Submission to the Joint Committee on
The Shakti Criminal Law (Maharashtra Amendment) Bill, 2020

15 January 2021

1. We, the undersigned, are working on issues concerning the human rights of women and children, particularly their dignity, safety and security. We condemn all forms of violence against women and children and appreciate the intent and concern shown by the Maharashtra government towards addressing sexual violence that has witnessed a surge over the years. We, however, are deeply concerned by the amendments proposed to the POCSO Act, 2012 and criminal laws for the following reasons:

1. **Undermining of the uniform legal framework for protection of children from sexual offences:** Such a move will lead to diverse practices and a disintegration of the uniform legal framework for safeguarding the rights of women and children. Moreover, the proposed Bill fails to recognize that a criminal case may be registered in Maharashtra but tried in another state or vice-versa, depending on the facts and circumstances of a case. Zero FIRs are registered and investigations can be transferred to another jurisdiction, if necessary. According to the NCRB, in 2019, 94 cases under the POCSO Act were transferred to another state or agency.[1] Several cases of trafficking in women and children invoke legal provisions relating to sexual violence. These cases may or may not be registered in Maharashtra, but may pertain to a woman or a child from Maharashtra. It could also be that the sexual offence takes place in Maharashtra but a case of trafficking is registered in another state. Keeping such situations in mind, it is obvious that the proposed bills, which seek to make both substantive and procedural changes in criminal law, can have serious implications in registration of a crime, its investigation and outcome.
2. **Increasingly punitive responses to sexual violence are detrimental to the protection of children:** Beginning with the Criminal Law Amendment Act, 2013, there has been a repeated revision of laws dealing with sexual offences against women and children with the penalty for such offences being increased and made increasingly stringent. In 2019, less than a decade of the POCSO Act, the punishment for sexual offences was enhanced and the death penalty was also introduced. We had made submissions against the enhancement of punishment and the introduction of the death penalty to the Central Government and we now earnestly appeal to the State of Maharashtra to reconsider the amendment proposed to the POCSO Act and IPC, in this respect. Instead of creation of systems that will encourage children and their families to report without fear, the Shakti Bill will have the opposite effect of silencing children. **The fear of the death penalty will act as a pressure upon children and their families as the trauma or guilt of sending someone they know to the gallows is a heavy burden.** Introduction of the death penalty for child rape subsequently through amendments to the criminal law in 2018 and the POCSO Act in 2019 in the name of child protection has not led to any significant change. When these amendments were being introduced, organisations working on ground and assisting support to child victims started receiving queries from children and their families, if the accused will be hanged to death. They wanted to see the accused punished but not put to gallows. Some decided not to pursue the case any further, especially where the accused was a family member. It is not the extent of punishment but

[1] National Crime Records Bureau, Government of India. *Crime in India, 2019*. Table 17A.3 - Police Disposal of SLL Crime Cases (Crime Head-wise) - 2019

certainty of unbiased investigation and prosecution that is necessary. Further, equating rape with loss of life sends the wrong message to child victims and dilutes efforts to build their confidence, self-esteem, and foster healing. **The increasing introduction of death penalty and sex offenders registry to address sexual violence against women and children displays a lack of understanding of the ground realities of sexual violence in the country, the absence of investment in child protection frameworks to prevent such violence, and a dismissive attitude to the implications of such an approach.** Please refer to Parts A and B of our submission on the Shakti Bills for our specific concerns.

3. **Evidence underlines the poor state of implementation and that solutions do not lie in making the laws more stringent.** Experience on the ground shows that children seldom want to take the legal course for various reasons ranging from lack of faith in the system, poor implementation of laws, absence of a strong support system, social stigma, fear of being blamed and not being believed, loss of relationships and multiple victimization. These are also factors responsible for the victims and complainants turning hostile, resulting in a high rate of acquittal and poor conviction. It has been a long struggle to break the silence around sexual abuse, especially in the case of child sexual abuse. However, introduction of stringent and ill-informed measures and methods of justice delivery is only going to silence children further. The Bills in their current form only introduce cosmetic changes that do not address implementation gaps and should be reconsidered in the light of existing evidence, experiences and deliberations across the country on gender based violence and child safety.

