

To  
Ms. K. Ratna Prabha,  
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Government of India  
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From: All India Network of Sex Workers (Contact- [ainsw.india@gmail.com](mailto:ainsw.india@gmail.com))

Subject: **Recommendations made to the Ministry of Women and Child Development on the laws and policies on sex work in India**

## I. Introduction

We, the All India Network of Sex Workers (hereinafter 'AINSW'), are a registered organisation representing 67 community based organisations from 16 States of India that have been working closely with the Ministry of Health and Family Welfare in the national HIV/AIDS prevention and control program and have been advocating the protection of rights and dignity of sex workers over the last few decades.

At first, we would like to sincerely thank, Ms. K. Ratna Prabha, the Additional Secretary, Ministry of Women and Child Development, Government of India (hereinafter 'WCD'), for attending the '*National Consultation for Protection of Dignity and Rights of Sex Workers*' held on 21<sup>st</sup> – 22<sup>nd</sup> August, 2013 at the Constitution Club, New Delhi. We also appreciate her endeavour of giving us an opportunity to express our views and concerns regarding the laws and policies that affect our lives and livelihood on a daily basis. Hitherto been excluded from most deliberations on sex work law reform measures, we thus deeply value the current process of engagement with the sex workers started by the WCD and hope that it will continue in the same spirit in future. We would also like to apologize for the delay in sending the submissions, since it took time to collate the views and suggestions of all our constituent member organisations.

## II. Suggested Recommendations

It is noted that AINSW, being a community-led group, is interested in suggesting an overall reorientation of the laws and policies governing sex work in India, drawing from the lived experiences of the sex workers themselves and their interactions with the police machinery, judicial system, State agencies, and community-based organisations. At the same time,

AINSW would like to optimize the given opportunity and make recommendations on the specific provisions of ITPA, as well as on other issues concerning the sex workers. For the sake of convenience, the recommendations are divided in the following parts:

## **1. Provisions under ITPA**

- The *Immoral Traffic (Prevention) Act* (earlier known as the *Suppression of Immoral Traffic in Women and Girls Act*) was enacted by the Parliament in 1956. It was intended to curb the exploitation of persons in prostitution by others and not to prohibit prostitution *per se*. Accordingly, the law sought to prohibit brothel keeping, living on earnings of prostitution, procuring, carrying on prostitution in public places and soliciting but did not proscribe sex work *simpliciter*.
- Sadly, this intent was lost in the course of implementation of the Act. It is well-established that the sex workers have disproportionately borne the brunt of the law, with over 60% of the total cases registered for soliciting.<sup>1</sup> The ITPA has made sex workers vulnerable to violence and abuse, especially from police, and has resulted in lack of protection of law. While ITPA has not achieved the 'intended' outcome namely, preventing the exploitation of prostitution of others, it has, on the contrary, led to 'unintended' outcomes like proliferation of violence and discrimination against sex workers.
- AINSW submits that the ITPA needs to be substantially overhauled, if not repealed, since the current law serves to violate the rights and interests of the sex workers and is also ineffective in curtailing exploitation in sex work, i.e., forcible entry of young and unwilling persons, repressive control of third parties, etc.
- In our view, any serious effort to envisage rights based and evidence-based law reform measures would have to be premised on the following principles:
  - ❖ Consensual sex between adults for money/kind is not illegal. As a logical corollary, the persons/parties associated to facilitate that voluntary sexual activity or the premises where the consensual sexual activity is taking place should be kept out of the purview of the law.
  - ❖ What is prohibited is trafficking for sex work or forcing somebody to carry on sex work against his/her consent.
  - ❖ Sex work is not sexual exploitation.
  - ❖ Sex work is not equivalent to trafficking.

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<sup>1</sup> Nair PM and Sen, S., *Trafficking in Women and Children in India*, Institute of Social Sciences, National Human Rights Commission and UNIFEM, published by Orient Longman (2005).

- ❖ Sex work is like any other work in the unorganized sector and sex workers ought to be treated as unorganized sector's workers, who are entitled to a safe and secure working environment as well as to social security protection and services.
- Accordingly, we propose the following changes with respect to ITPA:-

### **Definitions**

Section 2 (a): The definition of 'brothel' should be deleted (for reasons explained later).

Section 2(aa): The definition of 'child' should be changed to "a person who has not completed the age of eighteen years", in order to comply with the *Juvenile Justice (Care and Protection of Children) Act, 2000*.

Section 2 (b): The definition of 'corrective institution' should be deleted (for reasons explained later).

Section 2(ca): The definition of 'major' should be deleted.

