



**AMNESTY INTERNATIONAL INDIA SUBMISSION TO THE MINISTRY OF WOMEN AND CHILD
DEVELOPMENT ON THE TRAFFICKING OF PERSONS BILL, 2018**

22 MARCH 2018

Amnesty International India is writing to express concern regarding the draft “India Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill 2018” (the draft law). We are aware that the draft law has been revised on several occasions. This analysis is based on a draft which was released to some non-government organizations in 2017 before Cabinet approval.

Amnesty International India recognizes trafficking in persons as a grave abuse of human rights. Victims of such crimes are entitled to protection and remedies, regardless of their sex, caste, ethnicity, Indigenous identity, nationality, health status, sexual orientation, gender identity, prior work history, willingness to contribute to prosecution efforts, or other factors.

Along these lines, Amnesty International India commends the Indian government for taking trafficking in persons seriously. Moreover, we recognize the positive components of the draft law, including the provisions that ensure access to support and services for trafficking victims, capacity building for those tasked with enforcing the law, and call for coordination of anti-trafficking initiatives among various state agencies.

Despite the draft law’s positive attributes, many of the law’s provisions are problematic from a human rights perspective. Notably, all of India’s anti-trafficking laws, policies and initiatives must comply with international human rights standards. The current draft law appears to be both overbroad in some respects and under inclusive in other respects. Additionally, portions of the law contravene a range of fundamental principles of criminal justice and human rights law. Should this law be adopted by the government, the human

rights of human trafficking victims and adults who engage in sex work consensually (sex workers) will be at risk.

The government of India is obliged under a range of human rights treaties it is a state party to, including the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), and International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), among others, to guarantee the rights to equality and non-discrimination, to a fair trial, to liberty and security of person, and to freedom of movement. These rights are also guaranteed under the Constitution of India. Should the law pass, India may be in violation of its international and domestic legal obligations.

ANTI-TRAFFICKING INITIATIVES AND HUMAN RIGHTS

Amnesty International India supports the criminalization of trafficking in persons. We consider the full range of trafficking in persons, including for “sexual exploitation”, “slavery or practices similar to slavery” and “forced removal of organs” as contained in Section 370(1) of the Indian Penal Code to be grave human rights violations. These are serious crimes and all allegations and reports of crimes against individuals in all labour sectors should be promptly and impartially investigated and those found responsible brought to justice in proceedings that meet international fair trial standards. Nevertheless, the Indian government has a duty to ensure that the laws it uses to address these issues are appropriately focused on harm, are not overly broad, and do not violate human rights, in particular the rights of trafficking victims and sex workers.

Under international human rights law, trafficked persons must not be detained, charged, prosecuted or otherwise held responsible for unlawful acts and offences committed by them as part of the crime of trafficking; this includes engagement in sex work where that

is illegal.¹ Furthermore, many human rights instruments provide valuable guidance to states on fulfilling their obligations to trafficked persons, for example with regard to the right to remedy, which is required by the UN Trafficking Protocol and elaborated in the Recommended Principles and Guidelines and the work of the Special Rapporteur on trafficking.²

Anti-trafficking initiatives must not create or exacerbate situations that cause or contribute to trafficking or further undermine the human rights of anyone, especially women and people belonging to other marginalized groups. As stated by the former UN High Commissioner for Human Rights:

“That [...] is the only way to retain a focus on the trafficked person: to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order or a problem of organized crime. It is also the only way to ensure that well-intentioned anti-trafficking initiatives do not compound discrimination against female migrants or further endanger the precariously-held rights of individuals working in prostitution.”³

PROBLEMATIC ASPECTS OF THE DRAFT LAW

Overbroad Nature of the Law

As currently written, the draft law is overbroad in some portions, potentially jeopardizing the human rights of a wide range of people, but particularly trafficking victims and sex

¹ A. Gallagher and K. Skrivanekova, Human Rights and Trafficking in Persons, Background Paper for the 15th Informal Asia-Europe Meeting (ASEM) Seminar on Human Rights, 24-26 November 2015. This principle, of non-prosecution or non-punishment for status offences, was not addressed in the UN Trafficking Protocol but was introduced in the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (Guideline 5.5: “Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation”), and adopted into law in the Council of Europe Trafficking Convention, the EU Trafficking Directive, and the 2014 ILO Forced Labour Protocol. Furthermore, the fear of stigma-driven ostracization, including from their family or community due to having been trafficked into the sex sector from countries where prostitution is criminalized, may amount to a well-founded fear of persecution triggering international protection under refugee law.

