

Shri Janardhan Dwivedi
Chairperson
Parliamentary Standing Committee on
Human Resource Development (Rajya Sabha Secretariat)
Room # 122,
Parliament House Annexe,
New Delhi - 110001

Re: Written Memoranda on behalf of the Lawyers Collective HIV/AIDS Unit on the *Immoral Traffic (Prevention) Amendment Bill 2006* with a request to give an oral hearing to us

Hon'ble Chairperson,

We are submitting these submissions on the proposed amendment by the *Immoral Traffic (Prevention) Amendment Bill, 2006*. We would request that we be given a personal hearing on the issue.

The Lawyers Collective HIV/AIDS Unit (LCHAU) is a division of the Lawyers Collective, an organization registered under the *Societies Registration Act* and the *Bombay Public Trust Act*. The other division of the Lawyers Collective is the Women's Rights Initiative (LCWRI). The LCWRI is also making a separate submission in view of their expertise on women's issues.

The LCHAU is a leading legal organization in the country working on all issues relating to HIV and populations at risk of HIV, including sex workers. The LCHAU has at the instance of the Government of India, after extensive consultation around the country for nearly two years, drafted the proposed HIV bill which is now under consideration with the Government of India. The LCHAU is vitally concerned with the proposed Bill under consideration with this Committee.

Preface

The amendments that are sought to be proposed to the *Immoral Traffic (Prevention) Act* (ITPA for short) will have grave implications not only on the working of the law on the ground but also on India's obligations under various International Conventions. ITPA was originally introduced in 1956, that time known as *Suppression of Immoral Traffic Act* (SITA for short). Though the title of the Act throughout included the reference to trafficking, the law till now has not dealt with trafficking in the sense as it is understood internationally. Now a faint attempt is sought to be made to introduce provisions relating to trafficking through Sections 5A to 5C. However these are not in consonance with International law on trafficking in persons, which require comprehensive dealing with trafficking, including labour, slave or slave like practices, not limited to prostitution. Simply inserting the definition of trafficking and punishing

activities based on that, as the present amendments seek to do will not prevent trafficking at all. All this points to the need to have thorough look at the ITPA and trafficking laws to meet with India's obligation to the international conventions. We would urge that the Standing Committee propose that a serious consideration and a thorough look at trafficking holistically.

Legislative history of ITPA

Before examining Amendments to the ITPA, it is important to examine the circumstances that led to its enactment in 1956 and later amendments (in 1978 and 1986). Parliamentary debates at the time of passage of the SITA and the later Amendments provide insights into legislative thought, observation and most importantly, the real intent behind the principal statute.

Prior to 1956, prostitution was dealt with in accordance with State laws¹ that varied across provinces in their approach towards prostitution. The Suppression of Immoral Traffic Act or "SITA" was passed by Parliament in 1956 following India's accession to *United Nations International Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949*. The Convention mandated State parties to punish persons profiting from the prostitution of others especially women and children *without prejudice* to how signatories address prostitutes themselves. SITA mirrored the UN Convention.

Unlike today when legislative changes are being introduced in haste, intense scrutiny and debate preceded SITA's approval by Parliament back in 1956. While considering the Bill, the Legislature deliberated over the most critical question, that is, ***whether prostitution could be eradicated by penalizing sale and purchase of sex***. Legislators noted that prostitution, or sex between consenting adults in exchange for money, falls within private domain, which the State could not invade. Furthermore, Parliamentarians acknowledged the ***futility of banning prostitution without effectively rehabilitating prostitutes***, for whom commercial sex was the sole means for survival. The majority viewed prostitution as a social evil, which, could only be suppressed but not eliminated. The Legislature thus ***made clear its intention of not proscribing prostitution, but restricting its practice and inhibiting it from being carried on a commercial or organized scale***. As a result, the SITA penalised activities incidental to sex work but not prostitution *per se*.

The first set of Amendments were introduced in 1978 and the second (most recent amendments) were brought in 1986 and the Act was renamed ITPA. Though these changes were instituted to counter trafficking for sex work, in practice, the legislation remained deficient. Once again, Parliamentary debates during the 1986 Amendment

¹ See, The Suppression of Immoral Traffic Act, 1933 (Bengal Act VI of 1933) that applied to the province of Bengal.

record skepticism among legislators that trafficking for sex work cannot be eliminated without addressing the root causes of poverty, gender inequality and the status of women in Indian society. Twenty years since, we are at the same juncture where trafficking has not been dealt with and sex workers remain on the wrong side of the law.

