



LAWYERS

COLLECTIVE

22 September, 2016

Dear Madam/Sir,

Please find enclosed herewith written submissions by the Lawyers Collective for India's Universal Periodic Review in May 2017.

Lawyers Collective is a registered public trust under The Bombay Public Trusts Act, 1950 and The Societies Registration Act, 1860 which has worked on women's rights, labour rights, civil liberties, equality and non-discrimination, LGBT rights, access to medicines and intellectual property and narcotics control since the last three decades. On all these issues we undertake legal aid and strategic litigation, advocacy, capacity building and policy research.

We appreciate the opportunity to make submissions on Government of India's obligations under international law on legal and policy concerns.

Kind regards,

Anand Grover,
Director, Lawyers Collective.
(as encl.)

Access to Medicines as a part of the right to health

- i. India has an international obligation to ensure that all its citizens are guaranteed the right to health set out under Article 12 of the ICESCR, reinforced by General Comment 14, which defines its scope and content. State parties must respect, protect and fulfill the right to health by making health facilities, goods and services available, accessible, acceptable and of quality. Courts in India have held that access to essential medicines is a part of the right to health under Article 21, by incorporating Article 12 of ICESCR therein.^{1,2}
- ii. India is home to nearly 1.2 billion people living in poverty.³ Significant out-of-pocket health expenditure places a sizeable number of people in extreme poverty every year. Yet the public health budget has stagnated at 1.2%,⁴ despite the government's own draft health policy suggesting that this figure should be at least 5%.⁵

IP impacts access to affordable medicines

- i. Invention of truly innovative medicines in the developed world has substantially diminished. It is a fallacy that high pricing of drugs is necessary to invest in R&D, which requires greater capital, since a very small percentage of profits are actually funneled into R & D.⁶
- ii. Patents on pharmaceutical products allow for monopolistic pricing, which puts them out of reach of those who need them the most. A recent study comparing prices of patented and generic cancer drugs shows that while patented medicines in India can cost up to Rs. 1,00,000 (appx) per patient per month, generic prices are as low as Rs. 10,000 (appx).⁷
- iii. Generic competition is one of the most effective mechanisms to reduce prices.⁸ The 2005 amendments to the Patent Act, 1970, ensured that key public health safeguards, which would ensure generic competition, were maintained through the retention and effective use of TRIPS flexibilities.
- iv. Civil society and patient groups have filed several patent oppositions successfully relying upon Section 3(d). Following the *Novartis case*⁹ where Section 3 (d) of the Patent Act, 1970, was upheld by the Supreme Court and the *Nexavar* compulsory

¹*Amit Ahuja v. Union of India* W.P.(C) 1507/2014

² Domestically, constitutional freedoms and guarantees are enshrined Chapter III on *Fundamental Rights* which has often been informed by the principles laid down in Chapter IV- *the Directive Principles of State Policy* in order to expand the scope and reach of fundamental rights by Courts in India.

³The Millennium Development Goals Report 2014, at pg. 9.

⁴ National Health Accounts 2015

⁵National Health Policy Draft, 2015, Ministry of Health and Family Welfare, at pg. 12.

⁶Love J. Pharmaceutical global R&D was 7.9 percent of sales in 2010. Knowledge Ecology International: 2011 June

⁷Daniel Goldstein et al, Global differences in cancer drug prices: A comparative analysis, *J Clin Oncol* 34, 2016 (suppl; abstr LBA6500).

⁸Prices of ARVs drugs when introduced to the international market in early 2000s was 10,000 USD per patient per year but after generic companies started producing they reduced to 90 USD per patient per year by 2008. See Medecins sans Frontieres Campaign for Access to Essential Medicines. *Untageling the web of antiretroviral price reduction*. 11th edition. Geneva, Switzerland, 2008.

