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Insaaf responds to MSJE Transgender Rights Bill (2015)

To,

Smt. Ghazala Meenai,
Joint Secretary (SD),
Room No. 616, 'A' Wing,
Shastri Bhawan,
New Delhi – 110 001

Dear Madam,

INSAAF is a student driven legal aid project initiated by National Law University, Delhi, as part of its commitment to social justice and furthering the rule of law. INSAAF is supervised by Dr. Anup Surendranath (Assistant Professor of Law) and is staffed by seven students of the B.A., LL.B (Hons.) course.

We have been closely following the Rights of Transgender Persons Bill since it was tabled in the Rajya Sabha and we believe that the Bill in its present form suffers from several shortcomings. We have explained our concerns in detail in the attached PDF file. We have sent our comments to Ministry and hope to assist the Ministry with the Bill.

We stand in solidarity with members of the transgender community who are seeking a 45 day extension for proper consultation on the Bill. The Bill was uploaded on the Ministry's website on 26th December, and we feel that it is an incredibly short span of time to come up with constructive comments/suggestions. We humbly request you to extend the deadline for submission of comments so that proper community consultation can take place before the Bill is presented in the Lok Sabha.

Regards,

INSAAF

I. TRANSGENDER PERSONS AND INTERSEX IDENTITIES

Section 2(f) of the Rights of Transgender Person's Bill defines a transgender person as a person, whose gender does not match with the gender assigned to that person at birth, secondly, includes trans-men and trans-women (whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.), thirdly, gender-queer persons and lastly a number of socio-cultural identities such as —kinnars, hijras, aravanis, jogtas etc.

a) WHAT ABOUT TRANSMEN/FEMALE TO MALE PERSONS?

Most transgender persons in India are transwomen and therefore most discussions and advocacy revolve around hijras and transwomen. India has a small population of transgender men who face oppression due to the lack of awareness and ignorance about this group of persons. Additionally, sex reassignment surgery for this group of people is more complicated and doctors lack the medical expertise. Transmen are in fact, a minority within the gender minority. This makes transition from female to male tougher than male to female. Transgender men have very little/no support system and struggle for recognition or visibility in discussions about transgender persons. Recently, more organisations have started advocating and raising awareness about transmen.

Exerpts from Open Letter written by Transmen to Ministry of Social Justice and Empowerment requesting for an opprotunity to be included in consultation regarding progressive policies for transgender persons;

"If transpeople are a minority with almost no rights in this country, transmen are a minority within that minority."

"It is hence, we feel, important to give special considrations and additional support to a minority group."

"A lot of these problems our brave Hijra sisters have also faced, But because they were mistakenly seen as boys, they were free to roam around and find other trans people. Because their Hijra mothers made space for them, they were able to leave their homes and live with their trans sisters and mothers. We don't have that."

"We are learning to organise ourselves from them (transwomen) and are in the process of doing that."

"For an umbrella term, to refer to us in all our diveristy, we would like the use of the term trans masculine. We do not identify with PAGFB [Persons Assigned Gender Female at Birth] which is what is being used in reports and meetings here to descibe our identities."

"We strongly urge you to refer to us by identities that we assume, not ones that are imposed on us without due democratic discussions and consent."

"We would like to be included in the consultations to formulate profressive policies for transpeople and for trans me, gender non conformists and people who identify as intersex to be given an opportunity to put forward out demand."

b) SHOULD INTERSEX PEOPLE BE INCLUDED IN THE BILL?

Intersex conditions include a variety of conditions (sexual anatomy, reproductive organs or chromosome pattern) that lead to atypical development of physical sex characteristics that don't meet the binary sex sterotypes. The term Intersex refers to the physical anatomy of an individual while the umbrella term transgender refers to gender identity. Intersex conditions are also known as differences of sex development (DSD). Intersex persons can be transgender as there could be a possibility that an intersex child assigned a sex at birth may later identify with different or no sex, that child is then considered to be transgender, however the two cannot be used synonymously.

One in every 2,000 children is born intersex and India is home to a large population of intersexual persons, most of who are subject to sexual abuse or non-consensual sex assignment surgery and forced into sex work or begging while others earn a living through performing. Intersex persons are subject to similar disadvantages and face the same challenges as the transgender persons. Like some transgender persons, an intersex person struggles to fit into the existing gender binary model. It is for this reason that they are subject to ostracism and interphobia.

