

To,

Shri D.K.Sikri  
Secretary  
Ministry of Women and Child Development  
Shasti Bhawan  
New Delhi

Dear Mr. Sikri,

**Ref: Criminal Law Amendment Bill, 2010: Response of Women's Groups**

This has reference to the Criminal Law Amendment Bill 2010, being proposed by the government, to bring about changes in the Criminal Laws, with respect to protections against sexual assault. The Bill, which incorporates some of the recommendations of the 172<sup>nd</sup> Report of the Law Commission of India, 2000, is a welcome step and long overdue. However, given the importance of the subject and the experience on the ground of human rights groups combating sexual assault and sexual violence, women's groups, groups working on child rights and groups working with lesbian, gay, bisexual, transgender, intersex (LGBTI) people from across the country have come together to reflect on the extent to which this proposed bill addresses concrete concerns on the ground; to identify the major gaps and propose an alternative that might eliminate gaps and ambiguities to the maximum extent possible. We have come together to initiate this effort because of our long-term engagement with the justice process, and feel strongly that any legislation enacted at this stage must address the issue in all its complexity. This is especially important in view of the fact that it has taken thirty years to put the issue on the floor of the parliament a second time, and ten years after the Law Commission made fairly concrete recommendations.

Groups have organized discussions in different cities in the month of March. After this first level of discussions within different cities, the first national meeting to discuss the provisions on sexual assault was held in Mumbai on 10<sup>th</sup> and 11<sup>th</sup> April 2010, and in Delhi on 12<sup>th</sup> and 13<sup>th</sup> May 2010. Around 200 women – independent scholars, activists, representatives of women's groups, child rights groups, LGBTI groups, lawyers, rights educators, and representatives of research institutions committed to women's rights, children's rights and human rights – participated in these deliberations. The Delhi meeting was followed by a round of e-deliberations on the different elements that a sexual assault law must contain. We present below our key concerns in the form of comments and draft sections.

We sincerely urge the government to take note of the concerns raised in this draft and continue a dialogue with those engaged in this exercise, so that we may put in place a law which is based on evolving international jurisprudence and experience of rights groups on the ground.

Thank you,

Yours sincerely

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On behalf of the following organizations and individuals:

Organisations	City
Akshara	Mumbai
Alternative Law Forum (ALF)	Bangalore
Ankuram	Hyderabad
Anveshi	Hyderabad
Asmita	Hyderabad
Awaaz-e-Niswaan (AeN)	Mumbai
Centre for Alternate Dalit Media (CADAM)	Delhi
Centre for Equity Into Health and Allied Themes (CEHAT)	Mumbai
Centre for Equity and Social Studies (CESS)	Hyderabad
Centre for Legal Service	Mumbai
Centre for Women's Developmet Studies (CWDS)	Delhi
CREA	Delhi
Dalit Stri Shakti	Hyderabad
Forum Against Child Sexual Exploitation (FACSE)	Mumbai
Forum Against Oppression of Women (FAOW)	Mumbai
HAQ: Centre for Child Rights	Delhi
Human Rights Watch (HRW)	Mumbai
Jagori	New Delhi
Lesbians and Bisexuals in Action (LABIA)	Mumbai
Lawyers Collective (WRI)	Mumbai
Majlis	Mumbai
Mahila Manch	Madhya Pradesh
Matti	Uttarakhand
Multiple Action Research Group (MARG)	Delhi

National Campaign on Dalit Human Rights (NCDHR)	Delhi
Nirantar, Centre for Gender and Education	Delhi
Partners for Law in Development (PLD)	Delhi
Recovering and Healing from Incest Foundation (RAHI)	Delhi
Saheli Women's Resource Centre	Delhi
Sahiyan (Stree Sangathan)	Vadodra
Sama-Resource Group for Women and Health	Delhi
Sampada Gramin Mahila Sanstha (SANGRAM)	Sangli
Selvam	Chennai
Sanmitra	Mumbai
Sappho	Kolkata
Special Cell for Women	Mumbai
Stri Mukti Sanghatan	Mumbai
Swayam	Kolkata
Talking About Reproductive and Sexual Health Issues (TARSHI)	Delhi
Vikalp Women's Group	Vadodra
Women's Research Action Group (WRAG)	Mumbai
Women's Collective	Tamil Nadu
Young Womens Christian Association (YWCA)	Delhi
Individuals	City
Anagha Sarpotdar, PhD Candidate, TISS	Mumbai
Anita Ghai	Delhi
Deepti Gopinath	Mumbai
Farah Naqvi, Writer and Activist	Delhi
Jameela Nishat Shaheen	Hyderabad
Manisha Tulpule	Mumbai
Namrata Ganneri (SNDT University)	Mumbai
Ponni Arasu, Independent Researcher	Delhi
Pramada Menon, Activist	Gurgaon
Pratibha Menon	Mumbai
Putul Sathe (SNDT University)	Mumbai
Rohini Hensman	Mumbai
Saumya Uma, Human Rights Lawyer	
Uma Chakravarti, Feminist Historian and Democratic Rights Activist	Delhi
Urmila Pawar	Mumbai
Usha Ambore	Mumbai
Vasanth Kannabiran	Hyderabad
Veena Gowda	Mumbai
V Geetha, Feminist Historian and Activist	Chennai
Vrinda Grover, Human Rights Lawyer	Delhi

## **NOTE ON CRIMINAL LAW AMENDMENT BILL, 2010**

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## **PART A. STATEMENT OF OBJECTS AND REASONS**

1. The Indian Constitution and International Conventions ratified by the Government of India guarantee comprehensive protections against offences against the human body, and safeguard the right to life, bodily integrity and dignity. Consistent with this Constitutional commitment, and in furtherance of the recommendations of the 172<sup>nd</sup> Report of the Law Commission of India on the reform of rape laws, 2000, The Criminal Law Amendment Bill, 2010 creates a new chapter on sexual offences that provides comprehensive protections to women, children, and all other persons who on account of their sexual, gender or other identities are subjected to sexual violence.
2. Existing provisions relating to sexual violence are scattered across the Indian Penal Code in sections 375, 376, 377, 354 and 509. In their current form, these different sections do not respond to the reality of many different forms of sexual violence; nor do they incorporate a comprehensive understanding of sexual violence itself. The Criminal Law Amendment Bill, 2010 therefore deals with the entire range of sexual violence by introducing new provisions and revising existing provisions, which recognize that sexual violence violates the right to equality, dignity and bodily integrity and that they inflict injury and harm. This Bill seeks to place all provisions relating to sexual violence within a single chapter, in an attempt to provide a comprehensive guarantee to all persons of a life free from such violence and to punish those who perpetrate such violence against them.
3. The Criminal Law Amendment Bill, 2010 recognizes that in a sexual crime, the perpetrator exercises power over women, children and other persons. Sexual assault and sexual humiliation are tools that are used against women and others in situations of conflict such as those based on community, ethnicity, caste and religion in order to target the community that they are part of. Women with disabilities are especially vulnerable to sexual assault and aggravated sexual assault.
4. Sexual crimes form a continuum. Sexual violence includes but is not limited to sexual acts which involve penetration by the penis. They include acts which involve introduction of other parts of the body and objects as well as the use of criminal force, including stripping, parading and mutilation which are intended to sexually assault, degrade or humiliate those who are so targeted. In recognition of the structural and graded nature of sexual violence this Bill grades offences based on concepts of harm, injury, humiliation and degradation, using well-established categories of sexual assault, aggravated sexual assault, and sexual offences.
5. Sexual violence against women is an impediment to the achievement of equality, and their fundamental right to freedom. It is a manifestation of unequal power relations between men and women, prevents women's full advancement, and is a crucial social mechanism by which women are forced into a subordinate position as compared to men. The notions of dishonour and modesty, on which sections 354 and 509 IPC are premised, do not capture

the assaultive and violent nature of sexual offences and the physical, social, emotional and psychological harm caused by them. All sexual offences violate the right to bodily integrity, autonomy and dignity of the person against whom the sexual crime is perpetrated.

