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LesBiT's response to MSJE Transgender Rights Bill (2015)

Chapter 1 Preliminary

2(d) 'discrimination' means any distinction, exclusion or restriction on the basis of gender identity and expression which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination, including denial of reasonable accommodation;

Comments on Point 2(d): While addressing discrimination it should include the ways of segregation/ghettoization which is done in the name of inclusion. That makes trans persons more and more secluded from the mainstream. In the name of all separate provisions it should not become like trans persons are made as separate beings.

(s) 'Transgender Person' means a person, whose gender does not match with the gender assigned to that person at birth and includes trans-men and trans-women (whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.), gender-queers and a number of socio-cultural identities such as — kinnars, hijras, aravanis, jogtas etc. A transgender person should have the option to choose either 'man', 'woman' or 'transgender' as well as have the right to choose any of the options independent of surgery/hormones.

Comments on Point 2(s): Persons with Intersex variation also undergo severe exploitation, violence and discrimination. Persons with intersex variation when found at the birth should be given choice of their gender and it should be fully respected. The time taken till they choose gender where they live in different kinds of bodies that they have which can be surgically changed should not be discriminated. It also cannot be seen as trans gender issue as there is a bodily difference. They undergo similar issues like trans people in schools, colleges, work places, family, friends, public, which is violent and insulting because of this social system. There should be an environment which is violent free and discrimination free for their lives. There is also a need to address their needs with all its specificities. To be more inclusive the name of the bill should be also changed to Rights of Intersex and Transgender persons' Bill.

With persons with intersex variation the question of assigned gender at birth makes it very complicated as it is based on the biological bodies, which is constructed based on the hetero-normative reproductive paradigm. So to assign based on these two genders at birth is a wrong process.

(t) 'violence' means the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal development, or deprivation.

Comments on Point 2(t): The use of the word intentional in the definition of Violence is a little complicated when it comes to the issues of trans persons. There has been a history of violence against trans persons in the name of correcting, getting them to realize the assigned gender at birth, through physical violence, sexual violence, medical violence etc. If the word intentional is used then there is an escape way for the society to say that they never knew that it was trans issue. So there needs to be a mechanism to handle such violence which is intentional based on the social system of binary genders and hetero-normativity. It will help if there is a separate supportive Anti-Atrocities protection for Transgenders.

4. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

Comments on Point 4: “Act to have overriding effect” – In the context of transgender persons especially male to female who come from the cultural backgrounds begging and sex work has been their main profession. This is mainly because the society has pushed these communities to such lack of options for their survival. In India Begging is criminal, soliciting is criminal and the kind of sexual acts transpeople will get involved is also criminalized. In this back drop though sex work is not criminal and soliciting is criminal, the police and public morality acts against people in sex work. For people who are pushed into these professions from generations immediate shifting to the rightful mainstream is not easy. In fact many communities do not even have the knowledge of this bill. In this light sex work, begging and IPC 377 should be decriminalized.

Chapter 2 Transgender Identity

1. Transgender should be declared as the third gender, and a Transgender Person should have the option to identify as ‘man’, ‘woman’ or ‘transgender’ as well as have the right to choose any of the options independent of surgery/hormones. Only the nomenclature ‘transgender’ should be used and nomenclatures like ‘other’ or ‘others’ should not be used.

Comments on Point 1: “Transgender should be declared as the third gender” – is there a need for this hierarchy of first second and third gender? This would also mean first gender is man and second gender is woman and third is trans. In most of the academic studies it is proved that there are many expressions of genders. The state should be update with these gender discourses. These research discourses are based on real life experiences. The gender hierarchy has already resulted in severe patriarchal violence against women and all vulnerable communities. So we strongly refuse the third gender status.

2. Certificate that a person is a transgender person should be issued by a state level authority duly designated or constituted by respective the State/UT on the lines of Tamil Nadu Aravanis Welfare Board, on the recommendation of a District level Screening Committee headed by the Collector/District Magistrate and comprising District Social Welfare Officer, psychologist, psychiatrist, a social worker and two representatives of transgender community and such other person or official as the State Govt/UT Administration deems appropriate.

