shall formulate welfare schemes and programmes which are transgender sensitive, non-stigmatising and non-discriminatory.</p> <p>(4) The appropriate Government shall take steps for the rescue, protection and rehabilitation of</p>	<p>treat transgender persons as a socially and educationally backward class of citizens and extend reservations in educational institutions and public appointments to them (Direction 3, para 129). No provision for any kind of reservation has been made in the Bill.</p> <p>2. As mentioned in Part I, there is a lack of clarity in the division of responsibilities between the Central and State Governments, as well as other authorities where relevant. This can lead to administrative delays, confusion, and added regulatory costs, apart from impeding the effective implementation of this provision.</p> <p>3. The <i>NALSA</i> judgement has directed that the Expert Committee's recommendations be examined on the basis of the judgement and thereafter implemented (para 130). However, this chapter has not done justice to this direction since it is worded in vague and broad language and does not impose any</p>	<p>1. The areas of welfare in which schemes have to be formulated/extended must be mentioned in a non-exhaustive list in the Bill itself. These should include education, health, employment, insurance, pension, food security and sanitation. A reference to other rights-based legislations (Chapter VI of the Mental Healthcare Bill, 2016 and Chapter VIII of the Rights of Persons with Disabilities Bill, 2014) which have clear and exact responsibilities marked out may be helpful.</p> <p>2. A provision on reservations for transgender persons in educational institutions and public appointments must be introduced.</p> <p>3. As mentioned in Part I, the responsibilities of the Central and State Governments must be clearly demarcated to ensure that administrative delays are avoided.</p>
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	<p>transgender persons to address the needs of such person.</p> <p>(5) The appropriate Government shall take appropriate measures to promote and protect the right of transgender persons to participate in cultural and recreational activities.</p>	<p>tangible obligation on the government. Relevant recommendations of the Expert Committee are provided below:</p> <ul style="list-style-type: none"> • The Expert Committee Report has identified some welfare schemes/programmes which can be effectively used to benefit transgender persons. <ul style="list-style-type: none"> o These include: MNREGA, National Rural Livelihoods Mission, National Social Assistance Programme, Rashtriya Swasthaya Bima Yojana etc. (page 38-40) o The Expert Committee has also identified schemes specific to education such as Sarva Shiksha Abhiyan (SSA), Rashtriya Madhyamik Shiksha Abhiyan (RMSA), Jan Shikshan Sansthan (JSS). (page 53) • The Expert Committee has further suggested that the Ministry of Social Justice and Empowerment set up an umbrella scheme for transgender persons, for the purpose of making 	<ol style="list-style-type: none"> 4. There should be an express provision directing that application forms or any other documentation required for access to welfare schemes should provide an option for 'transgender,' in line with the Allahabad High Court judgment. While this provision should be in keeping with the principles behind the Allahabad HC judgement, it should not use 'other' for transgender persons, as several transgender groups and organizations have reiterated. 5. There should be a separate provision directing governments to adopt measures on generating awareness about the concerns of transgender persons, and sensitisation of relevant stakeholders. 6. As mentioned in Part I, timelines must be prescribed for the formulation of schemes/policies/measures so
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		<p>direct targeted interventions. (page 86)</p> <ul style="list-style-type: none"> • Further, the Expert Committee suggested measures for awareness generation and sensitisation of different stakeholders, such as teachers, caregivers and others (page 91-99). <p>4. In April 2015, the Allahabad High Court in <i>Ashish Kumar Misra vs. Bharat Sarkar</i>¹¹ upheld the right of transgender persons to access food security under the National Food Security Act, 2013, and to avail the status of the head of household. This was based on the interpretation that the term 'other' in 'male/female/other' used in application forms for getting ration cards, would necessarily include transgender persons. This Bill does not make any provision to ensure that transgender persons can similarly access other welfare measures. Such a provision could be a way of making welfare schemes</p>	<p>that accountability can be ensured.</p>
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¹¹ Misc. Bench No. - 2993 of 2015

		'transgender sensitive' as mandated in section 9(3).	
10	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.	As stated in the comment on clause 3, the list of prohibited grounds of discrimination in that clause ought to be extended to public establishments. The scope of recognised discrimination by establishments should not be limited to discrimination in employment.	
11	Every establishment shall ensure compliance with the provisions of this Act and provide such facilities to the transgender person as may be prescribed.	In addition to complying with the Bill and providing adequate facilities, establishments should also be obligated a safe working environment to transgender persons who are employed by them.	The clause ought to be replaced by the following: <i>"Every establishment shall ensure compliance with the provisions of this Act, provide a safe working environment and such facilities to the transgender person as may be prescribed."</i>
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.	1. Need to set up the institutional grievance redressal mechanism properly The Bill currently does not specify the exact functions of the complaint officer or vest the authority with any powers. To ensure the effective implementation of the Act, it is important to specify what kinds of complaints the complaint officer can look into, what kinds of orders it can	

		<p>pass and remedies it can provide. For this, reference may be made to the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (Sections 11-13).</p> <p>2. Need to account for establishments with less than a hundred employees:</p> <p>Restricting the obligation to set up grievance redressal mechanisms at the institutional level to establishments with more than a hundred employees might potentially leave transgender persons exposed to harassment and discrimination with no recourse except in the courts. Since the designation of one complaint officer in an institution is not an onerous or resource-intensive measure, this requirement should ideally be extended to all establishments under the Act. However, these institutions should only be set up after due consultation with transgender persons.</p>	
13(1)	No transgender person shall be separated from parents or immediate	From how it is worded, this clause seems to protect transgender persons from being separated from family on the grounds of	It is recommended that this clause be deleted.

