

12 December 2012

Mr. Nilanjan Sanyal
Additional Secretary
Additional Secretary,
Ministry of Women and Child Development (WCD)
Government of India and,
Chair, Inter Ministerial Group (IMG) on Amendments to the Immoral Traffic (Prevention) Act,
(ITPA) 1956

Re: Comments on IMG Report on ITPA Amendments

Dear Shri Sanyal,

Thank you for sharing the draft report of the IMG on the ITPA Amendments, which we received by email on 5 December 2012.

The Lawyers Collective (LC) has perused the report and wishes to express its disappointment with the manner of drafting of the document. **The contents of the report go beyond the issues discussed by the IMG.** LC was given to understand that the WCD did not want to make substantial changes to the ITPA, even though some IMG members were in favour of an overhaul of the Act. As a result, our written and oral submissions were limited in scope, in accordance with the terms outlined by the WCD. We are surprised to see that the report makes substantive and far reaching recommendations, which were not hinted, let alone discussed at the IMG meetings. LC was also conscious of the sharp divisions among the members of the IMG and went out of its way accommodate divergent views and arrive at a common understanding. **Unfortunately, this is not reflected in the report, which remains one-sided and unbalanced in its analysis.**

LC would like to place on record its support, reservations and dissent on the various observations and recommendations contained in the report. These are:-

I. Broad comments

Lack of consultation with sex workers

(i). The report must record the absence of sex worker representatives on the IMG, which was duly pointed out by LC in the IMG meetings as well as in our written comments dated 12 November 2012. According to international human rights law, to which India is a party, all affected groups and communities are entitled to participate in decisions that impact their lives. The WCD has failed to explain why it dispensed with consultation with sex workers, the group directly affected by the law.

Other relevant Ministers not on board

(ii) Other Ministries especially the Ministry of Health and Family Welfare and the Department of AIDS Control, which runs the largest programme for sex workers was also not represented at the IMG. It may be pointed out that the Group of Ministers (GOM) and deference of the ITPA Amendment Bill, 2006 alluded to in Para 2 of the IMG Report was on account of a conflict of views between the Ministry of Health and WCD. Given this history, the Health Ministry ought to have been on board in the IMG.

Incorrect interpretation of obligations under United Nations Convention on Transnational Organised Crime (UNTOC) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol)

(iii) The IMG report in Para 3 refers to obligations under the UNTOC and the Trafficking Protocol as one of the principal reasons for amending the ITPA. LC contends that obligations arising under these international agreements not been understood correctly. Firstly, Article 4 of the Trafficking Protocol expressly limits its scope of application to offences that are transnational in nature¹ and involve an organized criminal group. Therefore, the legal standards set out in the UNTOC and the Trafficking Protocol need not apply to domestic trafficking or where trafficking in persons is carried out by individuals, unassociated with an organized criminal group.

Secondly, as pointed out by some members of the IMG, the obligation under Article 3 read with Article 5 of the Trafficking protocol is to criminalise trafficking “for the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery

¹ According to Article 3, Para 2 of the UNTOC, an offence is of a transnational nature when it is – committed in more than one state, or though committed in one state, a substantial part of its preparation, planning, control, and supervision takes place in another place or, involves an organized criminal group active in more than one state or, has substantial effects in another state.

or practices similar to slavery, servitude or the removal of organs” While the IMG has made a recommendation to this effect in sub para 1 of general recommendations, the fact remains that by amending ITPA, which is prostitution specific, the Government will be falling short of its legal obligations under the UNCTOC and the Trafficking Protocol. If the WCD’s mandate is to make policy on matters concerning women and children, then trafficking in women and children for forced labor etc does fall within its remit. Thus, the WCD can propose broader anti-trafficking legislation for the protection of women and children and not confine itself to prostitution under the ITPA.

