

**Joint submissions in reference to the stakeholder consultation on *Supriyo Chakraborty & Ors. v. Union of India*, WP (C) No. 1011/2022**

**Ministry of Social Justice and Empowerment**

**5 August 2024**

1. In pursuance of the direction of the Hon'ble Supreme Court in *Supriyo Chakraborty & Ors. v. Union of India*,<sup>1</sup> the Ministry of Law and Justice (MLJ) constituted a committee by order dated 16.04.2024 to examine various issues in relation to lesbian, gay, bisexual, transgender, intersex, asexual and other queer (LGBTQA+) persons. The committee comprises the Cabinet Secretary (chairperson), MOSJE (convenor) and Ministry of Home Affairs (MHA), Ministry of Women and Child Development (MWCD), Ministry of Health and Family Welfare (MOHFW) and MLJ (members).
2. The committee is tasked with examining and submitting recommendations to the Central and State Governments on the following broad issues:
  - a. Measures to ensure non-discrimination in access to goods, services and social welfare entitlements to LGBTQIA+ persons;
  - b. Redressal for violence against LGBTQIA+ persons;
  - c. Prohibition of forced medical interventions against LGBTQIA+ persons and promotion of mental health;
  - d. Any other issues as deemed necessary.
3. Notably, the committee's mandate with respect to ensuring non-discrimination in access to goods, services and social welfare entitlements to LGBTQIA+ persons must be examined in the direct context of recognizing rights of lesbian, gay and non-binary transgender partners in non-marital relationships on equal terms to a marital couple in accordance with law, as per the direction of the Hon'ble Supreme Court.<sup>2</sup>
4. On 25.07.2024, MOSJE convened a stakeholder consultation with respect to the aforesaid terms of reference. During conclusion, the Secretary, MOSJE verbally committed to a deadline of 5 August 2024 for submitting detailed recommendations to guide the preparation of the committee's final report. We the undersigned herein take this opportunity to make joint submissions on the substantive issues covered by the committee's mandate and the procedural concerns which impede the committee's ability to hold a meaningful dialogue with LGBTQIA+ people.

**I. AREAS OF ENQUIRY:**

5. At the outset, we state unequivocally that the committee must be mindful that any proposed amendments to existing laws and delegated legislation must

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<sup>1</sup> 2023 SCC Online SC 1348

<sup>2</sup> *Supriyo Chakraborty* (2023), paras. 365(s), 379, 518-532, 564 (vi-vii),

not uncritically adopt 'gender-neutrality', as this can lead to the unintended consequences of women being duty bearers to men under the laws on maintenance, gender-based violence and other statutory provisions that are gender-specific as special measures for women,<sup>3</sup> in light of the social and economic status of women. We propose a 'SOGIESC-specific'<sup>4</sup> review of existing laws or introducing fresh laws for recognition of rights of lesbian, gay and non-binary transgender partners in the following section:

**A. Rights of lesbian, gay and non-binary transgender partners in non-marital relationships:**

6. While the Hon'ble Court recognizes the fundamental right of transgender and intersex persons in heterosexual relationships to solemnize and register marriages under all existing laws, the same is denied for lesbian, gay and non-binary trans persons under the *Special Marriage Act, 1954* (SMA). Although, in recognition of the fundamental right of lesbian, gay and non-binary transgender persons to choose a partner, the Hon'ble Court is cognizant that their exclusion from laws and regulations conferring benefits on the basis of marital status amounts to discrimination under Article 15 of the Constitution. This deprivation must be addressed by Central and State Governments, including by this committee.<sup>5</sup>
7. Notwithstanding the aforesaid, the Hon'ble Court is of the opinion that under Articles 245-246 read with Entry 5 of the Concurrent List in Schedule VII of the Constitution, the Parliament or State Legislatures are competent to enact laws to recognize and regulate marriages of lesbian, gay and non-binary transgender persons.<sup>6</sup> Therefore, the amendment of existing laws or enactment of fresh laws on marriage/divorce, guardianship, children, adoption, assisted reproductive technology, succession etc., with the intent of safeguarding the right to form a family and execute affairs as members of such a family unit by lesbian, gay and non-binary transgender persons, must be a central recommendation of this committee. The following is an illustrative list of existing laws that merit examination in this regard:
  - SMA, 1954;
  - *Hindu Marriage Act, 1955* (HMA);
  - *Muslim Personal Law (Shariat) Application Act, 1937*;
  - *Dissolution of Muslim Marriages Act, 1939*;
  - *Parsi Marriage and Divorce Act, 1936* (PMDA);
  - *Indian Christian Marriage Act, 1872* and *Indian Divorce Act, 1869*;
  - *Foreign Marriage Act, 1969*;
  - *Citizenship Act, 1955* with respect to the spouse of an overseas citizen of India;

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<sup>3</sup> *Supriyo Chakraborty* (2023), paras. 510-511

