

## Sex work law reform – Parliament *Plays it Safe*

On 22<sup>nd</sup> May, 2006 the Government of India introduced the Immoral Traffic (Prevention) Amendment Bill, 2006 (“the Bill”) in Parliament, amid widespread protests and opposition from sex workers and civil rights groups. On the same day, the Bill was referred to the Standing Committee on Human Resource Development<sup>1</sup> (“the Committee”) for examination within three months. Given its wider implications, the Committee invited comments from concerned persons and agencies by issuing a public notification. In response, it received 62 written memoranda on different provisions of the Bill. Later, the Committee invited some organisations for oral hearings including sex workers, women’s groups and anti-trafficking NGOs. The Lawyers Collective (LC) presented both written and oral submissions critiquing the Bill. The Committee also heard Secretaries from the Ministry of Women and Child Development (WCD) and National AIDS Control Organisation (NACO), Ministry of Health and Family Welfare before finalising its comments on the Bill.

### Contents of The Report

Prepared over a course of seven sittings, the 182<sup>nd</sup> Report of the HRD Committee on the ITPA Amendment Bill was presented in Parliament on 23<sup>rd</sup> November 2006. The report summarises arguments made against and in support of the Bill, presents the Committee’s findings and makes recommendations on the proposed Bill.

The following table presents amending provisions, LC’s arguments and inferences of the Committee on the ITPA Bill.

| Proposed Amendment   | LC’s Critique   | Committee’s Recommendation                                    |
|--|---|---|
| Sec 2 (aa) - Consistent age of child to mean person < 18 years   | Welcome measure; should be accompanied by provisions that distinguish child prostitution from adult consensual sex work | Approved  |
| Sec 2 (f) – Redefine prostitution as “ <i>sexual exploitation or abuse of persons for commercial purposes or for consideration of money or in any other kind</i> ” | Inserting words will penalise all transactional sex, against legislative intent   | Redraft in view of <i>purpose &amp; intent</i> of legislation |
| Sec 3 – Enhanced penalty for keeping/managing brothels   | Aggravated penalty does not secure more conviction; disruptive to   | Approved  |

<sup>1</sup> The Committee comprises 28 members from both Houses i.e, the Lok Sabha and the Rajya Sabha and is chaired by Shri Janardhan Dwivedi.

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|   | community outreach for HIV prevention  |  |
| Sec 5A – Definition of trafficking in persons   | Poorly drafted, use of terms with no legal meaning, limited to trafficking for prostitution only | Redraft to include “ <i>inducement of religious or social nature</i> ”   |
| Sec 5B – Punishment for trafficking in persons  |  | (i) Introduce discrete penalty for trafficking in children with 10 yrs imprisonment<br>(ii) Impose life imprisonment on second conviction                |
| Sec 5C - Punishment for persons visiting or found in a brothel for sexual exploitation of victim of trafficking | Deficient & unenforceable; will increase harassment & obstruct safety & HIV prevention           | Redraft with clear definitions for <i>victim of trafficking &amp; sexual exploitation</i>  |
| Sec 8 – Remove penalties against soliciting for prostitution  | Welcome measure; incongruous with new Sec 5C   | (i) Approved<br>(ii) Insert provision to penalise soliciting by pimps & agents   |
| Sec 10 (ii) – Extend stay of female offender in corrective home from 5 to 7 yrs                                 | Ensure sex worker’s consent through legal representation   | Rejected   |
| Sec 13 (2) – Lower rank of Special Police Officer from Inspector to Sub-Inspector                               | Dilutes legislative safeguard against misuse of powers; will increase Police harassment          | Rejected   |
| Sec 13 (A) & (B) – Set up nodal authority to combat trafficking at centre & states                              | Widen mandate & composition of agency  | (i) Make setting up of authority obligatory<br>(ii) Set out constitution & functions in the Bill<br>(iii) Ensure mixed composition including sex workers |
| Sec 20 - Divest Magisterial   | Welcome measure  | Approved   |

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| authority to evict sex worker from a locality |  |  |
| Sec 22 (ii) – Allow ‘incamera’ trials         |  | (i) Agreed with incamera proceedings to protect victim’s identity<br>(ii) Insert provision allowing presence of person trusted by victim |

In addition, the Committee makes some general observations, notably on the changing nature of commercial sex. According to the Committee, organised brothels are diminishing and sexual transactions are increasingly occurring in diffused and often, discreet sites. It also notes that trafficking of children for sex work has assumed grave proportions. For these reasons, the Committee suggests **a review\_of the ITPA in its entirety** and makes the following recommendations:

- Enact separate provisions in ITPA to address child prostitution including safeguards against prosecution of underage sex workers
- Introduce statutory provisions for rehabilitation of persons willing to quit sex work
- Increase budgetary allocation for rehabilitation, health and education of sex workers
- Amend Section 4 of ITPA to decriminalise voluntary spending by sex workers out of earnings from commercial sex
- Implement the 1998 Plan of Action to Combat Trafficking
- Undertake efforts to reduce stigma; treat sex workers as ‘victims’
- Redesign AIDS interventions recognizing exit from sex work as an efficacious prevention strategy

### **Critique**

The Standing Committee Report is a *mixed bag*; combining some new ideas with old thinking. To illustrate, the recommendation to include sex workers in nodal authorities under Sections 13 A and B is a bold step affirming community involvement in anti-trafficking efforts. Similarly, rejection of the proposal to lower Police rank under Section 13 (2) is recognition, for the first time, of harm that arbitrary law enforcement causes to sex workers. At the same time, the legislature has **responded conventionally** – on lines of *victim, crime and penal remedy*, breaking no new ground on sex work law reform.

