

# Legislative Brief

## The Transgender Persons (Protection of Rights) Bill, 2016

### Highlights of the Bill

The Bill was introduced in Lok Sabha on August 2, 2016 by the Minister of Social Justice and Welfare, Mr. Thaawarchand Gehlot.

The Bill was referred to the Standing Committee on Social Justice and Welfare (Chairperson: Mr. Ramesh Bais) on September 12, 2016.

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- ◆ The Bill defines a transgender person as one who is partly female or male; or a combination of female and male; or neither female nor male. In addition, the person's gender must not match the gender assigned at birth, and includes trans-men, trans-women, persons with intersex variations and gender-queers.
- ◆ A transgender person must obtain a certificate of identity as proof of recognition of identity as a transgender person and to invoke rights under the Bill.
- ◆ Such a certificate would be granted by the District Magistrate on the recommendation of a Screening Committee. The Committee would comprise a medical officer, a psychologist or psychiatrist, a district welfare officer, a government official, and a transgender person.
- ◆ The Bill prohibits discrimination against a transgender person in areas such as education, employment, and healthcare. It directs the central and state governments to provide welfare schemes in these areas.
- ◆ Offences like compelling a transgender person to beg, denial of access to a public place, physical and sexual abuse, etc. would attract up to two years' imprisonment and a fine.

### Key Issues and Analysis

- ◆ The Supreme Court has held that the right to self-identification of gender is part of the right to dignity and autonomy under Article 21 of the Constitution. However, objective criteria may be required to determine one's gender in order to be eligible for entitlements.
- ◆ The Bill states that a person recognised as 'transgender' would have the right to 'self-perceived' gender identity. However, it does not provide for the enforcement of such a right. A District Screening Committee would issue a certificate of identity to recognise transgender persons.
- ◆ The definition of 'transgender persons' in the Bill is at variance with the definitions recognised by international bodies and experts in India.
- ◆ The Bill includes terms like 'trans-men', 'trans-women', persons with 'intersex variations' and 'gender-queers' in its definition of transgender persons. However, these terms have not been defined.
- ◆ Certain criminal and personal laws that are currently in force only recognise the genders of 'man' and 'woman'. It is unclear how such laws would apply to transgender persons who may not identify with either of the two genders.

## PART A: HIGHLIGHTS OF THE BILL

### Context

According to the World Health Organisation, 'transgender' is an umbrella term that includes persons whose sense of gender does not match with the gender assigned to them at birth.<sup>1</sup> For example, a person born as a man may identify with the opposite gender, as a woman.<sup>2</sup> According to the 2011 Census, the number of persons who do not identify as 'male' or 'female' but as 'other' stands at 4,87,803 (0.04% of the total population). This 'other' category applied to persons who did not identify as either male or female, and included transgender persons.<sup>3</sup>

In 2013, the government set up an Expert Committee to examine issues related to transgender persons.<sup>2</sup> The Committee stated that transgender persons faced issues of social stigma and discrimination which affected their access to education, healthcare, employment and government documents. In 2014, the Supreme Court recognised a transgender person's right to self-identification as male, female or the third gender.<sup>4</sup> Further, the Court directed central and state governments to grant legal recognition to transgender persons, address issues of social stigma and discrimination, and provide social welfare schemes for them.

A private member Bill was introduced in Rajya Sabha by Mr. Tiruchi Siva in 2014 to guarantee rights and provide welfare measures for transgender persons.<sup>5</sup> This Bill was passed in Rajya Sabha in 2015, and is currently pending in Lok Sabha. In August 2016, the government introduced the Transgender Persons (Protection of Rights) Bill, 2016 in Lok Sabha. The 2016 Bill has been referred to the Standing Committee on Social Justice and Empowerment.

### Key Features

#### Definition of a transgender person

- The Bill defines a transgender person as one who is (i) neither wholly female nor male; or (ii) a combination of female and male; or (iii) neither female nor male. In addition, the person's gender must not match the gender assigned at birth. This will include trans-men, trans-women, persons with intersex variations and gender queers.

#### Certificate of identity for a transgender person

- A person recognised as transgender person under the Bill shall have a right to self-perceived gender identity.
- A transgender person has to obtain a Certificate of Identity which will confer rights and be proof of recognition of identity as a transgender person.
- An application for obtaining such a Certificate should be made to the District Magistrate (DM). The DM will refer such an application to a District Screening Committee.
- The District Screening Committee will comprise a: (i) Chief Medical Officer; (ii) District Social Welfare Officer; (iii) psychologist or psychiatrist; (iv) representative of the transgender community; and (v) government officer. The DM will issue a Certificate of Identity as 'transgender' based on the recommendation of this Committee.
- The gender of a transgender person will be recorded in all official documents, on the basis of this Certificate.
- If there is any change in gender, the transgender person may apply for a revised certificate by following the same process as that of obtaining a Certificate of Identity.