Thirdly, as LC has pointed out in its written submission dated 12 November 2012, the obligation is to adopt the “meaning and spirit” of international Conventions and not “copy and paste” words of the Trafficking Protocol. The IMG report is simply adapting language from the Protocol, which is unhelpful; as such language is incompatible with our constitutional and criminal justice system.

Fourthly, the report attempts to apply the Trafficking Protocol selectively; that is, follow it in some parts and depart from it in other parts. This is problematic.

Purpose and intent of ITPA has been controverted

(iv) Para 1 of the IMG report clearly enunciates that both the ITPA and its predecessor – the Suppression of Immoral Traffic Act, 1956 (SITA) were carefully drafted so as not to criminalise prostitution or prostitutes themselves. The 1986 amendments unambiguously strengthened the law’s reach over elements of exploitation and abuse for commercial gain. LC is concerned that the IMG report is attempting to bring in changes that mark a departure from over 50 years of legislative thinking on prostitution. That this is sought to be done, without proper discussion and consultation, is particularly disturbing

Legal infirmities

(v) Several provisions proposed in the report are poorly drafted and/or legally unsustainable. (See specific comments below)

II. Specific comments

1. Scope of the Act:

LC would like to point out that despite the proposed change; the scope of the Act is limited to trafficking in persons for prostitution. The suggested amendment in the scope of the Act is meaningless and unnecessary.

2. Title of the Act:

As pointed out at IMG meetings, the title of the Act is inconsequential. LC sees little value in changing the title, when the object and purpose of the Act remains unchanged.

3. New sub section 2(k) - Definition of trafficking in persons:

- **LC objects to the inclusion of the words “*position of vulnerability*”** in the proposed new definition of trafficking in persons. The same is incapable of application in a Court of law and should be dropped. Instead, words like “misrepresentation” and “undue influence” should be used as they are well understood in Indian legal jurisprudence and cover the situations sought to be covered by the words “position of vulnerability”.

- **LC objects to the words “*for the purpose of commercial sexual exploitation or abuse or pornography of such person*”**. It may be pointed out that the proposed definition of “commercial sexual exploitation or abuse” in section 2(l) refers to the definition of ‘trafficking in persons’ in section 2(k). And the definition of trafficking in persons in turn refers to commercial sexual exploitation or abuse. This is tautological and cannot be done in a penal statute. Pornography has not been defined in the Act. ITPA concerns itself with trafficking and exploitation within prostitution and cannot be arbitrarily expanded to cover pornography.

- Sub clause (b) “*The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used;*” is redundant. It is clear that where coercion, fraud, deception etc are established, there can be no consent. It makes no sense to state the obvious.

- Sub clause (c) is irrelevant, since any sexual exploitation or abuse of a child is an offence *per se* under the Indian Law, including the *Protection of Children from Sexual Offences Act, 2012*.

- In light of the above concerns, LC submits the following alternate definition - **“trafficking in persons” means the recruitment, transportation, transfer, harbouring or receipt of a person by means of threat, force, coercion, fraud, deception, misrepresentation, undue influence or by the giving or receiving of payments or benefits to achieve the consent of a person having control over another person or of inducing or dedicating a person under the guise of religious, social, cultural, customary practices or sanctions for the purpose of [exploitation of the prostitution of such person [OR] prostitution [OR] sexual exploitation or abuse.”]**

4. New sub – section 2(l): Definition of commercial sexual exploitation or abuse:

LC opposes the inclusion of this definition, which is unhelpful and unnecessary. It is incongruent as the existing definition of prostitution in section 2(f) refers to *“sexual exploitation or abuse for commercial purpose”*. It does not make any sense to add a definition for “commercial sexual exploitation or abuse”, a phrase which is not used in the Act. It is a cardinal rule that criminal law must be clear and not vague. The proposed definition will further confuse and complicate interpretation of ITPA, which will only benefit persons accused of offences under the Act.