Comments on Point 2: This points speaks about certification process. The NALSA judgment has stated about self-identification of gender as gender is an integral part of a one’s being and that has to be decided by the person. It is a contradiction if the state has to certify the gender of a person. And if state will certify the gender of trans people the state should

also certify the gender of women and men. That will address all citizens equally when it comes to self-identification of gender question.

The *NALSA* judgment allows trans people to self-identify as Man, Woman or Transgender. For many trans people to identify as 'man' or as 'woman' should be allowed through self-identification process. This can be done only through affidavit which is notarized or court, extending to all ID cards. This should also not be a problem for such people to avail services. Just because a person is trans it should not become mandatory for trans people to identify as transgender to avail services.

To quote the bill – “Transgender Person should have the option to identify as ‘man’, ‘woman’ or ‘transgender’ as well as have the right to choose any of the options independent of surgery/hormones. Only the nomenclature ‘transgender’ should be used and nomenclatures like ‘other’ or ‘others’ should not be used” – it contradicts when the line before says that transgenders should be declared as Third Gender. That is also another reason why third gender declaration should be removed and man, woman, or transgender self-identification should remain.

Moreover there are two separate needs of trans people: the self-gender identification and the self-gender identification and services. For the self-gender identification there should be court or notarized affidavit which should be accepted by all the state establishments, educational institutions and other state and private sectors. On the other hand the people who need services and entitlements from the state should have an authorization process. All the identity cards should be through self-identification process including voter ID, ration card, passport, pan card, Aadhaar, etc. For the services that state gives to trans people, there should be autonomous bodies for authorization and not certification for only services. The autonomous bodies should be with rotational representation for every 6 months and for that rotation there should be election with community. It should not have people sitting in the committee already. It should also have government represented mental health professionals. It should not be under the hands of NGOs working for the Transgender people which will force trans people to become members of the NGOs or the NGOs will favor whom to authorize and whom not and there are possibilities of discrimination. There should be a process where trans people who live in villages should also easily get services.

Chapter 3 – Rights and Entitlements

5: A harmonious reading of the Constitutional provisions as well as the provisions of the Citizenship Act, 1955 and the General Clauses Act, 1897 Act would show that in fact there is no conflict or limitation imposed on the concept of 'person' by any of these laws and a Transgender Person would undoubtedly fall within the definition of 'person'. It is evident that the Constitution of India guarantees right to equality and non-discrimination for all including transgender persons.

Comments on Point 5: In the entire of IPC there are gender specific terms like his, her, daughter, sister, wife, son, brother etc. and these needs to be expanded to include all trans and intersex persons.

7. The appropriate Government and local authorities shall take all necessary measures to ensure that transgender children enjoy human rights on an equal basis with other children

and also ensure that they have the right to freely express their views on all matters affecting them on equal basis with other children.

Comments on Point 7: Considering the present situation in India, at an early age, the concept of transgender is not known by children. They will be gender non-conforming. There are many children who express gender non-conforming expressions out of whom not all will be transgenders. There is a need for creating an environment for gender non-conforming children to freely express themselves. Those who might identify as trans later will need enabling environment to identify themselves. There is a need for gender neutral uniform attire system which will enable trans people to be more comfortable to identify themselves so that they will not be pushed out of educational system based on the prejudice of being non-conforming.

Point 9. Right to live in Community

9(2): The appropriate Government and local authorities shall take appropriate measures to ensure full enjoyment of the right mentioned in sub-section (1) of section 7 by:— (a) ensuring that Transgender Persons have access to a range of in-house, residential and other community support services, including assistance necessary to support living and inclusion with community; and (b) making community services and facilities for the general population available on an equal basis to Transgender Persons.

Comments on Point 9(2): Clarification is needed on this point. Who is the community that is mentioned here as not all trans cultures have community living? Is this based on the Hijra Community that lives together? What is the kind of support as it is not specified in this point? Is it about state financial support for trans communities living together or housing support for trans communities?

