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January 14, 2016

Ghazala Meenai,
Joint Secretary,
Ministry of Social Justice and Empowerment,
Government of India,
New Delhi 110001
Via E-mail: commentstgbill-dosje@gov.in

Re: Response to the Rights of Transgender Persons Bill, 2015

Dear Ms. Meenai,

Thank you for inviting me to join the January 18, 2016 pre-legislative consultation meeting with stakeholders on the Rights of Transgender Persons Bill.¹ Human Rights Watch welcomes the opportunity to make this submission to the Ministry of Social Justice and Empowerment on this encouraging initiative. India's transgender community remains exposed to widespread violence and discrimination. We hope that our recommendations will serve to make this law more effective in promoting the rights of one of the most marginalized and vulnerable communities in the country.

In recent years, there has been considerable progress on rights of transgender people in India. In 2014, the Supreme Court in *NALSA v. India* ruled that transgender people should be recognized as a third gender and not only enjoy all fundamental rights, but also be entitled to specific benefits in education and employment.² The inclusion of a third gender category in the 2014 national census represented another important step toward improving self-identification, social recognition, and access to services for transgender people.³

¹ Rights of Transgender Persons Bill, 2015, Ministry of Social Justice and Empowerment, Government of India, <http://socialjustice.nic.in/pdf/TGBillFinal.pdf> (accessed January 12, 2016).

² *National Legal Services Authority of India v. Union of India and Others*, Writ Petition (Civil) No.400 of 2012. With Wrt Petition No. 406 of 2013, <http://www.lawyerscollective.org/wp-content/uploads/2014/04/Transgender-judgment.pdf> (accessed January 12, 2016).

³ Census Bureau of India. "A Census for Third Gender," http://censusindia.gov.in/Ad_Campaign/press/third%20gender.pdf (accessed January 12, 2016).

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The Transgender Persons Bill lays out a positive framework, and in particular we are encouraged by the broad and inclusive definition of “transgender persons” and the clear distinction it draws between identity and medical procedures. However, we have concerns about the bill that we have highlighted below. We urge you to consider our comments to bring the Transgender Persons Bill in line with the provisions laid down in the *NALSA* judgment, India’s constitutional guarantees, and international standards.

Engagement with Communities: Currently, the text of the Transgender Persons Bill is only available in English and on the Internet, which limits access to affected persons and communities and their ability to respond with recommendations. We urge you to make the text available in other Indian languages and extend the deadline for comments by another month. At the same time, the ministry should hold multiple broad-based consultations and meetings in different parts of the country with transgender persons, groups, and activists to ensure a more inclusive process.

Include Intersex Persons: The bill should be renamed “Rights of Transgender and Intersex Persons Bill” and should include protections to address the specific concerns of intersex persons based on the recommendations by the Office of the United Nations High Commissioner for Human Rights in its May 2015 report to the Human Rights Council.⁴ The bill should prohibit medically unnecessary procedures on intersex persons, including children, without informed consent. It should protect intersex persons from discrimination, ban “conversion” therapy, involuntary treatment, forced sterilization, and forced genital and anal examinations. Intersex persons should be issued legal identity documents that reflect preferred gender and the government should ensure that intersex persons and organizations are consulted with regard to laws and policies that have an impact on their rights.⁵

Definition of Violence: Chapter 1, section 2(t) defines violence as the “intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, mal development, or deprivation.”

The inclusion of violence “against oneself” should be removed. This clause shifts the blame from the perpetrator to the victim by criminalizing self-harm. For instance, some transgender persons have resorted to suicide due to factors such as rejection from family,

⁴ Human Rights Council, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/29/23 (May 4, 2015).

⁵ *Ibid.*, paras. 78 and 79.

discrimination from society, and violence perpetuated against them. The government should not enact punishments for such actions, but rather take action to combat the legal and structural causes that contribute to such marginalization and poor mental health outcomes.