<sup>4</sup> SOGIESC: sexual orientation, gender identity and expression and sex characteristics

<sup>5</sup> *Supriyo Chakraborty* (2023), paras. 365(s), 379, 518-532, 564 (vi-vii),

<sup>6</sup> *Supriyo Chakraborty* (2023), paras. 365 (c), 562

- *Hindu Succession Act, 1956*;
- *Indian Succession Act, 1925*;<sup>7</sup>
- *Guardians and Wards Act, 1890*;
- *Hindu Minority and Guardianship Act, 1956*;
- *Juvenile Justice (Care and Protection) Act, 2015* (JJ Act) with respect to:
  - Enabling adoption by LGBTI families by revising the *Adoption Regulations, 2022*;
  - Enabling foster care for LGBTQIA+ minors by revising the *Model Guidelines for Foster Care, 2016*
- *Hindu Adoption and Maintenance Act, 1956*;
- *Assisted Reproductive Technology (Regulation) Act, 2021*;
- *Surrogacy (Regulation) Act, 2021*;

8. A gender-just review of the existing statutes that govern marital relations must address the following critical concerns:

- repeal provisions on restitution of conjugal rights under existing statutes on marriage as they violate the right to equality under Article 14 and the right to privacy, autonomy and dignity under Article 21;<sup>8</sup>
- review the law on rape under the Exception 2 of Section 375 and Section 376B of the *Indian Penal Code, 1860* (IPC) (now Exception 2 of Section 63 and Section 67 of the *Bhartiya Nyay Sanhita, 2023* (BNS)) read with Section 198B of the *Criminal Procedure Code, 1973* (CrPC) (now Section 221 of the *Bhartiya Nagarik Suraksha Sanhita, 2023* (BNSS)) to criminalize marital rape as the lack of legal redress for the offence of sexual assault in a marital relationship violates the right to equality under Article 14, the right to non-discrimination on basis of sex under Article 15, the right to free expression of sexuality under Article 19(1)(a) and the right to privacy, autonomy and dignity under Article 21;<sup>9</sup>
- repeal the framework of notice, domicile and objection (Sections 5-9) under SMA as it violates the right to be free from arbitrary interference, violence and discrimination in the choice of partner under Articles 19 and 21 by state and non-state actors.<sup>10</sup>

9. An illustrative list of areas of enquiry is suggested by the Hon'ble Supreme Court for the committee to comprehensively examine the scope of social and economic rights of lesbian, gay and non-binary transgender partners in non-marital relationships, including:

- *“The discriminatory impacts in relation to earned or compensatory benefits, or social welfare entitlements for which marital status is a*

<sup>7</sup> The *Uttar Pradesh Revenue Code, 2006* was amended in 2020 on recommendation of the 6th report of the State Law Commission on Transgender Rights in Agricultural Land

<sup>8</sup> *T. Sareetha v. T. Venkata Subbaiah*, 1983 (2) APLJ HC 37

<sup>9</sup> The opinion of Rajiv Shakhder, J in *RIT Foundation v. Union of India*, 2022 SCC Online Del 1404

<sup>10</sup> *Safiya Sultana v. State of Uttar Pradesh*, Habeas Corpus Petition No. 16907/2020, order dated 12.01.2021

*relevant eligibility factor, for queer couples who in their exercise of choice form relationships, have to be suitably redressed and removed by the State. These measures need to be taken with expedition because inaction will result in injustice and unfairness with regard to the enjoyment of such benefits, available to all citizens who are entitled and covered by such laws, regulations or schemes (for instance, those relating to employment benefits: provident fund, gratuity, family pension, employee state insurance; medical insurance; material entitlements unconnected with matrimonial matters, but resulting in adverse impact upon queer couples);<sup>11</sup>*

- *Enabling LGBTQIA+ persons in relationships to be treated as part of the same ‘family unit’ for purposes of ration cards, seek joint bank accounts with the option of nominating the partner in case of death;<sup>12</sup>*
- *LGBTQIA+ persons in relationships must be treated as ‘family’ in law for purposes of medical practitioners’ duty to consult family, next of kin or friends for a terminally ill person who has not executed an advance directive on course of treatment, as per Common Cause v. Union of India (I)<sup>13</sup> and (II);<sup>14</sup>*
- *Legal consequences such as adoption, succession rights, maintenance, financial benefits under Income Tax Act, 1961 and rights flowing from employment such as gratuity, provident fund, family pension, health insurance and other material entitlements;*
- *The right to access the body of deceased partner and arranging last rites;*
- *Jail visitation rights”.*

10. Without prejudice to the demand for amending existing laws or introducing fresh laws on recognizing the right to solemnize and register marriages for lesbian, gay and non-binary transgender persons, the following is an illustrative list of existing laws that merit examination in the context of protection of social and economic rights of lesbian, gay and non-binary transgender partners in non-marital relationships, which can be formalized through the instrument of a deed of familial association,<sup>15</sup> as recommended by the Hon’ble High Court of Madras:

