

Note on Revised ITPA Amendments, 2007

I. Background

Last year, the Ministry for Women and Child Development (MoWCD), Government of India introduced Amendments to the **Immoral Traffic (Prevention) Act, 1956 (“ITPA”)**, ostensibly to address trafficking in persons for commercial sex. Formulated without public consultation, the Amendments drew widespread protests among sex workers,¹ AIDS service organizations and other civil rights groups. As a result, **the Immoral Traffic (Prevention) Amendment Bill, 2006** (“the ITPA Bill”) was referred to a **Parliamentary Standing Committee** on Human Resource Development (“Standing Committee”) for review and recommendations. Having heard concerned groups, the Standing Committee submitted its findings to Parliament in the 182nd Report.² Subsequently, MoWCD revised the ITPA Bill,³ which came up for Cabinet approval on 6th September 2007. Owing to a lack of consensus, the Union Cabinet referred the Bill to a **Group of Ministers** (GOM) for further consideration. Ministers on the GOM are – *Renuka Chowdhary* (Minister for WCD), *Shivraj Patil* (Minister for Home Affairs), *Meira Kumar* (Minister for Social Justice and Empowerment), *Anbumani Ramadoss* (Minister for Health and Family Welfare) and *Kapil Sibal* (Minister for Science & Technology & Ocean Development).

One of the main issues that the GOM is expected to examine is if and how the proposed amendments will affect HIV prevention among sex workers and clients under the National AIDS Control Programme. This is a significant development as until now, HIV concerns vis-à-vis the Bill were being dismissed including by the Standing Committee, which not only brushed aside concerns of escalation of HIV but also advised NACO to support raid and rescue as effective prevention.

The ITPA Bill in its present form ignores HIV related concerns in sex work as it erodes sex workers’ ability to negotiate and use condoms. With the HIV epidemic concentrated among key populations, particularly sex workers and their partners, India can ill-afford to overlook public health implications of sex work law(s). This note attempts to present a legal and public health critique of the revised ITPA Bill 2007. In doing so, it also highlights provisions where the MoWCD has gone against recommendations of the Standing Committee.

II. Concerns with the Revised ITPA Amendments

The MoWCD’s proposal to **decriminalize soliciting** under the ITPA Bill is *welcome*. This will, to some extent, address harassment & arbitrary arrests of sex workers. However, positive changes will be countermanded by new definitions for **Prostitution** (Section 2(f)), and **Trafficking in Persons**, (Section 5A), which will, now guide application and interpretation of the law. Other contentious provisions relate to penalties against brothel keeping (Section 3.1) and visiting a brothel (Section 5C).

- **Expanding the Ambit of Prostitution** – Until now, ITPA did not criminalize sex work *per se*. In doing so, the Legislature adopted a conscious public policy not to punish sale and purchase of sex, which is the basis of sex work. However, Prostitution as defined in the Revised Amendments

¹ See http://news.bbc.co.uk/1/hi/world/south_asia/4513286.stm

² 182nd Report of the Parliamentary Standing Committee on Human Resource Development on the Immoral Traffic (Prevention) Amendment Bill, 2006. Available at <http://rajyasabha.gov.in/book2/reports/HRD/182ndreport.htm>

³ The Original Amendment Bill as well as the revised changes are available on <http://wcd.nic.in> under the Section on Trafficking. The text of the revised Bill circulated for Cabinet Approval is confidential and therefore unavailable to the authors.

means “the sexual exploitation or abuse of persons for commercial purposes for consideration of cash or kind” The words “**for consideration of cash or kind**” widen the definition to cover all transactional sex including that which is consensual and non-exploitative. In doing so, MoWCD has disregarded the Standing Committee’s suggestion to define Prostitution in keeping with legislative intent of ITPA.

- **Enhancement of penalty for keeping/managing brothels** – The ITPA Bill seeks to increase penalties for brothel related offences namely, keeping, managing, letting out and working in a brothel. Importantly, a brothel⁴ covers premises shared by two or more sex workers to provide sexual services which often include their homes. The burden of criminalisation is borne by sex workers as seen in Surat⁵ and Goa⁶, where demolition of brothels left hundreds of sex workers without shelter, earnings and essential services for HIV.