Immoral Traffic (Prevention) Act –An Overview

The legal regime around sex work in India is primarily outlined in the ITPA. Provisions of the *Indian Penal Code* (IPC) and **local Police enactments** such as the **Bombay Police Act** that supplement the ITPA. Acts made punishable under ITPA are mostly those performed by third parties i.e. agents facilitating sex work. These include *brothel keeping* (Section 3), *living off earnings of sex work* (Section 4), *procuring, inducing or detaining for prostitution* (Section 5 and 6). Penalties are higher where the offences involve children (<16 yrs) and minors (< 18 yrs). Though sex work *per se* is not illegal, the Act imposes certain restrictions on sex workers and clients by prohibiting prostitution in areas notified by the police and in the vicinity of public places (Section 7) and soliciting (Section 8). **All offences are cognizable** i.e., the police do not require a warrant to conduct searches or make arrests (Section 14). Police personnel entrusted with the implementation of the Act locally (*Special Police Officers*) as well as at the national level (*Trafficking Police Officers*) are accorded special powers (Section 13). **Procedures for investigation and arrest** including for conducting raids, rescue and search in premises suspected of serving as brothels are distinctly set out in Section 15, overriding general procedure under the Criminal Procedure Code. **Magisterial powers** to order arrests and removal of persons, direct custody of rescued persons, closure of brothels and eviction of sex workers are laid down in sections 16, 17, 18 and 20 of the Act. **Rehabilitation of rescued persons** is provided for in Sections 19, 21, 23 and the Rules framed under the Act.

Critique of proposed amendments

- **Amendment of Section 2 (aa) to raise the age of child from sixteen to eighteen years** -----The insertion of a consistent definition of child to mean a person below 18 years and the omission of the terms minor and major is a welcome measure. At the same time, the Bill should make a clear distinction between child prostitution, which must be punished in all forms and consensual sex work by adults, which ought to be removed from the purview of penal law.
- **Modification of definition of prostitution under Section 2 clause (f)** ----- The inclusion of the term “*or for consideration of money or in any other kind*” under Section 2 (f), expands the definition of prostitution to cover all sexual transactions between a sex worker and client irrespective of involvement of exploitation by third parties. The new law will now include all acts of prostitution where sex is

offered in return for money or other supplies, which were hitherto excluded under the ITPA.

Historically, under the *Suppression of Immoral Traffic in Women and Girls Act*², single acts of prostitution³ were not deemed illegal except when carried out in prohibited areas.⁴ In 1986 when the Act was amended and renamed, both prostitute and prostitution were redefined to mean “*sexual exploitation or abuse of persons for commercial purposes and the expression prostitute shall be construed accordingly.*” The existing definition focuses on elements of exploitation or abuse (which, by implication covers persons *other than* the prostitute, for it is legally not possible for someone to exploit her/himself). In the same vein, the term “commercial”⁵ denotes situations where prostitution is organized and carried on for the profit of third parties. In *Sangeeta and Anr vs State*⁶, the Delhi High Court ruled, “*prostitution itself is not a criminal offence. What is punishable under the Act is sexual exploitation of abuse of persons for commercial purposes....*”

The new definition under Section 2 (f) brings **within its ambit all contracts for sex, including individual/singular instances of prostitution**, that are neither organised for profit nor exploitative in nature. Such a move will cause confusion in implementation and contradiction in the interpretation of the Act **as it becomes unclear whether the ITPA targets situations of exploitation within sex work or sex work itself which may be consensual in nature.** The resultant ambiguity will expose the statute to judicial scrutiny and potential constitutional challenges.

- **Enhancement of penalty for keeping/managing brothels under Section 3** -----
It is now realized in the criminal justice system that the higher the punishment for an offence, the lesser is the rate of conviction of accused persons. This is because in trials involving offences carrying stringent penalties, judges need to be

² Central Act 104 of 1956

³ Under the Suppression of Immoral Traffic in Women and Girls Act (“SITA”), prostitution was defined in Section 2 (f) to mean *the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind.* Accordingly, a prostitute was defined in Section 2(e) to mean *the female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind.*

⁴ See *In Re Ratnamala and Anr vs. Respondent* AIR 1962 Mad31, *T. Jacob Vs. State of Kerala* AIR 1971Ker 166. In both cases, the Madars and Kerala High Courts respectively held that the accused (female sex worker) cannot be convicted for a solitary instance of prostitution and that to make out a case of carrying on prostitution, the prosecution must show promiscuous conduct on hire, that is, indiscriminate sexual activity with more than one customer, which may be proved evidentially or inferred from surrounding circumstances.