- As Chapter IX of the CrPC (now Chapter X of the BNSS) is a social security measure<sup>16</sup> to prevent destitution of wives, children and parents by guaranteeing a statutory right to maintenance, the provisions must be suitably amended to provide for the obligation of

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<sup>11</sup> *Supriyo Chakraborty* (2023), para. 564 (vi)

<sup>12</sup> *Supriyo Chakraborty* (2023), para. 366

<sup>13</sup> (2018) 5 SCC 1

<sup>14</sup> 2023 SCC Online SC 99

<sup>15</sup> *Sushma and Seema v. Commissioner of Police*, WP No. 7284/2021, order dated 17.11.2023

<sup>16</sup> *Capt. Ramesh Chander Kaushal v. Veena Kaushal*, AIR (1978) SC 1807

lesbian, gay and non-binary transgender partners in non-marital relationships to be governed by the same;

- As the aforesaid chapter of the CrPC/BNSS also safeguards the economic security of a child who has attained majority but is unable to maintain themselves due to a disability, likewise, a child who has attained majority, is LGBTQIA+ and dependent on the father shall be provided the right to claim economic security under the provision as they are vulnerable to dispossession by the natal family;
- With respect to lesbian, bisexual women and transgender men who were forced to marry heterosexual men by their natal families and subsequently choose to seek divorce, the issue of the child's custody shall be determined in accordance to the well-established rule of 'best interests of the child' and the sexual orientation or gender identity of the parent shall not be treated as incompatible with such best interests;<sup>17</sup>
- The laws relating to tenancy, ownership of residential property in a co-operative housing society and transfer of property (incl. payment of stamp duty) must be reviewed;<sup>18</sup>
- As adult gay and bisexual men are vulnerable to forced evictions by the natal family, the right to residence must be statutorily protected as available for women,<sup>19</sup> transgender persons<sup>20</sup> and people living with HIV<sup>21</sup> under special laws in recognition of their vulnerability to conflict with the natal family;
- The *Maintenance and Welfare of Parents and Senior Citizens Act, 2007* must be amended to provide that the parent/senior citizen shall not be entitled to claim any maintenance from the adult child in case such parent/senior citizen has subjected their child to violence on account of their identity as LGBTI. This basic principle of law already applies in context of marital parties, where the wife forfeits any claim to maintenance against the husband if she is proven to have committed adultery;<sup>22</sup>
- *Code on Social Security, 2020* (incl. provident fund, pension, gratuity, insurance and other employment benefits);
- Laws and regulations concerning immigration/emigration and spousal/dependant visas must be suitably amended for this purpose;

## **B. The growing recognition of chosen families under Indian law and policy:**

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<sup>17</sup> Principle 24 (c), The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2007)

<sup>18</sup> *Happy Together: Law and Policy Concerns of LGBTQIA+ Persons*, Centre for Health Equity, Law and Policy, pages 47-50

<sup>19</sup> Section 19 of the *Protection of Women from Domestic Violence Act, 2005* (PWDVA)

<sup>20</sup> Section 12 of the *Transgender Persons (Protection of Rights) Act, 2019* (TPA)

<sup>21</sup> Section 29 of the *HIV/AIDS (Prevention and Control) Act, 2017*

<sup>22</sup> Section 37(3) of SMA; Section 25(3) of HMA; Section 40(3) of the PMDA; Section 125 (4-5) of the CrPC (now Section 144 (4-5) of the BNSS)

11. During the proceedings before the Hon'ble Supreme Court, a group of petitioners made submissions with respect to the legal recognition of chosen families of LGBTQIA+ people, i.e., non-conjugal relationships of un-partnered LGBTQIA+ people, such as friends or peers from the community, which provide mutual care, support and economic security.<sup>23</sup> Although the Hon'ble Supreme Court did not issue any ruling on this issue in its judgment, there is a growing trend of recognition of rights and obligations among non-conjugal relationships (including chosen families of LGBTQIA+ people in particular) under Indian law and policy.
12. Since the 1990s, Indian courts have recognized the right of hijra gharana members to succeed to the property of deceased members of the gharana,<sup>24</sup> which are constituted beyond the limits of marriage, blood or adoption.
13. Section 14 The *Mental Healthcare Act, 2017* (MHCA) recognizes the right of persons with mental illness to appoint 'any person' as the nominated representative in addition to 'relatives', for purposes of giving effect to their advance directive on the course of mental healthcare treatment in the event of their incapacity. During legislative deliberations, this provision met with objections on grounds that codification of such practice in formal law is "alien to Indian culture", will pose a "danger" to the patient's health, lead to "conflict" between natal family and the nominated representative over the best interests of the patient and is liable to "misuse" by the nominated representative in usurping the economic rights of the patient. However, the Department of Health and Welfare issued a complete response to all concerns by stating that the appointment of nominated representative is limited for purposes for mental healthcare decision-making and the principle complies with the rights-based framework that seeks to protect the autonomy of persons with mental illness against "perceived rights" of natal families and caregivers.<sup>25</sup>
14. In 2022 and 2024, the MHA has issued circulars with respect to the treatment of LGBTQIA+ prisoners, which explicitly recognize the role of chosen families (including friends) in executing legal affairs on their behalf, in matters relating to preparation of appeal, applying for bail, managing their estate or family affairs.<sup>26</sup>
15. In 2024, the Hon'ble Supreme Court has declared with respect to habeas corpus petitions for the purposes of securing the life and liberty of LGBTQIA+ people, that courts shall not make roving enquiries into the precise nature of the relationship between the appellant (partner or friend) and the detenu.<sup>27</sup>