5. New sub – section 2(m): definition of “abuse of power or a position of vulnerability”:

- **LC opposes the inclusion of this definition.** The terms “abuse of power” and “position of vulnerability” are distinct and cannot be clubbed in one definition. Expressions akin to the term “abuse of power” are found in section 9 of the ITPA *“Any person who having the custody, charge or care of, or a position of authority over, any person..”* as well as in Section 376B and 376C of the Indian Penal Code, 1860 “ *....takes advantage of his official position”*. It may be better to use these known terms in Section 2(k) as opposed to inserting a new term of “abuse of power”.

- LC opposes the proposed definition for “position of vulnerability”. The definition rests on the subjective belief of the person concerned that he/she had no real and acceptable alternative at a particular time, which could vary from time to time. Such subjective assumptions cannot be basis of a criminal statute. In this case, the victim has to prove that he/she had ‘no real and acceptable alternative but to submit’, which would be highly improbable in prosecution proceedings. Further, this is not a precise legal definition but a descriptive, sociological formulation, as is evident in the usage of words - ‘societal

inferiority', 'poverty', 'precarious situation' and 'social survival'. An offence must be defined with precision and certainty; otherwise it will fall foul of Articles 14 and 21 of the Constitution of India. Therefore, the proposed section 2(m) should be dropped.

6. New sub section 2(o) – Definition of Commercial establishment

LC opposes this provision. The ITPA already provides for closure of premises being run or kept as a brothel which includes the establishments sought to be included through the proposed definition. Besides, if a licensed premise is misused as a brothel, then a reasonable and proportionate response would be to discontinue or stop such misuse. Cancellation of license is extreme and unnecessary.

7. Sub section 2(a) – Amendment of definition of brothel

- **LC opposes the insertion of the words “or contributes to sexual exploitation or abuse”.** It is submitted that the words “used for sexual exploitation or abuse” in the existing definition are wide enough to cover the situation contemplated by the drafters as the present law does not require sexual activity to have occurred in the said premises for it to be deemed a brothel. The term proposed is unwieldy and overbroad and likely to be struck down on constitutional grounds. The same may be dropped.

- The proposed proviso cannot be included in the definition. It is a substantive provision and must be included in a substantive sections 3 or 18 of ITPA. LC contends that the proposal will not benefit the intended beneficiaries, that is, sex workers working in premises for mutual gain, because they will still be arrested, prosecuted, tried and convicted in a criminal Court for brothel keeping offences. Besides, the proviso will not be applicable to sex workers, who may be in contravention of section 7(1), [carrying on prostitution within 200 metres of a school, hospital, religious place etc], thus restricting its purported benefit to a very small section of the community.

- **LC, therefore, rejects the proposed changes to section 2(a).** Instead, it suggests that the words “or for the mutual gain of two or more prostitutes” be dropped from the existing definition in order to extend genuine benefits to sex workers.

8. Amendment to sections 2(aa), 2(b), 2(ca), 2(cb)

LC welcomes the above changes.

9. Amendment to section 2(f) - definition of prostitution:

LC opposes the change, which seeks to bring consensual sex work within the ambit of the law despite the clear legislative intent of not criminalizing sex work *per se*. The words “**including for consideration in money or in any other kind or in any other kind**” are sought to be brought back from the 1956 SITA definition, which was reformed in 1986 to target exploitation, abuse and commercial gain by another person (not the prostitute, who cannot exploit herself and not the client, who does not gain commercially). The proposed change also deviates from the Trafficking Protocol, which the WCD is otherwise purporting to follow, as the said instrument requires criminalization of exploitation of the prostitution of others and not prostitution *per se*.² There is no justification for expanding the definition of prostitution to cover situations where exploitation and abuse are non-existent. The proposed change must be dropped.

