



Know Your Rights

A brief reckoner of rights of the queer community

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Mental Health and legal rights are closely interlinked. Being penalised for one's identity, or being deprived of the opportunity to wholly integrate into society because of one's sexual orientation or self-perceived gender identity has been the core reason for several documented instances of queer lives lost.

While the law applies equally to all citizens in our country, marginalised communities are provided safeguards to ensure that they can take equal part in society. With this in mind and in order to undo years of systemic inequality, these laws and judgments have sought to undo years of injustice and collective trauma:

National Legal Services Authority v Union of India (NALSA): In 2014, the Supreme Court of India provided legal recognition to transgender persons, and also provided the trans community the right to self-determine their gender. The Court also directed the Union Government to enact laws for the protection of the trans community, including a direction to provide reservations in service and education.

The University Grants Commission (Prevention, Prohibition and Redressal of Sexual Harassment of Women Employees and Students in High Educational Institutions) Guidelines - 2015: These UGC Guidelines were the first of their kind that made the act of sexual harassment completely gender neutral, allowing for the first time, trans persons and cis-men, to seek redressal along with cis-women.

The Mental Healthcare Act, 2017: An Act, which for the first time, prohibited discrimination on the basis of gender and sexual orientation, in addition to other marginalisations, while availing mental healthcare.

Navtej Singh Johar v Union of India: In 2018, the Supreme Court of India partially struck down Section 377 of the Indian Penal Code, 1860, insofar as it criminalised two consenting adults of same gender engaging in sexual relations.

The Transgender Persons (Protection of Rights) Act, 2019: This statute was enacted, pursuant to the judgement passed in NALSA, and granted transgender persons the right to self-determine their gender identity. This law also prohibited discrimination towards transgender persons in all aspects of societal integration.

Supriyo @ Supriya Chakraborty & Anr. v Union of India: In 2023, the Supreme Court of India dealt with the issue of marriage equality, and for the first time, explicitly held that transgender persons had the right to enter into a marriage with a person of the opposite* gender.

*Given that legally only heterosexual unions are recognised.

THE MENTAL HEALTHCARE ACT, 2017 & THE MENTAL HEALTHCARE (RIGHTS OF PERSONS WITH MENTAL ILLNESS) RULES, 2018 and LGBTIQ+ community

Section 3(3) of the Mental Healthcare Act, 2017 says that a person's non conformity with general societal, moral, religious, cultural or political values does not determine one's mental illness. Persons belonging to the LGBTIQ+ community are often diagnosed with pseudo mental health conditions which dehumanises them and deprives them of human dignity, health and safety. The Mental Healthcare Act came into force before the Hon'ble Supreme Court struck down Section 377, thereby allowing persons belonging to the LGBTIQ+ community, access to mental healthcare.

This act was referenced by the Hon'ble Supreme Court in the landmark ruling of *Navtej Singh Johar v Union of India* while decriminalising consensual sexual relationships of persons belonging to the same gender and held a part of Section 377 of the erstwhile Indian Penal Code, 1860, unconstitutional.

This Act defines who a 'Mental Health Professional' is and this broad term includes psychiatrists, clinical psychologists, mental health nurses, psychiatric social workers, and any professional having a postgraduate degree (ayurveda) in mano vigyan avum manas roga or a postgraduate degree (homoeopathy) in psychiatry or a postgraduate degree (unani) in moalijat (nafasiyatt) or a postgraduate degree (sidhaa) in sirapu maruthuvam.

Mental health professionals across India still diagnose persons belonging to the LGBTIQ+ community with pseudo mental illnesses only due to their sexual orientation or gender identity and continue to treat, prescribe or administer medicines towards attempting to cure them of the same. The abovementioned professionals sometimes prescribe the barbaric practice of corrective rape to cure pseudo mental illness of persons belonging to the LGBTIQ+ community.

File a complaint with the State Mental Health Authority

Such mental health practitioners will be in contravention of Section 108 of the Act.

If your mental health professional is a clinical psychologist, file a complaint with the Rehabilitation Council of India.