6. The Criminal Law Amendment Bill, 2010 recognises that women are not the only individuals targeted by men through sexual violence, but that other persons (based on their sexual, gender or other identities) are also sexually assaulted by men. This includes, among others, the category of transgender persons [by whatever name they are known]. The stigma, discrimination and human rights violations experienced by transgender persons in all aspects of their life because they do not fall clearly into the category of 'man' or 'woman' and transgress societal gender norms, are being increasingly recognized by civil society, public policies and the judiciary. This Bill recognizes that sexual violence perpetrated against transgender persons is a form of gender-based violence that must be punished. The Criminal Law Amendment Bill, 2010 therefore introduces a new section that defines sexual assaults by men against persons excepting women.

The category of "persons" also includes persons who experience sexual violence because of their sexual orientation. An important factor underlying such sexual violence is the social system, which seeks to suppress sexual diversity. In this context, the Bill makes a departure from the existing legal framework of "unnatural" carnal intercourse and draws the critical distinction between consent and lack of consent. Same-sex violence of a sexual nature, by definition committed against the will of the person on whom the violence is perpetrated, is thus brought within the purview of the Criminal Law Amendment Bill, 2010.

7. The Criminal Law Amendment Bill further recognises that children are also subjected to sexual offences. Sexual violence against children causes serious emotional, psychological and physical harm which, if not addressed, persists throughout their lives. By ratifying the United National Convention on the Rights of the Child, India is committed to take appropriate measures to deal with all forms of sexual violence, exploitation and abuse of children and prescribe a set of standards that ensure child protection and secure best interests of the child, particularly those who are victims of sexual violence and abuse (Articles 19, 34, 35, 36 and 39 of the UNCRC).

That India has high numbers of sexually abused children is well documented and acknowledged by the Government in its various policy and planning documents. Crime records also clearly suggest that sexual violence against children is often by family members, relatives and other people they trust or are known to them. Use of assault and criminal force against children for sexual purposes, sexual offences against children in schools, institutions and other custodial settings, sexual abuse through pornography and other information technology, makes their situation even more vulnerable and calls for special protection measures through law, policy and action. Moreover, recognizing that both girls and boys are victims of sexual violence against children and that the perpetrators too can be of any gender, such crimes against children require a gender-neutral disposition.

The Bill thus provides for comprehensive protections that are gender sensitive, in part through gender specific protections and in part through gender neutral protections, thereby recognising the specific needs of women, children and others such as men and transgender persons [by whatever name they are known] who are also subjected to sexual violence by men.

8. The prosecution in cases of sexual assault depends heavily on the question of consent. In recognition of the fact that this has been defined variously, often to the detriment of women's interests, the Criminal Law Amendment Bill, 2010 introduces a comprehensive definition of consent, which will guide prosecutors and judiciary in providing protection to victims of sexual assault.

9. It has also been recognized that coercive circumstances -- economic, political and social dominance, positions of authority and situations of custody, ranging from state institutions to the family -- enhance the power of the perpetrator in committing the sexual crime. The Bill introduces a section on aggravated sexual assault that deals with cases of sexual assault that are of a more grievous nature. This may be due to the fact that the perpetrator is in a position of authority or trust; because the victim is in a position of specific disadvantage or vulnerability; because of the aggravated bodily harm suffered; or because the assault has been committed in a context of community-based or sectarian violence. Sexual violence against women in certain specific situations of conflict where they are targeted by reason of their identity including community, ethnicity, caste, religion and language, merits special recognition. This section provides for aggravated circumstances including, but not limited to, the age of the survivor, the use of criminal force, the custodial position of the survivor, the nature of coercive circumstances, and the presence of multiple perpetrators.

The Criminal Law Amendment Bill, 2010 provides for effective and speedy complaint procedures. Remedies including reparation are laid down including protective measures such as safe havens, counseling and rehabilitation and support services for women against whom sexual offences are perpetrated.

## **PART B. DEFINITIONS**

1. ‘Consent’ means the unequivocal voluntary agreement of the woman or person, to engage in the sexual activity in question.

- (i) There is no unequivocal voluntary agreement where the complainant has, by words, gestures or any form of non-verbal communication, communicated unwillingness to participate in the sexual activities which form the subject matter of the charge.
- (ii) Unequivocal voluntary agreement may be specific and limited to the express acts or times consented to. Any sexual acts performed after the withdrawal of voluntary agreement is non-consensual.
- (iii) There can be no presumption of unequivocal voluntary agreement based on the woman/person’s class, caste, occupation, sexual identity, or membership in any group.
- (iv) No consent is obtained where the complainant is in coercive circumstances.
- (v) A person who does not offer actual physical resistance to sexual activity is not, by reason only of that fact, to be regarded as consenting to the sexual activity.
- (vi) The use of a condom or insistence on the use of a condom and/or the use of contraceptive medication or other prophylactic medication to prevent sexually transmitted diseases shall not be taken to mean unequivocal voluntary agreement.
- (vii) There is no unequivocal voluntary agreement where the complainant is below sixteen years of age.

2. “Coercive circumstances” includes

- (i) police, judicial or armed forces custody; a public hospital or health facility; a state home, observation home or any facility that provides shelter
- (ii) being a victim in an episode of collective violence; or a witness to such episode; or under fear or threat of collective violence;
- (iii) being a victim of domestic/intimate violence
- (iv) being a member of a scheduled caste or scheduled tribe
- (v) being in a position where s/he is subjected to social, political, and economic dominance by the person(s) accused.

3. “Police” includes police personnel of any rank who are in government service, special police officers (SPOs) and personnel of private security agencies contracted by the state to perform police functions.

4. “Security personnel” include personnel of the armed forces – the army, navy, air force, paramilitary forces and personnel of forces constituted by the statutes listed in the Schedule of this Bill, including special units, battalions, groups, divisions and forces, created, operated and controlled under such armed forces. Security personnel shall also include personnel of any other

forces constituted at any point of time by the state to perform security functions.

5. "Public Servant" is defined under Section 21 Indian Penal Code.

6. "Servant of Government" is defined under Section 14 Indian Penal Code.

6. "Women's institution" means an institution, whether called a home for neglected women or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women.

7. "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

8. "Economic/social dominance" includes situations of religious, ethnic, linguistic, caste and class dominance, including (but not limited to) both formal and informal employment situations such as landlord-agricultural labourer, contractor-labourer, employer-domestic worker,

\*Illustrations to be added to explain instances of economic dominance and social dominance.

