

LAW COMMISSION OF INDIA

ONE HUNDRED AND SEVENTY SECOND
REPORT

ON

REVIEW OF RAPE LAWS

MARCH, 2000

JUSTICE

B. P. JEEVAN REDDY

Chairman, Law Commission of India



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D.O.No.6(3)(36)/2000-LC(LS)

March 25, 2000

Dear Shri Jethmalaniji,

I am forwarding herewith the 172nd Report on Review of Rape Laws.

2. In Writ Petition (Crl.) No.33 of 1997, the petitioner, "Sakshi" an organisation interested in the issues concerning women, approached the Supreme Court of India inter alia for directions concerning the definition of the expression "sexual intercourse" as contained in section 375 of the Indian Penal Code.

3. The Supreme Court by its order dated 13th January, 1998 directed the Law Commission to indicate its response with respect to the issues raised in the above writ petition. The Commission filed an affidavit dated 28.7.1998 setting out in extenso the portions of its 156th Report on the Indian Penal Code dealing with the issues in question. In the said Report, the then Law Commission (14th Law Commission) did not agree with the viewpoint of the writ petitioners except in certain minor respects. The Supreme Court was inclined to agree with the submissions of the writ petitioners that the contents of the 156th Report did not deal with the precise issues raised in the writ petition.

4. On the directions of the Hon'ble Court, the petitioner drew up a note containing the precise issues involved in the petition. The Commission was asked by the Hon'ble Court by its order dated 9th August, 1999 to examine the said issues afresh. The Court observed that the issues needed a thorough examination. By the said order dated 9th August, 1999, the Hon'ble Court requested the Law Commission "to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code or deal with the same in any other manner so as to plug the loopholes".

5. A copy of the draft of comments prepared by the Law Commission was thereafter forwarded to Sakshi inviting their views thereon and for suggesting changes of a procedural nature, whether in the Criminal Procedure Code or the Evidence Act. Later on, three other organisations, namely, Interventions for Support, Healing and Awareness - IFSHA, All India Democratic Women's Association - AIDWA and the National Commission for Women - NCW also presented their views on the proposed suggestions.

6. After detailed discussions with these organisations, the Commission has recommended changes for widening the scope of the offence in section 375 and to make it gender neutral. Various other changes have been recommended in sections 376, 376A to 376D. We have also recommended insertion of a new section 376E dealing with unlawful

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sexual contact, deletion of section 377 of the IPC and enhancement of punishment in section 509 of the IPC. In order to plug the loopholes in procedural provisions, we have also recommended various changes in the Code of Criminal Procedure, 1973 and in the Evidence Act, 1872.

7. The Hon'ble Supreme Court forwarded vide its order dated 18.2.2000 the comments of the petitioner on the Response and Recommendations of the Law Commission of India for consideration. The Commission accordingly considered those comments and submitted its further response and recommendations dated 14.3.2000 to the Hon'ble Court. The Report being forwarded now also includes the said further response and recommendations dated 14.3.2000.

8. The present Report focuses on the need to review the rape laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters. The crime of sexual assault on a child causes lasting psychic damage to the child and as such, it is essential to prevent sexual abuse of children through stringent provisions. The UN Conventions and various constitutional provisions also underline the need for protecting the child from all forms of sexual exploitation and sexual abuse. This Report aims at the attainment of these objectives.

With regards,

Yours sincerely,


(B.P. Jeevan Reddy)

Shri Ram Jethmalani,
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CHAPTER ONE

Introduction

Background

1.1. Under an order dated August 9, 1999 made in Writ Petition (Cr1) No.33 of 1997, the Supreme Court of India requested the Law Commission "to examine the issues raised by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code or deal with the same in any other manner so as to plug the loopholes."

1.1.1. The petitioner 'Sakshi', an organisation interested in the issues concerning women, had approached the Supreme Court of India with the aforesaid Writ Petition praying for (a) issuance of a writ in the nature of a declaration or any other appropriate writ or direction declaring inter alia that 'sexual intercourse' as contained in section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration and (b) to issue a consequential writ, order or direction to the respondents in the Writ Petition and to their servants and agents to register all such cases found to be true on investigation.

1.1.2. The Law Commission was not made a party to the Writ Petition. The Supreme Court however directed the Law Commission, by its Order dated 13th January, 1998, to

indicate its response with respect to the issues raised in the said Writ Petition. The Law Commission in its affidavit dated 25.3.1998 brought to the notice of the Hon'ble Court that the 156th Report of the Law Commission on the Indian Penal Code had dealt, inter alia, with the issues raised in the Writ Petition, but since the said Report was not yet placed on the table of the Houses of Parliament, the matter may be adjourned by a few months. The matter was adjourned by three months. Meanwhile, the aforesaid Report of the Law Commission was placed on the table of both the Houses of Parliament. Thereafter, the Law Commission filed its affidavit dated 26.7.98 setting out in extenso the portions of the said Report dealing with the issues in question. Suffice it to say that by and large the then Law Commission (14th Law Commission) did not agree with the viewpoint of the writ petitioners except in certain minor respects which would be indicated at the appropriate stage later. It is after considering the said affidavit and the affidavit filed by the Ministry of Law, Justice and Company Affairs, that the Hon'ble Court passed the aforesaid order dated 9th August, 1999.

1.1.3. The order of the Hon'ble Court records the statement of the learned counsel for the writ petitioners that the contents of the 156th Report of the Law Commission were known to the petitioners, but since according to them the Report did not deal with the precise issues raised in the writ petition, a request was made by the counsel for the petitioner to seek further

consideration of the issues by the Law Commission and the Government of India. The Court was inclined to agree with the said submissions. The Court also noted that the 156th Report was submitted by the Law Commission prior to these issues being referred to the Commission and further that the said Report of the Law Commission did not in terms deal with various aspects of the issues raised in the Writ Petition. The order further recorded that at the suggestion of the Hon'ble Court, the petitioner did draw up a note containing the precise issues involved in the Writ Petition as well as other connected issues. After perusing the same, the Court asked the Law Commission to examine the said issues afresh. A copy of the 'precise issues' with the appendix and affidavit were sent to the Secretary, Law Commission with a request to place the same before the Chairman of the Law Commission for consideration. It was also observed that the Law Commission may, if so advised, call upon the petitioner to assist it in such manner as the Commission thought appropriate. The issues, the Court observed, "need a thorough examination". The matter was accordingly adjourned for three months within which period the Law Commission was expected to submit its response to the Hon'ble Court.

1.1.4. The order of the Hon'ble Court was received by the Secretary to the Law Commission on 19.8.99 and placed before the Chairman.

1.2. "Precise issues".- The 'precise issues' submitted by the petitioner before the Court and which have been sent to the Law Commission for consideration are divided into three parts (Annexure-A). Part I carries the title "Precise issues submitted for consideration of the Law Commission and the Government of India". Part II carries the heading "Existing inadequacies" and Part III is titled "Suggestions for amendment to the Indian Penal Code". We shall set out in brief the substance of the submissions made in all the three parts.

