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Errors, if any, in the Report, are the authors’ alone.

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## Authors

Akshat Agarwal, Diksha Sanyal and Namrata Mukherjee are Research Fellows at the Vidhi Centre for Legal Policy.

# Note

The Vidhi Centre for Legal Policy ('Vidhi') organised a consultation with some members of the LGBT+ community and persons working on gender and sexuality rights issues on the final two chapters of "Queering the law: Making Indian Laws LGBT+ inclusive" i.e. "Family" and "Employment". The consultations took place on the 25<sup>th</sup> of May, 2019 at Vidhi's office in New Delhi and was attended by: Rituparna Borah, Pramada Menon, Saptarshi Mandal, Aparna Mittal, Simran Shaikh, Pawan Dhall, Amrita Sarkar, Grace Banu, Sowmya T, Jamal Siddiqui, Swetha Sudhakar, Prabha Nagaraj and Jaya Sharma. It was moderated by Gowthaman Ranganathan.

A draft version of this Chapter was shared with the attendees and an open-ended discussion was carried out on the basis of the same. The discussions and issues raised at the consultation are reflected in the sections on "Issues for Consideration" and the "Summary of Consultation" of this chapter. They have also been incorporated into the main text of the Chapter where possible.

We would like to thank everyone who attended the consultation for taking out the time to read the draft reports, sharing their valuable insights and raising critical issues that require consideration for LGBT+ inclusion in our laws.

We would also like to emphasise the importance of reading this report in light of the issues discussed at the consultation.

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An abstract graphic design featuring a solid green field at the bottom and a black sky at the top. The boundary between them is a jagged, white, cloud-like line. The text "Queering the Law" is written in white, sans-serif font across the black sky area.

Queering the Law



# Law: Making Indian Laws LGBT+ Inclusive

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# A. Introduction:

# Discrimination in

# the Workplace

Access to employment and a discrimination-free workplace continues to be a challenge for LGBT+ persons. For transgender persons, limited access to formal education, discriminatory recruitment, and workplace practices of organisations are the major factors that lead to their exclusion at the workplace. Similarly, LGBT+ persons continue to be closeted about their sexuality at the workplace on account of fear of potential discrimination, and when out/outed often face discrimination. In fact, the Indian LGBT Workplace Survey of 2016<sup>1</sup> shows that about 40 per cent of LGBT+ persons have faced harassment at their workplace on account of their gender identity/sexual orientation.<sup>2</sup>

Besides discrimination in the formal sector, LGBT+ persons, specifically transgender persons, continue to be disproportionately targeted by enforcement agencies in the unorganised/informal sector. This is particularly prevalent in the case of sex work and begging, wherein transgender persons are often targeted by laws such as the Immoral Traffic (Prevention) Act, 1956 ('ITPA') and anti-begging laws, respectively. The lack of regulation of the informal sector makes LGBT+ persons working in the sector particularly vulnerable to discrimination and harassment. Accounts of harassment enabled by these laws have been covered, and demands for legal reform have been made on several occasions.<sup>3</sup> While some of these laws have been litigated or are in the process of

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<sup>1</sup> Mission for Indian Gay and Lesbian Empowerment, 'The Indian LGBT Workplace Climate Survey, 2016', available at [http://mingle.org.in/\\_workplace-report-2016.php](http://mingle.org.in/_workplace-report-2016.php) (last accessed on November 9, 2018).

<sup>2</sup> *Ibid.*

<sup>3</sup> People's Union for Civil Liberties, 'Human Rights Violations Against the Transgender Community', available at [http://pucl.org/sites/default/files/reports/Human\\_Rights\\_Violations\\_against\\_the\\_Transgender\\_Community.pdf](http://pucl.org/sites/default/files/reports/Human_Rights_Violations_against_the_Transgender_Community.pdf); International Commission of Jurists, 'Unnatural Offences: Obstacles to Justice in India Based on Sexual Orientation and Gender Identity', available at <https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf> (last accessed on November 9, 2018).



being litigated,<sup>4</sup> a large number of them continue to exist and are likely to be deployed against queer persons, particularly transgender persons, even post the Supreme Court's decisions. on transgender rights and Section 377.

