

RGICS LEGISLATIVE BRIEF

(August, 2017)

The Transgender Persons (Protection Of Rights) Bill, 2016

Prepared by Aadrita Das

Under the guidance of Barkha Deva

The Transgender Persons (Protection Of Rights) Bill, 2016

Background:

The Transgender Persons Bill 2016 was introduced in the Lok Sabha in August 2016 as a response to the Private Members Bill on the same that was passed by the Rajya Sabha and was pending in the Lok Sabha. The Bill seeks to protect and promote the rights of one of the most disadvantaged communities in the country and to mitigate the stigma, marginalization and abuse faced by them. However it has drawn considerable censure especially from civil society organizations and NGOs working for LGBTQ rights for its deviation from a right based approach and its cisnormative foundation. The Bill was also viewed as a considerably diluted version of the 2015 Private Members Bill. In the light of severe criticism, it was referred to a Standing Committee on Social Justice and Empowerment which came out with its Report in July this year, highlighting loopholes and making recommendations that in its view need to be incorporated to make it an effective legislation. This Brief attempts to draw a comparison between the provisions of the two Bills and the Commission Report and seeks to identify gaps that are yet to be addressed.

The Transgender Persons (Protection Of Rights) Bill, 2016

ISSUES	THE RIGHTS OF TRANSGENDER PERSONS BILL, 2015	TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016	STANDING COMMITTEE REPORT ON THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016 PRESENTED ON JULY 2017	COMMENTS
<p>Definition</p>	<p>‘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</p>	<p>Transgender is defined as a person who is neither wholly male or female or a combination of both neither.</p>	<p>It has been suggested that transgender be defined as a person whose gender does not match with the gender assigned to at birth and this includes trans men, trans women gender queers and other sociocultural I dentities</p>	<p>The Commission’s Report is right in recommending that the definition be made more inclusive. The definition provided in the 2016 Bill allows a person to only be recognised as a transgender even if the person identifies as a male or female. The clause should be redrafted to emphasise on the self perceived identity more than the biological sex of the person.</p> <p>The present definition of transgender under the 2016 Bill merges the concept of inter sex and transgender. The Commission report highlights this erroneous and restrictive nature of the definition. The Bill should include members who have undergone the surgery as well as other members of the community with distinct social identities.</p>

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Prohibition of Discrimination</p>	<p>A broad definition of the term 'discrimination' is included in the provision which describes it as distinction, restriction, exclusion or denial of fundamental rights on the basis of their gender.</p> <p>The Bill provides for the constitutional provisions to be upheld and for the members to have all the rights available to any citizen in India.</p> <p>The local and appropriate authorities shall take all necessary steps to prevent torture, cruel, inhumane and degrading treatment of transgender people.</p> <p>The Government must also raise awareness about incidents of abuse, legal remedies, steps to avoid incidents, procedure for reporting incidents, and steps required for rescue, protection and rehabilitation of transgender persons who have been victims.</p> <p>Necessary</p>	<p>The Bill provides for prohibition on discrimination on the grounds of denial, discontinuation or unfair treatment in relation to education, employment, healthcare, Right to movement, Right to reside, purchase or rent of property, enjoyment of goods services and facilities available to the public, opportunity to hold public or private office, in a Government or private establishment and denial, ill treatment or removal from care in whose custody the transgender is in. There is no definition of the term discrimination.</p>	<p>The Commission report suggests inclusion of 'or establishments' after the phrase 'no person shall' in section 3 of the Bill since 'person' according to Section 3 of the General Clauses Act does not include government.</p> <p>It also suggested including a definition of the term 'discrimination' so as to widen the scope of the act.</p> <p>It also suggested providing for a mechanism under which violation of this provision can be made liable.</p>	<p>Unlike the 2015 Bill, discrimination against transgenders is limited to the exhaustive list provided under Clause 3 of the 2016 Bill. A definition of the term discrimination should be added to the clause as suggested by the Commission Report so that the ambit of the provision can be expanded.</p> <p>The lack of legal recourse in the event of violation of this provision is highlighted by the Commission in its recommendation that a redressal mechanism be introduced. An option for legal aid should also be included in the light of the fact that transgenders might not be able to afford it themselves.</p> <p>The 2016 Bill makes no reference to amendments in the existing laws to incorporate crimes against transgenders. The criminal laws as well as the family laws adhere to the binary yardstick of male and female and has no provision for inclusion of a third gender. In such a legal framework,</p>
---	---	---	---	--

