



## The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021

### Comments provided by members of the National Network of Sex Workers (NNSW)

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**Smt. Smriti Irani, Minister**

**Department of Women and Child**

**Government of India**

**14 July 2021**

The National Network of Sex Workers (NNSW) is a pan-India network of over 1.5 lakh female, trans and male sex workers. NNSW calls on Smt. Smriti Irani, Minister, Department of Women and Child, Government of India **to withdraw harmful provisions of “The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021.**

We provide detailed reasons below on how provisions of the proposed Bill are over broad, with no relation to the stated objective of preventing trafficking and have tremendous scope for misuse against sex workers, their clients and third parties assisting them.

#### **Introduction**

Sex work is defined as an adult provision of sexual services for payment or goods. It is a dignified option of work adopted by millions of women, men and trans persons in India. It provides a vital earning through which adults support their families.

The harmful impact of assuming all forced workers as trafficked victims will result in the ‘forced rescue’ of adults earning a livelihood and incarcerated in ‘*Sudhar gruhas*’ be they domestic workers, bonded labourers, beggars, sex workers or surrogate mothers. The *Immoral Traffic Prevention Act, 1986* also uses the ‘raids to rescue’ model whereby law enforcement swoops in and uses the police to ‘pick up’ victims. The mode of raids by police and anti-human-trafficking units to rescue trafficked victims further traumatizes victims who have no clue why they are being rescued. Very often the IPC 370 clause is interpreted as a loss of consent over a livelihood choice especially in the case of sex work.

In the case of sex workers the Bill would also make way for the District committees to use provisions as a significant method in creating fear, increasing vulnerability to violence and unsafe working conditions. Police fear makes it difficult for workers to report violations and other crimes by perpetrators who carry out violence with impunity. The construction of sexual services as exploitation contributes to a climate of stigma and scorn towards persons in sex work and the work itself, thus endorsing State violence and discrimination.

One of the most vulnerable sections that will be adversely impacted by the Bill is that of adult sex workers. The fundamental flaw with the Bill is that it equates victims of human trafficking with adult persons in sex work. Trafficking of persons into forced or coerced labour (including sexual exploitation)

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should not be confused with sex work undertaken by consenting adults. This conflation could lead to misuse and over-broad application of the provisions in this bill.

The Trafficking Bill in effect, by adopting a definition of trafficking which defines victims as those who cannot consent, in effect hits at the autonomy of the so-called victims. Even those who are trafficked have the right to make decisions about their life. By empowering authorities to place persons who are trafficked in custodial institutions without their consent,<sup>1</sup> the Bill fundamentally negates the notion that individuals under the Indian Constitutional framework have autonomy of decision making.

By taking away the autonomy of so-called victims and treating victims as those without agency, it robs victims of their dignity. Recognizing the dignity of individuals means that all persons including victims have the right to make decisions about their own life. Right to autonomy and dignity of a person does not desert the person even in the most difficult circumstances. A victim of trafficking is entitled to Article 21 rights and should be able to make decisions about his or her life rather than forcibly being sent to a protection home.

The Bill also violates Article 19(1)(g) of the Constitution under which a citizen has the right to practice any profession or to carry on any occupation, trade or business. Persons doing sex work are often at the bottom of the socio-economic hierarchy in India. They seek to make a livelihood in extremely difficult circumstances. This Bill by implicitly including sex workers within the definition of persons who are trafficked, makes the lives of those who seek to make a livelihood from sex work that much more precarious. Under the guise of protection, the State seeks to withdraw one of the few options persons have to make ends meet.

The injustice of withdrawing the right under Article 19(1)(g) from adult persons also hits at the norm of equality. Its only when it comes to the question of sex work that the state treat adults who engage in that profession as persons in need of protection. This is because the question of sex work is freighted with notions of morality. For the Indian state, the impulse to defend a majoritarian morality prevails over the impulse to allow adult persons to exercise their right to autonomy, dignity and freedom to practise the profession of their choice. It is important for the government to recognize that its mandate is not to implement the morality of the majority. Rather the government must conduct its policy within the ambit of constitutional morality.