The Transgender Persons (Protection of Rights) Bill, 2018 ('2018 Bill') made an attempt, albeit poor, to address the issue of formal workplace discrimination against transgender persons. While the 2018 Bill prohibited discrimination against transgender persons in employment/occupation, the anti-discrimination provisions were weak and limited in scope.<sup>5</sup> Further, the 2018 Bill criminalised begging thereby criminalising the livelihood of transgender persons who engage in the same. The Bill was also silent on the issue of reservations, despite *NALSA vs. Union of India*<sup>6</sup> ('NALSA') clearly directing that transgender persons are to be granted reservations in matters of public employment and education.<sup>7</sup> In contrast, the Rights of Transgender Persons Bill, 2014

('2014 Bill'), which was introduced as a private member's Bill, provided for 2 per cent reservations for transgender persons in primary, secondary, and higher educational institutions<sup>8</sup> as well as public employment.<sup>9</sup> While the 2018 Bill has lapsed, it is critical that a future law on transgender rights has strong and enforceable anti-discrimination provisions, and extends reservations to transgender persons in matters of public education and employment. It was recommended at the consultation that a provision on reservation must account for the intersectional nature of discrimination faced by transgender persons who belong to the SC/ST category. It was suggested that horizontal reservations that cut across the vertical reservations meant for SC/ST persons may be a possible solution.<sup>10</sup> This position is reflected in the petition *Grace Banu Ganesan vs. State of Tamil Nadu & Ors.*<sup>11</sup> that has been filed in and is pending before, the High Court of Madras.

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<sup>4</sup> Examples of successful as well as ongoing litigation includes: *Karnataka Sexual Minorities Forum vs. State of Karnataka* (W.P. 1397/2015); *Harsh Mander vs. Union of India* (W.P.(C) 10498/2009 & CM APPL. 1837/2010); *Vijayanti Vasanta Mogil vs. State of Telengana* (W.P. (PIL) 44/2018), etc.

<sup>5</sup> You can read Vidhi's submissions on the 2016 Bill at: Vidhi Centre for Legal Policy, 'Submissions to the Standing Committee on The Transgender Persons (Protection of Rights) Bill, 2016', available at <https://vidhilegalpolicy.in/reports/2016/11/7/submissions-to-the-standing-committee-on-the-transgender-protection-of-rights-bill-2016> (last accessed on November 9, 2018).

<sup>6</sup> (2014) 5 SCC 438.

<sup>7</sup> *Ibid.*

<sup>8</sup> Clause 21, 2014 Bill.

<sup>9</sup> Clause 22, 2014 Bill.

<sup>10</sup> Consultation dated May 25, 2019, *see* Summary of Consultation.

<sup>11</sup> Writ Petition No. 6052/2019 (PIL).

Further, while a law on transgender rights can to a certain extent, address some of the issues faced by transgender persons at the workplace, parallelly other labour/employment laws need to be amended to ensure that transgender persons are brought within their ambit.

One of the recent measures to bring transgender persons under employment laws was witnessed in the case of the Labour Code on Wages Bill, 2015 ('2015 Code'). The Ministry of Labour and Employment, in its draft of the 2015 Code, included transgender employees within the ambit of the equal remuneration provisions.<sup>12</sup> However, the subsequent draft released by the Ministry of Law and Justice<sup>13</sup> did not explicitly include transgender persons within the ambit of the equal remuneration provisions. Instead, the provision prohibited discrimination in matters relating to wages on the ground of gender.<sup>14</sup> The dropping of the category of "transgender" from the 2015 Code was met with dissent and was deemed "exclusionary and regressive" in a letter penned to the Minister of Law and Justice by transgender persons and organisations.<sup>15</sup> In a society where parochial gender norms continue to dictate perceptions of acceptable gender identities, one

may argue that explicit inclusion of transgender employees as a category in equal remunerations provisions may be strategically a better call than merely prohibiting wage discrimination on the basis of gender. Further, states such as Kerala, Karnataka, Odisha, etc. have recognised the right of transgender persons to employment opportunities, and the necessity of creating a discrimination-free workplace, in their respective welfare schemes for transgender persons. These measures include: making self-employment grants available to transgender persons, provision of vocational training, ensuring that workplaces, public as well as private, are sensitised about transgender persons, etc. While such measures are indeed important and a welcome step, they do not preclude the necessity of introducing enforceable statutory right-based measures to ensure access to discrimination-free workplaces. Further, at the consultation, it was also emphasised that in addition to modifying existing employment laws, there is a pressing need to address the issue of access to employment for transgender persons. This includes working towards changing social attitudes, providing skill-building opportunities to transgender persons, and pushing organisations to

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<sup>12</sup> Clauses 2(x), 3, and 43, The Labour Code on Wages Bill, 2015.