The Transgender Persons (Protection Of Rights) Bill, 2016

amendments in IPC must be made to include crimes against transgenders.

implementation of this clause is impossible. While the Commission report has pointed out this lacuna, it has not been included in its recommendations. A separate provision on the application of other existing laws while implementing this Bill should be included.

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Right to self perceived identity</p>	<p>The Right to self perceived gender identity is recognized.</p> <p>Self identified gender also includes gender expression in the form of dress, words, action, behavior or other forms.</p> <p>Recognition of self identified gender and inclusion in all application forms.</p>	<p>The Bill provides for right of self perceived gender identity subject to prior recognition by the law.</p>	<p>The Commission Report recommends inserting a provision defining gender identity and gender expression as one refers to an internal identification of one's gender and other is an external manifestation.</p>	<p>As the Commission Report rightly points out, this clause changes the nature of the right of transgender from self identification to recognition under law which is against the very spirit of the Bill.</p> <p>Assigning the status of transgender only and excluding people who relate to the binaries of male-female risks denying people who identify to a gender different from the one they were assigned at birth their rights under this bill. This is in direct contradiction to the Right of self perceived identity espoused in this clause. This aspect should be addressed by the Bill, clarifying the rights of the persons who identify themselves outside the status of a transgender.</p>
--	--	---	--	--

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Issuance of certificate of identity</p>	<p>State level body constituted by the respective state or UT should issue a certificate of identity to a transgender upon recommendation by a District level Screening Committee.</p> <p>The Committee will be headed by the district magistrate and will comprise of a district social welfare officer, psychologist, psychiatrist, social worker, two representatives of the transgender community and any other official the state government deems fit.</p> <p>This certificate will be proof of gender identity for all government and official purposes.</p>	<p>District Magistrate on verification of the District Screening Committee shall issue a certificate of identity as a transgender person which entitles them to all rights and protection under this act.</p> <p>The representation of transgender committee was reduced to one.</p>	<p>Guidelines for determination of a person's status as transgender must be established to make the process as fair and hassle free as possible.</p> <p>The requirement for a district welfare officer must be specified.</p> <p>The Commission, while agreeing that the scope of the provision must be limited, recommended that that the certificate must specify the person simply as a 'transgender' and not as male or female.</p> <p>The Committee also recommended deleting clause 8(2) from the Bill as being superfluous since it is unlikely that the members of the community would approach the screening committee a second time to make an application for change in gender.</p>	<p>The role and powers of the Screening Committee is ambiguous and subjecting transgender people to undergo tests for identification may be violative of human rights. There should be a provision for self identification through notarised legal affidavit included in the Bill.</p> <p>Since no legal procedures are specified for the committee, it is suggested that guidelines be adopted for a more efficient and transparent functioning of the commission.</p> <p>The Bill should seek to elaborate further on the role and qualifications of the district welfare officer.</p> <p>The Bill should clarify whether this certificate of identity and recognition as a transgender will apply to legal purposes of marriage, adoption etc or is limited to being an identity proof.</p>
---	---	--	--	--