This Bill by denuding sex workers of their right to practise the profession of their choice, hits at the right to life itself. The state having failed to ensure equality of opportunity, now proceeds to make the precarious lives of those in very difficult circumstances even more unviable. By doing so the state only enhances the contradictions which structure Indian society including that between the wealthy and the poor.

Section 49(2) denies the accused person the right to anticipatory bail by specifically denying all persons accused of offences carrying a punishment of above two years; the right to approach the court under Section 438 for anticipatory bail. This is extremely harmful as it is highly likely that this provision will be

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<sup>1</sup>See Section 17 of the Bill



misused and false cases will be booked against victims. This is the experience under the ITPA where women in sex work are arrested and tried as brothel owners and pimps. By denying those arrested under this bill the right to anticipatory bail, the bill eliminates provisions meant to prevent misuse. The provisions for freezing of bank assets and sealing of places used for the 'purposes of trafficking' is also about using a criminal law approach to deal with the networks within which precarious labour is forced to eke out a livelihood. This approach of criminalization is also evident in the view that trafficking for the purposes of begging is termed an aggravated form of trafficking. The victims in this case as well will be sent to custodial institutions, thereby again betraying the state mindset behind this Bill.

### ***Amended definition of Trafficking in Persons***

Section 23 of the present draft Bill brings a significant amendment to the existing definition of Trafficking. The Palermo Protocol to which India is a signatory and Section 370 of the Indian Penal Code define the offence of Trafficking as specifically relating to the Acts, Means and Purpose (being exploitation).

The proposed Bill seeks to drastically dilute the definition by removing physical movement or transport from one location to another in the determination of the offence of Trafficking<sup>2</sup>. When read concomitantly with the definition of exploitation included under Section 2 (7); the intention of the proposed bill seems to be to include within its ambit every and any act of exploitation whether the purpose of the same was commercial gain. This renders the Act over broad and vague. Given the harsh nature of penalties and punishments envisaged under the present draft bill, this vagueness has potential for overuse and misuse. Literally every act of exploitation in every sphere will be invoked as an offence of Trafficking. Multiple definitions are provided for exploitation through the text of the draft Bill which have led to redundant arguments.

### ***Trafficked versus non - trafficked***

In its efforts to curb trafficking, the Bill does not have any fool-proof mechanism of differentiating between the trafficked and non-trafficked, especially in the context of sex work. Who would determine this status? What if an adult, consenting sex worker claims to be a voluntary entrant? Would this voice carry any weight? Without paying heed to her, what if the label of the trafficked gets affixed on her?

The impact of these questions could be understood across two segments of adult, consenting sex workers viz. those in sex work alone as against those in multiple, informal labour markets.

- a. For those in sex work alone, any attempt to arrest and confine the women/men/transgenders in the name of trafficking could be disruptive of precariously constructed livelihoods. The Bill does not in any way take cognizance of the economic arrangements that sex workers could have

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<sup>2</sup> Explanation 4, Section 23



created for themselves; any indiscriminate action implicating them could have dire consequences. For example, sex workers are significant borrowers. This has only become more conspicuous after the onset of Covid-19. The arrest and confinement of sex workers over a period of several months could coincide with the term of their loan. Who would bear responsibility for the repayment? Also, sex workers predominantly function from rented spaces. Who will bear responsibility for the rents during the period of their arrest? Unfortunately, the sex workers themselves would end up bearing the economic burden imposed by the state on them; these payments would get extracted from them post their release.

Drawing from the Pan India Survey of Sex Workers (2013) and the Covid-19 Survey of Sex Workers (2020-21), significant overlaps could be found between sex work and labour markets. A host of women operating in the informal labour markets do tap into the markets for sex work for improving on their incomes. Such participants make use of the established spaces for sex work (brothels and lodges in Red Light Areas) without actually residing there. Such women do not fall within the ambit of trafficking but are vulnerable to being caught given their presence in the spaces for sex work. Their arrest and confinement in remand homes disrupts both their personal/family lives and livelihoods in labour markets. Also, as mentioned previously, the Bill offers no mechanisms for accounting for their debts and rental payments.