10: Every Transgender Person has a right to respect for his or her physical and mental integrity on an equal basis with others.

Comments on Point 10: The language used in these lines creates an assumption that transgender persons do not have physical and mental integrity. It is pathologizing of transgender issues. It is also discriminatory to have wordings like 'his' or 'her' while speaking about trans issues which broadens the concept of 'his' and 'her'.

11. The appropriate Government and local authorities shall take all appropriate administrative and other measures to protect persons from being subjected to torture, or cruel, inhuman or degrading treatment or punishment.

12. (1) The appropriate Government and local authorities shall take all appropriate administrative, social, educational and other measures to protect Transgender Persons, both within and outside the home, from all forms of abuse, violence and exploitation. (2) Any police officer who receives a complaint or otherwise comes to know of abuse, violence or exploitation towards any Transgender Person shall inform the aggrieved person of:

Comments on Points 11 and 12 and sub sections 2 and 3: The use of language which includes rescue, protection and rehabilitation is degrading the integrity of transgenders. The rehabilitation language keeps away the rights language of violation of rights, violence, exploitation, torture, atrocities free of right to life. It is the rights of transgender people who

are like any other people. It is also the responsibility of the state agencies to be equipped to handle the cases where trans people are facing violation of rights, violence, exploitation, torture, atrocities etc. to give them the rightful remedies. We reject the framework of rehabilitation and instead would like the state to work on a rights based framework. (4) Necessary amendments in IPC to cover the cases of sexual assault on Transgender Persons.

Comments on Point 12(4): The victim category in the IPC section 375 should include transgender persons, persons with intersex variations, and genderqueers.

Point 13 (1): No child who is a transgender shall be separated from his or her parents on grounds of being a transgender except on an order of competent Court, if required in the best interest of the child. (2) Where the immediate family is unable to care for a transgender child, the competent Court shall make every effort to place such child within his or her extended family, or within the community in a family setting. Explanation—‘Family’ means a group of people related by blood, marriage or adoption to the Transgender Person.

Comments on Points 13(1), (2) and explanation: There is a need for the trans community people to have adoption rights and the alternate families constructed by transgenders like Hijra families should be legitimately recognized as families. On the other hand many female to male trans people who were previously forced into hetero sexual marriages also had to bear children. Those female to male trans people who now live in different family set ups which is alternative should also be recognized as legitimate families.

Chapter 4 Education

15. The appropriate Government and local authorities shall ensure 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 other;

Comments on Point 15 (i): In the context of sports and persons with intersex variation there needs to be a different way of addressing the issue of the bodily test of confirming gender. It should not be medical and the inclusion of persons with intersex variation in sports should be made.

There should be training on the issues of persons with intersex variation and transgenders starting from primary education to have an accepting environment in the educational system. This means the educational curriculum should change in terms of what is gender, what is a family, what are gender roles of people etc.

In the lower educational system there should be non-discriminatory environment and in the higher education where people start identifying their gender, we need the affirmative action of reservation which of course is not based on the number of population but a different mechanism which will enable trans people to get facilities in higher education.

16. The Appropriate Government and local authorities shall ensure participation of Transgender Persons in adult education and continuing education programmes on an equal basis with others.

Comments on Point 16: In the present system there are many trans people and people with intersex variation who have been pushed out of educational system due to discrimination of not being binary genders. In this context there is a need for reasonable accommodation which will enable the present communities of trans and intersex people to continue from the plus 2 class which is a preparatory course for degree in distance education system. At the same time if there are trans and people with intersex variation who have been pushed at the degree level then based on their skills they should be accommodated in different degree courses.

For the future generations there is a need for affirmative action in terms of reservation percentage not based on population. The number strategy does not work when it comes to trans and people with intersex variation as not all communities are out there. There are social morality restrictions on some trans and intersex communities which stops from expressing themselves.

Chapter 5 Skill Development and Employment

17(1): The appropriate Government shall formulate schemes and programmes to facilitate and support employment of Transgender Persons especially for their vocational training and self-employment.