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Welfare Schemes</p>	<p>The Bill mentions the welfare schemes and support system in detail. It provides that the government has an obligation to ensure that they 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 making community services and facilities for the general population available on an equal basis.</p> <p>Pension, Financial assistance to the parents of Transgender children.</p> <p>Facilities for Transgender Children who have no families or have been abandoned, or are without shelter or livelihood; access to safe drinking water and appropriate and accessible sanitation facilities especially in urban slums and rural areas.</p> <p>Safe and hygienic community centers with decent living conditions in terms of nutritious food, sanitation, health care</p>	<p>The Bill highlights efforts that must be taken by the government to secure full and effective participation, protect rights and interests and formulate welfare schemes and programs which are transgender sensitive, non- stigmatizing and non- discriminatory for the rescue, protection and rehabilitation of transgender persons to address the needs of members and their inclusion in society. This shall include vocational training and scope of self employment.</p> <p>Promotion and protection of the Right to participate in cultural and recreational activities should also be protected.</p>	<p>The Commission recommends the demarcation of duties between the Centre and the States and clarifies the roles of each division to avoid administrative glitches and undue delays in the implementation.</p>	<p>In the absence of mention of specific duties assigned, the clause remains vague and open to subjective interpretation. This is highlighted in the Commission Report and it is recommended that roles of the Centre and the States be clearly identified.</p> <p>Clause 15 of the 2016 Bill which refers to welfare schemes can be redrafted to include specific measures that need to be undertaken and to ensure there are no ambiguities in the clause.</p>
-------------------------------	---	--	--	--

The Transgender Persons (Protection Of Rights) Bill, 2016

and counseling.

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.

Shall consult the nongovernmental organizations. information campaigns and sensitization programmes, campaigns shall aim at enabling both state and civil society to comprehend transgenderism as an integral part of the human condition, to recognize the capabilities and contributions of transgender persons, and to

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Employment</p>	<p>The Bill formulates schemes to support employment, vocational training and self employment, institute mechanisms for provision of loans at concessional rates to Transgender Persons for self-employment ventures, and for marketing of their products. Right to interview, Establishment of Helpline for Career Guidance and Online Placement Support has also been included.</p>	<p>The Bill imposes an obligation on all establishments, government or private not to discriminate against transgenders in their access to education and jobs.</p> <p>A Complaint Officer must be set up in every establishment with a capacity of 100 employees.</p>	<p>The Complaint Officer should not be designated only for establishments with more than 100 employees but should extend to all.</p> <p>The role of the Officer should be in consonance with the Prevention of Sexual Harassment of Women at Workplace Act</p>	<p>There should be a provision added for the imposition of liability or enforcement mechanism against private sector for non implementation in the 2016 Bill. No recourse is mentioned for employees working in organisations with less than 100 employees. The commission has rightly recommended that this restriction be deleted from the Clause.</p> <p>The provision of reservation which has been omitted in the 2016 Bill can be incorporated to ensure genuine protection to the community.</p> <p>The 2016 Bill should build on protective measures mentioned in the Prevention of Sexual Harassment of Women at Workplace Act. The process of application of a gender specific law to this clause without the necessary amendments is an aspect that needs to highlighted.</p>
--------------------------	---	---	--	--

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Education</p>	<p>The Bill provides for all educational institutions funded or recognised by the government to provide them access to education, accommodation without discrimination as well as provide them with an inclusive environment for learning.</p>	<p>The clause states that all educational institutes funded or recognised by the government shall provide inclusive education and opportunities for sports, recreation and leisure activities without discrimination. Further, the Bill provides that the Government must formulate welfare schemes to facilitate and support including training employment.</p>	<p>The Commission has suggested a provision imposing liabilities on private education for discriminatory treatment and framing of the clause in accordance with the Right to Education Act 2009.</p> <p>Education system should be age appropriate, gender sensitive, non stigmatising and non discriminatory.</p>	<p>There are no guidelines or instructions issued to schools to adopt an inclusive system of education. The Bill as well as the Commission report fails to frame uniform rules that all schools within the scope of this Bill will have to adopt. Liability on non conformity with the rules should also be specified in the clause.</p> <p>A reservation clause including reservation for transgender students should be added to the Bill.</p>
<p>Residence</p>	<p>The Bill entitles transgenders the right to residence within the community with equal choices.</p> <p>Incase of family members being unable to take care of the trans gender children, they should be provided a home with immediate family or with the community in a family setting.</p>	<p>The Bill provides transgenders with the right to remain and be a part of the family household and the right to use the facilities in a non discriminatory manner.</p> <p>Only under the order of a competent court, a transgender person may be shifted out of his residence to a rehabilitation centre.</p>	<p>Commission points out that family as the unit of protection for transgender is a misplaced conception and therefore overlooks the actual concerns.</p> <p>It suggests recognition of alternate family structures as transgender children are often adopted by Hijra families and these should not be criminalised.</p> <p>It suggests that the word 'transgender' is replaced with 'transgender children'.</p>	<p>The Bill should shift its focus from rehabilitation as is provided in the Bill towards generating education and employment opportunities. This will better serve the purpose of integration of the transgender community into mainstream society. The Report highlights this concern but does not recommend any specific changes to the clause to incorporate it.</p>

