

**Comments on the  
Draft  
Transgender  
Persons  
(Protection of  
Rights) Rules,  
2020**

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# About the Authors

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Akshat Agarwal is a Research Fellow at the Vidhi Centre for Legal Policy working in the Vidhi Aid initiative.

Dhvani Mehta is a Senior Resident Fellow at the Vidhi Centre for Legal Policy working in the Vidhi Aid initiative.

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# I. Background

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In 2014, the Supreme Court of India in *NALSA v Union of India*<sup>1</sup> (“NALSA”) recognised the fundamental rights of transgender persons and accorded them equal constitutional status under Indian laws. Importantly, the court held that transgender persons had the right to self-identification, equality and dignity under the constitutional guarantees of liberty<sup>2</sup>, equality<sup>3</sup> and the freedom of expression.<sup>4</sup> The Court issued various directions regarding the welfare of the transgender community which had been marginalised for centuries.

Subsequently, since 2014, efforts had been underway to enact a legislative framework to protect the rights of the transgender community at the central level. These efforts culminated in the enactment of the Transgender Persons (Protection of Rights) Act, 2019 (“Act”) whose provisions came into force on 10 January 2020. The Act sought to operationalise the fundamental rights guaranteed in *NALSA* by giving a statutory basis to the right to self-identification and laying down procedures for recognition of a person’s self-perceived identity. Additionally, it contains a number of provisions that prohibit discrimination and seek to advance the welfare of the transgender community.

In April 2020, the Ministry of Social Justice and Empowerment (“Ministry”) released the Draft Transgender Persons (Protection of Rights) Rules, 2020 (“Rules”) under sub-sections (1) and (2) of Section 22 of the Act for public comments. These rules primarily seek to operationalise the Act’s provisions on the process of self-identification of transgender persons and also contain certain provisions relating to the socio-economic development of transgender persons in India.

This submission is in response to the Ministry’s call for public comments and analyses the Rules from a legal perspective. Part II of the submission lays down certain overall recommendations regarding the process of public consultation in light of prevailing circumstances and the rationale for the enactment of the rules by the Central Government. Part III of the submission provides a detailed clause-by-clause analysis of the rules in the format prescribed by the Ministry.

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<sup>1</sup> *Nalsa v Union of India*, AIR 2014 SC 1863.

<sup>2</sup> Article 21, Constitution of India.

<sup>3</sup> Article 14, Constitution of India.

<sup>4</sup> Article 19, Constitution of India.

# II. Overall Recommendations

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## A. Process of Public Consultation

### 1. Ongoing Lockdown

The World Health Organisation declared Covid-19 a pandemic on 11 March 2019.<sup>5</sup> In response to this extraordinary public health situation and to stem the spread of the illness in India, the Government of India declared a nation-wide lockdown by the end of March. Since then, the entire country continues to be under a lockdown to impose social distancing and check the spread of Coronavirus. The lockdown has had a substantial impact on the transgender community, amongst other vulnerable communities, since it has affected their livelihood and access to many essential services including healthcare.<sup>6</sup> During this period community-based organisations have thus had to concentrate on ensuring access to essential services and preventing destitution amongst vulnerable members of the community.

Holding a public consultation during such times is therefore inadvisable since members of the transgender community may not be able to fully participate in such a process thereby defeating its very objective. Moreover, the availability of the Rules in only the English language has curtailed access and prevented members of the community from meaningfully participating in the consultation process. Due to the significance of these Rules for the lives of the transgender community their participation in the process is essential. Therefore, consultations on the Rules should accordingly be postponed and in the meantime the Ministry should make efforts towards greater dissemination of the draft Rules in different regional languages.

### 2. Make Active Efforts to Seek Community Feedback

The involvement of the members of the transgender community is integral to the process of public consultation since the Rules will have a direct impact on their day-to-day lives and their ability to exercise their constitutional rights. The Ministry therefore must make all efforts in consulting members of the community across different States in India. The Ministry must only proceed with the Rules after seeking extensive feedback from members of the transgender community.

### 3. Pending Constitutional Challenge

Since its enactment, the Act has been challenged by multiple transgender persons and community-based organisations before the Supreme Court of India on the grounds that it violates the constitutional guarantees which had been recognised in *NALSA*.<sup>7</sup> The draft Rules seek to operationalise the right to self-identification which lies at the very heart of these constitutional challenges. For instance, Section 6 and Section 7 of the Act have been criticized by members of the transgender community as violating guarantees against requirements of medical interventions for recognition of gender identity in *NALSA*.<sup>8</sup> Further, the certificate of identity recognises “transgender” as the only gender identity and does not account for the fact that many transgender persons may

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<sup>5</sup> Who announces Covid-19 outbreak a pandemic, World Health Organisation < <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic>> (last accessed 13 May 2020).