	family on the ground of being a transgender, except on an order of a competent court, in the interest of such person.	their gender identity, unless so ordered by a court. However, this provision does not take into account the agency of the transgender person. It might thus serve as a potential tool for the harassment of transgender communities. If transgender persons decide to leave their family and live in a community, families may invoke this provision and seek prosecution on the grounds of 'separating' the transgender person from the family.	
13(2)	Every transgender person shall have— (a) a right to reside in the household where parent or immediate family members reside; ...	(-)	(-)
13(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 rehabilitation centre.	This clause provides for transgender persons to be placed in 'rehabilitation centres'. But it is not clear what the nature of these 'rehabilitation centres' is, or what the rehabilitation of transgender persons would entail. The Bill should further specify in what situations an adult transgender person would be unable to look after themselves and need to be placed in a rehabilitation centre instead. Any incapacity requiring rehabilitation must be	

		<p>specifically listed out in the Bill.</p> <p>This provision should also be harmonised with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 ('JJ Act') with respect to a "child in need of care and protection" (See sections 2(14), 8(g), 8(l), 31, 40 and 74 of the JJ Act) so that gender non-conforming children or children who are perceived to be gender non-conforming in addition to adults may claim the protection and benefits available to them under that Act.</p>	
14	<p>Obligation of educational institutions to provide inclusive education to transgender persons:</p> <p>All educational institutions funded or recognised by the appropriate Government shall provide inclusive education and opportunities for sports, recreation and leisure activities without discrimination on an</p>	<ol style="list-style-type: none"> 1. The intention of this provision is to impose positive obligations on educational institutions. However, it is worded in vague and broad language, without imposing any tangible obligation on the educational institutions. 2. Additionally, it does not encompass the provisions on inclusive education reflected in the earlier drafts: <ul style="list-style-type: none"> • Both the 2014 Private Member's Bill (clause 13) and the 2015 Bill (clause 15) provided for express obligations 	<p>The following factors should be kept in mind while drafting an alternative provision:</p> <ol style="list-style-type: none"> 1. Positive obligations should be drafted in express and clear terms such that accountability of actors is ensured. 2. Clauses 15 and 16 of The Rights of Transgender Persons Bill, 2015 regarding the duty of educational institutions should be retained in their entirety. 3. Obligations should be imposed on private educational

	<p>equal basis with others.</p>	<p>on educational institutions run or aided by the government. These included admission without discrimination, monitoring participation, providing reasonable accommodation and providing necessary support for maximising academic development.</p> <ul style="list-style-type: none"> • They also provide an obligation on the government to provide adult education to transgender persons. (clauses 14 and 16 respectively) • The 2015 Bill further provides for anti-discrimination cells to be set up at all educational institutions/universities. (clause 15(vi)) <p>3. The Right to Education Act, 2009 mandates private schools to grant non-discriminatory access to and provide free and compulsory education for children belonging to economically weaker sections and disadvantaged groups, including children with disabilities (up to a minimum proportion of available seats in the school). This Bill does not lay down any</p>	<p>institutions in line with the provisions of the Right to Education Act 2009.</p> <p>4. The Yogyakarta Principles on the ‘right to education’ may be used to inform additional measures that may be undertaken by the government. These principles include: equal access to education, equal treatment of students, staff and teachers within the educational system, tailored, student specific education, education directed towards the development of respect for human rights, development of education methods, curricula and resources to enhance understanding of and respect for diverse sexual orientations and gender identities, provision of adequate protection from social exclusion and violence within the school environment, including bullying and harassment. (Principle 16). (See Annexure 3).</p>
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		obligations for <i>private</i> educational institutions with respect to transgender persons.	5. Clause 17 of the HIV-AIDS Bill contains specific obligations on the government for the formulation of educational and communication programmes which are ' <i>age-appropriate, gender-sensitive, non-stigmatising and non-discriminatory.</i> ' A similar provision in the context of transgender persons could be adopted here.
15	Vocational Training and Self Employment: The appropriate Government shall formulate welfare schemes and programmes to facilitate and support livelihood for transgender persons including their vocational training and self-employment	<ol style="list-style-type: none"> 1. The Expert Committee Report suggests measures for convergence with existing schemes on employment, particularly those which are centrally sponsored. It also suggests that opportunities for information and counselling and providing career guidance need to be created. Further, a supportive work environment should be created by sensitising relevant stakeholders. (page 55) 2. The Bill does not incorporate these measures and does not address employment concerns beyond 	<p>The following factors should be kept in mind while drafting the provision:</p> <ol style="list-style-type: none"> 1. The concerns of transgender persons in all situations of employment, and not just vocational training and self-employment, should be addressed. Further, the kinds of vocational training and self-employment provided should be based on due consultations with transgender persons, to ensure they respond effectively to their needs and desires.

		vocational training and self-employment.	<p>2. The government should be directed to undertake specific measures such as counselling, career guidance and sensitising employers regarding concerns of transgender persons, as suggested in the Expert Committee Report. (page 76-77)</p> <p>3. In terms of livelihood, the Bill should provide for: pension, equal pay etc. Reference can be made to the UK Sex Discrimination (Gender Reassignment) Regulations, 1999¹², which has detailed provisions on discrimination in relation to pay, discrimination on the grounds of gender reassignment, discrimination in vocational training. (section 2A, Sex Discrimination Act,</p>
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¹² The Sex Discrimination (Gender Reassignment) Regulations 1999 were revoked in October 2010. However, the regulations can still be relied on where the discriminatory act complained of (such as a case of discrimination because of gender reassignment) occurred wholly before 1 October 2010. These Regulations, which are made under section 2(2) of the European Communities Act 1972, **extend the Sex Discrimination Act 1975 (“the 1975 Act”) to cover discrimination on grounds of gender reassignment in employment and vocational training**, following the judgement of the European Court of Justice in Case No. C-13/94 **P v S and Cornwall County Council**.

