

# Rules & Regulations Review

## Draft Transgender Persons (Protection of Rights) Rules, 2020

### Key Features

- ◆ The Draft Rules specify the process by which transgender persons may apply for a Certificate of Identity and the manner in which such a certificate will be issued to them.
- ◆ A Certificate of Identity recognises a person as transgender and will be issued by a District Magistrate. The application for the Certificate of Identity must include an affidavit, application form and psychologist's report.
- ◆ A District Magistrate may only issue a Certificate to an applicant who is a resident of the area under his jurisdiction for a period of one year as on the date of the application.

### Issues and Analysis

- ◆ The Draft Rules require an application for a Certificate of Identity to include a psychologist's report. Since persons have the right to self-perceive their gender identity, the purpose of the psychologist's report is unclear.
- ◆ The Draft Rules state that a District Magistrate may only issue a Certificate of Identity to an applicant who has been a resident of the area under the jurisdiction of the District Magistrate for a period of one year. However, experts have observed that the transgender community faces ostracisation, unemployment and homelessness. It can be argued that this would make it difficult for transgender persons to establish roots for a continued period of at least one year before submitting an application.
- ◆ The Act delegates welfare measures for transgender persons to be prescribed by Rules. The Draft Rules require government departments to review existing schemes and welfare measures to protect the rights and interests of transgender persons. However, the Draft Rules do not detail out the welfare measures.

In 2014, the Supreme Court recognised a transgender person's right to self-identify their gender as male, female or the third gender.<sup>1</sup> Further, the Court directed central and state governments to grant legal recognition to transgender persons, address social stigma and discrimination faced by them, and provide social welfare schemes for them.

The Transgender Persons (Protection of Rights) Act, 2019 was passed on November 26, 2019.<sup>2</sup> It allows persons to self-perceive their gender identity, provides for the identification of transgender persons, and confers them with certain rights and benefits. Following the notification of the Act, the government circulated the Draft Rules to the Act on April 16, 2020 for public feedback. The Draft Rules specify the manner, form and process by which persons may be recognised as transgender.

## KEY FEATURES

Table 1 includes a comparison between the rule-making powers specified under the Transgender Persons (Protection of Rights) Act, 2019 and the specification in the Draft Rules of those provisions.

**Table 1: Comparison between the provisions of the Act and Draft Rules**

Provisions	Rule-making powers under the Act	Specification in the Draft Rules
<b>Application for Certificate of Identity</b>	<ul style="list-style-type: none"> <li>The manner and form in which an application is made to the District Magistrate for a Certificate of Identity.</li> <li>Any additional documents that may be required.</li> </ul>	<ul style="list-style-type: none"> <li>Application includes a report of a psychologist employed at a government hospital, application form, and affidavit.</li> </ul>
<b>Issuance of Certificate of Identity</b>	<ul style="list-style-type: none"> <li>The procedure, form, manner and time period within which the District Magistrate must issue the Certificate of Identity.</li> </ul>	<ul style="list-style-type: none"> <li>The Certificate must be issued within 60 days. The District Magistrate will also issue a transgender identity card.</li> <li>The District Magistrate may only issue Certificates to applicants that have been residents of the area under his/her jurisdiction for one year on the date of application.</li> <li>The gender and name (if required) of the transgender person must be changed in all official documents as per the Certificate within 15 days of an application being made to this effect.</li> </ul>
<b>Application for revised Certificate of Identity</b>	<ul style="list-style-type: none"> <li>The manner and form in which an application is made to the District Magistrate for a revised Certificate of Identity after a person undergoes sex reassignment surgery.</li> </ul>	<ul style="list-style-type: none"> <li>Application must include an application form and a certificate by the Medical Superintendent or Chief Medical Officer of the institution in which the surgery took place.</li> </ul>
<b>Issuance of revised Certificate of Identity</b>	<ul style="list-style-type: none"> <li>The procedure, form, manner and time period within which the District Magistrate must issue the revised Certificate of Identity.</li> </ul>	<ul style="list-style-type: none"> <li>A revised Certificate of Identity must be issued indicating the gender of the person as male or female within 15 days of receipt of application.</li> <li>A revised identity card will also be issued.</li> </ul>
<b>Welfare measures</b>	<ul style="list-style-type: none"> <li>Welfare measures to protect the rights and interests of transgender persons and facilitation of their access to welfare schemes.</li> </ul>	<ul style="list-style-type: none"> <li>The appropriate government must: (i) review existing welfare measures and schemes to include transgender persons, (ii) ensure welfare schemes, programmes and subordinate legislation are non-discriminatory towards transgender persons, (iii) take adequate steps to prohibit discrimination towards transgender persons, and (iv) educate transgender persons on benefits available to them.</li> </ul>
<b>Facilities</b>	<ul style="list-style-type: none"> <li>Facilities that establishments must provide for transgender persons.</li> </ul>	<ul style="list-style-type: none"> <li>The appropriate government must create facilities, such as rehabilitation centres, HIV surveillance centres, separate hospital wards and separate wash rooms in establishments for transgender persons within two years from notification of rules.</li> </ul>
<b>National Council for Transgender Persons</b>	<ul style="list-style-type: none"> <li>Additional functions of the National Council for Transgender Persons.</li> </ul>	<ul style="list-style-type: none"> <li>The National Institute of Social Defence, under the Ministry of Social Justice and Empowerment, will act as the secretariat to the National Council for Transgender Persons. The central government will provide grant-in-aid to the National Institute of Social Defence for providing this function.</li> </ul>
<b>Any other matter that may be prescribed</b>	<ul style="list-style-type: none"> <li>Any other matter that may be prescribed.</li> </ul>	<ul style="list-style-type: none"> <li>If an application for Certificate of Identity is rejected, the applicant may appeal the decision within 30 days from the date of rejection. Appeals will be directed to the appellate authority designated by the appropriate government.</li> <li>If an application for Certificate of Identity is made with an intention to falsely obtain the status of transgender, the applicant may face penalties.</li> </ul>