9. "Position of political authority" includes authority vested in all elected representatives of legislative, municipal, panchayat and other bodies performing similar functions.

**PART C. DEFINITION OF SEXUAL VIOLENCE.** THE PROPOSED DEFINITION MOVES AWAY FROM THE PENETRATIVE REPRODUCTIVE LOGIC TO A MORE NUANCED UNDERSTANDING OF SEXUAL ASSAULT REDEFINED AS SEXUAL VIOLENCE, THAT TAKES INTO ACCOUNT THE RANGE OF SEXUAL VIOLENCE PERPETRATED AGAINST PERSONS, , WITH OR WITHOUT THE USE OF CRIMINAL FORCE. THESE INCLUDE ACTS RANGING FROM SEXUAL HARASSMENT TO THE GRAVEST FORMS OF SEXUAL ASSAULT. THESE ACTS ARE TO BE GRADED ACCORDING TO THE DEGREE OF VIOLATION AND PHYSICAL, PSYCHOLOGICAL, EMOTIONAL AND SOCIAL HARM IN THE AWARDING OF PUNISHMENTS. AS ARTICULATED IN THE STATEMENT OF OBJECTS AND REASONS, THESE SECTIONS MUST TAKE CARE OF SEXUAL VIOLENCE ON WOMEN, PERSONS EXCEPTING WOMEN AND CHILDREN.

**I. Sexual Violence on Women.** Women are assaulted in ways that range from sexual humiliation to physical assault. Sexual violence forms a continuum, ranging from sexual harassment without the use of criminal force to the gravest forms of assault.

**II. Sexual assault on men in custodial situations and otherwise; and on transgender persons.** There is by now a realisation that while sexual assault against women continues to be a major concern, children, men, and transgender persons are assaulted – children by family members and strangers; men in custody and because of their sexual orientation in the case of gay men; and transgender

persons, the violations against whom have been extensively documented by the Karnataka PUCL.

### **III. Sexual assault on children – boys and girls**

#### **PROPOSED STRUCTURE OF SECTIONS THAT DEFINE SEXUAL VIOLENCE AND ASSAULT**

##### **SECTION 375 A. SEXUAL VIOLENCE ON A WOMAN**

A man is said to commit an act of “sexual violence on a woman” if he—

- (a) Introduces his penis or any body part or object to any extent into the vagina, the anus or urethra of any woman;
- (b) Introduces his penis or other genitals to any extent into the mouth of woman; or forcefully applies his mouth or any other body part to her genitals or breasts; or forcefully applies his genitals to any other body part of the woman
- (c) Manipulates any part of the body of woman so as to cause introduction into the anus or mouth of his own body any part of the woman’s body or so as to cause introduction into the anus or vagina of the woman any part of her own body
- (d) Mutilates sexual and reproductive organs (including breasts, uterus, genital organs) of a woman;
- (e) Strips, disrobes, parades naked or participates in stripping, disrobing or parading naked, or compels a woman to strip, disrobe or parade naked
- (f) Assails or uses criminal force through verbal, non verbal and/or physical acts on any woman intending to sexually humiliate or knowing it to be likely that by such assault, he will thereby humiliate or cause the woman to be sexually humiliated
- (g) Assails or uses criminal force through acts of sexual nature on any woman, like, but not limited to, ejaculating or urinating on her
- (h) Forces sexual contact of any sort, including forcing a woman to perform sexual acts with him or another intending to violate her bodily integrity or knowing it to be likely that he will thereby violate her bodily integrity;
- (i) Exposes male sexual organs in front of a woman.
- (j) incites/instigates/compels/conspires/abets commission of any of the above acts on a woman by another person
- (k) touches, with a sexual purpose, with a part of his body any part of the body of a woman, without her consent.

(I) sexually harasses a woman by uttering any word, making any sound or gesture, or exhibiting any object or a part of the body intending that such a word or sound shall be heard, or that such gesture or object shall be seen to sexually violate, humiliate or intrude on the privacy of the woman.

Under the circumstances falling under any of the following eight descriptions:-

*Firstly* - Against her will.

*Secondly* - Without her consent

*Thirdly* - With her consent when such consent has been obtained deceit or fraud or by putting her or any person in whom she is interested, in fear of death or of hurt.

*Fourthly* - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married.

*Fifthly* - A woman does not consent to sexual activity if the activity occurs while she is affected by an intellectual, mental or physical condition or impairment of such a nature and degree that she cannot consent or refuse to consent to the activity.

*Sixthly* - With her consent when she is in a condition of intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that action to which she gives consent.

*Seventhly* - With or without her consent, when she is under sixteen years of age

*Eighthly* - With or without her consent, when she is in coercive circumstances.

Explanation I – Introduction of penis, object or other body part to any extent into the anus, vagina, or mouth of a woman without her consent is a sexual assault within the meaning of this section.

Explanation II – For the purposes of this section “vagina” shall also include labia majora.

## **SECTION 375 B: SEXUAL ASSAULT ON PERSON EXCEPTING WOMAN**

**This section assumes grave importance in the context of sexual violence faced by people because of their sexual, gender or other identities. In light of the inclusion of non consensual sexual acts in this section, and of sexual assault on children being addressed by 375 C of this Bill as well as the Sexual Offences Against Children Bill that is currently in process of being drafted, the rationale for section 377 IPC ceases to exist.**

For the purpose of this section, “person” shall mean any person not being a woman. This fact shall be determined through a declaration by the complainant. No medical examination shall be conducted for purposes of the determination of the sex of a complainant of sexual assault. This section includes men as well as transgender persons as victims of sexual violence.

Transgender persons include all those who do not fall clearly into the categories of 'man' or 'woman'. Therefore this section will use the pronouns 'him' as well as 'her'."

A man is said to commit "sexual assault on a person" if he–

- (a) Introduces his penis or any body part or object to any extent into the vagina, the anus or urethra, or any other sexual organ of any person, such as surgically reconstituted genitalia, organs and/or removed genitalia
- (b) Introduces his penis or other genitals to any extent into the mouth of the person; or forcefully applies his mouth or any other body part to her/his genitals or breasts; or forcefully applies his genitals to any other body part
- (c) Assaults or uses criminal force through acts of sexual nature like ejaculating , urinating on any person, intending to harm her/his bodily integrity or knowing it to be likely that he will thereby harm her/his bodily integrity;
- (d) Mutilates sexual and reproductive organs (including breasts and genital organs) of a person;
- (e) Forces sexual contact of any sort, including forcing the person to perform sexual acts
- (f) Strips, disrobes, parades or participates in stripping, disrobing or parading or compels a person to be naked
- (g) Assaults or uses criminal force through verbal, non verbal and/or physical acts to any person or abets or conspires to assault or uses such criminal force on any person intending to sexually humiliate or knowing it to be likely that by such assault, he will thereby humiliate or cause the person to be sexually humiliated
- (h) Manipulates any part of the body of the person so as to cause introduction into the anus or mouth of his own body any part of the person's body or so as to cause introduction into the anus or vagina of the person any part of her/his own body
- (i) Incites/instigates/compels the commission of any of the above crimes/acts on the person by another person

Under the circumstances falling under any of the following seven descriptions:-

*Firstly - Against her/his will.*

*Secondly - Without her/his consent*

*Thirdly - With her/his consent when such consent has been obtained by deceit or fraud or putting her/him or any person in whom s/he is interested, in fear of death or of hurt.*

*Fourthly - A person does not consent to sexual activity if the activity occurs while s/he is affected by an intellectual, mental or physical condition or impairment of such a nature and degree that s/he cannot consent or refuse to consent to the activity.*

*Fifthly - With her/his consent when s/he is in a condition of intoxication or the administration by him personally or through another of any stupefying or*

unwholesome substance, s/he is unable to understand the nature and consequences of that action to which s/he gives consent.