Comments on Point 17: In the name of vocational training for many communities there have been incompetent skill trainings which are not economically viable. For persons with intersex variation and transgenders there needs to be an in depth study on what is needed and then economically viable schemes should be given.

18(1): No establishment shall discriminate against any Transgender Person in any matter relating to employment including but not limited to recruitment, promotion and other related issues.

Comments on Point 18: There is a need for every sector whether government or private to have a non-discriminatory policy set up with guidelines which will monitor acts discrimination based on different issues including transgender issue.

Chapter 6. Social Security, Health, Rehabilitation and Recreation

19(2)(b) Pension to Transgender Persons subject to criteria as may be prescribed;

Comments on Point 19(2)(b): There is no clarity in the criteria. What should be the criteria for giving pensions. Some state governments are already giving pensions to trans people. More clarity is required on this point.

19(2)(c): Financial assistance to the parents of Transgender children;

Comments on Point 19(2)(c): Financial assistance to the parents of Transgender children; Point 19 – 2 (c). What is the basis on which financial assistance is given to parents of transgender children. There is no clarity on this point. If financial assistance is given to the parents of transgender children, then this should actually extend to parents of people with intersex variation especially from working class backgrounds.

19(2)(d): Assistance for Skill Development training to Transgender Persons.

Comments on Point 19(2)(d): Assistance for Skill Development training to Transgender Persons. (e) Facilities for Transgender Children who have no families or have been abandoned, or are without shelter or livelihood; (f) access to safe drinking water and appropriate and accessible sanitation facilities especially in urban slums and rural areas (g) safe and hygienic community centres with decent living conditions in terms of nutritious food, sanitation, health care and counselling;

19(2)(e): Facilities for Transgender Children who have no families or have been abandoned, or are without shelter or livelihood;

19(2)(f): access to safe drinking water and appropriate and accessible sanitation facilities especially in urban slums and rural areas.

19(2)(g): safe and hygienic community centres with decent living conditions in terms of nutritious food, sanitation, health care and counselling

Comments on Point 19(2)(e to g):

In the sub point (e) there is no clarification if the government will provide shelter to abandoned transgender children. In fact many children with intersex variation get thrown away by family. If the shelter is given there is need to recognize identity specificities of trans and intersex range.

In sub points (f) and (g) does it mean that only transgender persons will be provided water and sanitation facilities? It is detrimental make such points leaving out a range of people living in slums. Also there is an assumption that most of the transgender people live in slums.

20(1): The appropriate Government and local authorities shall take necessary measures to provide transgender persons:— (a) separate HIV Sero-surveillance Centres since they face several sexual health issues; (b) sex reassignment surgery, free of cost; (c) barrier-free access in the hospitals and other healthcare institutions and centres; (2) To fulfil its obligation under this Section, the appropriate Governments shall make schemes and programmes with participation and involvement of Transgender Persons and caregivers that inter alia makes provision for coverage of medical expenses and therapeutic intervention by a comprehensive insurance scheme for transgender persons.

Comments on Point 20(1) and 20(2): There is need for a separate chapter on health issue. There are differences within the trans identities and there is a major difference between trans surgeries and surgeries of persons with intersex variation. Though in the sub point 20 -1 (b), it says free surgery, there is a need of in depth understanding of the male to female surgeries and female to male surgeries. When it comes to the persons with intersex variation the variation differs from person to person in terms of their body composition. That is an entirely different surgery. HIV is a health issue that concerns mostly male born trans people. There are other health concerns of female born trans people. The health chapter should cover all these in detail. Also SRS is not the end of trans health issue. After SRS there is a need for care of post SRS health problems.