#### Prohibition against discrimination against transgender persons

- The Bill prohibits discrimination against a transgender person, including unfair treatment or denial of service in relation to: (i) education; (ii) employment; (iii) healthcare; (iv) access to public goods and facilities; (v) right to movement; (vi) right to rent or own property; (vii) opportunity to hold public or private office; and (viii) access to a government or private establishment which has custody of a transgender person.
- All public and private establishments are prohibited from discriminating against a transgender person in employment matters, including recruitment and promotion. If an establishment has more than 100 persons, a designated person will deal with complaints in relation to the Bill.

#### Benefits related to employment, health and education

- The central or state governments shall provide welfare schemes and programmes to facilitate and support livelihood for transgender persons. This will include vocational training and self-employment.

- The central and state governments shall take steps to provide healthcare facilities to transgender persons including: (i) separate HIV surveillance centers; (ii) sex reassignment surgery and hormonal therapy counselling; (iii) review of medical curriculum; and (iv) a comprehensive insurance scheme.
- Educational institutions shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons.

### National Council for Transgender persons

- A National Council for Transgender (NCT) persons will be set up to advise the central government on policies, and legislation related to transgender persons. It will also monitor and evaluate such policies.
- The NCT will consist of representatives from (i) ministries such as social justice and empowerment, health, minority affairs; (ii) NITI Aayog; (iii) National Human Rights Commission and National Commission for Women; (iv) state governments; (v) nominated members from the transgender community; and (vi) experts from non-governmental organisations.

### Offences and Penalties

- The Bill specifies the following offences: (i) compelling transgender persons to beg or do forced or bonded labour (excluding compulsory government service for public purposes); (ii) denial of use of a public place; (iii) denial of residence in household, village or other place of residence; and (iv) physical, sexual, verbal, emotional or economic abuse.
- These offences will attract imprisonment between six months and two years, and a fine.

## PART B: KEY ISSUES AND ANALYSIS

### Recognition of transgender identity

#### Self-determination of identity vs. verification of eligibility for entitlements

The Supreme Court has held that the self determination of one's gender is part of the fundamental right to dignity, freedom and personal autonomy guaranteed under Article 21 of the Constitution.<sup>4</sup> Further, the Court upheld the right of transgender persons to determine their self-identified gender as a man, woman or as third gender. This would protect their right to live with dignity and respect.

In addition, the Court directed the central and state governments to provide reservations in educational institutions and public offices, and social welfare schemes for transgender persons. In this regard, it could be argued that there must be objective criteria to verify the eligibility of applicants to receive benefits targeted for transgender persons. If self-determination of one's gender identity were to be the sole criterion to receive benefits, it could be misused by others to claim such benefits.

Clauses 3, 9-16  
The Bill creates provisions to protect transgender persons from discrimination, and provide welfare schemes in relation to health, education and employment. In doing so, the Bill provides for both – self-perceived gender identity, and a screening process – to recognise the identity of transgender persons. This leads to the issue discussed below.

#### The meaning and implication of the term 'self-perceived gender identity' is unclear

Clauses 4-7  
The Bill states that a person will be recognised as 'transgender' on the basis of a Certificate of Identity issued through a District Screening Committee. Such a Certificate will be proof of identity as 'transgender' and confer rights under the Bill. However, the Bill also states that a person who is recognised as 'transgender' shall have the right to 'self-perceived' gender identity. Given that there is a requirement of a Certificate of Identity under the Bill, it is unclear what the term 'self-perceived' gender identity entails and how it will be enforced.

Note that, if a transgender person is denied a Certificate of Identity, the Bill does not provide a mechanism for appeal or review of such decision of the District Screening Committee.

## Definition of ‘transgender person’

Clause 2 (i) The Bill defines a transgender person as one who is (i) neither wholly female nor wholly male; or (ii) a combination of female or male; or (iii) neither female nor male. In addition, the person’s sense of gender must not match with the gender assigned at birth. The Bill further states that this will include trans-men, trans-women, persons with intersex variations and gender-queers. There could be some issues with this definition.

