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

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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 first two chapters of "Queering the law: Making Indian Laws LGBT+ inclusive" i.e. "Identity" and "Violence". The consultation took place on the 13th of April, 2019 and was attended by: Amrita Sarkar, Danish Sheikh, Anindya Hajra, Maitreyi Gupta, Prabha Nagaraja, Sowmya T, Rudrani Chettri, Deepak Kumar Kulshresth, Rihana, Vikramaditya Sahai, Sunil, Minakshi Sanyal, Simran Shaikh, Bittu Kondaiah, Sarim Naved, Ajita Banerjie, Elina, Renu Arya, Saumya Maheshwari, Ramkali, Dhruvo Jyoti, Aditi Mukherji, Aishwarya Ayushmaan, and Priya. 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 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 same.

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Queering the La



Law: Making Indian Laws LGBT+ Inclusive

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A. Introduction:

Need for LGBT+ Inclusion in Criminal Law

Laws dealing with violence have a sharp impact on the lives of LGBT+ people in India. It is possible to identify two cardinal problems with these laws. First, substantive laws may not account for the LGBT+ community. This creates barriers in accessing such provisions. Second, prevalent discriminatory patterns lead to the well-documented persecution that they face at the hands of law enforcement agencies.¹ Since this report deals with the relationship between legal text and the LGBT+ identity, it limits its focus to the former problem. However, as emphasised in the Consultation on the draft report, the life of the law is equally significant and true inclusion would

imply that LGBT+ people are not discriminated against not only in the text of the law but also in their day-to-day negotiations with it.²

The invisibilisation of LGBT+ persons in substantive criminal law occurs at two levels. *First*, the operation of such laws in the male-female binary does not take into account the transgender identity, thereby creating a barrier for transgender persons from accessing such provisions. *Second*, the operation of criminal laws on heteronormative assumptions does not recognise same-sex relationships or non-heterosexual sexual orientations, thereby limiting the operation of such provisions to sexual acts in the male-female binary. Criminal law provisions such as rape

¹ See “Unnatural Offences” Obstacles to Justice in India Based on Sexual Orientation and Gender Identity, International Commission of Jurists (2017) available at <https://www.icj.org/wp-content/uploads/2017/02/India-SOGI-report-Publications-Reports-Thematic-report-2017-ENG.pdf> (Last accessed on 8 November 2018).

² Consultation dated 13 April 2019, *see* Summary of Consultation.

(Section 375 of the Indian Penal Code, 1860 ('IPC')) exclude LGBT+ persons at both levels. By operating in the male-female binary it fails to account for the transgender identity and by only accounting for heterosexual conduct it fails to include alternative sexual experiences.

Prior to the Supreme Court's judgement in *Navtej Johar vs. Union of India*³ ('*Navtej Johar*'), same-sex relationships were criminalised which implied that criminal laws, such as laws dealing with sexual violence, were constrained from recognizing such sexual activity. Post-decriminalisation and the recognition of equal constitutional rights in both *National Legal Services Authority of India vs. Union Of India*⁴ ('*NALSA*') and *Navtej Johar*, such provisions need to be reconsidered. This is essential to account for the lived experiences of LGBT+ persons who, while being at the receiving end of violence, are unable to access the protection provided by criminal law due to its gendered nature. Recently, the question of whether a transwoman could initiate criminal proceedings for sexual harassment under Section 354-A of the IPC came up before the High Court of Delhi. While ultimately the petition was not pressed since the police agreed to register a First Information Report ('FIR') to initiate a criminal investigation,⁵ the case pointed to the need to account for identities outside the binary in criminal law provisions.

While the need for LGBT+ inclusion in criminal law is clear, the path such reforms should take is not. In the past, as is explored later, proposals for neutrality of the victim as well as the perpetrator in such provisions have met with criticism. Further, any such reform would have to account for the continuing spectre of Section 377, which even after having been read down by the Supreme Court in *Navtej Johar*, continues to remain on the statute book.

Before outlining contours of what possible reforms could look like, it is however important to recognise the complexity of existing criminal law, that includes substantive as well as procedural provisions. Further, having been enacted in specific socio-historical contexts, these laws do not account for the life experiences of LGBT+ persons. In the Consultation, it was highlighted how criminal law reform should proceed on the basis of identifying a theory of power which accounts for dynamics of violence outside the male-female binary. This is essential if violence is contextualised in a societal setting as opposed to just being understood as a violation of the autonomy of an individual.⁶ For instance, legislations such as the Schedules Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 account for the historical context of violence. Further, participants in the Consultation emphasized the need for greater empirical work

³ *Navtej Johar*, WP (Crl.) No.76/2016.

⁴ *NALSA*, Writ Petition (Civil) No.400 of 2012.