1.2.1. Part I: Precise issues submitted for consideration of the Law Commission and the Government of India.- (1)

Having regard to the widespread prevalence of child sexual abuse, would it not be appropriate to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within the meaning of the expression "penetration" in the Explanation to section 375 of the IPC. The restrictive interpretation of 'penetration' in the Explanation to section 375 defeats the very purpose and object underlying section 376(2)(f);

(2) Is it not wrong to classify the penetrative abuse of a child below the age of 12 as unnatural offence under section 377 IPC or as outraging the modesty of a woman under section 354, depending upon the 'type' of penetration ignoring the 'impact' on such child.

(3) Is it not wrong to continue to treat non-consensual penetration upon such a child as offence under section 377 IPC on par with certain forms of consensual penetration (e.g. consensual homosexual sex) where consenting party can be held liable as an abettor or otherwise.

1.2.2. 'Appendix A' appended to Part I contains three notes, which we shall refer to in seriatum:

Note 1: The Explanation to sections 375 and 376 says that "penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape". By the Criminal Law (Amendment) Act 1983, raping of a woman under twelve years of age was made punishable with rigorous imprisonment for a term which shall not be less than ten years but which may be for life in addition to fine. In such a situation, it would be appropriate to broaden the meaning of penetration to include not only vaginal penetration but also anal and oral penetration as well as penetration by any part of the body or by any object.

Note 2: In a vast majority of child sexual abuse cases the penetration is other than penile-vaginal. Such penetration causes lasting psychic damage to the child. In such a situation, a restrictive meaning attached to penetration is likely to prove inadequate.

Note 3(a): The 156th Report of the Law Commission has recommended that penile/oral penetration and penile/anal penetration be covered by section 377 IPC and that finger penetration and object penetration into vagina or anus can be adequately covered under section 354 with a more severe punishment. This recommendation requires reconsideration. Such a restrictive view fails to take into consideration several forms of child abuse and the further fact that very often the sexual abuse of children is by persons known to them. As a matter of fact, rape is really intended to humiliate, violate or degrade a woman sexually. It adversely affects the sexual integrity and autonomy of women and children. The aforesaid recommendation of the Law Commission therefore defeats the very object underlying the Criminal Law (Amendment) Act, 1983 which inserted sub-section (2) and in particular clause (f) thereof in section 376. The above recommendation also does not take into account the fact that a child of tender years can not discern the degree of difference in terms of which orifice of hers is penetrated. Certain instances are then set out to illustrate the aforesaid point.

Note 3(b): Under this note, the petitioner has sought to argue in the light of the instances mentioned under Note 3(a) that the 156th Report of the Law Commission requires reconsideration.

1.3. Part II: Existing Inadequacies.- Various instances set out in Appendix-B to Annexure-A (a copy of the submissions of Sakshi including Appendix-B is enclosed herewith) to this part, the petitioner argues, would not amount to rape and perhaps not even to natural offence under section 377 or to outraging the modesty of a woman under section 354, in view of the existing law. They might just be a limited form of assault or criminal force, if at all, though all the said instances are of a grave nature and extremely disturbing. It is therefore necessary that there should be a rethinking on this issue and the offence of 'sexual assault' should be more precisely defined and its parameters indicated.

1.4. Part III: Suggestions for amendment to Indian Penal Code.- This part sets out the several amendments proposed by the petitioner. Suffice it to say that they seek to substitute the definition of 'rape' with the definition of 'sexual assault' and make it gender neutral. The object is to widen the scope of the offence. The expression 'consent' is also sought to be defined. A new section, section 375A with the heading 'Aggravated sexual assault' is sought to be created. This new offence seeks to synthesise the offences now categorised under sub-section (2) of section 376 as well as sections 376B to 376D.

CHAPTER TWO

VIEWS INVITED ON PROPOSED PROVISIONS

2.1. UN Convention and Constitutional provisions.-

Several cases of child abuse have all over the world have caused grave concern to the humanity. Article 34 of the Convention on Rights of the Child (20 November 1989) ordains the Member States to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties are required to take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

2.1.1. Article 39(f) of the Constitution of India, one of the Directive Principles of State Policy requires the State to direct its policy, inter alia, towards securing that childhood and youth are protected against exploitation and against moral and material abandonment. There is, therefore, great need for tightening the existing provisions relating to child sexual abuse or assault.

2.2. Draft of the Law Commission's proposals.- On a consideration of the 'precise issues' submitted by the petitioner and in the light of the order of the Hon'ble Court and also taking into account the laws in force in certain western countries on this subject, the Law Commission prepared a draft (Annexure-B) containing the proposed new sections, namely, sections 375, 376, 376A, 376B, 376C, 376D in substitution of the existing sections 375 to 376D and also suggested a new section, section 376E. The purport of these new sections is to substitute the offence of 'rape' under section 375 with the offence of 'sexual assault' by including all kinds of penetration in the vagina, anus or urethra of another, whether by a part of the human body or by an object. Section 376 is, accordingly, modified in the light of the change in section 375. Sections 376A, 376B, 376C and 376D are retained substantially except adapting them to the changes made in the offence under section 375 and a few changes in the matter of punishment. A new offence, namely, section 376E with the title 'unlawful sexual contact' is sought to be created. Besides the above, section 377 is proposed to be deleted as unnecessary in the light of the preceding provisions. Section 509 of IPC is also sought to be amended providing higher punishment where the offence set out in the said section is committed with sexual intent.

2.2.1. Views invited.- A copy of the said draft was forwarded to Sakshi on 27.8.99 and they were invited for a discussion on 13.9.99. It was indicated that the

discussion would not only be with respect to the draft prepared by the Law Commission but that they shall be free to put forward their other suggestions and ideas, if any, and further they could also bring representations of other women's organisations, along with them, for discussion. Accordingly, three persons, namely, Ms Naina Kapur (Director, Sakshi), Ms Jasjit Purewal (Director, Interventions for Support, Healing and Awareness - IFSHA) and Ms Kirti Singh (All India Democratic Women's Association - AIDWA) participated in the discussion, on behalf of their respective organisations. All the three organisations have also put forward their suggestions in writing - apart from what Sakshi had filed before the Supreme Court.

We may mention that hereafter whenever we speak of or refer to Sakshi, it means not only the Sakshi, but also the two other women's organisations, namely IFSHA (Interventions for Support, Healing and Awareness) and AIDWA (All India Democratic Women's Association) as well as the National Commission for Women (NCW), who were also heard on the proposals contained herein.

2.3. Views of the "Sakshi" on the IPC provisions.- On the first day of hearing (13.9.99), the said three persons expressed their appreciation of the draft prepared by the Law Commission stating that it was a substantial advance

on the subject and met many of their ideas. Even so, after a good amount of discussion, they came forward with the following changes in the said draft:

(a) The age of the person assaulted - referred to in clause "sixthly" in section 375 and in Explanation (2) to section 375 and in section 376(1) (where the age of the wife is referred to) - should be raised to sixteen. Raising the said age to eighteen may not be appropriate.

(b) A provision must be inserted to the effect that if the person assaulted gives his/her age, the court shall presume it to be so. A provision on the lines of section 114A of the Evidence Act be suggested.

(c) In the definition of sexual assault in section 375, there should be an explanation saying that penetration shall mean penetration to any extent whatsoever, inasmuch the penetration is never complete in the case of children.