## 1. Criminalisation of sex work

The intent to criminalise sex workers and destroy their livelihoods runs through the entire Bill. Despite numerous calls from sex workers to explicitly exclude adult consenting sex workers from the ambit of anti- trafficking laws, their voices are ignored.

*Sexual exploitation means the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or production of any pornographic material. (S 2 (25))*

*Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation... (S 23 (Explanation 1))*

*Where the purpose or consequence of the offence is prostitution, or any other manner of sexual exploitation of, ... (S 25 (o))*

The current draft bill continues to conflate sex work and trafficking by equating sex work with sexual exploitation (or any other manner of sexual exploitation) and by rendering the consent of a sex worker immaterial in the determination of whether she was trafficked or practicing sex work of her own volition<sup>3</sup>. This leads to harmful practices such as the forced rescue of adult women, their detention, and rehabilitation as victims of trafficking **against their consent**, separation from their families. This practice has been documented by sex worker groups repeatedly. No safeguards have been inserted into the current draft bill to prevent this harm.

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<sup>3</sup> Section 2 (25); Section 23 (Explanation 2)



*Sexual exploitation means the obtaining of financial or other benefits through the involvement of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or production of any pornographic material. (S 2 (25))*

Sex workers depend on a network of third parties to keep them safe while working. However, the current draft bill criminalises all third parties without even attempting to distinguish those who support sex workers in their work from those who exploit using force, fraud, deceit and other means to obtain consent or compliance.<sup>4</sup> Treating third parties as *per se* criminal or exploiters pushes sex workers into exploitative conditions of unsafe working conditions, low payments.

The Bill also criminalises clients of sex workers.<sup>5</sup>

*As per Section 30(1), “Whoever, knowingly or having reason to believe that a person is a victim, exploits such person, or takes benefit out of the exploitation of such person shall be punished.” Every customer, employer, pimp, broker by whatever name called, who causes engaging of services of a victim as a result of which he is exploited, shall, be liable to be punished on conviction under this section. (Explanation 2)*

The approach of criminalising clients is another crippling blow to the livelihoods of sex workers who are already on the margins of society. Since the inception of a similar clause under Section 370 A2 of the Indian Penal Code in 2013; sex workers have been sharing the harassment that they face. In a study conducted by sex workers from the National Network of Sex workers in 2019<sup>6</sup>, over 100 cases were recorded in cities and towns of Maharashtra where clients were threatened arrest under the provisions and then let off after they paid bribes. Some customers were taken to police stations, while others were let off outside the brothel spaces. Law enforcement personnel have also used this provision against clients, to demand bribes ranging from Rs. 2000 to Rs. 25000.

Another section that engenders disquiet is the impunity granted to officers implementing the draconian law. Section 51 lays down a clause to protect action “taken in good faith” by providing that “No suit, prosecution, or other legal proceeding shall lie against the Central Government or the State Government or any person acting under the directions of the Central Government or the State Government as the case may be, acting in good faith, or intended to be done in pursuance of this Act, or of any rules, or regulations made thereunder.”

Section 51 protects Central and State Government and individuals acting under the directions of the governments. However, when there is no definition provided of “good faith”, such a blanket impunity

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<sup>4</sup> [Section 2 (25); Section 23 (Explanation 1) and Section 25 (o)]

<sup>5</sup> Section 30 (Explanation 2) - Every customer, employer, pimp, broker by whatever name called, who causes engaging of services of a victim as a result of which he is exploited, shall, be liable to be punished on conviction under this section.

<sup>6</sup> Violence faced by sex workers in India, Status Report for the CEDAW Committee, 2019. National Network of Sex Workers, NNSW



can encourage over-use and misuse of the law. A number of raids, rescue and coercive rehabilitation measures are undertaken at the initiative of NGOs resulting in large scale violation of the rights of persons being 'rescued'. There is no process of transparency or accountability in these raid and rescue processes. It is a fact that many of these NGOs are obtaining project funds from donors to incarcerate individuals who are termed as "victims of trafficking" for long periods of time against their consent. There have been accounts of violence and inhuman treatment especially against sex workers seeking to be released.