⁵ Order dated 17 December 2018 in *Anamika v. Union of India*, W.P. (Crl) 2537/2018 (High Court of Delhi).

⁶ Consultation dated 13 April 2019, *see* Summary of Consultation.

on the kinds of violence faced by the LGBT+ community before finalising policy choices.

In the first part, this chapter undertakes a survey of existing criminal laws to recognise their complexity and highlights several issues that may have to be considered in thinking about LGBT+ inclusion. It also identifies provisions that are detached from the life-experiences of LGBT+ persons. In the second part, this chapter defines the contours of a way forward in thinking about reforming the existing criminal laws. It does so by engaging with debates on gender neutrality, dealing with what remains of Section 377 of the IPC and neutrality in workplace harassment laws. The suggested way forward is by no means exhaustive for the purposes of reform, but only highlights ways of dealing with certain specific issues.

B. Recognising the Complexity of Existing Criminal Laws

Presently, provisions of the IPC comprise the primary code on criminal law in India. Sections broadly dealing with offences of a sexual nature have either been categorised as offences dealing with assault or specifically as sexual offences. The former includes provisions on ‘Assault or criminal force to woman with intent to outrage her modesty’⁷, ‘Sexual harassment and punishment for sexual harassment’⁸, ‘Assault or use of criminal force to woman with intent to disrobe’⁹, ‘Voyeurism’¹⁰, ‘Stalking’¹¹ while the category of sexual offences includes ‘Rape’¹² and related provisions such as ‘Gang rape’.¹³ Currently, all

these provisions operate in the male-female binary and assume sexual acts in the same binary as well.

Apart from substantive provisions of the IPC, provisions in the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 detail the various procedural and evidentiary aspects that are closely associated with the operation of criminal law. For instance, Section 157 of the Code of Criminal Procedure, 1973 lays down a detailed procedure for investigation for an offence of rape. Requirements such as ensuring that the statement

⁷ Section 354, Indian Penal Code, 1860.

⁸ Section 354-A, Indian Penal Code, 1860.

⁹ Section 354-B, Indian Penal Code, 1860.

¹⁰ Section 354-C, Indian Penal Code, 1860.

¹¹ Section 354-D, Indian Penal Code, 1860.

¹² Section 375, Indian Penal Code, 1860.

¹³ Section 376-D, Indian Penal Code, 1860.

of the victim, as far as practicable, shall be recorded by a woman police officer indicate how the provision assumes the victim to be female in all instances. Section 114A of the Indian Evidence Act, 1872 creates a presumption of lack of consent by a victim of rape when she asserts that she did not consent to the sexual intercourse. Thus, thinking about substantive criminal law reform to ensure inclusion of LGBT+ persons cannot be in isolation and must account for procedural laws that are intrinsically linked to substantive laws. Annexure 'A' to this report details both these set of provisions.

Further, many of these provisions apart from operating in the male-female binary are substantively gendered as well. Thus, the acts that are criminalised are informed by gendered assumptions. Illustratively, Section 375 of the IPC which deals with rape is based on the idea of penetration that excludes non-penetrative forms of sexual activity that could be forced and violate bodily autonomy. In addition, provisions such as *Fourthly* of Section 375 deal with a situation when rape is presumed even when it is with the consent of the woman if the man knows that he is not her husband but she believes herself to be lawfully married to him.

In the context of procedural provisions, higher degree of procedural protections such as ensuring

that statements of the victim are recorded in the presence of a female police officer have been provided to grant greater protection to women. If substantive provisions account for genders other than female, then it follows that such procedural protections will have to be suitably amended as well. Similarly, the evidentiary presumption in Section 114A of the Indian Evidence Act, 1872 accounts for both the patriarchal power relations that continue to operate and influence the functioning of courts and women's experience in rape trials.¹⁴ Merely extending such a provision to victims who are not female without developing an adequate theory of why such a presumption should be extended may lead to unexpected outcomes. Thus if the provisions on rape were to be made victim neutral, then in cases where the victim is male a situation could arise where both the victim and the perpetrator could utilise the presumption.

In the context of violence at the workplace, provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ('POSH') are applicable. POSH also only recognizes women as victims of such harassment.

Several other legal provisions such as 'Assault or criminal force to woman with intent to outrage

¹⁴ Section 114-A, Indian Evidence Act, 1872 was enacted after the infamous Mathura case which led several reforms in rape law. It was further amended by the Criminal Law (Amendment) Act, 2013 which were enacted after the infamous Nirbhaya case.

her modesty'¹⁵, 'Word, gesture or act intended to insult the modesty of a woman'¹⁶ and 'Cruelty'¹⁷ of the IPC and provisions in civil-criminal laws such as the Protection of Women from Domestic Violence Act, 2005 specifically deal with the lived-experiences of violence of the victims they seek to protect. However, having been enacted in a specific historical and socio-cultural context¹⁸ they are not amenable to easy translation into the life-experiences of LGBT+ persons. Thus, while preparing a list of criminal law provisions in Annexure 'A', such provisions have not been included. However, in the Consultation, participants also pointed to additional IPC provisions such as 'hurt' and 'grievous hurt' which can be creatively interpreted by members of the LGBT+ community in situations of violence.¹⁹ Further, issues like intimate partner violence and sexual assault are also equally significant, however legal interventions will have to be appropriately tailored to respond to the life-experiences of the LGBT+ persons in India since the dynamics of power in LGBT+ relationships may be

substantially different from the traditional heteronormative unit.