Section 2 (cb): The definition of 'minor' should be deleted.

Section 2(g): the word 'corrective institution' should be removed from the definition of 'protective home'

Section 2(i): A new definition of 'sexual exploitation' can be added:

***"sexual exploitation means sexual activity engaged in, by an adult person against his/her consent/will or by a minor, for the commercial gain of another person"***

### Offences under the ITPA

#### a. **Brothels should be decriminalized**

- It is noted that brothel-keeping is prohibited under Section 3 of the Act. The term '*brothel*' in Section 2(a) includes not just premises used for purposes of sexual exploitation or abuse for the gain of another person but also includes premises used for the mutual gain of two or more prostitutes. In effect, if two or more sex workers rent out a place to provide sexual services, without any element of exploitation, that place would still fall within the definition of 'brothel' and thus be outlawed.

- AINSW submits that there is no basis to assume that brothels are necessarily places of sexual exploitation and abuse. Such exploitation can happen in any premise, which need not be a brothel. The aim should not be to criminalise brothels *per se*, but to stop exploitative practices, including indebtedness, lack of control over one's earnings and restrictions on freedom of movement of sex workers, in all sex work settings. Further, by criminalizing brothels, the Act pushes the entire trade underground, into the clutches of exploitative elements of third parties who thrive on the criminality associated with sex work and tend to exploit sex workers more. On the contrary, if brothels were to be regulated like any other unorganized sector work setting, with the application of laws on labour conditions and health safeguards, then it would be much more plausible to weed out exploitative elements from the brothels.
- In our experience, brothels are safer and provide a semblance of community to the sex workers, where they often develop close bonds with other residents or even with particular clients. Further, it is easier to provide health and other services in a brothel, because of its spatial setting. In other words, the brothels provide a sense of familiarity and security to sex workers as well as facilitate access to services. In contrast, street sex work is mostly unsafe and solitary, devoid of collective strength in resisting violence and abuse and also acts as an impediment to outreach of health interventions.
- It is noted that if any person is brought to a brothel against his/her consent or is being forced into sex work in a brothel, then the offender should be strictly punished but the whole brothel should not be closed down.
- In response to such abusive practices, the sex workers have collectivized themselves and formed 'Self-Regulatory Boards' (hereinafter 'SRBs') in Kolkata, Mysore, etc, wherein a multi-stakeholder Board comprising of sex workers, local MLA/Councillor, representatives from the departments of labour, health and social welfare, and women's activists is constituted. The purpose of this Board is to screen the every new entrant who joins sex work and to assess whether the person is a minor and if yes, whether he/she wants to engage in sex work, out of his/her own volition. This screening at the first instance ensures that no minor person joins sex work or no adult person is forced into sex work. It is no gain saying that sex workers themselves are vitally interested in creating a sex work setting, devoid of exploitation and abuse and that protects their fundamental right to carry on any trade or profession.
- It is noted that the Courts in other jurisdictions have recognised the harmful impact of having a blanket prohibition of prostitution in indoor settings, including in brothels. The Ontario Court of Appeal in *Canada (Attorney General) v. Bedford*<sup>2</sup>, while striking down the prohibition on keeping a bawdy-house in the Criminal Code,<sup>3</sup> observed that "*the bawdy-house provisions prevent prostitutes from taking the basic safety precaution of moving indoors to locations*

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<sup>2</sup> 2012 ONCA 186

<sup>3</sup> Section 210, Criminal Code of Canada, 1985

*under their control, which ..... is the safest way to sell sex. In this way, ....., the provisions dramatically impact on prostitutes' security of the person."*

- Recommendation: In light of above discussion, the following suggestion can be considered:

Section 3 of the Act should be amended as:

"3. Punishment for keeping a premise or allowing the premise to be used for the purpose of sexual exploitation:

*(1) Any person who keeps or manages or acts or assists in the keeping or management of any house, room, conveyance or place or any portion of any house, room, conveyance or place, **which is used for the purposes of sexual exploitation**, shall be punishable on first conviction with rigorous imprisonment for a term of not less than two years and which may extend to three years and also with fine which may extend to ten thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which shall not be less than three years and which may extend to seven years and shall also be liable to fine which may extend to two lakh rupees.*

*(2) "Any person who –*

*a. being the tenant, lessee, occupier or person in charge of any premises, uses, or knowingly allows any other person to use, such premises or any part thereof **for the purposes of sexual exploitation**, or*

*b. being the owner, lessor or landlord of any premises or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof is intended to be used **for the purposes of sexual exploitation**, or is wilfully a party to the use of such premises or any part thereof **for the purposes of sexual exploitation**,*

*shall be punishable on first conviction with imprisonment for a term which may extend to two years and with fine which fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which may extend to five years and also with fine."*

It may be noted that the above suggestion is broader than the current law on brothel keeping, since it does not require proving first that a premise is a brothel, and then punishing the persons for keeping/running the brothel. Instead, it makes any person, who is keeping a premise used for sexual exploitation, punishable, thereby widening the net for criminalizing exploitative elements.