Identity: Chapter 2, section 2 provides that a transgender person should be issued identity certificates “by a state level authority” duly designated or constituted on the lines of Tamil Nadu Aravanis Welfare Board “on the recommendation of a District level Screening Committee headed by the Collector/District Magistrate and comprising District Social Welfare Officer, psychologist, psychiatrist, a social worker and two representatives of transgender community and such other person or official as the State Govt/UT Administration deems appropriate.”

This provision is contrary to the *NALSA* judgment, which said that a transgender person should have the right to self-identify. No person’s identity should be adjudicated by committee. Human Rights Watch recommends self-identification be the sole criterion for legal gender recognition without psychological, medical, or other “expert” intervention. This self-declared identity should form the basis for access to all social security measures, benefits, and entitlements.

International standards and best practices call for separation of legal and medical processes of gender reassignment for transgender people. This includes the removal of evaluations of applicants for legal gender recognition by panels of psychologists, physicians, or other “experts.” Domestic lawmakers and tribunals are increasingly reflecting these standards in legislation and court judgments.

In a 2015 report, the outcome of a 2014 United Nations Human Rights Council resolution on sexual orientation and gender identity, the UN Office of the High Commissioner for Human Rights recommended that states begin immediately “[i]ssuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce.”⁶ The 2015 “Blueprint for the Provision of Comprehensive Care for Trans People in Asia and the Pacific,” co-published by WHO, UNDP, USAID, PEPFAR, the Asia-Pacific Transgender Network, and the Health Policy Project recommended that governments “[t]ake all necessary legislative, administrative, and other

⁶ UN Human Rights Council, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/29/23 (May 4, 2015), para. 79(i).

measures to fully recognize each person’s self-defined gender identity, with no medical requirements or discrimination on any grounds.”⁷

In similar terms, principle 3 of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, the bedrock international law instrument as it relates to lesbian, gay, bisexual, and transgender (LGBT) people, states that:

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom. *No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.*⁸

International expert bodies have in recent years strengthened their positions against medical models for legal gender recognition. The World Professional Association for Transgender Health (WPATH), an international multidisciplinary professional association aimed at promoting evidence-based care, education, research, advocacy, public policy, and respect in transgender health and comprised of over 700 members worldwide, called for removal of surgical requirements as part of legal gender recognition in a 2010 statement.⁹ WPATH stated:

If a sex marker is required on an identity document, that marker could recognize the person’s lived gender, regardless of reproductive capacity. The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures.¹⁰

⁷ Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme, *Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific* (Washington, DC: Futures Group, Health Policy Project, 2015), p. 112, http://www.healthpolicyproject.com/pubs/484_APTBFINAL.pdf (accessed January 12, 2016).

⁸ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, principle 3 (emphasis added), http://www.yogyakartaprinciples.org/principles_en_principles.htm (accessed January 12, 2016).

⁹ World Professional Association for Transgender Health (WPATH) statement (June 10, 2010), http://www.wpath.org/uploaded_files/140/files/Identity%20Recognition%20Statement%206-10%2000%20letterhead.pdf (accessed January 12, 2016).

¹⁰ WPATH statement (June 10, 2010).

In 2015 WPATH updated the statement, expanding its critique of arduous and medicalized procedures for legal gender recognition, saying: “No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone’s gender identity, so these should not be requirements for legal gender change” and “appropriate legal gender recognition should be available to transgender youth.”¹¹

Countries around the world have begun to apply these standards. Sweden, the Netherlands, Malta, Denmark, and Ireland recently changed their legal recognition procedures to remove invasive medical requirements, and Denmark and Malta, along with Argentina, also do not require a medical diagnosis for legal gender recognition.¹² Argentina and Malta are widely considered to set best standards in legal gender recognition procedures.¹³

As the UN special rapporteur on torture noted in his 2013 report, national courts have begun to reflect these standards in their decisions.¹⁴ Courts in Asia have demonstrated a similar commitment to medical non-interference in legal gender recognition processes, including in Nepal and India.¹⁵

Right to Equality: Chapter 3, section 5 states that, “It is evident that the Constitution of India guarantees right to equality and non-discrimination for all including transgender persons.”