² UN General Assembly, Report of the Special Rapporteur on trafficking in persons, especially women and children, A/66/283, 9 August 2011.

³ OHCHR, Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Organised Crime, Fourth session, Vienna, 28 June-9 July 1999.

workers. While states have latitude to determine what type of conduct is to merit criminal sanction, this policing power is not unlimited.⁴ Various human rights principles set forth limits on states' action (including passing and enforcing criminal law) that infringe on human rights.

⁴ See generally UN Commission on Human Rights, 41st Sess., 28 September 1984, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4, annex. The Siracusa Principles lay out the extent to which states can limit and/or derogate from individual human rights to promote the 'public good.' They were initially adopted in relation to the International Covenant on Civil and Political Rights (ICCPR), but over time have been applied to analyze state restrictions on rights more broadly. S Abiola, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights (ICCPR): History and Interpretation in Public Health Context' (Research Memorandum Prepared for the Open Society Institute's Public Health Program Law and Health Initiative) (2011); see also UN Commission on Human Rights, 43rd Sess., 8 January 1987, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/1987/17, annex (providing interpretive guidance regarding states' compliance with the International Covenant on Economic, Social and Cultural Rights); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (expert guidelines), 29 February 2012, available at <http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPPrinciples.htm> (elaborating on the Limburg Principles regarding the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies). For additional expert and scholarly analysis of limits on states' policing power, see L Farmer, 'Criminal Law as an Institution: Rethinking Theoretical Approaches to Criminalization' (Seminar Paper), Queen's University; N Jareborg, 'Criminalization as Last Resort (Ultima Ratio)' (2005) 2 *Ohio State Journal of Criminal Law* 521; D Husak, 'The Criminal Law as a Last Resort' (2004) 24 *Oxford Journal of Legal Studies* 207.

The principle of legality is a foundational requirement contained in almost every international human rights instrument.⁵ It requires that crimes and punishments be defined by law in a manner that is accessible to the population and that clearly outlines what conduct is criminalized. Overbroad laws which can be used to punish a wide range of behaviors and enforced in an abusive manner, fail to satisfy the principle of legality.⁶ India's Supreme Court has struck down laws on several occasions grounds of their vagueness.⁷

In particular, the following provisions lack sufficient clarity and appear to be overbroad:

- **Section 370 (Explanation), IPC – ‘Trafficking of Person’ definition**

An explanation provided to Section 370 of the Indian Penal Code, whose definition of “trafficking” is adopted by the draft law, states: “The consent of the victim is immaterial in determination of the offence of trafficking.” This provision risks criminalizing consensual adult sex work, and enables problematic conflation of trafficking in persons and consensual sex work, which has been shown to lead to a wide range of human rights violations against sex workers.⁸ Provisions of the draft law also appear to problematically conflate trafficking in persons and sex work, including a provision which allows for the closing, by executive orders, of “premises [suspected of being] used for the purpose of trafficking of persons”, regardless of whether the crime of trafficking in persons is proven (Section 36).

⁵ See S Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’ in A Cassese & P Gaeta, *et al.* (eds.) *The Rome Statute of the International Criminal Court* (2002) 19; Rome Statute of the International Criminal Court, Art 22(1); Universal Declaration of Human Rights, Art 11; European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 7; American Convention on Human Rights, Art 9; African Charter on Human and Peoples’ Rights, Art 7; League of Arab States, Arab Charter on Human Rights, Art 15.

⁶ See Siracusa Principles *supra* note 5.

⁷ See for example *KA Abbas v Union of India*, decided on 24 September 1970, 1971 AIR 481; *AK Roy v Union of India*, decided on 28 December 1981, AIR 1982 SC 710; *Kartar Singh v State of Punjab*, decided on 11 March 1994, 1994 SCC(3) 569; *Shreya Singhal v Union of India*, decided on 24 March 2015, AIR 2015 SC 1523.