We emphasize that the focus needs to be on strengthening the implementation of the child-friendly procedures under the POCSO Act and criminal laws instead of enhancement of punishment. We urge the Government of Maharashtra to consider the following recommendations on measures that can strengthen implementation of the existing laws and improve victims' experience of the justice delivery system:

1. **Withdraw the Shakti Criminal Laws (Maharashtra Amendment) Bill, 2020 and delete the provision related to Women and Child Offenders Registry in the Maharashtra Exclusive Special Courts (for certain offences against Women and Children under Shakti Law) Bill, 2020 and consider interventions that evolve through wide public consultation.**
2. Undertake a **comprehensive review** of the **implementation of the POCSO Act and criminal laws relevant to sexual offences,** consider the recommendations made based on independent studies, and take measures to address the gaps in implementation.
3. In furtherance of the Supreme Court's directions in *State of Gujarat v. Kishanbhai,* (2014) 4 SCC 108, **establish an acquittal review mechanism specifically for cases of sexual offences against women and children.**
4. Examine the **implementation of the Maharashtra Witness Protection and Security Act, 2017** and take necessary steps to create awareness and encourage its application in cases of sexual offences against women and children. In addition to the trauma caused by the sexual assault, victims and families face a second round of anguish due to the continuing stigma of sexual abuse and pressures to withdraw the cases. Based on consultations, consider replication of Section 15A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, which was introduced by way of an amendment in 2015, in the Maharashtra Witness Protection and Security Act, 2017.

5. Review the status of **award and disbursal of compensation to child victims of sexual offences** and take steps to ensure that the provisions of the POCSO Act and Rules, with respect to compensation, are followed.
6. Introduce **comprehensive sexuality, personal safety and life skills education** in all schools from Grade I-XII and encourage community-based programmes to ensure access to sexual and reproductive health related information among adolescents and young people outside of the school system.
7. Ensure that **adolescent girls have safe and confidential access to sexual and reproductive health information and services** as mandatory reporting under the POCSO Act has compromised this.
8. **Establish one stop crisis centres** similar to the Bharosa Centre in Telangana in every district.
9. Ensure extensive training for judges, prosecutors, Magistrates, police, court staff, Juvenile Justice Boards, Child Welfare Committees, Special Juvenile Police Units, and all other functionaries to ensure effective implementation of laws related to women and children.
10. **Ensure necessary budgetary allocations for**:
    - construction of vulnerable witness deposition complex that are sensitive to the needs of women, children, and persons with disability;
    - appointment of judges and prosecutors;
    - training of judges, prosecutors and police;
    - implementation of Victim and Witness Protection systems;
    - payment to Support Persons;
    - victim compensation;
    - establishment of one stop crisis centres; and
    - establishment of forensic laboratories in every district of the State,

Part A: Submissions with respect to Shakti Criminal Laws (Maharashtra Amendment) Bill

1. Concerns related to amendments proposed to the Protection of Children from Sexual Offences Act, 2012 (POCSO Act)

The POCSO Act, 2012 is a central legislation that was enacted by Parliament to address the gaps in criminal law in effectively addressing sexual offences against children. It was also enacted based on India' obligations under the UN Convention on the Rights of the Child, 1989. By design, it was intended to be a uniform law to ensure the protection of all children within the territory of India. **We are concerned by Maharashtra's proposal to amend the POCSO Act as it could potentially lead to a disintegrated response to sexual violence and dilution of protection of children based on their geographical location. We strongly recommend that the Maharashtra government withdraw the proposed amendments to the POCSO Act in toto.**

Specifically, we have the following concerns with respect to the amendments proposed to the POCSO Act:

1.1. Amendment to Section 4 is unnecessary and disproportionate

a) **Sections 5 & 6 POCSO Act address heinous sexual offences:** The Shakti Bill proposes the inclusion of death penalty for the offence of "penetrative sexual assault" under Section 4, POCSO Act. Such penalty may be meted out when the offence is "heinous in nature" or, when the "circumstances warrant exemplary punishment". This amendment is unnecessary and disproportionate as Sections 5 and 6 of the POCSO Act adequately address aggravated forms of sexual violence against children and the POCSO Act was amended in 2019 to introduce the death penalty for "aggravated penetrative sexual assault" (Section 6).

b) **Proposed amendment blurs the distinction between Sections 3 and 5:** By including death penalty as punishment for offences under section 3, the Shakti Bill blurs the legislative distinction between Sections 3 and 5 of the POCSO Act. It is important to examine the impact of the inclusion of death penalty in the POCSO Act before broadening the sexual offences under which death penalty may be imposed.

c) **Death penalty for sexual offences against children endangers them:** As per the *Crime in India 2019,*[2] in 98.8% of cases of penetrative and aggravated penetrative sexual assault in Maharashtra, the offender was known to the victim and constituted friends, neighbours, family, etc. In such situations, the offender holds great control over the disclosure of the incident of abuse, leading to many cases going unreported. Death penalty will only add more challenges to disclosure, as the proximity of the child to the offender deters reporting. This also puts children and their families in a precarious position of knowing that reporting the offence might cause a family member or friend to be sentenced to death. Studies by Centre for Child and the Law, NLSIU Bangalore (CCL Study) in Maharashtra,[3] and by HAQ Centre for Child Rights and the Forum against Child Sexual Abuse and Exploitation (FACSE) with support from UNICEF in Delhi and Mumbai,[4] reveal that the rate of children retracting their statements before the Special Court when the accused is a known person is very high. Such studies have revealed that a high percentage of children in all states turned hostile when the accused was the child's father, step-father, brother, or related to the child. Such pressure upon child victims of sexual violence will increase manifold if death penalty is imposed as punishment for 'rape'. The CCL Study found that the accused was acquitted in 97.93% of POCSO cases when the child victim turned hostile.