⁵ According to Black’s Law Dictionary, the term commercial activity includes any type of business or activity, which is carried on for profit.

⁶ *Sangeeta and Anr vs State* 1995 CriLJ3923

convinced that the accused was guilty beyond reasonable doubt, which is often difficult for the prosecution to prove. Therefore, **increasing penalties for brothel keeping will not necessarily result in higher conviction** of brothel managers and owners, which the Bill purportedly aims to secure. A number of studies conducted to examine gaps in implementation of the ITPA, including the most recent one by the National Human Rights Commission⁷ point out that the failure in prosecuting brothel keepers results because witnesses (sex workers and/or trafficked persons) are reluctant to testify in Court. ***Increasing punishment for brothel keeping clearly then is not a solution to the problem of non-prosecution and/or acquittal of persons involved in human trafficking.***

BrothelBane or Boon for AIDS Prevention?

Organized sex work settings such as brothels are more conducive to the implementation of health and safety measures. Globally, Thailand's success in combating HIV in the mid 1990s is attributable to aggressive condom programming in brothels and sex establishments. In India, a study among female sex workers in *Andhra Pradesh* notes that sex workers in brothels are more likely to use condoms with clients as compared to those working off streets.⁸ For health interventionists, it is easier to impart HIV prevention services in captive locations like brothels as compared to streets or highways, where it is difficult to establish contact with sex workers, let alone inculcate safer practices. For this reason, most government and donor-supported programmes to reduce HIV transmission operate in brothels. They do that through condom promotion. Under the National AIDS Control Programme, project implementers are mandated to work with madams, pimps, brothel and lodge owners as these agents positively influence sexual practices.

Yet, brothels are illegal under the ITPA and so are persons who work there. Three years ago, several hundred sex workers in *Chakla Bazar, Surat*, were forcibly evicted from their homes by the police, in the guise of committing offences of brothel keeping under section 3 (1) of the ITPA.⁹ The dislocation of sex workers and their partners brought the government run STD/HIV programme to an abrupt end. Similarly, enforcement action in red light areas of *Mumbai* and *Goa*¹⁰ resulted in the cessation of prevention services and a subsequent rise in sexually transmitted infections. Clearly, penalties against brothels have

⁷ See NHRC, UNFEM, ISS, *A Report on Trafficking in Women and Children in India 2002-2003*. Available at <http://www.nhrc.nic.in/Publications/ReportonTrafficking.pdf>

⁸ Dandona Rakhi et al. "High risk of HIV in non brothel based female sex workers in India" *BMC Public Health*. 2005; 5: 87. Published online 2005 August 20. doi: 10.1186/1471-2458-5-87. Available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1208909#N0x8e37578.0x8b9a850> (Accessed on 15.2.06)

⁹ Tandon Tripti, "Sex workers in Surat: Seeking Rights amidst wrongs?" From the Lawyers Collective, Vol 18-No.10, October 2003, p28

¹⁰ Maryam Shahmanesh, Sonali Wayal, "Targeting commercial sex-workers in Goa, India: time for a strategic rethink?" Available at <http://www.goanet.org/pipermail/goanet/2004-October/019130.html> (Accessed on 14.3.06)

an adverse bearing on the health and safety of its occupants as well as AIDS prevention in general. Aggravated penalties against brothels make neither sex work nor sex workers safe.

Lately, there has been increasing support for legalizing “*mini brothels*” as witnessed in ongoing sex work law reform debate in the United Kingdom. Alarmed at the rising reports of violence against streetwalkers, the government is considering legislative measures to permit a designated number of sex workers to reside and carry on work in certain premises. Analysts contend that brothels offer ‘safe spaces’ to adult sex workers as opposed to street work, which is more dangerous. If approved, sex workers could manage their workplaces independently, without pimps, escorts or managers. By letting sex workers control their working conditions, the government aims to reduce violence, exploitation and other harms associated with sex work.