⁸ The Indian Penal Code already contains provisions which state that ‘consent’ obtained through coercion or deception does not constitute consent. See Section 90, Indian Penal Code.

Trafficking in persons, including for sexual exploitation, is not the same as sex work. Sex work refers to a contractual arrangement where sexual services are negotiated between consenting adults with the terms of engagement agreed upon between the seller and the buyer.⁹ Trafficking is expressly non-consensual. The High Level Committee on the Status of Women, set up by the Ministry for Women and Child Development in 2013 to study the status of women in India, has clarified that trafficking is a criminal offence and should not be conflated with sex work.¹⁰

Conflation of human trafficking and sex work creates numerous problems in practice: it creates confusion amongst practitioners, media and the public and can lead to harmful laws and policies that negatively impact trafficked persons, migrants, and sex workers among others.¹¹

For example, coercive or overreaching interventions, such as raids or “rescues” solely on the basis that commercial sex is conducted, have resulted in sex workers being driven away from established sex work collectives or forced to move from one place to another. This undermines the connections and social fabric that can help keep them safe, including through disrupting HIV programmes.¹²

⁹ See UNDP, Global Commission on HIV and the Law, Risks, Rights & Health, 2012, p. 41, available at: <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>.

¹⁰ Ministry of Women and Child Development, Report of High Level Committee on Status of Women, 2015, p. 1197, available at: <http://wcd.nic.in/sites/default/files/Vol%203.compressed.pdf>.

¹¹ UNAIDS, Guidance note on HIV and sex work, 2012, p.14, available at: http://www.unaids.org/sites/default/files/sub_landing/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf; Urban Justice Center, Sex Workers Project, The danger Of conflating trafficking and sex work - A position paper, 2007, available at: sexworkersproject.org/media-toolkit/downloads/20070330-BriefingPaperOnConflationOfTraffickingAndSexWork.pdf; GAATW, Collateral damage: The impact of anti-trafficking measures on human rights around the world, 2007; Urban Justice Center, Sex Workers Project, Submission on Mexico to the general discussion of rural women to the United Nations Committee on the Elimination of all forms of Discrimination Against Women (CEDAW), 2013, available at: sexworkersproject.org/downloads/2013/20130919-cedaw-recommendations-rural-women-mexico.pdf; NSWP, Briefing Paper #03 Sex work is not trafficking, 2011 available at: www.nswp.org/sites/nswp.org/files/SW%20is%20Not%20Trafficking.pdf.

¹² See UNAIDS, Guidance note on HIV and sex work, 2012; A. Ahmed, ‘The unintended consequences of Nick Kristof’s anti-sex trafficking crusade’, Guardian, 2012.

Additionally, such interventions can impede trafficking victims from reaching out for legal protection and support, and/or leaving commercial sex.¹³ States that fail to make a distinction between trafficking and sex work may also be failing to comply with their international legal obligations on trafficking.

The first two holders of the mandate of the Special Rapporteur on trafficking in persons have raised concerns about failures of the criminal justice system that simultaneously fail to identify trafficked persons and breach the principle of non-prosecution or non-punishment for status offences, by arresting, detaining, charging and prosecuting women for engaging in sex work.¹⁴ The Special Rapporteur on violence against women, its causes and consequences, also noted with concern, following a country visit to India in 2013, a “tendency to a tendency to conflate sex work with trafficking in persons.”¹⁵

Anti-trafficking experts have expressed concern that over-extending the definition of trafficking in persons to include all cases of commercial sex undermines initiatives to end trafficking by diluting attention and effort: “The equation of prostitution with trafficking (typically through a broad reading of the means ‘abuse of a position of vulnerability’) provides a case in point: it permits states to claim easy credit for virtually effortless arrests and prosecutions that do little or nothing to address those egregious forms of sexual exploitation that the Protocol was intended to challenge.”¹⁶ Similarly, the

¹³ See New York Anti-Trafficking Network, *Ending Trafficking: #Talk Traffic Video Series*, NYATN 2015, available at: nyatn.org/talktraffic/ (see particular episodes on Human Rights Approach and Solutions).

