

Draft Trafficking Bill 2016

RECOMMENDATIONS FROM SEX WORKERS AND CIVIL SOCIETY TO DEPARTMENT OF WOMEN AND CHILD, GOVERNMENT OF INDIA.



July 2016
SANGRAM, VAMP,
SEX WORKERS COLLECTIVES AND FEDERATIONS FROM TAMIL
NADU, MAHARASHTRA, KERALA, ANDHRA PRADESH, GUJARAT,
JHARKHAND. (UKMO, KSWU, VADAMALAR, KNSW, MMW)

Trafficking Of Persons (Prevention, Protection and Rehabilitation) Bill, 2016

Comments and Recommendations

The Ministry of Women and Child Development, Government of India has proposed the Draft Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016 (hereinafter referred to as ‘the Draft Bill’). Unfortunately, the Draft Bill has been finalized without any consultation with the sections of society most affected by the provisions of the proposed law.

PROCESS OF OBTAINING COMMENTS

The present recommendations and comments with regard to the Draft Bill represent and are the outcome of a three-day consultative process with sex worker’s collectives from Andhra Pradesh, Maharashtra, Karnataka, Kerala, Tamil Nadu and Telangana. The comments and recommendations were collated by Rakesh Shukla Advocate Supreme Court; Aarthi Pai, Advocate (CASAM); and Meena Seshu (SANGRAM).

The objectives of the Draft Bill, the detailed provisions of the proposed law as well as related legislations like the Immoral Traffic Prevention Law, 1956 (ITPA) and Sections 370, 370A to 373 of the Indian Penal Code, 1860 (IPC) which deal with trafficking were extensively discussed and the pros and cons debated in arriving at the recommendations.

Following this, the draft recommendations were shared with civil society organisations, women's rights activists, lawyers for their comments and endorsements. The list of people who have signed in endorsement are appended to this document.

PROLOGUE

The Draft Bill does not repeal the Immoral Traffic Prevention Act, 1956 (ITPA) or Sections 370, 370A to 373 of the Indian Penal Code, 1860 (IPC) which deal with trafficking.

The proposed Bill brought in to prevent, protect and rehabilitate victims of trafficking does not provide any definition of trafficking. Similarly, ITPA the main legislation dealing with sex work does not provide any definition of trafficking.

Section 370 of the IPC brought in by the Criminal Law Amendment in 2013 defines trafficking of persons as:

Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—
using *threats, or using force, or any other form of coercion, or by abduction, or by practising fraud, or deception, or by abuse of power, or by inducement*, including the giving or receiving of payments or

benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

Explanation 1.— The expression “exploitation” shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs

Explanation 2 The consent of the victim is immaterial in determination of the offence of trafficking.

PART I

BROAD COMMENTS

A. Adult persons voluntarily doing sex work should be excluded from the ambit of the Draft Bill

- i. Adult persons doing sex work on their own volition and their clients¹ should be kept out of the purview of the proposed Draft Bill. It should be clearly and explicitly stated in the Statement of Objects and Reasons of the Draft Bill.
- ii. The Draft Bill should in the definition and at all relevant sections referring to prevention, rescue and rehabilitation clearly state that adult persons doing sex work on their volition are to be excluded from the ambit of the provisions².

B. Constitutional Fundamental Rights to life, liberty and production before Magistrate within 24 hours must be protected

- i. Article 21 of the Constitution enshrines the right to life and liberty and Article 22 (1) and (2) confers the right on a person detained to consult a lawyer and to be produced before a Magistrate within 24 hours of detention.