Under the current scheme of the proposed Bill, the District Anti Trafficking Committee has been given immense powers to decide on the rehabilitation of the victim/ advice the Magistrate on rehabilitation/ develop plans for rehabilitation. However, mechanisms of accountability have not been laid out in the proposed bill. There is no mention of the process of appeal for individuals seeking to opt out of the rehabilitation plans laid out by the District Anti Trafficking Committee. The agencies undertaking rescue, rehabilitation need to be held accountable for violations and be liable in civil and criminal law.

## 2. Prosecution and Judicial Trends

Currently the judicial trend appears to prosecute clients of sex workers. Courts have after quashing charges under ITPA directed prosecution under Section 370 A IPC – Exploitation of trafficked person. The prosecution and judicial trends stand substantiated by the experience of sex workers. In the context of Section 370 A, IPC which criminalises exploitation of an adult or minor trafficked person this would imply that clients of sex workers would be presumed to have knowledge or reason to believe that the person was trafficked and would have to establish the lack of such knowledge or belief. Section 370 A is already being used to arrest clients of adult sex workers without attempting to differentiate between "trafficked victims" and "adult women in sex work". In fact, the High Court in a couple of cases in 2016 *suo moto* took cognisance and directed the police to file cases against clients of sex workers under Section 370 IPC. The legislature needs to take on board the trends in practice, especially with regard to creations of offences like exploitation of trafficked person under Section 370 A IPC. While some courts recognise the agency of adult women and their intrinsic right to consent to their work<sup>7</sup>; other courts continue to regard sex workers as victims of trafficking<sup>8</sup>.

## 3. Raid Rescue and Rehabilitation

The Bill devises rehabilitation measures for rescued victims. Under Section 11, the Police Officer no below the rank of a sub-inspector is empowered to remove an individual who is in "imminent danger of becoming a victim or of being exploited as a victim of an offence under this Act" from any place or premises and produce the individual before a Magistrate or Child Welfare Committee.

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<sup>7</sup> Kajal Mukesh Singh and Ors. Vs. State of Maharashtra, 24<sup>th</sup> September 2020 Cr W.P 6065 of 2020, High Court at Bombay

<sup>8</sup> Ku Priyanka vs. The State of Madhya Pradesh, 20 May 2020, Cr Rev No. 789/2019, High Court of Madhya Pradesh





In the case of adults rescued by the police officer, the Magistrate may make an order sending the victim to a rehabilitation home (Section 16 (7)). If the rescued adult makes an application for release, the Magistrate may reject the application on grounds that it has not been made voluntarily.

The Bill calls to attention the continued focus of the State in the Raid, Rescue and Rehabilitation model as the panacea for all people who have been trafficked. Even as the consent of the victim gets negated, there is overwhelming evidence that the model has been used to forcibly incarcerate sex workers for long periods of time without recourse to judicial mechanisms.

Despite sex workers stating that they are adult and consent to being in sex work, they are “forcibly” picked up, their families are forced to give affidavits in courts stating that they will not do sex work again. In many instances, courts have refused to release HIV positive sex workers stating that families are not capable of looking after these women. These strategies further drive women in sex work underground and without safety nets in times of violence and exploitation.

Often heard experiences of vulnerable communities have shown that they have been at the receiving end of laws and policies that have been blindly applied to them in the name of forced rehabilitation. A study conducted by SANGRAM and VAMP called “Raided” revealed that out of a sample of 243 women picked up in raids in Maharashtra, 193 were adult consenting sex workers, who were incarcerated in rehabilitation homes against their wishes. Of these 28 women said that they had been incarcerated for periods between 6 months to 3 years before they were finally released<sup>9</sup>. Under the proposed law, this process will become more brutal and incursive for sex workers. It will also extend to groups of people most vulnerable because of poverty or attempt to make a livelihood through precarious forms of work. (Surrogates, domestic workers, sex workers, transgender people).