*Sixthly* - With or without her/his consent, when s/he is under sixteen years of age

*Seventhly* - With or without her/his consent, when s/he is in coercive circumstances.

Explanation I – Introduction of penis, object or other body part to any extent into the anus, vagina, or mouth of a person without her/his consent is a sexual assault within the meaning of this section.

Explanation II – For the purposes of this section “vagina” shall also include labia majora and reconstituted vagina.

### **SECTION 375 C: SEXUAL ASSAULT ON CHILDREN.**

A person is said to commit an act of “sexual assault on a child” if he/she-

- (a) Introduces his penis or any body part or object to any extent into the vagina, the anus or urethra or mouth of any child;
- (b) Introduces his penis or other genitals to any extent into the mouth of a child; or forcefully applies his/her mouth or any other body part to the child's genitals or breasts; or forcefully applies his/her genitals to any other body part of the child
- (c) Manipulates any object or part of his/her body or that of the child so as to cause introduction into the vagina, anus or urethra or mouth of the child
- (d) Involves the child in masturbation
- (e) Strips, disrobes, parades naked or participates in stripping, disrobing or parading naked or compels a child to be naked
- (f) Forces the child to perform sexual acts
- (g) Invites, counsels or incites a child for pornography or exhibits pornographic materials to a child
- (h) Takes photographs of the child in sexual poses or photographs of the child that can be used for sexual purposes or in a sexual manner
- (i) Flashes/exposes genitals to the child
- (j) Touches, strokes or rubs any part of the body of the child with a part of the body of the person doing so or with an object or invites a child for any such form of sexual gratification
- (l) Looks at the child or hugs or kisses the child in a sexual way

- (m) Watches a child bathe or undress in a way that makes the child feel uncomfortable
- (n) Bathes or washes the child in a manner that makes the child uncomfortable
- (o) Makes lewd or suggestive comments to or about the child
- (p) Uses the child in any other way for sexual gratification of self or others
- (q) Procures or traffics a child for sexual purposes, including commercial sexual exploitation.

Under the circumstances falling under any of the following two descriptions:-

*Firstly* – with or without her/his consent if s/he is under sixteen years of age  
*Secondly* – without her/his consent if s/he is above sixteen and below eighteen years of age, and the accused is more than five years older.

Explanation I – For the purposes of this section “vagina” shall also include labia majora.

Explanation II – A child is a person below eighteen years of age.

## **PART D. AGGRAVATED SEXUAL ASSAULT**

THE NEED TO ADDRESS THE REALITIES OF AGGRAVATED SEXUAL ASSAULT, PARTICULARLY IN SITUATIONS OF COMMUNAL, CASTE AND OTHER VIOLENCE, AND IN AREAS UNDER ARMED FORCES PRESENCE. THIS IS ESPECIALLY IMPORTANT AFTER GUJARAT, THE DECADE LONG STRUGGLE BY IROM SHARMILA AND THE WOMEN OF MANIPUR, AND OTHER EPISODES OF MASS VIOLENCE THAT HAVE SEEN SEXUAL VIOLENCE AS PART OF COLLECTIVE VIOLENCE.

AGGRAVATED SEXUAL ASSAULT REFERS TO SEXUAL ASSAULT OF A MORE GRIEVIOUS NATURE. IT INCLUDES SEXUAL ASSAULT THAT IS COMMITTED

- BY PERSONS IN A POSITION OF AUTHORITY OR TRUST;
- ON WOMEN, CHILDREN AND PERSONS WHO ARE IN A DISADVANTAGED/VULNERABLE POSITION;
- AS PART OF SECTARIAN VIOLENCE;
- THAT RESULT IN AGGRAVATED BODILY HARM.

### **Section 376 (2A) Custodial Aggravated Sexual Assault Of A Woman**

Whoever

(a) being a police official commits sexual assault –

- (i) Within the limits of the police station to which he is appointed;

- (ii) In the premises of any station house whether or not situated in the police station to which he is appointed; or
- (iii) On a woman in his custody or in the custody of a police officer subordinate to him; or
- (iv) When he is known or identified as a police official.

(Rationale for (iv) above: Authority remains with the police personnel, in or out of uniform, wherever he goes, including beyond the precincts of a police station and beyond his own jurisdiction).

*Illustration: Police official assaults a woman in the train or in a village, in circumstances where he is known to be a police official or where he identifies himself to be a police official, not in the course of the duties.*

(b) being a personnel of the security forces, commits sexual assault –

- (i) In the course of his duties; or
- (ii) Within the limits of the area in which he is deployed; or
- (iii) In any areas under army command or control (including army cantonment areas).
- (iv) On a woman in his custody or in the custody of a personnel of the security forces subordinate to him;
- (v) When he is known or identified as a personnel of the security forces

(Rationale for (v) above: authority remains with the personnel of the security forces with or without uniform, wherever he goes, beyond his own jurisdiction).

(c) Being a public servant, or servant of government, takes advantage of his official position and commits sexual assault on a woman in his custody or in the custody of a public servant subordinate to him; or

(d) Being on the management or on the staff of a jail, remand home, reception center or other place of custody established by or under any law for the time being in force or of a women's institution, educational institution or institution working with women with mental and/or physical disabilities, takes advantage of his official position and commits sexual assault on any woman,inmate of such jail, remand home, place or institution; or

(e) Being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a woman in that hospital; or

(f) Being family member or relative of, or person in a position of trust or authority towards the woman assaulted, commits sexual assault with such woman; or

(g) Being in a position of economic and/or social dominance and/or political authority commits sexual assault on a woman under such dominance

\* *Illustrations to be added to explain social, economic and political dominance*

Shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may be imprisonment for life and shall also be liable to fine:

### **Section 376 (3A): Non-Custodial Sexual Assault Of A Woman**

Whoever

- (a) Commits sexual assault on a woman knowing her to be pregnant; or
- (b) Commits gang sexual assault; or
- (c) Commits sexual assault on a woman suffering from physical, intellectual, psychological or sensory impairment;
- (d) While committing sexual assault causes grievous hurt, harms, maims, disfigures or endangers the life of a woman, or
- (e) Commits repeated sexual assault

Shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may be imprisonment for life and shall also be liable to fine.

Explanation I - Where a woman is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this subsection.

### **SECTION 376(4A):SEXUAL ASSAULT OF WOMAN AS PART OF SECTARIAN VIOLENCE**

Whenever

A person or group of persons commits sexual assault on a woman as part of sectarian violence he / they shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may be imprisonment for life and shall also be liable to fine.