			1975).
16	<p>Health Care facilities:</p> <p>The appropriate Government shall take the following measures in relation to the transgender persons, namely: —</p> <p>(a) a separate human immunodeficiency virus Sero-surveillance Centres;</p> <p>(b) to provide for medical care facility including sex reassignment surgery and hormonal therapy;</p> <p>(c) pre and post sex reassignment surgery and hormonal therapy counselling;</p> <p>(d) bring out a Health Manual related to sex reassignment surgery in accordance with the World Professional Association</p>	<p>1. The Expert Committee Report has recommended several measures which have not been explicitly incorporated in the Bill. These include:</p> <ul style="list-style-type: none"> • Developing trans-friendly hospital policies/guidelines. (page 76) • Developing non-discriminatory policies so that transgender persons can have barrier free access to healthcare. (page 76) • Funding research for promoting transgender health. (page 77) <p>2. Under clause 16(c), counselling is limited only to sex reassignment surgery, and hormonal therapy; there is no provision for psychological counselling or counselling related to mental health. Reference can be made to Section 15 of Malta's Gender Identity, Gender Expression and Sex Characteristic Act, 2015 which extends counselling to all persons seeking psychosocial counselling, not just for SRS and hormonal</p>	<p>The following factors should be kept in mind while drafting the provision:</p> <ol style="list-style-type: none"> 1. The measures recommended by the Expert Committee must be studied and feasible recommendations must be incorporated in express terms. 2. Measures on counselling, review of medical curriculum and insurance coverage must explicitly incorporate mental health concerns of transgender persons. 3. Setting up an expert committee to upgrade existing medical protocol to bring it in line with international best practices and human rights standards should be considered. Reference can be made to Section 16 of Malta's Gender Identity, Gender Expression and Sex Characteristics Act, 2015 (See Annexure 8).

	<p>for Transgender Health guidelines;</p> <p>(e) review of medical curriculum and research for doctors to address their specific health issues;</p> <p>(f) to facilitate access to the transgender persons in the hospitals and other healthcare institutions and centres;</p> <p>(g) provision for coverage of medical expenses by a comprehensive insurance scheme for transgender persons.</p>	<p>therapy (See Annexure 7).</p> <p>3. Clause 16 (g) does not make it clear if the comprehensive insurance scheme is simply for SRS and hormonal therapy, or for any health issues.</p>	
17	<p>National Council for Transgenders:</p> <p>(1) The Central Government shall by notification constitute a National Council for Transgender Persons to exercise the powers conferred on, and to perform the functions</p>	<p>1. The Council envisaged in the Bill houses about thirty members, including high-level officials such as Secretaries and Joint Secretaries. Such a composition may not be practically feasible, or allow for the Council's effective functioning, since the officials on the Council by virtue of their designations are already vested with a plethora of</p>	<p>While drafting an alternative provision the following factors should be kept in mind:</p> <p>1. The number of members must be reduced while ensuring sufficient and majority representation of transgender persons. A reference to the composition of the National Commission for Transgender</p>

<p>assigned to it, under this Act.</p> <p>(2) The Council shall consist of—</p> <p>(a) the Union Minister in-charge of the Ministry of Social Justice and Empowerment, Chairperson, ex officio;</p> <p>(b) the Minister of State, in-charge of the Ministry of Social Justice and Empowerment in the Government, Vice-Chairperson, ex officio;</p> <p>(c) Secretary to the Government of India in-charge of the Ministry of Social Justice and Empowerment, Member, ex officio;</p> <p>(d) one representative each from the Ministries of Health and Family Welfare, Home Affairs, Housing, Urban and Poverty Alleviation, Development, Human</p>	<p>responsibilities, thereby preventing them from dedicating the time and attention required to carry out the functions the Council is vested with.</p> <p>2. A timeline should be established for the constitution of the National Council such that there is no delay in setting up the body. Reference can be made to clause 33 of the Mental Health Care Bill, which provides for a time period of nine months for setting up the Central Mental Health Authority.</p>	<p>Persons (clause 26) under The Rights of Transgender Persons Bill, 2014, the National Commission for Women (section 3) under the National Commission for Women Act, 1990 and the National Commission for Minorities (section 3) under the National Commission for Minorities Act, 1992 may prove useful in this regard.</p> <p>2. Since the transgender community is not a monolith, and the concerns of different identities (transmen, transwomen, intersex persons who identify as transgender persons, socio-cultural identities such as kinnars, jogatas etc.) vary, plurality of representation, even amongst community members must be ensured to allow as many voices as possible to be heard.</p> <p>3. Appointments must be made keeping in mind that the</p>
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	<p>Resources Development, Rural Development, Labour and Employment and Departments of Legal Affairs, Pensions and Pensioners Welfare and NITI Ayog, not below the rank of Joint Secretaries to Government of India, Members, ex officio;</p> <p>(e) one representative each from the National Human Rights Commission and National Commission for Women, not below the rank of Joint Secretaries of Government of India, Members, ex officio;</p> <p>(f) representatives of the State Governments and Union territories by rotation, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members,</p>		<p>members have the necessary expertise, and are in a position to dedicate adequate time and attention to their functions, so that the Council is not reduced to an intermittently functioning body.</p>
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<p>ex officio;</p> <p>(g) five representatives of transgender community, by rotation, from the State Governments and Union territories, one each from the North, South, East, West and North-East regions, to be nominated by the Central Government, Members;</p> <p>(h) five experts, to represent non-governmental organisations or associations, working for the welfare of transgender persons, to be nominated by the Central Government, Members;</p> <p>(i) Joint Secretary to the Government of India in the Ministry of Social Justice and Empowerment dealing with the welfare of the</p>		
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	transgender persons, Member Secretary, ex officio. (3) A Member of National Council, other than ex officio member, shall hold office for a term of three years from the date of his nomination.		
18	<p>Functions: The National Council shall perform the following functions, namely: —</p> <p>(a) to advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to transgender persons;</p> <p>(b) to monitor and evaluate the impact of policies and programmes</p>	<ol style="list-style-type: none"> 1. The functions vested in the National Council are limited and vague. To ensure that the intent of the <i>NALSA</i> judgement is realised, it is important to vest the Council will more specific and elaborate powers and functions. 2. A reference to the powers and functions of similarly situated bodies such as the National Commission for Persons with Disabilities¹³, National Commission for Women ¹⁴, and National Commission for Minorities¹⁵ demonstrates that these 	<p>We recommend retaining the provisions contained in Chapter VII (National and State Commissions for Transgender Persons) of The Rights of Transgender Persons Bill, 2014.</p> <p>Further, while drafting a provision for an enforcement body we recommend the following:</p> <ol style="list-style-type: none"> 1. Reference be made to Chapter X (Appointment of Ombudsman) of the HIV-AIDS Bill, 2014 which provides for appointment and powers of the enforcing body under the Act. (See Annexure 9)