#### **c. Punishment for exercising control over the earnings of sex workers**

- Section 4 of the Act criminalises those (above the age of 18 years) who live on the earnings of sex workers, including children above 18 years, husbands/partners, aged parents and relatives as well as friends. Though the purported object of the law is to penalise those who exercise control over the earnings of sex workers, it has also brought in its ambit those persons who are voluntarily supported by the sex workers like major children and aged parents/relatives of sex workers.
- It is suggested that the offence should be restricted to the conduct of exercising control over the earnings of sex workers, wherein he/she is unable to spend the earnings according to his/her wish, instead the earnings are taken away by the pimps, managers or other third parties, including the unlawful pay offs to the local police officer or the beat constable in the area.
- AINSW submits that if the sex worker desires to spend his/her earning on a partner, children's education and health, or on parents' well-being, then it should not be criminalised. From our experience, it is clear that majority of sex workers in India earn their livelihood to sustain their families and to educate their children and give them the best possible upbringing. In this context, Section 4 of ITPA acts as a major hindrance to the efforts of sex workers to provide a comfortable life to their family members.
- Further, the Act has served to criminalise transactions, otherwise legitimate in other contexts, wherein sex workers are prohibited from hiring drivers, security guards or assistants, which would have increased their security and lessened the risk of harm. Though the law ostensibly seeks to protect sex workers from exploitation, the law, in effect, prevents them from adopting harm-reduction measures and in fact drives them further into the hands of the exploitative third parties.
- Only when the sex worker is forced to part with his/her earning, against his/her consent to anybody, then the offender should be punished. Further, the sex workers should not be proscribed from hiring the services of the third parties, where no element of exploitation/control exists.
- Recommendation: **Section 4 of the Act should be amended in the following manner:**

*"4. Punishment for exercising control over the earnings of prostitution: Any person over the age of eighteen years who **knowingly exercises control, direction or undue influence**, wholly or in part, on the earnings from the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both and where such earnings relate to the **prostitution of a child**, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years."*

**d. Deletion of Section 5 of the Act**

- The object of Section 5 was to prohibit the procuring or inducing a person for the purpose of sex work. It is noted that the Parliament has recently enacted *The Criminal Law (Amendment) Act, 2013* in March, 2013 has introduced the offences of trafficking of persons (Section 370) and exploitation of a trafficked person (Section 370A) in the *Indian Penal Code, 1860*. These provisions make the acts, of trafficking of a person for the purposes of physical exploitation or any form of sexual exploitation or engaging a trafficked person for sexual exploitation, punishable with rigorous imprisonment and fine.
- In light of that, Section 5 of ITPA has become redundant and ought to be deleted.
- It is further noted that if a sex worker seeks to join a brothel or start sex work on her own and seeks the services of a third party to get clients, then it should not be an offence. It is similar to hiring consultants who give information about prospective job offers in the market for a fee or going through a middleperson to get lucrative clients.
- It is only when the sex worker is controlled by a pimp or forced to give most part of the earnings to the pimp or have no freedom in her choice of clients, then the condition of exploitation arises, and ought to be rooted out. This situation of third party control over the sex workers' earning and work conditions can be adequately addressed in the proposed changes to Section 4 of the Act.
- Recommendation: **Section 5 should be deleted in light of Sections 370 and 370A of the IPC.**

**e. Punishment for detaining a person in premises for the purpose of sexual exploitation**

- Section 6 of the Act provides punishment for any person who detains another person in a brothel or in any premise for the purpose of sexual exploitation. In our view, the word 'brothel' should be removed and detention of any person in any premise for the purpose of sexual exploitation should be an offence.
- Recommendation: **Section 6 should be amended in the following manner**

***"6. Detaining a person in premises for the purposes of sexual exploitation.--- (1) Any person who detains any other person in any premise for the purposes of sexual exploitation, shall be punishable on conviction, with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also liable to fine:***

*Provided that the court may, for adequate and special reasons to be mentioned in a judgment, impose a sentence of imprisonment for a term of less than seven years].*