¹ The Verma Commission in a clarification issued on the amended Section 370 IPC had stated; "the recast Section 370 ought not to be interpreted to permit law enforcement agencies to harass sex workers who undertake activities of their own free will, and their clients. The Committee hopes that law enforcement agencies will enforce the amended Section 370 IPC, in letter and in spirit". ***Email dated February 8, 2013, Gopal Subramaniam, Clarification in respect of recommended amendment to Section 370 IPC, by the Justice J.S Verma Committee.***

² The Special Rapporteur on Violence Against Women (SR VAW) had in her India report submitted to the Un General Assembly (1 April 2014), "noted a tendency to conflate sex work with trafficking in persons and when sex workers are identified as victims of trafficking, the assistance that is provided to them is not targeted to their specific needs." She further noted with concern that there were rehabilitation centres for sex workers and the violence faced by them in custodial settings. The SRVAW had called for a review of the ITPA "to ensure measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers." ***Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Mission to India. 1 April 2014. A/HRC/ 26/38/Add.1***

- ii. The Draft Bill provides for the production of a ‘victim’; after rescue; before the Member-Secretary of the District Anti-Trafficking Committee. The District Anti-Trafficking Committee is comprised of the District Collector and representatives of the Government departments as well as two social workers.
- iii. Production before the District Anti-Trafficking Committee is violation of the fundamental rights guaranteed under the Constitution of production before a Magistrate and right to a legal practitioner.
- iv. The Draft Bill provides that a person rescued can be produced before the District Anti-Trafficking Committee by in addition to a police officer, **by any public servant or social worker or public spirited citizen**. Law confers powers only on police officers under the Criminal Procedure Code, 1973 to detain a person. The provision empowering any public servant or social worker or public spirited citizen is clearly a violation of the rule of law and the fundamental rights of rescued persons. Further, the provision empowering any public servant or social worker or public spirited citizen leaves the window open, if not an *invitation to busy bodies, interlopers, moral policing by all and sundry to ‘rescue’ persons and produce before the District Anti-Trafficking Committee*.

C. Conflation of the Role of the Executive and Judiciary in the District Anti-Trafficking Committee

- i. The District Anti-Trafficking Committee is tasked with the functions of prevention and rescue of trafficked persons. As part of the discharge of functions of prevention and rescue District Anti-Trafficking Committee may itself be a party to raids and rescues.
- ii. The Draft Bill provides for production of the victim after rescue before the same District Anti-Trafficking Committee.
- iii. The procedure to be followed by the District Anti-Trafficking Committee after production of the rescued victim is not clearly laid out, leaving room for the Committee to also be the authority to send the victims to Protection Homes established under the Draft Bill.
- iv. Such a procedure would clearly be in **violation of the well established principles of natural justice ‘No one can be a judge in their own cause’**.
- v. Lack of right to consult a legal practitioner would amount to **infringement of the principle of natural justice requiring that ‘reasonable opportunity to be given to a person’** to present facts and circumstances before a decision is taken.

D. Draft Bill Aim and Praxis

i. Forced Labour and Organ transplantation

A sizable number of persons through fraud, deceit and coercion get trafficked for forced labour in various areas. Domestic work, factories, small scale units in a variety of areas from metal forging to *zari* work and manufacture of crackers, as well as brick making and agriculture are

some common areas where persons are duped and forced to work for a pittance and in terrible work conditions. A significant number of poor persons get duped for organ transplantation.

However, the Draft Bill makes no provisions for prevention, rescue and rehabilitation for such persons who may have been coerced into forced labour or for organ transplantation.

ii. Placement Agencies

The Draft Bill merely has a provision for registration of ‘placement agencies’ and provides for punishment for violation of conditions for registration. There are ***no provisions as to the steps to be taken to prevent persons from being deceived through fraud and coercion by placement agencies*** and forced to work in miserable conditions for a pittance and even without pay. There is no detailed working out with respect to persons who may be trafficked for a variety of work.

iii. Agency and Consent

The Draft Bill denies agency to persons categorized as ‘victims’ and makes ***no provisions for*** ascertaining the wishes and ***taking the consent of persons to be prevented, rescued*** or rehabilitated under the proposed law. There is ***no opportunity*** for the ***“rescued” individual to exercise their choice*** as to the options available and to be exercised. There is a ***draconian provision to ‘repatriate’ rescued persons from one state to another state*** without giving an opportunity and ascertaining the wishes of the individual ‘rescued’.