Rather than the criminalisation, incarceration, rehabilitation framework proposed by the Bill, in contrast, Section 13 of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 mandates a comprehensive system of rehabilitation that is sensitive to the structural inequities that contribute to manual scavenging.<sup>10</sup>

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<sup>9</sup> Raided: How anti trafficking strategies increase sex workers' vulnerability to exploitative practices. Table 9, page 53 and Table 10, Page 54. <https://www.sangram.org/resources/RAIDED-E-Book.pdf>

<sup>10</sup> The Act states:13. *Any person included in the final list of manual scavengers published in pursuance of sub-section (6) of Section (11) or added thereto in pursuance of subsection (3) of Section 12 shall be rehabilitated in the following manner, namely: He shall be given, within one month, a photo identity card, containing, inter alia, details of all family members dependent on him, and such initial, one-time cash assistance, as may be prescribed his children shall be entitled to scholarship as per the relevant scheme of the Central Government or the State Government or the local authorities, as the case may be;*

*he shall be allotted a residential plot and financial assistance for house construction, , or a ready-built house, with financial assistance, subject to the eligibility and willingness of the manual scavenger, and the provisions of the relevant scheme of the Central Government or State Government or the concerned local authority; he, or at least one adult member of his family, shall be given, subject to eligibility and willingness, training in a livelihood skill, and shall be paid a monthly stipend of not less than three thousand rupees, during the period of such training.*

The Supreme Court in the case of *Budhadev Karmaskar v Union of India*, has repeatedly brought attention to the futility of remand in short stay homes against the wishes of the victim<sup>11</sup>. Moreover, the 7<sup>th</sup> Report of the Panel on Sex Work, constituted by the Supreme Court under the same case, states that provisions such as crèches, day care and night care facilities should be set up for children of sex workers. However, no such provision is incorporated within this Bill.

The UN Trafficking in Persons Report speaks of housing, and the Manual Scavenging Act speaks of provision of plots for house construction. The Karnataka Government has recently recommended the provision of housing for sex workers. These recommendations recognise that merely removing a person from the site of trafficking is not going to assist the victim of trafficking in being rehabilitated. Provision of housing, and not merely accommodation, is essential to the continued rehabilitation process.

Rehabilitation measures must account for the structural factors that contribute to driving women to be trafficked. The manual scavenging act for example, recognizes rehabilitation to be a process which may disrupt any income generation activities of the victim, and also recognises the support that families of exploited persons receive from their exploitation. Such an understanding is completely absent from the Bill.

#### 4. Negating Consent of Adult Victims

The lack of consent of adults to participate in processes that impact their lives, homes, and future hits at the very core of State obligations to preserve and promote an individual's right to free choice and movement. Lack of attention to consent is apparent in the following aspects:

##### **Rehabilitation**

Section 16 of the Bill empowers a magistrate to place a victim in a rehabilitation home. Subsection (6) states that a victim or a person on their behalf may make an application for release, supported by an affidavit. However, sub section (7) states that if the magistrate were to find that such application has not been made voluntarily, it may be rejected. What is noticeable is that the section does not set down any

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*He or at least one adult member of his family shall be given, subject to eligibility and willingness, subsidy and concessional loan for taking up an alternative occupation on a sustainable basis, in such manner as may be stipulated in the relevant scheme of the Central Government or the State Government or the concerned local authority.*

*He shall be provided any such other legal and programmatic assistance, as the Central Government or State Government may notify on his behalf.*

<sup>11</sup> In its order dated August 24, 2011, the Supreme Court states: *In this connection we wish to say that providing short stay homes to sex workers is hardly a solution to their problem. They must be provided a marketable technical skill so that they can earn their livelihood through such technical skill instead of by selling their bodies. Merely sending them to homes is sending them to starvation. ... In this connection, we would like to say that the Central Government scheme has placed a condition that the rescued sex workers must stay in a corrective home in order to get technical training. In our opinion, No such condition should be imposed as many sex workers are reluctant to stay in these corrective homes which they consider as virtual prison.*





criteria that the magistrate must follow before placing the victim in the home. Therefore, in the absence of objective criteria, it is entirely up to the discretion of the magistrate to decide whether to place a woman in the home or not. It should also be noted that other acts that permit institutionalisation, for example, the Juvenile Justice Act, also mention that institutionalisation should be of last resort. In fact, the JJ Act repeatedly stresses upon the importance of family and familiar surroundings. However, the Bill does not even mention that victims of trafficking may have families, neither does it speak of financial and other obligations that victims may have.