***Provided that where the person detained is a child, it shall be punishable with an imprisonment of either description for a term which shall not be less than ten years but which may be for life and shall also liable to fine.***

*(2) Where a child found in any premise, is on medical examination, detected to have been sexually abused, it shall be presumed, unless the contrary is proved, that the child has been detained **for the purposes or sexual exploitation** or, as the case may be, has been sexually exploited for commercial purposes."*

f. **Deletion of Section 7 of the Act**

- Section 7 of the Act prohibits prostitution in or in the vicinity of public places and provides punishment for both the prostitute and the client. This provision penalises the prostitute, since the object of the law is to curb public nuisance that might ensue from prostitution in public places. The term '*public place*' is defined in the Act<sup>4</sup> and includes a place of religious worship, educational institution, hostel, hospital and nursing home. The Act further prescribes prohibited areas where prostitution cannot be carried on, i.e., areas notified by the State Governments and those which are within a distance of 200 metres of any public place.<sup>5</sup>
- In our experience, the law has resulted in far-reaching consequences, apart from the intended purpose of limiting public nuisance. It has led to increased police powers and abuse, since the police conduct arbitrary raids in hotels and other places and round up adult persons engaging in consensual sex, whether for money or not, and charge them for prostitution in public places. These police actions do not serve the intended purpose of curbing public nuisance and are used as tools of harassment and extortion.
- It is further noted that hotels, motels and other such places should not be considered as public places for the purpose of this Section because two adults engaging in consensual sex in the privacy of a hotel/motel within 200 metres of a public place do not result in any annoyance to the public.
- In our view, sex workers hardly engage in prostitution in a public place, because they are responsible citizens, with a conscious civic sense who are aware of the consequences of the

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<sup>4</sup> Section 2 (h) "public place" means "any place intended for use by, or accessible to, the public and includes any public conveyance"

<sup>5</sup> Section 7(1) (a) and (b) of the Act

same. In case of anyone engaging in any sexual activity in a public place, he/she can be punished under the general criminal law for obscenity (Section 294), or public nuisance (Section 268). Thus, Section 7 of ITPA adds no value to the stated purpose of the law of restricting public nuisance, which can be achieved through other means. On the contrary, the law stigmatizes sex workers and makes them vulnerable to police violence and abuse.

- In light of above, we believe that Section 7 of ITPA should be deleted and the object of prohibiting public nuisance can be achieved through the general penal sanctions contained in the IPC.

- Recommendation: **Section 7 should be deleted.**

#### **g. Deletion of Section 8 of the Act**

- This provision is the most used provision of the law. It prejudices sex workers and has nothing to do with trafficking or sexual exploitation or abuse in prostitution. As mentioned above, the purported public nuisance that it seeks to contain can be addressed through the penal sanctions against obscene acts and public nuisance contained in the Indian Penal Code, 1860. The Ministry of Home Affairs, as well as the DIG in several States has already issued advisories to the Police to not invoke Section 8 of ITPA.<sup>6</sup>

- Recommendation: **Section 8 of the Act should be removed.**

#### **h. Seduction of a person in custody**

- Section 9 of the Act makes it a punishable offence, if a person, who having the custody/care/charge/position of authority over another person, causes/aids/abets seduction for prostitution. It is noted that the phrase used '*seduction for prostitution*' is an obsolete term and should be removed.
- Recommendation: Section 9 of the Act should be amended in the following manner:

**"9. Sexual exploitation of a person in custody.**----*Any person who having the custody, charge or care of, or a position of authority over, any person, causes or aids or abets the sexual exploitation of that person shall be punishable on conviction with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall be liable to fine.*

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<sup>6</sup> Ministry of Home Affairs, Government of India, Office Memorandum – Advisory on preventing and combating human trafficking in India, f no F.NO.15011/6/2009-ATC, dated 9 September 2009 at Para 2.5.

*Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years].*

**i. Deletion of Section 10A of the Act**

- Section 10A provides that if any woman is found guilty of an offence under Section 7 or Section 8, then the Court can pass an order of detention of such person in a corrective institution, instead of imprisonment, keeping in mind the character, state of health and mental condition of such person. The period of detention can range from a minimum of 2 years to a maximum of 5 years. The term '*corrective institution*' is defined in Section 2 (b) and provides for detention of persons who are in need of "correction" in institutions established under the Act.
- The fundamental premise of this section, i.e., correction of the women offender, since she has been held guilty of either prostitution in a public place or for soliciting, is deeply flawed and problematic. It is discriminatory towards women, in so far as the corrective procedure applies only to women, while if a man is found guilty of those offence, he shall be punished with an imprisonment up to three months. This is extremely arbitrary and violates the right to equality of women.
- The very idea of correcting female sex workers stems from moral considerations that perceive sex work as immoral and depraved and cannot accept that women can exercise their sexual autonomy in choosing sex work as their profession.
- Recommendation: **Section 10A should be deleted.**