<sup>6</sup> Kenneth Rosario, 'Covid-19 lockdown: transgender community pushed further to the margin' *The Hindu* (6 April 2020) < <https://www.thehindu.com/news/cities/mumbai/covid-19-lockdown-transgender-community-pushed-further-to-the-margin/article31265535.ece>> (last accessed 13 May 2020); 'As the world comes together, India's transgender community fights Covid-19 alone' Amnesty International India (1 April 2020) < <https://amnesty.org.in/as-the-world-comes-together-indias-transgender-community-fights-covid-19-alone/>> (last accessed 13 May 2020); 'Discriminated, Worried : India's Trans-persons on Covid-19 Crisis' *The Quint* (9 April 2020) < <https://www.thequint.com/neon/gender/coronavirus-transgender-community-impact>> (last accessed 13 May 2020).

<sup>7</sup> 'Supreme Court notice to Centre on plea against transgender act' *Hindustan Times* (28 January 2020) < <https://www.hindustantimes.com/india-news/supreme-court-notice-to-centre-on-plea-against-transgender-act/story-HfBrPZBTFmum9theecWoL.html>> (last accessed 13 May 2020).

<sup>8</sup> Niha Masih, 'A bill meant to protect India's transgender community instead leaves them angry and aggrieved' *The Washington Post* (30 November 2019) < [https://www.washingtonpost.com/world/asia-pacific/a-bill-meant-to-protect-indias-transgender-community-instead-leaves-them-angry-and-aggrieved/2019/11/29/6c2c7b7e-116b-11ea-924c-b34d09bbc948\\_story.html](https://www.washingtonpost.com/world/asia-pacific/a-bill-meant-to-protect-indias-transgender-community-instead-leaves-them-angry-and-aggrieved/2019/11/29/6c2c7b7e-116b-11ea-924c-b34d09bbc948_story.html)> (last accessed 13 May 2020); Akshat Agarwal, 'Making Legal Frameworks Inclusive' *The Pioneer* (27 December 2019) < <https://www.dailypioneer.com/2019/columnists/make-legal-frameworks-inclusive.html>> (last accessed 13 May 2020).

identify as male or female.<sup>9</sup> Such issues with the parent statute cannot be addressed in delegated legislation which is necessarily bound by the parent statute. This correspondingly limits the criticisms of the Rules. Due to the significance of the right to self-identification and the potential consequences of the Rules for transgender persons' exercise of their constitutional rights, it would be advisable to postpone the process of rule-making till the Supreme Court has settled the question of the validity of the self-identification provisions in the parent Act.

## **B. Greater Role for State Governments**

### ***1. Involving State Governments***

The Act delegates the rule-making power to the appropriate government but does not specifically apportion such powers between the Central and State Governments. Therefore, according to the provisions of the Act both the Central and State Governments have the power to enact rules to operationalise the provisions of the Act.<sup>10</sup> Therefore, it may be advisable to let the State Governments come out with their own rules since they will have the primary responsibility of implementing them as well. This would further allow the possibility of greater public consultation at local levels and facilitate engagement with a larger number of stakeholders. The Ministry should instead issue model guidelines containing best practices which the State Government can use as a template to draft their own rules based on local inputs.

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<sup>9</sup> *Id.*

<sup>10</sup> Section 22, Transgender Persons (Protection of Rights) Act, 2019.