<sup>13</sup> Clauses 2(u) and 3, The Code on Wages Bill, 2017.

<sup>14</sup> Clause 3, The Code on Wages Bill, 2017.

<sup>15</sup> Shalini Nair, 'Transgender community terms govt's Bill as 'regressive', launches nationwide protest movement', Indian Express, (December 1, 2017) available at <https://indianexpress.com/article/india/transgender-persons-bill-ministry-of-social-justice-4974281/> (last accessed on November 9, 2018).

become LGBT+ inclusive.<sup>16</sup> Recent initiatives such as ‘Ramjala Welfare Society – India’s Diverse Chambers’<sup>17</sup> is an example of a project working towards LGBT+ representation at the workplace in the formal sector. However, there is a long way to go before a discrimination-free workplace can be realised for transgender persons.

One of the most publicised instances of discrimination against transgender persons was witnessed in the case of Sabi Giri,<sup>18</sup> a transgender woman, who was discharged from the Navy after she decided to undergo gender confirmation surgery. The case is presently ongoing in the High Court of Delhi. The military’s defence in Giri’s case, i.e. Giri could not be reinstated as a sailor since women are not permitted to serve as sailors in the navy, demonstrates the larger issue of certain professions being deemed as “acceptably” discriminating on the basis of sex/gender. For instance, the military, specifically the army, continues to discriminate against women (and fails to recognise transgender persons) since women cannot serve in combat positions,<sup>19</sup> and are largely ineligible for permanent commission.<sup>20</sup> The Equal

Remuneration Act, 1976 which prohibits discrimination between men and women at the stage of recruitment makes an exception for cases where such discrimination is otherwise permitted by law. The military is a prime example of such an exception. While the constitutionality of these laws needs to be explored in a separate exercise, it demonstrates that laws in the area of employment continue to be dictated by sexist, and binaried presumptions of gender. Similarly, a string of cases from the High Court of Madras, specifically pertaining to police recruitment, demonstrates that even persons with intersex variations are often subject to discrimination based on perceived gender identity. In the cases of *I. Jackuline vs. The Superintendent of Police, Karur and Ors.*<sup>21</sup> and *G. Nagalakshmi vs. Director General of Police*,<sup>22</sup> the petitioners who identified as female were dismissed from service on the ground that their medical examinations revealed that they had intersex variations and thus did not qualify for a post meant for only female persons. In both cases, job posts existed for only male and female persons, and the petitioners were (incorrectly) classified as transgender persons in their medical reports, and

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<sup>16</sup> Consultation dated May 25, 2019 *see* Summary of Consultation.

<sup>17</sup> To learn more about the Rajmala Welfare Society – India’s Diverse Chamber, *see* <https://rwsindia.org/> (last accessed on June 10, 2019).

<sup>18</sup> *Manish Kumar Giri alias Sabi Giri vs. Union of India & Ors.* (W.P. (C): 9535/ 2017).

<sup>19</sup> At present women are permitted only in the medical, legal, educational, signals and engineering wings of the Indian Army.

<sup>20</sup> At present, to comply with the High Court of Delhi’s order in *Babita Punia vs. the Secretary* (WP (C) No.1597 of 2003) the Navy and Air-Force have granted permanent commission to SCC women officers. However, the army has challenged this order in the Supreme Court in *Ministry of Defence vs. Babita Puniya & Anr.* (Civil Appeal No. 9367-9369 of 2011).

<sup>21</sup> W.P. No. 587 of 2014 and M.P. Nos. 1 and 2 of 2014.

<sup>22</sup> W.P. No. 15223 of 2014 and M.P. Nos. 1 and 2 of 2014.

this became the basis of their dismissal. While the Court ruled in favour of the petitioners, such cases demonstrate that despite *NALSA*, discrimination against transgender persons and persons perceived to be transgender will continue to persist as long as employment laws and practices continue to operate on the presumption that gender exists only in the binary.

As far as sexual minorities are concerned, despite the precedent of *Navtej Johar vs. Union of India*<sup>23</sup> (*Navtej Johar*), the law continues to be silent on discrimination on the basis of sexual orientation thus leaving them without recourse when faced with discrimination at the workplace.

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<sup>23</sup> (2018) 1 SCC 791.