⁹ (2013) 6 SCC 1

license case¹⁰, there has been considerable pressure on the Indian government to restrict the use of TRIPS flexibilities and dilute the patent law as it exists. Several industry-backed administrative and trade bodies have, through reports and media propaganda, repeatedly and falsely targeted India's use of flexibilities as being harmful to foreign investment in India. Reports also suggest that there were assurances made that compulsory license would not be granted.¹¹

- v. The IP Policy launched in May, 2016, promotes an IP maximalist agenda without any context to the socio-economic realities to support the initiatives proposed. Furthermore, it pays lip-service to public health goals and obligations.

Free Trade Agreements (FTAs)

- i. The implications of harmful IP provisions in FTAs that prevent access to healthcare have been well documented by human rights bodies such as the OHCHR¹², experts¹³ and various other fora.¹⁴ These agreements prioritize private rights over public health, adversely impacting access to medicines by preventing access to affordable efficacious generic drugs. FTAs and BITs erode TRIPS flexibilities and promote TRIPS-plus measures such as Data Exclusivity, Patent Linkage, Patent Term Extension and Stronger enforcement mechanisms and other border measures.¹⁵

Urgent need for rights-based response to HCV and TB

- i. HCV has overtaken HIV as the number one cause of death from a communicable disease in India.¹⁶ India, being a world leader in generic production, could facilitate the manufacture of Direct Acting Antivirals (DAAs) that can cure HCV¹⁷ towards meeting its obligation to protect the health of its population but there has been no visible commitment by the government on this.
- ii. India has one of the highest TB prevalence, with 2,80,000 dying each year from TB alone. The paternalistic RNTCP programme has failed to meet even basic requirements such as counselling, testing and treatment. TB/HIV Co-infections are

¹⁰AIR 2014 Bom 178

¹¹Generic drugs: 'India must give written declaration on compulsory licensing' at <http://www.thehindubusinessline.com/economy/generic-drugs-india-must-give-written-declaration-on-compulsory-licensing/article8249342.ece>. See also NGOs urge PM to 'resist pressure' from U.S. on IPRs at <http://www.thehindu.com/business/Industry/ngos-urge-pm-to-resist-pressure-from-us-on-iprs/article8682612.ece>.

¹²<http://pacific.ohchr.org/docs/PacificTradeRightToHealth.pdf>

¹³ See the UNSR on the Right to Health report A/HRC/11/12, See also <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031>

¹⁴All costs, no benefits: How TRIPS-plus intellectual property rules in the US-Jordan FTA affect access to medicines, OXFAM, 2007. See also The price of medicines in Jordan: the cost of trade-based intellectual property, Journal of Generic Medicines 9(2) 75–85, 2012. See also Ellen R. Shaffer et al, A Trade Agreement's Impact On Access To Generic Drugs, Health Affairs 28, no.5 (2009).

¹⁵RCEP is a regional FTA being negotiated between India, ASEAN Countries, Japan, Korea, China, Australia and New Zealand. Leaked draft negotiating texts show that Japan and Korea are pushing for TRIPS Plus provisions Leaked IP Chapter of the RCEP negotiations, 15 October 2014 version. Available at <http://keionline.org/node/2472>

¹⁶Hatzakis A, Chulanov V, Gadano AC et. Al. The present and future disease burden of hepatitis C virus (HCV) infections with today's treatment paradigm – volume 2 Journal of Viral Hepatitis, 2015, 22, (Suppl. S1), 26–45;

¹⁷Community and civil society groups have drafted a rights-based analysis paper titled "Ensuring Access to HCV Treatment in India: A rights-based analysis" putting forth strong legal and policy arguments for why the government should formulate and implement a comprehensive strategy for HCV treatment. http://www.lawyerscollective.org/wp-content/uploads/2016/07/hcv_paper2_print_25th_July.pdf

the largest cause of death amongst PLHIVs but there has been no urgent change to policies or their implementation.