### ***Medical examination***

Informed consent is also noticeably in Section 11 (1) which provides for medical examination of a person as directed by a Magistrate. Nothing in the wording of this provision refers to the necessity of taking the consent of the adult individual. The right of an adult to consent to medical treatment of any nature is enshrined in the right to bodily autonomy under Article 21 of the Constitution. There have been many cases where medical tests of sex workers have been conducted and shared with courts without consent. HIV/AIDS test results have been used as a ground to deny them liberty from rehabilitation homes on grounds that they were incapable of taking care of themselves.<sup>12</sup>

### ***Repatriation***

Many women “rescued” in raids are separated from their families, including minor children, for months at an end. The Bill does not speak of a victim’s right to be reunited with her family. From a reading of Section 16 (7), it seems that the order of the Magistrate will prevail in the event that he reaches a conclusion that the application has not been made voluntarily. It is not clear how the provisions of Section 19(4) will be applied in such a case.

Every citizen is guaranteed the constitutional right to exercise their choice regarding decisions that impact their lives. The law must take into account the wishes and consent of the person in the present point of time for purposes of rescue, rehabilitation and prosecution. Even, if a person may have been initially trafficked at the time of entry, the consent and wishes of the persons in the present have to be ascertained. The wishes of the adult person rescued and not accused of any offence; must be given primacy and Section 19 (4) must be override the provisions of Section 16 (7) if the intent of the Act is to respect the consent and agency of an adult woman.

The proposed law as per Section 20(f) seeks to carry out repatriation of ‘victims’ within India, which is problematic, given the background of aspirational migration of citizens and their right to move safely through the territory of India.

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<sup>12</sup> Raided: How anti trafficking strategies increase sex workers’ vulnerability to exploitative practices. Sex workers in Kolhapur who were put in rehabilitation were denied discharge on grounds that they were HIV positive because their families had not taken care of them. (Page 66) . <https://www.sangram.org/resources/RAIDED-E-Book.pdf>



The Bill seeks to repatriate a victim after psychological counselling. It is not clear what counselling is to be provided to the individual. Importantly, it does not discuss job security to be provided on repatriation to the state of origin. Further does the individual have the right to appeal against the order of repatriation and seek legal aid for the same? There is no clarity on how cases of refusal will be handled by the authorities. When and how are the individuals to be released from rehabilitation homes?

Article 19 )1 (of the Constitution of India gives all citizens the right to move freely throughout the territory of India and the right to reside and settle in any part of India .Section 39 providing for repatriation of a 'victim' by the State Police Nodal Officer to the home state of any other state can only come into play by exercise of choice as to the place of residence by the concerned individual. The Section calls on the State Nodal Officer to obtain informed consent but does not lay down the procedure to be followed in the event the "victim' does not wish to move back to his/ her home state except for recommending the victim for counselling. It is not clear whether such individual will be sent to a rehabilitation home. An order of repatriation without the exercise of free choice and consent of the person would be violation of the fundamental rights of the concerned individual, unconstitutional, bad in law and impermissible.

All efforts to "restore" to their place of origin should be completely voluntary and based on consent after examining all available options. The rescued person should be counselled and informed of all available options including the choice of going back to their place of origin. The affected person should also have the right to appeal from any such order of the Committee and appropriate legal aid and other legal assistance should be provided to such individuals. The affected person should also be counselled about their rights.

### ***Repatriation v/s Restoration***

The term "repatriation" does not imply that the affected parties shall be reunited with their families, but only indicates that they shall be returned to their place of origin. At present, repatriation indicates that a woman shall be transferred from a shelter home in one state to a home in another state. Once repatriated, the woman has to undergo another long and arduous process of being finally reunited with her family. The Juvenile Justice Act distinguishes repatriation from restoration, with restoration indicating that the child shall be reunited with their family, while repatriation indicates a return to a similar socio-economic and cultural status. As such, in the context of a victim of trafficking, mere repatriation is simply not enough, and moreover, seems to indicate that removing a victim from a geographical area solves the problem of trafficking.