# III. Clause-by-Clause Recommendations

Comments on the Draft Transgender Persons (Protection of Rights) Rules, 2020				
S.No (1)	Section and Clause No. of the Rules(in serial order) (2)	Suggestions (Please indicate whether <b>Addition/ Modification/ Deletion/ Others</b> ) (3)	Exact Wording of proposed <b>Addition/ Modification/Deletion/Others</b> as indicated at Column No.3 to be indicated as “to be read as” (4)	Remarks (5)
1	Rule 2(d)	<b>Modification</b>	Rule 2(d) to be read as, ““application” means the application form in form-1 of these rules.”	An application for issuing a certificate of identity should not double-up as an enumeration form. Requiring the applicant to submit such information is unnecessary and has no nexus with the objective of issuing a certificate of identity in pursuance of the constitutional rights of transgender persons. Enumerating such information also goes against the concept of data minimisation i.e. only collecting the data that is necessary for performing a particular purpose, and may violate the privacy of the transgender persons.  If such data is required for formulating welfare policies, then it can be separately collected through enumeration exercises with the consent of the transgender person.
2	Rule 2 (g)	<b>Deletion</b>	Rule 2(g) to be deleted.	The definition of procedure refers to procedure laid down in annexure 1. However, annexure 1 does not lay down a procedure but merely provides an illustrative list of official documents which can be updated on the basis of the certificate of identity. Moreover, the procedure to be followed by the District Magistrate has already been laid down in the rules thereby making a definition of procedure redundant.
3	Rule 4 (1)	<b>Modification</b>	Rule 4 (1) to be read as, “The District Magistrate based on the application and affidavit shall verify the correctness of the place of residence of the applicant but will not require the applicant to undergo any medical examination.”	Sub-rule (1) requires the applicant to submit the report of a psychologist of a hospital of appropriate government. This requirement should be deleted since it violates the right to self-perceived gender identity which is guaranteed under Section 4 of the Act. Such a requirement is also violative of



				<p>the right to self-identification which was recognized as part of the right to live with liberty and dignity under Article 21 of the Constitution of India by the Supreme Court in <i>NALSA</i>. Thus, such a stipulation may be unconstitutional.</p> <p>Further, references to change of gender under Section 7 of the Act are unnecessary and may end up leading to confusion in interpretation. This is because of the process of change of gender under Section 7 is distinct from the issue of certificate of identity under Section 6. Even the rules envisage these as different processes. Therefore, while Rule 4 only deals with the issues of certificate under Section 6 of the Act, Rule 7 deals with the issue of certificate under Section 7 of the Act.</p>
4	Rule 4(2)	<b>Modification</b>	Rule 4(2) to be read as, "The applicant shall approach the District Magistrate of an area where the applicant is currently residing."	Sub-rule (2) restricts the applicant to filing an application before the District Magistrate of an area where they have been continuously resident for one complete year. The sub-rule further states that this restriction is to "protect the interests and facilitate the inclusive development of transgender persons." Such a requirement is onerous and links the issue of a certificate to continuous residence in a particular jurisdictional area. The right to self-identification is a constitutional right and should not be restricted in this manner. Further, it is unclear how such a requirement promotes the interests of transgender persons. In fact, it is well documented that transgender persons often end up moving away from their natal families due to persecution and violence. It is recommended that the requirement of continuous residence should be deleted and transgender persons should be allowed to approach the District Magistrate of an area where they are currently residing.
5	Rule 5(2)	<b>Modification</b>	Rule 5(2) to be read as, "The said certificate of identity shall be issued within 30 days of receipt of duly filled in application along with the affidavit."	60 days is an unreasonably long period of time especially considering that the District Magistrate does not have to undertake any extensive verification exercise. It is therefore recommended that the time period be reduced to 30 days. Further, since the requirement of psychologist's report may be unconstitutional due to the reasons given above, the same should also be deleted.
6	Rule 6(1)	<b>Modification</b>	Rule 6(1) to be read as, "If a transgender person undergoes surgery to change gender as either male or female, such a	Sub-rule (1) requires the applicant to apply in Form 1 of these rules. However, Form 1 only allows the applicant to

			person may apply in the form 1-A of these rules, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that persons has undergone the said surgery, to the District Magistrate for issue of a revised certificate of identity under section 7.”	request for change to “transgender” and does not allow the applicant to request a change to “male” or “female” gender. In order to avoid any confusion, it is recommended that a separate Form be prescribed for applications under Section 7 of the Act. It is therefore recommended that a Form 1-A be introduced which specifically provides for change of gender under Section 7 of the Act.
7	Rule 6(3)	<b>Modification</b>	Rule 6(3) to be read as, “The transgender person shall approach the District Magistrate of an area where they are currently residing.”	Sub-rule (3) restricts the applicant to filing an application before the District Magistrate of an area where they have been continuously residing for one complete year. The sub-rule further states that this restriction is to “protect the interests and facilitate the inclusive development of transgender persons.” Such a requirement is onerous and links the issue of a certificate to continuous residence in a particular jurisdictional area. The right to self-identification is a constitutional right and should not be restricted in this manner. Further, it is unclear how such a requirement promotes the interests of transgender persons. In fact, it is well documented that transgender person often end up moving away from their natal families due to persecution and violence. It is recommended that the requirement of continuous residence should be deleted and transgender persons should be allowed to approach the District Magistrate of an area where they are currently residing.
8	Proviso to Rule 7(7)	<b>Deletion</b>	Proviso to Rule 7(7) to be deleted.	The proviso reiterates Rule 7(7) and is therefore superfluous. It should be deleted.
9	Rule 8	<b>Modification</b>	<p>Rule 8 to be read as,</p> <p>“8. Rejection of Application:</p> <p>(1) The District Magistrate shall only reject the applications made under rule 4(1) or 6(1), if the application or the accompanying affidavit is incomplete or due to issues in verifying the information provided.</p> <p>(2) Before rejecting the application, the District Magistrate shall give detailed reasons for being unable to proceed with the applications made under</p>	The rule does not specify the criteria for rejecting the application nor does it allow the applicant to address any technical defects in the application. It is therefore recommended that specific criteria either on the basis of incompleteness of information or issues in verifying the information should be stipulated. This would ensure that the application is not rejected on arbitrary grounds. Further, instead of outright rejection the applicant should be allowed the opportunity to rectify the defects in the application. This would ensure that the District Magistrate plays a facilitative role in ensuring that the applicant receives a certificate of identity.