Approaches such as those adopted by the Committee on Amendments to Criminal Law led by Justice Verma, which suggested the repeal of the existing Sections 354 and 509 by replacing them with a new Section 354 that defines sexual assault in a gender neutral manner can be instructive.²⁰ The new Section 354 suggested by the Justice Verma Committee accounts for all non-penetrative acts of a sexual nature that attempt to account for the life experiences of LGBT+ persons as well.

¹⁵ Section 354, Indian Penal Code, 1860.

¹⁶ Section 509, Indian Penal Code, 1860.

¹⁷ Section 498A, Indian Penal Code, 1860.

¹⁸ For instance, the Protection of Women from Domestic Violence Act, 2005 was enacted due to consistent efforts by the Indian Women's movement and provisions in the Act specifically account for the life experiences of women. See Indira Jaising, *Concern for the Dead, Condemnation for the Living*, 49(30) *Economic and Political Weekly* (2014) and Indira Jaising, *Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence*, 46(44) *Economic and Political Weekly* (2009).

¹⁹ Consultation dated 13 April 2019, *see* Summary of Consultation.

²⁰ Sexual Assault has been defined as,

"(1) The following acts shall constitute the offence of sexual assault:- (a) Intentional touching of another person when such act of touching is of a sexual nature and is without the recipient's consent; (b) Using words, acts or gestures towards or in the presence of another person which create an unwelcome threat of a sexual nature or result in an unwelcome advance." See Committee on Amendments to Criminal Law led by Justice Verma at p. 436 (2013).

C. **Contours** of a Way Forward

(i) **Gender Neutrality** in Rape and other Gendered Criminal **Law**

Currently, most provisions in the criminal law context operate in the male-female binary. Thus inclusion of other identities such as transgender and recognition of non-heteronormative relationships automatically raises the larger question of gender neutrality. There has been a

spirited debate regarding making criminal law provisions such as rape, gender neutral in Indian law.²¹ The 172nd Law Commission Report first recommended complete neutrality in terms of both the perpetrator and the victim and introduced the new offence of sexual assault.²² These recommendations however met with stringent criticism from the women's movement.

²¹ Sonakshi Awasthi, Is India ready for gender-neutral Laws?, The Indian Express (18 October 2017) available at <https://indianexpress.com/article/india/is-india-ready-for-gender-neutral-laws-4895122/> (Last accessed on 10 November 2018); Also, see Cabinet nod to make rape gender neutral rile women's groups, The Times of India (20 July 2012) available at <https://timesofindia.indiatimes.com/india/Activists-oppose-making-rape-gender-neutral/articleshow/15049606.cms> (Last accessed on 10 November 2018).

²² Recommendations of the 172nd Law Commission Report. As on date provisions in the Indian Penal Code, 1860 require a female victim and a male perpetrator. The 172nd Law Commission report had however recommended the replacement of the existing rape provision by a gender-neutral provision on sexual assault.

Flavia Agnes argued that rape had to be viewed as, “a means through which the social hierarchy of power relationships is maintained and nurtured in a gendered society”.²³ According to her, thus divorcing rape from the reality of Indian social existence ignores how the discourse on sexual offences in India had never focused on the woman as the perpetrator. Rather, the focus has always been on expression of aggressive male sexuality both within and outside the home, and violations by the state in custodial situations. Thus, the shift recommended by the Law Commission was sudden and ignored social context. She argued that in fact a gender neutral rape law would only exacerbate the vulnerable position of women in society.²⁴

While the 172nd Law Commission’s recommendations were never implemented, debates regarding gender neutrality resurfaced after the Justice Verma Committee was constituted to respond to the call for criminal law reform post the infamous Nirbhaya Case. The Justice Verma Committee recommended neutrality for victims of rape.²⁵ It however explicitly rejected the idea of replacing the offence of rape with the offence of sexual assault due to

the idea of moral condemnation that was already associated with the offence.²⁶ The Justice Verma Committee felt that introducing the word ‘sexual assault’ would dilute the political and social commitment of protecting the rights of women.²⁷ Therefore, while introducing a victim-neutral rape provision for all sexual penetrative acts, it also introduced a victim-neutral sexual assault provision for all non-penetrative sexual acts.