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Health</p>	<p>The appropriate Government and local authorities shall take necessary measures to provide transgender persons:</p> <p>(a) Separate HIV Sero-surveillance Centres since they face several sexual health issues;</p> <p>(b) Sex reassignment surgery, free of cost;</p> <p>(c) Barrier-free access in the hospitals and other healthcare institutions and centers.</p> <p>To fulfill 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.</p>	<p>The appropriate Government shall take the following measures in relation to the transgender persons, namely:</p> <p>Separate human immunodeficiency virus Sero-surveillance Centres;</p> <p>To provide for medical care facility including sex reassignment surgery and hormonal therapy;</p> <p>Pre and post sex reassignment surgery and hormonal therapy counselling;</p> <p>Bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;</p> <p>Review of medical curriculum and research for doctors to address their specific health issues;</p> <p>To facilitate access to the transgender persons in the hospitals and other healthcare institutions</p>	<p>Commission suggests explicit incorporation of provisions such as trans friendly hospitals, non discriminatory hospital policies which ensures there is no barrier in accessing education.</p> <p>Any guidelines for SRS and trans health issues must be framed after consultation with health activists and trans gender individuals.</p> <p>Reframing of Clause 16 to include other health issues apart from insurance for SRS.</p>	<p>The Commission Report adds on to the provisions already provided for health care of transgenders by the 2016 Bill. It recommends a broader clause by including the phrase 'other health issues' so as not the limit it to SRS. These recommendations should be included in the Bill to ensure better and wider safeguards.</p>
----------------------	--	---	---	---

The Transgender Persons (Protection Of Rights) Bill, 2016

and centres;

Provision for coverage of medical expenses by a comprehensive insurance scheme for transgender persons.

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Reservation</p>	<p>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.</p> <p>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.</p> <p>Provided that Transgender Persons are not to be prevented from competing for seats which are not reserved for them.</p>	<p>There is no provision for reservation</p>	<p>The Commission Report while commenting on the miscellaneous section, recommended including a reservation clause as directed by the Supreme Court in the NALSA judgment.</p>	<p>The absence of a reservation clause goes against the NALSA judgment where the Supreme Court had directed that transgenders be recognised as a socially and educationally backward class and therefore be given due representation through reservations. The inclusion of a provision providing for reservation is essential to forward the cause of this community.</p>
---------------------------	--	--	--	--