Some other countries have laws to regulate sex work establishments in order to: 1) eliminate underage/unwilling persons and 2) universalize condom use and prophylaxis. In India, decriminalization of sex worker operated brothels by deleting the words “*mutual gain of two or more prostitutes*” from Section 2 (a) of the ITPA,¹¹ could be a first step in this direction. ***Health and safety considerations call for a rethink of legislative policy towards brothels in Indian law.***

- **Insertion of new Section 5A to define trafficking in persons** -----The proposed definition of trafficking in persons under the new Section 5A takes language from the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the U.N Convention against Transnational Organized Crime*, except that while the international instrument also covers human trafficking for non-sex work situations, Section 5A is restricted to *trafficking for prostitution only*. Clearly, **the Bill does not comply with international legal standards as far as trafficking in persons is concerned.**

The proposed definition reads:

5A. *Whoever recruits, transports, transfers, harbours or receives a person for the purpose of prostitution by means of:-*

- (a) *threat or use of force or coercion, abduction, fraud, deception; or*
- (b) *abuse of power or a position of vulnerability; or*
- (c) *giving or receiving payments or benefits to achieve the consent of such person having control over another person, commits the offence of trafficking in persons.*

Explanation: - Where any person recruits, transports, transfers, harbours or receives a person for the purpose of prostitution, such person shall, until the contrary is proved, be presumed to have recruited, transported, transferred, harboured or received the person with the intent that the person shall be used for the purpose of prostitution.

Legal infirmities

According to the above definition, a trafficker is someone who inducts a person into sex work by using any of the means set forth in sub-clauses (a), (b) and (c). In order for the offence of trafficking in persons to have been committed, the offender (“*whoever*”) must employ measures set out in sub-clause (a), or (b) or (c) to bring the victim (“*a person*”) into sex work. While *threat, use of force, coercion, abduction, fraud, deception* in sub-clause (a) have clear legal meaning, the term *abuse of power or position of vulnerability* in sub-clause (b) is **ambiguous** and may result in categorizing all recruitment into sex work as trafficking. It may be pointed that a significant number of persons enter sex work for economic reasons and are not recruited against their will through criminal means. It is feared that such persons may be understood as being in a *position of vulnerability* under the new Section 5A (b) and consequently, their entry in sex work will be construed as trafficking. The new provision then obscures the distinction between adult, consensual sex work and involuntary induction into sex work.

Sub-clause (c) suffers from **grammatical ambiguity**; it not only sets out the means (*giving or receiving of payments or benefits*), but also refers to the parties in crime, that is, the victim (“*another person*”) and a person exercising control over the victim (“*such person*”), which have already been described in 5A. Read as a whole (Section 5A with sub clause (c)), the section is incongruent..

Overall, Section 5A is poorly drafted and is likely to lead to differential and possibly, conflicting interpretations of trafficking in persons. This ambiguity lays itself open to challenge on constitutional grounds in Court.

Utilise existing anti-trafficking provisions

Already, provisions under the Indian Penal Code (IPC) set out penalties for acts akin to trafficking in persons. While kidnapping¹¹, abduction¹² and wrongful confinement are general offences, procuring of minors, importing foreign girls and selling¹³ and buying of minors¹⁴ are specific to prostitution and carry stringent

¹¹ Sections 359, 360 and 361, Indian Penal Code

¹² Section 362 defines abduction as, “whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.”

¹³ Section 372 says that, “whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall, at any age, be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful or immoral purpose... shall be punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.”

¹⁴ Section 373 says that, “whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose... shall be

punishment extending to ten years imprisonment. It is unclear why enforcement authorities including judicial officers do not invoke IPC provisions to prosecute and convict persons accused of child trafficking and prostitution. Similarly, Sections 5¹⁵ and 6¹⁶ of the existing ITPA lay down rigorous punishment for involuntary induction in sex work. These too are used infrequently.

If applied, existing legal provisions are sufficient to counter trafficking for commercial sex. Insertion of Section 5A, which too is limited to trafficking for prostitution, is then unnecessary.

▪ **Insertion of Section 5 C to punish persons visiting or found in brothels** -----

This is the most problematic provision of the ITPA Amendment Bill. The section reads:

5C. Any person who visits or found in a brothel for the purpose of sexual exploitation of any victim of trafficking in person shall be on first conviction be punishable with imprisonment for a term which may extend to three months or with fine which may extend to Rs. 20,000 or with both and in the event of a second or subsequent conviction with imprisonment for a term which may extend to six months and also with fine which may extend to Rs 50,000.

