



To,
Smt. Ghazala Meenai,
Joint Secretary (SD),
Room No. 616, 'A' Wing,
Shastri Bhawan, New Delhi-110001

Subject: Comments on the Rights of Transgender Persons Bill, 2015

4th January, 2016

Madam,

We write to you with the following comments and reformulations on the law relating to the Rights of Transgender Persons Bill, 2015 which is placed on your website for the same purpose.

The Equals Centre for Promotion of Social Justice is registered Trust which is committed to the cause of rights based approaches to marginalized sections of society, particularly persons with disabilities and their intersections. To this end, we focus on the Convention on the Rights of Persons with Disabilities, which India has ratified in 2007. When we read the Bill we found that there were many concepts – starting from the ‘Guiding principles’ under Section 3 to terms such as ‘inclusive education’, ‘reasonable accommodation’, ‘barriers’ etc. which have also been used in the Rights of Persons with Disabilities Bill 2013, also drafted by your Ministry. These in turn find their roots in the CRPD.

We thoroughly appreciate the Ministry’s inclusion of these concepts, as we believe that the CRPD has much to offer all marginalized groups, however, this in turn mandates being faithful to the original text and the jurisprudence that has followed from it. Our submission and recommendation should be taken accordingly, and suggestions relating to the substantive rights of gender non conforming persons must be in accordance with the responses from trans* organizations. Our submission shall not be construed to support any formulation in the Bill unless specifically mentioned.

We are ready and willing to appear before your Ministry to elaborate upon our submission and provide any additional documentation if so required.

Best regards,

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Comments on the Rights of Transgender Persons Bill, 2015

Statement of object and reasons: New formulation

'A legislation to enshrine the rights of Transgender Persons and to enable the framing of policy and welfare measures towards their inclusion and overall development'

The fact that this is legislation primarily concerned with the rights of Transgender persons must be laid down specifically, upon which there can be a framing of evolving policy and schemes.

Definitions

Definition of Abuse – Section 2 (a)

Must include instances of abuse that are specific to transgender persons which other persons may not consider being abuse specifically. This should be in line with framing of abuse definitions in domestic violence, caste atrocities, disability and similar legislation. For example, the act of forcing a trans* person to disrobe and 'prove' their gender may not be looked upon as abuse by many people as they may deem such invasive acts as necessary. For a trans* person it is humiliation beyond repair. Consultations with trans* groups to formulate this definition are required.

Definition of Discrimination – Section 2 (d)

(See reasonable accommodation, below)

Definition of Public Building – Section 2 (m) – new formulation

'Public building' means a building, irrespective of ownership, which is used and accessed by the public at large and includes its entrance, exit, parking space, footpath and other appurtenant lands; **and includes jails, prisons and places of detention;**

Definition of Reasonable Accommodation – Section 2 (n)

Reasonable accommodation is a concept that was introduced in the CRPD in 2007. The CRPD lays down several rights enabling the removal of barriers which exist against persons with disabilities – for instance, State obligations concerning physical access (Article 9), right to be recognized as persons before the law (Article 12), right to live independently and be included in the community (Article 19). These create inalienable rights. Because of the nature of disability, and the fact that there can never be a 'one size fits all' solution, the additional concept of reasonable accommodation was introduced, which is reproduced below as follows:

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights

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and fundamental freedoms;"

Hence, reasonable accommodation are measures to be taken over and above the provision of these specific inalienable rights.

The danger of only providing for reasonable accommodation without any other specific inalienable rights in a statute like this, is that everything that is required to enable the participation of a trans* person in the family, workplace, community etc. will be put down to this test of being 'reasonable'. In many cases the measures required may not seem reasonable to the person obliged to provide it.

