

## Coalition for an Inclusive Approach on the Trafficking Bill

### SUGGESTED AMENDMENTS TO THE TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) BILL 2018

<b><i>Provisions of the Trafficking Bill</i></b>	<b>Concerns</b>	<b>Suggestions for Amendment / Comments</b>
<b>Statements of Object and Reasons</b>	There is a long history of the conflation of trafficking and sex work and the likelihood of sex workers being targeted in a major way under the new legislation.	It may be best to explicitly state that adult persons voluntarily in sex work are to be excluded and the following added:  <i>‘Adult persons voluntarily in sex work are not covered within the ambit of the bill’.</i>
<b>Section 2(n) “premises”</b>	The definition is overbroad and vague and includes places in the future like ‘destination of trafficking’	The latter part: <i>‘...and includes any source, transit or destination of trafficking’</i> - could be omitted
<b>Section 11(2) (ix) National Anti-Trafficking Relief and Rehabilitation Committee - Composition</b>	Four representatives of civil society organisations – the perspective of these organisations may be at variance from an empowering vision of sex workers and other collectives and organisations	The representation of civil society members could be substituted or the number reduced to two and two members of sex workers or other organisations could be added.  <i>‘Two representatives of sex workers or other collectives/unions/organisations – Members’.</i>
<b>Section 12(2)(ix) State Anti-Trafficking Committee</b>	Two social workers out of which one shall be a woman – the social worker members may have their own perspective far at variance from an empowering perspective giving agency.	It is important to have persons from sex workers or other affected communities. Perhaps it could read:  <i>‘Two representatives of sex workers organisations’ or in the alternative’: ‘Two social workers out of which one shall be a person from a sex workers or other collective/union/organisation</i>
<b>Section 13(2)(v) District Anti-Trafficking Committee Composition</b>	Peer presence and participation by sex workers would work towards fulfilling the function of providing psychological assistance and need based rehabilitation.	Representation of sex workers to achieve the goal of ‘need based rehabilitation’ rather than mechanistic rehabilitation.  <i>‘Two representatives of sex workers collective/union/organisation’</i> - could be substituted.
<b>Section 13(2)(vi)</b>	Same as above	After ‘such other members as may be prescribed’ - the following could be added:

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		<p><i>‘Two representatives of sex workers or other collective/union/organisation’.</i></p>
<p><b>Section 16(1) ‘rescue in case of imminent danger to life and person ..</b></p> <p><b>The provision also provides for medical examination, but does not mention taking consent of the ‘rescued’ person</b></p>	<p>Recording the reasons in writing acts as a check in the working of law so that a provision to be used if there is imminent danger to life is not used in a mechanical manner in each and every case as a convenient short cut to avoid safeguards provided in law.</p> <p>Consent for medical examination is part of right to life and liberty under Article 21. It is likely that persons may be tested for HIV without consent and the finding disclosed.</p>	<p>In Section 16(1) which reads: ‘Where a police officer or Anti-Trafficking Police Officer or Anti-Trafficking Unit has reason to believe that it is necessary to rescue a person without undue delay due to the imminent danger that may cause his life or person, the following may be added: <i>for reasons to be recorded in writing, he or it may remove such person...</i></p> <p>After ‘take necessary steps for the medical examination’, the following may be added: <i>“with the consent of the rescued person.”</i></p>
<p><b>Section 17(4) Magistrate power in case of adult rescued...victim may be placed for such reasonable period</b></p>	<p>Delays are notorious in the legal system. Even where time limits are specified they are rarely adhered to. However, specifying time limit acts as a check. The Allahabad High Court gave compensation in one case as the time limit specified was exceeded.</p>	<p>The provision for sending an adult to a home for rehabilitation without taking into account consent or lack of consent must be removed.</p> <p>If that is not agreeable, then in the alternative a time limit must be fixed: <i>‘...for a maximum of four/six weeks’</i></p>
<p><b>Section 17(4) Proviso – Magistrate power to reject Voluntary application of adult person</b></p>	<p>An adult person must not be kept in custody without consent after being ‘rescued’. Life and liberty is only to be deprived as punishment for committing crimes.</p>	<p>The proviso needs to go in toto. However, if that is not agreeable – then the adult person must be provided a reasonable opportunity including legal representation to refute the Magistrate’s view that the application is not voluntary.</p> <p>Accordingly, at the end of the proviso: ‘...the Magistrate may reject such application after recording his reasons in writing’, the following could be added: <i>“and an opportunity offered to the rescued adult person to refute the opinion that the application is involuntary and establish that in fact the application seeking release is voluntary.’</i></p>
<p><b>Section 17(5) Magistrate may summon mental health professional or psycho-</b></p>	<p>Many mental health professionals may have stereotypes prevalent in society. Peer presence would help in creating a non-judgmental space.</p>	<p>Peer presence is crucial to the process of counselling and ascertaining need based rehabilitation.</p>