The Justice Verma Committee considered the realities of sexual violence against transgender, intersex persons and men in recommending neutrality from the perspective of the victim. In this context Narrain²⁸ has argued that sexual intercourse without consent is not only a crime that constitutes a sex act but is also a crime of violation of bodily integrity which leads to the causing of grave physical harm. Thus, rape is as much a tool of sexual humiliation as well as a tool of sexual assault capable of being perpetrated against any vulnerable minority. Narrain points out that those who violate societal norms of gender identity and the normative understandings of what it means to be a man or a woman could especially be subjected to sexual violence. Sexual violence against both transgenders²⁹ as well as

²³ Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, *Economic and Political Weekly* (2002).

²⁴ *Id.*

²⁵ The Nirbhaya Rape Case that Rocked India, NDTV available at <<https://www.ndtv.com/india-news/the-nirbhaya-rape-case-that-rocked-india-1880338>> (Last accessed on 10 November 2018); Report of the Committee on Amendments to Criminal Law, available at <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (Last accessed on 10 November 2018) [Hereinafter, ‘Justice Verma Committee’].

²⁶ Committee on Amendments to Criminal Law led by Justice Verma at p. 111 (2013).

²⁷ Committee on Amendments to Criminal Law led by Justice Verma at p. 111 (2013).

²⁸ Arvind Narrain, *Violation of Bodily Integrity: The Delhi Rape Case Among Others*, 48(11) *Economic and Political Weekly* (2013).

²⁹ People’s Union for Civil Liberties Karnataka, *Human Rights Violations Against the Transgender*

men³⁰ has been documented in India. The Justice Verma Committee's suggestions with regard to gender neutrality however were not implemented in the final Criminal Laws (Amendment) Act, 2013 which was enacted by Parliament. This was however in line with submissions from feminist organisations to the Justice Verma Committee, who felt that in India sexual violence occurred in the context of gender power relations which predominantly constitutes male violence against women.³¹

While gender neutrality for both the perpetrator and the victim has been vehemently opposed both on ground of not accurately representing social realities as well as on grounds of there being a potential threat of counterclaims, there seems to be greater consensus on gender neutrality for the victim.³² This view is also in line with the recommendations of the Justice Verma Committee. Some commentators have also suggested the inclusion of specific identities such

as transgender and intersex instead of absolute neutrality.³³ This is indicative of the highly contested nature of these debates in India. However, post decriminalisation of consensual same-sex relations the need for a criminal law response to non-consensual sexual violence, considering the reality of such violence, outside the male-female binary, has become even more pressing. While Section 377 could theoretically be used to cover such acts, the same would be deeply problematic for the reasons mentioned in the next section.

Therefore, in light of the realities of sexual violence, a potential way-forward could be the neutrality of the victim for the offence of rape and for related provisions of sexual violence. Further, in line with the recommendations of the Justice Verma Committee, introduction of a victim-neutral provision that deals with non-penetrative acts of sexual violence could also be considered. Such an approach would recognize LGBT+

Community, 2003, pp 29, 37 and 40 available at <http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html> (Last accessed on 10 November 2018).

³⁰ Why perpetrators can walk free after assaulting transgender or gay men in India, The News Minute (9 November 2015) available at <https://www.thenewsminute.com/article/why-perpetrators-can-walk-free-after-assaulting-transgender-or-gay-men-india-35830> (Last accessed on 10 November 2018); Shivam Vij, Section 377 must go but who will speak for the men raped in India? Asia Times (24 January 2018) available at <http://www.atimes.com/article/india-section-377-male-rape/> (Last accessed on 10 November 2018); "My Partner was Gang-Raped, We couldn't tell the Cops; A Gay Man's Story, NDTV (7 September 2018) available at <https://www.ndtv.com/india-news/section-377-verdict-what-dad-told-me-on-phone-after-377-verdict-a-gay-mans-story-1912955> (Last accessed on 10 November 2018); Gay Men in India reveal Terrifying Tales of Rapes and Extortion on Dating App Grindr, News18 (27 September 2018) available at <https://www.news18.com/news/buzz/gay-men-in-india-reveal-terrifying-tales-of-rapes-and-extortion-on-dating-app-grindr-1884845.html> (Last accessed on 10 November 2018).

³¹ For instance, see Submission to the Committee headed by Justice J.S. Verma on Amendment of Laws Relating to Rape and Sexual Assault by Partners for Law in Development (5 January 2013) available at <http://pldindia.org/wp-content/uploads/2013/04/Submission--PLD-to-Justice-Verma-Committee.pdf> (Last accessed on 23 January 2019).

³² Harshad Pathak, Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law, 11 Asian Journal of Comparative Law (2016).