### Criteria specified in the definition of ‘transgender person’ are unclear

The Bill requires that, in order to be identified as a transgender person, a person must be (i) neither wholly male nor female; or (ii) a combination of male or female; or (iii) neither male nor female. However, the Bill does not specify if the terms ‘male’ and ‘female’ refer to biological sex which includes the human anatomy and chromosomes. Or if being ‘male’ and ‘female’ also refers to one’s psychological sense of gender, which includes how one chooses to feel, identify and express oneself.

International expert bodies like the World Professional Association for Transgender Health, World Health Organisation and the American Psychological Association define a transgender person as one whose gender identity does not align with the sex assigned at birth.<sup>1,6,7</sup> Note that these expert bodies do not specify any biological criteria in their definitions of transgender persons.

In line with such international standards, the Supreme Court, the Expert Committee of the Ministry of Social Justice and Welfare and the 2014 Private Member Bill have also defined ‘transgender persons’ based on psychological criteria only. The 2016 Bill is at variance with these definitions. We compare these definitions in Table 1 below.

**Table 1: Comparison of the definition of transgender persons by various expert bodies**

Supreme Court (2014) <sup>4</sup>	Expert Committee (2014) <sup>2</sup>	Private Member Bill (2014) <sup>5</sup>	Government Bill (2016)
<ul style="list-style-type: none"> <li>Persons whose gender identity does not match their biological sex.</li> </ul>	<ul style="list-style-type: none"> <li>Persons whose sense of gender does not match with the gender assigned at birth.</li> <li>They express their gender through several identity terms and names.</li> </ul>	<ul style="list-style-type: none"> <li>Persons whose sense of gender does not match with the gender assigned at birth;</li> <li>Includes trans-men, trans-women, gender-queers and socio-cultural identities.</li> </ul>	<ul style="list-style-type: none"> <li>Persons who are (i) neither wholly female nor wholly male; or (ii) a combination of female and male; or (iii) neither female nor male; and</li> <li>the persons’ sense of gender does not match with the gender assigned at birth.</li> <li>Includes trans-men, trans-women, persons with intersex variations and gender queers.</li> </ul>

Sources: National Legal Services Authority vs. Union of India (2014); Report of the Expert Committee on the Issues relating to Transgender Persons (2014); The Rights of Transgender Persons Bill, 2014; The Transgender Persons (Protection of Rights) Bill, 2016; PRS.

### Certain terms in the definition of ‘transgender person’ have not been defined

Clause 2 (i) The Bill includes terms like ‘trans-men’, ‘trans-women’, persons with ‘intersex variations’ and ‘gender-queers’ in its definition of transgender persons. However, these terms have not been defined. Therefore, it is unclear who would be covered under these terms.

## Transgender persons and their status under existing laws

Clauses 19, 21 Currently several criminal and civil laws recognise two categories of gender i.e. man and woman. These include laws such as Indian Penal Code (IPC), 1860, National Rural Employment Guarantee Act, 2005 and Hindu Succession Act, 1956 which contain some gender specific provisions. The Bill recognises a third gender i.e. ‘transgender’. However, the Bill does not clarify how the above mentioned laws will apply to transgender persons. Table 2 below lists some legal provisions that are gender specific in their application.

Note that the penalties for similar offences may vary because of the application of different laws, based on gender identity. For example, under the IPC, sexual offences related to women attract a higher penalty (up to life imprisonment) than that specified for sexual abuse under the Bill (up to two years).<sup>8</sup>

**Table 2: Gender specific laws and procedures in India**

Legislation	Gender specific provision
	Criminal laws
Indian Penal Code, 1860	<ul style="list-style-type: none"> <li>Punishment for assault on a woman with intent to outrage her modesty;</li> <li>Punishment for selling female minors for purposes of prostitution;</li> <li>Rape as an act committed by a man on a woman;</li> <li>Word, gesture or act intended to insult the modesty of a woman;</li> <li>Husband or relative of husband of a woman subjecting her to cruelty;</li> <li>Dowry death, where death of a woman caused due to cruelty by husband or his relatives.</li> </ul>