Successful HIV prevention requires universal condom use in brothels and other sex work establishments. Punitive measures against brothels disallow enforcement of condom use. Brothels have been used as sites for delivery of health and other services, critically needed by sex workers⁷. Criminalization of brothels will not only dissuade such positive efforts but will also have an adverse bearing on the health and safety of its occupants. Aggravated penalties against brothels make neither sex work nor sex workers safe.

- **Criminalising ‘vulnerability’ as Trafficking** - The definition of “Trafficking in Persons” under the proposed Section 5A is problematic as it includes the expression “position of vulnerability” – a vague term, without any meaning in criminal law. Many persons, especially women, engage in sex work for economic reasons since the State offers little or no material assistance to the destitute. Under the proposed Section, those who enter sex work because of poverty or difficult economic circumstances, will be seen in a “*position of vulnerability*” and considered “*trafficked*”. This not only obscures the distinction between consensual & involuntary induction into sex work but also **criminalizes all entry into sex work as trafficking.**

It may be pointed out that the impugned term is adapted from the definition of Trafficking in Persons in the U.N Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N Convention against Transnational organized Crime, 2000.⁸ Commentaries on the Protocol⁹ admit to the ambiguity in language¹⁰ and advice signatory States to adopt a clear definition in domestic law. Importantly, common law countries like U.K,

⁴ Section 2(a), The Immoral Traffic (Prevention) Act, 1956

⁵ Tandon Tripti, “Sex workers in Surat: Seeking Rights amidst wrongs?” From the Lawyers Collective, Vol 18-No.10, October 2003, p28

⁶ Maryam Shahmanesh, Sonali Wayal, “Targeting commercial sex-workers in Goa, India: time for a strategic rethink?” The Lancet. Comment. Volume 364, Number 9442 09 October 2004

⁷ Stadler, Jonathan; Delany, Sinead, “The ‘healthy brothel’: The context of clinical services for sex workers in Hillbrow, South Africa,” Culture, Health & Sexuality, Volume 8, Number 5, September-October 2006 , pp. 451-463(13)

⁸ Available at

http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf

⁹ See Annotated Guide to the Complete UN Trafficking Protocol at www.hrlawgroup.org/resources/content/TraffAnnoProtocol.pdf

¹⁰ Protocol Annotation, Protocol Article 3, Use of Terms, “The international definition is not appropriate for use in domestic criminal codes. It has too many elements that would have to be proven by prosecutors, thus making prosecutions more difficult. Also, some of the language is ambiguous, which could also lead to legal challenges by defendants. It is important toincorporate the essence of that definition into national legislation using **simple and clear language**” [Emphasis added]. See above at Pg 7.

Canada and Australia (which the Indian legal system follows) have not included terms such as “position of vulnerability” in their anti-trafficking legislation.

- **Penalty for visiting Brothel** – Contrary to legislative intent, insertion of new Section 5C seeks to punish persons found in or visiting a brothel for sexual exploitation of trafficked victims. In its review, the Standing Committee found the provision ambiguous and incapable of application, especially since it provided no guidance on distinguishing a trafficked sex worker from a non-trafficked one. It recommended that the Section be redrafted so as to avoid harassment and punishment of all persons in a brothel. There has been no change in Section 5C, which reads: .

5C. “Any person who visits or found in a brothel for the purpose of sexual exploitation of any victim of trafficking in person shall be on first conviction be punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs. 20,000 or with both and in the event of a second or subsequent conviction with imprisonment for a term which may extend to six months and also with fine which may extend to Rs 50,000. “

Prima facie, section 5C applies to persons who visit a *brothel* for the *purpose of sexual exploitation of any victim of trafficking in person*, that is, clients who seek sexual services of a trafficked victim. However, this simplistic facial reading does not hold true on several counts.