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<p><b>social counsellor or....to assist...</b></p>		<p>Accordingly, among the persons whose assistance can be taken the following could be added: <i>‘peer members or representatives of the organisation/collective of the rescued person.</i></p>
<p><b>Section 19 Presumption as to offences in case of offences in respect of a child or woman or person suffering from physical or mental disability</b></p>	<p>The provision provides for wholesale presumption that the person has committed the offence for which he is being prosecuted. Presumption of innocence and burden of proof on prosecution are foundational principles of criminal jurisprudence. The section turns this on its head and places the onus of proving innocence on the accused.</p>	<p>Even under the amended rape law – there is a limited presumption that ‘if the woman says she did not consent, then the lack of consent is to be presumed’. This limited presumption can be rebutted by the accused under the rape law. Introducing whole sale presumption of having committed an offence for any category of offences is a dangerous proposition in criminal jurisprudence leading to undermining of foundational principles which form the bedrock of the criminal-justice system. <i>Section 19 needs to be deleted.</i></p>
<p><b>Sections 21 to 23 provide for setting up Protection Homes and Rehabilitation Homes by Government and NGOs</b></p>	<p>The quality and manner of running the homes needs an efficient monitoring mechanism</p>	<p>Provisions need to be introduced setting up an independent monitoring mechanism with representatives from the ‘rescued’ victim’s community for monitoring the quality and manner of running Protection Homes and Rehabilitation Homes.</p>
<p><b>Section 24 – Application by person rescued to make voluntary application to be in a Rehabilitation Home</b></p>	<p>Rehabilitation should be offered to the victims as a choice which they can exercise. All provisions providing for stay in Protection and Rehabilitation Homes against the wishes of a ‘rescued’ adult person are a violation of the fundamental rights to life, liberty, freedom of movement and the right to carry on any business, occupation or profession.</p>	<p>The only provision needed is one which provides for a ‘rescued’ victim/survivor to opt for stay in rehabilitation home if they wish as specified in Section 24 and in tune with need based rehabilitation and exercise of choice, agency and consent.</p>
<p><b>Section 26 Repatriation</b></p>	<p>The provision provides for written consent of the victim/survivor and for counselling by psycho-social professionals. However, providing a non-coercive space and peer support is crucial for the exercise of consent.</p> <p>The bill aims to address the ‘legal, economic and social environment for the victims’. Repatriation does not address these concerns and only puts the individual back</p>	<p>Section 26(3) After ‘..shall make arrangements for the counselling for the victim by trained psycho-social professionals the following could be added: ‘along with <i>counselling and support by peer members from the community of the victim including any collective/union or organisation</i>’.</p> <p>Provisions to provide for the contingency where the ‘rescued’ person does not consent to be repatriated need to be added. In</p>