### ***Flawed findings on Trafficking***

The Committee has failed to scratch the surface and identify existent deficiencies in anti-trafficking law. Involuntary induction into sex work is already punishable<sup>2</sup> Penalties for child prostitution over which the Committee has expressed enormous concern, are higher

<sup>2</sup> Sections 5 and 6 of ITPA. Sections 372 and 373 of the Indian Penal Code, 1860.

than what is proposed.<sup>3</sup> What is left unlegislated is **trafficking for purposes other than sex work**. Although the Committee notes that trafficking must be prohibited in all sectors, it justifies WCD's stand that ITPA can only address trafficking for sex work. This is unfortunate, as the demand for a comprehensive anti-trafficking law has come from all quarters.

The proposed definition of trafficking has been adopted from the U.N protocol<sup>4</sup>, which allows flexibility to national legislatures to define trafficking in a manner consistent with domestic criminal law. The Committee ought to have advised the government not to follow admittedly vague language from the protocol.<sup>5</sup> By accepting defective provisions in Sections 5A and 5B, the legislature will allow accused to evade prosecution. Though appreciable, the Committee's suggestion to consider religious or customary inducement in sex work as trafficking ought to have been preceded by an assessment of existing laws against *Devdasi* and related practices.<sup>6</sup> What was called for was a legal scrutiny of both existing and proposed anti- trafficking provisions. Instead, Parliament is left with a set of amateurish findings on trafficking in persons.

### ***Underestimating the threat to public health***

The most disappointing inference in the report is the denial of the undisputed link between public health and law. Universally, legal structures are known to influence risks and amplify vulnerability to HIV in commercial sex. The interface between HIV and rights is exemplified by the contrast between *Sonagachi*, Kolkata where HIV was successfully prevented among sex workers through rights based measures with *Kamatipura, Mumbai* where coercive strategies saw HIV prevalence soar among sex workers. The Committee however dismissed **warnings on the deleterious effects of punitive measures** ignoring testimonies from sex workers and health agencies including the Ministry of Health. It further advises NACO to **replace 'condoms' with 'rescue and raid,'** against epidemiological evidence and good science. Unlike other countries like Thailand where public health concerns have influenced State policy on commercial sex, the Indian legislature has regrettably chosen a legal response that hinders successful HIV programming.

### ***Thumbs down to sex workers' rights***

Through the 182<sup>nd</sup> Report, the Committee has attempted to appease both – pro and anti sex worker rights advocates alike. Yet, it is not difficult to see through the cracks.

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<sup>3</sup> Proviso to Section 5 and Section 6 (2 A) ITPA penalises offences related to children with seven years imprisonment.

<sup>4</sup> The U.N Protocol to Prevent, Suppress and Punish Trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized Crime 2000. Available at [www.unodc.org/unodc/en/trafficking\\_protocol.html](http://www.unodc.org/unodc/en/trafficking_protocol.html)

<sup>5</sup> International commentaries on the U.N Trafficking Protocol admit to the ambiguity in language and the problems that it may pose in convicting traffickers. See Annotated Guide to the Complete UN Trafficking Protocol at [www.hrlawgroup.org/resources/content/TraffAnnoProtocol.pdf](http://www.hrlawgroup.org/resources/content/TraffAnnoProtocol.pdf) The Protocol provides flexibility to national legislatures to define trafficking in a manner that is consistent with domestic criminal law.

<sup>6</sup> See, Andhra Pradesh Devadasis (Prohibition of Dedication) Act, Act No.10 of 1988, and Karnataka Prohibition of Devdasi Act, 1982

Though the report discourages punitive measures against sex workers, it does not recognise their claims to work, earnings, health and occupational safety. The repeated reference to sex workers as ‘victims’ smacks of a patronising approach. Despite the State’s abject failure in providing viable alternatives to persons in sex work, the report continues to endorse ‘rehabilitation’. The biggest blow is the Committee’s acceptance of penalties against clients under Section 5C. Proposing minor changes to the section does not detract from the Committee’s *principled support to a prohibitionist legal regime*, rejected by sex workers and progressive rights groups universally.

**A missed opportunity.....**

Given the polarised nature of debate on sex work law as well as the starkly opposite representations that it received, the Committee has cleverly walked the tight rope; neither favouring nor disfavours any view or constituency. While the report is politically expedient, it is also an opportunity lost to *honestly* review and revamp a law that has little to show in 50 years of its existence.

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