Legislation	Gender specific provision
Code of Criminal Procedure, 1973	<ul style="list-style-type: none"> <li>▪ A female under arrest can be searched only by another female with strict regard to decency;</li> <li>▪ Grants the power to compel restoration of the liberty of unlawfully detained females;</li> <li>▪ Requires the medical examination of a victim of rape, who should be a woman.</li> </ul>
Indecent Representation of Women (Prohibition) Act, 1986	<ul style="list-style-type: none"> <li>▪ Prohibits the indecent representation of women in various forms of publications.</li> </ul>
Protection of Women from Domestic Violence Act, 2005	<ul style="list-style-type: none"> <li>▪ Grants protection to a woman in a domestic relationship and who alleges domestic violence.</li> </ul>
Civil laws	
The Sexual Harassment of Women At Workplace (Prevention, Prohibition, Redressal) Act, 2013	<ul style="list-style-type: none"> <li>▪ Provides protection against the sexual harassment of women at the workplace.</li> </ul>
Hindu Marriage Act, 1955	<ul style="list-style-type: none"> <li>▪ Recognises marriage between a man and a woman.</li> </ul>
The Special Marriage Act, 1954	<ul style="list-style-type: none"> <li>▪ Recognises marriage between a man and a woman.</li> </ul>
Hindu Adoptions and Maintenance Act, 1956	<ul style="list-style-type: none"> <li>▪ Provides different criteria for a man and a woman in relation to adoption of a child.</li> </ul>
Hindu Succession Act, 1956	<ul style="list-style-type: none"> <li>▪ 'Heir' refers to either a male or a female for the purpose of succession, in the absence of a will.</li> </ul>
The Muslim Personal Law (Shariat) Application Act, 1937	<ul style="list-style-type: none"> <li>▪ Specifies 'special property' of females which includes personal property inherited or obtained by contract, gift, etc.</li> </ul>
Other laws	
The Mines Act, 1952	<ul style="list-style-type: none"> <li>▪ Prohibits the employment of a woman in areas of a mine below ground level;</li> <li>▪ Permits the employment of a woman in a mine above ground level between the hours of 6 am and 7 pm.</li> </ul>
Factories Act, 1948	<ul style="list-style-type: none"> <li>▪ Permits a woman from working in any factory only between the hours of 6 am and 7 pm.</li> </ul>
National Food Security Act, 2013	<ul style="list-style-type: none"> <li>▪ States that the eldest woman in every eligible household will be head of the household for the purpose of issue of ration cards.</li> </ul>
National Rural Employment Guarantee Act, 2005	<ul style="list-style-type: none"> <li>▪ States that priority will be given to women workers (at least one-third of the beneficiaries are to be women) if they have registered and requested for work under this Act.</li> </ul>
The Companies Act, 2013	<ul style="list-style-type: none"> <li>▪ Requires the Board of Directors of every company to have at least one woman director.</li> </ul>

Sources: Various central laws;<sup>9</sup> PRS.

1. "Transgender persons", World Health Organisation, <http://www.who.int/hiv/topics/transgender/en/>.
2. Report of the Expert Committee on the Issues relating to Transgender Persons, Ministry of Social Justice and Empowerment, January 27, 2014, <http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf>.
3. Primary Census Abstract Data for Others (India & States/UTs), Census 2011.
4. National Legal Services Authority vs. Union of India [(2014) 5 SCC 438].
5. The Rights of Transgender Persons Bill, 2014, Private Member Bill, August 24, 2015, [http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210\\_2016\\_LS\\_Eng.pdf](http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/210_2016_LS_Eng.pdf).
6. Guidelines related to Transgender persons, American Psychological Association, <https://www.apa.org/practice/guidelines/transgender.pdf>.
7. Standards of Care, 7th Version, The World Professional Association for Transgender Health, [https://s3.amazonaws.com/amo\\_hub\\_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf).
8. Sections 354, 354A, 354B, 375, Indian Penal Code, 1860.
9. Sections 354, 372, 375, 509, 498A, 304B, Indian Penal Code, 1860; Sections 51, 98, 164A, Code of Criminal Procedure, 1973; Indecent Representation of Women (Prohibition) Act, 1986; Protection of Women from Domestic Violence Act, 2005; Sexual Harassment of Women At Workplace (Prevention, Prohibition, Redressal) Act, 2013; Section 7, Hindu Marriage Act, 1955; Section 4, Special Marriage Act, 1954; Sections 7,8, Hindu Adoptions and Maintenance Act, 1956; Section 3, Hindu Succession Act, 1956; Section 2, Muslim Personal Law (Shariat) Application Act, 1937; Section 46, The Mines Act, 1952; Section 66, Factories Act, 1948; Section 13, National Food Security Act, 2013; Section 5, National Rural Employment Guarantee Act, 2005; Section 149, The Companies Act, 2013.

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## Annexure: Comparison of 2016 Bill with the Supreme Court decision, 2014 Bill and Expert Committee

The Supreme Court, Expert Committee of the Ministry of Social Justice and Welfare and a 2014 Private Member Bill passed in Rajya Sabha examined several aspects related to the recognition and rights of transgender persons. Table 3 compares the provisions of the 2016 Bill with these recommendations.

