To,
The Hon'ble Chairperson and members
Law Commission of India
4th Floor, B Wing, Lok Nayak Bhawan
Khan Market
New Delhi - 110 003

Subject: Response to Law Commission on Uniform Civil Code (UCC) from Queer Trans organisations and Individuals

We write this as queer and trans individuals, independent or affiliated to LGBTQIA+ collectives, organizations and networks, to draw attention to our position in relation to any reforms that may be sought in family laws. Our submission is that **any discussion on family laws undertaken at this point must be in consultation with LGBTQIA+ people throughout India, whose many forms of family and community support should inform such discussions.**

The Law Commission **needs to reconsider its notice** on the Uniform Civil Code. The notice comes just five years after the 21st Law Commission looked at the same issue and found it "*neither necessary nor desirable at this stage*" to consider a UCC. In the notice issued on 14th June 2023, the Law Commission indicates that they "*considered it expedient to deliberate afresh over the subject*" because of "*various court orders*".

The Law Commission has not mentioned which court orders it is referring to. We wish to particularly draw their attention to some of these matters, while at the same time requesting them to reconsider the process in its entirety and clarify the framework within which it seeks to undertake this deliberation.

- The central government argued, during the recent Supreme Court hearings on marriage equality (*Supriyo @ Supriya Chakraborty v. Union of India, WP (C) 1011/2022*), that marriage is a religious institution and despite codification of personal laws, a "sacrament", and thus, the "sanctity" of personal laws must not be interfered with. We believe that the 22nd Law Commission has a significant hurdle to cross in terms of reform of personal laws before proposing a framework for a UCC.
- Deliberations around gender justice on issues related to family laws would also benefit from the decision of the Constitution Bench presently looking at the scope of personal law–related rights under Article 25 in Part III of the Constitution (*Kantaru Rajeevaru v. Indian Young Lawyers Association, (2020) 9 SCC 121*). This is likely to impact concerns of family laws on marriage, divorce, adoption, guardianship, maintenance, inheritance and others as per each community's personal law.
- Recently, a decision of the Manipur High Court on the issue of re-categorizing Meiteis as a Scheduled Tribe (*Mutum Churamani Meetei & Ors. v. State of Manipur, 2023 SCC Online Mani 156*) has provoked large-scale violent conflict. It caused concern among tribal communities

regarding opening access to community owned lands to 'others'. The 6th Schedule and Articles 371(A-I) of the Constitution guarantee special protections for tribal communities in Nagaland, Manipur, Assam, Meghalaya, Tripura and other states with respect to matters of customary practices and family laws which govern community land ownership.

Therefore, any reform of family laws must proceed with abundant caution and be respectful of every community's practices and customs, otherwise such an exercise would defeat the aim of 'national unity'.

Uniformity in law shall destroy diversity of lived realities

The 21st Law Commission's report 'Reform of Family Law' acknowledged the need to eliminate gender-based inequalities while preserving the diversity of personal laws for the communities. It noted the legal challenge entailed in codifying a 'uniform' civil code, as barring religious communities from organizing family affairs in accordance with their religious beliefs would arguably violate the guarantees of equality, freedom from discrimination and freedom of religion under Articles 14, 15 and 25. It notes an important facet of Article 44, enjoining the state to bring into effect a UCC – that the state must be **'enabler', not 'initiator',** due to the complexity of resolving competing interests of gender justice groups and religious groups.

In complete opposition to this stand, the Law Commission now wants to engage with **"recognised religious organizations"** and the public at large. The Law Commission neither defines who/what is a recognised organization, nor whom it represents. What is of concern is that **in most communities there is gender disparity and inequality** of various kinds. This makes it imperative to talk to those impacted by this structural oppression. **Our argument, therefore, is that any proposal of a UCC will be illegitimate unless it responds to the lived realities of women's groups, LGBTQIA+ groups and other marginalized sections of society.**

Queer and trans people have started being recognised in law very recently. Our lives are still not completely legible in law. We consider it the Law Commission's duty to think of legal reform from the lens of all citizens, especially the most marginalized, and believe that our realities have to be reflected in any suggestions made by this Law Commission.