¹³ Section 73 of the Persons with Disabilities Bill, 2015.

¹⁴ Section 10 of the National Commission for Women Act, 1990.

¹⁵ Section 9 of the National Commission for Minorities Act, 1992.

	<p>designed for achieving equality and full participation of transgender persons;</p> <p>(c) to review and coordinate the activities of all the Departments of Government and other Governmental and non-Governmental Organisations which are dealing with matters relating to transgender persons;</p> <p>(d) to perform such other functions as may be prescribed by the Central Government</p>	<p>bodies are vested with far more powers, and elaborately defined functions than the National Council under the Bill.</p> <p>3. In addition to vesting the Council with policy and administrative tasks, it is necessary to empower them to carry out fact-finding as well as to initiate inquires (suo moto and upon receipt of complaints) with respect to deprivation of rights of transgender persons_____and safeguards available to them, and take up the matter with the appropriate authorities for corrective action to ensure effective implementation of the Act. The bodies cited above are all vested with similar powers.</p> <p>4. <u>The need for an an enforcement mechanism:</u> While the National Council is vested primarily with policy-making functions, <u>it is important to incorporate a Chapter on enforcement.</u> The absence of an enforcement mechanism implies that any contravention of the provisions of</p>	<p>2. Enforcement bodies must be set up at the State level by the State Government. Multiple bodies can be set up if deemed necessary.</p> <p>3. To ensure effective enforcement we recommend that such body should be vested with the powers to:</p> <ul style="list-style-type: none"> • Suo moto or upon complaint carry out an inquiry into violations of the provision of the Act and furnish information for such inquiry. • Carry out a hearing, and pass orders as it deems fit (which must include the power to impose monetary penalties as well as issue remedial orders). • Direct civil authorities in the area where it has jurisdiction to assist in the execution of her order • Act as an intermediary between transgender persons and the police by forwarding criminal complaints from them to the police.
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		<p>the law would require the aggrieved party to invoke the writ jurisdiction of the High Court. Given that access to formal institutions such as courts poses particular difficulties for transgender persons, it is important to provide for an accessible enforcement mechanism within the present Bill.</p> <p>5. Further, we are of the opinion that apart from having the power to issue appropriate orders for contravention of the provisions of the Act, such an enforcement body should also act as an intermediary between transgender persons, and the police in case of criminal complaints. Approaching the police is a challenge for transgender persons since they are further victimised in police stations. Thus, having an intermediary body which forwards criminal complaints to the police can make access to justice easier.</p>	<p>4. Further to allow for enforcement of the orders of such body, non-compliance must attract penalties which should serve as a strong deterrent. The mechanism for enforcing the orders of such body must be made express in the Bill.</p>
19	Offences and Penalties: Whoever, — (a) compels or entices a	<p>1. A person has a right to be recognised as a transgender person only in accordance with the provisions of</p>	<p>We recommend:</p> <p>1. Consultations be carried out to ensure that the various forms of</p>