# B. The need to Reimagine Discrimination at the Workplace

At present, employment/labour laws cover various aspects of employment including terms and conditions of employment, industrial relations, discrimination, maternity benefit, etc. and span across multiple sectors. In this section, however, our analysis will be restricted to laws governing workplace discrimination and maternity benefits. Besides these two categories, multiple other laws concerning insurance, infrastructure, work-conditions, social security, etc. need to be critically analysed and modified for LGBT+ inclusion.<sup>24</sup> For instance, the Workmen's Compensation Act, 1923 defines a dependant to only include partners within the binary of male and female.<sup>25</sup> Similarly,

the Payment of Gratuity Act, 1972 defines a family in a manner that excludes transgender partners and same-gender partners.<sup>26</sup> Another legislation is the Factories Act, 1948 ('1948 Act') which provides for various restrictions concerning the employment of women in factories including limiting their work hours from 6 am to 7 pm.<sup>27</sup> By providing for such gendered restrictions, the 1948 Act not only adopts a protectionist approach towards women but also fails to recognise gender outside the binary of male and female. Such provisions reinforcing the binary of genders exist across a range of labour/employment related laws and need to be addressed.

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<sup>24</sup> Consultation dated May 25, 2019 *see* Summary of Consultation.

<sup>25</sup> Section 2(d), The Workmen's Compensation Act, 1923.

<sup>26</sup> Section 2(h), The Payment of Gratuity Act, 1972.

<sup>27</sup> Section 66, The Factories Act, 1948.

While at present, the existing labour/employment laws are being codified into 4 major codes: The Wages Code, the Industrial Relations Code, the Social Security Code, and the Occupational Safety, Health and Working Conditions Code, this section will focus on labour/employment laws as they exist on date and not the draft Codes.

At present, workplace discrimination is addressed by the Equal Remuneration Act, 1976 ('1976 Act'). The 1976 Act prohibits sex-based discrimination between men and women at the stage of recruitment and sex-based wage discrimination.<sup>28</sup> By limiting its application to the binary sexes of male and female, it automatically excludes discrimination on the basis of gender identity thereby leaving transgender persons outside its ambit. While one way of addressing this issue could be to amend the relevant provisions of the 1976 Act to include transgender persons within its ambit (as was the approach of the Ministry of Labour and Employment with the Labour Code on Code Bill, 2015) such an approach is undesirable since the architecture of the 1976 Act continues to be deeply entrenched in the binary sex model (for instance, while the

Advisory Committee set up under the Act requires 50 per cent representation of women it does not provide for transgender representation<sup>29</sup>), fails to address the various explicit and implicit forms of workplace discrimination,<sup>30</sup> harassment and bias that persons may face besides discrimination at the stage of recruitment and wage discrimination, and fails to cover discrimination on the basis of identities other than the binary sexes of male and female (for instance, gender-identity, sexual orientation, caste, religion, disability status, ethnicity, etc.). An inclusive workplace discrimination legislation which accounts for the above-mentioned factors may be the ideal way to bring LGBT+ persons (and other identities) within the ambit of protections at the workplace.

Another legislation which needs to be fundamentally re-conceptualised to account for LGBT+ persons and families is the Maternity Benefit Act, 1961 ('1961 Act'). At present, the 1961 Act only provides maternity benefit and maternity leave to cisgendered women who give birth, or adopt or rely on a surrogate to have a child (though differentiated)<sup>31</sup>, thus leaving LGBT+ families,<sup>32</sup> transgender persons, and men outside its ambit. By doing so the 1961 Act not

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<sup>28</sup> Sections 4 and 5, The Equal Remuneration Act, 1976.

<sup>29</sup> Section 6, The Equal Remuneration Act, 1976.

<sup>30</sup> For instance, in the present legal scenario, a gay man who is being denied recruitment on the basis of his sexual orientation has no statutory recourse available under the 1976 Act.

<sup>31</sup> The 2017 Act which amends the 1961 Act provides for 26 weeks of maternity leave to women who are giving birth, whereas a woman adopting a child or a woman using the services of a surrogate is entitled to 12 weeks of maternity leave.