The 21st Law Commission advised that "*the legislature should first consider guaranteeing equality 'within communities' between men and women, rather than equality 'between communities'*" (para 1.4). It further mentioned that the conceptual understanding of 'man' and 'woman' that the law presumes must be revisited in consultation with the LGBTQI communities to take this conversation forward. We assert that it is **essential to expand the understanding of gender to consider transgender persons who identify within and outside the gender binary**, as recognized in *NALSA* (2014) and the *Transgender Persons' (Protection of Rights) Act, 2019 (*henceforth *'Trans Act')*.

We make this submission with a specific demand that the view of diverse, and particularly marginalized voices within the LGBTQIA+ community be taken on board in any discussion around laws related to family.

The framework of laws applicable to queer trans people

All queer and trans people are born/brought up in families governed by the existing family laws. **We need to look at all existing laws from the lens of queer and trans lives.** In addition, our chosen forms of intimacy have thus far not been recognised in law. The marriage equality petitions are the first time that we have had public discussions at this scale on the possibilities of legal interventions within the queer and trans intimacies and families. The suggestions we provide in this response regard the diverse ways in which we live our lives, and how we would like the Law Commission to respond to our needs.

Social security as a prerequisite to gender justice in the family

Before looking at legal changes, however, we wish to emphasize the fact that there is no way that justice can be obtained by any marginalized community without the State's accountability and responsibility, no matter how good the law may be. The crucial need is **for social security,** as prescribed in the Directive Principles of State Policy.

Families are usually built around the care and nurture of all their members, however their membership may be defined. In that sense, they shoulder the burden of welfare for society/ the state. Not having adequate social security makes people dependent on their families. Many queer and trans people report extreme violence from our natal families (PUCL & NNLBIWTP, 2023[1]), and not having any other material support compels us to remain in these abusive situations at the cost of our own lives and dignity.

The state needs to step in to protect our rights, as our choices are in consonance with the constitutional morality that we as a nation are committed to. **Building a powerful social security web is hence essential** from our point of view and it must be included in any debate around gender justice in intimacies. **It is also important that the meaning of the units that can access social security schemes of the state expands** to be wider than just the idea of a cis-heteronormative patrilineal and patrilocal family.

Concretely, some of our suggestions towards social security are:

- Safe shelters for all queer and trans people, alone and in different forms of relationships and intimacies where they would not experience further violence, discrimination and curtailment of freedom and where they could access support to build their capacity to be independent.

1 PUCL and National Network of LBI Women and Trans Persons. (2023). *"Apnon ka Bahut Lagta Hai" (Our Own Hurt Us the Most): Centering Familial Violence in the lives of Queer and Trans Persons in the Marriage Equality Debates.* A Report on the findings from a closed door public hearing on April 1, 2023. Our Own Hurt Us the Most: Centering Familial Violence in the lives of Queer and Trans Persons in the Marriage Equality Debates | orinam

- Particularly safe homes for queer and trans children in the multiple ways elaborated below
- Access to good legal aid
- The **creation of a care fund** which provides funds for those with no independent means, especially the young, the old, and others dependent on care and support.
- Access to **education and skill building at any time of our lives**, to be able to move towards more independent living.
- **Reforms in domains like land ownership and property ownership** to make these more accessible to us, and also such that they are **in favour of groups of queer and trans individuals working together**.
- Implementation by the central and state governments of their binding obligations under the *Transgender Persons (Protection of Rights) Rules, 2020* by undertaking measures to facilitate access to healthcare, education, housing, food security, economic support and other welfare schemes.