- iii. New amendments are being enacted to protect the rights of those participating in clinical trials and to ensure highest standards of ethics are maintained.¹⁸ In 2012, the Supreme Court directed the Government to provide a strong framework before approval is granted for clinical trials.¹⁹ The ethics and legalities involved in medical experimentation involving children is also explored through a PIL that is still underway.²⁰

Recommendations

1. **Increase public health budget to 5% of GDP with higher investment in primary healthcare.**
2. **Respect, protect and fulfil the right to health by utilizing existing legal mechanisms to ensure access to affordable medicines including TRIPS flexibilities.**
3. **Refrain from adopting TRIPS plus standards in the patent law and resist the push towards IP maximalism under the national IP policy.**

DRUGPOLICY:

Criminalization of Drug-Use:

- i. The Narcotic Drugs & Psychotropic Substances Act, 1985 is modeled on 3 international conventions,²¹ none of which requires Member States to criminalize drug-use; on the contrary, they encourage alternatives to incarceration, including treatment, education and rehabilitation.
- ii. The UNSR on Right to Health (2010) recommends Member States to de-criminalize possession and drug-use, as criminalization and excessive law-enforcement undermine the right to health and increase health risks to HIV, HCV & TB.²²
- iii. Criminalizing drug-use *per se* violates a person's right to privacy and autonomy.²³

¹⁸ The draft Drugs and Cosmetics (Amendment) Bill, 2015 introduces significant changes to the clinical trial regulatory framework in India including a new chapter on clinical trials which also provides for medical treatment and compensation to those injured due to the clinical trials, stronger powers to Ethics Committees and criminal penalties for non-compliance in certain cases. See [http://www.cdsco.nic.in/writereaddata/D&%20C%20AMMENDMENT%20BILL\(1\).pdf](http://www.cdsco.nic.in/writereaddata/D&%20C%20AMMENDMENT%20BILL(1).pdf)

¹⁹ *Swasthya Adhikari Manch & Anr v. Union of India & Ors* (W.P. 33 of 2012).

²⁰ *SAMA Resources Centre for Women v. Union of India and Ors*. W.P (C) 921 of 2013 filed at the Supreme Court of India.

²¹ The Single Convention on Narcotic Drugs, 1961, The Convention on Psychotropic Substances, 1971 and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

²² Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UNGA, 6th August 2010, A/65/255

²³ The legal policy under The NDPS Act, 1985 is contradictory in so far as it criminalizes drug users, but also considers them as persons in need of treatment and help. Drug-use is criminalized under S. 27 'Punishment for consumption of any narcotic drug or psychotropic substance' and results in a rigorous prison term of upto 6 months or 1 year and/or a fine, depending on the substance consumed

- iv. NDPS data in Punjab amply illustrates how criminalization of drug-use is leading to a systemic pattern of prosecution and persecution of persons dependent on drugs – nearly half of the State’s prison population is persons who use drugs.^{24,25} The so-called ‘*War on Drugs*’ is, in fact, a ‘*War on Addicts*’, as experts explain that disproportionate arrests and its impact on the economic and social life of people dependent on drugs and people involved with small quantities is flawed, failing to address structural issues on health, education or trafficking.²⁶

Harm Reduction – Access to Opioid Substitution Therapy (OST):

- i. The UNSR on Right to Health recommends Member States to ensure access to harm reduction services by amending laws to increase access to essential medicines for people dependent on drugs, particularly OST.²⁷
- ii. The UNSR on Torture has declared the denial of OST as violative of the right to be free from torture and ill-treatment, as intentional denial of evidence-based and effective drug treatment subjects people dependent on drugs to severe pain and suffering.²⁸
- iii. NACO²⁹ has mainstreamed access to harm-reduction services such as maintenance-therapy by providing access to clean needle/syringe exchange programmes³⁰ or alternatively providing opioid substitution therapy (OST).³¹ However, govt. services are highly restrictive, only to injecting drug-users for HIV-prevention, and not for drug-dependence per se. Instead, persons dependent on drugs are sent to ‘de-addiction centres’, which employ unscientific practices and disregard rights to autonomy and consent, often operating without any oversight.
- iv. However, harm reduction’s public health benefits continue to be viewed with suspicion. In 2015, Punjab police demanded personal information of patients from doctors offering maintenance therapy.³² The doctors refused to divulge any