d) **Strict implementation of child-friendly procedures will not be possible because of the heavy standards for proof and due process in offences punishable with death:** Section 33(2), POCSO Act requires the Special Public Prosecutor or the defence counsel to communicate the question to be put to the child during examination-in-chief, cross-examination or re-examination to the Special Court. The Special Court should in turn put those questions to the child. The CCL Study revealed that the application of this provision is strongly resisted by defence counsels in Maharashtra, and children still continue to be questioned directly by them. Children cannot withstand direct questioning by lawyers, which

[2] Table 4A.2(ii), SLL Crimes against Children - 2019, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%204A.2_2.pdf

[3] CCL-NLSIU, Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra (2017), https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf: 1330 judgments from 1 January 2013 till 31 December 2016.

[4] HAQ Centre for Child Rights, FACSE & UNICEF, Implementation of the POCSO Act: Goals, Gaps and Challenges – Study of Cases of Special Courts in Delhi & Mumbai (2012-2015), November 2017, http://haqcrc.org/publication/implementation-pocso-act/: 1803 cases in Delhi and 154 cases in Mumbai and 21 judgments analyzed in depth, November 2012 till 31 July 2015.

are invariably confusing and humiliating for the child. It will be near impossible for Special Courts to strictly apply this measure intended to protect children from trauma if the punishment of death penalty remains, as the accused will necessarily have to be given every opportunity by the court to defend himself. In practice, child-friendly procedures will be denied to children who are most in need of such protection, and they will be subjected to harsh cross-examination.

e) **Stringent punishments adversely impact adolescents:** An analysis of POCSO cases that have emerged over the past few years indicated that a large number constitute cases where the victim and offender are in a consensual romantic relationship. As the POCSO Act does not recognize the consent of children below the age of 18 years to engage in sexual activity, all sexual intercourse involving a consenting minor is considered rape. As a result, several minor boys and young adult men find themselves incriminated for engaging in consensual relationships with minor girls. While many such consensual cases result in acquittals due to the refusal of the 'victim' to testify against her partner, there are still cases where there is strong evidence of the relationship that result in conviction, subjecting such young male offenders to harsh laws. As per the NCRB's Crime in India 2019 report, in 53% of cases registered under Sections 4 and 6 of the POCSO Act in 2019 in Maharashtra, the offender and victim's relationship was described as "Friends/ Online-Friends on Pretext of Marriage".[5] The result of inclusion of the death penalty as a possible punishment aggravates the existing concerns over criminalization of young persons.

f) **Death penalty is not in keeping with the thinking of domestic and international experts:** The Justice Verma Committee on Amendments to Criminal Law, 2013, consciously and expressly refused to recommend sentencing to death as a punishment for 'rape', stating that it would be a "regressive step in the field of sentencing and reformation." The Committee also stated that the claim that inclusion of death penalty will instill fear in the minds of the perpetrators, thereby reducing the incidence of 'rape,' is belied by lack of credible evidence that the death penalty is an effective deterrent. This holds particularly true in the context of sexual offences against children, where a majority of the perpetrators are known to the child, meaning that a punishment like the death penalty will only deter reporting. The UN Human Rights Committee has also stated that crimes such as sexual offences not resulting directly and intentionally in death do not justify the imposition of Death Penalty.[6]

g) A child victim often does not correlate justice with the quantum of punishment meted out to the offender.[7] Often, more than harsh punishment, the survivor wants the abuse to stop and their testimony to be believed[8] and taken seriously. With the overpowering social stigma associated with sexual abuse, children face distrust from all quarters, including their own families. A child, who has endured such aggravated trauma, is forced to undergo a further ordeal in convincing people to believe her story and support her. Survivors also want answers and to express the impact of the abuse on them so that they can get closure.

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[5] Table 4A.10, Offenders Relation to Child Victims of POCSO Act (Section 4 & 6) - 2019, available at https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%204A.10_1.pdf

[6] UN Human Rights Committee (HRC), General comment no. 36, Article 6 (Right to Life), 3 September 2019, CCPR/C/GC/35, available at: https://www.refworld.org/docid/5e5e75e04.html

[7] Counsel to Secure Justice and NLU Delhi, *Perspectives of Justice, Restorative Justice and Child Sexual Abuse in India*, 2018.