Rights already covered by family laws, concerning assigned/natal families

<u>Custody and Guardianship of Natal/Assigned Family over Queer and Trans Children</u>

In families where queer and trans children face violence and discrimination from their natal/assigned families, such violence is normalized, considered to be a means of discipline and not recognized as violence by the police. The family is seen as a unit always working in the best interest of the child. **Individuals are compelled to stay within violent families because of financial constraints, and because of lack of external support**. The Trans Act mentions the inclusion of trans children's rights, but further discussion is needed on what this will entail.

- Laws governing the relationship between natal families and children need to be considered in view of this, starting from rethinking the concept of the child. **Legal changes are needed to grant greater freedoms of self-identification and determination to minor children.**
- Legal provisions are necessary to support queer and trans children facing violence to **leave their natal families or to access legal entitlements such as choosing adults** for care-giving beyond the natal family.
- **Relationships, communities and partnerships outside of heteronormative understandings need to be created and recognized,** so that safe spaces for queer and trans children can be expanded (PUCL & NNLBIWTP, 2023, 101).
- When facing violence, queer and trans children often take refuge in the support of community elders, who then come under attack by the natal families. **Fostering guidelines need to be expanded, and queer and trans families** must be considered eligible to provide foster care for such children, with economic support from the state. At present the *Model Foster Care Guidelines, 2016* in India only give rights to married couples.
- Most often, even when families push queer and trans children into controlling and oppressive heterosexual marriages as young as 14, they are unable to reach out for help.

Systems need to be set in place so that they are able to reach the Child Welfare Committees, which can recommend that a child has the right to be sent to foster care.

- Though the law speaks of **special homes** where they do not face further violence because of their gender or sexual orientation, queer and trans children are often sent to observation homes with no specific protection given to ensure safe space for them. If there are no such appropriate children's shelters available, **children should be accommodated in the adult shelters for queer and trans people**. Such orders were obtained from CWC by NGOs working in Tamil Nadu and West Bengal. (PUCL & NNLBIWTP, 2023, 101; Namrata (Varta), 2020[2])
- NGOs working on queer and trans issues should be involved at every stage of the decision-making processes: from short-listing of eligible children, preparation of home study reports to counselling the child, foster family and child care institutions. (PUCL & NNLBIWTP, 2023, 102)

Rights of (Dependent) Queer and Trans Adult Children

- The **frequent social and economic disenfranchisement that queer and trans children face from their natal families needs to be prevented**. The right of residence and **maintenance of queer and trans children and dependent persons** should be ensured in a way similar to how the law recognizes the obligation of parents to maintain an adult child with a disability (S. 125, CrPC). Laws such as *HIV/AIDS Act, 2017, Protection of Women from Domestic Violence Act, 2005* and *Trans Act* provide protection to the **right to residence** of queer and trans persons in limited contexts.
- When queer and trans persons run away from natal homes to escape violence, whether alone or as a couple, families often withhold their identity papers and other documents, as a form of blackmail. Legal provisions are needed for the **protection of identity and other documents.**
- It is necessary to **establish safe houses for queer and trans couples**. The Delhi High Court has provided such directions, but these need to be expanded throughout the country (*Dhanak of Humanity & Ors. v. State of NCT & Anr. WP (Crl)1321/2021).*
- There have also been documented instances of natal families which have been violent to queer and trans children, who were then expected to look after these families, if they want to be part of financial and property inheritance as per the *Maintenance and Welfare of Parents and Senior Citizens Act, 2007* (Section 23). The law must ensure that **parents cannot claim maintenance in cases where they have committed acts of domestic violence against their queer and trans children**.
- Both minor and adult children also need the **right to exit the natal family**. While in principle an adult individual can assert their choices, since there is no legal way to cut ties with one's assigned family, these families continue to exercise power over queer and trans individuals, and continue to be seen as connected in instances where medical, legal and other decisions are required. Exiting the natal family would mean **state protection from illegal confinement**

2 Namrata (Varta). (2020, August 29). Which way home for transgender minors? *Insight | Policy Matters | Varta Trust*. Which way home for transgender minors? | Varta Trust (vartagensex.org)

by the natal family an individual has chosen to exit. It would also mean that the family no longer holds rights over the person, their property and earnings.