Objects and reasons of the Bill include ensuring protection of transgender persons/ person who have difficulty with fitting into existing gender roles/ stereotypes from abuse, social, economic and political injustice. The Bill covers transgender persons; transsexual persons and gender queer people under Section 2(f). It only covers persons who, by choice, have changed their gender (Sex Reassignment Surgery), but does not include those who have been assigned a sex at birth. The definition of a transgender makes no mention of people who are born with atypical genitals. It recognizes persons who could be any transgender, transsexual, gender queer or identify themselves as male or female all of which an intersex person can feel about their gender as well.

The only category of persons, which could explicitly include intersex persons, is hijras. Ordinarily, hijras, are female identified males, some of whom are transgendered, transsexual or intersexual. National Legal Services Authority v. UOI recognises transgenders/hijras (which includes intersex) as the third gender. The decription of a hijra given in this judgment is; a hijra is a biological male who rejects his masculine identity to identify as any other or no gender. They are usually MTFs. Therefore, even though the judgment recognises their rights, the Bill makes no clear mention of an intersex person denying them multiple rights specifically the right to life and dignity. Following the NALSA judgment, the State Policy for Transgenders in Kerala, 2015, adopts an inclusive approach to explicitly include intersex persons within the definition of transgender.

In addition to the various challenges the intersex community faces (which are similar to those of the transgender community), Intersex children face the problem of undergoing Sex Assignment Surgery (SAS) without their consent. The procedure assigns a sex to the person by altering and removing one set of reproductive organs in order to "normalize" ambiguous genitalia. Termed as "intersex genital mutilation", children are not given the choice or opportunity to give their consent to the surgery..

The problem with this procedure is that, it is a cosmetic procedure, aimed at altering the external features of an intersex person, in order to give them the appearance of a single sex. Children who undergo this surgery are forced to sit for at least three of five subsequent procedures over their lifetime. However, the surgery leaves patients with a number of physical and psychological problems such as the inability to experience any form of sexual sensation, gender dysphoria, sense of betrayal, assault etc. SAS without consent is also human rights issue as it violates the rights of a child under the Convention on the Rights of the Child and the Principle 18 of the Yogyakarta Principles. Studies also show that parents tend to assign the male gender to their intersex child while some even force their female child to undergo a sex change. The Supreme Court in the NALSA Judgment categorically mentioned that insistence on SRS is immoral and illegal.

Malta recently adopted the Gender Identity, Gender Expression and Sex Characteristics Act, 2015. This is an anti-discrimination law intended to protect and ease the process of gender

identity for transgender, gender queer and intersex persons. The most significant feature of this Act is that it bans any non-vital gender assignment surgery on children before they are capable of giving consent. This law guarantees intersex children their right to bodily integrity and self-determination.

Physical, psychological and legal consequences of Intersex Surgery, suggests that it should included under the Bill and the rights of intersex persons should be protected in addition to those of transgender persons.

Rights that can be protected: in addition to the ones given under the Bill – prohibit unnecessary/ non-vital surgery and provide adequate counseling to families with intersex children.

c) WHAT SHOULD BE PRACTICAL PROCEDURE FOR STATE RECOGNITION OF GENDER IDENTITY THAT IS INCONSISTENT WITH AN INDIVIDUAL'S ASSIGNED SEX?

In India, a person can be legally recognized as a transgender person, as a man, a woman or a separate gender/third gender. The UNDP report by Arvind Narrain and Venkatesan Chakrapani suggests three basic models of implementation, which are:

Certification Model: In this model, an individual wishing to alter his/her gender submits the necessary documents and a gender certification panel set up by the government will issue a certificate after a screening process. This is operational in the states such as Tamil Nadu in the form of Aravanis Welfare Board. The Ministry of Social Justice and Empowerment in its report in 2014 also recommended that other States adopt this model and make changes according to their requirements.

A transgender identity card is issued to a person after clearance from the Screening Committee headed by the District Magistrate, Deputy Durector, Social Welfare Officer, psychologist/psychiatrist, representative of the transgender community and any other person of official that the Governemtn deems necessary/appropriate. After screening, this persons birth certificate etc. will be changed.

In this model, the criterion or test for qualifying a person as a transgender will depend on a fact to fact basis and the fact that the person is a part of a particular transgender group will act only as a corroborative evidence. It adopts a more bureaucratic procedure.