iv. Repatriation and Rights

Article 19 (1) (d) of the Constitution of India gives all citizens the right to move freely throughout the territory of India. Article 19(1) (e) of the Constitution of India gives all citizens the right to reside and settle in any part of India. Section 31 providing for repatriation of a ‘victim’ by the District Anti-Trafficking Committee to the home state of any other state can only come into play by exercise of choice as to the place of residence by the concerned individual. An ***order of repatriation without the exercise of choice and consent of the person would be violation of the fundamental rights*** of the concerned individual, unconstitutional, bad in law and impermissible.

v. Targeting sex workers

The Chapter IX on Rehabilitation and Reintegration comprising of a sole Section 11 makes reference to special schemes only for ‘women engaged in prostitution or any other form of commercial sexual exploitation’. The Draft Bill makes no mention for schemes for persons trafficked for organ transplant, which definitely requires special schemes. Similarly, The Draft Bill makes ***no reference to schemes for persons in forced labour and measures to prevent the practice and rehabilitate the persons***. The Draft Bill appears as if specifically aimed at and working in practice at targeting adult persons doing sex work of their own volition.

E. Lack of Representation of Sex Workers

- i. The Draft Bill suffers from the infirmity of the ***lack of consultation and representation of sex workers in the process of drafting and finalizing The Draft Bill.***
- ii. Besides, there is a lack of representation of sex workers at each level of the Committees from the District to the Centre in the Draft Bill.
- iii. There is also a lack of representation and consultation of sex workers in the procedures laid down with no opportunity for support and counselling by peers.

F. Lack of precise definitions and conferment of blanket powers

- i. The Draft Bill suffers from the vice of imprecise definitions and lack of specifics in the conferment of powers. Section 2(q) defining ‘victims’ is illustrative of the infirmity:
 - i. “‘victim’ means a person or persons on whom trafficking is caused or attempted to be caused by any other person or persons’.
- ii. The District Anti-Trafficking Committee is to exercise powers, perform functions and duties ‘in relation to prevention, rescue, protection, medical care, psychological assistance, skill development, need based rehabilitation of victims’.

G. Reversal of Presumption of Innocence and Burden of Proof

- i. The presumption of innocence is the cornerstone of right to life, liberty and criminal jurisprudence. The burden of proof to establish the commission of an offence leading to deprivation of liberty is on the prosecution.
- ii. Section 24 of The Draft Bill lays down that in case of a person prosecuted for committing or abetting or attempting to commit offences under Sections 16 and 17 of the proposed legislation and Sections 370-373 of the Indian Penal Code the “***Special Court shall presume that such person has committed the offence, unless the contrary is proved***”.
- iii. Section 21 of The Draft Bill similarly states that the burden of proving that the property attached and confiscated is not acquired or used in the commission of the offence shall be on the accused person.
- iv. In effect it would mean the onus of investigation; collection of evidence, locating witnesses would be placed on the accused to prove his/her innocence.
- v. In the context of Section 370 A, IPC which criminalizes exploitation of an adult or minor trafficked person this would imply that clients of sex workers would be presumed to have knowledge or reason to believe that the person was trafficked, and would have to establish the lack of such knowledge or belief.
- vi. Similarly, in the context of attachment and confiscation of property the burden of establishing that the property was not acquired or used in connection with the commission of an offence under the proposed law would be placed on the accused person.

- vii. In practice this would work out in conferring arbitrary and wide powers of harassment by attaching properties of individuals who would have to prove their innocence.
- viii. The wholesale reversal of the presumption of innocence and laying down that a person accused of offences specified under The Draft Bill is to be presumed to be guilty is violation of the rights to life, liberty, rights to move around freely and reside in any place of choice.

