24 July 2019

Urgent Appeal
Regarding The Protection of Children from Sexual Offences (Amendment) Bill, 2019

Hon'ble Member of Parliament,
Rajya Sabha

We write to you on behalf of organisations, academics, and individuals working on issues concerning children in India and disability, with decades of experience in the area of child rights as well as rights of persons with disabilities.

At the outset, we would like to state that we **unequivocally condemn sexual violence against women and children**. We firmly believe that while sexual offences against children must be stringently prosecuted, the **solutions also lie in preventive efforts and in strengthening implementation of existing laws and schemes**.

We are deeply concerned by the proposed amendments to Sections 4 and 6 of The Protection of Children from Sexual Offences (Amendment) Bill, 2019, [the Bill] which has been introduced in the Rajya Sabha. The amendments to these provisions provide for the death penalty for aggravated penetrative sexual assault of all persons below 18 years of age and enhance the mandatory minimum sentence for penetrative sexual assault as well as aggravated penetrative sexual assault.

Our concerns against the Bill are that:

A. DEATH PENALTY FAILS TO CONSIDER THE NATURE OF CHILD SEXUAL ABUSE AND ENDANGERS CHILDREN

- National Crime Records Bureau's (NCRB) *Crime in India, 2016* reveals that 94.6% of all cases registered under rape and rape read with penetrative sexual assault of children, were committed by people known to the victim, such as immediate family, relatives, neighbours, employers/co-workers, or other known persons.[1]
- **The fear of the death penalty will serve as a pressure upon children and their families to turn hostile, as the trauma and guilt of sending someone they know to the gallows is a very heavy burden. This will also severely impact the reporting of child sexual abuse by children with disabilities if they are being sexually abused by their caregivers.**
- The proposed amendment fails to consider that significant number of cases under the POCSO Act are of statutory rape, i.e., cases in which the victim is below 18 years and willingly engaged in consensual sexual activity. Studies conducted by the Centre for Child and the Law, National Law School of India University in the States of Delhi, Assam, Karnataka, Andhra Pradesh, and Maharashtra on the functioning of the Special Courts under the POCSO Act, revealed that cases in which the prosecutrix admitted to a relationship with the accused amounted to 21.8% in Karnataka (3 districts), 23% in Delhi, 15.6% in Assam, 20.5 per cent in Maharashtra, and 21.2% in Andhra Pradesh. The criminalization of consensual sexual activity among or with adolescents between 16-18 years has severe implications on their right to life, privacy,

[1] Table 3A.4, Offenders Relation to Victims of Rape - 2016.

and right to health. The possibility of the imposition of death penalty in such cases in itself constitutes a grave violation.

- The amendment fails to consider that the category of statutory rape includes within its scope, older adolescents in consensual relations, many of them in marriages that are valid under the Prohibition of Child Marriage Act, 2006. According to the NFHS-IV (2015-16), states that 26.8% of all women are still married before the age of 18 years. The increase in age of sexual consent from 16 to 18 years, treats all such couples in consenting relations, as sexual abuse victims and sex offenders.

B. PUNISHMENT UNDER EXISTING LAWS ADEQUATELY CONSIDER THE GRAVITY OF RAPE AND AGGRAVATED RAPE

- The Bill fails to recognize that the existing penalties in the law were already sufficiently stringent.
- **Despite existing stringent penalties, the Bill increased the penalty for sexual offences across the board, and introduced the death penalty for rape of aggravated penetrative sexual assault.**
- The Bill has enhanced the minimum sentence for rape of a child below 16 years and for aggravated penetrative sexual assault to 20 years imprisonment, while the maximum is 'imprisonment for life' which has been extended to mean "the remainder of that person's natural life". Such enhanced terms of imprisonment and introduction of death penalty will exert pressure on and deter a child from registering an offence against a family member, relative, or known perpetrator, and hence will be counter-productive.
- Studies by the Centre for Child and the Law, National Law School of India University (CCL-NSLIU) in five States revealed that in cases that resulted in convictions, most Special Courts awarded the minimum sentence and the award of maximum punishment was an exception. Several judges were of the view that punishment under the POCSO Act was very stringent and did not provide them with any discretion to award a sentence below the minimum.[2] The lack of judicial discretion in sentencing, coupled with enhanced mandatory minimum sentences provided for in the Bill, may have the reverse effect by potentially increasing the chances of judges acquitting offenders rather than imposing what they believe are disproportionate sentences.
- Multi-state studies by Partners for Law in Development offer evidence of malicious and motivated prosecutions of adolescent couples in consenting relations and self-arranged marriages, by parents of girls. The increase in age of sexual consent, makes law an easy tool for perpetrating honour based retaliation by the girls' parents. Interviews conducted with the CWC members, social workers, health care providers, shelter homes and police are unanimously of the view that the use of criminal law in relation to adolescent consensual relations is dangerous and harmful for the young population that the law seeks to protect. The young from poor and marginalised

[2] CCL-NLSIU's Studies on the Working of Special Courts under the POCSO Act, 2012
Maharashtra, Available at: https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf
Delhi, Available at: https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf
Assam, Available at: https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourtassamPOSCOAct2012.pdf
Karnataka, Available at: https://www.nls.ac.in/ccl/jjdocuments/posco2012karnataka.pdf
Andhra Pradesh, Available at: https://www.nls.ac.in/ccl/POSCOAP2017study.pdf
& CCL-NLSIU's report on the Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues, Available at: https://www.nls.ac.in/ccl/jjdocuments/posco2012spcourts.pdf

populations bear the brunt of this law, and most likely to enter the criminal/ juvenile justice system.