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<sup>23</sup> *Rituparna Borah & Ors. v. Union of India*, WP (C) No. 260/2023

<sup>24</sup> *Ilyas v. Badshah alias Kamla*, AIR 1990 MP 334; *Sweety v. General Public*, AIR 2016 HP 148

<sup>25</sup> Report No. 74, Department Related Parliamentary Standing Committee on Health and Family Welfare, pages 8, 52

<sup>26</sup> MHA (2022), *Treatment and Care of Transgender Persons in Prisons*; MHA (2024), *Prison Visitation Rights of Queer Community (LGBTQ+)*

<sup>27</sup> *Devu G Nair v. State of Kerala & Ors.*, 2024 INSC 228

16. In light of growing recognition of chosen families under various areas of Indian law and policy, we fully adopt the submissions in paragraphs 9-10 hereinabove to humbly submit that chosen families of LGBTQIA+ people deserve social and economic rights on equal terms with those of LGBTQIA+ people in conjugal/marital relationships and this must be articulated in the recommendations of this committee to Central and State Governments. This is pertinent especially since the Hon'ble Supreme Court has declared that 'atypical' manifestations of love and families are as real as 'traditional' families, therefore, social welfare laws must be responsive to their needs.<sup>28</sup>

**C. Preventive, remedial and punitive measures for gender-based violence against LGBTQIA+ persons:**

17. In recognition of the nature and scale of violence against LGBTQIA+ people from state and non-state actors (including the natal family),<sup>29</sup> the Hon'ble Supreme Court has declared that State Governments must take immediate measures to prevent, remedy and punish such acts and provide shelter homes on a district-level for LGBTQIA+ individuals or couples who apprehend threats to their safety and well-being,<sup>30</sup> in terms of *Shakti Vahini v. Union of India*,<sup>31</sup> which dealt with violence by state and non-state actors against inter-caste and inter-faith couples. The Hon'ble High Court of Delhi has already expanded the availability of shelter homes under the mandate of *Shakti Vahini* (2018) to provide security to a lesbian couple.<sup>32</sup>

- This inter-ministerial committee shall issue instructions to the appropriate authorities of all State Governments in this regard and monitor, evaluate and supervise the implementation of the *Shakti Vahini* (2018) apparatus in a manner that is responsive to the needs of inter-caste, inter-faith and LGBTQIA+ couples who are in conflict with state or non-state actors.

18. India has binding commitments under the Constitution<sup>33</sup> and international human rights law<sup>34</sup> to ensure accountability of state and non-state actors who are responsible for gender-based violence (GBV) against LGBTQIA+ persons. This committee shall recommend adoption of measures with respect to:

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<sup>28</sup> *Deepika Singh v. Central Administrative Tribunal*, 2022 SCC Online SC 1088

<sup>29</sup> People's Union for Civil Liberties (PUCL) and National Network of Lesbian, Bisexual, Intersex Women and Transgender Persons (NNLBWTP), (2023), *Apno Ka Bahut Lagta Hai: Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates*

<sup>30</sup> *Supriyo Chakraborty* (2023), paras. 364 (a), 365 (o), 564 (xi)

<sup>31</sup> (2018) 7 SCC 192

<sup>32</sup> *Dhanak of Humanity and Others v. State of NCT and Another*, WP (Cri.) No. 1321/2021, order dated 23.07.2021

<sup>33</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar & Ors. v. Union of India*, 2018 10 SCC 1

<sup>34</sup> General Recommendation (GR) No. 27 (older women's rights), GR No. 28 (core obligations of state parties), GR No. 33 (women's access to justice), GR No. 35 (GBV against women), among others, under the *Convention on Elimination of All Forms of Discrimination Against Women* (CEDAW), 1979