Prima facie, section 5C applies to a person who visits or is found in a brothel for the purpose of sexual exploitation of any victim of trafficking in person, that is, clients who seek sexual services of a trafficked victim. However, this simplistic facial reading does not hold true on several counts.

Legal infirmities

Firstly, the term ***sexual exploitation*** is *not defined* anywhere in the Act. It is a cardinal principle of criminal law that seeks to convict persons for certain acts, that what constitutes an offence must be clear and not vague. The fact that sexual exploitation is defined may be a ground of acquitting a lot of persons, even those who had the intention of having sex with a trafficked victim. Otherwise it is open to constitutional challenge for being vague. It may be further pointed out that

punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.”

¹⁵ Section 5 of the ITPA provides for rigorous imprisonment upto 7 years and fine upto Rs. 2000 for the offence of *procuring, inducing or taking away or attempting to take away, any person for the purpose of prostitution, or causing or inducing a person to carry on prostitution*. If the offence is committed against the will of any person, the imprisonment shall extend to 14 years. Offence committed with respect to a *minor or a child* attracts enhanced imprisonment upto 14 years and life imprisonment respectively.

¹⁶ Section 6 of the ITPA provides for punishment upto life imprisonment and fine for the offence of *detaining any person in a brothel or any premises with the intent that such person may have sexual intercourse with a person other than the spouse of such person*. *Presumption of offence arises when a person is found in a brothel with a child.*

though sex work or prostitution is not illegal under the ITPA, the way it has been implemented as if all acts of sex work or prostitution are seen as sexual exploitation. Hence, it is likely that the term sexual exploitation in section 5C may be interpreted to include all transactional. This may be given credence in view of the expanded definition of prostitution in section 2(f) under the Amendment. As a result, every client visiting a brothel to purchase sex will incur penalties under 5C even though he lacks *knowledge* (of the presence of a trafficked person) and *intention* (to have sex with a trafficked person), the two essential ingredients of crime. Although the proposed Bill does not intend to punish consensual sex with non-trafficked sex workers, that is what is likely to happen.

Secondly, a brothel (as defined in Section 2 (a)) not only means premises where persons are coerced into sex work but also includes sites operated by two or more adult, consenting sex workers for transactional sex. Thus, clients visiting residential premises of sex worker(s) may also be hit by section 5C.

Thirdly, for the Police, the act of visiting a brothel is sufficient grounds for arrest, as the Section does not require the offender to have sex with the trafficked victim. How will the police determine that the person who visits or is found in a brothel is there for *sexual exploitation of any victim of trafficking in person*? The Police will intercept and arrest any person present in a brothel irrespective of the object of the visit. Increased powers in the hands of the police will give them a handle to harass and extract money not only from sex workers but now, even clients.

Fourthly, undefined terms and vague language under Section 5C will pose serious problems in its implementation. It is unclear how the prosecution will prove that an offence was committed under Section 5C. The only other country that has a provision for punishing clients of sex workers is Sweden. As is evident from the Swedish experience (see box), sex workers will rarely testify against customers. While public witnesses may corroborate the presence of the accused in a brothel, that in itself does not establish that the accused intended to sexually exploit a trafficked survivor. In its present form, *Section 5C may become unenforceable and is likely to remain an inert provision, without much application in Court.*

In practice, Section 5C will be used by the Police to interrupt, harass and extort money out of persons seen in and around brothels.

Moreover it is contrary to the intention of deleting Section 8, dealing with solicitation. Solicitation under the proposed Bill will not be crime. In effect

therefore a sex worker can solicit for a customer, but the moment he visits a brothel or is found in a brothel, he is likely to be arrested under Section 5C.

Failure of the Swedish prohibitionist model.....

In 1999, Sweden became the first country in the world to introduce criminal sanctions against persons buying sexual services. Swedish law neither criminalizes sex work nor the sex worker but targets customers who pay, and/or offer to pay for sex. Strangely then, it is legal to sell but not buy sex in Sweden.. The law was enacted to protect prostitutes by sending out a strong warning to men looking for commercial sex and ultimately eliminate prostitution itself.