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>National Council/Board</p>	<p>The bill provided for the formation of a National Commission which will function in accordance with the powers and duties assigned to it.</p> <p>It will be headed by a chairperson who shall be an eminent personality in the field of transgender rights.</p> <p>There will be 6 other members out of which 3 will be representatives of the transgender community. The appointments shall be made by the central government.</p> <p>The commission will also have a secretary and other administrative staff as deemed necessary by the central government.</p> <p>The Commission's powers and functions have been specified in clause 34 and all powers of civil courts under CPC shall apply to the commission. Similar provision is made in the states for formation of respective state councils.</p> <p>It also provided for a rights court.</p>	<p>The core aims of the National Council shall be to advise the Central Government on the formulation of policies, monitor and evaluate the impact of policies, review and coordinate the activities of all the Departments of Government other Governmental and non- Governmental Organizations, and to perform such other functions as may be prescribed by the Central Government in relation to transgenders.</p>	<p>The Commission recommends the insertion of a provision listing the functions and powers of the council and exact redressal mechanism that is to be set in place. This provision must be supplemented by making the council's decisions enforceable and attraction of penalties in case of non compliance.</p> <p>State level bodies should also be set up to ensure proper compliance.</p>	<p>The Council is not a statutory body and lacks the authority to take significant decisions. It does not have the powers under CPC that other statutory commissions are empowered with which in essence renders it toothless. The scope of the Council's powers must be significantly enlarged if it is expected to be effective.</p> <p>There is also no mention of councils at the state level. The Commission Report therefore recommends the setting up of state level bodies as well.</p>
--------------------------------------	---	---	---	---

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Penalty</p>	<p>Though offences are specified, their corresponding penalty is not.</p>	<p>The Bill provides for punishment of not less than six months up to two years with fine for anyone who entices a transgender person to indulge in the act of begging, bonded labor, denies them right of passage to a public place, obstructs them from having access to a public place, forces them to leave household, village or place of residence, harms, injures, endangers the life, safety, physical or mental well being or does acts causing physical, verbal, sexual, emotional or economic abuse.</p>	<p>The Commission suggests that there be proportionality in the punishments in accordance with the severity of the offence.</p> <p>The provision be amended to include graded punishments. Sexual and physical assault should attract stricter penalties.</p>	<p>By criminalising the very source of income for transgender people and not providing an alternative, the provision denies them their livelihood.</p> <p>The penalties for the offences listed out can turn counterproductive as it can be used to harass transgender people instead of assisting them. The Bill and the Commission fails to highlight these concerns and ground realities in its Report.</p> <p>Provisions on sexual and physical assault on transgenders should be inserted in the IPC for the law to be effectively implemented. The Commission Report has not made any such recommendations.</p>
-----------------------	---	---	---	---

The Transgender Persons (Protection Of Rights) Bill, 2016

Legal Standing	Overriding effect not in derogation of other laws	Laws and rules made herein under are in addition to and not in derogation of any other laws in force.	Related laws be amended in such a way so as to incorporate the rights and liabilities that this Bill proposes.	Many clauses in this Bill are rendered in effective because no corresponding amendments have been made to related existing laws. For example, the Bill prohibits discrimination against transgenders and lists physical and sexual abuse as an offence. Without the corresponding IPC amendment, there is no means of validating this right in the event of its violation.
-----------------------	---	---	--	--

The Transgender Persons (Protection Of Rights) Bill, 2016

<p>Miscellaneous</p>	<p>Include Transgender as a third gender in all application forms.</p>	<p>The Central Government may provide funds as and when it may be necessary.</p> <p>The appropriate government may also make rules for the functioning of this act.</p>	<p>The Commission has provided several suggestions which it recommends the bill should incorporate for the welfare of transgenders.</p> <p>Grant reservation status as a socially and educationally background as recommended by the NALSA judgment</p> <p>Confer civil rights like marriage, adoption, divorce, adoption etc.</p> <p>Providing exclusive HIV zero surveillance centres for transgenders since their risks are higher.</p> <p>Amendments to be made to section 377 so that marriages are not criminalised.</p> <p>Facilities like gender neutral toilets must be introduced.</p> <p>Career guidance as well as Counselling services to deal with trauma and violence should be provided.</p> <p>The bill should also include definition of an intersex person.</p> <p>Separate frisking zones in airports and other public places.</p>	<p>The ultimate goal should be integration of transgenders into mainstream society and as such laws of the country need to be amended to recognise them as the third gender.</p>
-----------------------------	--	---	--	--

The Transgender Persons (Protection Of Rights) Bill, 2016

Provision for penalising abortions of intersex foeticide

Marriage, divorce and other personal laws be amended to include transgender rights as well.

The Transgender Persons (Protection Of Rights) Bill, 2016