If we take the simple example of the right to access toilets, which concern both trans* persons and persons with disabilities. A transwoman is often not allowed to access 'ladies toilets' and is forced to use men's toilets which are both inaccessible (because of urinals) and dangerous. Many persons with locomotor disabilities cannot enter toilets unless they are designed to accommodate them. In India, the obligation to provide for accessible toilets for persons with disabilities is a State obligation by virtue of Article 9 of the CRPD. It is not reasonable accommodation. Since there is no basic provision in the law giving the right to trans* persons to use gender specific restrooms in the manner of their choosing, leaving this to the 'reasonable' test will lead to a denial of rights.

It is therefore suggested that the 'reasonable accommodation' clause only be incorporated when there is a bedrock of substantive rights below it. To this end, a wider consultation must be held on what inalienable rights mean for trans* persons and how to incorporate that in such a law.

Definition of Rehabilitation - Section 2 (p)

Rehabilitation appears to have been incorporated from a disability specific context. Rehabilitation itself focuses on the individual, whereas it is societal barriers leading to discrimination and violence that require to be addressed. Detailed consultations must be sought with the representatives of the trans* community as to what their requirements are from such a provision.

Definition of 'Stigma against transgendered persons' – Section 2 (r)

Not referred to throughout the draft bill besides the definitions clause.

Rights

Section 5 – Constitutional Protection – new formulation

All transgender persons have the right to recognition everywhere as persons before the law.

Section 8 (2) – Right to life and personal liberty – new formulation

No person shall be deprived of their personal liberty on the ground of being a transgender.

This section has been reproduced from Article 11 of the CRPD pertaining to personal liberty. During the negotiation process of the CRPD, the drafting of this Article and the words "no person shall be deprived of their personal liberty **only** on the ground of disability" were objected to because of the reality of associated conditions leading to deprivation of liberty of persons with disabilities. For example, under this

formulation a person with leprosy who is found begging can still be incarcerated in a beggar's home because they are being deprived of their liberty on the grounds of begging, even though this circumstance is a consequence of their being afflicted by leprosy. Such a vulnerability possibly exists among trans* persons as well. Hence, the word 'only' must be removed.

Section 9 – Right to live in the community

While the right to live in the community is paramount, the manner in which this Section is drafted is reflective of the lived experience of persons with disabilities as has been stated under the CRPD and may not be receptive to that of trans* persons. Detailed consultations must be sought with the representatives of the trans* community as to what their requirements are from such a provision in order to ensure their rights.

Section 10 – Right to integrity

In the disability specific context the right to integrity was debated in the United Nations and said to have specific relevance to mental health interventions. Detailed consultations must be sought with the representatives of the trans* community as to what vulnerabilities are faced by them to their mental and physical integrity, and so how their rights should be framed in such a provision.

Section 12 (4) – Protection from violence, abuse and exploitation

Specific criminal offences should be created for offences committed against trans* persons of a sexual nature or otherwise which can be prefaced by a non-obstante clause to preempt conflict with the Indian Penal Code.

Section 13 – the Right to Home and Family

Along with the rights of trans* children to home and family the provisions must contain rights of trans* persons to marry, and to have, adopt, and retain custody of children on an equal basis with others. The evolving capacity of trans* children must be specifically recognized to enable the self-determination of their gender identity with age appropriate support.

Other rights which require recognition

1. The right to privacy needs to be recognized in the specific context of trans* persons.
2. The right of trans* persons with disabilities to be given accessible information and appropriate supports when required to exercise self-determination with regard to gender identity.

Social security, health, rehabilitation and recreation

Section 19 – Schemes and programmes for empowerment

The use of the word 'pension' is commonly associated with retirement and inability to contribute further in terms of employment. The same should be replaced by 'allowance'.

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The Section should specify that schemes should be formulated in consultation with representatives of the trans* movement and that schemes should be monitored for efficacy.

Section 27 – Budget

Along with the Ministry/department programmes a fixed reservation should exist in all other schemes of other departments/ministries – for example: housing, finance, self-help loans etc. for trans* persons and spending on the trans* community should be a minor head across all ministry and departmental budgets. There must be a commitment across sectors for relevant ministries to ensure that their policies and programmes are responsive, and the resources should be spent in an inclusive manner. Financial and physical data disaggregation is essential across ministries.

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