- The advisability of either adopting fresh GBV laws for LGBTQIA+ survivors or amend existing violence against women (VAW) laws and re-introduce them as GBV laws with victim-neutrality to ensure access to justice for women and LGBTQIA+ survivors. In case the former option is preferred, the legislation must ensure proportionality in terms of severity of punishment for offences against LGBTQIA+ survivors and women survivors.
- Section 18 of the *Transgender Persons (Protection of Rights) Act, 2019* (TPA) must be amended to provide for proportionality of punishment of offences against transgender survivors and women survivors;
- Notwithstanding the need for the aforesaid amendment to the TPA, this committee shall issue instructions to the appropriate authorities of all State Governments to the effect that a purposive application of Rule 11(4) of the *Transgender Persons (Protection of Rights) Rules, 2020* (TPR) mandates that transgender women shall have the right to decide whether to seek a remedy for GBV under the TPA or existing VAW laws. In case transgender women choose to seek remedies under VAW laws, their access to justice must be facilitated by according full respect to self-determination of gender identity and no proof of medical intervention must be demanded for such purpose, as 5 judges of the Hon'ble Supreme Court have unanimously affirmed this rule of law;<sup>35</sup>
- Ensure implementation of the Hon'ble Court's directions to obviate discrimination and violence by law enforcement agencies.<sup>36</sup> In addition, Central and State Governments shall ensure similar accountability mechanism under the laws and regulations governing police conduct as the amendments to the *Tamil Nadu Subordinate Police Conduct Rules, 1964* which provide for disciplinary action against police officials found guilty of harassment of LGBTQIA+ persons;<sup>37</sup>
- Monitor the implementation of the Hon'ble Supreme Court's direction that all sex workers (including transgender sex workers) are entitled to equal protection of law, adult consenting sex workers must not face any civil or criminal liability and law enforcement officials must be offered periodic training sessions with respect to rights of sex workers as per law;<sup>38</sup>

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<sup>35</sup> *Supriyo Chakraborty* (2023), paras. 364(a)(viii), 564(xi)

<sup>36</sup> *Supriyo Chakraborty* (2023), paras. 364

<sup>37</sup> *Sushma and Seema v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 18.02.2022

<sup>38</sup> *Budhadev Karmaskar v. State of West Bengal*, Criminal Appeal No. 135/2010, order dated 19.05.2022

- As Tamil Nadu,<sup>39</sup> Rajasthan, Arunachal Pradesh, Chhattisgarh<sup>40</sup> and Telangana<sup>41</sup> have already done, all State Governments must constitute Transgender Protection Cells under the Directorate General of Police in accordance with Rule 11(5) of the TPR;
- The JJ Act must be applied in a manner that is responsive to the concerns of LGBTQIA+ minors in need of care and protection, in context of the Hon'ble Supreme Court's recent declaration that courts must intervene in habeas corpus petitions concerning LGBTQIA+ minors;<sup>42</sup>
- GBV against LGBTQIA+ people must be treated as a public health concern and they must receive care, support and treatment on equal terms as women survivors, including access to vaccines of Hepatitis B and HPV and post-exposure prophylaxis (PEP) to prevent risk of sexually transmitted infections in the aftermath of sexual assault;<sup>43</sup>
- The ecosystem of support services for survivors of GBV (including helplines, legal services authorities, one stop crisis centres, special cells etc.) established by state and non-state actors shall be responsive to the needs of LGBTQIA+ survivors;<sup>44</sup>
- As the Hon'ble High Courts of Delhi and Jammu & Kashmir have struck down anti-begging laws in their jurisdictions, the committee must undertake a comprehensive review of anti-begging laws and recommend decriminalization since these laws penalize the poor, homeless, sex workers, transgender persons and other marginalized groups on account of poverty or status in law;<sup>45</sup>

**D. Respect, protect and fulfil the right to highest attainable standard of physical and mental health of LGBTQIA+ persons:**

19. The Hon'ble Supreme Court has unanimously declared that Central and State Governments must take immediate measures to prohibit forced medical procedures against LGBTQIA+ people, including conversion therapy against lesbian, gay and bisexual persons, compulsory medical intervention for transgender persons to obtain legal recognition of gender identity and forced corrective surgeries on intersex infants or children.<sup>46</sup> Despite the status of 'public health' as a state subject, the Central Govt. has a duty to promote public health under Article 21 read with Article 47 of the Constitution by

<sup>39</sup> *Sushma and Seema v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 23.12.2021

<sup>40</sup> *Sushma and Seema v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 08.04.2022

<sup>41</sup> *Vyjayanti Vasanta Mogli v. State of Telangana*, 2023 SCC Online TS 1688

<sup>42</sup> *Devu G Nair (2024)*, para. 16 (g)

<sup>43</sup> MOHFW (2014), *Guidelines and Protocols on Medico-legal care for Survivors/Victims of Sexual Violence*

<sup>44</sup> *At Home, At Risk: A rapid survey series across 7 states on the domestic violence redressal ecosystem during Covid-19 outbreak (2020)*, Lam-lynti Chittara Neralu

<sup>45</sup> *Harsh Mander & Anr. v. Union of India*, 2018 SCC Online Del 10427; *Suhail Rashid Bhat v. State of Jammu and Kashmir*, 2019 SCC Online J&K 869