Other provisions under ITPA

**i. Raid, rescue and detention of women in protective homes**

- While Section 15 authorises a designated police officer to search any premise without warrant in order to remove a person, with respect to whom an offence under ITPA was being committed, Section 16 empowers the Magistrate to direct rescue of a person who is living/carrying on prostitution in a brothel. These provisions constitute the basis of what is commonly called 'raid and rescue model' of the police. Under this model, the police get information that a brothel is being run or minors are pushed into prostitution, then the police conducts a raid on that premise and remove all persons found therein, independent of age or consent. These 'rescued persons' are then produced before the Magistrate under Section 17 and end up being detained in the Protection Homes for a period ranging from one year to three years.
- In our experience, the 'raid and rescue operations' carried out by the police under the ITPA violate the rights of sex workers. Raids are conducted in an arbitrary

manner, wherein women, irrespective of age or consent, are violently removed and detained in institutions for indeterminate periods. For sex workers, these protective homes are worse than jails and offer no meaningful alternatives, comparable to earnings from sex work. Sex workers have repeatedly complained of loss of liberty, verbal and physical abuse in these institutions as well as forcible separation from their children or families.

- Our experience has further shown that the raid and rescue model has failed miserably in the prevention of trafficking. Often, the adult sex workers who are in the trade on their own are 'rescued' and kept in protection homes for years, without access to legal representation, while the traffickers go scot free.
- AINSW submits that detaining any adult person in a custodial institution against their will is violative of their fundamental rights to life and personal liberty. Further, mere detention of any person, whether a minor or major, in an institution with severe restrictions on their personal liberty is no answer to meaningful rehabilitation, without offering them sustainable options of education and livelihood in society.
- Recommendations:

a) Section 15 (4) should be amended in the following manner:

*"4. The special police officer or the trafficking police officer, as the case may be, entering any premises under sub-section (1) shall be entitled to remove **the person referred to in sub-section (1) therefrom.**"*

b) Section 16 should be amended as follows:

*"16. Rescue of person.--- (1) Where a magistrate has reason to believe from information received from the police or from any other person authorised by the State Government in this behalf or otherwise, that any person **has been subjected to or is being subject to sexual exploitation in any premise**, he may direct a police officer not below the rank of a sub-inspector to enter such premise, and to remove therefrom such person and produce him before him.*

*(2) The police officer, after removing the person, shall forthwith produce him before the magistrate issuing the order."*

c) A proviso should be added to Section 17(4) as:

***"Provided that no such order shall be made with respect to an adult person who does not wish to be detained in a protective home".***

- d) Section 17A should be deleted, since it is obsolete and redundant in the present circumstances. It is noted that the custody of an adult person cannot be handed over to his/her parents, guardian or husband. Secondly, the enquiry by the Magistrate about the genuineness or capacity of parents/guardians is already contemplated in Section 17 (2) and need not be separately sought in Section 17A. Section 17A does not add any value to the object of Section 17 and in fact, makes it difficult for parents or guardians from economically poor backgrounds to get the custody of their minor children, who had been rescued under Section 16.

## ii. **Eviction of offenders from the premises**

- Section 18 gives the Magistrate the power to order closure of brothels and eviction of offenders from the premises. This provision is intended to discourage use of premises, which fall within 200 metres of designated public places, to be used as brothels or for prostitution. It is noted that the law deems the activity of running a brothel or carrying on prostitution as improper use and the premises used for such purpose are liable to be closed down and the offenders to be evicted.
- Importantly, Section 18 has been used by the police to close down several brothels in various cities of India, thereby evicting thousands of sex workers and their families, including young children from their homes, and rendering them homeless and bereft of personal belongings.
- As noted before, brothels are not necessarily places where sexual exploitation happens and should not be criminalised *per se*. Sexual exploitation can happen in any premise that need not be a brothel and in that case, the offender should be punished as well as evicted from that premise. Because of one person's wrong doing, the other persons residing in that premise, including sex workers ought not to be evicted.
- Further, carrying on sex work by consensual adults cannot be termed as 'improper use' and sex workers cannot be evicted for using any premise for that purpose.
- Recommendation:

Section 18 of the Act should be amended in the following manner:

***"18. Closure of premises and eviction of accused persons from therein.—(1) A magistrate may, on receipt of information from the police or otherwise, that any house, room, place or any portion thereof, is being used for the purposes of sexual exploitation by any person, issue notice on the***

owner, lessor or landlord of such house, room, place or portion or the agent of the owner, lessor or landlord or on the tenant, lessee, occupier of, or any other person in charge of such house, room, place or portion, to show cause within seven days of the receipt of the notice why the same should not be attached for improper user thereof; and if, after hearing the person concerned, the magistrate is satisfied that the house, room, place or portion is being used **for the purposes of sexual exploitation**, then the magistrate may pass orders—

(a) **directing eviction of the accused person** within seven days of the passing of the order from the house, room, place or portion;

(b) directing that before letting it out during the period of one year, or in a case where a child has been found in such house, room, place or portion during a search under Section 15, during the period of three years, immediately after the passing of the order, the owner, lessor or landlord or the agent of the owner, lessor or landlord shall obtain the previous approval of the magistrate:

Provided that, if the magistrate finds that the owner, lessor or landlord as well as the agent of the owner, lessor or landlord, was innocent of the improper user of the house, room, place or portion, he may cause the same to be restored to the owner, lessor or landlord, or the agent of the owner, lessor or landlord, with a direction that the house, room, place or portion shall not be leased out, or otherwise given possession of, to or for the benefit of the person who was allowing the improper user therein.

(2) A court convicting a person of any offence under **Section 3 (2)** may pass orders under sub-section (1), without further notice to such person to show cause as required in that sub-section.

(3) Orders passed by the magistrate or court under sub-section (1) or sub-section (2) shall cease to have validity after the expiry of one year, or three years, as the case may be:

Provided that where a conviction under Section 3 (2) is set aside in appeal on the ground that such house, room, place or any portion thereof is not being used **for the purposes of sexual exploitation**, any order passed by the trial Court under sub-section (1) shall also be set aside.

(4) When an owner, lessor or landlord, or the agent of such owner, lessor or landlord fails to comply with a direction given under clause (b) of sub-section (1) he shall be punishable with fine which may extend to five hundred rupees or when he fails to comply with a direction under the proviso to that sub-section, he

*shall be deemed to have committed an offence under clause (b) of sub-section (2) of Section 3, as the case may be, and punished accordingly."*

### **iii. Application to be kept in protective home and establishment of Protective homes**

- Sections 19 and 21 of the Act provide for applications to be made by sex workers to the Magistrate to be kept in a protective home and establishment of such homes by the State Governments. These sections also refer to corrective institutions, which, as noted before, have become anachronistic and are discriminatory in nature.

- Recommendations:

a) The phrase 'corrective institution' should be removed from Sections 19 and 21 of the Act.

b) A proposed Sub-section 2A can be added to Section 21 as:

***"(2A) The State Government may ensure that inmates of the protective home have access to visitors and also access to legal aid, wherever possible, during their period of stay in such homes."***

### **iv. Deletion of Section 20 of the Act**

- Section 20 provides for removal of sex workers from particular areas by the Magistrate in certain situations. This is another provision that stigmatizes sex workers and is an assault on their dignity and ought to be removed, as has been suggested by both the Government and the sex workers' community.
- Recommendation: **Section 20 of the Act should be deleted.**

### **v. Rule-making powers of the State Government under Section 23**

- Section 23 empowers the State Governments to make rules for carrying out the purposes of this Act.
- Recommendation: The word 'corrective institution' should be removed from Section 23.

## 2. Other concerns

### 2.1 **Client Criminalisation**

- AINSW is aware that the WCD has been contemplating the prospect of criminalizing the clients of sex workers, while seeking to decriminalize soliciting by the sex workers over the last few years. In fact, the *ITPA (Amendment) Bill, 2006* ran into stiff opposition from the sex workers' community and the other civil society organisations precisely for this reason, wherein the proposed Section 5C sought to penalise 'persons visiting a brothel'.
- It is submitted that AINSW does not support the criminalisation of clients and does not believe that buying of sex is inherently exploitative for a sex worker. On the other hand, criminalisation of clients would spell a death-blow to our livelihood and source of income and would further drive us into penury and impoverishment. The Government cannot possibly penalize the clients in the garb of protection of sex workers' rights.
- In our experience, most clients do not pose a problem and are respectful of agency, health and consent of sex workers. They are not particularly violent and if anyone tries to assault a sex worker, then the client can be punished under the general criminal law. In fact, it is the police who refuse to register complaints of sexual assault or non-consensual sex from sex workers on the ground that the latter 'cannot' be raped.
- It is noted that under the new *Criminal Law (Amendment) Act, 2013*, several new offences have been introduced, including sexual harassment<sup>7</sup>, voyeurism<sup>8</sup> and stalking<sup>9</sup>, apart from increasing the punishment for rape. Thus, the revised penal law is sufficient to deal with non-coercive sex or addressing clients' violence. Further, the *Protection of Children from Sexual Offences Act, 2012* proscribes any sexual act with a minor under 18 years of age, thereby completely prohibiting having sex with a minor.
- Thus, in our view, penalizing clients would not add any value to the stringency of the ITPA. Instead, any such provision of targeting clients would be used by the police to harass and extort money from clients and make a large section of society vulnerable to criminal sanction and fear.
- Recommendation: WCD should oppose the criminalisation of clients of sex workers .