The result, however, has been quite the contrary. Although sex work is less visible, it has neither diminished nor effaced from Sweden. It has simply gone underground. On the other hand individual sex workers have been forced to solicit and do business in dark, hidden alleys and other isolated sites, outside the reach of medical, social and legal help. Dependence on pimps and criminal gangs has intensified as prostitutes find it difficult to negotiate with customers on their own. Work has gotten displaced and dangerous and sex workers are feeling more unsafe than ever. More and more it is going into the hands of organized criminal gangs. This is the most dangerous trend. Like prohibition gave rise to the mafia, now punishing clients of sex workers in Sweden is allowing criminal gangs to come in and take over.

Enforcement authorities in Sweden too have not seen the outcomes promised. Police contend that the law is difficult to implement, as there are no victims or complainants. Among those arrested, few have been prosecuted, and still fewer convicted. Sex workers are unwilling to testify against their customers leaving the prosecution with no witnesses or supporting evidence. Further still, enforcement agencies are finding it tough to interdict forced prostitution or check trafficking as much of sex work has shifted underground.

There is a growing sense in Sweden that the law targeting sex customers has been a failure.

If a small country like Sweden, with only 2,500 sex workers is unable to prohibit prostitution by punishing clients, how can we, in India, expect to succeed through similar measures?

WCD's claims unfounded

The Ministry of Women and Child Development (WCD) claims that the Section 5C will provide a penal remedy against clients, who, despite fuelling the demand for trafficking in sex work, are not punishable under existing law. Though legitimate, this contention is not correct. Under existing Section 5 (1) of the ITPA, procuring or taking a person for prostitution without their consent is punishable with imprisonment between seven and fourteen years. Though “*procuring*”

predominantly covers acts of pimping and pandering,¹⁷ at common law, the term has been held to apply also to a man who causes a woman to have illicit intercourse with himself.¹⁸ In an Indian case too, the word ‘procurer’ was held to take in not only persons who procure women for others but also persons who procure women for themselves.¹⁹ **Hence, existing provisions of the ITPA are sufficient to penalize clients looking out to have sex with trafficked persons. Adding a new Section 5C is then unnecessary.**

Furthermore, it may be pointed out that trafficked survivors are unable to seek assistance of the enforcement machinery, including the Police and Magistracy for various reasons. Protective provisions such as Section 19 (1) of the ITPA²⁰ remain unutilized. It is highly unlikely then that trafficked persons will be able to lodge complaints against abusive clients under Section 5C.

Clearly, Section 5C does not, in any way, avert trafficking or other exploitative situations. It also does not empower sex workers or trafficked survivors to resist non-consensual and unprotected sex. On the contrary, the proposed section creates conditions that erode sex workers’ ability to negotiate work, health and protection and spells disaster for the country’s anti-AIDS programme. (See box).

ITPA Amendment Bill : Endangering the nation’s health.....

Since the detection of the first case of HIV and AIDS in a sex worker in *Chennai* in 1986, the National AIDS Control Organisation (NACO) of the Ministry of Health & Family Welfare, Government of India, has been actively pursuing programmes to stem the spread of HIV among commercial sex workers and prevent transmission to the rest of the population. These interventions are conducted through NGOs that receive funds from NACO and its state affiliates i.e the State AIDS Control Societies (SACS) to impart services such as information and behaviour change communication, treatment for sexually transmitted diseases (STDs) and supply of condoms that are indispensable to the prevention of HIV. Currently, NACO and SACS support nearly 300 such interventions with female, male, and transgendered (*hijra*) sex workers in brothels, streets, roadsides, highways and other sites of transactional sex. Over the next few years, NACO proposes to cover about 1 million sex workers under its condom promotion programme. Since it is

¹⁷ According to Black’s Law Dictionary, to procure means to obtain, as a prostitute, for another.

¹⁸ *Williams* (1898) 62 JP 310 and *Cook* [1954] 1 All ER 60,

¹⁹ *Cheriyian v. State*, (1973) 17 Mad LJ (Cr 107 at pp.108, 109, 110

²⁰ Section 19 of the ITPA allows a person, who is carrying on, or is being made to carry on, prostitution to apply for protective custody before a local Magistrate. After hearing the applicant and on completion of inquiry, the Magistrate is authorized to order such person to be kept in a protective institution or appoint another person for the care and custody of the applicant.

difficult for external agencies to permeate sex work structures, these projects typically employ community members including sex workers, pimps and clients to influence sexual practices.

