

Comment on the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016

Lawyers Collective, India

1. At the outset, the Lawyers Collective ('LC') appreciates the Ministry of Women and Child Development ('MWCD'), Government of India's endeavor to frame a comprehensive legislation for addressing all aspects of trafficking in persons. Presently, trafficking in persons is covered under a range of laws including:-
 - Sections 370-373 of the Indian Penal Code, 1860 ('IPC') [which criminalize conduct that constitutes trafficking in persons.]
 - The Immoral Traffic (Prevention) Act, 1956 ('ITPA') [which criminalizes activities related to prostitution and provides rescue and rehabilitation of victims.]
 - The Juvenile Justice (Care and Protection of Children) Act, 2015 ('JJA') [which provides a framework for protection of children at risk of, or who have been trafficked]
 - The Bonded Labour System (Abolition) Act, 1976, the Contract Labour (Regulation & Abolition) Act, 1970, the Inter-state Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979, Children (Pledging of Labour) Act, 1933 and the Child Labour (Regulation and Prohibition) Act, 1986 [which cover aspects of labour regulation, welfare and exploitation]
2. The MWCD had the option of enacting a new, all encompassing law on trafficking in persons or amend existing laws like the ITPA to cover all aspects of trafficking (and not just limited to prostitution). Yet another option could be to lay down punitive provisions against trafficking in the IPC and enact a separate law for the protection of trafficked persons. Irrespective of the type of legislative model, it is

important that measures to counter trafficking be rooted in the human rights framework, that is, where interventions are carried out in accordance with human rights standards and are aimed at protecting and promoting the victim's rights, as recognized in international human rights as well as trafficking conventions.

3. From a bare perusal of the *Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016* (hereinafter "Bill"), it is evident that the same is far from being comprehensive. On the contrary, it is limited in scope and fails to address the lacunae in existing laws and leaves most of the critical issues to the Executive, via delegated legislation. It is a patchy attempt to add new offences or provisions, without making any attempt to harmonise the same with other laws like ITPA and IPC provisions. In its current form, the Bill is confusing, vague and incapable of implementation. It is also violative of fundamental rights of equality, freedom and liberty guaranteed under Articles 14, 19, and 21 of the Constitution. In short, the Bill is wholly unnecessary and does not serve any useful purpose.
4. Notwithstanding the above, LC seeks to make the following constructive submissions on the proposed provisions of the Bill.
 - Long Title and Preamble
5. LC notes that the reference to Article 21 of the Constitution is unnecessary and should be dropped. Instead, a reference to Article 15(3) of the Constitution of India [*special provisions for women and children*] may be more appropriate.
6. With respect to India's ratification of the United Nations Convention on Transnational Organised Crime ('UNTOC') and its three Optional Protocols, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000 ('UN Trafficking Protocol'), it is important to bear in mind that Article 4 of the Protocol limits its scope of application to offences that are transnational in nature and involve an organized criminal group. Since the

Bill does not deal with these aspects, reference to the UNTOC and the UN Trafficking Protocol in the proposed Preamble are open to question.

- **Framework of institutionalization through Protection Homes and Special Homes** (Ref: Sections 2(j), 2(l), 8 and 9 of the Bill)

7. The Bill defines '*Protection Home*' (section 2(j)) and '*Special Home*' (section 2(l)) and contains substantive provisions on the establishment of 'Protection Homes' in section 8 and setting up of 'Special Homes' in section 9. It is stated that similar institutions already exist under ITPA and JJA. While ITPA provides for '*corrective institutions*' (u/s 2(b)) and '*protective homes*' (u/s 2(g) read with section 21), the JJA provides for the establishment of '*Children's Homes*' (u/s 2(19)), '*observation home*' (u/s 2(40)), '*open shelter home*' (u/s 2(41)), and '*special home*' (u/s 2(56)) amongst others. It is unclear whether the institutions proposed in the Bill will be different from the existing homes or whether the same institutions would be registered under the Bill and/or the ITPA or JJA.
8. Importantly, the Bill envisages that a victim of trafficking could be a person of any age and gender, that is, a child or an adult as well as a man, woman or transgender person. The proposed provisions for '*Protection Home*' and '*Special Home*' in the Bill do not make a distinction on the basis of age and gender of the victim. Consequently, children and adult victims will be housed in the same protection and special home, as also persons of male, female and transgender identity. This is a serious oversight, which the MWCD needs to address.
9. In addition, institutionalization and detention of adult persons, in the name of rehabilitation is antithetical, both to fundamental rights and social re-integration. It must be remembered that persons who have been trafficked are not accused of committing a crime. Therefore, detaining them in protection homes, against their will, is a gross violation of their fundamental right to liberty under Article 21 as well as the various freedoms guaranteed under Article 19 of the Constitution of India.