C. Death Penalty will Inevitably result in Dilution of Child-Friendly Procedures

- **The POCSO Act encompasses several child-friendly procedures that may be severely threatened by 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 to the Special Court the questions to be put to the child during examination-in-chief, cross-examination, or re-examination. The Special Court should in turn put those questions to the child. Studies by the Centre for Child and the Law, NLSIU Bangalore revealed that the application of this provision is strongly resisted by defence counsel and children continue to be questioned directly by them.
- Children, especially those who are younger, cannot withstand direct questioning by lawyers, which are invariably confusing, threatening and humiliating. It will be near impossible for Special Courts to strictly apply this protection measure, if death penalty remains a sentence for aggravated penetrative sexual assault of a child.
- In evaluating harm and degree of abuse (and indeed, the minimum age of consent), the law must differentiate on the basis of age related vulnerabilities and capacities, according to the UN Convention of the Rights of the Child. The psychological and physiological development of children evolves with age, distinguishing capacities of infants, toddlers, pre-schoolers, pre-teens, younger and older adolescents. Sexual consciousness of adolescents arises with puberty, growing considerably leading to sexual activity, that may be consensual or otherwise. The law must distinguish harm and abuse caused, on the basis of these complex factors, and avoid harm approaches that treat 0-18 years as a flat undifferentiated group.

D. Focus on Harsher Punishments Distract and Divert Attention from the Poor Implementation of the POCSO Act

- The convictions for child rape have steadily declined in the last 10 years despite the enactment of the POCSO Act, which provides for child-friendly procedures. From a conviction rate of 32.6% in 2006 for child rape, it is down to 28.2% in 2016, while the pendency has climbed from 81.3% in 2006 to 89.6% in 2016.[3] On 12 July 2019, the Hon'ble Supreme Court has taken suo-motu cognizance of the high pendency of POCSO cases as data revealed that "from January 1 to June 30 this year, 24,212 FIRs had been filed across India. Out of over 24,000 cases, 11,981 are still being investigated, while police have filed charge sheets in 12,231 cases. Trials commenced in 6,449 cases only, it said, adding that they are yet to commence in 4,871 cases. Till now, trial courts have decided only 911 cases, about 4 per cent of the total cases registered."[4] **The introduction of the death penalty for child rape shifts attention away from the poor state of implementation of the POCSO Act.**

[3] Crime in India, 2006, Table 6.11, http://ncrb.gov.in/StatPublications/CII/CII2006/cii-2006/Table%206.11.pdf; Crime in India, 2016, Table 4A.5, http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Table%204A.5.pdf

[4] SC takes suo motu cognizance of "alarming rise" in child rape cases, https://www.tribuneindia.com/news/nation/sc-takes-suo-motu-cognizance-of-alarming-rise-in-child-rape-cases/801071.html

- Studies conducted by CCL-NLSIU, HAQ Centre for Child Rights, Delhi and Forum Against Child Sexual Abuse (FACSE), Mumbai,[5] highlight several systemic gaps in implementation of the law:
  a. **Absence of exclusive "Special" Courts and Special Public Prosecutors**
  b. **Procedural Lapses:** Children are often exposed to the accused, and aggressive questioning of victims persists, resulting in victims frequently turning hostile, more so in the absence of any witness protection systems. The identity of the child is routinely compromised. Compensation is rarely paid to child victims. Neither Support Persons nor any form of orientation is made available to them about the trial.
  c. **Lapses in investigation:** Failure on the part of the police to collect relevant evidence, take statements of relevant witnesses, or collect forensic samples correctly, are some of the major lapses that affect convictions.
  d. **Absence of Victim Protection & Support:** A study conducted by HAQ: Centre for Child Rights based on cases in which it provided services to children as Support Persons under the POCSO Act revealed that in as many as 26% cases, children discontinued education after the incident. 20% of the children had to relocate their residence after the incident and 60% of them had to move because of safety reasons.[6] A survey of 100 survivors of rape/sexual assault survivors by the Delhi Commission for Protection of Child Rights revealed that one in three children who faced sexual abuse, dropped out of school. Further, only 15% of the survivors received compensation.[7]