(d) Explanation (2) to draft section 375 (which says that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, does not amount to sexual assault) should be deleted. Forced sexual intercourse by a husband with his wife should equally be treated as an offence just as any physical violence by a husband against the wife is treated as an offence. Following the same logic, they submitted that the words

"unless the person subjected to sexual assault is his own wife and is not under 15 years of age in which case he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both" in section 376(1) of the Law Commission's draft [adaptation of the existing section 376(1)] should also be deleted. Section 376A should also be deleted, they said, on the same reasoning.

(e) In the first proviso to draft section 376(1) (in the draft of the Commission), the words "the father, grandfather or brother" should be substituted with the words "a person holding position of trust vis-a-vis the other person" and further to add an explanation saying that the said expression shall include father/step father, brother/step brother, teacher, instructor, guardian and the like.

(f) Consent should be defined to mean "unequivocal voluntary agreement".

2.3.1. A copy of the handout given by the persons mentioned in paragraph 2.2.1, supra of this chapter, on the first date of meeting is placed at Annexure-C.

2.4. Views of the "Sakshi" on the relevant provisions of the Code of Criminal Procedure and the Indian Evidence Act.- At the end of the discussion on the first day, it was indicated to the persons mentioned in para above that

if they wished to suggest any changes of a procedural nature, whether in the Criminal Procedure Code or in the Evidence Act, they could send the same by the next date, which was specified as 17th September 1999. Though the "precise issues" did not speak of any changes in the procedural laws (and was confined to amendments to Indian Penal Code only), we were of the opinion that unless certain changes are effected simultaneously in the relevant provisions of the CrPC and Evidence Act, the purpose underlying the changes in the substantive law IPC - may not be fully served. It is for this reason that we suggested to Sakshi to come forward with their suggestions, if any, for amendment of procedural laws to achieve the purpose underlying changes in substantive laws. Accordingly, they came forward with as many as 14 suggestions proposing amendments not only in the Criminal Procedure Code and Evidence Act but also in the Indian Penal Code (Annexure-D). The procedural amendments suggested by them are to the following effect:

(1) The 84th Report of the Law Commission had suggested that where the statement of a girl-victim below twelve years of age is recorded, it should be done by a woman police officer or by a woman belonging to an organisation interested in the cause of women or children. The said recommendation should be accepted with certain changes set out in their note.

(2) The present proviso to sub-section (1) of section 160 of the Code of Criminal Procedure should be substituted by the following proviso:

"Provided that no male person under the age of sixteen years or a woman shall be required to attend at any place other than his or her home or place of his or her choice."

(3) A new sub-section, namely, sub-section (6) should be inserted in section 160 CrPC to the effect that the statement of a male person under the age of sixteen years or a female, during the course of investigation, should be recorded only in the presence of a relative, a friend or a social worker of the person's choice.

(4) A new section, namely, section 164A should be inserted in the Code of Criminal Procedure stating that as soon as a case of sexual assault is reported to a Police person, he shall have the person (allegedly assaulted sexually) examined medically by a registered medical practitioner and that such medical practitioner shall after due examination, prepare a report setting out the various specified particulars. This proposal is a slight modification of the recommendation contained in the 24th Report of the Law Commission.

(5) Sub-sections (1A), (1B), (1C) and (1D) should be inserted in section 53 of the Criminal Procedure Code as recommended by the 84th Report of the Law Commission, with necessary adaptations.

(6) While granting bail to a person accused of sexual assault, one of the conditions which should be imposed by the court shall be that such person shall not be in the proximity of the person assaulted.

(7) In the case of sexual assault, there shall be no interference with or disturbance of the natural habitat of the person sexually assaulted by or through the criminal justice process.

(8) The investigation and trial of sexual offences should be time-bound and should be concluded within six months.

(9) The expression 'social worker' shall be defined to mean a woman interested in or working for the cause of women and/or children and who is familiar with issues of violence against women and children.

(10)(a) A new section 114B should be introduced in the Evidence Act stating that where in a prosecution for aggravated sexual assault under sections 376A to 376D of the IPC, the question is whether the person so assaulted

consented to it and where such person states before the court that he/she did not so consent, the court shall presume it to be so.

(b) Clause (4) in section 155 to the Evidence Act (which permits the person accused of rape or attempt to ravish to prove that the prosecutrix was of generally immoral character) should be deleted.

(c) In section 146 of the Evidence Act, another clause, namely, clause (4) should be added stating expressly that in a prosecution for sexual assault, it shall not be permissible to adduce evidence or to put questions in cross-examination of the person assaulted with respect to his/her previous sexual history, character or conduct whether to establish consent or otherwise.

(d) The absence of a medical report in the case of a sexual assault shall not be a factor against the complainant/person assaulted.

(11) There should be a provision either in the CrPC or in the Evidence Act to the effect that a minor who has been assaulted sexually, should not be required to give his/her evidence in the presence of the accused as it will certainly traumatise the minor. Steps should also be taken to provide an appropriate and safe environment in which the child can recover.

(12) The testimony of a child who is subjected to sexual assault should be recorded at the earliest opportunity by a judge/magistrate in the presence of a friend, relative or social worker whom the minor trusts. For a proper implementation of the above suggestion, videotape/circuit television should be provided. Further, where the child is to be cross-examined, the questions shall be handed over to the judge who shall, in turn put those questions to the minor. While recording the evidence of the minor, appropriate breaks should also be given to make the minor feel comfortable.

(13) All cases of sexual assault should be tried by special courts which shall be manned by judges, prosecutors and counsellors, 'specially trained/sensitised to issues of sexual assault'.

(14) A new offence should be created by appropriately amending section 166 IPC making it an offence for a public servant to disobey the direction of law prohibiting the summoning of a minor/woman at any place other than her place of choice and also a public servant who disobeys any direction of law with respect to the manner in which the investigation concerning a minor shall be conducted.

2.4.1. Discussion on the suggestions of "Sakshi".- Each of the above suggestions were discussed in the Commission in the presence of the three persons representing organisations mentioned in para 2.2.1 above, in the light of the

84th Report of the Law Commission as well as the 154th Report of the Law Commission. While we agree with some of the aforesaid suggestions (as would be evident from the recommendations set out in the succeeding chapters), we find ourselves unable to agree with all of them.

2.5. Views of the National Commission for Women (NCW) invited.- The Law Commission would also wish to put on record that before finalising their recommendations, the Law Commission had also sent a letter to the National Commission for Women (NCW) enclosing the aforementioned draft (prepared by the Law Commission) (Annexure-B) and inviting them to come and have a discussion with the Law Commission on 16.9.99. The National Commission for Women deputed their Joint Secretary, Ms Leena Mehendale. One of the Members of the Law Commission, Mrs Justice Leila Seth, heard the Joint Secretary and also asked her to put her ideas/suggestions in writing. Accordingly, the NCW sent a set of suggestions in writing signed by the Joint Secretary. A copy of the said proposals is appended herewith (Annexure-E).