<sup>32</sup> Sections 2(o), 4 and 5, The Maternity Benefit Act, 1961.

only invisibilises queer families and persons who may choose to have children but also propagates the sexist norm that women have the primary obligation of child-rearing and nurturing thereby contributing to systemic discrimination against women in the family space as well as the workplace.<sup>33</sup> A gender-neutral parental benefit legislation which accounts for the various forms of families outside the heteronormative unit is the need of the hour for the inclusion of LGBT+ families and to address the sexist biases reinforced by the existing maternity benefit legislation. An

interesting example in this regard is Sweden's law on parental leave known as the Föräldraledighetslag<sup>34</sup> or Parental Leave Act. This Act provides parental leave to both parents and includes same-gender parents and transgender parents within its ambit. Further, the Government of Sweden has now introduced a Bill in the Parliament proposing that a parent's cohabitee<sup>35</sup> must be accorded the same status as a parent in cases where they are not married to each other or do not have or have had children together, when it

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<sup>33</sup> While direct discrimination accounts for the pay gap and this largely holds true for India, another structural factor which contributes to the pay-gap is the "motherhood penalty". Statutorily guaranteed maternity leave (and not paternity leave) has the implication of only women bearing a disproportionate burden of child-rearing, while men continue to attend work with little disruption on account of parenthood. As a result, women suffer systemic disadvantage at workplaces in a culture where presence is deemed as intrinsic to productivity. Mandating parental leave wherein both parents are required to play a role in child-rearing may address this issue to a certain extent. *See*, Shalini Nair, 'The Gender Pay Gap', *The Economist* (December 9, 2017) available at <https://www.economist.com/international/2017/10/07/the-gender-pay-gap> (last accessed on November 9, 2018); Sarah Kliff, 'A stunning chart shows the true cause of the gender pay gap', *Vox* (February 19, 2018) available at <https://www.vox.com/2018/2/19/17018380/gender-wage-gap-childcare-penalty> (last accessed on November 9, 2018); 'Paid Family Leave Can Help Narrow the Gender Wage Gap', *The Economist* (October 7, 2017) available at <https://www.economist.com/international/2017/10/07/the-gender-pay-gap> (last accessed on November 9, 2018); Malavika Ravi, 'Is childbirth the only prerequisite? On The Maternity Benefit (Amendment) Bill, 2016', *Feminism in India* (October 26, 2016) available at <https://feminisminindia.com/2016/08/26/critical-analysis-maternity-benefit-bill-2016/> (last accessed on December 12, 2018).

<sup>34</sup> The Parental Leave Act, available at <https://www.government.se/4ac87f/contentassets/d163a42edcea4638aa112f0f6040202b/sfs-1995584-parental-leave-act> (last accessed on June 19, 2019).

<sup>35</sup> Sweden also has law regulating cohabitee relationships known as the Cohabitees Act which seeks to provide minimum protection for the weaker party when a cohabitee relationship ends. The Act defines cohabitees as "two persons who (1) Permanently live together, that is to say more than a short association, [or] (2) Live together as a couple, that is to say, a relationship where a joint sexual life normally forms part, [or] (3) Have a joint household, which means chores and expenses are shared." Ministry of Justice, Government of Sweden, 'Family Law: Information on Rules', available at <https://www.government.se/4a767e/contentassets/1e0263a0318e47b4b8515b535925941b/family-law.pdf> (last accessed on June 19, 2019).

comes to parental leave and benefits.<sup>36</sup> The intention behind this is to ensure that various family configurations (beyond the traditional family model) including rainbow or queer families are able to take advantage of parental leave and benefits.<sup>37</sup>

Finally, another law that requires attention in the context of workplace equality is the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('2013 Act'). The 2013 Act recognises only women as the aggrieved party thereby excluding transgender persons and precluding the possibility of LGBT+ persons as being subjects of sexual harassment. As discussed in the chapter on "Violence"<sup>38</sup> of this series, complete neutrality of workplace harassment laws may be considered as a potential way ahead to account for LGBT+ experiences at the workplace. At the consultation, however, the dangers of neutrality of workplace discrimination laws were discussed extensively. It was mentioned that gender neutrality of workplace harassment laws can potentially go against LGBT+ persons in light of rampant homophobia and transphobia being present at the workplace. This is because terms such as "unwelcome behaviour" and

"sexually coloured remarks" may be interpreted differently in cases of heterosexual and cisgender people, and non-heterosexual and non-cisgender people. It is thus necessary that a gender-neutral workplace harassment policy be accompanied by a strong anti-discrimination framework to prevent such a policy from being misused against LGBT+ persons.<sup>39</sup>