Globally as well as in India, programmes using peer strategies and premised on respect, recognition and rights of sex workers such as the renowned STD and HIV/AIDS Intervention Project (SHIP) in *Sonagachi, Kolkata* have yielded consistent health outcomes. According to UNAIDS estimates, at the end of 2004, over 85% sexual encounters in *Sonagachi* were safe and HIV prevalence among sex workers stood at 4%. In contrast, sporadic and piecemeal efforts to promote condoms in *Kamatipura, Mumbai* have resulted in HIV prevalence of 52% among sex workers.

Accordingly, the World Health Organisation notes, “*that protecting the human rights of sex workers is one of the best ways to protect the society from HIV/AIDS.*” The National AIDS Control Programme of the Government of India too, adheres to this ‘rights based approach’ to public health. Recent epidemiological studies show that aggressive condom promotion along with attempts to strengthen sex workers’ ability to negotiate their use with clients in *Tamil Nadu* has resulted in declining incidence (new cases) of HIV in States of Southern India.²¹ For the first time there is downward trend of new infections of HIV in India.

The introduction of Section 5C under ITPA could, however change, even reverse that. Under this new provision, clients, wanting to avoid arrest will go underground and so will those selling sex, hampering interventions to prevent HIV. With sex work becoming invisible, health workers will find it difficult to identify, contact and supply condoms to persons engaged in commercial sex. Further still, sex workers will themselves avoid broaching the issue of safe sex, let alone persuade clients to use condoms, for fear of violence or other harms, that are more likely to be encountered in unfamiliar locations than those with peer or community presence.

This is evident from the experience of sex workers in Surat where data shows that with raids condom uptake goes down drastically thus impeding HIV intervention programmes.

Section 5C will jeopardize attempts to promote and universalize condom use in situations of commercial sex causing sexually transmitted infections including HIV and AIDS to proliferate. Presently, India has the second largest population of HIV amongst the sexually active population between the 15 and 49 years old, at about 5.2 million. The HIV epidemic is still in a concentrated stage, leaving us with a small window of opportunity to stem its spread. In this epidemiological context, the strength, scale and effectiveness of interventions in sex work settings will be decisive in turning the course of the epidemic. ***Can India afford the debilitating consequences of a defective law?***

²¹ See Kumar R, Jha P, Arora P, for the International Studies of HIV/AIDS (ISHA) Investigators. *Trends in HIV-1 in young adults in south India from 2000 to 2004: a prevalence study*. **Lancet** 2006; published online March 30. DOI:10.1016/S0140-6736(06)68435-3.

- **Deletion of Section 8 to decriminalize soliciting for sex work** ----- The proposal to repeal Section 8 is a welcome step. Seeking clients by soliciting is, in many ways, indispensable to earning a livelihood out of sex work. The criminalization of soliciting by imposing fines and/or imprisonment is one of the most obvious legal afflictions for sex workers, who are faced with arrests, court hearings and convictions on a routine basis. Besides the actual application of the provision to apprehend sex workers, the section lends clout to local police, who are known to harass sex workers by threatening to invoke this section and use it just to extract bribes and free sex. The deletion of Section 8 will bring some respite, though sex workers may continue to be harassed and arrested under public nuisance laws like Section 110 of the Bombay Police Act and Section 294 of the Indian Penal Code.

For sex workers, there is no gain in decriminalizing soliciting if the client(s) that they attract get intercepted by the Police under Section 5C. As stated elsewhere, sex workers soliciting from a brothel widow could now face arrest for inviting the client, that is, aiding and abetting an offence under Section 5C. *The addition of section 5C then is inconsistent with the deletion of Section 8.*

- **Extending stay in corrective institution under Section 10 from 5 to 7 years** --- The last fifty years of implementation of the ITPA has shown that institutionalization is not an answer to the problems faced by sex workers. Magisterial orders for placement in a home must only be made with the sex worker's informed consent, after providing legal representation and counseling. This is not reflected in the Amendment Bill. At the same time, the legal machinery must offer community alternatives to institutionalization. The state of affairs in the institutional homes, where they exist, is appalling. These only tend to ensure that there is no alternative to sex workers but prostitution.
- **Lowering rank of police officers authorized to conduct anti-trafficking operations from Inspector to Sub Inspector under Section 13 (2)** ----- The proposal to lower the rank of police officers, authorized to enforce the ITPA from Inspector to Sub-Inspector will result in increased police excesses against sex workers. It is well known that powers conferred on law enforcement officials; both under the ITPA as well as local police enactments such as Bombay Police Act are grossly misused to threaten and extract favours from sex workers either in the form of bribes or free sex. Reduction in the rank of the Special Police officer will only aid police personnel in lower ranks to abuse statutory powers, flout legal norms to violate fundamental rights and civil liberties.