10. In fact, the United Nations Special Rapporteur on Trafficking in Persons, especially Women and Children has explicitly noted that:- “*..detention of victims of trafficking is incompatible with a rights-based approach to trafficking because it inevitably compounds the harm already experienced by trafficked persons and denies them the rights to which they are entitled.*”¹ The Report further states that “*international law absolutely prohibits any discriminatory detention of victims, including detention that is linked to the sex of the victim. The routine detention of women and of children in shelter facilities, for example, is clearly discriminatory and therefore unlawful.*”²

11. Accordingly, LC urges MWCD to rethink the framework of “victim detention” in the Bill. Where necessary, protective custody of victims of trafficking must be for a definite and limited period and with legal safeguards of judicial scrutiny, hearing and review. Besides, victims housed in protection and special homes should have access to all social, health and legal services as well as the right to communicate with their families, friends and legal counsel.

- **Definition of ‘Victim’** (Ref: section 2(q) of the Bill)

12. LC notes that the proposed definition of ‘victim’ in section 2(q) of the Bill is vague and confusing. The phrase “*on whom of trafficking of persons is caused*” does not make sense. It is submitted that the term ‘victim’ is already defined in Section 2(wa) of the Code of Criminal Procedure, 1973 (“CrPC”) and therefore, there is no need to define it in the Bill.

¹ Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children, [A/HRC/20/18, dated 6th June, 2012] at para 25

² Ibid at para 56

13. Alternately, the Bill may incorporate a term like “*trafficked person*”, or “*person subjected to trafficking*”, to avoid ambiguity in its interpretation and application. More importantly, the term must be clearly defined so as not to include persons who are not trafficked (eg: adult persons consenting to engage in labour or sex work)

14. It is submitted that section 2(s) of the Bill may be broadened to include words and expressions used in the IPC and the ITPA and not just limited to the words and expressions used in the JJA.

- **District Anti-Trafficking Committees** (*Ref: sections 3 and 4 of the Bill*)

15. With respect to the constitution of District Anti-Trafficking Committee, it is noted that the proposed section 3 is very limited in scope, as it only mentions the composition of the District Anti-Trafficking Committee and does not lay down the powers and functions of the said Committee.

16. It appears that the District Anti-Trafficking Committee is purported to be established as a quasi-judicial body, along the lines of the ‘*Child Welfare Committees*’ under the JJA. If that is the case, then the powers and functions of the District Anti-Trafficking Committee must be spelt out in the Bill itself and cannot be left to be delineated by the Executive in Rules. The MWCD may examine relevant provisions of the JJA for guidance and craft similar provisions for District Anti-Trafficking Committees in the Bill.

17. LC further submits that if the District Anti-Trafficking Committees are not proposed to be a quasi-judicial body but an extension of the system of State support, then the said committees can be modeled on the lines of ‘*State and District Child Protection Units*’ (u/s 106, JJA) or the ‘*State/District AIDS Prevention and Control Societies*’, which are incorporated under the Societies Registration Act, 1860. In

that case, the composition of the District Anti-Trafficking Committee must be expanded to include representatives from civil society, community groups, including sex workers' organisations. The MWCD may look at the 'self-regulatory board or 'SRB' model adopted by community based organizations to prevent trafficking in sex work,³ which have been found to be empowering and effective. The lack of participation of affected communities is a glaring lacuna in the composition of the said Committee and ought to be redressed.

18. It is also important to bear in mind that the Bill, if passed into law, will be implemented in addition to ITPA and not just sections just 370 and 370A, IPC. It is not clear whether all trafficked victims would be produced before District Anti-Trafficking Committees, irrespective of existing provisions of the ITPA, which provide that persons removed or rescued from a brothel be produced before a Magistrate (u/s 15 and 17, ITPA).