10. Amendment in sub section 2(j) - Trafficking Police Officer

It may be pointed out that the ITPA does not refer to “human trafficking”. Even the proposed amendments, if accepted, use the expression “trafficking in persons”. Therefore, the proposal to rename trafficking police officer as ‘Anti Human Trafficking Police Officer’ may need to be reconsidered. ‘Anti Trafficking Police Officer’ may be a better formulation than the one proposed.

11. Amendment to section 3 - enhanced punishment for brothel keeping offences

LC will accept stringent penalties for brothel offences only if the definition of brothel in section 2(a) is amended to exclude the words “*or for the mutual gain of two or more prostitutes*”.

12. Amendment to section 4 –punishment for living on the earnings of prostitution

LC welcomes the proposed change.

13. Deletion of existing section 5 and insertion of a new section 5A:

² See United Nations, Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, New York, 2006. The commentary notes at pg 347 - “*The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws.*”

- LC suggests that the new section 5A may be given the title/ heading “**Trafficking in persons for prostitution**”.

- The **proposed proviso “if any offence under this sub section is committed against the will of any person” is unnecessary**. It is inconsistent with the proposed definition of trafficking in persons in the new section 2(k), which does not allow for consideration of “willingness” of the victim if the means provided therein are used. By alluding to “against the will of the person”, the proviso may frustrate the aims of the law, as the accused will try to use “willingness” of the trafficked person” as a defence or to plead for a lesser sentence.

14. Amendment to Section 7 (1):

LC welcomes the move to remove imprisonment as a penalty but suggests that the fine be enhanced marginally and not so drastically, as poor sex workers will not be able to pay the proposed amount of Rs 5,000.

15. Deletion of section 8 – soliciting for purpose of prostitution

LC welcomes the proposed change.

16. Deletion of section 10A – detention in a corrective institution

LC welcomes the proposed change.

17. Insertion of explanation to Section 15(5):

It may be pointed out that in most cases, the age of persons removed from brothels is indeterminate at the time of their removal. Whether a person is a child or an adult is ascertained only after the age-verification test is ordered and performed under the Magistrate’s orders. Therefore, it is impractical to suggest that where the person is a child, the Magistrate should be deemed to be a Child Welfare Committee (CWC). Besides, a Magistrate cannot be deemed to be a CWC as the two are entirely different in composition, statutory powers, role, functions and jurisdiction. Under existing provisions of the ITPA and Juvenile Justice (Care and Protection of Children) Act, 2000, once a person is determined to be below the age of 18 years, they have to be produced before the CWC and the Magistrate ceases to exercise jurisdiction over them. **The proposed provision in the report needs to be carefully reviewed.**

18. New sub section 15 (5B) for victim's medical examination:

LC is opposed to the imposition of mandatory testing of sex workers, victims and other persons removed from brothels. LC suggests that such testing must be voluntary and conducted, only if the concerned person so desires. It may be remembered that the Cr PC allows medical examination of persons arrested³ and not of complainants. Here, the persons being subjected to mandatory medical examination of an intrusive nature are neither accused nor complainants. The existing provision needs to be reviewed in light of various judicial pronouncements, which have held denounced mandatory testing in criminal proceedings and held them violative of Article 21 of the Constitution.

19. New section 15 B – confiscation of proceeds of offences under the Act:

LC reiterates its opposition to confiscation of property/assets as long as the ITPA continues to criminalise sex workers.

20. Deletion of section 20 – removal of prostitutes from any place:

LC welcomes the proposed change.

21. Amendment to section 22 - Trial:

The proposed sub section (2) to Section 22 is legally unsustainable. The procedure for trial must be laid down by statute, either a special statute like the ITPA or under general law like the Criminal Procedure Code. It is impermissible to delegate essential law making powers such as criminal procedure for trial to an administrative authority. This is arbitrary and liable to immediate challenge in Court.

We're grateful for the opportunity to be on the IMG and comment on its report,

Yours sincerely,

Anand Grover
Senior Advocate and Director, Lawyers Collective

³ Section 53, Criminal Procedure Code, 1973