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<sup>7</sup> Section 354A, IPC

<sup>8</sup> Section 354C, IPC

<sup>9</sup> Section 354D, IPC

## 2.2 **Trafficking**

- AINSW strongly believes that sex work is different from trafficking and the two cannot be equated or conflated. Though trafficking happens for variety of purposes including domestic labour and organ removal, we are restricting our submissions to trafficking for sex work.
- It is submitted that trafficking for sex work does not mean buying and selling sex. Thus, the sex worker who sells sexual services or the client who pays for such service is not a trafficker. Trafficking in the context of sex work means buying and selling persons for the purpose of making such persons' carry on sex work. Accordingly, a trafficker is a person who sells a girl/ woman to a brothel and, or a person who buys such girl/woman in order to keep her in the brothel and make her engage in sex work.
- As noted before, trafficking in persons has become an offence, in pursuance to Section 370 and Section 370A of the IPC brought into force by the *Criminal Law Amendment Act, 2013*. Section 370 emphasizes three elements in the offence of trafficking, that is, i) movement or recruitment of a person, ii) for the purpose of exploitation, which includes any form of sexual exploitation, and iii) through the use of force, threat, abduction, fraud etc.
- As per the above provision, a trafficked person is someone who has been recruited or harboured for sexual exploitation by the use of force, threat, coercion etc. It is noted that consent is irrelevant where trafficking has taken place, since the means used have the effect of vitiating consent.
- Importantly, it is submitted that Section 370 has no bearing on the consent to sex work and does not affect the same.
- Recommendation: WCD should not conflate trafficking for sex work and sex work *per se*.

## 2.3 **Rehabilitation**

- In the experience of AINSW, any successful rehabilitation effort is based on the principles of voluntary and informed consent and respecting the dignity and autonomy of the individual. An adult sex worker cannot be forcibly rehabilitated.
- Accordingly, the existing rehabilitation schemes formulated by the WCD, i.e., *Ujjawala* and *Swadhar*, have been unsuccessful, since they failed to imbibe these fundamental principles of voluntariness and autonomy. They have mainly focused on

institutionalisation where rescued women are taught vocational skills like sewing, tailoring, making food products, etc to the exclusion of other services and facilities. Thus, rehabilitation has to be tailored to the needs and suitability of specific individuals and cannot be based on “one size fits all” approach.

- It is noted that rehabilitation should be prioritized for three groups: i) minor girls, ii) adult women compelled to engage in sex work against their will and iii) aged or infirm women, who are unable to support themselves through earnings from sex work.
- In our experience, most of the current efforts seem to be focused on ‘rehabilitating’ those sex workers who are making considerable earnings from sex work and are able to provide a comfortable life to their families. These detained sex workers are being provided with non-viable vocational skills in the name of ‘rehabilitation’. Instead, it would be lot more effective if sex workers, who want rehabilitation, are provided with vocational training in an open and community-based environment, without institutionalization and without contingent upon them exiting sex work. In such cases, they can continue to stay with their families and learn new skills, while exploring the option of rehabilitation.
- Furthermore, it is the old/aged sex workers, who are in need of rehabilitation the most and are not getting any social support from the State, thereby resulting in their penury and further impoverishment. In fact, if the Government is serious about preventing sexual exploitation, then it should offer meaningful and viable alternative livelihoods or sustainable social security like old age pension, BPL cards, etc to old/aged sex workers, in order to wean them away from the potential traffickers.
- We are aware that the Supreme Court of India is presently deliberating on various aspects of sex work in *Budhadev Karmaskar v. State of West Bengal* (Criminal Appeal No. 135 of 2010), wherein the Court has appointed a panel to deliberate on prevention of trafficking, rehabilitation of sex workers who wish to quit sex work and conditions conducive for sex workers to live with dignity in accordance with the provisions of Article 21 of the Constitution. The Supreme Court has clearly articulated that rehabilitation of sex workers should be voluntary and offered to those who need it.<sup>10</sup>
- Recommendation: WCD should formulate policies on rehabilitation of sex workers based on the principles of voluntariness and autonomy of sex workers and that prioritise the needs of those who are under age or old/aged sex workers.

