

## **Note on behalf of civil society on proposed legal measures on Trafficking in Persons**

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New Delhi

In continuation of the interaction that civil society organizations and partner NGOs had with senior officials of the Ministry of Women and Child Development, Government of India (MWCD) at the Conference on *Implementation of Policies, Schemes and Programmes for Women and Children: Challenges and Way Forward* on 9 October, 2017 at Ashoka Hotel, Delhi and the kind offer made by the Joint Secretary, MWCD to Ms. Akhila Sivadas, Centre for Advocacy and Research (CFAR) to continue engagement on human trafficking and proposed legal measures, we –the *All India Network of Sex Workers, Lawyers Collective, CREA* and *CFAR* are jointly submitting a note on the issue.

We hope that the points made and suggestions proposed in the note helps MWCD to address the many concerns that got raised and deliberated at the aforesaid conference, particularly on the gaps and lacunae in the existing law and the growing need to harmonize and create a more comprehensive legislation on trafficking in persons.

While we have not seen the final version of the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016(hereinafter “Trafficking Bill”) which is due to be examined by the Union Cabinet, we have some comments and suggestions to offer, based on our analysis of previous drafts of the Trafficking Bill which were circulated for consultation as well as statements made by the Hon’ble Minister for MWCD in the press and other public forums.

### **I. Comments:**

#### **1. Gaps in the legal response to trafficking are not addressed**

There is no denying that the present legal framework for trafficking is patchy and scattered across different laws, which are inconsistent and possibly, outdated. Trafficking in the context of labour is addressed very differently from trafficking for sex work. Sections 370 and 370A of the Indian Penal Code, 1860 (“IPC”) introduced a uniform definition and punishment(s) for the offence of trafficking in persons, irrespective of where it takes place. Yet, problems persist. The Immoral Traffic (Prevention) Act, 1956 (“ITPA”) conflates forcible entry of underage girls into sex work with adult, consensual sex work, thus targeting the wrong set of people. The Bonded Labour System (Abolition) Act, 1976 (“BLSA”) does not provide alternatives to persons who are found in situations of exploitative labour. It is unclear how these gaps are being addressed in the proposed law, which does not provide anything new or different. Most sections of the Trafficking Bill are superfluous and

unnecessary, as they are already covered in existing laws. For example, ‘purpose – specific’ trafficking, i.e. for begging, marriage, child bearing etc. are already criminalized under Explanation 1 to section 370 of the IPC, which is inclusive and covers ‘*any act*’ of *physical exploitation, sexual exploitation, slavery or practices similar to slavery and servitude*. Further, the Trafficking Bill does not override the ITPA or BLSA, and is intended to apply *in addition to* them. This will only aggravate the harms arising out of existing laws and do nothing to mitigate them.

## **2. Provisions are vague and overbroad and cast a wide net**

The wording of the proposed Bill is vague and confusing. Though the MWCD has stated that the Government does not intend to criminalise sex work, the language suggests otherwise. Terms such as ‘*place of exploitation*’ and ‘*keeping a place of exploitation*’ are overbroad and cast a very wide net. Provisions related to pregnancy and exposure to life-threatening illnesses directly target sex work. Given the way in which anti-trafficking laws like ITPA and section 370, IPC have been enforced, there is a genuine fear that the new Bill will adversely impact sex workers.

## **3. Multiplicity of agencies will only cause confusion and result in inaction**

The plethora of anti-trafficking officers, agencies and committees being created under the Trafficking Bill will result in chaos and policy-indecision as well as the ‘passing the buck’ on enforcement. Besides, none of the proposed bodies have any representation from communities, whose experience and expertise is vital to preventing trafficking. The need of the hour is co-ordination and streamlining and not enlarging the institutional apparatus.

## **4. No concrete measures for Rehabilitation**

Contrary to press statements, the Trafficking Bill contains nothing substantial or concrete to enable trafficked persons to rebuild their lives or that of their families. The so-called “right to rehabilitation”, which cannot be waived off is disingenuous and deceptive, as the only rehabilitation provided in the Bill is institutionalization, which affected persons have long rejected. We may point out that the Panel appointed by the Hon’ble Supreme Court in the *Budhadev Karmaskar* case has given carefully thought-out suggestions on rehabilitation of sex workers including a scheme for mentorship and oversight within the community, which may be useful in other contexts.

## **5. Chilling effect on health and social protection programmes**

The Trafficking Bill will have a chilling effect on HIV prevention and social security programmes. The overbroad nature of offences and stringent penalties (of a minimum of

10yrs imprisonment), which suggests ‘guilt by association’ has caused fear among peer and outreach workers of being charged with a trafficking-related offence, when carrying out public health or social protection initiatives with sex workers.

#### **6. No repeal or reform of ITPA; problems for sex workers will remain**

Since the proposed Bill keeps the ITPA intact, problems faced by sex workers including arrests under sections 7 and 8 [prostitution in public place and soliciting], forcible raid, rescue and eviction, detention in the name of rehabilitation will continue, notwithstanding the new Bill. The carceral approach adopted in the Bill does not allay the concerns of sex workers, including those who have experienced trafficking. Therefore, the MWCD’s assurance that Trafficking Bill does not harm sex workers cannot be believed.

In view of the above, ***we ask the MWCD to reconsider the Trafficking Bill in its entirety.***

In order to strengthen the legal response to trafficking in persons, we urge the MWCD to consider the following -

### **II. Suggestions**

#### **1. Develop a National Policy on Trafficking in Persons *before* developing new legislation**

Trafficking in persons is a complex and multi-sectoral problem. One of the reasons for the piecemeal response to the problem is the absence of a national policy, which lays down the role and responsibility of different agencies and sectors and guides a harmonized response. A clearly articulated national policy against Trafficking in persons, founded on Article 23 of the Constitution of India, could be the first step towards developing effective legislation.

#### **2. Examine legislative approaches – one comprehensive law *OR* different laws with machinery for co-ordination**

Different countries have different legislative approaches to counter human trafficking. In light of the existing legal framework in the country, the MWCD may consider:

Option 1: Substitute existing laws that deal with trafficking with one consolidated Bill, which will define offences, prescribe punishment, delineate procedure for investigation, designate officers and agencies and lay down measures for protection and support of victims of trafficking.

This would mean doing away with ITPA and sections 370 and 370A of the IPC and replacing them with a comprehensive legislation, which covers all aspects of prevention, prosecution and protection for trafficking in persons. Needless to say, the comprehensive anti-trafficking law

must distinguish between voluntary and coerced/exploitative forms of work and working conditions including sex work.

Option 2: Retain existing laws and bring in a Bill that creates a dedicated agency for handling trafficking-related offences as well as for providing victim-support. In our experience, the main weakness in the current legislation is that the absence of a nodal agency for co-ordination including investigation of trafficking crimes, especially those that are committed inter-state and across borders. There is also no agency to ensure protection of victims of trafficking, who receive little or no material assistance from the State.

The proposed law could be developed along the lines of the *National Investigation Agency Act, 2008* which contains a 'schedule' of laws, for which the designated agency is empowered to take action. The said agency may be guided to act in a way that distinguishes adult, consensual and non-exploitative work from trafficking and exploitation.

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