However, the problem with this system is that it may not be in full conformity with the self-identification model mandated by the Supreme Court in the NALSA Judgment. Instead of an affidavit declaring ones gender a person must pass the test of providing relevant evidence to prove. The State may interpret such procedures differently and no two states may follow the same procedure.

Furthermore, this system may lead to gender policing and might end up complicating the entire process making it cumbersome, possibly corrupt and even arbitrary. Even though, it is understandable to require some kind of authorization to change one's gender identity, it should be ensured that the process is as hassle free and un-bureaucratic as possible. Further, it is important mechanisms for proper checks and balances to ensure that the process remains as free and fair as possible. A more representative/ empathetic screening committee might help.

Medical Model: Which requires a transgender person to be issued a certificate by doctors diasgnosing him/her with gender dysphoria/ clearing him/her for SRS before he/she can be legally identified as a transgender. The WPATH (World Professional Association for Transgender Health), has a standardised procedure often requiring the consent of the person undergoing the SRS. It has the tendency of pathologising bodies and treating gender fluidity as a medical concern rather than a social one. Although this model is suitable for MtF or FtM transitions and is not suited for other transgenders who do not identify themselves within this gender binary.

Self-Identification Model: This model doesn't require any medical intervention, procedure or certification. It is followed in Argentina, under the Gender Identity Law, 2012 where there is no need for medical diasgnosis of Gender Dysphoria.

The Supreme Court in the NALSA judgment, hints at the self- identification model when it writes "Gender identity as already indicated forms the core of one's personal self, based on self identification, not on surgical or medical procedure." However, the mechanisms advocated in the report of the Ministry seem to be based on the certificaiton model. The certifying authority model although not inherently flawed, unfortunately depends a lot on on how it is carried forward and what processes are adopted for identification. Therefore, a procedure which meets the certifiction model and the self identifiation medal somewhere in the middle can be adopted in ordeto reconcile these two diverging opinions.

In this context, is there a need for medical diagnosis of gender dysphoria or should it be left to self-identification? The Supreme Court in the NALSA said gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender. Prior to the NALSA judgment, Sex Reassignment Surgery was required to be done, post the surgery a certificate of sex change was required to be issued by the concerned hospital. Now, SRS is no longer necessary, medical certificates based on SRS are also unecesssary, but a psychological assessment report may be required.

d) CAN/SHOULD CHILDREN BE CATEGORIZED AS TRANSGENDER CHILDREN OR SHOULD THEY BE REFERRED TO AS GENDER NONCONFORMING?

The term "gender nonconforming" is used synonymously with "gender variant". It refers to a person who does not fit into existing gender stereotypes (masculine or feminine), which based on sex, are assigned at birth. Referring to external expression and behavior, the term is broader than transgender. The difference between a gender variant and a transgender person is knowledge/being conscious of identifying with a gender different from the one assigned at birth. All gender variant children may not necessarily grow up to identify as transgender. It is only after a certain age, that students/children begin to understand their behaviour/consciously identify with a different gender. It is for this reason that the term gender variant is used for children and transgender is used for adults or youth. A more apt term in Section 5 could be "gender non conforming children"/ "gender variant children" and "transgendered youth" as opposed "transgender children".

II. PROTECTION AGAINST DISCRIMINATION

BY PRIVATE INDIVIDUALS

Horizontal Application of fundamental rights determines the relationship between private individuals and implies that one can claim redressal for wrongs done to them by private individuals. In India, most fundamental right violations can only be claimed against the 'State' as defined in Article 12 of the Constitution of India. However, the most pervasive forms of discrimination in Indian society have been horizontal, and involve excluding a section of society from the economic and social mainstream through boycotts and denial of access to public spaces.

If we read the Rights of Transgender Persons Act, 2014, we can observe that it creates the scope for horizontal application of fundamental rights guaranteed under Article 15 of the Constitution of India.

Section 2(d) defines 'establishment' and it is clear that it includes non statutory bodies and institutions such as a company, firm, cooperative, association, trust, agency, organization, industry, supplier of goods or services, factory etc. Section 2(n) which defines a 'public building' must be read in consonance with this. It explicitly mentions that it includes any building used and accessed by the public at large, irrespective of ownership. This Act defines 'discrimination' through section 2(c) and now transgender persons can bring a case against private entities for discrimination under the Act as well as violation of fundamental rights mentioned in part III of the Constitution. This is necessary in this day and age when transmen and transwomen are being denied entry into malls and are being deprived of educational opportunities.