CHAPTER THREE

Changes recommended in the Indian Penal Code, 1860

3.1. Substitution of definition of 'rape' by definition of 'sexual assault'.

Not only women but young boys, are being increasingly subjected to forced sexual assaults. Forced sexual assault causes no less trauma and psychological damage to a boy than to a girl subjected to such offence. Boys and girls both are being subjected to oral sexual intercourse too. According to some social activists like Ms Sheela Barse, both young girls and boys are being regularly used for all kinds of sexual acts and sexual perversions in certain tourist centres like Goa - mainly for edification of the foreign tourists. Sakshi have also recommended for widening the scope of the offence in section 375 and to make it gender neutral. Some of the western countries have already done this. It is also necessary to include under this new definition (sexual assault) not only penile penetration but also penetration by any other part of the body (like finger or toe) or by any other object. Explanation to section 375 has also been substituted by us to say that penetration to any extent whatsoever shall be deemed to be penetration for the purpose of this section. This is so provided for the reason that in the case of children, penetration is rarely complete - for physical reasons. So far as the Exception is concerned, we have retained the existing Exception the only change made being in the matter of age; we have

raised the age of the 'wife' from fifteen to sixteen. The age of the person assaulted sexually referred to in the clause "sixthly" has also been raised to sixteen from fifteen.

3.1.1. We may also mention that in redrafting the section, we have stuck to the existing provision as far as possible. This is for the reason that since these provisions have already been interpreted and elucidated by the decisions of the courts, it is better to stick to them rather than use new expressions and new wording. In drafting clauses (a) to (e) in section 375, we have drawn inspiration from the Criminal Law Western Australia.

3.1.2. Substitution of existing section 375 of the IPC recommended.- We accordingly recommend that the existing section 375 be substituted by the following:

"375. Sexual Assault: Sexual assault means -

(a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with -

- i) any part of the body of another person or
- ii) an object manipulated by another person

except where such penetration is carried out for proper hygienic or medical purposes;

- (b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;
- (c) introducing any part of the penis of a person into the mouth of another person;
- (d) engaging in cunnilingus or fellatio; or
- (e) continuing sexual assault as defined in clauses (a) to (d) above

in circumstances falling under any of the six following descriptions:

First- Against the other person's will.

Secondly- Without the other person's consent.

Thirdly- With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly- Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly- With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly- With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault."

3.1.2.1. Representatives of Sakshi wanted us to recommend the deletion of the Exception, with which we are unable to agree. Their reasoning runs thus: where a husband causes some physical injury to his wife, he is

punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognized by law; if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault where the wife happens to be above 15/16 years. We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship.

3.2. Modification of S.376.- So far as the proposed section 376 is concerned, we are not suggesting any substantial changes except two and adapting the language of the section to accord with the change in section 375. In the light of instances coming before the courts and the instances mentioned in the Note prepared by Sakshi, we have proposed addition of a proviso to sub-section (1) (while treating the existing proviso as the second proviso) providing that where the sexual assault is committed by the father, grandfather or brother, the punishment should be severe. On the basis of suggestions made by Sakshi, we have also added the words "or any other person being in a position of trust or authority towards the other person" after the words "father, grandfather or brother". The second change suggested by us is in the matter of the age of wife referred to in proposed sub-section (1) as also of the person assaulted in clause (f) of sub-section (2). The age "fifteen" is raised to "sixteen".

3.2.1. The reasons for these changes are: (1) to visit with a severe penalty the near relations and persons in position of trust and authority who more often than not commit the offence of sexual assault on the members of the family or on unsuspecting and trusting young persons. We have in this connection taken note of the extremely odious and debased conduct of the father of the minor girl in the facts highlighted in Sudesh Jakhoo v. K.C.J. and others [1996 (3) AD Delhi 653 = (1996) 62 DLT 563] and (2) to maintain uniformity in the matter of age of wife or any other young person who needs special protection - as sixteen.

3.2.2. Views of "Sakshi" considered.- Though the representatives of Sakshi have suggested that we should delete the second proviso to section 376 (1) and the proviso to section 376 (2) (which confer a discretion upon the court to award a sentence lesser than the minimum punishment prescribed by the sub-sections), we are not satisfied that there are any good reasons for doing so. Any number of situations may arise, which it is not possible to foresee, and which may necessitate the awarding of lesser punishment than the minimum punishment prescribed. Safeguard against abuse is provided by requiring that adequate and special reasons be mentioned in the judgment, for awarding such lesser punishment. Nor is there justification in the criticism that such discretion once conferred is liable to be abused or that it will always be misused to help the accused.

3.2.3. Recasting of section 376 of the IPC recommended.-

Accordingly, we recommend that section 376 shall be re-cast as follows: -

"376. Punishment for sexual assault - (1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the person subjected to sexual assault is his own wife and is not under sixteen years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

If the sexual assault is committed by a person in a position of trust or authority towards the person assaulted or by a near relative of the person assaulted, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than minimum punishment prescribed in this sub-section.

(2) Whoever,-

(a) being a police officer commits sexual assault-

(i) within the limits of the police station to which he is appointed; or

(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 person in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital; or

(e) commits sexual assault on a woman knowing her to be pregnant; or

(f) commits sexual assault on a person when such person is under sixteen years of age; or

(g) commits gang sexual assault,

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

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- Where a person is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang sexual assault within the meaning of this sub-section.

Explanation 2.- "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.- "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."

3.3. Amendment of S.376A.- Representatives of Sakshi wanted us to recommend the deletion of section 376A (as well as Exception to section 375). Their logic was this: when a man who causes hurt or any other physical injury to his own wife is liable to be punished for such offence like any other person causing such hurt or physical injury, why should a husband who sexually assaults his wife, who is living separately under a decree of separation or under any custom or usage, be not punished like any other person. Section 376A, which provides a lesser punishment to a husband who sexually assaults his own wife living separately in the aforesaid circumstances, they argued, is arbitrary and discriminatory. They say that once section 376A is deleted, the husband in such a case would be punished under section 376(1) which carries higher punishment than section 376A. While we appreciate

the force of said argument in the context of the wife who is living separately under a decree of separation or under any custom or usage, we can not at the same time ignore the fact that even in such a case the bond of marriage remains unsevered. In the circumstances, while recommending that this section should be retained on the statute book, we recommend enhancement of punishment under the section.

3.3.1. Modification in section 376A of the IPC recommended.- Accordingly, section 376A shall read as follows: -

"376A. Sexual assault by the husband upon his wife during separation.- Whoever commits sexual assault upon his wife, who is living separately from him under a decree of separation or under any custom or usage, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to seven years and shall also be liable to fine."

3.4. Amendment of S.376B, 376C and 376D: Having regard to the gravity of these offences, we recommend enhancement of punishment - with a minimum punishment of not less than five years. We have also added an Explanation which will govern all these three sections. The Explanation defines "sexual intercourse" to mean any of the acts mentioned in

clauses (a) to (e) of section 375. Explanation to section 375 will however apply even in the case of sexual intercourse as defined by the Explanation to this section.

3.4.1. Modifications in sections 376B, 376C and 376D of the IPC recommended.- Accordingly, section 376B with necessary adaptations and changes, shall read as follows:

"376B. Sexual intercourse by public servant with person in his custody.- Whoever, being a public servant, takes advantage of his/her official position and induces or seduces any person, who is in his/her custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation: "Sexual intercourse" in this section and sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

"376C. Sexual intercourse by superintendent of jail, remand home, etc.- Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his/her official position and induces or seduces any inmate of such jail, remand home, place or institution to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation 1.- "Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he/she can exercise any authority or control over its inmates.