Issues of Succession and Inheritance

- Often, as we have heard from queer and trans persons from rural and semi rural areas who testified in the Jan Sunwai in April 2023 (PUCL & NNLBIWTP, 2023), families threaten them with disinheritance and force them to sign affidavits giving up their right to ancestral and family property. Due to the abuse and violence, the individuals cannot even contemplate a challenge to the legal validity of such affidavits. Concepts such as **family settlements** have to be examined keeping in mind the power relationship within to make such settlements equitable, and the right to exit the natal family needs to be further qualified with **the ability to settle rights recognised in law over property and other entitlements**. (PUCL & NNLBIWTP, 2023, 98) A percentage of the parents' wealth that cannot be denied to their children may also be considered, similar to provisions currently present in Muslim personal law.
- The Trans Act now makes it possible for an individual's gender identity to be recognized as different from the one assigned at birth. This could occur at any point during a person's life. At present, many **laws around inheritance distinguish rights based on gender. Such laws should be gender neutral, and should also ensure a minimum of inheritance** at least for the first line of legal heirs. It is important to note also that the *Uttar Pradesh Revenue Code, 2006* was amended in 2020 to include transgender persons (as partners or children) for succession to agricultural land.
- The law ought to also **look to hijra gharana customs on how property is transferred** to and retained within the chosen community, which has received recognition in law by several High Courts, and **extend this to different forms of family and kinship**.The law also needs to ensure that gharanas retain rights over their communal property and assets, which are claimed by natal families.

Issues Connected with Queer and Trans People's Pre-Existing Marriages

- There are also cases in which queer and trans individuals have married under various laws and later transitioned to affirm their gender identity. As long as the partners in the marriage do not object, **the law must continue to recognize the validity of the marriage between them, and ensure that it may be registered** under the Special Marriage Act when it fails to comply with requirements of the law under which it was initially registered.
- In other instances, LBT persons in particular are frequently coerced into heterosexual marriages by natal families, and then face the spectre of **'restitution of conjugal rights'** under marriage laws, if they separate from the spouse. This provision, which is often used as a tool of harassment to defeat queer and trans persons' claims of maintenance and separation, is being challenged at the moment (*Ojaswa Pathak & Anr. v. Union of India, WP(C) 250/2019*) and the commission must **recommend its deletion from all marriage laws.**

Rights related to families made by queer and trans people

Queer and trans people come from diverse lived realities. Our choices of how we wish to live our lives, with whom and in what way are not uniform. We have a rich tradition of communities of Aravanis, hijras, Nupi Manbis and Nuppi Paibis, Kinnars and many others that have sustained and looked after each other for many centuries now. These are well established and have different forms and ways of living across the country, with **systems and practices which they have evolved and transformed too.**

There are also others who have informal communities of support with friends. And some of us choose to get into coupled monogamous relationships and among these some may want to get these relationships recognised as any other marriage with the same rights as are provided to others in a similar institutional framework.

Creation and legal recognition for relationships other than marriages

A family is a care unit and can be thought of in many ways. People in these care units could be in intimate or non-intimate relationships, or could be in chosen communities of friends. They could be made of people who live together and share domestic and caregiving responsibilities and material resources, but could also be people not necessarily cohabiting and yet being each others' support network.

Nominating representatives

Without legal recognition in any form, these chosen 'care units' and 'communities' get sidelined especially when the assigned family is in conflict with the queer/trans person and their chosen relationships. In the situation where the person is not able to assert their right to voice their opinions, most state agencies turn to assigned families to make decisions – such as in medical care, living arrangements, custody of children etc. Very often the decisions made by assigned families are in contradiction to the decisions that the persons may want to make about their lives. The State needs to recognise chosen forms and structures of intimacy so that the autonomy, choice and dignity of the individual is respected at all times.