III. THE WASHROOM DEBATE: SEPARATE BUT EQUAL?

It is common knowledge that trans people face harassment when they make use of public facilities assigned for men and women. Their access to such public spaces is limited by their legitimate and understandable fear of persecution and harassment. A single experience of denied access, verbal harassment, or physical assault is certainly a problem in its own right. These experiences, however, can have far-reaching effects that impact people's lives. Trans persons are constantly faced with harmful consequences in their daily lives when it comes to their access to washrooms. Their school life may be bridled with discomfort and anxiety and there may be marginalization be peers and further, segregation at places of employment. Their participation in public life is hindered as they may refrain from attending events where they will be confronted with the dilemma of choosing a washroom or rather, have a washroom chosen for them. It has been well documented that constant curbing going to the washroom may cause Urinary tract infections; weaken the bladder, kidney infections and dehydration.

When the Court mandates creation of washroom facilities for the third gender, we must ask whether trans people have access to all washrooms, or if they are only 'allowed' to make use of 'their' washroom.

If a trans person identifies as a woman, and is thus, a transwoman, restricting her access to facilities available to 'women' strikes down her right to self-determination and autonomy. Despite her choosing and expressing desire to belong to a certain gender, she is asked to perform the role of the third gender. It encourages the notion that she is not a 'real' woman and is and will always be a trans person, simply trying to mimic a woman's lived

experiences. If access of trans people is limited to their assigned washrooms it rings a bell to the "separate but equal" argument of Brown v. Board of Education.

Limiting their access to washrooms of the gender with which they identify, is stripping them of their identity and reinforcing notions of how trans people are violent and segregation is beneficial for them. This is a paternalistic viewpoint, which is almost condescending when we explore reasons behind the rigid entry into the washrooms.

One reason for denying transwoman access to female washrooms is that women feel unsafe or uncomfortable due to the visible masculine presence and need to be protected from the same. We have situations where their mere presence is construed to be an act of harassment. The discomfort of 'real' women is given weight when in reality, statistics indicate that trans people are actually at a much greater risk of harassment at the hands of the other genders. Trans women are perceived to be harassers by virtue of their appearance and this just feeds into the larger narrative of how they are aggressive, loud and invasive with no regard to privacy or security of others.

However, many fears against trans women inclusion are based on misinformation and unfounded fears due to pervasive stereotypes that depict them unfavorably. This will just become another means to further trans oppression, by confining them to a separate space and preventing socialization and inclusion. It singles out trans people, even when they want to be perceived as a gender from the current binary and not the third gender assigned to them by the Court.

For them using a washroom, something so integral to daily life, in accordance with the gender they identify with, could be a way of reclaiming their identity and asserting it. We don't want situations wherein a transwoman is denied entry to a female washroom and is told to go where she 'belongs'. Allotting them a third gender washroom is simply opening the doors for marginalization and taking away their agency to determine the washroom they would like to use. The argument that trans people themselves may feel uncomfortable using washrooms of the gender binary is extremely patronizing and resonates the arguments made in favour of racial segregation in terms of access to public fountains, schools and buses.

Just as a trans person while filling up an application form, has the right of choice to be any of the three genders (male / female/ the third gender), they should also have the right to use facilities for the gender they identify with.

I would like to end with a quote by the author Amin Maalouf, "For it is often the way we look at people that imprisons them… And it is also the way we look at them that can set them free."

IV. RESERVATIONS FOR THE TRANSGENDER COMMUNITY:

POSSIBILITIES AND PITFALLS

In NALSA v. Union of India, the Supreme Court directed the Central and the State Governments to take steps to treat transgender persons as socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments. About a month after the NALSA decision, the National Commission for Backward Classes (NCBC) recommended the

inclusion of transgender persons in the central list of the OBCs. The Rights of Transgender Persons Bill also provides for two percent reservation in educational institutions and public employment .

In India, affirmative action as a tool of group representation has mainly been associated with caste in both judicial discourse and public imagination. By recognising that transgender persons constitute a distinct class of individuals who are discriminated against based on their gender identity, the Court has expanded the scope of equality jurisprudence in India.