Sources: Transgender Persons (Protection of Rights) Act, 2019, Draft Transgender Persons (Protection of Rights) Rules, 2020; PRS.

## KEY ISSUES AND ANALYSIS

### Requirement of psychologist's report to apply for a Certificate of Identity

Act: Section 4(2), 5 and 6.  
Draft Rules: Rule 3 and 4.

The Transgender Persons (Protection of Rights) Act, 2019 states that a person who is recognised as 'transgender' shall have the right to 'self-perceive' their gender identity.<sup>2</sup> Once a person identifies as transgender, they may apply for a Certificate of Identity issued by a District Magistrate. Such a certificate will be proof of their identity as 'transgender' and confer rights and benefits under the Act. The Draft Rules specify the manner, form and process by which persons may apply for a certificate, and in which the certificate will be issued. The Draft Rules state that to apply for a Certificate, applicants must provide (i) an application form, (ii) an affidavit declaring themselves to be transgender, and (iii) report from a psychologist of a government hospital. Based on these documents, the District Magistrate may certify the applicant as transgender. This raises the following three issues.

#### **Purpose of psychologist's report is unclear**

The Act specifies that persons have the right to self-perceive their gender identity.<sup>2</sup> This implies that the gender identity of a person cannot be determined by anyone other than themselves. The Certificate of Identity acts as an acknowledgement of a person's self-perceived identity by the state. It is unclear why the Draft Rules require a psychologist's report as part of an application for a Certificate of Identity as transgender. Note that as per the process stated in the Act, when issuing the Certificate, the District Magistrate does not need to 'evaluate' the person's gender. Instead, his role is to issue a Certificate to any person that self-identifies as transgender. Since an evaluation is not required for issuing a Certificate, it is unclear why a psychologist's report is necessary in the application process.

Note that the Standing Committee on Social Justice and Empowerment (2016) that examined the Bill when introduced in Parliament observed that the presence of medical professionals in the panel for determining the certification of a person as transgender increases the risk that the applicant's gender identity will be assessed on a medical, biological, or psychological basis.<sup>3</sup> According to the Committee, this would violate the right of transgender persons to self-identify their gender, as held by the Supreme Court in *National Legal Services Authority vs. Union of India* (2014).<sup>1</sup>

#### **Content of the psychologist's report not specified**

The Draft Rules do not specify the content of the psychologist's report that is to be submitted when applying for a Certificate of Identity. If a person can declare themselves as transgender in the affidavit provided in their application, it is unclear what additional information will be provided in the psychologist's report.

#### **Shortage of clinical psychologists**

The Draft Rules require that the report should be from a psychologist of a government hospital. According to the National Human Rights Commission, as of 2019 there are 898 psychologists serving in government and private hospitals whereas the demand for clinical psychologists is 20,250.<sup>4</sup> Note that the number of persons who do not identify as 'male' or 'female' but as 'other' stands at 4,87,803 (0.04% of the total population), as per the 2011 Census.<sup>5</sup> It may be argued that the shortage of psychologists in the country will make it difficult for transgender persons to obtain psychologist reports when applying for certification.

Typically, professionals who have the statutory authority to issue certificates are licenced and regulated by statutory bodies. For example, practicing doctors are regulated by the Medical Council of India, and similar bodies regulate dentists, chartered accountants and architects.<sup>6</sup> Psychologists are not certified or regulated by any statutory body. Therefore, there could be an inconsistency across government hospitals as to which persons qualify to provide reports for the purpose of obtaining a Certificate of Identity.