<p>transgender person to indulge in the act of begging or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government;</p> <p>(b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;</p> <p>(c) forces or causes a transgender person to leave household, village or other place of residence;</p> <p>(d) harms or injures or endangers the life, safety, health, or well-being, whether mental or physical, of a transgender person or</p>	<p>the Act. This is further made clear by clause 4(2) which states that “a person recognised as transgender under sub-section (1) shall have a right to self perceived gender identity.”. These provisions convey the meaning that in the absence of such a certificate a person will not be recognised as a transgender person. Inevitably, in any prosecution under Chapter VIII, the identity of the complainant/informant as a transgender person will be a fact in issue. This would mean that in the absence of a certificate under the Act, the trial would most likely fail.</p> <p>2. On account of lack of economic opportunities begging has become an activity that certain transgender communities engage in as a means of livelihood. At present, anti-vagrancy laws are often misused by the police to harass transgender persons who are visible in public places. Such a provision not only criminalises the trans-identity but also legitimises the harassment of transgender</p>	<p>direct/indirect violence that transgender persons face be captured in this provision.</p> <p>2. The following offences must be incorporated:</p> <p>a. Intentional breach of confidentiality of transgender persons.</p> <p>b. Transgender persons are often subjected to cruel and inhumane “medical processes” to correct their “gender dysphoria.” An illustration of this is electrotherapy (page 49 of Expert Committee Report). The Bill must recognise harmful and forced medical practices based on gender identity and gender expression as an offence. (Principle 18(a), Yogyakarta Principle 18)(Annexure 10).</p> <p>c. In case of inter-sex persons, medical procedures to impose a gender identity on inter-sex children without their full, free and informed consent must be</p>
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	<p>tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;</p> <p>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>communities who engage in begging on account of economic and social compulsion. We recommend that “the act of begging or other similar forms of” be deleted from section 19(1)(a).</p> <p>3. Section 19(d) has been borrowed from Section 3(a) of the Protection of Women from Domestic Violence Act (‘PWDVA’), 2005. Further, the definitions of the terms “physical abuse”, “sexual abuse”, “verbal and emotional abuse” have been defined specifically in the context of the PWDVA. We recommend that this provision be drafted afresh keeping in mind the type and forms of violence faced by transgender persons.</p> <p>4. The clubbing of varied offences into one single provision and providing for the same penalty must be avoided. Further, the penalty envisaged for heinous offences is disproportionately low. We recommend that separate provisions be created for separate</p>	<p>made an offence. (Principle 18(b), Yogyakarta Principles) (See Annexure 10) (Section 14(1) of Malta’s Gender Identity, Gender Expression and Sex Characteristics Act, 2015) (See Annexure 11)</p> <p>3. As expressed earlier, it should be made explicit in this Chapter that proof of identity of a transgender person is not contingent on production of a certificate under clause 4.</p> <p>4. A provision on Safeguards for transgender persons during trials be introduced in this chapter. To protect transgender persons against harassment during trials such a provision is necessary. As mentioned in the comment on Clause 3 and in keeping with <i>NALSA</i>, one of the safeguards should be a clause which prohibits the carrying out of any physical/medical/psychological</p>
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		<p>offences. Further the Indian Penal Code be used a guideline when determining penalties such that the principle of proportionality is preserved.</p>	<p>examination to determine whether a person is a transgender person or not. Further, the adducing of medical proof should not be mandatory.</p>
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III. ANNEXURES

Annexure I

Legislations in the following jurisdictions have recognised the right to self determination as absolute:

1. Argentina (Article 4 of the Gender Identity Law, 2012)

“Article 4 – *Requirements*. All persons requesting that their recorded sex be amended and their first name and images changed invoking the current law, must comply with the following requirements:

1. Prove that they have reached the minimum age of eighteen (18) years, with the exception established in Article 5 of the current law.
2. To submit to the National Bureau of Vital Statistics or their corresponding district offices, a request stating that they fall under the protection of the current law and requesting the amendment of their birth certificate in the records and a new national identity card, with the same number as the original one.
3. To provide the new first name with which they want to be registered.

In no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place.”

2. Ireland (section 10 of the Gender Recognition Act, 2015)

“Requirements on application for a gender recognition certificate

10. (1) A person who applies for a gender recognition certificate under section 8 shall furnish the following to the Minister:

- (a) his or her name, address, PPS number and contact details;
 - (b) the forename and surname by which he or she wishes to be known;
 - (c) proof of his or her identity;
 - (d) in relation to his or her birth—
 - (i) where he or she is a person referred to in paragraph (a) of section 9(1), applicable proof of birth referred to in that paragraph, or
 - (ii) where he or she is a person referred to in paragraph (b) of section 9(1), applicable proof of birth referred to in that paragraph;
 - (e) where he or she is a person referred to in paragraph (b) of section 9(1), information and evidence to satisfy the Minister that the applicant is ordinarily resident in the State;
 - (f) a statutory declaration declaring that he or she—
 - (i) is not married or a civil partner
 - (ii) has a settled and solemn intention of living in the preferred gender for the rest of his or her life,
 - (iii) understands the consequences of the application, and (iv) makes the application of his or her free will.
- (2) In this section “PPS number” means a personal public service number within the meaning of section 262 of the Social Welfare Consolidation Act 2005.”

3. Malta (section 4 of the Gender Identity, Gender Expression and Sex Characteristics Act, 2015)

- “4. (1) It shall be the right of every person who is a Maltese citizen to request the Director to change the recorded gender and, or first name and, first name, if the person so wishes to change the first name, in order to reflect that person’s self determined gender identity.
- (2) The request shall be made by means of a note of enrolment in accordance with article 5(2).

(3) The Director shall not require any other evidence other than the declaratory public deed published in accordance with article 5.

(4) The Director shall within fifteen days from the filing of the note of enrolment by the Notary at the public registry, enter a note in the act of birth of the applicant.

(5) The provisions of article 249 of the Civil Code shall Cap. 16. *mutatis mutandis* apply.

(6) (a) The person who made a request in accordance with sub-article (1) shall also be entitled to demand that a full certificate of the act of birth showing the particulars resulting from the annotations be issued to them so however that there shall be indicated on such certificates the annotations that have been made upon it by virtue of a decree of a court or in terms of the procedure established under this Act without the details of the said annotations being specified.

(b) A person whose request to the Court of Revision of Notarial Acts, for a correction in the name and gender assigned to them in their act of birth, shall be entitled to demand that a full certificate of their act of birth showing the particulars resulting from the annotations be issued to them so however that there shall be indicated on such certificate that annotations have been made upon it by virtue of a decree of a court without the details of the said annotations being specified.

(c) Within seven days from receipt of a request made for the issue of a birth certificate drawn up in accordance with this article, the Director shall not give any information contained in the register indicating the original act of birth except insofar as provided in this article.