Explanation I: Sectarian violence is any attack committed against the persons and properties of individuals or a group of persons on the basis of their group identity, which can be inferred directly or from the nature or circumstances of the attack. It includes any one or a combination of the following:

- (i) multiple attacks
- (ii) attacks in mass numbers,
- (iii) attacks over a prolonged period,
- (iv) attacks in a number of places simultaneously and / or
- (v) attacks with a systematic and consistent pattern.

Explanation II: ‘Group identity’ could be, inter alia, on the basis of religion, gender, caste, class, language, region, political ideology or other identity of the group.

Explanation III: Where a woman is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of such persons shall be deemed to have committed aggravated sexual assault within the meaning of this subsection.

## **AGGRAVATED SEXUAL ASSAULT ON PERSON EXCEPTING WOMAN**

While defining aggravated sexual assault for persons excepting woman, only the following situations are included:

### **376(2B) CUSTODIAL AGGRAVATED SEXUAL ASSAULT ON PERSON EXCEPTING WOMAN**

- custodial sexual assault as defined under section 376 (2A)a, b, d, e;

### **SECTION 376(3B): NON-CUSTODIAL SEXUAL ASSAULT OF A PERSON EXCEPTING WOMAN**

- non custodial aggravated sexual assault as defined under section 376(3A) b, c, d, e

### **SECTION 376(4B): SEXUAL ASSAULT OF A PERSON EXCEPTING WOMAN AS PART OF SECTARIAN VIOLENCE**

- sectarian violence as defined under section 396(4A)

## **AGGRAVATED SEXUAL ASSAULT ON A CHILD**

While defining aggravated sexual assault for minors all the above clauses that exist for women apply for children as well but entails a higher punishment.

### **376 (2C) CUSTODIAL AGGRAVATED SEXUAL ASSAULT ON A CHILD**

Whoever

- (a) being a police official commits sexual assault on a child –
  - (v) In the course of his/her duties or otherwise
  - (vi) Within the limits of the police station to which he/she is appointed;
  - (vii) In the premises of any station house whether or not situated in the police station to which he/she is appointed; or

- (viii) On a child in his/her custody or in the custody of a police officer subordinate to him/her; or
- (ix) When he/she is known or identified as a police official; or.

(Rationale for (iv) above: Authority remains with the police personnel, in or out of uniform, wherever he/she goes, including beyond the precincts of a police station and beyond his own jurisdiction).

*Illustration: Police official assaults a child in the police station or elsewhere, while on duty or otherwise, in circumstances where he is known to be a police official or where he identifies himself to be a police official*

(b) being a personnel of the security forces, commits sexual assault on a child–

- (vi) In the course of his duties; or
- (vii) Within the limits of the area in which he is deployed; or
- (viii) In any areas under army command or control (including army cantonment areas).
- (ix) On a child in his custody or in the custody of a personnel of the security forces subordinate to him;
- (x) When he is known or identified as a personnel of the security forces

(Rationale for (v) above: authority remains with the personnel of the security forces with or without uniform, wherever he goes, beyond his own jurisdiction).

(c) Being a public servant, or servant of government, takes advantage of his/her official position and commits sexual assault on a child in his/her custody or in the custody of a public servant subordinate to him/her; or

(d) Being on the management or on the staff of a jail, remand home, reception center or other place of custody established by or under any law for the time being in force or of a children's institution, educational institution or institution working with women and children with mental and/or physical disabilities, takes advantage of his/her official position and commits sexual assault on any child inmate of such jail, remand home, place or institution; or

(e) Being on the management or on the staff of a hospital, takes advantage of his/her official position and commits sexual assault on a child in that hospital; or

(f) Being family member or relative of, or person in a position of trust or authority towards the child, commits sexual assault with such child; or

(g) Being in a position of economic and/or social dominance and/or political authority commits sexual assault on a child under such dominance

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be imprisonment for life and shall also be liable to fine:

### **376(3C) NON-CUSTODIAL AGGRAVATED SEXUAL ASSAULT ON A CHILD**

Whoever

- (a) Commits sexual assault on a child below twelve years of age
- (b) Commits gang sexual assault; or
- (c) Commits sexual assault on a child suffering from physical, intellectual, psychological or sensory impairment;
- (d) While committing sexual assault causes grievous hurt, harms, maims, disfigures or endangers the life of a child, or
- (e) Commits repeated sexual assault

Shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be imprisonment for life and shall also be liable to fine.

Provided that where such sexual assault is committed on a child aged twelve years or above not falling into any of the categories listed herein above, the punishment shall be rigorous imprisonment of not less than seven years, which may extend to life imprisonment and shall also be liable to fine.

Explanation I - Where a child is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this subsection.

### **376(4C) SEXUAL ASSAULT ON A CHILD AS PART OF SECTARIAN VIOLENCE**

Whenever

A person or group of persons commits sexual assault on a child as part of sectarian violence he/she / they shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may be imprisonment for life and shall also be liable to fine.

Explanation I: Sectarian violence is any attack committed against the persons and properties of individuals or a group of persons on the basis of their group identity, which can be inferred directly or from the nature or circumstances of the attack. It includes any one or a combination of the following:

- (vi) multiple attacks
- (vii) attacks in mass numbers,
- (viii) attacks over a prolonged period,
- (ix) attacks in a number of places simultaneously and / or
- (x) Attacks with a systematic and consistent pattern.

Explanation II: ‘Group identity’ could be, inter alia, on the basis of religion, gender, caste, class, language, region, political ideology or other identity of the group.

Explanation III: Where a child is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of such persons shall be deemed to have committed aggravated sexual assault within the meaning of this subsection.

**PART E. EVIDENCE, MEDICAL PROCEDURES AND PUNISHMENTS.** THE WIDESPREAD CONCERN IS ON IMPUNITY FOR PUBLIC SERVANTS, WITNESS PROTECTION AND MEDICAL EXAMINATION. THE EXISTENCE OF TESTS LIKE THE TWO-FINGER TEST, WHICH FURTHER AGGRAVATE WOMEN’S EXPERIENCE OF ASSAULT, AMONG OTHERS.

**PROPOSED AMENDMENTS TO PROCEDURAL LAW AND THE LAW OF EVIDENCE IN CASES OF SEXUAL ASSAULT OF WOMEN, PERSONS OR CHILDREN**

**(a) Command responsibility of public servant**

A public servant shall be criminally responsible both for acts of commission and omission for all crimes of sexual assault committed by forces or other public servants under his effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- i. That public servant either knew or, owing to the circumstances at the time, should have known that forces/ persons subordinate to him were committing or about to commit such crimes; and
- ii. That the public servant failed to take all necessary and reasonable measures within his power/ authority to prevent or control their commission or omission
- iii. or to submit the matter to the competent authorities for investigation and prosecution.

**(b) Superior responsibility of persons other than public servant.** With respect to superior and subordinate relationships not described in paragraph (a), such as a political party or an organisation a superior shall be criminally responsible for crimes of sexual assault committed by subordinates under his or her effective authority and control, as a result of his failure to exercise control properly over such subordinates, where:

- i. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- ii. The crimes concerned activities that were within the effective responsibility and control of the superior; and

- iii. The superior failed to take all necessary and reasonable measures within his or her power to prevent or control their commission or to submit the matter to the competent authorities for investigation and prosecution.