Over the years, Supreme Court jurisprudence on reservations has moved away from an individualistic colour-blind model to a more group oriented conception of equality. In Indira Sawhney, the Court held that caste could be used as a criteria for identifying backward groups because caste is nothing but a socially and occupationally homogenous class. However, the Court cautioned that caste cannot be the sole criteria for granting reservation under the OBC category and carved out the creamy layer exception. It is important to note that the Court in Indira Sawhney prohibited caste from being the sole criteria but it did not provide that caste must be a factor in all cases. Therefore, what is relevant isn't caste but the existence of a distinct class of individuals who suffer from backwardness.

For the purpose of providing reservation in public employment under Article 16(4), the state must prove lack of adequate representation in addition to backwardness. According to the 2011 census, there are 4.9 lakh transgender persons in India. However, there exists virtually no data about the representation of transgender persons in government employment. It can be argued that the lack of data is in itself indicative of the kind of callous treatment meted out to the community. However, it is desirable for the state to carry out an empirical assessment of the number of transgender persons in public employment. While most of us intuitively know that transgender persons are not adequately represented in government jobs, having empirical evidence of the same would prevent legal challenges in future.

a) WHO IS A TRANSGENDER PERSON IN THE EYES OF THE LAW?

There exists significant confusion about who is a transgender person as per the law. Both the NALSA judgment and the Bill emphatically provide that Sex Reassignment Surgery (SRS) or Hormone Replacement Therapy (HRT) cannot be prerequisites for laying claim to the transgender identity. However, it is unclear whether mere self-identification is enough to qualify as a member of the transgender community, or whether there should be a screening process. The UNDP report by Arvind Narrain and Venkatesan Chakrapani suggests three basic models of implementation: the certification model, the medical model and the self-identification model. The certification model is currently operational in Tamil Nadu in the form of Aravanis Welfare Board. There exist serious problems with all three approaches that must be carefully considered. Unlike caste identity which can be objectively verified because it depends on a person's birth, gender identity is internal, fluid and highly subjective. If benefits of affirmative action were to be conferred exclusively based on self-identification, it could become impractical and susceptible to misuse. On the other hand, any kind of bureaucratic gatekeeping would run the risk of policing of marginalized identities. Therefore, the procedure by which an individual is to be legally recognized as a member of the transgender community is of utmost importance, and requires further deliberation and consultation.

b) WHAT ABOUT TRANSGENDER PERSONS WHO BELONG TO SC/ST CATEGORIES?

One of the reasons provided by the government for resisting the implementation of the NALSA decision is that it would be inappropriate to include transgender persons in the OBC category because some of them belong to Scheduled Castes and Scheduled Tribes. For these individuals, there seems to exist an ostensible clash between their gender identity and caste identity. Even within the transgender community, the opinion is divided on how to resolve this dilemma. Some suggest that members who grew up SC/ST should continue seeking reservations under that category, while others can be classified as OBC. However, there are Dalit transgender activists who oppose such a move because they fear that if transgender Dalits remain categorized as SCs, they will have to compete against those Dalits who didn't struggle with their gender or their families. A novel solution has been offered in the form of horizontal reservation across categories. In November 2014, a group of transwomen petitioned the Madras High Court demanding a 3 percent reservation for transgender people under a new category, similar to reservations for people with disabilities. However, based on our past experience with disability reservations, there exists a legitimate concern that if transgender reservations were not anchored by an OBC listing, they could become vulnerable to legal challenges and narrow interpretation.

c) WHETHER TRANSWOMEN ARE ELIGIBLE FOR POSTS RESERVED FOR WOMEN?

Another highly contentious issue is whether reservations for women should be restricted to persons assigned female at birth or should they be extended to individuals who were assigned male at birth but now identify as women. There are persuasive arguments from both sides. On one hand, it is contended that privilege is a matter of societal perception rather than internal identity. Therefore, transwomen who have had access to better education and nutrition during their formative years should not be allowed to contest for seats reserved for women. On the other hand, it is argued that the discrimination and violence that transwomen suffer on account of transphobia offsets any preferential treatment that may have received early in their life and makes them far more disadvantaged than cis women. However, the debate here isn't whether transwomen should be granted reservations. The real question is whether the reservations for transwomen should come out of cis women's share or if they should be over and above reservations meant for persons assigned female at birth. It is also unclear whether transmen would qualify for women's reservations.