<sup>46</sup> *Supriyo Chakraborty (2023)*, paras. 364(a)(viii), 564(xi)

actively monitoring the implementation of state-level measures and provide support for such measures.<sup>47</sup> In particular, this inter-ministerial committee must issue the following recommendations and oversee their implementation:

- The decision of the National Medical Commission (NMC) to designate conversion therapy as a ‘professional misconduct’<sup>48</sup> must be reflected in the final draft of the proposed *NMC Registered Medical Practitioner (Professional Conduct) Regulations, 2021*. The appropriate authorities must be trained to identify the full-spectrum of conduct by state and non-state actors in performing conversion therapy for successful implementation of such measures. These include medical practitioners abusing medicines and/or therapies that are otherwise validly sanctioned by their discipline with intent to change sexual orientation,<sup>49</sup> rituals associated with faith “healers” and superstitious practices of ‘witchcraft’, involuntary confinement at home, mental healthcare institutions, “de-addiction centres”, curative/corrective rape;<sup>50</sup>
- In the case of adult individuals who “voluntarily” seek conversion therapy, the Hon’ble Court has declared that it is the duty of mental health professionals to provide queer affirmative services and explain that conversion therapy is not a medically/scientifically valid procedure and is barred under the MHCA;<sup>51</sup>
- Adopt measures similar to Tamil Nadu<sup>52</sup> and Kerala<sup>53</sup> to prohibit forced corrective surgeries on intersex infants or pre-adolescent children with atypical genitalia;
- Pending the judicial review or a legislative amendment to the TPA, issue instructions immediately to Chief Secy. and District Magistrates in all States to enforce the statute in strict compliance with the rule of self-determination and ensure that transgender persons obtain their certificates/IDs as male, female or transgender without being coerced to undergo any medical intervention;
- Without prejudice to the aforesaid submission, review and amend Section 7 of the TPA read with Rules 6-7 of the TPR to bring conformity for legal recognition of gender identity for all transgender persons (male, female or non-binary) in accordance to the legal principle of self-determination;

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<sup>47</sup> *Devika Biswas v. Union of India*, (2016) 10 SCC 726

<sup>48</sup> *Conversion Therapy of LGBTQIA+ Community Group as a Professional Misconduct under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002*, notification dated 25.08.2022 of Ethics and Medical Registration Board, National Medical Commission

<sup>49</sup> *S. Sushma and U. Seema Agarwal v. Commissioner of Police & Ors.*, WP No. 7284/2021, order dated 31.08.2021

<sup>50</sup> PUCL and>NNLBIWTP (2023), *Apno Ka Bahut Lagta Hai: Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates*

<sup>51</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, para. 449

<sup>52</sup> *Arunkumar and Sreeja v. Inspector General of Registration & Ors.*, AIR 2019 Mad 265

<sup>53</sup> *X v. Director of Health Services*, WP (C) No. 19610/2022, order dated 07.08.2023

- As directed by the Hon'ble High Courts of Kerala<sup>54</sup> and Madras,<sup>55</sup> undertake comprehensive review of existing medical curricula in higher education institutions and ensure training of general and specialised healthcare professionals to be responsive to the needs of LGBTQIA+ people;
- Develop gender affirming care protocols based on World Professional Association on Transgender Health (Standards of Care, Version 8), as mandated under Section 15(d) the TPA;
- Training of medical practitioners to ensure that the Medical Termination of Pregnancy Act, 1971 is implemented in a manner to facilitate access to abortion and allied services for trans-masculine persons, as declared by the Hon'ble Supreme Court;<sup>56</sup>
- The Insurance Regulatory and Development Authority (IRDA) must actively monitor the compliance of its circular to public and private health insurance providers to cover gender affirming care<sup>57</sup> in accordance with Section 15(g) of the TPA and ensure its implementation. Without prejudice to this submission, the IRDA must simultaneously strive towards coverage for gender affirming care in public group insurance schemes like the Employee State Insurance Scheme (ESIC), Ayushman Bharat - Pradhan Mantri Jan Aarogya Yojana (AB-PMJAY) etc., the voluntary market can be exclusionary;
- Public health interventions must contribute towards developing programmes for meeting the mental healthcare needs of LGBTQIA+ people and suicide prevention efforts within the LGBTQIA+ community in terms of Section 29 of the MHCA;<sup>58</sup>
- As per requirement of Section 18(2) of the MHCA, take immediate measures for facilitating LGBTQIA+ people's access to mental healthcare services that are affordable, good quality, adequately available and geographically accessible (including district-level availability of counsellors who are trained to respond to needs of LGBTQIA+ people) and prevent forced institutionalization.