Explanation 2.- The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376.

376D. Sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital. Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his/her position and has sexual intercourse with any person in that hospital, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation.- The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376."

3.5. Insertion of section 376E:

This is a wholly new section recommended by us. We have called it the offence of 'unlawful sexual contact'. This section is intended to cover a wide variety of offences including sexual harassment at work

place and sexual perversions of the kind mentioned in the note submitted by Sakshi. Sub-section (1) of this new section covers touching, directly or indirectly, with a part of the body or with an object, any part of the body of another person (not being the spouse of such person), with sexual intent and without the consent of such other person. In case the other person is below sixteen years of age, we have recommended higher punishment. Sub-section (2) is an extension or elaboration of the offence mentioned in sub-section (1), while sub-section (3) deals with a case where such offence is committed on a young person - young person being defined by the Explanation to mean a person below the age of sixteen years. If the offence of unlawful sexual contact is committed on a young person by a person with whom such young person is in a relationship of dependency, the punishment is rigorous imprisonment which may extend to seven years or with fine or with both and in case the offender happens to be the father, grandfather or brother, a still higher punishment is provided for. In the case of a 'young person', consent is treated as irrelevant. (Sections 151, 152 and 153 of the Canadian Criminal Code also contain similar provisions).

3.5.1. Insertion of new section 376E recommended.- We therefore recommend that a new section, namely, section 376E be inserted in the IPC in the following terms:

"376E. Unlawful sexual contact (1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person, not being the spouse of such person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.

(2) Whoever, with sexual intent, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites, or touches, with sexual intent, directly or indirectly, with a part of the body or with an object any part of the body of a young person, shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

(3) Whoever being in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine.

Explanation: "Young person" in this sub-section and sub-section (2) means a person below the age of sixteen years."

3.6. Deletion of section 377:

In the light of the change effected by us in section 375, we are of the opinion that section 377 deserves to be deleted. After the changes effected by us in the preceding provisions (sections 375 to 376E), the only content left in section 377 is having voluntary carnal intercourse with any animal. We may leave such persons to their just deserts.

3.7. Amendment of section 509:

So far as this section is concerned, the only change we are suggesting is enhancement of punishment. We recommend that the existing section 509 be amended as follows:

"509. Word, gesture or act intended to insult the modesty of a woman:

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such

woman, shall be punished with simple imprisonment for a term which may extend to three years and shall also be liable to fine.”

3.6. New Section 166A, IPC:

The 84th Report of the Law Commission had recommended (para 3.20) that a new section, namely, section 166A, be inserted in the Indian Penal Code. The object behind this new section was to punish a public servant who knowingly disobeys any direction of law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter or knowingly disobeys any other direction of law regulating the manner in which he shall conduct such investigation and which act of his causes prejudice to any person. The representatives of Sakshi with whom we had a discussion, requested that a new section as recommended by 84th Report of the Law Commission be recommended to be inserted in the IPC. This provision must be understood in the light of the fact that in the next chapter, we are recommending several measures with respect to the manner in which the statement of women and children (below 16 years) should be recorded, the place where it should be recorded and so on.

3.6.1. New section 166A of the IPC recommended.-

Accordingly, we recommend that a new section be introduced in the IPC in the following terms:

"166A. Whoever, being a public servant-

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

3.9. Views of "Sakshi" for defining 'consent' considered.- Lastly, we may refer to a request of Sakshi to insert the definition of "consent" for the purpose of the aforesaid sections. We are however of the opinion that no such definition is called for at this stage, for the reason that the said expression has already been interpreted and pronounced upon by the courts in India in a good number of cases. Reference in this behalf may be made to page 700 of the Commentary on IPC by Justice Jaspal Singh (First Edition 1998) where it is stated, on the basis of the decisions of the Madras, Punjab and Nagpur High Courts, that "consent implies the exercise of a free and untrammelled right to forbid or withhold what

is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former".

CHAPTER FOUR

Changes recommended in the Code of Criminal Procedure, 1973

4.1. Proposals of "Sakshi" relating to the Code of Criminal Procedure.- As stated in chapter two, the representatives of Sakshi have come forward with as many as 14 recommendations proposing amendments to the Code of Criminal Procedure and the Evidence Act. We had mentioned them in the said chapter. We shall now proceed to discuss them.

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Commission

4.2. Addition of sub-sections (3) to (5) in section 160, CrPC.- The 84th Report of the Law Commission had recommended (paragraphs 3.1 to 3.15) that sub-sections (3) to (7) be added in section 160. Instead of paraphrasing the reasons given in the 84th Report in our own words, it would be appropriate to set out paragraphs 3.11 to 3.15 of that Report hereinafter:

"IV. Interrogation of female victims of sexual offences

3.11 Reporting and Investigation.- These matters concern the arrest and detention of women in general. We now deal with certain matters peculiar to women who are victims of sexual offences. Women who have been raped are reluctant to report it, partly because of the embarrassment

of discussing the details with male policemen, and partly because of the very fear of even more painful humiliation of being a witness in Court.

They get scared and become confused when, in the strange environment of the Court room, they have to conduct themselves in a manner foreign to their custom and under a restraint not conducive to clear and coherent thought or free expression.

3.12 Investigation by female police - No statutory change recommended.- A woman is often discouraged from pressing a charge of rape or other sexual offence by the fact that she usually encounters only male police and prosecution officers. It is presumably for this reason that it has been suggested that the investigation of such offences should be done by women police officers only.

We would be happy if the questioning of female victims of sexual offences would be done by women police officers only. We are not, however, inclined to recommend a statutory provision in this regard. A mandatory provision to that effect may prove to be unworkable. The number of women police officers in rural areas is very small. Even in urban areas, unless a centralised cell

(With the status of a police station) is created for investigation into sexual offences against women, such a provision may not be practicable.

We regard this difficulty as a transient one. An all-out effort for the recruitment of sufficient number of women police officers, who could be drafted for the police duties of interrogation and investigation, should be made.

3.13 Practice to be adopted in metropolitan cities.- Till then, in metropolitan cities or big cities where there are sufficient number of women police officers, a practice should be established that women police officers alone investigate sexual offences and interrogate the victim.

We are, therefore, not in favour of any statutory provision being made in this respect, subject to what we are recommending in the next paragraph.

3.14 Interrogation of child victim of rape - Statutory provision recommended.- The practice as suggested above could be adopted in metropolitan areas and big cities. But there is one matter which is of importance for the whole country. It is necessary that in the case of girls below a certain age - say, below twelve years who are

victims of rape, there should be a statutory provision to ensure that the girl must be interrogated only by a woman. A woman police officer would be preferable. But, if a woman police officer is not available, an alternate procedure as detailed below should be followed.

The alternate procedure that we contemplate is this. Where a woman police officer is not available, the officer in charge of the police station should forward a list of questions to a qualified female (we shall suggest details later) who would, after recording the information as ascertained from the child victim, return the papers to the officer in charge of the police station. If necessary, further questions to be put to the child may be sent by the police to the interrogator.