³³ Sonakshi Awasthi, Is India ready for gender-neutral Laws?, The Indian Express (18 October 2017) available at <https://indianexpress.com/article/india/is-india-ready-for-gender-neutral-laws-4895122/> (Last accessed on 10 November 2018).

people's right to sexual autonomy and choice and also obviate concerns of the use of a dated provision like Section 377 in instances of sexual violence. Neutrality of the perpetrator is however a more complex issue and would require further research to be undertaken before being considered. As pointed out in the Consultation, it is however important to remember that neutrality cannot be the only answer to LGBT+ inclusion in the law and much more needs to be done in order to make access to justice a reality.³⁴ This requires measures such as greater legal education, sensitisation of law enforcement authorities etc.

(ii) **Dealing with what is left of** **Section 377**

A complication arising out of *Navtej Johar's* reading down of Section 377 by excluding consensual same-sex relationship between adults is that the provision continues to apply to non-consensual acts between adults.³⁵ A possible interpretation could thus be that post *Navtej*

Johar, Section 377 could still be used as a proxy for the provisions on rape and sexual violence for non-consensual sexual acts where the perpetrator-victim fall outside the male -female binary. The use of Section 377 in such instances may however be deeply problematic because:

³⁴ Consultation dated 13 April 2019, *see* Summary of Consultation.

³⁵ Para 21 (iii), *Malhotra J., Navtej Johar v. Union of India* (2018) 10 SCC 1.

(i) Section 377 is a colonial provision which classifies sexual acts on the basis of whether they are against the order of nature or not. The phrase is extremely vague and therefore arbitrary in its application. Case-law in the past has interpreted “against the order of nature” as implying procreational sex³⁶ which excludes from within its purview several intimacies especially those in non-heteronormative relationships. Therefore, utilising such a vaguely worded provisions for sexual violence that requires clear definitions is inadvisable.

(ii) The historical context of Section 377 as encompassing a Judeo-Christian outlook and Victorian morality is at odds with constitutional morality envisaged under our Constitution. This makes the continued operation of such a provision in the penal code unsuitable. Further, in recent years the provision has become the rallying point of India’s queer movement and has been widely perceived as a tool of oppression. Therefore, its use as a tool by victims of sexual violence does not fit the historical context in which law and society perceive Section 377.

(iii) The language of the provision does not distinguish between the perpetrator and the victim

since Section 377 was never intended to be used against sexual violence. In fact, prior to *Navtej Johar’s* reading down of the provision, consent was irrelevant to the application of the provision. Therefore, any intended use of Section 377 for non-consensual sexual conduct by survivors of sexual violence is bound to lead to problems of clarity in application.

In view of the above, Section 377’s use for sexual violence by adults falling outside the male-female binary is likely to lead to problems of interpretation and is not advisable considering the historical context of the provision. Therefore, the provision could be repealed since the enactment of victim-neutral rape law would obviate any need for it on the statute book. Other aspects of Section 377 such as sexual offences against children are already covered under Protection of Children from Sexual Offences Act, 2012, thereby making Section 377 redundant in that regard. The only offence left under Section 377 would then be bestiality, which, in accordance with demands of organisations such as the People for the Ethical Treatment of Animals (PETA),³⁷ can be introduced as an offence under the Prevention of Cruelty to Animals Act, 1960 which would be a more suitable legislation for housing such an offence.

³⁶ *Khanu v. Emperor*, AIR 1925 (Sind).

³⁷ ‘Include Bestiality as offence under law against Animal Cruelty’ PETA India tells Centre’, Scroll (1 August 2018) available at <https://scroll.in/latest/888856/include-bestiality-as-offence-under-law-against-animal-cruelty-peta-india-tells-centre> (Last accessed on 10 November 2018).

(iii) **Neutrality of Workplace**

Sexual Harassment Laws

In India, instances of workplace sexual harassment are dealt by the POSH. Provisions in the Act, however, only recognize the complainant to be an “aggrieved woman” under Section 2(a), thereby excluding transgender persons and precluding the possibility of LGBT+ persons being subjects of workplace sexual harassment.

Post *NALSA* and *Navtej Johar*, the inclusion of these marginalised experiences has become imperative. In fact, the existing University Grants Commission (Prevention, prohibition and redressal of sexual harassment of women and employees and students in higher educational institutions) Regulations made in 2015 make it incumbent upon higher educational institutions to “act decisively against all gender based violence perpetrated against employees and students of all sexes recognising that primarily women employees and students and some male students and students of the third gender are vulnerable to many forms of sexual harassment and humiliation and exploitation.”³⁸ Therefore, while there has been implicit recognition of sexual harassment outside the male-female binary, the procedure under

POSH may need amendments to provide for appropriate procedure that apply across workplaces and are not restricted to Universities.