Already, Police officials conducting rescue and raid operations disregard procedural safeguards (under Sections 15 and 16 of the ITPA) such as recording

of reasons, presence of a public witness and interrogation by a female officer. The proposed amendment will make it more difficult than before to scrutinize Police conduct and ensure adherence to statutory norms.

The move to allow **Sub-Inspectors to invoke the ITPA is inconsistent with the legislative intent behind the original provision**, which was to minimize misuse of powers accorded to the Police. As such, the Police exercise extraordinary powers to arrest, detain, raid, search and remove persons under the ITPA, leaving scope for excessive use. While Section 13 (2) was introduced with a view to augment Police force available to enforce the Act, the condition that only senior ranking officers (not below rank of Inspector) be entrusted with powers was inserted to check abuse.²² Enormous powers are conferred to the police under ITPA. It is a cardinal principle of law that where such powers are conferred they should be vested in high officials so that the possibility of misuse is minimal. This cardinal principle is given a go by in this legislation. Lowering the rank of Special Police Officers to sub-inspector disregards the letter and spirit of the principal enactment.

- **Setting up of a Nodal Authority at the Central and State level under new Sections 13A and 13 B to combat trafficking** ---- The mandate of the authority being proposed is limited to countering trafficking. Assistance to and restoration of survivors of trafficking also need to be addressed. Secondly, the section must spell out the composition of the Committees to make it multidisciplinary to include not only sex workers representative but also agencies working for HIV prevention. In addition, sex workers' involvement in anti-trafficking measures must not only be encouraged, but also formally incorporated under Sections 13 (A) (2) and 13 (B) (2). It has to be noted that the sex workers are the best placed to find out whether a trafficked victim has entered the commercial sex setting. This is evident from the experience in Sonagachi. These lessons must not be lost on the Nodal Authority.
- **Deletion of Section 20 that authorizes Magistrates to remove a sex worker** ---- This is a welcome measure. Though Magistrates rarely ever invoke this provision, the threat of expulsion under Section 20 renders sex workers vulnerable. At the same time, sex workers are mostly evicted from their homes under Sections 15 and 16, which also need to be reviewed.

Reject piecemeal approach to reform

²² The section was amended by Act 46 of 1978. See, Statement of Objects and Reasons , Suppression of Immoral Traffic in Women and Girls (Amendment) Bill, 1978

The ITPA needs to be examined and transformed in its *entirety* as the statute has failed on all counts. The legislation and the machinery provided under it have failed to prevent trafficking and sexual exploitation of persons - terms that continue to evade conceptual and legal clarity. State run homes set up under the Act are unable to rehabilitate rescued persons. At the same time, the law has become a source of repression and harassment for sex workers, who bear the burden of most punitive actions, particularly at the hands of the Police, who are known to extort money, bribes, even free sex. Raids, rescues and closure of brothels that are purportedly conducted to protect persons in sex work, are instead, detrimental and aggravate sex workers' vulnerability to violence and HIV infection. At a time when the country is facing the threat of a spiraling HIV epidemic, the ITPA has created conditions that are antithetical to effective prevention and impact mitigation.

It is worth noting yet again, at the cost of repetition, that defects in the legislation were apparent even at the time of the passage of SITA. Parliamentary debates record fears expressed by Legislators that the punitive legal order being instituted under the Act would drive prostitution underground; fuel corruption and misuse of powers by Police and ultimately, cause severe harm to the very women sought to be protected. Regrettably, predictions that the "*Act will fail to achieve its intended objective*" have come true over the last fifty years.

Ignoring hindsight and all lessons, the Government is once again resorting to fractional modifications of an already deficient law. The failure to distinguish consensual sex work from sexual exploitation and prostitution from trafficking lies at the heart of the dissonance between legislative intent, policy and practice. So long as this ambiguity remains, the ITPA will remain a failure. The proposed set of amendments will further confuse, conflate and fail to benefit any section of society. Prostitution law in India today needs a comprehensive overhaul and not fragmental changes here and there.

Thank You,

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