It is also important to point out here that while LGBT+ inclusive labour/employment laws may to a certain extent ensure formal inclusion of LGBT+ persons, at a structural level, organisations in both the public and private sector need to take steps to ensure workplaces are LGBT+ friendly. This can be done by: undertaking measures such as adopting a comprehensive anti-discrimination policy, providing equal benefits to non-heterosexual partners, supporting LGBT+ Employee Support Groups, providing leave for gender-confirming processes, and organising awareness and sensitisation programs. In the background of judgements such as *NALSA* and *Navtej Johar*, the Government, particularly the Ministry of Labour and Employment, can play an important role in ensuring this, at least in the public sector, through issuing a notification

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<sup>36</sup> Government Offices of Sweden, 'Equal Rights and Opportunities for LGBT persons in Sweden', available at <https://www.government.se/4a0326/contentassets/b9aa1c9ecc4d4cc6899409d75bcb1a70/equal-rights-and-opportunities-for-lgbt-persons-in-sweden.pdf> (last accessed on June 19, 2019).

<sup>37</sup> *Ibid.*

<sup>38</sup> The Chapter on "Violence" which is part of this series has a detailed discussion on the necessity of neutrality of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

<sup>39</sup> Consultation dated May 25, 2019 *see* Summary of Consultation.



requiring workplaces to take active steps to become LGBT+ friendly. Precedent to this effect exists in the form of the various directions and notices issued by the University Grants Commission requiring universities to take active steps to become transgender friendly post *NALSA*.<sup>40</sup>

Further, in addition to the reimagining the existing legislation, there is a pressing need to pay attention to labour reforms in the unorganised sector. The unorganised or informal sector in India accounts for an overwhelming proportion of the poor and vulnerable working population in India.<sup>41</sup> It is generally characterised by “lack of employment security (no protection against arbitrary dismissal), work security (no protection against accidents or illness at the workplace) and social security (no maternity or healthcare or pension benefits)”.<sup>42</sup> While the lack of protection and benefits renders the workforce in the unorganised sector vulnerable, some categories of workers including LGBT+ workers are particularly vulnerable on account of their identity. Within

the LGBT+ community, transgender persons are specifically targetted by laws such as anti-begging laws and the Immoral Traffic (Preventions) Act, 1956 Act. The High Court of Delhi in its landmark decision *Harsh Mander vs. Union of India*<sup>43</sup> (*Harsh Mander*) struck down several provisions of the Bombay Prevention of Begging Act (which was adopted by Delhi) as unconstitutional on the ground that they criminalised poverty. However, the 2018 Bill which was introduced post the *Harsh Mander* decision and which amended the Transgender Persons (Protection of Rights) Bill, 2016 (‘2016 Bill’) failed to delete the provision of the 2016 Bill that criminalised begging. Despite *Harsh Mander*, anti-begging laws continue to exist and operate in several other States across the country. Thus, in addition to modifying laws affecting the formal sector, there is a pressing need for extending statutory protections to workers in the unorganised sector, repealing anti-begging laws, and recognising rights of sex workers.

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<sup>40</sup> University Grants Commission, ‘D. No. 14-8/2014 (CPP-II)’, available at [https://www.ugc.ac.in/pdfnews/2234892\\_TG.pdf](https://www.ugc.ac.in/pdfnews/2234892_TG.pdf) (last accessed on November 15, 2018).

<sup>41</sup> National Commission for Enterprises in the Unorganised Sector, ‘Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector’, available at [https://www.prsindia.org/uploads/media/Unorganised%20Sector/bill150\\_20071123150\\_Condition\\_of\\_workers\\_sep\\_2007.pdf](https://www.prsindia.org/uploads/media/Unorganised%20Sector/bill150_20071123150_Condition_of_workers_sep_2007.pdf) (last accessed on May 14, 2019).

<sup>42</sup> *Ibid.*

<sup>43</sup> AIR 2018 Del 188.

# C. The need for a **Comprehensive** **Anti-** **Discrimination** **Law**

The issue of discrimination at the workplace brings us to the larger issue of discrimination on the basis of gender identity and sexual orientation in India. LGBT+ persons experience stigma, harassment and violence on a daily basis at the hands of various actors and across all sectors of life on a regular basis. While the Indian Penal Code, 1860 has provisions on hurt, grievous hurt and assault,<sup>44</sup> it provides

recourse only in cases of physical violence and being within the realm of criminal law it cannot address the systemic discrimination and exclusion faced by LGBT+ persons. LGBT+ persons are thus left with very little or no recourse when faced with discrimination.

