



India's new law on the protection of rights of transgender persons

Monday 2 November 2020

[Back to Diversity and Equality Law Committee publications](#)

Ajay Singh Solanki
Nishith Desai Associates, Mumbai
ajay.solanki@nishithdesai.com

The Transgender Persons (Protection of Rights) Act, 2019^[1] ('Transgender Persons Act') seeks to recognise the identity of transgender persons and prohibit discrimination in, inter alia, the fields of education, employment, healthcare, holding or disposing of property, holding public or private office and access to and use of public services and benefits.

BACKGROUND

In 2014, the Supreme Court of India, in the case of National Legal Services Authority v. Union of India,^[2] established the foundation for the rights of transgender persons in India by recognising 'transgender' as the 'third gender' and laying down several measures for prohibition of discrimination against transgender persons and protection of their rights. The judgment recommended reservations for transgender persons in jobs and educational institutions and the right of transgender persons to declare their self-perceived gender identity without undergoing a sex reassignment surgery.

In the same year, a private member's bill was introduced in the Indian Parliament which was subsequently passed by the upper house of the Parliament, a rare feat in itself, since, historically, not many private members' bills have progressed this far. However, while the private member's bill was still pending, in 2016, the Indian government drafted and tabled its version of the bill in the Parliament which was referred to a Standing Committee of the Parliament for further suggestions. Based on the Committee's suggestions, in 2018, a new version of the bill was introduced. However, with the dissolution of the Parliament in 2018 and formation of new central government in 2019, the bill was reintroduced in the Parliament in 2019 and finally enacted into a law.

With the Transgender Persons Act having come into effect recently, it is important to understand the key features of the law, what the hits and misses are and what the impact on employers is, especially in the private sector.

KEY FEATURES OF THE LAW RELATING TO TRANSGENDER PERSONS

Some of the key features of the law relating to transgender persons include:

- Definitions: definitions of 'person with intersex variation'^[3] and 'transgender person'^[4] have been provided to inter alia include trans men and trans women (whether or not such person has undergone sex reassignment surgery, hormone or other therapy); inclusive definitions provided for 'inclusive education'^[5] to prevent discrimination, neglect, harassment and intimidation of transgender persons at schools; and 'institution'^[6] for the protection and care of transgender persons.
- Non-discrimination: it prohibits the discrimination of transgender persons at educational establishments, in employment or occupational opportunities, healthcare services and access to public facilities and benefits. It further reinforces transgender persons' right of movement, right to property and holding of public or private office.
- Certificate of identity: it provides for a right to self-perceived gender identity and casts an obligation on the district magistrate (a designated government official) to issue a 'certificate of identity' as a transgender person, without the requirement of any medical or physical examination. It further provides that a person undergoing surgery for change of gender to either male or female may make an application for issuance of a revised certificate indicating change in gender.

- Equal opportunity policy for transgender persons: every establishment has been mandated to formulate an equal opportunity policy for transgender persons with certain specific information as prescribed under the law.
- Complaint officer: every establishment has been mandated to designate a person as a complaint officer to handle complaints from transgender persons.
- Welfare schemes: the government has been mandated to formulate welfare schemes and programs which are transgender sensitive, non-stigmatising and non-discriminatory.
- Medical care facilities: the government has been mandated to set up separate HIV sero-surveillance centres to conduct sero-surveillance for transgender persons; provide for medical care facilities including sex reassignment surgery and hormonal therapy; and provide for a coverage of medical expenses by a comprehensive insurance scheme for sex reassignment surgery and other therapies.
- National Council for Transgender Persons ('NCT'): constitution of the NCT to advise the government for the formulation and monitoring of policies and redress the grievances of transgender persons.
- Offences and penalties: offences, like indulging transgender persons in forced or bonded labour or denial of access to public places; physical, emotional or sexual abuse; or other offences committed under the provisions of the Transgender Persons Act, are punishable with imprisonment for a term of at least six months, extending up to two years along with fine.

NEW SET OF COMPLIANCES FOR PRIVATE EMPLOYERS

The Transgender Persons Act envisages a set of compliances for all establishments including, private employers:

- Prohibition of discrimination: provide a safe working environment and ensure that no transgender person is discriminated in any matter relating to employment including infrastructure adjustments, recruitment, employment benefits, promotion and other related issues.
- Equal opportunity policy: publish an equal opportunity policy for transgender persons and display such policy on the company website and in absence of a website, at conspicuous places in the premises.
- infrastructural facilities (such as unisex toilets), measures for safety and security (transportation and guards) and amenities (such as hygiene products) to be provided to the transgender persons to effectively discharge their duties; applicability of all rules and regulations of the employer regarding service conditions; and maintenance of confidentiality of the gender identity of the transgender employees.
- Appointment of a complaint officer: establishments are required to designate a person to be a complaint officer, to handle the complaints relating to the violation of the provisions of the Transgender Persons Act. The complaint officer has been mandated to enquire into complaints and the head of the establishment has to take action on the complaint officer's enquiry report, within prescribed timelines.