MEDICAL MALPRACTICE

Negligence, lack of skill, prejudices and biases cause medical professionals including mental health practitioners to provide substandard or dangerous medical service to persons belonging to the LGBTIQ+ community. Right to safe health care is a fundamental right. Persons belonging to the LGBTIQ+ community are more vulnerable to medical negligence due to sheer personal biases of mental health professionals and lack of sound scientific knowledge and approach. Lack of safe gender affirming medical care, prevalent practice of conversion therapy and violative, invasive procedures performed by medical practitioners, are some of the most common issues faced by persons belonging to the LGBTIQ+ community.

Lack of safe gender affirming medical care

Due to the lack of expertise of medical professionals well versed in gender affirming procedures and surgeries, many trans and intersex persons suffer lifelong pain and disability. Trans and intersex victims of medical negligence have a right to sue their doctor who have failed to provide adequate post or pre operative care to them, under various laws.

Conversion therapy

Pursuant to the historic case of the Hon'ble Madras High Court in *Sushma & Anr. v DGP, Tamil Nadu* and banning conversion therapy and the Court's direction to the National Medical Commission to make the pseudo - scientific practice - a professional misconduct, the National Medical Commission banned conversion therapy across India in August, 2022. Conversion therapy is a pseudo - scientific, harmful practice of attempting to "cure" a person's sexual orientation and gender identity.

Make informed decisions prior to signing any contract/non-disclosure agreements with your hospital or your doctor while opting for gender affirmative care.

Prefer a complaint against your doctor to your State Medical Council and the National Medical Commission.

Respective councils/commissions have powers to initiate disciplinary enquiry against concerned medical professionals under the Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulations, 2002.

Practising conversion therapy has been added as one of the professional misconducts in August, 2022.

File a case before your district or state consumer forum, depending on the amount of damages being claimed by you or call 1800114000 or 1915.

Consumer grievances can also be filed on the website of National Consumer Helpline. Website: consumerhelpline.gov.in/public

File a suit for medical negligence to claim damages.

The Transgender Persons (Protection of Rights) Act, 2019 & The Transgender Persons (Protection of Rights) Rules, 2020

A transgender person according to the Act is, “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 persons having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*.”

Salient Features of the Act

- Enacted for the protection of transgender persons, their rights and welfare.
- Prohibits any person or establishment from discriminating against trans persons in matters of education, employment, housing, medical services, public utilities, freedom of movement and denial of access to Government or private offices.
- Grants the right of self-perceived gender identity.
- Provides identity documents which can serve as a public ID.
- Provides the right of residence to trans persons to reside with their natal families if they so choose.
- Mandates that the Government set up medical facilities which are accessible to trans persons and provide sex reassignment surgery if they so choose.

Safeguards under the Act

This Act prohibits atrocities against trans persons by criminalising offences which trans persons have been historically subject to, such as:

- Compelling a trans person into bonded labour or forced labour.
- Denying a trans person the right of passage to a public place or obstructing trans persons from accessing a public place to which other persons have access to.
- Forcing a trans person to leave their household, village or other place of residence.
- Harming or injuring or endangering the life, safety, health or well-being, whether mental, physical, of a trans person.
- Engaging in any activity that causes physical abuse, sexual abuse, verbal and emotional abuse and economic abuse of trans persons.

Any person engaging in the above conduct can be punished with imprisonment for a term of 6 months which can extend up to 2 years.

Note: The punishment specified above is specific to this Act and it will be in addition to any other punishment applicable under general criminal law.

Procedure to avail remedies under this Act

A trans person who has suffered any of the atrocities set out above can approach the local police for immediate relief. However, as the offences are bailable, non-cognizable offences, the appropriate remedy, in case of non-registration of an FIR, would be to approach the jurisdictional Judicial Magistrate with a complaint under Section 223 of the BNSS, 2023.

Procedure to file a complaint in respect of an offence

Filing a complaint before the Police

Approach the local police station with a complaint.

In case of inaction, forward a copy of the complaint to the Superintendent of Police for the District.

Approaching the Court for remedies

If the complaint is still not taken on file, approach the jurisdictional judicial magistrate with a private complaint under Section 223 of the BNSS, 2023 read with Section 18 of the Trans Act, 2019.