- State Anti-Trafficking Committee and the Central Anti-Trafficking Advisory Board (Ref: sections 5 and 6 of the Bill)

19. LC submits that there is lack of clarity on the nature and role of the State Anti-Trafficking Committees and the Central Anti-Trafficking Advisory Board (u/s 5 and 6 of the Bill). If District Anti-Trafficking Committees are intended to be quasi-judicial bodies like the '*child welfare committees*' under the JJA, then the said committees have to function in accordance with the provisions of the Bill and not on the 'advice' of the State Anti-Trafficking Committees or the Central Anti-Trafficking Advisory Board, as proposed.

20. Further, the proposed provision on constituting a Central Anti Trafficking Advisory Board to be headed by the MWCD Secretary, is vague and lacking in necessary

³ http://durbar.org/html/anti_trafficking.aspx

details, since it does not even specify the composition of such a Board, let alone laying down the powers and functions of the same.

21. In terms of the proposed Committees, the Bill is unclear as to whether to create quasi-judicial bodies like the 'Child Welfare Committees' with statutory powers under the JJA or to adopt a model for provision of broader policy guidance like under the Commission for the Protection of Child Rights Act, 2005 or to set up a mechanism for social inputs in adjudicating individual cases, such as under sections 13(3) and 17(5) of ITPA. The MWCD must be clear in its intention, only then will the structural mechanisms proposed in the Bill become effective and useful.

- **Special Agency for investigation** (*Ref: sections 7 and 28 of the Bill*)

22. It is stated that the proposed provision for the constitution of a special agency by the Central Government for investigation of offences under the Bill is ambiguous since it fails to state the purpose, nature, powers and functions of the said agency. Further, the Bill provides that the special agency can investigate offences under the Bill only and not under any other law(s). In other words, the proposed special agency will have the power to investigate ancillary offences relating to trafficking, i.e., sections 13-18 of the Bill, but not the power to investigate the substantive offence of trafficking in persons, as provided in sections 370-370A, IPC. This does not make sense.

23. In addition, there is a contradiction between the proposed section 7 and section 28 of the Bill, which empowers State Governments to designate a police officer of the Gazetted rank as an Investigating Officer empowered to investigate offences under this Bill and also under Sections 370-373, IPC. It is unclear whether the power of investigation rests with the special agency created by the Central Government or with police officers designated by the State Governments or both.

24. It is also unclear how the proposed provisions for investigation of offences in the Bill will play out in the context of enforcement mechanisms under related laws like ITPA (which provides for ‘*Special Police Officers*’ and ‘*Trafficking Police Officers*’ u/s 13 of ITPA), the JJA (which provides for ‘*Child Welfare Police Officer*’ and ‘*Special Juvenile Police Unit*’ u/s 107 of JJA), various labour laws (which have officers for registration and inspection) or police officers exercising powers under the CrPC in relation to offences committed under sections 370-373, IPC.

- Rehabilitation and Social Integration (Ref: section 11 of the Bill)

25. LC contends that the proposed provision on rehabilitation and social integration of trafficked victims in section 11 is lacking in detail and fails to lay down the nature of rehabilitation, support and after-care services that the State will provide. As noted earlier, protection and rehabilitation must be based on a rights-framework, according full respect to the dignity, autonomy and potential of the individual concerned.

26. Rehabilitation is anchored in the idea of persons moving forward in their lives; from situations of risk, harm and exploitation into conditions of greater freedom, fulfillment and security. Institutionalization of victims in state-run ‘homes’ cannot be considered rehabilitation, in any sense of the word. Sadly, the Bill does not provide anything more than ‘protection and special homes’ for persons subjected to trafficking. It is suggested that the principle of “Build, Back, Better” (an approach employed in the context of management and reconstruction post natural disasters) has as much relevance in the context of trafficking in persons. Rehabilitation, must therefore, not only remove trafficked persons from situations of exploitation, but offer also opportunities to improve their lives from thereon, with full respect for their rights and freedoms.