[8] Arpan, "*Recounting Abuse, Reporting Abusers"*. Available at: http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf; Counsel to Secure Justice and NLU Delhi, *Perspectives of Justice, Restorative Justice and Child Sexual Abuse in India*, 2018.

1.2. Enhancement of fines does not advance the interest of child victims

a) The Shakti Bill proposes to insert a provision prescribing a minimum fine of Rs. 5,00,000/- (Rupees Five Lakh) at the end of Section 4(2) of the POCSO Act. Fines imposed on the accused are rarely recoverable as their payment depends on the financial ability and willingness of the offender to pay the fine, and the offender undergoes further imprisonment in default of fine.
b) Section 357A on the Victim Compensation Scheme was included in the Code of Criminal Procedure, 1973 ('CrPC') by the Code of Criminal Procedure (Amendment) Act 2008, whereby the State Government is required to compensate victims "who have suffered loss or injury as a result of the crime and who require rehabilitation," which meets the needs of child victims better. Under the POCSO Act and Rules, the Special Court should ascertain and pass orders for compensation to the child, which is to be paid by the State Government.
c) An affidavit filed by the National Legal Services Authority before the Supreme Court in *Nipun Saxena Vs. Union of India, 2018 SCC OnLine SC 2772* revealed that only 5-10% of the victims of rape were receiving compensation under the Nirbhaya Scheme and other schemes for compensation.[9] Further, a study conducted by HAQ: Centre for Child Rights and FACSE found that from 2012-15, no orders for compensation under the POCSO Act had been passed in Mumbai.
d) Therefore, the focus should be on ensuring that existing mechanisms under the POCSO Act are implemented adequately, so that children may receive adequate and timely compensation. The additions under the Shakti Bill are merely paying lip-service and will not ensure that rehabilitation needs of victims are addressed adequately.

In sum, punishment and fine under Section 4, POCSO Act is adequate and does not require any enhancement.

1.3. Enhancement of punishment for sexual assault and aggravated sexual assault is unwarranted and excessive

a) The punishment prescribed for sexual assault at the time of enactment of the POCSO Act was imprisonment for a minimum of three years which may extend to five years. The Shakti Bill seeks to enhance it to imprisonment of a minimum of five which may extend to seven years. Additionally, the punishment for aggravated sexual assault at the time of enactment was fixed at imprisonment for a minimum period of five years extendable to seven years. The Shakti Bill seeks to enhance it to imprisonment for a minimum of seven years which may extend to ten years. In effect, any person committing aggravated sexual assault upon a child may be punished with imprisonment of upto ten years which is the present minimum punishment for penetrative sexual assault. This negates the gradation of offences envisaged under the POCSO Act and equates a non-penetrative sexual offence with a penetrative sexual offence. With such high and disproportionate sentences, judges are likely to acquit.
b) The existing punishment in the POCSO Act more than sufficiently addresses the crime of sexual assault and aggravated sexual assault and prescribes minimum mandatory sentences of

[9] Live Law News Network, "Only 5-10% Sexual Assault Victims Paid Compensation: NALSA tell SC", 9 May 2018, http://www.livelaw.in/only-5-10-sexual-assault-victims-paid-compensation-nalsa-tells-sc/

three years and five years respectively with discretion to enhance them up to five years and seven years. The proposed amendment is unwarranted and excessive.

c) As stated above, where a vast number of POCSO cases constitute consensual cases, the resulting enhancements in punishments can result in young men and boys being put away in prison for a long period for engaging in acts such as hugging or kissing minor girls they are in a relationship with.

2. Concerns related to the amendments to the Indian Penal Code

2.1. Punishment for false complaints will deter reporting

Section 4 of the Amendment Act, which proposes insertion of Section 182A creates a new offence with respect to filing of false complaints with enhanced punishment. The said provision runs counter to the object of the law regarding sexual offences, to encourage reporting. Such a provision will only deter persons from reporting on account of fear of punishment. In any event, there are ample provisions in the Indian Penal Code that punish false reporting and perjury and it is incomprehensible why a special provision needs to be made with respect to sexual offence alone. The fear that the provisions of the law may be misused is an argument that should run across the board for all offences and there is no reason why sexual offences must be singled out for special treatment.