#### **2.4 Access to public services and government welfare schemes**

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<sup>10</sup> Order dated 02.08.2011 in Criminal Appeal No. 135 of 2010, Supreme Court of India

- It is submitted that sex workers are entitled to all public services and social security schemes implemented by the government as well as should have equal access to public services and facilities, including identity cards, ration card, old age pension, free education and health care, and also housing benefits.
- In our experience, however, the sex workers' access to these services has been severely limited, due to the illegality associated with various aspects of sex work and the consequent socio-economic marginalisation of sex workers. The stigma attached to sex work further fuels discrimination and prejudice against sex workers. In particular, sex workers face discrimination in accessing the following services:
  - ❖ Health services: Though the recent success of the national HIV/AIDS prevention programme in reducing new infections by almost 50% is largely credited to the community empowerment of female sex workers and the concomitant rise in condom use with their clients, instances of stigma and discrimination have not reduced significantly. Sex workers continue to encounter prejudicial attitudes and a deep seated anathema to their profession, amongst health care workers including the doctors in public hospitals. In our opinion, the focus on their health is from the limited prism of HIV prevention and the Government is not concerned about the overall health and well-being of the sex workers. In fact, most sex workers have access to condoms but they cannot get basic medications for cold, fever, TB, etc.
  - ❖ Banking facilities: It is an irony that sex workers, who are constantly dealing in monetary cash, would have one of the lowest rates of access to banking facilities and financial services in India. Apart from the difficulties in opening bank accounts, on account of lack of residential proofs or other bureaucratic procedures, sex workers have almost nil knowledge of monetary savings or of financial investment. As a result, they spend most of the limited money earned by them, without securing a sound financial future for themselves and children, thereby fueling more dependence on others.
  - ❖ Education for children: Like all mothers, sex workers want the best education and upbringing for their children. They believe that if given equal opportunity, the children of sex workers can excel in every field including academics and sports, like any other child. In our experience, however, the children of sex workers have been singled out and subjected to worst forms of ridicule and derision, in view of their mothers' profession, by the teachers, students and parents of other children in the schools.

Further, this harassment in school happens only when they manage to get admission in schools. In most cases, the children of sex workers are even refused admission in schools because of the fact that they are children of sex workers. This is in complete violation of the fundamental right of every child (from 6 – 14 years) to education under Article 21A of the Constitution. Further,

the *Right of Children to Free and Compulsory Education Act, 2009* guarantees a right to free and compulsory education to every child from 6 – 14 years in a neighbourhood school till the completion of elementary education<sup>11</sup> and obligates the Government to ensure that no child from weaker sections or from disadvantaged groups are discriminated and prevented from pursuing their elementary education<sup>12</sup>.

- Recommendation:
  - a) WCD should coordinate with all the concerned Ministries to ensure that all public services, goods and facilities are available and accessible to the sex workers, without discrimination.
  - b) WCD should ensure that the financial interests of the sex workers are protected, by providing them trainings in financial management and savings. It should also work towards increasing the access to banking facilities and services to sex workers, by removing procedural technicalities in opening bank accounts and prioritizing the needs of sex workers.
  - c) WCD should coordinate with all the concerned Ministries to ensure that the government welfare benefits and social security programmes reach out to sex workers, especially those who are old and in need of social security.
  - d) WCD should ensure that the children of sex workers are not discriminated in schools and their right to free and compulsory education is not violated.

### III. Conclusion

- In light of above, AINSW submits that the current laws and policies on sex work in India have not succeeded in ameliorating the socio-economic conditions of the sex workers. In fact, their conditions have worsened and their rights have been violated. AINSW hopes that the WCD would do a proper 'reality check' on the effectiveness of the existing legal framework on sex work, after hearing the concerns and experiences of the sex workers on the ground. It has been our sincere attempt to reflect some of those concerns and lived experiences into the above-mentioned recommendation. In the end, AINSW would again like to thank Ms. K. Ratna Prabha for initiating this process of engagement with the sex workers. We would be happy to meet you in person and further articulate our opinion on the same.

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<sup>11</sup> Section 3 of the Act

<sup>12</sup> Section 8 (c) of the Act

(With legal inputs from Lawyers Collective)

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