Given the above requirements, employers should look to revamp and amend their existing HR policies and make efforts towards training and sensitising their employees, especially their HR department.

ANALYSIS OF THE NEW LAW

THE HITS:

For many years now, there has been a pressing need to create awareness amid various communities and establishments to take active responsibility in recognising the rights of transgender persons, and treating them with basic human dignity and at par with other genders, be it at educational institutions or for equal opportunities in employment or ensuring access to healthcare and use of public benefits and facilities. By enacting the Transgender Persons Act, India has taken a step forward in granting and protecting much deserved identity and rights to transgender persons. The Transgender Persons Act is an indication that India is making a move towards a more inclusive and progressive society where the opportunities to persons will not be limited on the basis of their gender. This should hopefully ensure that employment standards are brought in line with international standards.

Social attitudes and stigma have been a major reason for limiting the opportunities of transgender persons, whether it be their social or economic life or even within their own families. Despite the magnitude of the issue, awareness of the rights of transgender persons has been lacking. To that extent, the government's initiative to recognise the identity of these persons and protect their rights is a remarkable step.

Through the enactment of this law, India has brought itself at par with the international standards on human rights protection, as envisaged by the United Nations Office of the High Commissioner for Human Rights in 2015, where it recommended States to begin, '[...] issuing legal identity documents, upon request, that reflect preferred gender, eliminating abusive preconditions, such as sterilization, forced treatment and divorce'.^[2] Similarly, the 2015 World Health Organization Report recommended that governments '[...] take all necessary legislative, administrative, and other measures to fully recognize each person's self-defined gender identity, with no medical requirements or discrimination on any grounds'.

Amid the massive criticism and pan-India protests, one of the more highlighted and contentious issue relating to the criminalisation of begging of transgender persons, which formed a part of a previous draft bill, has been dismissed. While begging will continue to remain a larger issue to be addressed, by not criminalising the act under the Transgender Persons Act, the government has at least tried to minimise harassment of transgender persons who may not have any other means of livelihood and sustenance.

The requirement under a previous draft bill of undergoing a medical or physical screening and examination for procuring a certificate of identity has been dismissed in the Transgender Persons Act. This will further reduce the trauma and harassment that transgender persons may have been subjected to, had this draconian provision not been removed.

AND THE MISSES:

The definition of a 'transgender person', as provided under the Transgender Persons Act is ambiguous and misleading. While a transgender person is one who has a different gender identity than that provided at the time of birth, a 'person with intersex variations' is one whose gender is based on biological characteristics. Though the difference is subtly brought through the two separate definitions, the definition of 'transgender persons' has been made too broad to include a 'person with intersex variations'.

The penalties for offences under the Transgender Persons Act extend only up to two years of imprisonment with fine, which may seem inadequate for more heinous violations like sexual abuse, rape, criminal assault or sexual harassment.

The Transgender Persons Act probably remains inadequate as it fails to provide for a skeleton on various other related rights, like marriage rights, adoption rights, maternity rights etc – a missed opportunity to be even more inclusive.

The Transgender Persons Act leaves too many obligations with the 'appropriate government' to act upon. How much priority will the government give to ensuring that all those obligations are fulfilled in a timely manner will need to be seen – leaving the transgender persons at the mercy of the system for effective implementation of the benefits promised to them under the Transgender Persons Act.

Some may argue that the Transgender Persons Act may have appealed better to the transgender persons and been more comprehensive and effective had it provided for reservations (affirmative action) for transgender persons in educational institutions and employment.

[1]The Transgender Persons Act was passed by the lower house of the Indian Parliament on August 05, 2019, by the upper house of the Parliament on November 26, 2019 and finally received the Presidential assent on December 05, 2019. It has been brought into effect by the Indian Government on January 10, 2020. The Transgender Persons (Protection of Rights) Rules, 2020 were notified on September 29, 2020.

[2]National Legal Services Authority v. Union of India A.I.R. 2014 S.C. 1863.

[3]Section 2(i) – "Person with intersex variations" means a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body"

[4]Section 2(k) – "Transgender person" means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment

Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”

[5]Section 2(d) – “Inclusive education" means a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students”

[6]Section 2(e) – "Institution" means an institution, whether public or private, for the reception, care, protection, education, training or any other service of transgender persons”

[7]Human Rights Council, United Nations General Assembly (2015), “Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity”, Report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/29/23), dated May 04, 2015. Available at: <https://undocs.org/A/HRC/29/23>