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	to place of origin.	<p>case the person rescued does not wish to be repatriated, then he/she should be at liberty to be released.</p> <p>Provisions detailing steps to address the economic and social environment of trafficked persons need to be worked out in tune with the object of protection, prevention and rehabilitation of the bill.</p>
<b>Section 29 (1) Forfeiture of property is or likely to be used for the commission of an offence</b>	<p>Property is generally attached if a person is absconding to ensure presence to face trial or after conviction as the offence has been established and property attached as punishment.</p> <p>Section 29(2) Provides for forfeiture of movable and immovable property after conviction.</p>	<p>Retention of Section 29(1) can lead to harassment. The presumption of innocence mandates that property be forfeited after conviction.</p> <p>Section 29(2) provides for forfeiture after conviction and addresses the issue.</p> <p><i>Section 29(1) could be deleted.</i></p>
<b>Section 30 (i) to (xi) - Aggravated form of trafficking</b>	<p>Trafficking for Child-bearing; administering hormones for early sexual maturity; marriage or pretext of marriage; begging are some of the purposes which constitute aggravated offence. There is likelihood of transgender persons taking hormones or of woman consenting to surrogacy being targeted. Similarly, child marriages and young eloping couples could be roped in the ambit of the provision.</p> <p>Section 31(viii) mentions ‘causing or exposing a person to a life-threatening including acquired immune deficiency syndrome or human immunodeficiency virus’ as an aggravated offence.</p>	<p>Explanations could be inserted:</p> <p>Section 31 (ii) <i>Explanation I – ‘A woman bearing child with consent would not come within the ambit of the provision.’</i></p> <p>Section 31(iv) <i>Explanation II – Hormones taken as part of the processes by transgender persons or male to female or female to male sex change do not fall within the ambit of the offence.</i></p> <p>Section 31(v) <i>Explanation III – Eloping couples do not fall within the ambit of trafficking.</i></p> <p>Section 31(viii) Other illnesses could be added to avoid singling out and stigmatising HIV/AIDS:  <i>‘...life threatening illness including hepatitis, ....’</i></p> <p><i>Explanation IV – Testing for HIV is to be done after counselling, consent and confidentiality maintained about the results.</i></p>
<p><b>Section 34 Punishment for keeping or allowing premises to be used as a place for trafficking</b></p> <p><b>Section 34(1) ...to be used as a place for trafficking</b></p> <p><b>Section 34(2) ...used or intended to be used</b></p>	<p>The phrases are vague and over broad referring to a future possibility and have the potential to be used to harass persons</p>	<p>Section 34(1) ‘to be used as a place for trafficking’ could be amended to read: ‘used as a place for trafficking’.</p> <p>Trafficking is defined while Exploitation is an undefined vague word.</p> <p>Section 34(2) .. <i>intended to be used as a place of exploitation –</i></p>