The recognition could take the form of decentralizing the bundle of rights that comes with natal and marital families, making it possible for **queer and trans people to nominate representatives for specific aspects of their lives – choices of profession, living arrangements, custody of minor children, heirs and end of life decisions, etc**.

Countries like the USA and Canada have concepts of 'reciprocal beneficiaries', 'domestic partnerships', recognized economically and socially. These are not based on conjugal, monogamous

relationships and between two or more people. For instance, Hawaii (USA) recognizes families comprising multiple members (friends, partners, cousins), in which care-giving rights and financial entitlements are shared equally among people. Alberta (Canada) recognizes 'Adult Interdependent Relationships' for which the basis is not conjugality or even a romantic relationship, opening them up to asexual people as well.

Indian law is not new to such choices. Section 14 of **the Mental Healthcare Act, 2017 recognises a person's right to appoint 'any person' as the nominated representative** to give effect to their advance directives during mental healthcare treatment in the event of their incapacity. This move towards taking away the primacy given to natal or marital families can be extended to the general context of family in law. The Supreme Court's guidelines in *Common Cause v. Union of India, 2023 SCC Online SC 99* on administration of advance directives provide that where a patient has not made an advance directive, medical practitioners shall consult family or 'next of friend' in proceeding with the course of treatment.

In *Deepika Singh v. Central Administrative Tribunal & Ors., (2022 SCC Online SC 1088)*, the Supreme Court noted that families are organized in diverse forms, including by LGBT families, and declared that members of such 'atypical families' deserve full recognition and protection in law.

The *Yogyakarta Principles* (2006), which impose binding international human rights obligations on India with respect to protecting rights of queer and trans persons, mandate the recognition of diversity of family forms, including those not defined by marriage or birth, in order to ensure that all members have access to family-related social welfare and other public benefits (*Principle 24: Right to Found a Family*).

- We request the Law Commission to **issue guidelines for people to register their legal representatives** through affidavits or other easily accessible and easy to execute methods for all those who are not in marriages recognized by law.
- Such nominations would also mean that queer and trans persons can have a **nominee or a beneficiary to their income and assets.** This would facilitate members of the care unit or community to make a gift of property, to procure a joint loan from a bank, to nominate as an heir, as beneficiary in medical insurance schemes or upon death, for benefits from retirement, pension and for various other social, legal and economic rights and entitlements that family members have (PUCL & NNLBIWTP, 2023, 96).

Custody and Guardianship as Queer and Trans Parents

Queer and trans people need to be seen as equally entitled to custody and guardianship of minor children. In instances where queer and trans individuals had children within forced heterosexual marriages, or if they identified as queer or trans later in life, their access to their own children is often prevented and children are turned against them, on the excuse that being with a queer or trans parent is not in the interests of the child. This is a violation of their rights as parents of their children.

- Provisions are needed for all **parents in chosen relationships to share custody and guardianship of their children** with any consenting adults from their chosen care units.
- Existing laws around adoption, the *Juvenile Justice (Care and Protection of Children) Act, 2015* and the CARA guidelines need to be modified to ensure that this sharing of parenting can happen and also that **people can apply for adoption as joint parents and trans people's rights to adoption are also recognised**.
- The Supreme Court is presently dealing with the validity of *Assisted Reproductive Technology (Regulation) Act, 2021 ('ART Act')* and the *Surrogacy (Regulation) Act, 2021* in so far as they exclude families of queer and trans persons from undertaking such services, among other concerns, in *Arun Muthuvel v. Union of India, WP (C) 756/2022*. In recognition of the demands of queer and trans persons for the right to found a family, the commission must recommend that access to ARTs should be made available to all people irrespective of their gender, sexuality or marital status.
- Similarly the *Model Guidelines for Foster Care, 2016* need to extend the right to foster and take care, to adult queer-trans people who are not married. This is particularly useful for queer-trans children who may be abandoned by their assigned families and may not find the support and nurture that they need from other families that are not familiar with queer-trans lives.
- The *Yogyakarta Principles* (2006) also mandate that governments must adopt legislative, administrative and other measures to guarantee access to adoption and ART services for queer and trans persons (*Principle 24: Right to Found a Family*).