²⁴ *Cut and paste, cut and paste and you have a drugs FIR in Punjab*, Indian Express, 9th June 2016. See also *Punjab’s war on drugs is more a war on drug addicts*, Indian Express, 9th June 2016. See also *Punjab’s war on drugs: Untold toll, one death in custody every four days*, Indian Express, 10th June 2016. See also *Punjab’s war on drugs: The living and the dead*, Indian Express, 10th June 2016. See also *Almost half of all prisoners in Punjab jails face cases of narcotics use, sale or seizure*, Indian Express, 16th September 2015

²⁵ *Almost half of all prisoners in Punjab jails face cases of narcotics use, sale or seizure*, Indian Express, 16th September 2015

²⁶ *Doctors to lawyers: ‘Crackdown skewed, drug addicts being targeted’*, Indian Express, 9th June 2016.

²⁷ Report of UNSR on Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UNGA, 6th August 2010, A/65/255

²⁸ Report of UNSR on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Mendez, UNGA 1st February 2013, A/HRC/22/53

²⁹ National AIDS Control Organization functions under The Ministry of Health & Family Welfare

³⁰ Guidelines on safe disposal of used needles and syringes in context of Targeted intervention for Injecting Drug Users: <http://naco.gov.in/upload/NGO%20&%20Targeted/waste%20disposal%20guideline%20for%20IDU%20TI.pdf>

³¹ Substitution therapy with Buprenorphine for opioid Injecting Drug Users: http://www.naco.gov.in/upload/Publication/NGOs%20and%20targetted%20Intervations/Bupenorphine%20Practice_Guidelines.pdf. In 2014, the NDPS (Amendment) Act, 2014 legalized maintenance-therapy: <http://www.indiacode.nic.in/acts2014/16%20of%202014.pdf>. In 2015, Methadone was notified as an *essential narcotic drug*: <http://palliumindia.org/cms/wp-content/uploads/2014/01/Gazette-Notification-No.923-regarding-Essential-Narcotic-Drugs-dated-05-05-2015.pdf>

³² *Punjab cops knock on doors of de-addiction centres, ask for patient details*, Indian Express, 16th July 2015

information as sharing private and confidential medical records with police would threaten the efficacy of drug-dependence treatment in the State and make patients liable for criminal prosecution. The UNSR on Right to Health has observed that “police crack-downs” result in displacement of drug users from areas serviced by harm-reduction programmes, impeding access to essential healthcare services.³³

Drug Offences punishable by Death:

- i. Article 6, ICCPR requires Member States which apply the death penalty to limit its imposition only for *most serious crimes*, i.e., cases where it can be shown there was intention to kill which resulted in loss of life.³⁴
- ii. The UNSR on extra-judicial executions in its India Report has clarified that application of death penalty for drug-offences under NDPS Act does not qualify the threshold of *most serious crimes*, and therefore executions for drug-offences are in violation of international human rights law.³⁵
- iii. In 2015, the Law Commission of India opined that death penalty for drug-offences does not qualify the threshold of *most serious crimes* and favoured abolition of the same.³⁶
- iv. The NDPS Act provides death penalty for a repeat offense involving manufacture, transportation, import/export and possession of a specified quantity of drugs³⁷. On a constitutional challenge, the legal provision was read-down by Bombay High Court in 2011 to provide judicial discretion in application of the death penalty.³⁸ The issue of validity of death penalty for drug offences is currently pending in the Supreme Court.³⁹

Recommendations:

1. **Repeal Section 31A, NDPS Act that provides for death penalty for repeat drug offenders.**
2. **Decriminalize the offences of possession for small quantity and consumption of drugs under NDPS Act.**

HIV/AIDS:

³³Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UNGA, 6th August 2010, A/65/255

³⁴Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 29th January 2007, A/HRC/4/20

³⁵Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to India, Christof Heyns, 26th April 2013, A/HRC/23/47. Also affirmed by UNOHCHR in *Study on the Impact of the World Drug Problem on the Enjoyment of Human Rights*, UNOHCHR 2015, A/HRC/30/65

³⁶Report No. 262, The Death Penalty, Law Commission of India

³⁷ The parameters for determining quantity of drugs remains vague and unscientific. Additionally, the general canon of criminal law is reversed here – convictions can be lawfully secured on basis of ‘confessions’ to drug law officers

³⁸*Indian Harm Reduction Network (IHRN) v. Union of India* | 2012 BomCR (Cri) 121.