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<b>as a place of exploitation</b>		- could be omitted and <i>‘used as a place for trafficking’</i> could be retained in the section.
<b>Section 35(1) Closure and eviction Empowers Magistrate to evict occupiers from premises used for trafficking</b>	Sex workers are likely to get evicted even though they are the looked upon by the law as victim and survivors, yet they would be rendered homeless.	The owner, landlord, lessor could be retained in the category of persons liable and a proviso introduced:  <i>‘Provided that sex workers who are victim/survivors under the law are not to be evicted from their living spaces’.</i>
<b>Section 36 Punishment for promoting or facilitating trafficking of person</b>	‘...material that promotes trafficking or exploitation of a trafficked person..’ The expression ‘promotes’ is vague and has the potential of misuse as well as the space for subjective interpretations of individual police officers	Perhaps the following could be substituted: <i>‘..any material which has a direct nexus and leads to the trafficking of any person’</i>
<b>Section 39(2)</b>	‘Whoever solicits or publishes electronically ...or any other form which may lead to the trafficking of a person...’ May lead to trafficking is talking of a hypothetical situation which may happen in the future and is prone to misuse and subjective interpretations.	It could be substituted with: <i>‘...which has led to the trafficking of any person’.</i>
<b>Section 41 Offences related to media</b>	‘Whoever distributes, sells or stores...showing incidence of sexual exploitation, sexual assault....shall be punished	Explanation on the lines of Section 79 of the IT act could be added to provide safe harbour to intermediaries: <i>‘Explanation – An intermediary who acts as a mere conduit and does not initiate the transmission, select the receiver to the transmission, or select or modify the information contained in the transmission, and exercises due diligence while discharging duties under the law and observe prescribed guidelines does not fall within the ambit of the offence.’</i>
<b>Section 42 Punishment for disclosure of identity</b>	Often the police hold a press conference and disclose the identity or present the ‘rescued’ victim/survivors to the press. At present the section mentions newspapers; magazines, etc but omits investigating agencies.	A sub-section to Section 42(1) could be added: <i>‘The police or any other investigating agency or the prosecution shall not disclose the name, address or any other particulars which may lead to the identification of a victim or witness of trafficking.’</i>
<b>Section 52 (2)(a)</b>	Provision for anticipatory bail has been made inapplicable for offences punishable with more than two years imprisonment.	It is best to delete the provision so that the provision for anticipatory bail is available. Anticipatory bail is not as a matter of right and is granted at the discretion of courts, which

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	The anticipatory bail provision is to avoid unnecessary detention and harassment by being booked in criminal cases. Cases take a long time to conclude leading to prolonged detention of persons presumed innocent in law.	is a sufficient check, as in appropriate cases the court will refuse the request for anticipatory bail.  <i>Section 52 (2) (a) could be deleted.</i>
<b>Section 52 (2)(b)(ii)</b>	<p>The section specifies that bail is to be granted if the court is satisfied that ‘there are reasonable grounds for believing that the accused is not guilty of such an offence or that he is not likely to commit any offence while on bail.’</p> <p>It is difficult for an accused to establish a negative like ‘not guilty of an offence’ or ‘not likely to commit any offence while on bail’.</p> <p>In effect this provisions works to effectively deny release on bail leading to prolonged incarceration due to the time taken for trials to conclude.</p> <p>Experience of the working of similar provisions in other laws substantiates the fact of virtual denial of bail and long periods of detention.</p>	<p>The only reasons to deny bail are circumstances showing that the accused intends to abscond, or threaten witnesses or tamper with evidence or commit other offences.</p> <p>Opportunity to the Public Prosecutor under Section 52 (2)(b)(i) to oppose the application before release on bail is a sufficient safeguard that reasons for denying bail would be brought to the notice of the Court for a considered decision with regard to grant or denial of bail.</p> <p><i>Section 52 (2) (b)(ii) could be deleted.</i></p>

### Specific Comments by HAQ Center for Child Rights

<i>Provisions of the Trafficking Bill</i>	<i>Issue</i>	<i>Suggestion/Comments</i>
<p><b>Section 2: Definitions</b></p> <p>Sub-clause (2) of Section 2 states that the terms which have not been defined in this Bill shall have the meaning as prescribed in IPC, Code of Criminal Procedure, 1973 (Cr.P.C.), Information Technology Act, 2000, Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act,2015).</p>		<p>In order to make the Bill comprehensive, the said provision should also include acts such as - Immoral Traffic (Prevention) Act, 1956, Protection of Children from Sexual Offences Act (POCSO Act), 2012, Bonded Labour System (Abolition) Act, 1976, Prohibition of Child Marriage Act, 2006 and Child and Adolescent Labour (Prohibition and Regulation) Act, 1986.</p>