V. EQUALITY AND NON-DISCRIMINATION

The Rights of Transgender Persons Bill, 2014 employs the phrase 'on an equal basis with others' multiple times. It is important to discern the meaning of this phrase and to understand what it entails.

Article 14 of the Constitution of India provides:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India".

Traditionally, in the Indian judiciary, equality challenges have been decided using the Classification Test where what is to be seen is whether the law in question creates an

intelligible classification and whether there exists a rational nexus between such classification and the object of the legislation. Both these parts of the test must be satisfied in order for a legislation to survive this scrutiny.

As opposed to this, another conception was introduced in India in the case of E P Royappa v State of Tamil Nadu . All that this new test of Non Arbitrariness requires to be seen is whether there is any element of arbitrariness in the action in question. Arbitrariness can be brought about through bias, non-application of mind, non-consideration of relevant factors or consideration of irrelevant factors. This test recognized the problem inherent in the Nexus test including the fact that it does not mandate an inquiry into the quality of the nexus or the strength of it.

The Arbitrariness Test is materially different from the Classification (or Nexus) Test because it is does not require a comparator for the object of scrutiny and merely requires that the object of scrutiny in and of itself must not have been subject to state action in an arbitrary manner through consideration of irrelevant factors or non-consideration of relevant factors. The advantage in this is that the Arbitrariness Test has greater scope for Affirmative Action and pays regard to the treatment of a particular group regardless of whether a comparator group can be found and how the comparator group is treated.

The phrase 'on an equal basis with others' in the Rights of Transgender Persons Bill, 2014, carries with itself the idea that the 'other' will always be required as a comparator to measure equality and the special needs of the group, in and of the group itself, shall not be a factor for measuring equality.

It may be argued that the is a fairly commonly used phrase in international conventions as well as domestic legislation, but it is important to note that wherever the phrase has been employed, it has been done so with care to not exclude situations of affirmative action. For example, in s. 3 (equality and nondiscrimination) of the Rights of Persons with Disabilities Bill, 2014, while subsection 1 employs the phrase 'on an equal basis as others', subsection 2 discusses special measures to be taken by appropriate governments. No such caution seems to have been taken with respect to the Transgender Persons Bill.

As a matter of fact, the Convention on Rights of Persons with Disabilities also includes "equal basis as others" However, even the convention takes the precaution of including references to positive discrimination.

Given that transgender persons are a group of people for whom finding a comparator would be difficult and they are also a marginalized community that will require affirmative action, it makes little sense to exclude that from the legislation.

VI. EDUCATIONAL ENTITLEMENTS

a) NARROW DEFINITION OF INCLUSIVE EDUCATION

The Rights of Transgender Persons Bill defines 'inclusive education' as "means a system of education wherein all students learn together, most or all of the time" . S.13 puts a duty on the appropriate Government and local authorities to "ensure that that all educational institutions funded or recognized by them, provide inclusive education, and inter alia, —(i) admit transgender students without discrimination and provide them education

as also opportunities for sports, recreation and leisure activities on an equal basis with 10 other;

(ii) provide reasonable accommodation of the individual's requirements;

(iii) provide necessary support in environments that maximize academic and social development, consistent with the goal of full inclusion;

(iv) monitor participation, progress in terms of attainment levels, and completion of education, in respect of every transgender student."

The definition of "inclusive education" is very narrow and simply focuses on learning together. A more encompassing definition would be something like "Inclusive education means that all students attend and are welcomed by schools in age-appropriate, regular classes and are supported to learn, contribute and participate in all aspects of the life of the school". UNESCO has also given a more expansive and better-suited definition which provides that "(inclusive education) involves changes and modifications in content, approaches, structures and strategies, with a common vision which covers all children of the appropriate age range and a conviction that it is the responsibility of the regular system to educate all children". If the Act is to help meaningfully provide for inclusive education, it must encourage schools to not only to make do with a system where students learn together, but to create a curriculum that creates an atmosphere of inclusivity by changing content and modifying approaches and structures which are more gender-neutral. For example, content on gender sensitization and information about potential procedures such as sexual reassignment surgery and hormone therapy, as well as the possible implications/effects of both.