For the present, this procedure may be applied to female victims below 12 years. It could later be utilised for child witnesses in general, if found practicable.

The "qualified female" whom we have in mind should be one who is a social worker belonging to a recognised social organisation. If

she possesses some knowledge of law and procedure, it would be all the more useful, but that need not be a statutory requirement.

3.15 Amendment of section 160 recommended by insertion of sub-sections (3) to (7).- In view of what is stated above, we would recommend the addition of the following provision - say, as new sub-sections - in section 160 of the Code of Criminal Procedure, 1973:

"(3) Where, under this chapter, the statement of a girl under the age of twelve years is to be recorded, either as first information of an offence or in the course of an investigation into an offence, and the girl is a person against whom an offence under section 354, 354A or 375 of the Indian Penal Code is alleged to have been committed or attempted, the statement shall be recorded either by a female police officer or by a person authorised by such organisation interested in the welfare of women or children as is recognised in this behalf by the State Government by notification in the official gazette.

(4) Where the case is one to which the provisions of sub-section (3) apply, and a female police officer is not available, the officer in charge of the police station shall, in order to facilitate the recording of the statement, forward to the person referred to in that sub-section a written request setting out the points on which information is required to be elicited from the girl.

(5) The person to whom such a written request is forwarded shall, after recording the statement of the girl, transmit the record to the officer in charge of the police station.

(6) where the statement recorded by such person as forwarded under sub-section (5) appears in any respect to require clarification or amplification, the officer in charge of the police station shall return the papers to the person by whom it was forwarded, with a request for clarification or amplification on specified matters; and such person shall thereupon record the further

statement of the girl in conformity with the request and return the papers to the officer in charge of the police station.

(7) The statement of the girl recorded and forwarded under sub-sections (3) to (6) shall, for the purpose of the law relating to the admissibility in evidence of statements made by any person, be deemed to be a statement recorded by a police officer."

4.2.1. The representatives of Sakshi supported the said recommendation and wanted us to reiterate the same.

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Report of
the Law
Commission
of India

4.2.2. The 154th Report of the Law Commission dealt with the above recommendation in paragraphs 6.5 to 6.9. After setting out the aforesaid sub-sections in para 6.5, the 154th Report makes the following comments and recommendation in paragraphs 6.6 to 6.9 of chapter XVIII:

"6.6 The origin of this suggestion in its embryonic form can be traced to the Law Commission's Reports on "Rape and Allied Offences" and "Women in Custody".

6.7 The Bill (NCW) has gone beyond the Law Commission's earlier recommendations in that, insisting on the presence of a female police

officer. Though the presence of such female officer is useful and necessary, their absence should not lead to delay in the investigation of the offences. Sub-sections (4), (5), (6) and (7) referred to above obligates the officer incharge of the police station to forward the person to a representative of a government, recognised women's organisation and the statement recorded by such person shall be deemed to be a statement recorded by the police officer.

6.8 It may be pointed out that the 1994 Bill does not incorporate the above amendment.

6.9 We are of the opinion that section 160 be amended on the lines suggested above subject to certain modifications. The recommendation made in sub-section (4) of NOW Bill is not practicable having regard to the present condition and dearth of female police officers. It may also not be practicable for the victim or any person interested in her to approach the person mentioned in sub-section (3). Instead, we suggest that sub-section (4) may be amended to the effect that where a female police officer is not available and to contact the person mentioned in sub-section (3) is difficult, the officer in charge of the police station, for reasons to be recorded in writing,

shall proceed with the recording of the statement of the victim in the presence of a relative of the victim.

Further, the age of "twelve years" be raised to "eighteen years" in conformity with the Convention on the Rights of the Child."

4.2.3. Reiteration of the recommendations made in the 154th Report.- On a consideration of all the relevant facts and the realities of life, we too are of the opinion that the procedure indicated in the sub-sections (4), (5) and (6) is too involved besides being impracticable. Implementation of the several steps mentioned in the said sub-sections (4) to (6) would indeed result in unnecessary harassment to the victim of the offence or to the complainant, as the case may be. We are inclined to agree with the opinion expressed in para 6.9 of the 154th Report of the Law Commission in this behalf. We have however changed the language of sub-section (3) by including a woman government officer. Changes are also called for in the light of the amendments effected by Act 43 of 1983 and also in the light of the recommendations made by us in paras 3.2 and 3.5 (substitution of the offence in section 375 and the addition of section 376E).

4.2.3.1. Insertion of sub-sections (3) & (4) in section 160 of the Code of Criminal Procedure, 1973.-

Accordingly, we recommend that the following two sub-sections be inserted in section 160 of the Code of Criminal Procedure:

"(3) Where under this chapter, the statement of a female is to be recorded either as first information of an offence or in the course of an investigation into an offence and she is a person against whom an offence under sections 354, 375, 376, 376A, 376B, 376C, 376D, 376E or 509 of the Indian Penal Code is alleged to have been committed or attempted, the statement shall be recorded by a female police officer and in case a female police officer is not available, by a female government servant available in the vicinity and in case a female government servant is also not available, by a female authorised by an organisation interested in the welfare of women or children.

(4) Where in any case none of the alternatives mentioned in sub-section (3) can be followed for the reason that no female police officer or female government servant or a female authorised by an organisation interested in the welfare of women and children is available, the officer in charge of the police station shall, after recording the

reasons in writing, proceed with the recording of the statement of such female victim in the presence of a relative of the victim."

4.3. Substitution of the proviso to sub-section (1) of section 160.- Sub-section (1) of section 160 deals with the power of a police officer to require the attendance of witnesses who appear to be acquainted with the facts and circumstances of the case being investigated by him. It also casts an obligation upon the person so required to attend. The proviso as it now stands, however, says that "no male person under the age of 15 years or woman shall be required to attend at any place other than the place in which such male person or woman resides". We recommend raising the age from 15 years mentioned in the said proviso to 16 years.

4.3.1. Consideration of the view of "Sakshi" regarding presence of a relative or a friend or a social worker during the investigation.- At this stage, we may deal with another suggestion put forward by Sakshi to provide that even where the statement of a male person under the age of 16 years or of a female is recorded by a police officer during the course of investigation, a relative or a friend or a social worker of the choice of such male person below 16 years or the woman, as the case may be, shall be allowed to be present throughout the period during which the statement is recorded. We are inclined to agree with

this suggestion, particularly in the light of the decision of the Supreme Court in Nandini Satpathy v. P.L. Dani (AIR 1978 SC 1025).

4.3.2. Substitution of the proviso to sub-section (1) of section 160 recommended.- Accordingly, we recommend that the proviso to sub-section (1) of section 160 be substituted to read as below:

"Provided that no male person under the age of 16 years or woman shall be required to attend at any place other than the place in which such male person or woman resides. While recording the statement, a relative or a friend or a social worker of the choice of the person whose statement is being recorded shall be allowed to remain present. The relative, friend or social worker so allowed to be present shall not interfere with the recording of statement in any manner whatsoever."