2.2. More stringent punishments are not a solution to address acid attacks

a) Section 6 and 7 of the Amendment Act seek to impose more stringent punishments (imprisonment for the remainder of natural life or death for causing grievous hurt by way of using acid and a minimum mandatory of 7 years and a maximum of 10 years for attempts). As stated above more stringent punishments are not an appropriate response or solution to violence committed against women and children, and in fact that may result in less willingness to complain or pursue prosecution.

b) The NCRB figures since 2014, under the heading "Acid Attacks and Attempt to Acid Attack" shows that despite existing stringent punishments (of imprisonment till life), the number of cases has only been on the rise since 2014. While an increase in the number of FIRs registered may also be viewed as better awareness and more willingness to prosecute, the number of convictions remain low and a large number of cases remain pending investigation and submission of final report. At the All-India level, a total of 596 acid attack cases were reported in 2017 and 2018, but data shows that only 149 people were charge-sheeted in each year. A larger number of cases are pending trial (more than 700 of them) and conviction rates continue to remain low (only 25 of the 67 cases tried in 2016 and 2017 ended in conviction. In 2018, of the 523 cases which went for trial, only 19 ended in conviction.[10] Thus, without addressing the root causes of low rates of disposal and convictions, the situation will not see any improvement.

c) Further, imposition of death penalty for causing grievous hurt will not measure up to the requirement that punishments have to be proportionate to the offences committed. The

[10] NCRB, *Crime in India* (2014-2018); Answer to question raised in Rajya Sabha, dated 12th April 2017, https://www.mha.gov.in/MHA1/Par2017/pdfs/par2017-pdfs/rs-12042017/427.pdf

language of the provision also fails to acknowledge the "rarest of rare" requirement for the imposition of the death penalty. The requirement that the penalty can be imposed "if conclusive evidence is there" is meaningless as no person can be convicted without proof beyond all reasonable doubt.

d) Lastly, while the amendment to the first proviso to Section 326A (adding expenses for plastic surgery or facial reconstruction to be part of the fine imposed) is in principle a welcome one, it does very little to provide adequate and timely compensation to the victims of acid attack. The imposition of fine is in contingent on a conviction and as we have seen above, the judicial process is a slow one, taking years to complete. Further, the provision is also not clear about the eventualities if a convicted person lacks the means to pay the fine. Section 357A of the Code of Criminal Procedure mandates the State Government to establish a victim compensation fund and the *Manodhairya* Scheme has been framed by the Government of Maharashtra for this purpose. A report[11] notes that there remain a number of issues with the structure and implementation of that Scheme, including disincentives from applying for compensation, low rates of disbursal of compensation and divergence from international best practices and standards. The said scheme caps all compensation at 3 lakhs and it does not cover expenses for plastic surgery or facial reconstruction. Relying on the criminal justice system and the capacity of private parties (the accused) to ensure adequate compensation to the victims cannot absolve the State of its responsibilities towards ensuring that they are compensated adequately, in a timely manner. Imposing more stringent punishments without addressing these core issues would not contribute much to ensuring safety and security of women and children.

2.3. Creation of a new offence to deal with online sexual or other harassment is unnecessary

a) **Section 8 of the Amendment Act** inserting a new provision "354E" is unnecessary as it does not provide any additional layer of protection, which is not already covered by Sections 354A, 354C, 500, 503, 507 and 509 of the IPC & Sections 66E, 67, 67A,67B of the Information Technology Act, read along with section 511of the Indian Penal Code as well as Sections 13-18 of the POCSO Act.

b) Further, the proposed provision is punctuated with vague and ambiguous terms such as "offensive communication", "disrepute", "intimidation and fear" etc. all of which can result in the provision being declared unconstitutional, as it happened in the case of Section 66A of the Information Technology Act, which was declared unconstitutional by the Supreme Court in *Shreya Singhal v. Union of India,* (2015) 5 SCC 1. Further, since the offences are cognizable, these vague expressions can result in misuse of the provisions to stifle free speech, legitimate expressions and fair criticisms, by way of creating a "chilling effect".

2.4. Introduction of death penalty for rape is excessive, disproportionate and counterproductive.

Section 9 of the Amendment Act introducing the death penalty for rape (and the special sub-categories of rape) "*in cases which have the characteristic of offence is heinous in nature and where adequate conclusive evidence is*

[11] S. Uma & V. Hiremath, Why Maharashtra's 'Justice for Acid Attack Victims' Scheme Is a Monumental Farce, https://thewire.in/gender/why-maharashtras-manodhairya-scheme-is-a-monumental-farce

there and the circumstances warrant exemplary punishment, with death". Please refer to Section 1.1 above for the arguments against the introduction of the death penalty.