At the core of anti-discrimination lies the right to equality. At present, guarantees of equality are contained in the Constitution of India,

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<sup>44</sup> You can read about gender neutral offences at Vidhi Centre for Legal Policy, 'The Law Isn't Straight: A Queer Person's Guide to Accessing Rights', available at <https://vidhilegalpolicy.in/reports/2018/2/12/the-law-isnt-straight-a-queer-persons-guide-to-accessing-rights> (last accessed on May 14, 2019).

specifically Articles 14 ('right to equality'), 15 ('prohibition of discrimination'), 16 ('equality of opportunity in public employment') and 17 ('abolishment of untouchability'), and are scattered across multiple laws such as: the Equal Remuneration Act, 1976, the Rights of Persons with Disabilities Act, 2016, the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, the Mental Healthcare Act, 2017, the HIV-AIDS (Prevention and Control) Act, 2017, etc. Each of these laws has a different approach to equality and covers different classes of persons. However, none of these laws recognise or address the intersectional nature of discrimination that individuals are subject to on account of multiple marginalised identities. As far as LGBT+ persons are concerned, the Mental Healthcare Act, 2017 is the only law that expressly prohibits discrimination in accessing mental healthcare treatment and services on the basis of sexual orientation and gender identity.<sup>45</sup> In light of judgements such as *NALSA* and *Navtej Johar* which have read "gender identity" and "sexual orientation" into "sex" in Article 15(1) of the Constitution, respectively, there is a strong legal justification for bringing these identities

within the ambit of anti-discrimination law. An attempt has been made in this regard in the form of the private member's bill, namely, the Anti-Discrimination and Equality Bill, 2016,<sup>46</sup> which was introduced in the Lok Sabha by Congress MP Shashi Tharoor in March 2017. Other private efforts towards arriving at an anti-discrimination framework include the Centre for Law and Policy Research's draft equality law titled *The Equality Bill, 2019*.<sup>47</sup>

It was recommended at the consultation that perhaps an anti-discrimination framework could be one of the major common goals of the LGBT+ movement in India.<sup>48</sup> While there is ongoing debate and discussion about the form that an anti-discrimination law may take, there is no doubt that for LGBT+ persons, introducing an anti-discrimination framework is the need of the hour. At the consultation, it was hoped that the framing of such legislation is rooted in an intersectional LGBT+ movement, and care is taken with respect to those who are involved in taking the policy calls vis-à-vis such a Bill, and who its intended beneficiaries are. This is necessary to ensure that marginalised voices are not

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<sup>45</sup> Section 18(2), The Mental Healthcare Act, 2017.

<sup>46</sup> The Anti-Discrimination and Equality Bill, 2016, available at <http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/2991.pdf> (last accessed on November 9, 2018).

<sup>47</sup> Centre for Law and Policy Research, 'The Equality Bill, 2019', available at <https://clpr.org.in/wp-content/uploads/2019/06/Equality-Bill-2019-4.pdf> (last accessed on June 19, 2019).

<sup>48</sup> Consultation dated May 25, 2019 *see* Summary of Consultation.

invisibilised or sabotaged in this process and such a Bill effectively represents and caters to those who are affected by systemic discrimination in the country.

# Issues for Consideration

- Employment laws particularly workplace discrimination laws and maternity benefit laws, fail to account for LGBT+ persons, and families, respectively. These laws need to be radically reimagined to become LGBT+ inclusive.
- The Equal Remuneration Act, 1976 may be rethought and an inclusive workplace discrimination law which prohibits discrimination on the basis of various identities (sex, gender identity, sexual orientation, disability, caste, ethnicity, etc.) and captures the various forms of direct and indirect discrimination (beyond recruitment and pay) may be introduced.
- Any future legislation on transgender rights must comply with the *NALSA* judgment, and provide reservations for transgender persons in public education and employment.
- LGBT+ persons, specifically transgender persons are particularly vulnerable in the unorganised/informal sector given the lack of legal protections in the sector. There is thus a need to introduce labour reforms in the unorganised sector such that rights of workers in the sector are recognised and protected. Further, laws that criminalise begging must be repealed in light of the High Court of Delhi's decision in Harsh Mander, and rights of sex workers recognised and protected.
- While complete neutrality of workplace harassment laws has the potential to bring LGBT+ persons within its ambit, it can also work against the interests of LGBT+ persons if a strong anti-discrimination framework does not supplement it. An anti-discrimination framework is necessary to ensure that LGBT+ persons are not targeted under workplace harassment laws on the basis of prejudiced stereotypes rooted in homophobia and transphobia.
- Workplaces, in both the public and private sector, must introduce anti-discrimination policies and undertake positive measures to become LGBT+ inclusive. Such positive measures could

include: providing leave for gender-affirming therapy, skill building for LGBT+ persons, gender-neutral bathrooms, etc.