27. The MWCD may note that the issue of rehabilitation of sex workers and trafficked victims has been looked into by a panel appointed by the Hon'ble Supreme Court in *Budhadev Karmaskar v. State of West Bengal* (Criminal Appeal No. 135 of 2010), which has prepared a number of interim reports, which have been submitted to the Hon'ble Court and some orders were passed accordingly. The said panel is expected to submit its final report to the Hon'ble Supreme Court sometime in the near future. The MWCD may wish to wait and consider the same as well as any orders that may be passed by the Hon'ble Supreme Court in this regard before the finalizing the Bill.

28. With respect to the proposed section 11(2), it is noted that the term '*women engaged in prostitution*' is not in consonance with existing laws. ITPA uses the term '*prostitute*' (u/s 2(f)), which is gender neutral, that is, any man/woman/transgender can be a prostitute. The Bill may be revised accordingly.

- Punishment for disclosure of identity (Ref: section 15 of the Bill)

29. This is a welcome provision. The MWCD may incorporate the same language as it appears in **section 74 of JJA**, which prohibits the disclosure of identity of children, whether in conflict with law or in need of care and protection or a child victim or witness to a crime.

- Using narcotic drugs, psychotropic or alcoholic substances for trafficking (Ref: sections 16 of the Bill)

30. It is submitted that the conduct in question is already penalized under **section 328 of the IPC**, which punishes a person who:- "*administers to, or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or facilitate the commission of an offence or knowing it to be likely that he will thereby*

cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.” an intoxicating drug with intent to commit an offence with punishment up to ten years along with fine.”

31. The proposed provision is unnecessary, and therefore, must be deleted.

32. It is stated that the punishment proposed in sections 16 and 17 of the Bill, which are ancillary to the main offence of trafficking in persons is excessive and disproportionate, as the main offence under section 370, IPC provides for the same punishment, i.e., ranging from a minimum of 7 years to a maximum of 10 years along with fine under section 370(2), IPC.

- **General Penalty** (Ref: sections 18 and 37 of the Bill)

33. LC states that the proposed provision pertaining to *violations of any of the directions given by the appropriate government to any individual, person or body of persons or organisation, whether incorporated or not, in respect of any matter under this Act* is vague and overbroad, It is well-settled that an offence has to be specified in precise and clear terms, leaving no ambiguity in mind about the conduct that is sought to be prohibited. The person/authority to whom a direction can be issued in law must also be specified and can't be left vague or open-ended, as proposed. The penalty proposed for contravention of a direction is severe. The proposed provisions are arbitrary and overbroad and may contravene Articles 14 and 21 of the Constitution of India.

- **Confiscation, Forfeiture and Attachment of Property** (Ref: sections 20-22 of the Bill)

34. It is submitted that the proposed provisions on confiscation and forfeiture of property are vague and overbroad, since they do not define the term 'property' and

have no requirement that the property in question be acquired through the offence of trafficking in persons. The said provisions may be arbitrary and contrary to Article 14 of the Constitution.

35. The MWCD may note that certain offences under the ITPA are included in the Schedule to the Prevention of Money Laundering Act, 2002 ('PMLA') and are deemed as '*proceeds of crime*', thereby attracting punitive provisions for money laundering. Thus, the MWCD may propose to amend the schedule of the PMLA to include trafficking offences (covered under sections 370-373, IPC) instead of enacting a separate provision on confiscation and forfeiture of property.

36. Further, the proposed section 21 places the burden of proof on the accused to show that the property so attached and confiscated has not been acquired or used in the commission of offence under the present law. This is contentious, since the general rule of criminal law jurisprudence is that one is deemed to be innocent until proven guilty.

37. Besides, there exists an anomaly in section 21, which limits the offence to the ones specified in the present Bill, while the substantive provision on forfeiture and confiscation of property in Section 20 is applicable to Sections 370-373, IPC too. Does it mean that the burden of proof on the accused is only vis-à-vis sections 16 and 17 of the Bill and not vis-à-vis Sections 370-373, IPC?