¹¹ WPATH statement on Legal Gender Recognition, 2015, http://www.wpath.org/uploaded_files/140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf (accessed January 12, 2016).

¹² For Denmark, see Motion to Law amending the Law on the Central Office (Assigning new personal number for people who experience themselves as belonging to the other sex), http://www.ft.dk/Rlpdf/samling/20131/lovforslag/L182/20131_L182_som_fremسات.pdf (accessed January 13, 2015). For Malta see: Gender Identity, Gender Expression and Sex Characteristics Act, 2015, <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26805&l=1> (accessed January 13, 2015).

¹³ Identidad de Género Ley 26.743 Establécese el derecho a la identidad de género de las personas, <http://tgeu.org/argentina-gender-identity-law/> (accessed January 13, 2015).

¹⁴ Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/22/53 (February 1, 2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf (accessed January 13, 2015).

¹⁵ *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in NAT’L JUD. ACAD. L.J., 2008, at 262. <http://www.gaylawnet.com/laws/cases/PantvNepal.pdf> (accessed January 12, 2016); *National Legal Services Center v. Union of India and Others*, WRIT PETITION (CIVIL) NO.400 OF 2012, <http://www.lawyerscollective.org/wp-content/uploads/2014/04/Transgender-judgment.pdf> (accessed January 12, 2016). Also see the 2015 Delhi High Court judgment which reinforced that, “Everyone has a fundamental right to be recognized in their gender” and that “gender identity and sexual orientation are fundamental to the right of self-determination, dignity and freedom.” *Bhat v. State of NCT of Delhi and Others*, W.P. (CRL) 2133/2015, <http://lobis.nic.in/ddir/dhc/SID/judgement/05-10-2015/SID05102015CRLW21332015.pdf> (accessed January 12, 2016).

The existence of section 377 in the Indian Penal Code, which criminalizes sexual relations among consenting adults, is inconsistent with the constitutional guarantee to right to equality and is contrary to this provision including in the case of transgender persons. This law should be repealed with the existing law amended to protect men from sexual violence.

Transgender children: All references to transgender children should be expanded to include “transgender, intersex, and gender-nonconforming” children. This is because children who do not conform to binary gender identity are frequently bullied, harassed, and discriminated against at home, in schools, and by society at large whether or not they have intersex conditions or currently or later in life adopt transgender identities. It is important that the government implement specific protections for the rights of children to access education and information, including by guaranteeing their safety at school.

One example that should be considered is Malta’s Gender Identity, Gender Expression, and Sex Characteristics Act of 2015, which features a universal right to gender identity with no age restrictions. Like the Indian Transgender Persons Bill proposes, children’s applications for legal gender recognition must give consideration to the best interest of the child.

The government of Malta took an important protective step by publishing a comprehensive education policy for transgender and gender non-conforming students in schools.¹⁶ Noting that “[b]eing able to be one’s self at school is an essential factor in every student’s success and well-being,” the policy mandates that “[s]chools are therefore obliged to ensure safe and inclusive environments for all students.” The procedures that accompany this policy detail specific standards related to school uniforms, preferred name and pronouns, access to toilets, changing facilities and other gender-segregated facilities, and gender markers on official school documents.¹⁷

Sexual Violence: Chapter 3, section 12(4) provides for “necessary amendments in IPC [the Indian Penal Code] to cover the cases of sexual assault on Transgender Persons.”

There should be greater clarity on what such amendments will look like. Any amendments to the Indian Penal Code should expand the category of a rape victim or survivor to be gender neutral and include transgender and intersex persons.

¹⁶ Government of Malta, Ministry for Education and Employment, “Trans, Gender Variant, and Intersex Students in Schools Policy,” June 2015, <http://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Policy.pdf> (accessed January 12, 2015).