(7) The said information or copy of the original act of birth may be given:

(a) with the consent of the person to whom the certificate refers; or

(b) when there is no such consent, upon an order of the Court (Voluntary Jurisdiction Section) or of another Court taking cognizance of a cause where the necessity of the presentation of that certificate or information arises, where the Court is satisfied that the issuing of the said certificate or information is necessary to defend or safeguard a right or a legitimate interest of the person making the demand which, after taking into consideration all relevant circumstances, the court's considerations should prevail over the right to privacy of the person to whom the certificate refers. Cap. 420.

(8) A person who was granted international protection in terms of the Refugees Act, and in terms of any other subsidiary legislation issued under the Refugees Act, and who wants to change the recorded gender and first name, if the person so wishes to change the first name, shall make a declaration confirmed on oath before the Commissioner for Refugees declaring the person's self-determined gender and first name. The Commissioner for Refugees shall record such amendment in their asylum application form and protection certificate within fifteen days."

4. Denmark¹⁶

Legislation not available in English.

¹⁶ See, <http://www.yesmagazine.org/people-power/no-surgery-required-denmark-becomes-second-country-to-let-citizens-choose-their-gender>

Annexure 2

The following are jurisdictions which have clarified the impact a change in gender will have on the rights of such persons vis-a-vis other laws,

1. Part III of Ireland's Gender Recognition Act, 2015¹⁷

Legislation is linked since provisions are too large to reproduce.

2. Section 3(2) of Malta's Gender Expression, Gender Identity, and Sex Characteristic Act, 2015

Without prejudice to any provision of this Act -(a)a person's rights, relationship and obligations arising out of parenthood or marriage shall in no way be affected; and(b)the person's rights arising out of succession,including but not limited to any testamentary dispositions made in one's favour, and any obligations and, or rights subjected to or acquired prior to the date of change of gender identity shall in no way be affected. (c) any personal or real right already acquired by third parties or any privilege or hypothecary right of a creditor acquired before the change in the gender identity of the person shall in no way be affected."

3. Chapter on Consequences of issue of gender recognition certificate etc., The UK Gender Recognition Act, 2004¹⁸

Legislation is linked since provisions are too large to reproduce.

4. Article 7 of Argentina's Gender Identity Law, 2012

Effects. The effects of the amendment of the sex and recording a new first name/s according to the current law will create rights against third parties since the record is first made.

The amendment in the records will not change the legal entitlements to rights and legal obligations that could have corresponded to the persons before the recording of the amendments, nor those derived from the relationships consecrated by family law at all levels and degrees, that will remain unchanged, including adoption.

¹⁷ See, http://tgeu.org/wp-content/uploads/2015/08/IRELAND_Gender-Recognition-Act-2015.pdf at page 19

¹⁸ See, http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf, sections 9-21

In all cases, the number in the persons' national identity document will be relevant over the first name or morphological appearance of the persons, for identification purposes."

5. Section 6 of Norway's Legal Gender Amendment Act¹⁹

Legislation is linked since provisions are too large to reproduce.

¹⁹ See <https://www.regjeringen.no/en/topics/equality-and-social-inclusion/likestilling-og-inkludering/gender-equality/id670481/>

Annexure 3

The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

THE RIGHT TO EDUCATION

PRINCIPLE 16: Everyone has the right to education, without discrimination on the basis of, and taking into account, their sexual orientation and gender identity.

States shall:

- A. Take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation or gender identity;
- B. Ensure that education is directed to the development of each student's personality, talents, and mental and physical abilities to their fullest potential, and responds to the needs of students of all sexual orientations and gender identities;
- C. Ensure that education is directed to the development of respect for human rights, and of respect for each child's parents and family members, cultural identity, language and values, in a spirit of understanding, peace, tolerance and equality, taking into account and respecting diverse sexual orientations and gender identities;
- D. Ensure that education methods, curricula and resources serve to enhance understanding of and respect for, inter alia, diverse sexual orientations and gender identities, including the particular needs of students, their parents and family members related to these grounds;
- E. Ensure that laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment;
- F. Ensure that students subjected to such exclusion or violence are not marginalised or segregated for reasons of protection, and that their best interests are identified and respected in a participatory manner;

- G. Take all necessary legislative, administrative and other measures to ensure that discipline in educational institutions is administered in a manner consistent with human dignity, without discrimination or penalty on the basis of a student's sexual orientation or gender identity, or the expression thereof;

Ensure that everyone has access to opportunities and resources for lifelong learning without discrimination on the basis of sexual orientation or gender identity, including adults who have already suffered such forms of discrimination in the educational system.

Annexure 4

Source	Clause/ P.No.	Provision
The Rights of Transgender Persons Bill, 2014 (passed by the Rajya Sabha)	4	<p>(1) The appropriate Government shall take all necessary steps to ensure that transgender persons enjoy the right of equality guaranteed by Article 15 of the Constitution of India on an equal basis with others.</p> <p>(2) The appropriate Government shall take all necessary steps to ensure reasonable accommodation for the transgender persons.</p>
Expert Committee Report	p. 91	<p>(Facets of discrimination highlighted in the report)</p> <ul style="list-style-type: none"> • Violence and discrimination at educational institutions • Medical treatment and healthcare • Discrimination in shelter and residence • Employment discrimination and discrimination at the workplace • Discrimination and violence by law enforcement • Sexual violence
HIV/AIDS Bill, 2014	3	<p>No person shall discriminate against the protected person on any ground including any of the following, namely:—</p> <p>(a) the denial of, or termination from, employment or occupation, unless, in the case of termination, the person, who is otherwise qualified, is furnished with—</p> <p>(i) a copy of the written assessment of a qualified and independent healthcare provider competent to do so that such protected person poses a significant risk of transmission of HIV to other person in the workplace, or is unfit to perform the duties of the job; and</p> <p>(ii) a copy of a written statement by the employer stating the nature and extent of</p>