The position under POSH, which is essentially a civil law, is fundamentally distinct from criminal laws. This is due to the broad ambit of actions/behaviour that constitute sexual harassment under it, the relatively low threshold for proving that sexual harassment actually occurred and the nature of remedies/punishments that exist under it.³⁹ Even currently, under POSH while the victim can only be a woman, the accused can be either male or female. Due to these distinctions in the legal framework, objections to neutrality under criminal laws may not equally apply to procedures under POSH. Moreover, it must be noted that even now many organisations observe completely gender neutral sexual harassment policies since POSH does not restrict them from affording protection to employees of all genders. Amending the Act would ensure that such protection has a statutory basis. However, in the Consultation on the chapter on Employment it was pointed out that complete neutrality in workplace harassment laws should also be

³⁸ Regulation 3(d), University Grants Commission (Prevention, prohibition and redressal of sexual harassment of women and employees and students in higher educational institutions) Regulations, 2015.

³⁹ For an easily accessible guide to the legal framework under POSH, see Sexual Harassment at the Workplace, Nyaaya: Indian Laws Explained, available at <https://nyaaya.in/topic/sexual-harassment-at-the-workplace/victims-recognized-by-the-law> (Last accessed on 23 February 2019).

accompanied by a comprehensive anti-discrimination law.

Issues for Consideration

- Post decriminalisation of same-sex relationships, the inclusion of LGBT+ persons in criminal laws has become imperative. Such inclusion will not only account for their experiences of violence but also further their rights under the Indian Constitution.
- Recognising the complexity of criminal laws in terms of both substantive and procedural laws must be the starting point before undertaking any reform.
- Contours of a way-forward could include victim neutrality in sexual offences, the repeal of Section 377 of the IPC and introduction of complete neutrality in workplace harassment laws.
- There is also a need to develop a theory of power to explain violence against LGBT+ persons. This includes both acts of violence committed against the community and incidences of violence within the community. This theory should further inform law reform.
- Further, there are limits to inclusion through substantive law reform and it

must be recognised that there is need for greater legal education, sensitization etc., to ultimately tackle the lived experiences of violence.

- It should, however, be recognised that such an exercise of inclusion will be complex since it will require re-thinking many of the existing substantive assumptions. Any conversation forward must account for views of the community, legal practitioners and academics.

Summary of Consultation

The issues discussed at the consultation have been arranged thematically:

Need for Empirical Evidence to inform Policy

- Empirical evidence is required regarding forms of violence in LGBT+ relationships. This should inform further law reform and policy especially with regard to making legislations such as the Protection of Women from Domestic Violence Act, 2005 inclusive of all identities and experiences. Substantive content of core criminal offences such as those in the Indian Penal Code, 1860 should also be informed by such empirical evidence.
- Before suggesting neutrality, it may be important to understand how criminal procedures such as the taking of statements, currently work in practice.

Need for Legal Education and focus on the Social life of the Law

- Till law reform occurs existing criminal law provisions such as 'hurt' and 'grievous hurt' may be creatively interpreted to cover situations of violence.

- While negotiating the criminal justice system there is need for greater legal awareness and education. Further, there is a need for greater accountability of the police, law enforcement and lawyers. In the short term community organisations, activists etc., have a pivotal role to play in creating awareness and enforcing rights. In this process, the law enforcement at the ground level, i.e. local police and lower courts are important to engage with. Further, in this process, India's unique socio-cultural context (for instance, the historical context of the transgender identity in India) must be accounted for.
- Queering the law in the long term also has to go beyond provisions of substantive law and needs to account for behavioural attitudes of law enforcement. Even currently, activists face the dilemma of being third parties in negotiating the law since often a conversation about an individual case of violence becomes one between the police and the family of the survivor. Access to justice thus goes beyond the text of the law.
- Neutrality in provisions may thus not be the answer to making laws inclusive since inclusiveness of laws needs to be a larger

conversation that accounts for the social dimension of people's lives.

- Need for larger discussions on violence in the social life of the law. Social perceptions of LGBT+ persons inform the law's perception of them as well. Larger public discussions on LGBT+ issues to influence public perceptions and attitudes.
- Personal stories of violence should be considered while thinking about law reform.

Better understanding of the nature of 'Violence'

- In the process of thinking about law reform, violence within the community also needs to be accounted for. This may be a very immediate concern.
- At the same time, it is important to understand that some of these offences (for instance, the offence of rape) are not merely physical acts but also attacks on the 'honour' of weaker identities. By including new identities (for instance,

men) how will the historical context of such acts translate?

- Post *Navtej Johar*, there has been a spite in instances of violence and also of people wanting to come out of forced marriages. Often violence is perpetrated by the family. This often leads to suicide when there is lack of support and timely crisis intervention.
- There is a need for formulating a theory of power (as exists for violence against cis-women) to account for the various ways in which violence may be committed against members of the LGBT+ community (example, prevalence of transphobia as opposed to sexism). For instance, where in the hierarchy of power will trans-men be when compared to cis-women. However, a note of caution should be that it may not be appropriate to create hierarchies of violence.
- There is also a need to account for violence committed against communities as such, as opposed to the commission of violence against individuals.