³⁹ *Indian Harm Reduction Network (IHRN) v. Union of India* [SLP (Cri) No. 114 of 2012]

- i. The right to health under international law particularly requires establishment of prevention and control programmes for HIV/AIDS and the right to HIV/AIDS-related health facilities, goods and services on an equal and non-discriminatory manner.⁴⁰
- ii. The Committee on Economic, Social & Cultural Rights (CESCR) has clarified that under Article 2 of ICESCR, States are required “to take steps” for progressive realization of Covenant-rights. It particularly notes that in matters of right to health, legislative measures may also be indispensable.⁴¹
- iii. In *Sankalp Rehabilitation Trust v. Union of India*, the Supreme Court issued a series of landmark orders to Central and State Governments to protect and promote the fundamental rights of persons living with HIV (PLHIV) to access healthcare services. Importantly, the Court directed the Government to guarantee equal access to life-saving anti-retroviral (ARV) medicines and diagnostics for all PLHIV, without discrimination.⁴²
- iv. In February, 2014, *The HIV/AIDS (Prevention & Control) Bill 2014* was tabled in the Rajya Sabha.⁴³ After consultations with PLHIV networks, most at risk populations (MARPs)⁴⁴, healthcare workers, women and child rights’ activists and human rights lawyers between September 2003-November 2004, the final draft bill was submitted by Lawyers Collective to NACO, Ministry of Health in August 2006.⁴⁵ Between 2006-2014, the bill shuttled between the Ministries of Health & Law on vetting legal policy concerns – of which, *universal access to ARV medicines* and *MARPs* remain contentious issues to date. Presently, a Group of Ministers (GoM) is deliberating the Parliamentary Standing Committee’s recommendations on the bill.
- v. The proposed Bill focuses on *right to health* and *non-discrimination*, with respect to legal policy concerns of PLHIV. The Bill guarantees access to treatment and provides for non-discrimination on grounds of HIV-status particularly in education, employment and healthcare services, including insurance. The Bill is informed by the *integrationist policy*, as it recognizes that criminalization and stigmatization compounds risk of HIV to MARPs⁴⁶ and alternatively provides for access to preventive HIV-related healthcare services.

Recommendations:

1. Enact the HIV/AIDS Bill immediately.

⁴⁰General Comment No. 14, The Right to Highest Attainable Standard of Health, CESCR 2000, E/C.12/2000/4

⁴¹General Comment No. 3, The Nature of States Parties’ Obligations, CESCR 1990, E/1991/3

⁴²Orders dated 1st October 2008, 1st October 2010 & 16th December 2012, *Sankalp Rehabilitation Trust v. Union of India* | *WP(Civil)* 512/1999

⁴³PRS Bill track on HIV/AIDS Bill: <http://www.prsindia.org/billtrack/the-human-immunodeficiency-virus-and-acquired-immune-deficiency-syndrome-prevention-and-control-bill-2014-3126/>

⁴⁴ Commercial sex workers (CSW), persons who use drugs (PWUD), transgender persons (TG) & men-who-have-sex-with-men (MSM)

⁴⁵ Lawyers Collective Newsletter on HIV/AIDS Bill, 2007: [http://www.lawyerscollective.org/files/ENGLISH%20\(July%202007\)%20FINAL%20COPY.pdf](http://www.lawyerscollective.org/files/ENGLISH%20(July%202007)%20FINAL%20COPY.pdf)