After issuing summons to the Accused person and hearing them and also the Complainant and any witnesses, the Court can take cognizance of the incident and proceed to trial.

Decision

If convicted and found guilty of the offence, the Accused person will be sentenced to imprisonment for a minimum of six months to a maximum of two years.

Procedure in case of discrimination by a Government Authority

In case of any form of discrimination by a government authority, be it in the matter of employment, healthcare, housing, education or otherwise, the aggrieved person can directly approach the High Court to obtain a direction to the respective authority to cease any discrimination and grant the aggrieved person the relief sought for.

IDENTITY DOCUMENTS FOR TRANSGENDER PERSONS

For the first time, the Transgender Persons (Protection of Rights) Rule, 2020 set out the procedure for a trans person to obtain an Identity Card, which can either bear a trans-marker or a gender-binary marker. More importantly, the Act permits a trans person to change their name and gender marker on all other identity documents, such as Aadhar, Voter's ID, Birth Certificate and others, solely on the basis of their Identity Card obtained under the Act. The procedure to obtain the identity card and effect name and gender change in other identity documents is as below:

Certificate of Identity

- Any trans person can make an application to the District Magistrate (generally the District Collector) under Section 5 of the Act to obtain a Certificate of Identity as a transgender person.
- The Certificate of Identity issued under Section 6, based on an application under Section 5 will specifically state the gender of the Applicant as 'Transgender'.
- This certificate will entitle its holder to record their gender as 'Transgender' in all of their other official documents.

Change of Gender

- After obtaining the Certificate of Identity, if a trans person undergoes medical procedure to affirm their gender, they can then make an application to the District Magistrate under Section 7 of the Act, along with a certificate from the Chief Medical Officer or Medical Superintendent of the institution where they underwent the procedure confirming the procedure.
- Based on this application, the gender of the person making the application will be changed from 'Transgender' to a binary marker such as 'male' or 'female'. This revised certificate will bear a binary gender marker.
- This certificate will entitle its holder to record their gender as either 'male' or 'female' in all of their other official documents, depending on the contents of the revised certificate.

In case the applicant is a minor, an application either for Certificate of Identity or Change in Gender will have to be made through their parent or legal guardian.

Procedure to obtain a Certificate of Identity under Section 6

Step 1

Submit an application to the Collector of the District (or officer appointed by them for this purpose) either in person or by post by filling up the proforma Form-I and Form-2 found in the Transgender Persons (Protection of Rights) Rules, 2020.

Step 2

The District Magistrate will not conduct any form or medical or physical examination and will allot an identification number to the application, which is to be used as a reference number in all further correspondences.

Step 3

Based on the correctness of the particulars, the District Collector should issue a certificate of identity within 30 days from the date of making the application. The certificate shall be in Form-3 of the Rules.

Step 4

Along with the certificate, the applicant will also be issued a transgender identity card in Form-5 of the Rules.

Step 5

In case of the application being rejected, the applicant can prefer an appeal to the appropriate authority specified by the State Government.

Procedure to obtain revised Certificate based on Change in Gender under Section 7

Step 1

The applicant should have undergone a medical procedure to affirm their gender and should have also obtained a certificate from the Chief Medical Officer of the Medical Superintendent of the institution certifying that the applicant has undergone a medical procedure.

Step 2

The applicant must then submit an application in Form-I along with the medical certificate mentioned in Step 1 above to the District Collector, either in person or by post.

Step 3

Based on the correctness of the particulars, the District Collector should issue a certificate of identity within 15 days from the date of making the application. The certificate shall be in Form-4 of the Rules.

Step 4

Along with the certificate, the applicant will also be issued an identity card In Form-6 of the Rules which shall bear the binary gender marker of the applicant.

Step 5

In case of the application being rejected, the applicant can prefer an appeal to the appropriate authority specified by the State Government.