3. Concerns related to the Amendments to the Code of Criminal Procedure, 1973

3.1. Unrealistic time frames will adversely impact the quality of investigation

a) Section 16 of the Amendment Act seeks to lay down a rule that the investigation of cases of 326A, 326B and rape (along with specific scenarios of rape) are to be completed within a period of 15 days from the registration of FIR and a grace period of seven more days can be granted by a superior police official. The time frame proposed in the Bill is grossly unrealistic, since delays in investigations are often on account of factors beyond the control of the police, especially when one considers the shortage of manpower. No such amendment should be introduced without taking stock of the current rates of charge-sheeting and the difficulties in adhering to the existing timelines.

b) Further, delays are often also caused on account of inadequate infrastructure – in the form of forensic laboratories (which also suffers from acute shortage of manpower), thereby causing delays in the submission of chemical analysis-reports within a reasonable timeframe. It is worthwhile to note here that the Supreme Court had acknowledged the need for submission of medico-legal reports without delays and it has been suggested that a Forensic Science Lab be established in all the districts.[12]

c) In addition to these, it is important to note that the victim may not always be in a mental or physical state to fully cooperate with the investigation, especially where the FIR has been registered close to the incident and hence is not in a position to give her statements. A 15-day rule would also be absurd in cases where the accused has not been identified yet, or where the complexity of the case requires more investigation. Further, police investigations are complex and are not only dependent on the police personnel but also upon the discharge of duties of several stakeholders such as medical staff, forensic agencies, etc. The period for completion of investigation may vary depending on the facts and circumstances of a particular case, and that any time-restriction could be counter-productive.

d) The stipulated time varies depending on the nature of the case, and where an offence is punishable with a minimum imprisonment for a term of ten years, or with life imprisonment or with death, a time period of 90 days is provided. However, the normal stipulated period in respect of other offences is only 60 days. **The Shakti Bill thus sends a confusing message - while on the one hand, it claims that 'rape' is a serious offence requiring stringent consequences, on the other, it is treating it on par with the less serious offences by reducing the period for completion of investigation to 15 days. Such reduction, and making the same mandatory, instead of ensuring successful prosecution, may result in a hastily conducted haphazard investigation or an incomplete charge sheet being submitted or the accused being granted statutory bail - all of which will be detrimental to the interest of the child and / or the outcome of the case.**

e) **While it is essential that investigations are completed in a time bound manner, it would be counter-productive to lay down a uniform rule, without accounting for the diversity**

[12] Order dated 25.7.2019 in Suo Moto Writ Petition (Criminal) No. 1 of 2019, Supreme Court of India

of situations that may arise. Thus, it is recommended that the time-frame laid down in the Code of Criminal Procedure not be disturbed.

3.2. Unrealistic timelines being imposed for completion of trials

a) Much like Section 16, Section 17 of the proposed Amendment Act sets an unrealistic timeline of 30 days from the filing of charge sheet for the completion of trials in case of offences under Sections 376, 376-A, 376-B, 376-C, 376-D, 376AB, 376DA, and 376DB. In 2019, the pendency rate for rape cases was around 90% at the all-India Level (NCRB, 2019) and the pendency rate for crimes against women in Maharashtra was about 94%. Crime in India 2019 shows that regarding 'Child Rape' (cases under Section 4 and 6 of the POCSO Act / Section 376 of IPC) 88.4% cases were pending trial from previous year.[13] According to the data available on the National Judicial Data Grid, more than 70% of all cases pending for disposal in Maharashtra are criminal cases and 77% of all Trial Cases that remain pending are criminal cases. Further delays and increase in pendency are to be expected on account of COVID-related lockdowns and restrictions.

b) It is also noticed that trial courts have not been able to adhere to the time schedule under the POCSO Act, which requires the Special Court to complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence due to delays by the police, forensic laboratories, non-appearance of witnesses, absence of judges, and adjournments. A study by HAQ: Centre for Child Rights shows that of the 1950 hearings held in 126 cases, 38.2% were adjourned for factors that can be attributed to the investigating agency, prosecution, defence, court, and the legal system.[14] Maximum adjournments were due to the judge being on leave or in a training programme. In 17% of adjourned hearings the reason was absence of victim/ witness or their inability to depose and absence of prosecution witnesses other than the victim such as doctors and police witnesses other than the Investigating Officers. Many such delays are tolerated as otherwise it would affect the outcome of the case. According to the CCL Maharashtra Study, the disposal time was more than one year for 63% of decided cases from 2013-2016. It is critical to address the root causes of pendency, such as inadequate number of courts and judges, delays in the delivery and enforcement of summons and warrants etc.[15]

c) Lastly, speedy justice should not result in injustice to the victim – a child, who may be undergoing trauma or injuries and is recovering or is under treatment may not be able to testify in court without these being addressed. It is worthwhile noting here that a study[16] on the functioning of POCSO Courts in the State of Maharashtra shows that "the acquittal rate as well as the rate of victims turning hostile was highest in matters disposed within one year" and that it was better where the trials took more than a year to complete. The researchers therein hypothesized that this might be on account of the fact that the courts were not examining the other witnesses where the victim turned hostile.