21. (1) The appropriate Government and local authorities shall undertake or cause to be undertaken services and programmes of rehabilitation, particularly in the areas of health, education and employment for all Transgender Persons. (2) The service and programmes shall be designed so to begin at the earliest possible stage and to be based on a comprehensive assessment of issues faced by Transgender Persons. (3) For purposes of subsection (1) of section 19, read with subsection (2), the appropriate Government and local

authorities shall, subject to fulfilment of financial and other norms, and availability of budgetary allocation, grant financial assistance to non- governmental organizations. (4) The appropriate Government and local authorities, while formulating rehabilitation policies, shall consult the nongovernmental organizations working for the cause of Transgender Persons. (5) Without prejudice to the generality of sub-section (1) of section 19, the appropriate Government shall by notification formulate schemes to provide aid to Transgender Persons.

Comments on Point 21 (1) to (5): This entire section looks like state is dumping all the responsibility on non-governmental organisations to empower the trans community. The main point that should be understood is that not all transgender persons and persons with intersex variation are covered by NGOs. The dependence on NGOs creates limited reach and creates space for favoritism. There will be a force on the community to become the members of those NGOs. The state should give these services directly to the transgender persons and persons with intersex variation.

The language of rehabilitation is very regressive in this context. Transgender community and persons with intersex variation for years and centuries were denied the right to citizenship in this country. Now while addressing the rights of this community the language of rehabilitation will mean that this community is being pathologised.

23: Those Transgender Persons who by birth do not belong to Scheduled Caste or Scheduled Tribe may be declared as Backward Class and be entitled for reservation under the existing ceiling of OBC category. Provided that those Transgender Persons who by birth belong to Scheduled Caste or Scheduled Tribe would be entitled for reservation under their respective categories as per the existing Rules. Provided that Transgender Persons are not to be prevented from competing for seats which are not reserved for them.

Comments on Point 23: In the context of reservation the OBC status will work for non SC/ST trans people but for SC/ST there should be special provisions within SC/ST categories otherwise they will be pushed under general category with other SC/ST people and will not get their rightful space. Also many transgender persons and persons with intersex variation would leave homes when they are young and will not have the necessary caste certificate. That should also be provided to this community.

CHAPTER VII

DUTIES AND RESPONSIBILITIES OF APPROPRIATE GOVERNMENT

Comments on this chapter: The whole design of awareness raising of transgender and persons with intersex variation rights should be done with a rights-based approach and not to gain sympathy. The awareness raising should be done in villages also using material which is visual and literary as not all people in India are literate. Public awareness can be created using hoarding boards, busses, media, and public advertising systems. All state and private establishments should have cells to sensitize about transgender and persons with intersex variation rights. On the other hand transgender and persons with intersex variation rights should also reach communities across villages in India and this can be done through local self governments. Government helplines should be established for availing support, information, crisis intervention etc. This will have more firm value if done by the government on the public.

Suggestions to be incorporated:

- This bill does not cover the rights of transgender persons and persons with intersex variation –
 1. Marriage rights
 2. Adoption rights
 3. Property and Succession rights.
- There is a need for inclusion of transgender persons and persons with intersex variation in some special acts for rightful protection – 1. Protection of Women From Domestic Violence Act (this is in context of family torture and force on trans and persons with intersex variation to remain in the assigned genders)
- There is a need to make necessary changes in IPC sections to include transgender persons and persons with intersex variation.
- There is a definite need to have transgender and persons with intersex variation rights commissions at center and state level which should not just end up being a recommendatory body. These commissions should have power to take necessary actions in order to protect the rights of transgender and persons with intersex variation.
- In this entire bill there is no penalty provision for the violation of rights mentioned in this bill. It is not mentioned either in the form of punishment or compensation. That should be included as this community is stigmatized and faces violence from public, family, friends, educational institutions, teachers, employers, co-workers, etc.
- To look into the implementation of this ACT there should be a monitoring body which includes the community people to ensure that the provisions are being implemented and going in the rights based approach and reaching the services to the community without any lack.

The drafting mistakes

- There are missing sections from Point 1-4 in Chapter 3: it starts with point 5.
- In Chapter 3 sub section Point 12 jumps from Point 4 to 8, the 5, 6, and 7 are missing.
- Chapter 6 ends with ends with point 23 and Chapter 7 starts with point 25. Point 24 is missing.