**Table 3: Comparison of 2016 Bill with the Supreme Court decision, Private Member Bill (2014) and the Expert Committee report**

Provision	Supreme Court (2014)	Expert Committee (2014)	Private Member Bill (2014)	Government Bill (2016)
Definition of the term 'transgender person'	<ul style="list-style-type: none"> <li>A person whose gender identity, gender expression or behaviour does not conform to their biological sex.</li> </ul>	<ul style="list-style-type: none"> <li>A person with a gender other than the gender assigned at birth.</li> </ul>	<ul style="list-style-type: none"> <li>A person, whose sense of gender does not match with the gender assigned at birth;</li> <li>Includes trans-men and trans-women (whether or not they have undergone sex reassignment surgery), gender-queers and a number of socio-cultural identities.</li> </ul>	<ul style="list-style-type: none"> <li>A person who is:               <ol style="list-style-type: none"> <li>neither wholly female nor wholly male; or</li> <li>a combination of female or male; or</li> <li>neither female nor male; and</li> </ol> </li> <li>whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men, trans-women, persons with intersex variations and gender-queers.</li> </ul>
Identification of transgender persons	<ul style="list-style-type: none"> <li>Legal recognition of transgender persons who self-identify as male, female or as third gender.</li> </ul>	<ul style="list-style-type: none"> <li>A transgender person will have the choice to declare oneself as either man, woman or transgender.</li> </ul>	<ul style="list-style-type: none"> <li>No provision.</li> </ul>	<ul style="list-style-type: none"> <li>A person recognised as transgender person shall have the right to self-perceived gender identity.</li> <li>A certificate of identity as 'transgender' to be issued by a District Magistrate based on the recommendations of a Screening Committee.</li> <li>If there is a change in gender, a revised certificate may be obtained by following a similar procedure.</li> </ul>
Prohibition of discrimination	<ul style="list-style-type: none"> <li>Directs central and state governments to address social stigma and discrimination faced by transgender persons.</li> </ul>	<ul style="list-style-type: none"> <li>Recommends non-discrimination in: (i) families; (ii) educational institutions; (iii) healthcare; (iv) social welfare; (v) shelter and residence.</li> </ul>	<ul style="list-style-type: none"> <li>'Discrimination' refers to any restriction due to a person's gender identity which affects their human rights and freedoms.</li> </ul>	<ul style="list-style-type: none"> <li>Prohibits discrimination in relation to areas including: (i) education; (ii) employment; (iii) healthcare; (iv) access to public goods; (v) right of movement; and (vi) occupation of property.</li> </ul>
Welfare schemes	<ul style="list-style-type: none"> <li>Directs central and state governments to provide schemes for transgender persons in areas including housing and employment.</li> </ul>	<ul style="list-style-type: none"> <li>Recommends schemes for: (i) education; (ii) subsidised loans; (iii) pension; and (iv) grants to organisations working with transgender persons.</li> </ul>	<ul style="list-style-type: none"> <li>Requires provision of schemes for: (i) pension; (ii) unemployment allowance; (iii) health provisions like free sex reassignment surgery; (iv) insurance.</li> </ul>	<ul style="list-style-type: none"> <li>Requires provision of schemes for: (i) rehabilitation; (ii) livelihood support; (iii) healthcare facilities; and (iv) insurance.</li> </ul>
Reservations	<ul style="list-style-type: none"> <li>Directs provision of reservation in: (i) educational institutions; and (ii) public appointments by the central and state governments.</li> </ul>	<ul style="list-style-type: none"> <li>No recommendations.</li> </ul>	<ul style="list-style-type: none"> <li>Requires provision of reservations for two percent seats in all government educational institutions and offices.</li> </ul>	<ul style="list-style-type: none"> <li>No provision.</li> </ul>
Grievance redressal and penalties	<ul style="list-style-type: none"> <li>Not addressed.</li> </ul>	<ul style="list-style-type: none"> <li>No recommendations.</li> </ul>	<ul style="list-style-type: none"> <li>Special transgender rights courts to be created.</li> <li>Court to determine penalties for offences.</li> <li>Penalties specified for hate speech (imprisonment and fine) and failure to furnish information (fine).</li> </ul>	<ul style="list-style-type: none"> <li>No mechanism of grievance redressal specified.</li> <li>Penalties (imprisonment and fine) specified for: (i) compelling a transgender person to beg; (ii) denying access to public places; and (iii) physical, sexual and verbal assault.</li> </ul>

Sources: National Legal Services Authority vs. UoI (2014); Report of the Expert Committee (2014); The Rights of Transgender Persons Bill, 2014; The Transgender Persons (Protection of Rights) Bill, 2016; PRS.