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[13] TABLE 4A.5 Court Disposal of Crime against Children (Crimehead-wise) - 2019 (Concluded). https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%204A.5_2.pdf

[14] HAQ: Centre for Child Rights, Children's Access to Justice and Restorative Care. Factsheet No. 7, "Adjournments", 2018. https://haqcrc.org/wp-content/uploads/2018/04/childrens-access-to-justice-and-restorative-care.pdf-1.pdf

[15] CCR, A Study on Implementation of POCSO Act in West Bengal, (NUJS, 2017)

[16] Centre for Child and Law, Study On The Working Of Special Courts Under The Pocso Act, 2012 In Maharashtra, P.29, https://ccl.nls.ac.in/wp-content/uploads/2017/01/POSCOMaharashtrastudy.pdf

d) Despite such data, the Shakti Bill has made it mandatory to complete the trial within 30 days of the charge sheet being filed. What happens if in a particular case, due to a large number of witnesses or for any other reason, it is impossible to complete the trial within 30 days? Will a vital prosecution witness be dropped or will the prosecution close evidence and a judgment be delivered on the basis of scanty evidence? Moreover, what is to happen if on commencement of trial, further investigation is found necessary, and the investigating agency requires to submit supplementary charge sheet [under section 173(8) of Cr.P.C?[17] Will such further investigation be foreclosed or will the same require to be done within the stipulated time-frame? It is important to note that under criminal law, advantage of any procedural lapse goes to the accused, hence, if the time limit for completion of trial is reduced, the same will benefit the accused.

e) Instead of stipulating mandatory stringent time-frames, it should be left to the trial court to take proactive steps to suitably control the delay. Such provisions are undermining the authority of the trial courts and the investigating agency and will have a negative consequence on the child's case.

3.3. Enlisting of public servants and social workers as witnesses during search raise fair trial concerns

Panch witnesses must necessarily be "independent"[18] witnesses and should not be related to the prosecution in any manner or be perceived as being interested in the outcome of the criminal trial. Inclusion however, of public servants and social workers as witnesses during a search as proposed under the proviso to Section 100, Cr.P.C, defeats this requirement. This will provide defence an opportunity to assail the fairness of the trial as Social Workers support child victims or victims of rape, may not be perceived as independent witnesses. Further, punishment is already prescribed under Section 187, IPC for refusal to witness a search without reasonable cause when called upon to do so by a written order. This provision should therefore be deleted.

Part B. Submission on Maharashtra Exclusive Special Courts (for certain offences against Women and Children under Shakti Law) Bill, 2020

Concerns about the Women and Child Offenders Registry under Clause 10

The proposal to introduce a sex offender registry (SOR) in the state of Maharashtra to address increasing cases of sexual abuse, may not be effective in addressing the concern, but may also be counterproductive to public safety. Sex offender registries have been in vogue in several Western nations over the past few decades and have failed in showing any impact upon sex crimes. SORs are

[17] In 2019, 47335 cases were reported to police under the POCSO Act and 17764 were pending investigation from the previous year. Another 85 cases were reopened for investigation. In other words, a total 65184 cases were up for investigation in 2019. The chargesheeting rate for cases under the POCSO Act was 93.3%. [TABLE 17A.3 - Police Disposal of SLL Crime Cases (Crime Head-wise), Crime in India (NCRB, 2019)

[18] Code of Criminal Procedure, 1973, Section 100(4).

based on certain assumptions that have been proven to be wrong in countries which have experimented with SORs.[19]

Overall the following concerns arise with respect to SORs

1. **SORs have little to no impact on recidivism rates.** While the Crime in India publications of the NCRB do not provide rate of recidivism for sexual offences, most studies agree that recidivism is generally low for sex offences. On the contrary, rehabilitation and social re-integration programmes can not only reduce recidivism but also encourage positive outcomes, while being more cost-effective. Studies conducted upon the effectiveness of such registries in the United States of America have indicated that it may actually increase crime as it prevents convicts who have served their sentences from reintegrating with society and leaves them ostracized and consequently drives them back to crime.[20] A 2010 study on the effect of sex offender registries and its public notification concluded that "notification laws may harden registered sex offenders, however, making them more likely to commit additional sex offenses, perhaps because criminal behavior is relatively more attractive for registered sex offenders living under a notification regime."[21] Another study on the impact of these registries concluded that **public sex offender registries have not decreased the rate of rape and other sex offences after noting no decrease in rates of such offences after the introduction of the registry.** The study further concluded that these registries do not reduce recidivism and on the contrary registered individuals were more likely to re-offend.[22]