⁴⁶Reports of UNSR on Right to Health of Everyone to Enjoyment of Highest Attainable Standards of Physical & Mental Health, Anand Grover, 27th April 2010, A/HRC/14/20& 6th August 2010, A/65/255

2. Provide free 3rd line treatment to PLHIVs who need it

TRAFFICKING OF WOMEN:

Criminalization of Adult, Consensual Sex Work:

- i. The *Immoral Trafficking (Prevention) Act*, 1956 (ITPA) does not prohibit sex work *per se*, but criminalizes activities related to commercial sex.⁴⁷
- ii. The *de facto* criminalization of sex work has undermined sex workers' ability to claim access to justice. The absence of any safeguards in law has compounded violence and exploitation of sex workers by police as well as agents. The fear of prosecution makes safe-sex difficult and compounds risk of HIV for sex workers. Though the provision on solicitation does nothing to prevent or abate trafficking, it is most used with maximum arrests and convictions being resorted u/s. 8, ITPA.
- iii. A Supreme Court-appointed panel in *BudhadevKarmaskar v. State of West Bengal*⁴⁸ has recommended de-criminalization of voluntary sex work and de-penalization of adult sex workers who 'participate with consent'.⁴⁹
- iv. The UNSR on Right to Health recommends Member States to repeal all laws criminalizing sex work and to establish appropriate regulatory frameworks within which sex workers can enjoy safe working conditions.⁵⁰
- v. The UNSR on Violence Against Women in its India Report noted that Indian legal policy tends to conflate sex work and trafficking. It adds that sex workers are exposed to a range of abuse, harassment by clients, family, the community and State authorities, and recommends India to amend ITPA to review criminalization of sex work to ensure that measures to address trafficking do not overshadow protection of human rights of sex workers.⁵¹
- vi. Amnesty International adopted a policy in 2016 on human rights of sex workers, recommending States to repeal existing laws and refrain from introducing new laws that criminalize sex between consenting adults in exchange for money, and ensure that sex workers have equal access to justice, healthcare and other public services.⁵²

⁴⁷ Acts punishable under The Immoral Trafficking (Prevention) Act, 1956 include *keeping a brothel or allowing premises to be used as a brothel u/s. 3; living on the earnings of prostitution u/s. 4; procuring, inducing or taking person for sake of prostitution u/s. 5; detaining a person in premises where prostitution is carried on u/s. 6; prostitution in or in vicinity of public places u/s. 7 and soliciting u/s. 8.*

⁴⁸Criminal Appeal No. 135 of 2010

⁴⁹Adult sex workers "participating with consent" should not be arrested: SC Panel, LiveLaw, 16th February 2016

⁵⁰ Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of Highest Attainable Standard of Physical & Mental Health, Anand Grover, 27th April 2010, A/HRC/14/20

⁵¹ Report of Special Rapporteur on Violence Against Women, Its Causes & Consequences: Mission to India, RashidaManjoo, 1st April 2014, A/HRC/26/38

⁵² Amnesty International Policy on State Obligations to Respect, Protect & Fulfill the Human Rights of Sex Workers, 26th May 2016. See <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>

Victim Detention:

- i. The UNSR on Trafficking has stated that any effective criminalization policy needs a rights-based approach to trafficking. It recommends Member States to immediately review national legislation that criminalize sex workers for 'solicitation', and provide mandatory detention (rehabilitation) for trafficked victims in the name of protection, as they are not compatible with international human rights law.⁵³
- ii. The police are empowered under the law to remove any person found in premises where sex work is carried out,⁵⁴ regardless of age and consent of the 'rescued' person, and held in State homes for indefinite periods.⁵⁵
- iii. The Government continues to ignore demands for de-criminalization, and instead proposes laws such as *The Trafficking of Persons (Prevention, Protection & Rehabilitation) Bill, 2016*⁵⁶ that reinforces the conflation of sex work with trafficking and criminalization, and therefore violates fundamental rights of equality, freedom and liberty guaranteed under Constitution of India.⁵⁷