¹⁷ Government of Malta, Ministry for Education and Employment, “Trans, Gender Variant, and Intersex Students in Schools Procedures,” June 2015, <http://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Procedures.pdf> (accessed January 12, 2015).

Education: Human Rights Watch recommends that in addition to current provisions in chapter 4 regarding education, there should be an emphasis on training teachers to sensitize them on transgender and intersex issues and to help them adopt inclusive teaching methods to ensure these children are not harassed or discriminated against by staff or other children.¹⁸ The UN Special Rapporteur on the Right to Education noted in 2010 that sexuality, health, and education are “interdependent rights,” explaining that, “we must be able to look after our health, deal positively, responsibly, and respectfully with our sexuality, and must therefore be aware of our needs and rights.”¹⁹

Health: Chapter 6, section 20(1) says the appropriate authorities “shall take necessary measures to provide transgender persons (a) separate HIV Sero-surveillance Centres since they face several sexual health issues; (b) sex reassignment surgery, free of cost; (c) barrier-free access in the hospitals and other healthcare institutions and centres.”

Most transgender groups advocate against separate HIV centers fearing further stigmatization of an already marginalized group. Instead, all HIV care providers should receive training on transgender and intersex issues, and be bound by strict non-discrimination policies in their work. Also, barrier-free access in hospitals should ensure admission of in-patients in wards consistent with their gender identity, access to transgender-affirming mental health services, and ban the practice of conversion therapy.²⁰

Reservation Benefits: Chapter 6, section 23 provides that:

Transgender Persons who by birth do not belong to Scheduled Caste or Scheduled Tribe may be declared as Backward Class and be entitled for reservation under the existing ceiling of OBC [Other Backward Class] category. Provided that those Transgender Persons who by birth belong to Scheduled Caste or Scheduled Tribe would be entitled for

¹⁸ In its 2014 report, “*They Say We’re Dirty*”: Denying an Education India’s Marginalized, Human Rights Watch found that discrimination by teachers, school staff, and students against children from marginalized communities such as Dalits, Muslims, and tribal groups can result in these children dropping out of school. Transgender, intersex, and non-gender conforming children are even more vulnerable to harassment and face a greater risk of dropping out. <https://www.hrw.org/report/2014/04/22/they-say-were-dirty/denying-education-indias-marginalized> (accessed January 12, 2016).

¹⁹ Report of the United Nations Special Rapporteur on the right to education. July 23, 2010. A/65/162. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/462/13/PDF/N1046213.pdf?OpenElement>. According to the Special Rapporteur, “In order to be comprehensive, sexual education must pay special attention to diversity, since everyone has the right to deal with his or her own sexuality without being discriminated against on grounds of sexual orientation or gender identity.”

²⁰ UN mechanisms condemn conversion therapy as unethical, unscientific and ineffective and, in some instances, tantamount to torture. Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23, para. 52.

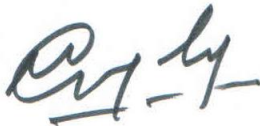
reservation under their respective categories as per the existing Rules. Provided that Transgender Persons are not to be prevented from competing for seats which are not reserved for them.

In keeping with the *NALSA* judgment, the Transgender Persons Bill should clearly specify that transgender and intersex persons are entitled to reservations under their respective categories of Scheduled Caste, Scheduled Tribe, or Other Backward Class in both public educational institutions and government jobs.

Monitoring and Accountability: Lack of clear monitoring and accountability mechanisms in the current draft could seriously undermine enforcement. Human Rights Watch recommends including a separate chapter on mechanisms to ensure effective monitoring of the Transgender Persons Bill's implementation. The chapter should also include penalties for those who violate its provisions.

Thank you for your attention to these concerns. We hope that you will take our recommendations into account.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Meenakshi Ganguly' in a cursive style.

Meenakshi Ganguly
South Asia Director
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