Firstly, the term **sexual exploitation** is not defined anywhere in the Act. In order to derive its meaning, a judge would have to examine the purpose and object of the statute¹¹, which, is the inhibition of organized prostitution. It may be pointed out that not only does the ITPA fail to distinguish consensual sex work from sexual exploitation; it colors all prostitution as sexual exploitation under Section 2 (f). Hence, it is likely that the term sexual exploitation in section 5C will be interpreted to include all commercial sex.¹²

Secondly, a **brothel** (as defined in Section 2 (a)) not only means premises where persons are coerced into sex work but also includes sites operated by two or more adult, consenting sex workers for transactional sex. Thus, clients visiting sex worker run brothels will also be hit by section 5C.

Thirdly, for the Police, **the act of visiting a brothel is sufficient grounds for arrest, as the Section does not require the offender to have sex with the trafficked victim**. The Police can intercept and arrest any person present in a brothel irrespective of the object of the visit.

In practice, Section 5C will be used by the Police to interrupt, harass and extort money out of persons seen in and around brothels. Already, attempts by AIDS prevention workers to contact clients of sex workers and popularize safer sexual practices are constrained by their invisibility. With Section 5C coming into force, clients wanting to avoid the Police will seek sexual services even more clandestinely, pushing sex work underground. This will frustrate contact with health

¹¹ A cardinal principle of interpretation is that the meaning of a word, or phrase in a statute has to be construed in the light of the object and purpose that pervades throughout the statute. This is known as the rule of purposive construction.

¹² Already, judicial decisions on prostitution including those from the Supreme Court of India are value laden. In *Vishal Jeet v. Union of India* AIR 1990 SC 1412, the apex Court observed “*No denying the fact that prostitution always remains a running sore in the body of civilization and destroys all moral values. The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it.*” Given this moral standpoint, it would not be difficult to argue and convince Courts that sex work being “dirty” and “debasing”, no one engages in it voluntarily. Equating sex work with sexual exploitation would then seem a logical consequence.

agencies and make both provision and use of HIV risk reduction services extremely difficult. For sex workers, whose very survival is threatened by the proposed provision, desperation will compel them to accept any and every client, the risk of HIV/AIDS notwithstanding

Already, the effectiveness of targeted interventions in commercial sex is constrained by inadequate focus on behaviours/practices of male clients.¹³ The recently concluded 8th International Congress on AIDS in Asia and the Pacific (ICAAP), Colombo called for greater attention on “*mobile men with money*” – i.e male partners of sex workers, who drive the HIV epidemic in the general population.¹⁴ In this context, **the move to criminalize clients is irrational and ill-conceived for it will endanger public health.**

- **Continued criminalization of earnings of sex work** – Section 4 of the current ITPA punishes persons > 18 years who depend on earnings of sex work. In response to sex workers’ plea, the Standing Committee, in a welcome observation, questioned the criminalization of persons willingly supported by a sex worker through earnings from sex work. Accordingly, it recommended that the sex workers’ ability to voluntarily dispense earnings be protected. However, the MoWCD has disregarded this suggestion. As a result, dependents of sex workers including aged parents and children older than 18 will continue to be criminalized. Anecdotally, it is known that sex workers’ ability to dispense their earnings has a positive bearing on negotiation and control – important elements for HIV prevention.

III. Conclusion

Overall, the Revised Amendments proposed by MoWCD blur the distinction between trafficking and adult, consensual sex work. The revisions attempt to criminalise sex work; without regard to its implications and contrary to legislative intent. The revised changes remain *severely deficient; doing little to prevent trafficking, reduce HIV or protect sex workers.*

¹³ Padma Chandrasekaran, Gina Dalabetta, Virginia Loo, Sujata Rao, Helene Gayle, Ashok Alexander, “Containing HIV/AIDS in India: the unfinished agenda”, *Lancet Infect Dis* 2006; 6: 508-521. Available at <http://infection.thelancet.com>

¹⁴ “Overview of Epidemic and Response in Asia and the Pacific”, Plenary speech at the VIIIth International Congress on AIDS in Asia and the Pacific (ICAAP), Colombo, 2007 by JVR Prasada Rao, Director, Regional Support Team, UNAIDS. Available at http://data.unaids.org/pub/Speech/2007/20070821_sp_icaap_mr%20rao_en.pdf