### **E. Social security:**

20. In accordance to the draft Tamil Nadu Sexual and Gender Minorities Policy,<sup>59</sup> the Central and State Governments must adopt measures for social security

<sup>54</sup> *Queerhythm v National Medical Commission and Ors.*, WP(C) No. 18210 of 2021, order dated 07.09.2021

<sup>55</sup> *Sushma & Seema v. Commissioner of Police & Ors.*, WP No. 7284/2021

<sup>56</sup> *X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, 2022 SCC Online SC 1321

<sup>57</sup> IRDAI (2022), *Disclosure of underwriting philosophy of offering health insurance coverage to transgender persons*

<sup>58</sup> Supriyo Chakraborty (2023), para. 364 (b)

<sup>59</sup> The components of the draft policy are discussed in *Sushma and Seema v. Commissioner of Police*, WP No. 7284/2021, order dated 29.01.2024

for all LGBTQIA+ persons irrespective of relationship/marital status, including but not limited to:

- Horizontal reservations in education (public and private sectors) to remedy the disparity in secondary and higher education among LGBTI persons,<sup>60</sup> similar to the Babasaheb Ambedkar Open University, Ahmedabad offering free education to transgender persons. Such measures shall include provision of hostel facilities for higher education;
- Horizontal reservations in employment (public and private sectors) and livelihood schemes for LGBTI persons;
- Create a Gender Inclusion Fund for all girls and transgender individuals for facilitating access to education (foreg., provision of sanitation and toilets, bicycles, conditional cash transfers, etc.) and to release funds for community interventions to this effect;<sup>61</sup>
- Availability of gender-neutral single-use disability-inclusive toilets for use by all persons regardless of gender, gender identity, and disability status.
- Housing, shelter homes and assisted living facilities for ageing LGBTQIA+ people. If a LGBTQIA+ couple seeks support from a shelter home, they should be housed in the same shelter home, as separation can compound their trauma and vulnerability;
- Preventive, remedial and punitive measures for harassment, discrimination and violence in all levels of educational institutions. In particular, the teaching staff must be regularly trained in SOGIESC-inclusive gender sensitization programmes;<sup>62</sup> and schools must ensure gender-neutral washrooms, flexibility in gendered-uniforms, and inclusion of SOGIESC-inclusive content in biology and comprehensive sexuality education.
- Access to free legal aid under the mandate of District, State and National Legal Services Authorities;
- Universal stakeholder awareness and sensitization in collaboration with LGBTQIA+ people's collectives (foreg., healthcare, education, law enforcement, shelter services, etc.);
- Recognize vulnerability of gender non-conforming children under the *Juvenile Justice (Care and Protection) Act, 2015* and ensure suitable protection;
- Institute a universal basic income and expand the *National Social Assistance Programme* to cover LGBTQIA+ persons in the unorganized sector;
- Monitor, evaluate and supervise the implementation of the TPA in context of transgender persons' access to education, housing, employment, healthcare, food security and other social security measures;
- Use of gender-inclusive language in official documents and application forms, including gender markers (M, F, T), honorifics (Mr/Ms/Mx), parent identities (M, F, parent), and child identities (son/daughter/child of) where relevant, in accordance with the 2023 guidelines on gender-inclusive communication developed by the Ministry of Women and Child Development via the Lal Bahadur Shastri National Academy of Administration.

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<sup>60</sup> *National Education Policy (2020)*, Clauses 6.2 and 14.4.2(k)

<sup>61</sup> *National Education Policy (2020)*, Clause 6.8

<sup>62</sup> *National Education Policy (2020)*, Clauses 6.14 and 6.20

- Ensure the implementation of all social security measures by taking into account the intersectionality of vulnerabilities of caste and religion in context of LGBTQIA+ persons;

## II. **STAKEHOLDER CONSULTATION:**

21. At the outset of the meeting on 25.07.2024, we brought to the attention of the committee that the Hon'ble Supreme Court has directed the committee to hold "wide stakeholder consultations" with the LGBTQIA+ community, Central and State Governments, in order to undertake a comprehensive examination of the scope of rights and entitlements of lesbian, gay and non-binary transgender partners in relationships.<sup>63</sup> We requested the committee to hold open and regional consultations in order to be truly representative of the scope of the social and economic concerns of lesbian, gay and non-binary transgender partners in relationships.
22. The Secretary, MOSJE verbally granted permission for submitting recommendations to the committee. Our original demand of at least 30 days was not accepted and a deadline of 31 July 2024 was set. After negotiation, they extended the deadline up to 5 August 2024. However, this is inadequate. The need for adequate opportunity for people's participation in the law and policy making process is officially sanctioned by the MLJ order dated 05.02.2014, which instituted a pre-legislative consultation policy (PLCP) as a consensus building exercise by the Central Government. The order requires that:

*"a policy on pre-legislative consultation...should invariably be followed by every Ministry/Department of the Central Government before any legislative proposal is submitted to the Cabinet for its consideration and approval. This policy should also guide and govern the handling of subordinate legislations."*

23. With respect to the mandate of the committee, the PLCP would require that the concerned Ministries should publish online and place in the public domain for a "minimum period of 30 days" the information regarding the stakeholder consultation.
24. We humbly submit that courts have routinely intervened on grievances of inadequate stakeholder consultation on law, rights and public policy concerns and removed barriers like failure of publication of notice of stakeholder consultation in the public domain, adopting only English to the exclusion of