The definition provides that "students learn together most or all of the time". The definition gives institutions a lot of leeway in adopting inclusive education methods only when it is convenient for the institution to do so. This can be counter-productive to achieving the objectives of the Act.

b) LACK OF GUIDELINES ON HOW TO ACHIEVE REASONABLE ACCOMMODATION

The Act defines reasonable accommodation as "an accommodation needed to ensure transgender persons the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". Section 13(ii) provides that the educational institutions have to "provide reasonable accommodation of the individual's requirements".

The Act provides no guidelines on how reasonable accommodation of the individual requirements are to be achieved and which aspects this must cover. There is a requirement for the Government, through rules or otherwise, to have guidelines for educational institutions with respect to sex-segregated bathrooms, how gender neutrality is to be achieved in dress codes, and sports. The Government can refer to several Guidelines prevalent in other countries like the NYC Education Department Transgender Student Guidelines, or District of Colombia Public Schools- Transgender and Gender Non-Conforming Policy Guidelines. Detailed guidelines can be implemented by a body like CBSE or by the Ministry of Education in India for all schools to incorporate in order to achieve reasonable accommodation and the Act/Rules should provide for a provision under which such guidelines have to be implemented. Guidelines incorporate topics like Privacy, Gender

Pronouns, Sports and Physical Education, Restroom and Locker Room Accessibility, Gender Segregation in other Areas, Dress Codes, Resource Material etc.

VII. CUSTODIAL VIOLENCE, POLICE TORTURE AND NEED FOR ACCOUNTABILITY

Section 377 of the Indian Penal Code which criminalizes same-sex relations among consenting adults is used as an instrument and justification for discrimination, police harassment, extortion and abuse against transgender communities, thus cementing their vulnerable and marginalized status.

As per Human Rights Watch, Delhi, the population census of 2011 counted transgender persons as a separate category for the first time in India and recorded an official count of nearly half a million. Some activists from the community are of the opinion that the actual numbers could be higher. In April 2014, the Supreme Court ruled that transgender persons should be recognized as a third gender and highlighted the stigma faced by the community. This landmark judgement, however, sees close to no practical implementation on the ground as attacks against transgender people continue at an alarming rate.

The nongovernmental organization Telangana Hijra Transgender Samiti, based in the southern city of Hyderabad, reported 40 attacks on transgender people in the last six months of 2014. According to the rights group, in several cases, the police refused to even register complaints. The transgender community remains vulnerable to harassment and violence especially by the police encouraged only by the ridicule and apathy of the Indian society.

In an incident on January 20, 2015, the police detained a young hijra – a distinct transgender and intersex community – for questioning about the murder of another hijra. She was detained at the police station for four hours without there being a female police official present and was allegedly stripped naked and suffered verbal as well as physical abuse. In another incident, on January 22, 2015, police picked up a transgender woman in Chennai for interrogation purposes and at the station, allegedly suspended her by her legs with a rope and penetrative her post-operative genitals with a baton. She was left bleeding overnight and was released only in the morning. Incidents involving police brutality against transgender persons are innumerable and many accounts have been listed in the PUCL, Karnataka report (2003) titled 'Human Rights Violations against the Transgender Community'.

Section 10(2)(a) of the Rights of Transgender Persons Bill, 2014 states that the police can be authorized to provide safe custody to the transgenders who are victims of abuse, violence or exploitation. This is problematic because historically, police conduct towards the community has veered towards stigmatization and brutalization. An example of this is an incident which took place in June 2014 where eight hijras were arrested in Ajmer for assaulting a policeman. Seven alleged that there were beaten by the police while in custody and one said that she had been taken into a separate room and raped by three policemen. A bribe was demanded of her by the policeman for not filing charges against her.

As the transgender community is not a recipient of systematic and structural legal assistance, they are often forced to negotiate terms with the police in an effort to lodge complaints or assert their rights. This process leaves them at the mercy of a police structure which exploits their vulnerability for unprotected sex, money, and other forms of violence specific to transgender persons, especially transgender women, such as stripping, mutilation of genitals,

forced redressing in clothes to fit assigned gender, rape, insertion of objects, etc. Furthermore, transgender persons are unable to report sexual assault without the looming shadow of fear as sodomitic acts – as per Sec. 377 – leaves them open to criminal liability. When transgender people are denied their basic rights and the opportunity to secure education, employment and health benefits, they are left with no option but to beg or engage in sex work, thus perpetuating the vicious cycle which exposes them to further brutality at the hands of law enforcement authorities.