H. Appeals

- i. Judges as human beings are fallible and appeals against decisions are provided to correct errors made and bring accountability to the process of decision-making.
- ii. The rescue, rehabilitation powers, production powers conferred on the District Anti-Trafficking Committee affect the fundamental rights of life, liberty, move around freely and the right to reside in a place of choice. There is no provision for appeal against the orders passed by the District Anti-Trafficking Committee. Unlike courts The Draft Bill does not visualize an appeal from the District Anti-Trafficking Committee to the State or Central Anti-Trafficking Committee.
- iii. The Draft Bill provides for appeals (Section 31) – only against orders of the Special Court to be constituted under the proposed law to a Division Bench of the High Court.
- iv. Generally, ***law confers two rights of appeal to a person in the interests of justice, accountability and the correction of mistakes made by courts.*** The ***Draft Bill makes a departure from this well established principle and provides for only one appeal.***

PART II

RECOMMENDATIONS AS TO SPECIFIC PROVISIONS OF THE DRAFT BILL

Section 3

- a. ITPA law and state guidelines already have committees to enforce the provisions of raid and rescue, production of rescued persons before the Magistrate. The District Anti Trafficking Committees under Section 3 are a duplication of these existing structures.
- b. Section 3 (1) refers to "need based rehabilitation of victims". The term needs to clearly articulate whether this indicates the choice expressed by the "rescued person" or whether the proposed district anti trafficking committee will decide on the needs of all rescued persons including adults. The proposed bill attempts to negate the consent of the "rescued person" despite well established understanding that the response needs to place the rescued person at the centre. Consent of the rescued person is critical to all acts of prevention, protection and rehabilitation.
- c. Instead of using the word "victim" throughout the text of the proposed Bill, the term "affected person" should be used.

- d. Section 3 (2) lays down the members of the District Anti Trafficking Committee. Time and again sex worker collectives, organisations working with sex workers have shown that they are natural allies and partners to root out exploitative practices and provide alerts on trafficking for sexual exploitation. Despite this, the proposed committee precludes their participation. It is proposed that any committee at the district level that seeks to fight human trafficking must have participation of and consultations with sex worker groups and collectives. Additional members should include members of the Human Rights Commission at the district level. The social workers must have a proven track record of working on women's issues/ empowerment and not limited to anti trafficking work in order to ensure a more holistic perspective. Lawyers with a track record of working with sex workers, women in distress, violence against women should be included in the Committee.
- e. Section 3 (3) - the district anti trafficking committee must meet more frequently at least once a month.
- f. Section 3 (4) confers too many powers on the district committees to evolve its own procedures for conducting meetings. Each district committee will develop its own procedures for the meetings and it may lead to non transparent mechanisms of functioning. These procedures should be clearly stipulated by Rules laid down as part of the proposed Bill. The Women and Child Department should call for a civil society consultation to develop a transparent plan of action for the Committee.
- g. The District Anti Trafficking Committee powers, responsibilities must be more transparent and they must be a system of accountability for the committee.

Section 4/ Section 30

- a. Section 4 (1) give powers of rescue to any arbitrary individual. The ITPA and court judgements that have interpreted raid and rescue process have laid down stringent recommendations and guidelines to be adopted during raid and rescue operations and the rights of persons being rescued. The section is a clear violation of these rights and gives arbitrary powers to a large number of individuals. It will also lead to large scale violence and harassment against sex workers under the garb of rescue operations.
- b. Every rescued person should be given the option of being counselled before being produced. The counselling team should be an independent of the District Anti Trafficking Committee and should include members of sex worker collectives or rights activists. A report should be submitted by the counsellor to the Member Secretary based on which further action and decisions must be taken.