Recommendations:

1. **Decriminalize activities associated with adult consensual sex work, including working out of a common premise and implement safety and security measures, like hiring a manager.**
2. **Frame a policy on meaningful rehabilitation of sex workers who want to quit sex work, based on the principles of voluntariness, autonomy and dignity.**

LESBIAN, GAY, BISEXUAL, TRANSGENDER (LGBT) RIGHTS:Criminalization of same-sex conduct:

- i. In *Toonen v. Australia*,⁵⁸ UNHRC observed that criminalization of sex between consenting adults constitutes arbitrary interference and violation of right to privacy under ICCPR, by holding that 'sex' includes 'sexual orientation'.⁵⁹

⁵³ Report of Special Rapporteur on Trafficking in Persons, especially Women & Children, Joy Ngozi Ezeilo, 6th June 2012, A/HRC/20/18

⁵⁴ Section 15 'Search without Warrant' & Section 16 'Rescue of Person'

⁵⁵ Section 19 'Application for being kept in a protective home or provided care and protection by Court' & Section 21 'Protective Homes'

⁵⁶ Trafficking of Persons Bill, 2016: <http://wcd.nic.in/acts/trafficking-persons-bill-2016-draft>

⁵⁷ Sections 370 & 370A introduced in 2013 further complicates the issue by criminalising a wide range of conduct and failing to distinguish voluntary sex work and trafficking and makes the consent of 'victim' irrelevant.

⁵⁸ Human Rights Committee Communication No. 488/1992, 4th April 1994

⁵⁹ ICESCR and ICCPR are specifically recognized as binding human rights law under The Protection of Human Rights Act, 1993.

- ii. The ICESCR Committee has clarified ‘*other status*’ under the covenant means and includes ‘*sexual orientation*’ and ‘*gender identity*’.⁶⁰
- iii. The UNSR on Right to Health recommends Member States to immediately take steps to de-criminalize same-sex conduct, which not only violate the right to health, but also perpetuate discrimination and violence against LGBT persons.⁶¹
- iv. The OHCHR published a report⁶² in 2015, recommending Member States to immediately de-criminalize same-sex conduct.
- v. The UNSR on Torture recommends Member States to immediately take steps to de-criminalize same-sex conduct to prevent torture and other cruel, inhuman or degrading treatment or punishment against LGBT persons.⁶³
- vi. At the 2nd UPR (2012), UNHRC issued 67 recommendations to Govt. of India, particularly recommending to “*Study possibility of eliminating criminalization of same-sex relations*”.⁶⁴
- vii. In February 2016, the Supreme Court of India directed *NAZ Foundation Trust v. Suresh Kumar Koushal*⁶⁵ to be heard by a larger constitution bench (5 judges) to decide on constitutionality of the anti-sodomy law u/s. 377, Indian Penal Code 1860, in so far as it criminalizes all penile-non vaginal-sex, regardless of age and consent.⁶⁶
- viii. Between 2015-2016, Parliament defeated private member bills twice to de-criminalize same-sex conduct.⁶⁷
- ix. At least 3 executive bodies have advocated de-criminalization of same-sex conduct in India: Law Commission of India (2000),⁶⁸ National Human Rights Commission (2002)⁶⁹ and Justice Verma Commission (2013).⁷⁰

⁶⁰ General Comment No. 14 (2000) | E/C.12/2000/4, General Comment No. 15 (2003) | E/C.12/2002/11& General Comment No. 20 (2009) | E/C.12/GC/20, CESCR

⁶¹ Report of The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standards of physical and mental health, Anand Grover, 27th April 2010, A/HRC/14/20

⁶² ‘*Discrimination and Violence against individuals based on Sexual Orientation & Gender Identity*’: Report of the Office of the United Nations High Commissioner of Human Rights, 4th May 2015, A/HRC/29/23

⁶³ Report of The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Mendez, 5th January 2016, A/HRC/31/57