It is recommended that such gender-specific instances of sexual and physical violence intended to degrade or humiliate transgender persons ought to be treated as specific circumstances of aggravated assault and should be assigned specific punishments not left to the discretion of the judiciary as power dynamics could – and would most probably – work against the already oppressed community.

Section 10(4) discusses the duty of a police officer who receives a complaint regarding the abuse or exploitation of a transgender. However, this clause fails to include substantial methods to ensure that the filing of an FIR is not refused due to the gender identity of the victim. Such discriminatory behaviour should be made legally punishable by allowing the victim to approach a superior police officer or officers at other police stations who are then bound to conduct an enquiry. Any information that ought to be disseminated by the police under this clause should be verified or confirmed by a higher authority/superior officer to check situations where the police officer is principally involved in the discrimination. Alternatively, NGOs and parallel organizations can be employed to aid the police in disseminating such information. Furthermore, the rules which apply to the arrest and detention of women at night should apply to transgender women as well.

Police violence cannot be observed in isolation. It is the offspring of widespread social prejudice against transgender persons in India, finding its place in the behaviour of family members, medical authorities, government employers, etc. It must be made mandatory for police personnel to undergo sensitization and awareness programmes about handling cases involving transgenders under Section 10(6) to ensure that the survivor does not undergo further trauma and judgement as a result of which they will be deterred from pursuing their case further. Avoiding a superficial discourse on the subject, police personnel should receive substantial theoretical and practical training including basic tenets like respect for the chosen gender of a transgender or intersex person, not referring to them by their assigned gender, etc.

Through a structured system for tackling police harassment and brutality against the transgender community, India can prevent police action that constitutes ‘state-sponsored discrimination’.

VIII. DATABASE CREATION AND PRIVACY CONCERN

With the privacy debate gaining momentum, database creation is engulfed in controversy mainly with respect to issues of actual security of the database and the legal and ethical implications of what can/should be stored on the databases in the first place. There are no consistent and uniform privacy regulations in place in India.

United States has a comprehensive privacy law which was based on the Fair Information Practice developed in the 1970s. The basic principles of data protection were to redefine the concept of personal privacy:

- There must be no personal-data record-keeping systems whose very existence is secret.

- There must be a way for an individual, to find out what information is in a record and how it is used.

- There must be a way for an individual to prevent information obtained for one purpose from being used or made available for other purposes without his consent.

- There must be a way for an individual to correct or amend a record of identifiable information.

- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

- Data should be deleted when it is no longer needed for the stated purpose

PROS AND CONS OF CREATING A DATABASE

The transgender Bill comes with its own set of problems– it nowhere talks about identification and survey of Transgender Persons. This becomes of paramount importance as such identification must begin at the preliminary stages and will involve creating a reaffirming environment for gender expression and use of inclusive, non-gender-specific language. The State must adopt a model that allows for minimal violation of privacy and gives an individual the autonomy to exercise their freedom of expression. The self identification model while may be best suited, it can also be used to exploit and deny them rights. The government must actively participate and ensure that confidential information is not released unless it is authorized under any law.

The right to privacy must include the right to keep one's gender private. As this bill seeks to accord rights to transgender persons, we must find a middle path between protection of this right and creation of a database.

There is no national database to track violence against transgender people. And while this is an urgent need to give law enforcement the resources to track and prevent such incidents, there is also paramount concerns about the privacy and safety concerns of these individuals. Transgender persons have faced discrimination and harassment at the hands of these very law enforcement agencies and an open database may only perpetuate increase in violence.

We require government agencies, social workers, counselors, medical professionals, and non-profit organizations who provide direct services to transgender people to reexamine the ways they are engaging with the transgender community.

Orinam note: *While we greatly appreciate the intent and comprehensive nature of this letter, we would like to point out some ambiguities in the wording "It only covers persons who, by choice, have changed their gender (Sex Reassignment Surgery), but does not include those who have been assigned a sex at birth." This wording is misleading because:*
(i) Most people are assigned a sex at birth.

(ii) The Bill does cover people who have not had SRS.
(iii) SRS is not synonymous with changing gender. We need to distinguish between social gender change and medical procedures. NALSA and the MSJE bill are clear that surgery and endocrine therapy are not (and should not be) criteria for legally determining transgender identity