¹⁴ See Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. A/HRC/20/18, 2012, para. 23; Commission on Human Rights, *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Addendum: Mission to Lebanon*, UN Doc. E/CN.4/2006/62/Add.3, 2006, para. 58; Commission on Human Rights, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. E/CN.4/2005/71, 2004, para. 10.

¹⁵ Report of the Special Rapporteur on violence against women, its causes and consequences, *Addendum: mission to India*, UN Doc. A/HRC/26/38/Add.1, 2014, para 20.

¹⁶ A.T. Gallagher and J.N. Ezeilo, “The UN special rapporteur on trafficking: A turbulent decade in review”, *Human Rights Quarterly*, Vol.37, No.4, 2015, pp. 913-940.

Special Rapporteur on trafficking in persons has urged more attention to the structural root causes of trafficking.¹⁷

- **Section 37 – “Promoting or Facilitating Trafficking of Person”**

Under this provision, a person promotes, procures or facilitates trafficking in persons if that person “advertises, publishes, prints, broadcasts, or distributes, or causes the advertisement, publication or distribution by any means, including the use of information technology or any brochure, flyer or any propaganda material that promotes trafficking of person or exploitation of a trafficked person in any manner”. Given this extremely broad language and the fact that trafficking in persons and sex work is conflated at times in the draft law, this provision could be enforced against a wide range of people not engaging in or facilitating trafficking in any way. Moreover, it could be used to punish sex workers who use various means of communication to locate clients and sell sex consensually, and who are not exploited and do not identify as trafficking victims.

Lack of Separation of Powers at the Local Level

¹⁷ “[The Special Rapporteur] wants to shift the attention away from exclusively tackling consumer demand and to underline the critical need to ensure that undivided attention is paid to prevention strategies that focus on tackling the structural root causes of trafficking while respecting the human rights of trafficked persons.” UN General Assembly, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, UN Doc. A/65/288, 2010, para. 36.

The separation of powers between the three organs of government – executive, legislature and judiciary – ensures checks and balances against excesses from any of them. In the words of the African Commission on Human and Peoples’ Rights: “The main *raison d’être* of the principle of separation of powers is to ensure that no organ of government becomes too powerful and abuses its power. The separation of powers between the three organs of government – executive, legislature and judiciary – ensures checks and balances against excesses from any of them.”¹⁸ These same principles apply to government authorities and initiatives delegated to local governments. Notably, the draft law’s call for giving certain powers to “District Rehabilitation Committees” (discussed further below) blurs the lines between the various functions of government, thus jeopardizing “separation of powers” which is essential for the protection of human rights.

- **Section 13 – “District Anti-trafficking Committee”**

This provision calls for the creation of District-level committees for “exercising the powers and performing such functions and duties in relation to prevention, rescue, protection, medical care, psychological assistance and need-based rehabilitation of victims.”

When read in conjunction with the provisions on “preventive measures” (Section 21) which vaguely discusses prevention in terms of “co-ordinating the implementation of all the programmes, schemes and plans relating to the prevention of trafficking of persons” and “developing appropriate law and order framework”, and confirms that District Anti-Trafficking Committees can “undertake all measures... to protect and prevent vulnerable persons from being trafficked”, there is a risk of conflation of powers. Notably, the District Anti-Trafficking Committees could be tasked with undertaking law enforcement procedures. The lack of clear delineated roles and responsibilities among government units can compromise due process guarantees, including the right to fair trial.

Right to Liberty and Fair Trial Guarantees

¹⁸ *Lawyers for Human Rights v Swaziland* (251/2002), African Commission on Human and Peoples Rights (2005) para. 56.

The right to a fair trial is one of the universally accepted guarantees under the Universal Declaration of Human Rights, the cornerstone of the international human rights system, adopted in 1948 by the world's governments. This right has since become legally binding on all states as part of customary international law.¹⁹ The right to a fair trial has been reaffirmed and elaborated since 1948 in legally binding treaties such as the ICCPR. India's Supreme Court has also ruled that the right to a fair trial is a fundamental part of Indian criminal jurisprudence.²⁰

Some of the fair trial rights implicated by the draft law include “pre-trial” rights including the right to access legal counsel and family, rights and safeguards during questioning, and detention-related rights. The draft law also potentially jeopardizes rights during trial such as presumption of innocence, burdens and standards of proof, and rights to appeal. In particular, the following provisions jeopardize fair trial guarantees:

- **Section 17 - Custody of Persons Rescued under Section 17**

Section 17 allows the police to “remove” and “rescue” people from premises when they believe there is “imminent danger that may cause to his life and person”.