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of the Law
Commission of
India

4.4. Insertion of a new section, namely section 164A in the Code of Criminal Procedure.- The 84th Report of the Law Commission had recommended insertion of such a provision in paragraphs 4.8 to 4.11 of chapter 4. The reasons for such a provision and the provision suggested are the following:

"III. Examination of the victim

4.8 Section 164A, CrPC (To be added).- We next deal with the victim. In many cases, the report of the medical examiner as to the examination of the female victim is also found to be somewhat cursory and does not give adequate information about the material particulars which are necessary for an adjudication as to the various ingredients of section 375. Further, it is sometimes noticed that the medical examination report is not sent promptly to the investigating officer. As a result, the possibility of tampering with the report remains.

In our opinion, the report of the examination of the victim in a case of rape should (besides containing the usual formal particulars) deal specifically with -

- (i) the age of the victim,
- (ii) the question whether the victim was previously used to sexual intercourse,
- (iii) injuries to the body of the victim,
- (iv) general mental condition of the victim, and
- (v) other material particulars in reasonable detail.

It is also necessary that the report should note the time of examination and be sent without delay to the investigating officer. It is very important that the report should state reasons for the conclusions recorded.

4.9 Need for legislative provisions.- Ordinarily, such matters are left to be dealt with by executive instructions. However, having regard to the importance of the subject, it would be proper to insert in the Code of Criminal Procedure, at an appropriate place, a provision incorporating the guidelines that we have suggested above. In the light of the practical working of the provision, further improvements could be made in the relevant provisions.

4.10 Section 164A, CrPC, recommended.- Accordingly, we recommend that the following new section should be inserted in the Code of Criminal Procedure, 1973:

"164A. (1) Where, during the stage when an offence of rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged to have been committed or attempted, examined by a medical expert, such examination shall be

conducted by a registered medical practitioner, with the consent of the woman or of some person competent to give such consent on her behalf and the woman shall be forwarded to the registered medical practitioner without delay.

(2) The registered medical practitioner to whom such woman is forwarded shall without delay examine her person and prepare a report specifically recording the result of his examination and giving the following details:

- (i) the name and address of the woman and of the person by whom she was brought,
- (ii) the age of the woman,
- (iii) whether the victim was previously used to sexual intercourse,
- (iv) marks of injuries, if any, on the person of the woman,
- (v) general mental condition of the woman, and
- (vi) other material particulars, in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of some person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(6) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or of any person competent to give such consent on her behalf."

4.11 Medical examination of the victim of rape.-
In regard to the examination of the person of the accused, section 53(2) of the Code of Criminal Procedure provides that whenever the person of a female is to be examined under that section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

The question whether a provision should be inserted to the effect that where a female victim of a sexual offence is to be examined, the medical examination shall be conducted only by a female medical practitioner has been carefully considered by us. We think that a statutory provision is not necessary, for two reasons. In the first place, this is almost the invariable practice in India and a statutory mandate is not needed. In the second place, if a female victim does not wish to submit to examination by a male doctor, there is no legal obligation on her part to do so. For that reason also, a statutory provision is not necessary. It may be mentioned that such medical examination cannot be lawfully made without the consent of the woman or of some person competent to give consent."

4.5. Reiteration of the above proposal in the 154th Report.- The 154th Report of the Law Commission has reiterated the said proposal in paras 7.1 to 7.3 of chapter XVIII. The Commission expressed the opinion that such a provision is eminently desirable subject to the modification that medical examination be made preferably by a female medical practitioner. The Report also emphasises the importance and significance of a speedy and detailed medical examination of rape victims and speedy despatch of such report to the investigating officer.

4.5.1. Acceptance of the proposal with consequential changes.- We affirm and reiterate the aforesaid recommendations contained in the 84th and 154th Reports. However, in the light of the changes proposed by us in section 375, necessary changes by way of adaptation have to be made.

4.5.2. Insertion of section 164A in the Code of Criminal Procedure recommended.- Accordingly, we recommend that the following section 164A be inserted in the Code of Criminal Procedure:

"164A. (1) Where, during the stage when any offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E is under investigation and it is proposed to get the victim examined by a medical expert, such examination shall be conducted by a

registered medical practitioner, with the consent of the victim or of some person competent to give such consent on his/her behalf. In all cases, the victim should be sent for such examination without any delay.

Provided that if the victim happens to be a female, the medical examination shall be conducted by a female medical officer, as far as possible.

(2) The registered medical practitioner to whom the victim is forwarded shall without delay examine the person and prepare a report specifically recording the result of his examination and giving the following details:

(i) the name and address of the victim and the person by whom he/she was brought,

(ii) the age of the victim,

(iii) marks of injuries, if any, on the person of the victim,

(iv) general mental condition of the victim and

(v) other material particulars, in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the victim or of some person competent to give such consent on his/her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(6) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or any person competent to give such consent on his/her behalf."

The recommen-
dations of the
84th Report
of the Law
Commission
on the Code
of Criminal
Procedure

4.6. Insertion of a new section 53A in the Code of Criminal Procedure.- The 84th Report of the Law Commission had recommended the insertion of new section 53A in paras 4.5 to 4.7 of chapter 4, which reads as follows:

"II. Examination of the accused

4.5 Provision in the Code - Need for timely examination.- The Code of Criminal Procedure has, in section 53, a general provision on the subject of medical examination of the accused in all cases where such examination would afford evidence of commission of offence.

It is, however, seen that the report of the medical examination is often cursory, or is not sent in time, in cases of rape or attempt to commit rape.

In a recent Calcutta case (Narayan Dutta v. State, 1980 CrLJ 264, paras 1-2), the High Court was constrained to observe-

"It is also striking that the appellant, though arrested on that very night (9th May) was not produced before Dr. Pal (P.W. 11) who examined P.Ws. 1 and 10 on 10.5.1970."

4.6 Particulars to be entered and reasons to be given.- It is also desirable that the report should (besides containing the usual formal particulars) deal specifically with - (i) the age of the accused, (ii) injuries to the body of the accused, and (iii) other material

particulars in reasonable detail. It should also note the precise time of examination. It should be sent without delay by the registered medical practitioner to the investigating officer and the latter should file it before the Magistrate empowered to take cognisance along with the documents sent with the challan under section 173(5) of the Code.

4.7 Recommendation as to section 53, CrPC.- It is very important that reasons should be given for the opinion expressed in the report. Accordingly, we recommend the insertion in section 53 of the Code of Criminal Procedure, of the following sub-sections :

"Section 53(1A), (1B), (1C) and (1D), Code of Criminal Procedure, 1973 to be inserted.

(1A) When a person accused of rape or an attempt to commit rape is arrested and an examination of his person is to be made under this section, he shall be forwarded without delay to the registered medical practitioner by whom he is to be examined.

(1B) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused, and

(iv) other material particulars in reasonable detail.

(1C) The report shall state precisely the reasons for each conclusion arrived at.

(1D) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the report to the investigating officer,

who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

4.6.1. Views of "Sakshi" considered.- The representatives of Sakshi supported the said proposal with a few additions. By means of these additions it was sought to be provided that the registered medical practitioner shall also state in his report with respect to "any traces of blood, semen and evidence of any recent sexual activity in reasonable detail". We are, however, of the opinion that the said addition suggested by Sakshi is unnecessary since the provision as suggested by the 84th Report is comprehensive enough to take in the said particulars as well. Accordingly, we affirm and reiterate the recommendation of the 84th Report, subject, however, to changes and adaptations in the light of our recommendation for substitution of section 375 of the IPC.