Explanation – a subordinate for purposes of (b) is not limited to persons who are members of a party or organization.

#### **PROPOSED AMENDMENTS TO THE CRIMINAL PROCEDURE CODE FOR INVESTIGATION, COURT PROCEEDINGS AND TRIAL.**

These amendments are in addition to those already made in the law from 2005 onwards with specific reference to sexual assault, recording statements of victims, their examination etc.

- (i) In all cases of sexual assault under section 376(2) IPC the complainant/victim shall in addition to a right to a free copy of the FIR under Section 154 Cr. P.C. have the right to copies of all his/her statements recorded under section 161 Cr.P.C.
- (ii) In all cases of sexual assault under section 376(2) IPC the complainant/victim shall also be given a copy free of cost of all documents listed under section 207Cr.P.C viz. police report,; FIR; statements recorded under section 161Cr.P.C.; confessions and statements recorded under section 164 Cr.P.C.; any other document of the report filed by the police under section 173 Cr.P.C
- (iii) In all cases of sexual assault during mass crimes and custodial sexual assault the complainant/victim shall
  - (a) have the right to file an application before any Metropolitan Magistrate or Judicial Magistrate, whether or not he has jurisdiction in the case, for the said Magistrate to record a statement under section 164Cr.P.C. in relation to sexual assault during the course of the investigation. The statement recorded by the Magistrate under this provision shall be forwarded to the Magistrate by whom the case is to be inquired into or tried.
  - (b) The Victims/witnesses shall have the right to file an application before any Metropolitan Magistrate or Judicial Magistrate, whether or not he has jurisdiction in the case, seeking permission to file an affidavit in relation to any communal crime during the course of the investigation. The affidavit filed by the Magistrate under this provision shall be forwarded to the Magistrate by whom the case is to be inquired into or tried.
- (iv) In all cases of sexual assault during mass crimes and custodial sexual assault the fear and apprehension expressed by the victim /witnesses in a petition seeking transfer of the trial of the case to another jurisdiction,

shall in the interest of justice be accorded due consideration by the concerned court.

- (v) If the witness/victim expresses apprehension or fear in appearing in person before the court to give her evidence the same shall be recorded through the use of video conference and the witness/victim including the examination in chief and cross examination. (Refer to *State of Maharashtra vs. Dr. Praful B. Desai* (2003) 4 SCC 601.) This shall extend to all cases where victims reside in another state.
- (vi) In all cases of sexual assault during mass crimes a Special Public Prosecutor shall be appointed under section 24(8) Cr. P.C. who is professionally competent, a person of integrity and inspires the confidence of the victims.
- (vii) The trials shall be concluded in a time bound manner.
- (viii) In all cases of sexual assault the complainant shall have a right to appoint a private counsel under proviso to section 24(8) Cr.P.C.
- (ix) In cases of sexual violence against women with mental and/or physical disability or sensory impairments, a person of her choice be appointed to assist her through the legal process including the investigating agency and the court.
- (x) In case of women with mental and/or physical disability or sensory impairments, provision be made that she is able to give her statement in a language or form she is comfortable in. For example, alternate modes of communication like Braille and sign language should be allowed. The investigating agency and the Court shall appoint a person competent to interpret and assist her in her communication with the legal system.
- (xi) The proforma for medical examination of a woman victim sexual violence is enclosed as Annexure A and the consent form for medical examination of a woman victim of sexual violence is enclosed as Annexure B

#### **NO REQUIREMENT OF PRIOR SANCTION OF THE GOVERNMENT IN A CASE OF SEXUAL ASSAULT BY A PUBLIC SERVANT**

**Exception: Notwithstanding anything contained in any other law for the time being in force, sexual assault in the situations mentioned below shall constitute an exception to sections 45 and 197 Cr. P.C. and any other provision in any law which requires prior sanction of the Government for prosecution of the public servant or a member of the armed forces.**

- Custodial sexual assault as defined under Sec.376(2)
- sexual assault in situations of sectarian violence/mass crimes/ communal violence

- sexual assault in coercive circumstances

**Rationale:** Given the complete impunity that state functionaries enjoy in cases of sexual assault because of the requirement of prior sanction from the government for prosecution, a modification in the existing provision is proposed that would safeguard the public servant from malicious or frivolous prosecution.

*The Criminal law Amendment Bill 2010, proposes in CHAPTER II AMENDMENT OF THE INDIAN PENAL CODE Insertion of new section 166A “Public servant Disobeying direction under law.”*

*“166A. Whoever, being a public servant, -*

*(a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or*

*(b) knowingly disobeys, to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.”*

It is proposed by us that the word “Knowingly” should be deleted from sec 166A (a) and (b). A disobedience of the mandate of law should be an offence in itself.

The following Proviso may be added to section 166A IPC

To provide adequate protection to the public servant from being wrongly implicated a Proviso should be added to this section which provides that the Court shall consider whether due diligence was exercised by the public servant and despite observance of all due care and compliance with the law the public servant could not fulfill the mandate of the law. This may be assessed by the Court at the initial stage of Charge and if the public servant is able to prima facie establish the above the Court shall honourably discharge him. The same shall however be a matter of judicial determination. It will not be within the purview of the Executive to grant or withhold sanction for prosecution of a public servant.

#### **PROPOSED AMENDMENT TO THE INDIAN EVIDENCE ACT**

- (i) The court shall not draw any adverse inference on account of any delay in lodging the FIR or recording of the statements of the complainant and witnesses. The same shall be condoned by the Court if a reasonable explanation is given by the complainant/witness for the delay.
- (ii) The court shall not draw any adverse inference on account of absence of a medical examination report of sexual assault in cases of sexual assault during mass crimes/sectarian violence. The Court shall take

- into consideration the coercive circumstances and the explanation presented by the prosecutrix.
- (iii) In all cases of sexual assault during sectarian violence section 114A of the Indian Evidence Act will apply. Sexual violence in a communal/sectarian situation should be equated to custodial rape as the mob exercises complete control and is in a position of authority. Hence, the Bill should in cases of sexual violence during sectarian violence provide for enhanced punishment and also shift the burden of proof from the victim to the perpetrator.
  - (iv) Victim – survivor of sexual violence to be provided protection under the victim / witness protection regime.
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### **SCHEME OF PUNISHMENT**

**THE SCHEME OF PUNISHMENT IS TO BE DETERMINED IN A GRADED MANNER SO AS TO REFLECT THAT SEXUAL VIOLENCE TAKES THE FORM OF A CONTINUUM WHILE ALSO RECOGNISING DEGREES OF SEVERITY OF THE CRIME.**

### **WITNESS /VICTIM PROTECTION**

Victims / survivors of sexual assault would be amenable to approaching the legal system and to give truthful testimonies only if the system guaranteed to protect their and their families' privacy, security, identity and dignity. The UN Declaration of Basic Principles for Victims of Crime and Abuse of Power spells out victims' rights as follows:<sup>1</sup>

- The right to be treated with respect and recognition;
- The right to be referred to adequate support services;
- The right to receive information about the progress of the case;
- The right to be present and give input to the decision-making;
- The right to counsel;
- The right to protection of physical safety and privacy;
- The right of compensation, from both the offender and the State.