Annexure ‘A’

The table reproduces the legal provisions in criminal law that continue to operate in the male-female binary and are therefore LGBT-exclusionary. Gendered language in the provisions, wherever necessary, has been italicised for ease of reference.

S. No.	Name of Law	Relevant Provision	Relevant Ministry
1.	Indian Penal Code, 1860	Section 8 Gender -The pronoun “ <i>he</i> ” and its derivatives are used of any person, whether <i>male</i> or <i>female</i> .	Ministry of Law and Justice
		Section 10 - “ <i>Man</i> ”, “ <i>Woman</i> ”.- The word “ <i>man</i> ” denotes a <i>male</i> human being of any age; the word “ <i>woman</i> ” denotes a <i>female</i> human being of any age.	Ministry of Law and Justice
		Section 354 A. – Sexual harassment and punishment for sexual harassment.— (1) A <i>man</i> committing any of the following acts— (i) physical contact and advances involving unwelcome and explicit sexual overtures; or (ii) a demand or request for sexual favours; or (iii) showing pornography against the will of a <i>woman</i> ; or (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment. (2) Any <i>man</i> who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both. (3) Any <i>man</i> who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.	Ministry of Law and Justice
		Section 354D. - Stalking. —	Ministry of Law

	<p>(1) Any <i>man</i> who—</p> <p>(i) follows a <i>woman</i> and contacts, or attempts, to contact such <i>woman</i> to foster personal interaction repeatedly despite a clear indication of disinterest by such <i>woman</i>; or</p> <p>(ii) monitors the use by a <i>woman</i> of the internet, email or any other form of electronic communication, commits the offence of stalking;</p> <p>Provided that such conduct shall not amount to stalking if the <i>man</i> who pursued it proves that—</p> <p>(i) it was pursued for the purpose of preventing or detecting crime and the <i>man</i> accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or</p> <p>(ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or</p> <p>(iii) in the particular circumstances such conduct was reasonable and justified.</p> <p>(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.</p>	and Justice
	<p>Section 375.- Rape. —</p> <p>A <i>man</i> is said to commit "rape" if he—</p> <p>(a) penetrates <i>his</i> penis, to any extent, into the vagina, mouth, urethra or anus of a <i>woman</i> or makes <i>her</i> to do so with <i>him</i> or any other person; or</p> <p>(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a <i>woman</i> or makes <i>her</i> to do so with him or any other person; or</p> <p>(c) manipulates any part of the body of a <i>woman</i> so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes <i>her</i> to do so with <i>him</i> or any other person; or</p> <p>(d) applies <i>his</i> mouth to the vagina, anus, urethra of a <i>woman</i> or makes <i>her</i> to do so with <i>him</i> or any other person, under the</p>	Ministry of Law and Justice

		<p>circumstances falling under any of the following seven descriptions:—</p> <p><i>First.</i>—Against <i>her</i> will.</p> <p><i>Secondly.</i>—Without <i>her</i> consent.</p> <p><i>Thirdly.</i>—With <i>her</i> consent, when <i>her</i> consent has been obtained by putting <i>her</i> or any person in whom <i>she</i> is interested, in fear of death or of hurt.</p> <p><i>Fourthly.</i>—With <i>her</i> consent, when the <i>man</i> knows that <i>he</i> is not <i>her</i> husband and that <i>her</i> consent is given because <i>she</i> believes that <i>he</i> is another <i>man</i> to whom <i>she</i> is or believes <i>herself</i> to be lawfully married.</p> <p><i>Fifthly.</i>—With <i>her</i> consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by <i>him</i> personally or through another of any stupefying or unwholesome Substance, <i>she</i> is unable to understand the nature and consequences of that to which <i>she</i> gives consent.</p> <p><i>Sixthly.</i>—With or without <i>her</i> consent, when she is under eighteen years of age.</p> <p><i>Seventhly.</i>—When <i>she</i> is unable to communicate consent.</p> <p><i>Explanation 1.</i>—For the purposes of this section, "vagina" shall also include labia majora.</p> <p><i>Explanation 2.</i>—Consent means an unequivocal voluntary agreement when the <i>woman</i> by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:</p> <p>Provided that a <i>woman</i> who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.</p> <p><i>Exception 1.</i>—A medical procedure or intervention shall not constitute rape.</p>	
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		<p><i>Exception 2.</i>—Sexual intercourse or sexual acts by a <i>man</i> with <i>his own wife</i>, the <i>wife</i> not being under fifteen years of age, is not rape.⁴⁰</p>	
		<p>Section 376A.- Punishment for causing death or resulting in persistent vegetative state of victim. — Whoever, commits an offence punishable under sub-section (1) or subsection (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the <i>woman</i> or causes the <i>woman</i> to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.]</p>	Ministry of Law and Justice
		<p>Section 376C. - Sexual intercourse by person in authority. — Whoever, being— a. in a position of authority or in a fiduciary relationship; or b. a public servant; or c. superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or d. on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any <i>woman</i> either in <i>his</i> custody or under <i>his</i> charge or present in the premises to have sexual intercourse with <i>him</i>, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.</p> <p>Explanation 1.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.</p> <p>Explanation 2. —For the purposes of this section, Explanation I to section 375 shall also be applicable.</p>	Ministry of Law and Justice