		<p>administrative or financial hardship for not providing him reasonable accommodation;</p> <p>(b) the unfair treatment in, or in relation to, employment or occupation;</p> <p>(c) the denial or discontinuation of, or, unfair treatment in, healthcare services;</p> <p>(d) the denial or discontinuation of, or unfair treatment in, educational, establishments and services thereof;</p> <p>(e) the denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public, whether or not for a fee, including shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing <i>ghats</i>, roads, burial grounds or funeral ceremonies and places of public resort;</p> <p>(f) the denial, or, discontinuation of, or unfair treatment with regard to, the right of movement;</p> <p>(g) the denial or discontinuation of, or, unfair treatment with regard to, the right to reside, purchase, rent, or otherwise occupy, any property;</p> <p>(h) the denial or discontinuation of, or, unfair treatment in, the opportunity to stand for, or, hold public or private office;</p> <p>(i) the denial of access to, removal from, or unfair treatment in, Government or private establishment in whose care or custody a person may be;</p> <p>(j) the denial of, or unfair treatment in, the provision of insurance unless such unfair treatment is based on and supported by actuarial studies;</p> <p>(k) the isolation or segregation of a protected person;</p> <p>(l) HIV testing as a pre-requisite for obtaining employment, or accessing healthcare services or education or, for the continuation of the same or, for accessing or using any other service or facility:</p> <p>Provided that, in case of failure to furnish the written assessment under subclause (i) of clause (a), it shall be presumed that there is no significant risk and that the person is fit to perform the duties of the job, as the case may be, and in case of the failure to furnish the written statement under sub-clause (ii) of that clause, it shall be presumed that there is no such undue</p>
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		administrative or financial hardship.
Mental Health Care Bill, 2016	21(1)	<p>Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:–</p> <p>(a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability;</p> <p>(b) emergency facilities and emergency services for mental illness shall be of the same quality and availability as those provided to persons with physical illness;</p> <p>(c) persons with mental illness shall be entitled to the use of ambulance services in the same manner, extent and quality as provided to persons with physical illness;</p> <p>(d) living conditions in health establishments shall be of the same manner, extent and quality as provided to persons with physical illness; and</p> <p>(e) any other health services provided to persons with physical illness shall be provided in same manner, extent and quality to persons with mental illness.</p>

Annexure 5

Elements of Discrimination in the Anti-Discrimination Act, 1977 (New South Wales)

Section	Provision
38C	<p>Discrimination against applicants and employees</p> <p>(1) It is unlawful for an employer to discriminate against a person on transgender grounds:</p> <ul style="list-style-type: none">(a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or(b) in determining who should be offered employment, or(c) in the terms on which employment is offered. <p>(2) It is unlawful for an employer to discriminate against an employee on transgender grounds:</p> <ul style="list-style-type: none">(a) in the terms or conditions of employment that are afforded to the employee, or(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or(c) by dismissing the employee or subjecting the employee to any other detriment. <p>(3) Subsections (1) and (2) do not apply to employment:</p> <ul style="list-style-type: none">(a) for the purposes of a private household, or(b) if the number of persons employed by the employer (disregarding any persons employed within the employer's private household) does not exceed 5, or(c) by a private educational authority.
38E	<p>Discrimination against contract workers</p> <p>It is unlawful for a principal to discriminate against a contract worker on transgender grounds:</p>

	<ul style="list-style-type: none"> (a) in the terms on which the contract worker is allowed to work, or (b) by not allowing the contract worker to work or continue to work, or (c) by denying the contract worker access, or limiting the contract worker's access, to any benefit associated with the work performed by the contract worker, or (d) by subjecting the contract worker to any other detriment.
38K	<p>Education</p> <p>(1) It is unlawful for an educational authority to discriminate against a person on transgender grounds:</p> <ul style="list-style-type: none"> (a) by refusing or failing to accept the person's application for admission as a student, or (b) in the terms on which it is prepared to admit the person as a student. <p>(2) It is unlawful for an educational authority to discriminate against a student on transgender grounds:</p> <ul style="list-style-type: none"> (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority, or (b) by expelling the student or subjecting the student to any other detriment.
38L	<p>Access to places and vehicles</p> <p>It is unlawful for a person to discriminate against another person on transgender grounds:</p> <ul style="list-style-type: none"> (a) by refusing to allow the other person access to or the use of any place or vehicle that the public or a section of the public is entitled or allowed to enter or use, for payment or not, or (b) in the terms on which the person is prepared to allow the other person access to or the use of any such place or vehicle, or (c) by refusing to allow the other person the use of any facilities in any such place or vehicle that the public or section of the public is entitled to use, for payment or not, or (d) in the terms on which the person is prepared to allow the other person the use of any such facilities, or (e) by requiring the other person to leave or cease the use of any such place or vehicle or any such facilities.
38M	<p>Provision of goods and services</p> <p>It is unlawful for a person who provides (whether or not for payment) goods or services to discriminate against</p>

	<p>another person on transgender grounds:</p> <p>(a) by refusing to provide the person with those goods or services, or</p> <p>(b) in the terms on which the other person is provided with those goods or services.</p>
38N	<p>Accommodation</p> <p>(1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on transgender grounds:</p> <p>(a) by refusing the person's application for accommodation, or</p> <p>(b) in the terms on which he or she offers the person accommodation, or</p> <p>(c) by deferring the person's application for accommodation or giving the person a lower order of precedence in any list of applicants for that accommodation.</p> <p>(2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on transgender grounds:</p> <p>(a) by denying the person access, or limiting the person's access, to any benefit associated with accommodation occupied by the person, or</p> <p>(b) by evicting the person or subjecting the person to any other detriment.</p>

5. Direct Discrimination

(1) A conduct, law, policy, criterion, practice or structure is directly discriminatory if it satisfies sub-section (2) of this section, and prima facie directly discriminatory if it satisfies any of the sub-sections (3), (4), (5) or (6) of this section.