### ***Eviction***

Section 42 (1) (i) empowers the Magistrate after a seven- day show cause notice to evict the occupier from the premises being used for trafficking for sexual exploitation. This is an extremely problematic provision. This is in stark contrast to provisions of Section 8 the Bonded Labor Act which expressly

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prohibit eviction of the person freed from bonded labour and their families from their homestead. Sex workers are evicted and brothels sealed under The Immoral Traffic Prevention Act since brothels are illegal spaces in and of themselves. Experience has shown that in the case of sex workers, they are often evicted from the premises where they live on grounds of brothels being places of trafficking – their families have been thrown on the streets and the brothels sealed with no provision of appeal.

There are two problems emerging from this provision:

- Given the history of the application of the provisions of ITPA, this provision is likely to be used to target brothel spaces and evict sex workers from their homes. This provision can be used to evict sex workers from the premises as occupiers though they have not been accused of any offence. Historically - Section 18 of the ITPA from which this provision has been derived, has been used on numerous occasions to close brothels and evict sex workers and their children. Most recently, we have witnessed these instances in Mumbai, Pune, Kolhapur, Nagpur – in some cases after giving seven -day notice period, but in most cases the brothels were closed without notice. There must be a clear stipulation that the provisions will not be used to shut places where adult consenting sex workers are residing with their children and family members.
- In the case of bonded labourers these places include working establishments such as garment industries, brick kilns, factories. In the case of commercial surrogacy, these places of exploitation potentially could be clinics and hospitals. However, it is a question whether the proposed bill envisages that these spaces will be closed and all employees evicted from the premises in the event that these spaces are being used for exploitation.

### **5. Lack of Representation of Affected parties**

There is a lack of representation of sex workers, bonded labourers, domestic workers and other affected parties at each level of the Committees from the District to the Centre in the Draft Bill. There must be participation of sex worker collectives, organisations working with bonded labour and domestic workers or organisations with a track record of working for the rights of the marginalised in the District/ State Anti-Trafficking Committee. Lawyers with a track record of working with sex workers, women in distress, violence against women should be included in the Committee. The Committee must include a representative of the State AIDS Control Society. The National Anti-Trafficking Board should include members of sex work networks/ collectives and activists with a track record of working on women's rights and labour rights. There is also a lack of representation and consultation of affected parties in the procedures laid down with no opportunity for support and counselling by peers.

### **6. Accountability of Organisations running Rehabilitation centres, Anti Trafficking Committees**

A number of raids, rescue and coercive rehabilitation measures are undertaken at the initiative of NGOs resulting in large scale violation of the rights of persons being 'rescued'. There is no process of

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Under the current scheme of the proposed Bill, the District Anti-Trafficking Committee has been given immense powers to decide on the rehabilitation of the victim/ advise the Magistrate on rehabilitation/ develop plans for rehabilitation. However, mechanisms of accountability have not been laid out in the Bill. There is no mention of the process of appeal for individuals seeking to opt out of the rehabilitation plans laid out by the District Anti-Trafficking Committee. The agencies undertaking rescue, rehabilitation need to be held accountable for violations and be liable in civil and criminal law.

## 7. Prolonged Incarceration Without Safeguards

The impact of the Bill will be that those who are arrested under the Act will spend years in jail without trial, in contravention of international jurisprudence. Under the ordinary criminal law, all accused will at least have the possibility that the Court may release them on bail.

The following provisions govern the issue of bail and anticipatory bail in the Bill:

*S49 (2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -*

*(a) Nothing in Section 438 of the Code shall apply in relation to any case involving in the arrest of any person on an accusation of having committed an offence under this Act with imprisonment of more than two years.*

*(b) no person accused of committing an offence under this Act shall be released on bail or on his own bond unless -*

*(i) the Special Public Prosecutor has been given an opportunity to oppose the application for such release;*

*(3) where the Special Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail; and*

There are two provisions that give reason for unease of the attempt to limit the right to freedom till convicted of an offence. The first attempt is a blanket denial of anticipatory bail to individuals accused of offences under the proposed bill leading to imprisonment of more than two years. The very purpose of the anticipatory bail provision in the Criminal Code was to ensure that no person would be confined unless and until found guilty. As mentioned earlier this provision is not only harmful but will lead to misuse and false cases being booked against victims.