			<p>rule 4(1) or rule 6(1) and gave the applicant an opportunity to rectify the defects within 15 days of such communication.</p> <p>(3) If the applicant is unable to address the defects in the time period provided under rule 8(2) then the District Magistrate shall communicate the rejection of the application and provide detailed reasons for such rejection.”</p>	
10	Rule 9	<b>Modification</b>	<p>Rule 9 to be read as, “Right to appeal: The applicant shall have a right to appeal to the Department of Social Welfare or its equivalent in the Government of the concerned State or Union Territory.”</p>	<p>The rule provides for a right to appeal in case of rejection of application however it does not specify who the appellate authority is going to be. The designation of appellate authority is further delegated to the appropriate government. The rules should clearly identify the appellate authority and should not further delegate this function to the appropriate government since the right to appeal is a substantive right in the rules. Leaving it to the discretion of the appropriate government may lead to arbitrary decisions and adversely affect the rights of the applicants. It is recommended that the Department of Social Welfare be treated as the appellate authority.</p>
11	Rule 10	<b>Modification</b>	<p>Rule 10 to be read as,</p> <p>“10. Welfare measure, education, social security and health of transgender persons by appropriate Government under sections 8, 13, 14 and 15 of the Act:</p> <p>(1) The appropriate Government shall undertake the following measures for the welfare of the transgender community:</p> <p>(i) Within a period of 1 year from the date these rules come into force, concerned Ministries and Departments under the appropriate Government shall review all existing educational, social security, health, welfare and vocational training and self-employment measures and schemes to include transgender persons so as to protect their</p>	<p>The rule stipulates the welfare measures to be undertaken by the appropriate Government. In order to ensure accountability, the rules should specify timelines by which such measures will be operationalized. The obligation to undertake welfare measures should also be framed with greater specificity to ensure that there is clarity regarding the exact nature of the obligations. Further, the rules should mandate the involvement of community members in the formulation and the implementation of welfare policies. This would ensure that the policies are responsive to the lived-realities of transgender persons.</p> <p>It is thus recommended that timelines be introduced for the specific measures, wherever applicable. For the sake of greater clarity, it is suggested that the obligation to prohibit discrimination should be understood as formulating a scheme to address complaints regarding discrimination in both government and private establishments. Similarly, the</p>