- c. The District Anti Trafficking Committee cannot have authorities to send a person for short or long term institutional support without the complete consent of the rescued person. Such order is violative of the constitutional rights of such individual.
- d. Section 30 also requires that any individual who takes charge of a trafficked person shall report to a District Anti Trafficking Committee. Currently, under the provisions of ITPA, rescued persons should be produced in the magistrate's court and this provision provides greater safeguards for the rights of trafficked persons. Hence Section 30 and Section 4 of the proposed bill should be deleted in light of the existing provisions of ITPA.

Section 5

- a. The State Anti Trafficking Committee should have powers of oversight over the district anti trafficking committee. Regular reports of activities of the District Anti Trafficking Committee should be presented before the State Anti Trafficking Committee and these should be public documents. The State Anti Trafficking Committee should monitor whether the process followed by the District Anti Trafficking Committee are done with the understanding and consent of the rescued person including all orders of short stay, rehabilitation and repatriation. The right to consent of the rescued person must be protected.
- b. There must be participation of sex worker collectives or organisations with a track record of working for the rights of sex workers in the State Anti - Trafficking Committee. Lawyers with a track record of working with sex workers, women in distress, violence against women should be included in the Committee. The Committee must include a representative of the State AIDS Control Society.

Section 6

- a. The Central Anti Trafficking Board should include members of sex work networks/ collectives and activists with a track record of working on women's rights including rights of sex workers.

Section 7

- a. There is a duplication of agencies since there are Anti Human Trafficking Units which are already functioning at the district and state level. The special agency will be tasked with investigating offences relating to registration of short stay homes, special homes, placement agencies, using narcotic drugs for trafficking and chemical substances for exploitation.
- b. Local law enforcement machinery must be sensitised and strengthened to support anti trafficking initiatives.

Section 8 / 9

- a. Consent of the rescued person is key before sending her to a Special Home/ Protection Home. In the event that a rescued person wants to leave a protection home at any time after she is admitted, she should be allowed to do so on her own cognisance.
- b. Words like rehabilitation should be avoided when referring to an affected person since they are deeply stigmatising and not rights based.
- c. In the case of minors, parents should be consulted and have a say in the decisions to send to JJ Homes or Protection Homes of any kind.

Section 10 / Section 13

- a. The quality and performance of Special Homes and Protection Homes should be evaluated at regular intervals. Licenses and registrations of Special Homes and Protection Homes should be cancelled if any of the rescued persons complain of abuse and harassment or forced detention. Criminal proceedings should be initiated against the authorities running such Special Home or Protection Home where abuse is reported.

Section 11

- a. Rescued persons should have the freedom to opt in for programmes and schemes as per their choice and consent.
- b. Sex work is work and not akin to commercial sexual exploitation. The wording of Section 11 (2) to liken sex work to commercial sexual exploitation should be deleted. Sex workers are already integrated with mainstream society and do not need schemes for reintegration. Sex workers should be kept out of the ambit of the proposed bill and this should be clearly articulated in the overall Statement and Purpose.

Section 15

- a. Social media and MMS should be included within the ambit of this provision
- b. Any person who releases information that can identify the rescued person or affected person should be bought within the ambit of this provision and criminal action should be initiated against such individuals. This includes NGO workers, government officials, police officers, special agencies, social workers, media persons or any other individual or institution.

Section 16

- a. The provisions should not be misused against consenting adult sex workers who may be found in situations of intoxication along with other sex workers. While the provisions are meant to target those who dupe victims for the purpose of trafficking, there is scope for its misuse on the ground against brothel owners and sex workers.

Section 20

- a. There is a likelihood that the provisions of this section will be misused against sex workers, their partners and third parties who assist their work. We suggest that the section should not be applied against accused, but only against those **convicted of offenses** mentioned in Section 20 (1).

Section 21

- a. The police and investigating agencies should clearly establish and prove that the property in question has been obtained through the gains of trafficking. The burden of proof cannot be shifted to the accused.

Section 24

- a. There will be a lot of misuse of this provision. The police and other investigating agencies should be tasked with investigating, collecting evidence and proving the offences listed in Section 24. The burden of proving innocence should not be shifted onto the accused.