The second provision on the conditions imposed on regular bail are equally problematic Section 52 (2) (b) (ii). Bail not jail is the fundamental norm to be followed by courts<sup>13</sup>. Presumption of innocence is the hallmark of criminal jurisprudence. Incarceration in jail as an under trial before an offence has been proved to be committed by the individual subverts the right to life, liberty and the presumption of innocence. Circumstances showing that the person intends to run away or threaten witnesses or commit other offences are the only grounds to refuse bail. Under the general law of bail, in offences punishable with life imprisonment or death notice is to be given to Public Prosecutor and he has to be heard before a decision on the important issue of release on bail. The current sub section 52 (2) (b) (ii) laying down that there should be 'reasonable grounds for believing that the accused is not guilty of such offence' before granting bail amounts to virtual denial of bail, incarceration and curtailment of liberty without undergoing trial and an offence being proved against the individual.

Section 37(1) of the Narcotics and Psychotropics Substances Act, 1987 (NDPS) contains an identical provision that an accused person is not to be released on bail unless the court is satisfied that there are reasonable grounds for believing that the accused is not guilty. Experience of the working of the provision under NDPS shows that it results in virtual denial of bail and years of incarceration. Similar draconian provisions in various anti-terror laws resulted in long periods of imprisonment without trial evoking strong criticism from the human rights movement.

The combination of an NIA investigation combined with a harsh bail provision will only mean years in jail for the accused under the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021.

### Our demands

- i. Adult persons doing sex work on their own volition and their clients<sup>14</sup> should be kept out of the purview of the proposed Draft Bill. It should be clearly and explicitly stated in the Statement of Objects and Reasons of the Draft Bill.
- ii. The Draft Bill should in the definition and at all relevant sections referring to prevention, rescue and rehabilitation clearly state that adult persons doing sex work on their volition are to be excluded from the ambit of the provisions<sup>15</sup>.

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<sup>13</sup>State of Rajasthan versus Balchand AIR 1977 SC 2447

<sup>14</sup>The Verma Commission in a clarification issued on the amended Section 370 IPC had stated; "the recast Section 370 ought not to be interpreted to permit law enforcement agencies to harass sex workers who undertake activities of their own free will, and their clients. The Committee hopes that law enforcement agencies will enforce the amended Section 370 IPC, in letter and in spirit". **Email dated February 8, 2013, Gopal Subramaniam, Clarification in respect of recommended amendment to Section 370 IPC, by the Justice J.S Verma Committee.**

<sup>15</sup>The Special Rapporteur on Violence Against Women (SR VAW) had in her India report submitted to the Un General Assembly (1 April 2014), "noted a tendency to conflate sex work with trafficking in persons and when sex workers are identified as victims of trafficking, the assistance that is provided to them is not targeted to their specific needs." She further noted with concern that there were rehabilitation centres for sex workers and the violence faced by them in custodial settings. The SRVAW had called for a review of the ITPA "to ensure measures to address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers." **Report of the Special**



- iii. Differentiate clearly between third parties that support sex workers to work in a safe environment and keep them out of the ambit of penal provisions.
- iv. Adult persons voluntarily doing sex work are not to be detained either as accused or rescued for “reformation”.
- v. Amend provisions that seek the evictions of sex workers and their families from their homes in the name of anti -trafficking measures. Clearly differentiate between those who exploit and sex workers and their families.
- vi. Include sex worker collectives and networks in all national, state and district anti – trafficking committees to ensure that the objectives of the draft Trafficking Bill 2021 are achieved without causing harm to consenting adult sex workers, while at the same time assisting victims of trafficking with a robust response.

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**Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Mission to India. 1 April 2014. A/HRC/ 26/38/Add.1**

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