⁴⁰ Exception 2 of Section 375 of the IPC has been read down by the Supreme Court of India in Independent Thought v. Union of India, W.P. (Civil) No. 382 of 2013, decided on 11 October, 2017 as "Sexual intercourse by a man with his wife, the wife not being less than 18 years of age, is not rape".

		<p>Explanation 3.—"Superintendent", in relation to a jail, remand home or other place of custody or a <i>women's</i> or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.</p> <p>Explanation 4.—The expressions "hospital" and "<i>women's</i> or children's institution" shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.</p>	
		<p>Section 376D.- Gang rape. — Where a <i>woman</i> is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those <i>persons</i> shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:</p> <p>Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim: Provided further that any fine imposed under this section shall be paid to the victim.</p>	Ministry of Law and Justice
2.	Code of Criminal Procedure, 1973	<p>Section 157(1) Procedure for Investigation. - [Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of <i>her</i> choice and as far as practicable by a <i>woman</i> police officer in the presence of <i>her</i> parents or guardian or near relatives or social worker of the locality.]</p>	Ministry of Law and Justice
		<p>Provided further that the statement of a <i>woman</i> against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a <i>woman</i> police officer or any <i>woman</i> officer.</p>	Ministry of Law and Justice
		<p>Section [164A.- Medical examination of the victim of rape.— (1) Where, during the stage when an offence of committing</p>	Ministry of Law and Justice

		<p>rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such <i>woman</i> or of a person competent to give such consent on her behalf and such <i>woman</i> shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.</p> <p>(2) The registered medical practitioner, to whom such <i>woman</i> is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:—</p> <p>(i) the name and address of the <i>woman</i> and of the person by whom she was brought;</p> <p>(ii) the age of the <i>woman</i>;</p> <p>(iii) the description of material taken from the person of the <i>woman</i> for DNA profiling;</p> <p>(iv) marks of injury, if any, on the person of the <i>woman</i>;</p> <p>(v) general mental condition of the <i>woman</i>; and</p> <p>(vi) other material particulars in reasonable detail.</p> <p>(3) The report shall state precisely the reasons for each conclusion arrived at.</p> <p>(4) The report shall specifically record that the consent of the <i>woman</i> or of the person competent to give such consent on her behalf to such examination had been obtained.</p> <p>(5) The exact time of commencement and completion of the examination shall also be noted in the report.</p> <p>(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of subsection (5) of that section.</p> <p>(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the <i>woman</i> or of any person competent to give such consent on her behalf.</p>	
3.	Indian Evidence Act,	<p>Section 114A. . —</p> <p>Presumption as to absence of consent in certain prosecutions</p>	Ministry of Law and Justice

	1872	<p>for rape.—In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (f), clause (g), clause (h), clause (i), clause (k), clause (l), clause (m), or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the <i>woman</i> alleged to have been raped and such <i>women</i> states in <i>her</i> evidence before the Court that <i>she</i> did not consent, the Court shall presume that <i>she</i> did not consent.</p> <p><i>Explanation.</i> — In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375 of the Indian Penal Code (45 of 1860).</p>	
4.	Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013	<p>Section 2(a) "aggrieved <i>woman</i>" means --</p> <p>(i) in relation to a workplace, a <i>woman</i>, of any age whether employed or not, who alleges to have been subjected to any act of sexual harassment by the respondent;</p> <p>(ii) in relation to a dwelling place or house, a <i>woman</i> of any age who is employed in such a dwelling place or house;</p>	Ministry of Law and Justice/Ministry of Labour/Ministry of Women and Child Development
		<p>Section 2(e) "domestic worker" means a <i>woman</i> who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency on a temporary, permanent, part time or full time basis, but does not include any member of the family of the employer;</p>	Ministry of Law and Justice/Ministry of Labour/Ministry of Women and Child Development
		<p>Section 2(m) "respondent" means a person against whom the aggrieved <i>woman</i> has made a complaint under section 9;</p>	Ministry of Law and Justice/Ministry of Labour/Ministry of Women and Child Development

Queering the



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