			<p>rights and interests and facilitate their access to such schemes and welfare measures framed by that Government.</p> <p>(ii) All educational, social security, health and welfare schemes and programmes shall be formulated in a manner that is inclusive, sensitive, non-stigmatising and does not discriminate against transgender persons.</p> <p>(iii) Within a period of 1 year from the date these rules come into effect, the appropriate Government shall review and revise all Acts, rules, regulations, codes, bye-laws and such statutes to address any kind of discrimination against transgender persons and to promote their welfare and dignity.</p> <p>(iv) Within a period of 1 year from the date these rules come into effect, the appropriate Government shall formulate a scheme to prohibit and address complaints of discrimination against transgender persons in Government or private organisations and establishments.</p> <p>(v) Within a period of 2 years from the date these rules come into effect, the appropriate Government shall create institutional and infrastructure facilities, including but not limited to, rehabilitation centres, separate human immunodeficiency virus serosurveillance centre, appropriate facilities in healthcare establishments and washrooms in all establishments to protect the rights of transgender persons.</p> <p>(vi) Carry out awareness campaigns to educate, communicate with and train transgender persons to avail the benefits of welfare</p>	<p>obligation to review existing laws, rules etc., should also include an obligation to revise them. Further, a separate sub-rule requiring mandatory consultation with members of the transgender community while formulating such policies should also be introduced.</p>
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			<p>schemes formulated and implemented by appropriate Government.</p> <p>(vii) Carry out training and education programmes for all stakeholders in developing appropriate change in behaviour towards transgender persons.</p> <p>(2) The appropriate Government shall undertake all measures under sub-rule (1) only in consultation with the members of the transgender community.”</p>	
12	Form 1	<b>Deletion/Modification</b>	<p>All references to “Application – cum – enumeration” should be read as “Application.”</p> <p>Note 2 to read as, “Information provided by you in this Application will be treated as confidential and shall not be shared with any person or organisation.”</p>	<p>An application for issuing a certificate of identity should not double-up as an enumeration form. Requiring the applicant to submit such information is unnecessary and has no nexus with the objective of issuing a certificate of identity in pursuance of the constitutional rights of transgender persons. Enumerating such information goes against the concept of data minimisation i.e. only collecting the data that is necessary for performing a particular purpose, and may violate the privacy of the transgender persons.</p> <p>If such data is required for formulating welfare policies, then it can be separately collected through enumeration exercises with the consent of the transgender person.</p> <p>The form currently stipulates that information provided by applicants shall be kept confidential and shall not be shared with any person or organization save the Central and/or State securities. This is vague since it does not clarify the purposes for which the information will be shared nor does it clearly identify the security agencies with whom such information can be shared. It may therefore violate the privacy of transgender persons. Thus, it is recommended that information collected at the time of issuing the certificate of identity should not be shared. If information is to be shared, then such sharing should be authorised along with relevant purpose specifications and other data protection measures by introducing a substantive provision in the rules instead of bringing it in as a statement in the form.</p>

			Item 4 should read as, “Guardian’s name (only applicable if applicant is a minor).”	Item 4 in the form requires the applicant to fill the Guardian’s name. It should be specified that this will only be applicable if the applicant is a minor.
			-	Item 5(ii) of the Form only permits the applicant to request for certification as ‘Transgender’. However, this is not applicable for an application under Section 7 of the Act/Rule 6 of the Rules where the applicant may be applying for recognition as “male” or “female”. It is recommended that a separate Form 1-A be provided for an application under Section 7 of the Act/Rule 6 of the Rules.
			Items 7, 8, 14, 15 and 16 to be deleted.	<p>The Form requires the applicant to submit a wide variety of information. It is unclear why the applicant is required to submit such information for issuing a certificate of identity. Requiring the applicant to submit such personal information is not proportional to the purpose of issuing a certificate of identity and may violate their privacy. It is therefore recommended that the following items be removed from the form:</p> <ul style="list-style-type: none"> <li>○ Item 7 – Education Qualification</li> <li>○ Item 8 – Name of the School or College or University with complete address</li> <li>○ Item 14 – Whom do you stay or live with?</li> <li>○ Item 15 – Sources of income</li> <li>○ Item 16 – If you have a source of income, state your annual income</li> </ul> <p>If data of such nature is required for formulating welfare schemes for transgender persons then the same should be specified and such information should be collected with the consent of the transgender person by way of enumeration exercises.</p>

			-	Item 17 of the Form requires the applicant to furnish information regarding their identity documents. It is unclear if all these documents are required to be enclosed. The Form should specify that the applicant can submit <u>any</u> of these documents. Further, a copy of identity documents such as an Aadhaar card should only be collected with the informed consent of the applicant and in compliance with the provisions of the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.
			Item 18 to be deleted.	To avoid any confusion Item 18 should be deleted and a separate Form 1-A should be provided for the issue of a certificate under Section 7 of the Act/ Rule 6 of the Rules.
13	Form 2	<b>Modification</b>	“son/daughter” to be read as “child”.	It would be appropriate to replace “son/daughter” with “child”, which is a gender neutral alternative since the applicant may not identify within the binary of male or female.

14	Form 3	<b>Modification</b>	In Item 1, "son/daughter" should be replaced by "child". In Item 2, "His/her" should be replaced by "their".	It would be appropriate to replace all gendered language with gender neutral language since applicants may not identify within the binary of male or female.
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**[www.vidhilegalpolicy.in](http://www.vidhilegalpolicy.in)**

**Vidhi Centre for Legal Policy  
A-232, Defence Colony  
New Delhi - 110024**

**011-43102767/43831699**

**For any queries please contact  
[akshat.agarwal@vidhilegalpolicy.in](mailto:akshat.agarwal@vidhilegalpolicy.in)/  
[vclp@vidhilegalpolicy.in](mailto:vclp@vidhilegalpolicy.in)**