Through this amendment a Witness Victim protection regime to be developed in accordance with guidelines stated by the Supreme Court, reports of Law Commission of India including the 198<sup>th</sup> Law Commission Report and other existing standards of law. The Law Commission of India's 198<sup>th</sup> Report, released in 2006, focuses on victim and witness protection. It has drafted a Bill on Witness Identity Protection (applicable during investigation and in court), as well as a detailed framework with elaborate rules of procedure for preventing the witness (including victim-survivors) from trauma and intimidation at the stages of investigation, during inquiry and before recording evidence at the trial, during the trial and post-trial. Some of the recommendations are significant and path-breaking for the manner in which

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<sup>1</sup> Known as 'Victims' Declaration', adopted by the General Assembly in November 1985

they seek to balance the rights of the accused with the need for protecting the anonymity of the witness and the victim-survivor from further trauma.

A law on victim and witness protection should necessarily include the following components, all of which would need to be balanced with aspects of fair trial and rights of the accused:

- Preventing the identification of victims and witnesses to the public and media;
- Preventing further trauma to the victim-survivor caused by confronting the accused;
- Ensuring anonymity from the accused and defence counsel;
- Delaying the disclosure of witness identity prior to trial; and
- General measures concerning the protection of witnesses and victims prior to, during and subsequent to the trial (commencing from the stage of investigation and prosecution to conviction and appeal).

Victim and witness protection measures ought to specifically include:

- A guarantee of the safety, physical and psychological well-being, dignity and privacy of victim-survivors, witnesses and their families;
- Since family members are often at grave risk due to the testimony given in court, it is important to extend protective measures, security arrangements, counseling and other appropriate measures not only to victim-survivors and witnesses that appear before the court but also to their family members and other dependents;
- Protecting the identity of such persons from the media and public by conducting any part of the proceedings by video camera or allowing the presentation of evidence by electronic or other special means;
- A special obligation to protect women and child victims and witnesses, in particular, where the crimes involve sexual or gender-based violence; and
- A special effort to protect child victims and witnesses from further trauma through court proceedings, including by conducting any part of the proceedings by video camera or presentation of evidence by electronic means, as well as assigning a child-support person to assist the child through all stages of the proceedings, with the consent of the child's parents or legal guardian.

The horizons of legal initiatives at victim and witness protection ought to extend beyond anonymity and allowances, keeping human dignity, respect, privacy and right against repeated trauma as its focal points.

A Victim –Witness Support Unit to be housed in the existing offices of the Legal Services Authority at the district and State level. It can comprise of paralegals, legal aid lawyers, NGO members by the Legal Services Authority. It shall be the duty and responsibility of the Investigating officer/Agency and the SPP to keep this unit informed of the progress of the case. The victims – witnesses will be regularly informed of the proceedings in their case and shall be apprised of court procedures etc.

## **PART F. SPECIAL PROCEDURES IN CASE OF CHILD VICTIMS**

### **1. POLICE**

On a complaint of sexual assault/harassment/abuse alleged to have been committed or attempted on a child victim, the information shall be recorded, as far as possible, by a woman police officer in the case of girls and a male officer in the case of boys not below the rank of Sub-Inspector, preferably a designated male or female child welfare officer from the concerned police station as the case may be.”

Explanation: Under the Juvenile Justice (Care and Protection) of Children Act, officers not below the rank of Sub-Inspector, have to be designated as child welfare officers at the police station level across the country. As far as possible all information about an alleged or attempted sexual offence against a child should be recorded by them.

The FIR recorded under section 154 Cr.P.C shall be clearly read out to the complainant.

In the event of recording the statement of the child, if the Investigating Officer should so feel the necessity, s/he may take the assistance of a social worker, counselor or psychologist, translator and such other persons that may help record accurate information.

The officer recording the statement of the child victim should not be in police uniform.

No child victim shall be made to sign on any statements recorded by the police.

The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear.

The statement should be recorded promptly without any loss of time.

The parents of the child or any other person in whom the child reposes trust and confidence shall be allowed to remain present at the time of recording of the child's statement under Section 161 Cr.P.C.

The Investigating Officer shall ensure that at no point should the child victim come in contact with the accused. (This is important because the victim and the accused cannot be taken for a medical examination or recording of Section 164 statements in the same vehicle).

The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.

The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance

with Section 164-A Cr.P.C) at the nearest government hospital or hospital recognized by the government.

The Investigating Officer shall promptly refer for forensic examination clothing and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.

The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s.

The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.

## **2. MEDICAL EXAMINATION OF A CHILD VICTIM OF SEXUAL ASSAULT**

In case of a girl child victim the medical examination shall be conducted by a female doctor.

In so far as it may be practical, the help of a counselor or psychologist shall be made available to the child victim before medical examination at the hospital itself.

Special rooms to be set up in all government hospitals for victims to be examined and questioned in privacy

The parents/guardian/person trusted by the child should be allowed to be present during the medical examination.

A sexual assault evidence collection kit or sexual assault forensic evidence (SAFE) kit consisting of a set of items used by medical personnel for gathering and preserving physical evidence following a sexual assault should be available with all the Government Hospitals. A sexual assault evidence collection kit should contain commonly available examination tools such as;

- Detailed instructions for the examiner.
- Forms for documentation.
- Tube for blood sample
- Urine sample container
- Paper bags for clothing collection
- Large sheet of paper for patient to undress over.
- Cotton swabs for biological evidence collection
- Sterile water.
- Glass slides
- Unwaxed dental floss.
- Wooden stick for fingernail scrapings
- Envelopes or boxes for individual evidence samples.
- Labels.

Other items needed for a forensic/medical exam and treatment that may be included in the sexual assault kit are:

- Woods lamp
- Toluidine blue dye.
- Drying rack for wet swabs and/or clothing.
- Patient gown, cover sheet, blanket, pillow.
- Needleless/syringes for blood drawing
- Speculums
- Post-It Notes used to collect trace evidence
- Camera (35 mm, digital, or Polaroid), film, batteries.
- Med-scope and/or colcoscope
- Microscope
- Surgilube
- Acetic acid diluted spray
- Medications
- Clean clothing and shower/hygiene items for the victim's use after the examination.

A detailed description of "Assault/Abuse History" be mentioned by the attending doctors on the MLC of the victim; the doctor must ensure that the complete narration of the history of the case detailed by the victim and her/his escort is recorded.

After the examination is complete the victim should be permitted to wash up using toiletries provided by the hospital. The hospital should also have clothing to put on if her/his own clothing is taken as evidence.

All hospitals should co-operate with the police and preserve the samples likely to putrefy in their pathological facility till such time the police are able to complete their paper work for dispatch to forensic lab test including DNA.

The medical examination report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.

In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.

Emergency medical treatment wherever necessary should be provided to the child victim.

The child victim shall be afforded prophylactic medical treatment against STDs.

In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.

### **3. RECORDING OF STATEMENT BEFORE MAGISTRATE OF A CHILD VICTIM**

The Magistrate, unless there are compelling reasons shall record the statement of the victim under Section 164 Cr.P.C. on the day on which the application is moved by the Investigating Officer. Any adjournment shall be avoided and in case the same is unavoidable, reasons shall be recorded in writing.