Section 31

- a. The powers of repatriation conferred on the District Anti Trafficking Committee are vast and arbitrary and without any accountability or transparency. Every citizen of India has the right to move freely within the territory of India and all efforts to "restore" to their place of origin should be completely voluntary, and based on consent after examining all available options. The rescued person should be counselled and informed of all available options including the choice of going back to their place of origin. The affected person should also have the right to appeal from any such order of the Committee and appropriate legal aid and other legal assistance should be provided to such individuals. The affected person should also be counselled about their rights.

Section 33

- a. All citizens have a right to appeal against orders of a court or authority. Denying the right to appeal to any order which is likely to impact the lives of citizens is a gross violation of their right to life. Section 33 must include the right to appeal from all orders of the District Anti Trafficking Committee or Special Court, including order of repatriation. Denying an individual a right to appeal an order of repatriation is a gross rights violation.

ORGANISATIONS AND INDIVIDUALS ENDORSING THE COMMENTS AND RECOMMENDATIONS

1. National Network of Sex Workers (India)
2. Rakesh Shukla, Advocate, Supreme Court
3. Aarthi Pai, Advocate, CASAM
4. Meena Seshu, SANGRAM
5. SANGRAM, Sangli
6. Centre for Advocacy on Stigma and Marginalisation (CASAM)
7. Veshya Anyaya Mukti Parishad (VAMP)
8. Mitra, (Collective of children of sex workers)
9. Muskan (Male sex workers collective)
10. Me and My World, Andhra Pradesh and Telengana
11. Vadamar Federation, Tamil Nadu
12. Uttara Kannada Mahila Okkuta (UKMO), Karnataka
13. Karnataka Sex Workers Union, Karnataka
14. Kerala Sex Workers Network, Kerala
15. Saheli Sangh, Pune
16. Ambika, Kerala Sex Workers Network
17. Asma, Kerala Sex Workers Network
18. Banu, Vadamar Federation
19. Beena, Kerala Sex Workers Network
20. Bharthi, Karnataka Sex Workers Union
21. Dharani, Karnataka Sex Workers Union
22. Hazarth Bi, UKMO
23. Jaseema , Kerala Sex Workers Network
24. Kiran Deshmukh, VAMP
25. Kokila, Vadamar Federation
26. Kotramma, UKMO
27. Lakshmi, UKMO
28. Lakshi Rathod, UKMO
29. Chandralekha, Kerala Sex Workers Network
30. Mahadevi Madar, Saheli Sanstha
31. Maya Gurav, VAMP
32. Meena Koli, Saheli Sanstha

33. Mariamma, Me and My World
34. Mukta, UKMO
35. Ponnumani, Vadamalar Federation
36. Prabhavathi, Karnataka Sex Workers Union
37. Rani Kamble, Saheli Sanstha
38. Rupa Shinge, Saheli Sanstha
39. Sangita Manoji, VAMP
40. Seenath, Kerala Sex Workers Network
41. Shashikala, Karnataka Sex Workers Union
42. Shridevi Kamble, Saheli Sanstha
43. Sumitra Mhetre, VAMP
44. Tayavva Kopad, VAMP
45. Vimala, Vademalar Federation
46. Gurukiran Kamath
47. Mahesh Bhandari, UKMO
48. Mandakini, Saheli Sanstha
49. K Ramu, Women's Initiatives (WINS)
50. Pushpa Achanta
51. Rajendra Naik, Mitra Collective
52. Santoshi Rani, SANGRAM
53. Satish Joshi
54. Sham Prasad, Karnataka Sex Workers Union
55. Shashikant Mane, SANGRAM
56. Shantilal Kale, SANGRAM
57. Sonu Niranjana, Kerala Sex Workers Network
58. Teajha Singh, SIAAP
59. Tejaswi Sevekari, Saheli Sanstha