- **Special Courts and Powers of Special Courts** (*Ref: sections 23-27 of the Bill*)

38. It is submitted that the proposed provision to specify a Court of Session for each district to be a Special Court in Section 23 of the present Bill goes against the settled norms of criminal justice and administration. The Bill makes it mandatory for the State Government to create Special Courts, in consultation with the High Court. This is highly problematic, since the general rule is that the State Governments

have the discretion, in consultation with the High Courts, to establish, either district courts or Courts of Session, as Special Courts, depending on the specific requirements of each district or sessions division.

39. Further, Section 309, CrPC stipulates that trial proceedings to continue day to day until all the witnesses have been examined, except when the Court finds it fit to grant adjournment for reasons to be recorded in writing, while the proviso states that in cases of sexual offences (Sections 376-376D, IPC), the trial should be completed within 60 days from the date of filing charge sheet. Thus, the existing penal laws already have sufficient provisions to provide for speedy trial of offences and the need is to implement these provisions properly, instead of creating new unfamiliar procedures.

40. The proposed provision on presumption of certain offences in section 24 of the present Bill is flawed and problematic, apart from having drafting errors. The right to be presumed innocent, unless proven guilty is part of Article 21 of the Constitution of India as well as the International Covenant on Civil and Political Rights. Admittedly, there are some laws where the burden to prove innocence is on the person accused of committing the offence, but even in those cases, the initial burden is always on the prosecution to establish the foundational facts of commission of an offence and only then does the burden shift on the accused to disprove the same. It is submitted that the proposed provision may not pass the muster of constitutional scrutiny, as held by the Hon'ble Supreme Court in *Noor Aga vs. State of Punjab*⁴.

41. With respect to the proposed procedure for recovery of fines in section 27, it is unclear whether the amount supposedly due to the victim is from the employer or from the trafficker. Further, it assumes that any amount would be due to the victim.

⁴ (2008) 16 SCC 417

It is also submitted that section 27 only proposes to specify the procedure for recovery of fines, but it cannot create a substantive penalty of imposing a fine of minimum Rs 5 lakhs on the trafficker for each victim engaged by him/her, which is not provided in any of the offences specified in the Act. Thus, a procedural provision cannot be used to create a substantive offence, i.e., engaging trafficked victims for employment, unless it is separately provided for in the Bill.

- **Anti-Trafficking Fund** (Ref: section 29 of the Bill)

42. It is noted that the creation of these funds is not effective, since problems of implementation and corruption are endemic. Instead of creating new funds, the existing schemes should be judiciously utilized.

- **Repatriation to another State** (Ref: section 31 of the Bill)

43. LC states that if a trafficked victim, who is a citizen of India is repatriated to another state, against their will, then such a measure is violative of the fundamental rights to move freely throughout the territory of India and the freedom to reside and settle in any part of the territory of India, as guaranteed under Article 19(1)(d) and (e) of the Constitution.

- **Appeal** (Ref: section 33 of the Bill)

44. It is stated that since the right to appeal is a statutory right, it is governed by the concerned legislation. While the present Bill may provide for an appeal provision vis-à-vis sections 16 and 17, there already exists the appeal procedure with respect to Sections 370-373, IPC, as evident from Sections 372-394, CrPC. Thus, there is no need to stipulate an appeal procedure for offences under Sections 370-373, IPC under the proposed Bill.

- **Rule –making powers** (Ref: sections 35, 36, 38 of the Bill)

45.LC contends that sections 35 and 36 are sketchy and do not specify the areas in which the Central Government or the State Governments are empowered to frame Rules under the present Bill.

46.It is submitted that the requirement of “laying” the Rules framed under the Bill before the Legislature is only for the Central Government. A similar provision needs to be inserted for Rules enacted by the State Governments.

Concluding Observations

47.In light of the above discussion, it is stated that the present Bill is neither a comprehensive legislation on trafficking nor does it cover the lacunae present in laws like ITPA or sections 370-373, IPC. On the contrary, it is inconsistent with several existing laws, including those that deal with trafficking and related activities.

48.It is suggested that the MWCD undertake an elaborate assessment of existing laws, policies and programmes on trafficking in persons including interactions with victims, community groups, enforcement agencies, lawyers and judicial officers as well as a comparative analysis of international law and best practice on the subject. Such an exercise will provide valuable inputs and guidance for framing the much-needed comprehensive law on trafficking in persons. LC will be happy to support such research or analysis and extend its services to the MWCD.