Right to Marriage

The 21st Law Commission's Consultation Paper recognizes that 'there are significantly different attitudes towards how a union between two people is imagined.' (Point 2.2, 21LC, 17) These differences are not visible only between communities, but also between heterosexual unions and the kinships and communities that queer and trans persons imagine and practice, which are not recognized within the other communities that the individuals belong to.

In our marriage-centric cultural context, couples want to get married since marriage is the only supportive structure available to meet economic and care needs and achieve social recognition, especially for low-income, inter-caste couples, and queer couples.

The Jan Sunwai report shows the stark violence individuals face when natal/assigned families find out about their queer relationships. Extending the right to marry would '**empower queer and trans persons to assert and claim their rights within their natal families**,' (PUCL & NNLBIWTP, 2023, 99) and enable us to live without fear of having to return to our natal families.

A recognition of marriage in law would percolate down to police stations, public hospitals and educational institutions and would ensure that we get protection from natal family violence, and are able to live a life of dignity and autonomy as is assured within the Constitution.

- Many religious and other social communities may not be accepting of this right to marry being extended to people other than cis- heterosexual men and women. The Special Marriage Act or an equivalent secular law which guarantees equal rights is the only way that constitutional rights of queer-trans citizens can be protected by the State at the present moment. Hence we ask that **marriage under the Special Marriage Act be extended to any two consenting adults.**
- **Rethinking the 30 day notice period under Special Marriage Act, 1954**: it is important to also note the opposition that queer and trans people face from natal families when they decide to establish relationships with partners of their choice. The 30 day notice period required under SMA then serves no purpose other than to give an opportunity to natal families to prevent registration. The 21st Law Commission's Consultation Paper (Point 2.113) also mentions the need to reconsider the notice period. '[T]he object of the Act [SMA, 1954] was to enable couples to marry by their own will and choosing. Increasingly, with moves to announce such a notice online, or with registrars directly contacting parents of the couple, the purpose of the Act, 1954, is being defeated.' (21st Law Commission, Point 2.113, p. 58)
- **Domicile Requirement:** A lot of queer-trans people are forced to migrate to escape violence and to gain acceptance or find community. Very often they run away as a couple and need to get their marriage registered as soon as they reach. Hence the need for domicile where they register their marriage should also be deleted.
- **Differences in documents:** Another situation that may arise in cases of queer trans persons is having a different name and gender in the Aadhaar card and class X or school certificate, leading to the rejection of the marriage application/certificate. Rejection ought not to be based on mere lack of reconciliation of the two documents. **Either a method of reconciling the documents or a format of affidavit ought to be made available**. (PUCL & NNLBIWTP, 2023, 100)
- **Presumption of Marriage:** In heterosexual live-in relationships that exceed a certain time period, there is a provision of 'presumption of marriage'. We suggest that queer people living in a domestic partnership – sharing space and economic resources – should also be able to ask for recognition under the same provision to secure whatever limited socio-economic rights are available.

Even a cursory glance reveals the multiple ways in which any consideration of family laws need to engage meaningfully with the multiplicity of queer and trans lived experiences. The Law Commission notice also mentions that if required it may 'may call upon any individual or organization for a personal hearing or discussion'. We strongly encourage such personal hearings with the signatories of the present response and others who belong to and have been engaging on queer and trans issues, even as we insist once again on the need to reconsider the notice itself on a Uniform Civil Code.