2. **Reporting of offences by victims does not appear to have been greatly affected by the implementation of SORs.** Sexual offences generally remain underreported. The US National Institute of Justice discovered that only 19% of women who were victims of rape reported the crime to police,[23] despite the United States having an elaborate Sex Offenders Registry and Notification system.
3. **SOR is a wastage of financial resources of the State** Experience from countries that have long implemented sex offender registration laws shows that the costs of implementation outweigh the expected outcomes. For example in the USA, the Justice Policy Institute estimates the costs of implementation for each state, and for large states such as California the cost of implementation is estimated at nearly 60 million dollars for the first year of implementation.[24]**Investment should instead be in rehabilitation programmes.** A study by Wortley and Smallbone concludes that 'Sex offenders should not be seen as sexual deviants, but as opportunity takers who have generalised difficulties with self control, especially within

[19] The following information is taken from HAQ: Centre for Child Rights & Maquarie University, *The Benefits and Detriments of Sex Offender Registries: A Comprehensive Qualitative Analysis* (Sydney, 2018).
[20] Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?**,** J.J. Prescott & Rockoff, 2011, *Journal of Law and Economics, Vol. 54, No. 1, February 2011*.
[21] *Ibid*, p. 22.
[22] Amanda Agan, *Sex Offender Registries: Fear without Function?,* The Journal of Law & Economics, Vol. 54, No. 1 (February 2011), pp. 208.
[23] Human Rights Watch, '*No Easy Answers, Sex Offender Laws in the US*' (Research Discussion Paper, 11 September 2007)
[24] Justice Policy Institute, What will it cost states What will it cost statesto comply with the Sex to comply with the Sex Offender Registration and Notification Act?, available at http://www.justicepolicy.org/images/upload/08-08_fac_sornacosts_jj.pdf

their interpersonal domain.'[25] Consequently, the focus in Australia has moved away from sex offender registers towards sex offender rehabilitation programmes to reduce recidivism rates.

4. **SORs are a complete negation of the reform-oriented approach to criminal justice.** The proposed Sex Offenders Registry (SOR) will contain details of persons convicted of specified offences and will be linked to the National Registry of Sexual Offenders. It is likely to violate the right to privacy of offenders, as well as impact their ability to reform and re-integrate into society.
5. **Stigmatization of offenders and their families will affect their rehabilitation and reintegration.** SORs, by their very nature, discourage social interaction and bonding, which weakens bonds with both society and the state and leads to increased opportunity and motive to reoffend. It also has repercussions on families of offenders placed on SORs. They often experience the social isolation and feelings of shame associated with registration that limit their access to socially valued resources, and infringe on their capacity to contribute and participate within their communities.[26] Lack of employment opportunities resulting from SORs is bound to drive the perpetrators towards adopting a life of crime for survival.[27] the Families of offenders placed on SORs often experience the social isolation and feelings of shame associated with registration that limit their access to socially valued resources, and infringe on their capacity to contribute and participate within their communities.[28]
6. **SOR brings with it serious social, political and economic repercussions for not just the perpetrators and their families but vast segments of the marginalised populations and the society at large.** The SOR will affect the vast number of adolescents and young people involved in marital or consensual relationships and found guilty of 'statutory' rape. NCRB data on prisons in India shows that the criminal justice system disproportionately penalizes persons from vulnerable socio-economic backgrounds. Of the total prison population in Maharashtra, 22% convicted persons belonged to Scheduled Castes (SC), 14.6% belonged to Scheduled Tribes (ST), and Other Backward Classes (OBC) constituted 24.4%.[29] Further, 54% of convicted prisoners have not completed high-school and 11% were illiterate.[30] A study by the National Law University Delhi found that almost 74% of death-row prisoners belong to socio-economically vulnerable sections of the population, including SCs, STs, OBCs and religious minorities.[31] Given these realities, the proposed Sex Offenders Registry will only serve to further marginalize socio-economically marginalized groups, and add to their existing caste and class inequality, while leading to travesty of justice.

[25] R Wortley and S Smallbone '*Applying Situational Principles to Sexual offending Against Children*' in R Wortley and S Smallbone (eds.) Situational Prevention of Child Sexual Abuse (Criminal Justice Press, 2006). 52 Above n 16, 39.
[26] Richard Tewksbury and Matthew Lees, 'Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences' (2006) 26(3) *Sociological Spectrum* 309, 313.
[27] Jessica Henry, 'Criminal History on a 'Need to Know' Basis: Employment Policies that Eliminate the Criminal History Box on Employment Applications' (2008) 5(2) *Justice and Policy Journal* 212, 220.
[28] Richard Tewksbury and Matthew Lees, 'Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences' (2006) 26(3) *Sociological Spectrum* 309, 313.
[29] Table 2.10D, Prison Statistics India, 2019, NCRB (2020), page 63.
[30] Table 2.10A, Prison Statistics India, 2019, NCRB (2020), page 65.
[31] Anup Surendranath and Shreya Rastogi, Death Penalty India Report, National Law University Delhi (2016)