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<sup>63</sup> Supriyo Chakraborty (2023), para. 365(s)

regional languages (Eighth Schedule of the Constitution of India) for public notices, closed-door meetings, unreasonably short deadlines for submissions etc., and directed concerned Departments/Ministries to adopt inclusive processes for all affected stakeholders.<sup>64</sup> In order to adequately engage with the committee's terms of conference, the LGBTQIA+ community needs to organize, collaborate and hold meetings to deliberate the complexity of issues relating to a rights based approach to the role of gender and SOGIESC in the body of family law, best interests of the child, redressal against gender based violence, public healthcare measures to promote the highest attainable standard of physical and mental health, among others.

25. During conclusion, we brought to the committee's attention that they must co-opt experts from amongst LGBTQIA+ collectives to be representative with respect to the recommendations of the final report, as the aforesaid order dated 16.04.2024 empowers the committee to do so. The Secretary, MOSJE stated that the committee would be seeking assistance for writing its final report from the Vidhi Centre for Law and Policy (VCLP), whose representatives were in attendance. We have both personally witnessed and are reliably informed as a matter of public record on the serious concern of VCLP repeatedly usurping democratic spaces that should be reserved for a broader coalition of people's collectives, often adopting anti-rights based approaches on law, rights and public policy concerns relating to privacy, right to contest panchayat elections, public health surveillance, intelligence for law enforcement agencies and drafting legislation on anti-trafficking, Aadhaar (which mediates access to social welfare entitlements) and data protection.<sup>65</sup> It is unfortunate that the committee's reliance on such "experts" is directly undermining LGBTQIA+ people's participation in this democratic process. In fact, the courts have declared that communities must be at the centre of any stakeholder consultation in a governance based on the rule of law and they must not be relegated to a procedural formality.<sup>66</sup>

## **CONCLUSION:**

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<sup>64</sup> Order dated 03.09.2020 by the Hon'ble High Court of Delhi in *Dr. Satendra Singh v. Union of India & Ors.*, WP (C) No. 5959/2020; Order dated 30.06.2020 by the Hon'ble High Court of Delhi in *Vikrant Tongad v. Union of India*, WP (C) No. 3747/2020; Order dated 05.08.2020 by the Hon'ble High Court of Karnataka in *United Conservation Movement Welfare and Charitable Trust v. Union of India*, WP (C) No. 8632/2020; *MC Mehta v. Union of India*, (2019) 12 SCC 720; Order dated 12.09.2018 by the Hon'ble Supreme Court in *Swasthya Adhikar Manch v. Union of India*, WP (C) No. 33/2012; *Cellular Operators Association of India v. TRAI*, (2016) 7 SCC 703; *Chandramouleshwar Prasad v. Patna High Court*, (1969) 3 SCC 5

<sup>65</sup> Nileena MS (2020), *From Aadhaar to Aarogya Setu, Vidhi's questionable role in technology-related policy making*, The Caravan: <https://caravanmagazine.in/technology/vidhi-aadhaar-aarogya-setu-arghya-sengupta-privacy-think-tank>; Venkat Ananth and Dinesh Narayanan (2020), *Vidhi: inside India's most influential legal think tank*, The Economic Times: <https://economictimes.indiatimes.com/prime/economy-and-policy/vidhi-inside-indias-most-influential-legal-think-tank/primearticleshow/77749948.cms?from=mdr>

<sup>66</sup> *Hanuman Lakshman Aroskar v. Union of India*, (2019) 15 SCC 401

26. Given the expansive scope of law and policy concerns that merit examination by the Central and State Governments, we urgently demand the committee to adopt the following measures to gain legitimacy for its mandate:

- publish a public notice (English and regional languages) for a fresh round of stakeholder consultations on MOSJE's website and disseminate the same via other routes to ensure widespread publicity for the LGBTQIA+ community;
- conduct open consultations and hearings on a regional level to facilitate LGBTQIA+ participation;
- grant an opportunity of at least 30 days period for making submissions for all stakeholders;
- VCLP must immediately recuse itself from the committee to enable LGBTQIA+ people to effectively participate in the democratic process for the community;
- as an inter-ministerial committee, issue interim recommendations to appropriate authorities for ensuring that the everyday task of application of existing laws that regulate benefits to marital parties must be enforced in a manner to extend the same benefits to LGBTQIA+ persons in non-marital relationships to fulfil the mandate of Articles 14 and 15, as declared by the Hon'ble Supreme Court;<sup>67</sup>
- monitor, evaluate and supervise the implementation of the committee's final recommendations within a fixed deadline, as directed by the Hon'ble Supreme Court.<sup>68</sup>

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<sup>67</sup> Supriyo Chakraborty (2023), paras. 389-390

<sup>68</sup> Supriyo Chakraborty (2023), para. 367

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