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<p><b>Section 17: Safety, care and protection of persons rescued</b></p> <p>Provision (3) of Section 17 states that after age inquiry by the Magistrate if it is found that the victim is a child, then the Magistrate will pass such order as he deems necessary for the care and protection of the child.</p>	<p>Once it has been determined that the victim is a child, the Child Welfare Committee (CWC), under the JJ Act, 2015, has been conferred with the power and responsibility for the care and protection of the child.</p> <p>However, in the present provision, the Magistrate has been given the power to pass necessary orders in regard to care and protection of the child.</p>	<p>In order to clear the ambiguity in the role and powers of the authorities, the provision may be amended to state that upon conducting age inquiry, the Magistrate should send the child victim to concerned CWC for further action with regard to the care and protection of the child.</p>
<p><b>Section 21 and 22: Protection Home and Rehabilitation Home</b></p>	<p>Protection Home under Section 21 and Rehabilitation Home under Section 22 have not been specifically defined under Bill.</p> <p>For the purpose of Section 22(2), the appropriate government may utilize any existing shelter home for the purposes of rehabilitation home - It is not clear that whether the older victims apart from children will also be placed in these shelter homes.</p>	<p>As terms like shelter home, observation homes, special homes etc have been categorically defined under JJ Act, 2015, similarly important terms like protection home and rehabilitation homes should also be categorically defined for the purpose of this Bill to distinguish them from the Children’s Homes.</p> <p>It must be made clear that adult victims of trafficking will not be housed with children and for children it will be the Children’s Homes to which children will be sent on order of the CWC</p>
<p><b>Section 23: Registration</b></p> <p>Protection and Rehabilitation Homes shall be registered under this Bill. Further, in the event that any person in-charge of the Protection or Rehabilitation Home, contravenes the aforesaid provision, the aforesaid person-in-charge shall be made punishable.</p>	<p>Whether the existing shelter home as defined under JJ Act, 2015, also used for providing rehabilitation services for the purpose of the Bill is required to separately register under Section 23(1) of this Bill?</p> <p>Monitoring mechanisms have not been laid down in the said Bill to check the licensing or registration or compliances of said homes providing rehabilitation and protection services to victims of trafficking.</p>	<p>The provision may be amended to include regular monitoring of the Protection or Rehabilitation Home and if found not</p>

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		complying with the conditions of the registration/license i.e. abusing/harassing the child victims, the registration would be cancelled and any further action may be taken as suggested under Section 23(2) of the Bill.
<p><b>Section 24: Application for providing care and protection</b></p> <p>The victim or any person (rescued on behalf of the victim) may make an application to the Magistrate, in whose limits the victim or other person is trafficked or suspected to be trafficked, for an order to be kept in rehabilitation home.</p> <p>In the event the victim is a child, the provisions of JJ Act shall apply.</p> <p>The Magistrate shall, before taking a final decision with respect to rehabilitation, consult the District Anti-trafficking Committee.</p>	<p>What does the term “person rescued on behalf of him” mean?</p> <p>Whether the CWC shall be consulted in the event the victim is a child? Section 37 of the JJ Act gives power to the CWC to decide whether the child is need of care and protection and accordingly pass orders for rehabilitation of the said child.</p>	<p>Sub- clause (3) should be amended to specifically lay down that the magistrate shall, before taking a final decision with respect to rehabilitation, consult the District Anti-trafficking Committee and in case the victim is a child, then the authority for deciding the rehabilitation and protection of the child shall solely lie with the CWC.</p> <p>Proviso to Section 24(1) should apply to all the sub clauses of Section 24.</p>
<p><b>Section 31: Offences and penalties</b></p> <p>Defines the forms of Aggravated trafficking</p>		<p>For the purposes of definition of aggregated form of trafficking, the provision must include that if any of the forms of trafficking, as mentioned in the section, are in relation to a child, the same should be construed as a part of definition of ‘aggravated form of trafficking’.</p>
<p><b>Section 47: Designated Courts</b></p> <p>Special courts shall be designated in each district court for the purposes of trial of cases under this Bill.</p>	<p>In a case in which provisions of the Bill have been violated along with offences under POCSO Act, whether the trial will be conducted before the special courts designated under Section 46 of this Bill or special courts designated under POCSO Act?</p>	