(2) It is motivated by prejudice against or is intended to harm, injure, cause a detriment to or adversely affect a protected group.

(3) It is based on stereotypical assumptions about members of a protected group.

(4) It includes a reference to a protected characteristic, whether on its own or in combination with any other criteria.

(5) It is applied to a member or members of a protected group but not to a member or members of any other group defined by the same protected characteristic.

(6) Although applied generally,

(a) it adversely affects or would adversely affect all members of a protected group to whom it is or would be applied, and

(b) does not or would not adversely affect all members of any other group defined by the same protected characteristic to whom it is or could be applied.

(7) Subject to the other provisions of this section, prima facie direct discrimination constitutes direct discrimination unless the respondent shows that the conduct, law, policy, criterion, practice or structure

(i) is a proportionate means of achieving a legitimate objective, and

(ii) was adopted in good faith.

6. Indirect Discrimination

(1) A generally applicable conduct, law, policy, criterion, practice or structure is prima facie indirectly discriminatory if it does not amount to direct discrimination, and

(i) either puts or would put members of a protected group at a special detriment when compared with members of any other group defined by the same protected characteristic, or

(ii) has or would have a disproportionate adverse effect on members of a protected group when compared with members of any other group defined by the same protected characteristic.

(2) Prima facie indirect discrimination constitutes indirect discrimination unless the respondent shows that the conduct, law, policy, criterion, practice or structure

(i) is a proportionate means of achieving a legitimate objective, and

(ii) was adopted in good faith.

(3) A conduct, law, policy, criterion, practice or structure shall not be proportionate if its objective can be substantially achieved through non-discriminatory or less discriminatory means.

Annexure 7

Section 15 of Malta's Gender Identity, Gender Expression and Sex Characteristic Act, 2015: Health Services

All persons seeking psychosocial counselling, support and medical interventions relating to sex or gender should be given expert sensitive and individually tailored support by psychologists and medical practitioners or peer counselling. Such support should extend from the date of diagnosis or self-referral for as long as necessary.

Annexure 8

Section 16 of Malta's Gender Identity, Gender Expression and Sex Characteristic Act, 2015: Treatment Protocol

- (1) The Minister, after consulting the Minister responsible for health, shall appoint a working group.
- (2) The working group shall consist of a Chairperson and nine members.
- (3) The Chairperson shall be a medical doctor with at least twelve years experience.
- (4) The members shall be three experts in human rights issues, three psychosocial professionals and three medical experts.
- (5) The Minister shall appoint the working group within three months of the entry into force of this Act.
- (6) The members of the working group shall review the current medical treatment protocols in line with current medical best practices and human rights standards and shall, within one year from the date of their appointment, issue a report with recommendations for revision of the current medical treatment protocols.

Annexure 9

Chapter X (Appointment of Ombudsman) of the HIV-AIDS Bill, 2014

23. (1) Every State Government shall appoint one or more Ombudsman,—

(a) possessing such qualification and experience as may be prescribed, or

(b) designate any of its officers not below such rank, as may be prescribed, by that Government, to exercise such powers and discharge such functions, as may be conferred on Ombudsman under this Act.

(2) The terms and condition of the service of an Ombudsman appointed under clause (a) of sub-section (1) shall be such as may be prescribed by the State Government.

(3) The Ombudsman appointed under sub-section (1) shall have such jurisdiction in respect of such area or areas as the State Government may, by notification, specify.

24. (1) The Ombudsman shall, upon a complaint made by any person, inquire into the violations of the provisions of this Act, in relation to healthcare services by any person, in such manner as may be prescribed by the State Government.

(2) The Ombudsman may require any person to furnish information on such points or matters, as he considers necessary, for inquiring into the matter and any person so required shall be deemed to be legally bound to furnish such information and failure to do so shall be punishable under sections 176 and 177 of the Indian Penal Code.

(3) The Ombudsman shall maintain records in such manner as may be prescribed by the State Government.

25. The complaints may be made to the Ombudsman under sub-section (1) of section 26 in such manner, as may be prescribed, by the State Government.

26. The Ombudsman shall, after giving an opportunity of being heard to the parties, pass such order, as he deems fit, giving reasons therefor.

27. All authorities including the Civil authorities functioning in the area for which the Ombudsman has been appointed under section 23 shall assist in execution of orders passed by the Ombudsman.

Annexure 10

The Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity

PROTECTION FROM MEDICAL ABUSES

PRINCIPLE 18: No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

- a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;
- b) Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration;

Annexure 11

Section 14(1) of Malta's Gender Identity, Gender Expression and Sex Characteristics Act, 2015: Right to Bodily Integrity and Physical Autonomy

It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which treatment and/or intervention can be deferred until the person to be treated can provide informed consent:

Provided that such sex assignment treatment and, or surgical intervention on the sex characteristics of the minor shall be conducted if the minor gives informed consent through the person exercising parental authority or the tutor of the minor.



Vidhi

Centre For Legal Policy

BETTER LAWS. BETTER GOVERNANCE

Please direct all correspondence to:

Nivedita Saksena,

Vidhi Centre for Legal Policy,

D-359, Lower Ground Floor, Defence
Colony, New Delhi – 110024.

Phone: 011-43102767

Email:

nivedita.saksena@vidhilegalpolicy.in