The Magistrate before proceeding to record the statement shall ensure that the child is made comfortable and she is free from the extraneous pressure.

In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.

To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.

The child victim shall not be separated from her/his parents/guardians nor taken out from her/his environment on the ground of ascertaining voluntary nature of statement unless the parents/guardians are reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.

In all circumstances, before handing over the child to her/his parents/guardians, the Magistrate shall ascertain that such parents/guardians are bona fide and that there is no likelihood of the child being in any danger or harm from them.

In an event where the child expresses fears on being handed over to her/his parent/guardians, the Magistrate shall place the child in an appropriate institution and pass on the matter to the concerned Child Welfare Committee or District Magistrate/Collector where such Committees do not exist for further suitable rehabilitation of the child.

Wherever possible, the Magistrate shall ensure that the statement of the child victim is also video recorded.

No Court shall send a child in an institution meant for adults.

### **4. TRIAL COURT PROCEDURES IN CASES OF SEXUAL VIOLENCE OF A CHILD**

It shall be endeavor of the Court to create a child friendly atmosphere while conducting its proceedings in respect of a sexually abused child.

Proceedings shall be conducted in camera and appropriate measures taken to ensure that the child victim is not confronted with the accused and the directions in this regard given by the Supreme Court in 2004 (5) SCC 518 'Sakshi vs. Union of India' are enforced.

Wherever possible the Court may resort to the recording of statement through video conferencing.

In no circumstance shall a child below 10 years of age be asked to repeat the statement.

The Court may, if it so thinks fit, direct that the questions to be put by the accused in cross-examination to the child victim be given in writing to the Presiding Officer of the Court, who may in turn put the same to the victim in a language which is neither embarrassing nor confusing.

The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the charge sheet.

In case of the physically and mentally challenged victims, the Court shall necessarily make such support services and tools available for the child victim as may be necessary to ensure a fair trial. This would include availability of experts as well as adequate use of equipments like braille, art, sign language.

The Additional Session Judge/District Judge shall maintain a panel of psychiatrists, Psychologists and experts in sign language etc. who would assist in recording the statement of witnesses as and when requested by the Sessions Courts.

A list of various accredited support services and experts in the concerned state/district shall be available with the Prosecution Branch, the Commissioner of Police/SP as well as the Registrar of all High Courts.

In cases of sexual assault by a family member or a relative, before deciding on sending the child back to her/his family, the court shall involve the Child Welfare Committee or a Social Welfare Agency to conduct a home study for ascertain the safety and protection of the child as well as for reducing the possibility of the child getting influenced by other members of the family in the course of trial.

In such cases where the accused is a family member, such accused should be kept away from the child even after release on bail.

Further, in all such cases, supervision orders shall be necessary to ensure safety and well being of the child. The Child Welfare Committees/accredited Social Welfare Agencies/NGOs may be asked to supervise and monitor and file a monthly report before the concerned court.

*The Hon'ble Supreme Court in Delhi Domestic Working Women Forum Vs. Union of India, 1995 (1) SCC 14 and reiterated by this Hon'ble Court in Khem Chand Vs. State of Delhi 2008 (4) JCC 2 497 had directed that the victim be provided with a counsel. The victims shall thus be provided the opportunity of being represented by a counsel from the Legal Aid Services Authority or by a private lawyer.*

As far as possible chief examination and cross examination of the victim must be completed on the same day; No adjournment shall be granted except in keeping with the best interests of the child with reasons clearly recorded in

writing.

If it is brought to the notice of the Court from a support person/ Advocate/victim, regarding threats received by the victim or her/his family members to compromise the matter, the judge shall immediately direct the ACP/Additional SP to look in to the matter and provide an action taken report before the court within 2 days. The Court must ensure that protection is provided to the victim and her/his family.

The Court shall ascertain the need for protection for the child and her/his family in every case of sexual assault brought before it and pass necessary protection orders, with or without an application being made in this regard.

In cases in which the witness is sent back unexamined and is bound down, the Court shall ensure that at least the traveling expenses for coming to and from for attending the Court are paid.

## **5. CHILD WELFARE COMMITTEE**

In cases of sexual assault by a family member and child in need of care and protection, the Child Welfare Committee shall examine the victim to ascertain the nature of support she/he is getting from her/his family and initiate steps for ensuring best interest of the child. In such cases the Child Welfare Committee shall conduct a home study to assess and ensure the safety of the victim.

In cases where the child is placed in the shelter or under supervision orders, the Committee shall monitor the condition of the victim closely.

In cases of sexual assault by a family member or a relative and a child in need of care and protection, while the victim stays in the foster home the family members should be allowed to meet the victim only in the presence of the support person and care be taken by the staff of the home that the meeting be not used to pressurize/influence the victim to change for statement;

Child Welfare Committee shall ensure that rehabilitation facilities are provided to the victim in appropriate cases. In cases of a prolonged stay, the victim should be given educational and vocational training in order to enable the victim to support herself /himself after she/he leaves the foster home. The Social Welfare Department and Child Welfare Committee will develop and implement Foster Care Services within two months.

Before passing any order of restoration of custody of child to the family, the Child Welfare Committee shall conduct an inquiry to assess the suitability of the victim being restored to the family. The Custody of the child will be altered by the Child Welfare Committee only after consultation with the stake holders.

Child Welfare Committee shall ensure that the victim is provided with necessary medical and psychological aid during her/his stay in foster home for the purpose of her/his rehabilitation;

Child Welfare Committee shall maintain a list of all registered Foster Homes providing residential support, special services and rehabilitation facilities to the victim.

**MOST OF THE POINTS ABOVE ARE FROM A JUDGEMENT OF THE DELHI HIGH COURT IN COURT ON ITS OWN MOTION VERSUS STATE AND ANR. W.P. (CRL.) No. 930/2007, JUDGEMENT DATED 14.08.2007 AND DELHI COMMISSION FOR WOMEN VERSUS DELHI POLICE- W.P. (CRL.) 696/2008, ORDER DATED 23.04.2009.**

**PART G. SCHEDULE:****SECURITY FORCES CONSTITUTED UNDER**

- (a) Air Force Act, 1950
- (b) Army Act, 1950
- (c) Bombay Home Guard Act, 1947
- (d) Border Security Force Act, 1968
- (e) Central Industrial Security Force, 1968
- (f) Central Reserve Police Act, 1949
- (g) Coast Guard Act, 1978
- (h) Delhi Special Police Establishment Act, 1946
- (i) Indo-Tibetan Border Police Act, 1992
- (j) Navy Act, 1957
- (k) Railway Protection Force Act, 1957
- (l) Sashastra Seema Bal Act, 2007
- (m) Special Protection Group Act, 1988
- (n) Territorial Army Act, 1948

All such other forces constituted in exercise of power under List I, Entry 2 and List II, Entry 2 of the Seventh Schedule of the Constitution of India, and such other armed forces constituted to aid the civil powers of the Union or the State, and empowered to employ force during war or otherwise or to take cognizance of offence, including armed forces as defined in section 2(a) of the Armed Forces Special Powers Act, 1958.