“Rescue raids” of sex sector establishments by police, as provided for under the draft law, provides little room for the identified “victims” to exercise agency regarding their situations and/or to consent to being “rescued.” These types of interventions may also result in abuses against sex workers, including arbitrary detention in “rehabilitation

¹⁹ See Amnesty International, Fair Trial Manual (2nd Edition), 2014, Index: POL 30/002/2014.

²⁰ See, for example, *Zahira Habibullah Sheikh v State of Gujarat*, decided on 8 March 2006, AIR 2006 SC 1367.

centres”, and can lead to the dispersal of sex workers from safer working environments.²¹ According to the World Health Organization (WHO) and the Global Coalition on Women and AIDS, “in several countries certain activities such as rescue raids of sex establishments have exacerbated violence against sex workers and compromised their safety.”²²

In India and Indonesia, researchers have found that sex workers who were rounded up in raids were beaten, coerced into sex by police, and placed in institutions where they were sexually exploited and otherwise suffered physical abuse.²³

The High Level Committee on the Status of Women, set up by the Ministry of Women and Child Development, stated in 2015 that the “rescue and rehabilitation provisions” under Indian law are based on “a moralistic approach to sex work” and lead to widespread human rights abuse.²⁴

The draft law makes no reference to the individuals’ right to access legal representation or engage with their families (if desired). Any person arrested or detained should have

²¹ Sex Workers Project, *The use of raids to fight trafficking in persons: A study of law enforcement raids targeting trafficking in persons*, 2009; Empower Foundation, *Hit & run: The impact of anti-trafficking policy and practice on sex workers’ human rights in Thailand*, 2012.

WHO and the Global Coalition on Women and AIDS, *Violence against sex workers and HIV prevention, violence against women and HIV/AIDS: Critical intersections*, Information Bulletin Series, Number 3, 2005; see also R. Surtees, ‘Brothel raids in Indonesia – Ideal solution or further violation?’, *Research for Sex Work*, 2003, pp. 5-7; Sangram, *Point of View and VAMP, Rehabilitation: Against their will? Of veshyas, vamps, whores and women: Challenging preconceived notions of prostitution and sex work*, 2002.

See Human Rights Watch, *Bashed up: Family violence in Papua New Guinea*, 2015, available at www.hrw.org/report/2015/11/04/bashed/family-violence-papua-new-guinea (providing an overview of government law and policy measures to address family violence).

²² WHO and the Global Coalition on Women and AIDS, *Violence against sex workers and HIV prevention, violence against women and HIV/AIDS: Critical intersections*, Information Bulletin Series, Number 3, 2005.

²³ See R. Surtees, ‘Brothel raids in Indonesia – Ideal solution or further violation?’, *Research for Sex Work*, 2003, pp. 5-7; Sangram, *Point of View and VAMP, Rehabilitation: Against their will? Of veshyas, vamps, whores and women: Challenging preconceived notions of prostitution and sex work*, 2002.

²⁴ Ministry of Women and Child Development, *Report of High Level Committee on Status of Women*, 2015, pp. 1197-1198, available at <http://wcd.nic.in/sites/default/files/Vol%203.compressed.pdf>.

access to a lawyer as soon as they are deprived of their liberty.²⁵ If a detained person does not have legal counsel of their choice, they are entitled to have a lawyer assigned whenever the interests of justice require it. If the person cannot afford to pay, assigned counsel must be provided free of charge.²⁶ Moreover, detainees are to be given all reasonable facilities to communicate with and receive visits from family and friends.²⁷ Restrictions and supervision are permitted only if necessary in the interests of justice or security and good order in the institution.²⁸ The right to receive visits applies to all detainees, regardless of the offence of which they are suspected or accused.²⁹ Denying visits may amount to inhuman treatment.³⁰