⁶⁴ List of Recommendations Accepted by Govt. of India during 2nd cycle of UPR, 2012. See: http://nhrc.nic.in/Documents/Annexure_II_UPR_Recommendations_19_05_2016.pdf

⁶⁵ Curative Petition (C) Nos. 88-102 of 2014

⁶⁶ Post-2013, there has been a noticeable rise in the number of cases under Section 377, some of which may involve same-sex desiring persons, and also an increase in harassment and abuse cases has been reported

⁶⁷ ShashiTharoor’s bill to decriminalize homosexuality defeated in Lok Sabha, Indian Express, 18th December 2015; Lok Sabha votes against ShashiTharoor’s bill to decriminalize homosexuality again, Indian Express, 12th March 2016

⁶⁸ 172nd Report on Review of Law on Rape (2000): <http://www.lawcommissionofindia.nic.in/rapelaws.htm>

⁶⁹ Report of Conference on Human Rights and HIV/AIDS (2002): <http://nhrc.nic.in/Documents/Publications/KYR%20HIV-Aids%20English.pdf>

⁷⁰ Report on Amendments to Criminal Law (2013): <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf>

Rights of Transgender Persons:

- i. In April 2014, the Supreme Court of India gave a landmark decision on transgender-rights in *National Legal Services Authority v. Union of India* (‘NALSA’),⁷¹ as it directed Government to grant legal recognition to self-determined gender identity for all persons as *male, female* or *third gender*. The Court also declared discrimination on grounds of gender-identity violative of the equal treatment clause of the Constitution.
- ii. The High Court of Madras has in 3 separate cases declared medical examinations that compel transgender persons to ‘*declare sex*’ during recruitment violative of NALSA and the right to life under Article 21, Constitution of India.⁷² In another case, the High Court of Madras directed public authorities to consider applications for change of personal records of transgender persons on grounds of equity and justice, rather than denying relief on administrative grounds.⁷³
- iii. One of the biggest challenges of non-enforcement of NALSA by the Government is the non-availability of an effective remedy against gender-based violence for transgender persons, due to non-recognition of gender identity in statutory-law.⁷⁴
- iv. The Ministry of Social Justice & Empowerment (MoSJ&E) prepared a draft legislation, *The Rights of Transgender Persons Bill, 2016*. However, the bill mandates a District Screening Committee for ‘*certifying*’ identity - while NALSA recognizes *self-determination* of gender identity. There has been an outpouring of criticism by the transgender community across India, who has deemed the bill as violative of NALSA.⁷⁵
- v. The CEDAW Committee has clarified that the convention applies to transgender women.⁷⁶

Recommendations:

- 1. Repeal Section 377, IPC with immediate effect.**
- 2. Enact a comprehensive law on transgender rights, based on NALSA.**

⁷¹ (2014) 5 SCC 438

⁷² Nanga v. Superintendent of Police, Karur | (2014) 4 MLJ 12; Nangai II v. D.G. of Police, Chennai | (2014) 7 MLJ 452; T. Thanasu v. Secy. to Govt. of Tamil Nadu | WP No. 16539/2014

⁷³ Swapna v. Dept. of School Education | WP No. 10882/2014

⁷⁴ Transgender persons experience gender-based violence within the home as well as in public life, however, laws such as *The Protection of Women from Domestic Violence Act, 2005* and *The Sexual Harassment of Women at Workplace [Protection, Prevention & Redressal] Act, 2013* and the law on rape in The Indian Penal Code, 1860 afford protection and redressal only to persons who are assigned ‘female sex’ at birth.

⁷⁵ Communities & Allies respond to the MOSJE Transgender Rights Bill (2015), Orinam, 18th January 2016. See: <http://orinam.net/response-to-msje-trans-rights-bill-2015/>

⁷⁶ General Recommendation No. 27, Committee on Elimination of Discrimination against Women, 19th October 2010, CEDAW/C/2010/47/GC.1

- 3. Provide a legal remedy on protection of gay men and transgender persons from sexual assault.**