Benefits

- In case the Government rolls out welfare schemes for the transgender community, the identity cards mentioned above will serve as proof to avail those schemes.
- Additionally, the identity cards issued under this Act are considered as public documents and can be used to enforce a change in name and gender in marksheets and other government records.
- More specifically, the identity cards issued under this Act served as documentary proof of one's gender, hence also granting the right to marry to the person concerned, if they marry a person of the opposite gender.

In the event of any other violation under the Act, the aggrieved person is entitled to approach the civil court.

MISCELLANEOUS

1. Police Related Issues

A primary concern among the queer community at large is the lack of access to justice in the event of discrimination, harassment or even assault. Particularly, refusal by police authorities to act on complaints or acting on complaints by third parties.

Refusal to register an FIR at any station

Approach the Superintendent of Police of the district with a written complaint in person or by post.

If Step 1 is unsuccessful, approach the jurisdictional magistrate with a private complaint under Section 223 of the BNSS, 2023 or with a Petition under Section 175 (3) of the BNSS, 2023.

Filing of frivolous FIRs based on wrong information

In case of registration of an FIR, if it is a cognizable, non-bailable offence, approach the District Sessions Court for anticipatory bail before arrest.

If bail has been granted or the offence for which FIR is registered is bailable, approach the High Court with a petition to quash the FIR under Section 528 of BNSS, 2023

If there exists a threat of harassment

Approach the High Court with a petition under Section 528 of the BNSS, 2023 with a petition seeking a direction to the police authorities to not harass the petitioner.

2. Issues concerning marriage of trans and intersex persons

While marriage is not a fundamental right, it cannot be denied that the institution of marriage provides a set of rights that are unavailable to unmarried couples in relationships.

Consequent to the judgement passed by the Supreme Court of India in *Supriyo @ Supriya Chakraborty*, queer persons in same-sex relationships do not have the right to enter into a marriage under the existing laws.

However, trans persons in heterosexual relationships have the right to marry under existing law, including personal laws which regulate marriage. Additionally, intersex persons who identify as either male or female have the right to marry under existing law including personal laws which regulate marriage.

3. Extortion and Blackmail

In recent times, scams and traps involving queer persons, especially on online dating websites and applications, have become increasingly prevalent. Scammers and harassers gain access to personal information of queer persons and then use that information, including their queer identity, to extort money, favours and other valuables. While the permanent solution to this problem is for society to become inclusive of queer persons, the immediate stopgap solution lies in the criminal legal system.

Extorting or blackmailing a person for money or other valuables constitutes a crime under the BNS, 2023. Extortion is an offence under Section 308 of the BNS, 2023 and criminal intimidation, wherein a person threatens another person using the threat of damaging their personal reputation in order to obtain their valuables, is also an offence under the BNS, 2023.

Criminal Intimidation is a non-bailable, cognizable offence, meaning that the aggrieved person does not have to approach the courts and can directly lodge a complaint with police authorities. In case the police refuse to register an FIR, the aggrieved person can follow the steps as outlined in 'Refusal to register an FIR at any station' hereinabove.

4. Online harassment, cyber-bullying and media trials

Increasingly, all issues surrounding the queer community have drawn the attention of several online personalities, including trolls and bad-faith actors. While it may not be possible to act against each instance of harassment or online hate speech, the legal system provides redressal in case of certain instances.

In case of homophobic, transphobic or queerphobic content or information being published or broadcasted on news channels or TV channels, the aggrieved person can approach the News Broadcasting Standards Authority with a complaint.

In case the offender is a YouTube channel or verified social media personality, the aggrieved person can issue a defamation notice or a notice calling for the offending content to be taken down.

In all other cases of individual infraction, the aggrieved person can approach the civil court seeking for the offending content to be taken down.

NATAL FAMILY VIOLENCE

For persons belonging to the LGBTIQ+ community, their families are often the primary perpetrators of violence against them. Domestic violence, sexual violence and illegal detention are some of the most common issues faced by the queer community from their natal families.

Illegal detention/wrongful confinement

Persons belonging to the LGBTIQ+ Community are detained at their homes, at de-addiction centres, or at unlicensed mental wellness homes, against their will. They are physically restrained using chains and ropes, administered intravenous drugs, deprived of their belongings such as mobile phones, education certificates and identity documents. A friend, partner or a relative of the person detained (detenue) can utilise one of the following steps.