The UN Rules for the Treatment of Women Prisoners instruct authorities to encourage and facilitate women's contact with their families, including children, and to counterbalance disadvantages faced by women detained in institutions far from their homes.³¹

- **Section 20 - Presumption of Offenses**

²⁵ Article 37(d) of the Convention on the Rights of the Child, Principle 17 of the Body of Principles, Principle 3 and Guidelines 3 para. 43(b) and (d) and 4 para.44(a) of the Principles on Legal Aid, Guideline 20(c) of the Robben Island Guidelines, Principle V of the Principles on Persons Deprived of Liberty in the Americas; Human Rights Council resolution 13/19, UN Doc. A/HRC/RES/13/19 (2010) para. 6, HRC Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (1997) para. 27, Jordan, UN Doc. CCPR/C/JOR/CO/4 (2010) para. 9; CAT Concluding Observations: Latvia, UN Doc. CAT/C/CR/31/3 (2004) §§6(h), 7(c); *Dayanan v Turkey* (7377/03), European Court of Human Rights (2009) paras. 30-33; CPT 12th General Report, CPT/Inf (2002) 15, paras. 40-41.

²⁶ HRC Concluding Observations: Tajikistan, UN Doc. CCPR/CO/84/TJK (2005) para.11, Slovenia, UN Doc. CCPR/CO/84/SVN (2005) para. 9; CPT 12th General Report, CPT/Inf (2002) 15 para. 41.

²⁷ Article 17(2)(d) of the Convention on Enforced Disappearance, Article 17(5) of the Migrant Workers Convention, Article 16(2) of the Arab Charter, Rules 26-28 of the Bangkok Rules, Guideline 31 of the Robben Island Guidelines, Rule 92 of the Standard Minimum Rules, Section M(2)(e) of the Principles on Fair Trial in Africa, Principle V of the Principles on Persons Deprived of Liberty in the Americas, Rules 24 and 99 of the European Prison Rules, Regulation 100(1) of the ICC Regulations.

²⁸ Principle 19 of the Body of Principles, Rule 92 of the Standard Minimum Rules, Section M(2)(g) of the Principles on Fair Trial in Africa, Rule 24 of the European Prison Rules, Regulation 100(3) of the ICC Regulations.

²⁹ See *Marc Romulus v Haiti* (Case 1992), Inter-American Commission on Human Rights (1977).

³⁰ *Civil Liberties Organisation v Nigeria* (151/96), African Commission, 13th Annual Report (1999) para. 27.

³¹ Rule 26 of the Bangkok Rules.

This provision problematically shifts the burden of proof and presumes guilt of an individual who “is prosecuted for committing or abetting or attempting to commit any offence under this Act in respect of a child or a woman or a person suffering from physical or mental disability.”

Everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness.³² The right to be presumed innocent is a norm of customary international law – it applies at all times, in all circumstances. It is an essential element of the right to fair criminal proceedings and the rule of law. The right to be presumed innocent applies to suspects even before formal charges are filed and continues until a conviction is confirmed following a final appeal.

The requirement that the accused be presumed innocent means that the burden of proving the charge rests on the prosecution. A court may not convict unless guilt has been proved beyond reasonable doubt. If there is reasonable doubt, the accused must be acquitted.³³ Although neither the burden nor the standard of proof are explicitly set out in the ICCPR or regional human rights treaties, the Human Rights Committee, the Inter-American Court, the European Court and the African Commission have all indicated that the presumption of innocence requires the prosecution to prove guilt beyond reasonable doubt. In the words of the Human Rights Committee, the presumption of innocence “imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt [and]

³² Article 11 of the Universal Declaration, Article 14(2) of the ICCPR, Article 40(2)(b)(i) of the Convention on the Rights of the Child, Article 18(2) of the Migrant Workers Convention, Article 7(1)(b) of the African Charter, Article 8(2) of the American Convention, Article 16 of the Arab Charter, Article 6(2) of the European Convention, Principle 36(1) of the Body of Principles, Article XXVI of the American Declaration, Article 66 of the ICC Statute, Article 20(3) of the Rwanda Statute, Article 21(3) of the Yugoslavia Statute.