- A comprehensive anti-discrimination law is the need of the hour. The contours of such a law must be carefully debated and discussed to ensure that it adequately protects all marginalised identities from various direct and indirect forms of discrimination. Marginalised voices must be at the forefront of the process of shaping this law.

# Summary of Consultation

The issues discussed at the consultation are arranged thematically.

- **Reservations**
  - *NALSA's* direction that transgender persons be treated as a Socially and Economically Backward Classes ('SEBC') for the purpose of reservation disadvantages transgender persons who belong to the Scheduled Castes/Scheduled Tribe ('SC/ST') category.
  - Horizontal reservations cutting across vertical reservations that exist on the basis of caste identity would be ideal since transgender persons belonging to the SC/ST category will not have to give up their caste status while accessing reservations.
- **Access to Employment**
  - While amending employment laws to account for LGBT+ persons is important, there is a pressing need to first address the issue of access to employment.
    - Corporates and workplaces in the organised sector need to become LGBT+ inclusive in both principle and practice.
    - In the unorganised sector, self-employment may be promoted in a constructive and sustainable manner. Models such as SEWA and Start-Up India may be explored for this purpose.
    - Skill developing initiatives for LGBT+ persons, particularly transgender persons is the need of the hour.
- **Sexual Harassment at the Workplace**

- Gender neutrality of workplace harassment laws can potentially go against LGBT+ persons in light of rampant homophobia and transphobia being present at the workplace. It is thus very important that we are cognisant of how power operates before pushing for gender neutrality.
- Categories such as “unwelcome behaviour” and “sexually coloured remarks” may be interpreted differently in cases of heterosexual and cisgender people, and non-heterosexual and non-cisgender people. It is necessary that a gender-neutral sexual harassment policy be accompanied by a strong anti-discrimination framework to prevent such a policy from being misused against LGBT+ persons.
- Workplace harassment laws can also be potentially used to clamp down on sex-positivity at the workplace. Thus a queer perspective on workplace harassment must also account for sex positivity.
- **Anti-Discrimination Legislation**
  - Need to think of anti-discrimination legislation not as a project-specific exercise, as has been the case till date, but a movement specific one.
  - Pushing for an anti-discrimination legislation could be the next major unifying factor for the movement. However, the movement needs to also go beyond the law.
  - While discussing a potential anti-discrimination framework, we also need to be cognisant of the potential harms that may arise from such a framework. This is specifically important in light of the attack on reservations. Further, there is a need to be cognisant of who is designing such a framework and who its intended beneficiaries are.
  - **Other Laws**
    - In addition to reforming employment laws, there is a need to address inclusion in other laws to ensure that the workplace is truly inclusive for LGBT+ persons. These include: insurance laws, real estate laws, privacy laws, social security laws, etc.
    - Penalties under labour laws are abysmally low and thus fail to operate as a deterrent. While



heavy penalty is not the key to enforcement, there is a need to revisit penalties under such laws such that they have a deterring effect.

- **Way Ahead**

- There is a need to identify the next big issues post Section 377 for the LGBT+ movement.
- Intersectionality and communication between different communities is key to the future of the movement. There is a pressing need to break

out of silos and learn from the mistakes of the past movement(s).

- Need to think holistically about a development model for the queer community which includes various facets including education and employment.
- As resources are scarce, there is a need to identify new sources (such as CSR funding, etc.), and work towards mobilising the community across the country so conversations about the way ahead can happen at a national level.

# Queering the



Please direct all correspondence to:  
Akshat Agarwal  
Vidhi Centre for Legal Policy,  
D-359, Defence Colony, New Delhi – 110024.  
Phone: 011-43102767/ 43831699  
Email: [akshat.agarwal@vidhilegalpolicy.in](mailto:akshat.agarwal@vidhilegalpolicy.in)  
[vcpl@vidhilegalpolicy.in](mailto:vcpl@vidhilegalpolicy.in)