### Applicant to be a resident of the area for one year before submitting application

Draft Rules: Rule 4(2).

The Draft Rules state that a District Magistrate may only issue a Certificate of Identity to an applicant who has been a resident of the area under his jurisdiction for a period of one year as on the date of the application. It may be argued that this provision increases the burden on transgender persons to apply for a Certificate of Identity.

The Expert Committee on Issues Related to Transgender Persons (2014) observed that the transgender community faces ostracisation from family, unemployment and homelessness.<sup>7</sup> Therefore it may be difficult for transgender persons to prove residence for a continued period of at least one year before submitting an application.

Various other licences and certificates do not have a one-year residency requirement. The notice for a civil marriage requires at least one of the parties to the marriage to have resided in the area for at least 30 days.<sup>8</sup> Also,

there is no minimum time period for which a person must reside in the area when applying to a Road Transport Organisation for issuance of a driving licence.<sup>9</sup>

### **Purpose for collection and sharing of certain data not specified**

Draft Rules:  
Form-1.

The application form for a Certificate of Identity requires the applicant to submit information such as education qualification, name of school or college, whom they live with, and sources of income. It is unclear why such information is required for the certification of a person as transgender.

Further, the application form requires that information provided by applicants will be kept confidential and may only be shared with central or state security agencies. It does not state the purpose for which the information will be shared. It also does not identify the security agencies with whom such information can be shared.

### **Penalty for making a false application**

Draft Rules:  
Rule 12.

The Draft Rules require an applicant to submit an affidavit declaring their identity as a transgender person, along with their application. However, the Draft Rules also specify a penalty against persons who make an application for Certificate of Identity with an intention to falsely obtain the status of a transgender person. Since persons have the right to self-perceive their gender identity, it is unclear on what basis authorities may determine whether a person is filing a false application. Note that the Act does not specify a penalty for making a false application for a Certificate of Identity.<sup>2</sup>

### **Welfare measures for transgender persons not specified**

Act: Section  
8, 13, 14,  
and 15.  
Draft Rules:  
Rule 10

The Act states that welfare measures to protect the rights and interests of transgender persons and facilitate their access to welfare schemes may be prescribed in the Rules.<sup>2</sup> The Draft Rules state that the appropriate government must: (i) review existing welfare schemes to include transgender persons, (ii) ensure welfare schemes, programmes and subordinate legislation are non-discriminatory towards transgender persons, (iii) take adequate steps to prohibit discrimination towards transgender persons, and (iv) educate transgender persons on benefits available to them. These details have currently not been specified in the Draft Rules.

The Draft Rules also state that the appropriate government must provide separate washrooms in establishments within two years from the notification of the rules. As per the Act, an “establishment” includes central and state government funded or controlled bodies, and any other company, body corporate, association or body of individuals, firm, society, trust, agency, or institution. Given that the definition of establishment is broad, it may be argued that it is not feasible for the appropriate government to provide separate washrooms for transgender persons in all private and public establishments.

### **Process for determination of gender after sex-reassignment surgery is unclear**

Draft Rules:  
Rule 6,  
Form-1 Item  
5(ii), Form-6

The Act provides for transgender persons that undergo sex-reassignment surgeries to apply for a revised Certificate of Identity and identify as male or female.<sup>2</sup> The Draft Rules specify the manner in which a person who has undergone surgery can apply for a revised Certificate. This includes providing a medical certificate and application form. However, the application form provided in the Draft Rules for a revised Certificate only allows the applicant to select ‘transgender’ as their gender of choice and not ‘male’ or ‘female’. This seems to be a drafting error as the revised identity card issued on the basis of such application declares the person’s gender as ‘male’ or ‘female’.

<sup>1</sup> National Legal Services Authority vs. Union of India [(2014) 5 SCC 438].

<sup>2</sup> [The Transgender Persons \(Protection of Rights\) Act, 2019](#).

<sup>3</sup> Report no. 43, Standing Committee on Social Justice and Empowerment: [The Transgender Persons \(Protection of Rights\) Bill, 2016](#), Lok Sabha, July 7, 2017.

<sup>4</sup> “Despite efforts huge gap remains between the requirements and availability of facilities in the mental healthcare sector, says NHRC Chairperson, Mr. Justice H.L. Dattu”, Press Information Bureau, Ministry of Home Affairs, August 7, 2019.

<sup>5</sup> Primary Census Abstract Data for Others (India & States/UTs), Census 2011.

<sup>6</sup> [The National Medical Commission Act, 2019](#).

<sup>7</sup> [Report of Expert Committee on the Issues relating to Transgender Persons](#), Ministry of Social Justice and Empowerment, January 27, 2014.

<sup>8</sup> [The Special Marriage Act, 1954](#).

<sup>9</sup> [Motor Vehicles Act, 1988](#).

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