(There are precedents where the Courts insisted the petitioner to prove their relationship with the detenue if they are not related by blood. If your partner/friend is in potential danger of violence, ensure to have a copy of their identity documents.)

Make a complaint before the District Collector or Sub Collector/ Revenue Divisional Officer or the jurisdictional Judicial Magistrate/ Magistrate of First Class about the illegal confinement under Section 100 of the of BNSS, 2023 (Section 97 of the CrPC)

The listed bodies have the power to issue a search warrant and if found, the detenue will be produced before the Judicial Magistrate for enquiry.

File a Writ of Habeas Corpus before the High Court

Latin for 'produce the body', habeas corpus petition ensures the detenue is produced before the State's top most court and set at liberty.

If the threat persists, seek police protection under Sec. 528 of BNSS, 2023 (Section 482 of CrPC)

Domestic Violence

Protection of Women from Domestic Violence Act, 2005 not only protects married cis-het-women from their husbands but also unmarried cis-queer-women and trans-women against violence their family members or from their partners, if they have lived in a shared household with them. Domestic Violence does not only mean physical violence but also includes mental, emotional and financial violence according to the above-mentioned legislation.

Reach out to the district protection officer appointed under the Act.

File a case under the Act before your jurisdictional magistrate to avail remedies such as protection order or residence order and to claim compensation.

Incase of a married cis- or a trans-woman

File a complaint with the jurisdictional police station for offence under Section 85 & 86 of BNS, 2023 (Section 498A of IPC).

Incase of a trans-woman

File a private complaint before the jurisdictional magistrate for offences under Section 19 of the Transgender Persons (Protection of Rights) Act, 2019.

RESOURCES

- Inclusive Newsroom's (led by Queer Chennai Chronicles and The NewsMinute) LGBTQIA+ Media Reference Guide is available in English, Tamil, Malayalam, Kannada, Marathi, Hindi.

Website: news-inq.com

- A policy brief called 'Happy Together- Law and Policy Concerns of LGBTQI Persons and Relationships in India', written by Suraj Snap, Vivek Diva, Unmukt Gera and published by Centre for Health Equity Law and Policy (C-HELP), Indian Law Society, Pune is available in English, Bangla, Hindi, Kannada, Manipuri, Marathi, Tamil and Telugu.

Website: c-help.org/resources

- Varta Trust's Online Service Locator helps one find trusted queer affirmative mental health, legal aid and sexual health services across India.

Website: resources.vartagensex.org/service-providers-search

- Varta Trust's Resources contains a list of support groups to reach out to and COVID-19 queer friendly resources.

Website: resources.vartagensex.org

- Mithra Trust provides various guides and tools for survivors of trauma including tools for grounding and recovery.

Website: www.knowingtrauma.com

- Garima Greh, which are shelter homes for trans persons run by the Ministry of Social Justice and Empowerment, Government of India under its scheme, SMILE.

Website: transgender.dosje.gov.in/Applicant/Registration/ListofNGO

- Orinam provides resources for friends and families of persons belonging to the LGBTQIA+ community, resources to deal with the law enforcement among others.

Website: orinam.net/resources-for

Mithra Trust launched in 2018 to provide mental health information and tools to young people in a way that a trusted friend would. Mithra Trust offers safe and brave spaces where tools and practices are provided for self-reflection, self-expression and to promote understanding, empathy, and connectedness, thereby building an individual's capacity for self-discovery and self-healing. Mithra Trust commits to maintaining a safe and brave space for the queer community and for survivors of all forms of sexual, physical, emotional, and gender-based violence. To learn more about their work, join **The Meh® Sessions** at www.mithratrust.com/sessions

DISCLAIMER

The information contained in this publication is an overview of the law and it does not constitute and/or substitute legal advice. For legal advice, please contact a lawyer.

This is only a basic compilation of resources which a person belonging to the LGBTIQ+ community might use. The compilation of resources are from publicly available information online and the authors are not responsible for any discrepancy in service rendered by any. Kindly use your discretion.

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Publication commissioned by