E. Introduction of the Death Penalty is a Regression from Human Rights Standards

- The Death Penalty undermines human dignity, which is the bedrock of the Universal Declaration of Human Rights, 1948 (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) which has been acceded to by India in 1979.
- Article 6(2) of the ICCPR states that countries which have not abolished the death penalty, may impose it only for the "most serious crimes". The Human Rights Committee, the treaty-body responsible for the monitoring of the ICCPR has uneqivocally stated in General Comment No.36 that **"sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty."**[8]
- **Globally more than 142 countries have abolished the death penalty either in law or by practice. Only 23 countries of the world continue this practice**, amongst which only 13 other countries at present have the death penalty for child rape, namely: Qatar, Bahrain, Jordan, Kuwait, the UAE, China, Cuba, Mauritania, Sudan, Tajikistan, Thailand, Tunisia and Vietnam. Considering that none of the countries

[5] 3. 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/

[6] HAQ: Centre for Child Rights, Children's Access to Justice and Restorative Care: Factsheets. Factsheet 10.

[7] "One of three raped minors drop out of school: DCPCR study", 3 July 2019, *Hindustan Times,* https://www.hindustantimes.com/education/one-of-three-raped-minors-drop-out-of-school-dcpcr-study/story-iZBMjschbaySs8hBQ1M5QI.html

[8] Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, 30 October 2018, para 35.

mentioned are democracies, it is time to consider whether India, the world's largest democracy should align itself with this group of countries, or the lamentable Human Rights Indices they represent.

- The Supreme Court, on multiple occasions has itself voiced the concern that **application of the death penalty is subjective and arbitrary** and that even though "the rarest of rare doctrine" intended principled sentencing, sentencing has now really become judge- centric.
- The Death Penalty India Report, 2016,[9] based on interviews with India's death row prisoners (373 in number) found that 74.1% of India's prisoners on death row were from economically vulnerable backgrounds, and that 84% of the prisoners who either had their mercy petition pending or rejected were from marginalised communities. 76% of India's death row prisoners were from backward classes and religious minorities and the proportion of SC/STs was 42% at the mercy stage. Religious minorities comprised 19.6% of the cases at the High Court pending stage, but their proportion increased to 29.4% at the Supreme Court pending stage. Out of 270 prisoners who spoke of their experience in police custody, 80% said that they had experienced severe custodial torture. Out of the 92 prisoners who had confessed in police custody, 78.3% said that they had given forced confession due to the torture suffered in police custody. This clearly demonstrates that **the burden of the death penalty falls disproportionately on socially and economically marginalised groups in India, who are also extremely vulnerable to police excesses.**
- **Extradition** of several foreign nationals who have raped Indian children and sought asylum in the countries that have abolished the death penalty in law or practice will be exceedingly difficult, if the death penalty is on the statute book for such crimes.

OUR APPEAL

Child sexual abuse is indeed a very serious matter of concern. A society where the most vulnerable and innocent are routinely and gruesomely abused is indicative of a sombre situation that undoubtedly demands urgent intervention. The collective shame that we feel as a society should translate into collective responsibility towards our children. This can be achieved by ensuring that children are protected and supported when they courageously report sexual offences; child-friendly procedures are followed diligently; investigation and prosecutions are strengthened; and the necessary personnel, resources, and child friendly courtrooms are in place. More importantly, efforts towards prevention of sexual abuse need to be intensified.

We emphasize that the Justice Verma Committee on Amendments to Criminal Law, 2013, consciously and expressly refused to recommend death sentence for 'rape' by stating it would be a "regressive step in the field of sentencing and reformation." It also stated that the claim that inclusion of death penalty will instill fear in the mind of the perpetrators, and reduce the incidence of 'rape' is belied by lack of credible evidence that death sentence is an effective deterrent. This holds particularly true in the context of sexual offences against children, where majority of the perpetrators are known to the child and a punishment like the death penalty will only deter reporting.

[9] Anup Surendranath and Shreya Rastogi, "*Death Penalty India Report, 2016*", Centre on the Death Penalty, National Law University of Delhi. Available at: http://www.deathpenaltyindia.com/The-Death-Penalty-India-Report-2016.jsp

System strengthening is the need of the hour instead of amplifying punishments. Establishment of exclusive Special Courts and investment in infrastructure, people, and training along with the implementation of a robust Victim and Witness Protection Program will provide the much-needed framework for ensuring support and protection to child victims of sexual offences, enabling both higher conviction rates and greater levels of healing and rehabilitation of child victims – a win-win strategy. What is also required is **certainty of conviction** that will send a clear message to the offenders that they cannot get away.

We reiterate that the death penalty and enhanced sentences in child rape cases are not the solutions as these will not make our children safer. The POCSO Amendment Bill, 2019, is anti-child, regressive and counter-intuitive, and will inevitably endanger children rather than serve their interests.

We appeal that the amendments proposing the introduction of the death penalty and enhancement of sentences for penetrative sexual assault and aggravated penetrative sexual assault be withdrawn. We also urge that the Bill be sent to a Parliamentary Standing Committee for further discussion and deliberation.

Please feel free to contact us for any further information or clarification you desire on the subject.

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