³³ Section N(6)(e)(i) of the Principles on Fair Trial in Africa, Article 66(2) and (3) of the ICC Statute, Rule 87(A) of the Rwanda Rules, Rule 87(A) of the Yugoslavia Rules.

ensures that the accused has the benefit of the doubt”.³⁴ The prosecution bears the burden of proof throughout the trial.

- **Section 35 - Punishment for Keeping or Allowing Premises to be Used as a place for trafficking of persons.**

This provision similarly presumes guilt and shifts the burden of proof to the accused in a problematic manner. The human rights standards regarding presumption of innocence and burdens and standards of proof also apply here.

Lack of Meaningful Participation of Trafficking Victims and Sex Workers

The human rights principle of meaningful participation is essential to ensuring individuals’ human rights. This principle calls for states to involve those directly affected by the laws and policies at hand in the development and implementation of those laws and policies. Along these lines, the rights of all trafficking victims and sex workers to participate without discrimination in decisions affecting their lives must be respected.

In establishing laws and policies relevant to trafficking in persons, the Indian government should ensure the meaningful participation and consultation of trafficking victims. They must also ensure the participation and consultation of sex workers, given the impact of anti-trafficking initiatives on sex workers’ lives and the fact that sex work is effectively criminalized under the draft law. Participation must involve trafficking victims and sex workers from marginalized groups and those facing discrimination on the basis of, for example, sexual orientation, gender identity, race, caste, ethnicity and Indigenous identity.

Amnesty International India understands that the drafting and finalizing of the draft law lacked meaningful consultation with trafficking victims and sex workers. Moreover, there

³⁴ HRC General Comment 32, para. 30; European Court: Barberà, Messegué and Jabardo v Spain (10590/83), (1988) para. 77, Telfner v Austria (33501/96), (2001) para. 15; See Ricardo Canese v Paraguay, Inter-American Court (2004) §§153-154.

are no provisions currently in the draft law which include trafficking victims and sex workers in the implementation of the law, particularly within the many state entities that will be tasked with enforcing and implementing the law, during “rescues” and amidst the delivery of support services.

Equality and Non-discrimination

States’ criminal justice endeavors are bound by principles of equality and non-discrimination. One component of equality is the right to be treated equally under the law or to enjoy “equal protection” of the law, which is also guaranteed under Article 14 of the Constitution of India. Moreover, criminal laws and policies must be applied equally to all people and must not have a discriminatory impact on particular groups of people.³⁵ Given the disproportionate focus of the draft law on “trafficking in persons for sexual exploitation” and lack of a clear distinction between trafficking victims and sex workers, the draft law runs the risk of having a disproportionate impact on sex workers and women from marginalized backgrounds who may be vulnerable to trafficking, as well as potentially violating the equal protection of the law for these individuals.

RECOMMENDATIONS

While Amnesty International India supports the government’s efforts to tackle trafficking in persons as a grave human rights violation, when considering this draft law, it calls on the government to do the following:

- Ensure that enforcement of anti-trafficking laws, policies and initiatives comply with international human rights law and standards.
- Remove or reframe the provisions of the draft law that are overbroad, disproportionate and which could lead to unlawful discrimination.
- Remove or reframe the provisions of the draft law that fail to distinguish between trafficking in persons and sex work between consensual adults; make a clear

³⁵ See Siracusa Principles, *supra* note 5, at paras 9, 28; Limburg Principles, *supra* note _5, at paras 35-41, 49.

distinction between trafficking victims and sex workers in the law and make clear that the law should not be enforced against sex workers.

- Decriminalize consensual sex work between adults, including those who sell sex, buy sex or facilitate sex in a non-exploitative manner, as criminalization of sex work can hinder the fight against trafficking.
- Separate the functions of those tasked with identifying potential victims, investigating potential crimes, service provision and make legal determinations regarding liability under the law.
- Include trafficking victims and sex workers in the National Commission on Trafficking in Persons (NACTIP) and other local structures that may be created to implement the law.
- Ensure the participation of trafficking victims and sex workers in the development of all laws, policies and initiatives that impact their lives.