4.6.2. New section 53A in the Code of Criminal Procedure, 1973 recommended.- Thus the proposed section 53A shall read as follows:

"53A. (1) When a person accused of any of the offences under sections 376, 376A, 376B, 376C, 376D or 376E or of an attempt to commit any of the said offences, is arrested and an examination of his/her person is to be made under this section,

he/she shall be sent without delay to the registered medical practitioner by whom he/she is to be examined.

(2) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:

(i) the name and address of the accused and the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused, and

(iv) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the

report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

4.7. Consequential amendments in the First Schedule to the Code of Criminal Procedure, 1973 recommended.-

Consequent upon the proposed amendments in sections 376 to 376D, 377 and 509 and the insertion of new section 376E in IPC, the First Schedule to the Code of Criminal Procedure, 1973 will need to be amended and the existing entries in respect of sections 376 to 376D, 377 and 509 of the IPC will have to be substituted and entry in respect of new section 376E will have to be inserted as under:

376	Sexual assault	Imprisonment for life or imprisonment for 10 years and fine	Ditto	Non-bailable	Court of Sessions
	Sexual assault by a man on his own wife being under 16 years of age.	Imprisonment for 3 years and fine	Non-cognizable	Ditto	Ditto
	Sexual assault committed by a person in a position of trust or authority towards the person assaulted or by a near relative of the person assaulted.	Imprisonment for life and fine	Cognizable	Non-bailable	Ditto
	Sexual assault by a police officer or by a	Imprisonment for life and fine	Cognizable	Non-bailable	Ditto

public servant
or by a person
being on the
management or on
the staff of a
jail, remand
home or other
place of custody
or women's or
children's
institution or
by a person on
the management
or on the staff
of a hospital,
taking advantage
of his official
position.

376A	Sexual assault by the husband upon his wife during separation.	Imprisonment for 7 years and fine	Cogni- zable (but only on the complaint of the victim)	Non- bailable	Ditto
376B	Sexual intercourse by public servant with person in his custody.	Imprisonment for 10 years and fine	Cogni- zable (but no arrest shall be made without a warrant or without an order of a Magistrate)	Non- bailable	Ditto
376C	Sexual intercourse by Superintendent of jail, remand home etc.	Ditto	Ditto	Ditto	Ditto
376D	Sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital.	Ditto	Ditto	Ditto	Ditto

376E	Unlawful sexual contact.	Imprisonment for 2 years, or fine or both	Non-cognizable	Bailable	Magistrate of the First Class
	Unlawful sexual contact with a young person.	Imprisonment for 3 years	Cognizable if information relating to the commission of the offence is given to an Officer-in-charge of a Police Station by the person aggrieved by the offence or by any person related to her/him by blood, or adoption or if there is no such relative, by any public servant belonging to such class or category as may be notified by the State Government in this behalf	Non-bailable	Ditto
	Unlawful sexual contact by a person in a position of trust or authority towards a young person.	Imprisonment for 7 years and fine	Ditto	Non-bailable	Court of Session
377	Delete	Delete	Delete	Delete	Delete
509	Uttering any word or making any gesture intended to insult the modesty of a woman etc.	Simple imprisonment for 3 years and fine	Cognizable	Non-bailable	Magistrate of the First Class

4.8. Amendment of sub-section (6) of section 198 of the Code of Criminal Procedure, 1973.- Consequent upon proposed amendment of section 376 of IPC, sub-section (6) of section 198 CrPC shall be amended in the following manner:

The words "sexual intercourse" shall be substituted by the words "sexual assault" and the word "fifteen" shall be substituted by the word "sixteen".

4.9. Insertion of new section 198B of the Code of Criminal Procedure, 1973.- After section 198A of the Code of Criminal Procedure, 1973, the following new section 198B shall be inserted:

"Prosecution of offences under sub-sections (2) and (3) of section 376E of the Indian Penal Code.-

No court shall take cognizance of an offence punishable under sub-sections (2) and (3) of section 376E of the Indian Penal Code (45 of 1860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by his/her father, mother, brother, sister or by

his/her father's or mother's brother or sister or, by any other person related to him/her by blood or adoption, if so permitted by the court".

4.10. Proposals for amending CrPC put forward by Sakshi with which we do not agree.- Sakshi have put forward certain other suggestions which we have set out under items 6, 7, 8 and 9 in chapter two of this report. In our opinion, the said proposals are unnecessary in view of the existing provisions and the recommendations made by us herein. It is better to leave these matters to the discretion of the court.

CHAPTER FIVE

Changes recommended in the Evidence Act, 1872

5.1. Suggestions of "Sakshi" considered.- The representatives of Sakshi have suggested three amendments to the Evidence Act, viz. (a) amendment of section 114A saying that in a prosecution for aggravated sexual assault and where sexual intercourse is proved and the question is whether it was without the consent of the complainant and the complainant states in her evidence before the court that she did not consent, the court shall presume that she did not consent; (b) clause (4) in section 155, which permits a man prosecuted for rape or an attempt to ravish, to show that the prosecutrix was of generally immoral character should be deleted and (c) in section 146, a new clause, clause (4), shall be added stating that in a prosecution for sexual assault or an attempt to commit sexual assault and where the question of consent is in issue, it shall not be permissible to put any questions in the cross-examination of the complainant with respect to his/her previous sexual history, character or conduct for proving consent or the quality of consent.

5.1.1. Suggestion No.1.- So far as the first suggestion is concerned, it has evidently been made without taking note of Act 43 of 1983 which had introduced section 114A in the Evidence Act. The section reads as follows:

"114A. Presumption as to absence of consent in certain prosecutions for rape.- In a prosecution for rape under clause (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

5.1.2. A reading of the above section shows that it does provide for the matter which the representatives of Sakshi wanted.

5.1.3. Recommendations on section 114A of the Evidence Act.- It is however necessary to point out that section 114A is confined only to the aggravated forms of rape mentioned under clauses (a) to (e) and (g) of sub-section (2) of section 376. It does not apply to sub-section (1) of section 376 or for that matter to sections 376A to 376D. But the representatives of Sakshi also wanted such a presumption to be raised only in respect of "aggravated sexual assault" and that is exactly what section 114A provides. No amendment is therefore called for in section 114A except some modifications - by way of adaptation - in the light of amendment proposed by us to section 375, IPC.

5.1.4. Modification of section 114A of the Evidence Act recommended.- Accordingly, we recommended that section 114A be modified to read as follows:

"114A. Presumption as to absence of consent in certain prosecutions for sexual assault.- In a prosecution for sexual assault under (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted and such other person states in his/her evidence before the court that he/she did not consent, the court shall presume that he/she did not consent.

Explanation: "Sexual intercourse" in this section and sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

5.1.4.1. It goes without saying that the aforesaid presumption is a rebuttable presumption of law ('shall presume') within the meaning of section 4 of the Evidence Act.

5.1.5. Consideration of the suggestion of "Sakshi" to create presumption in respect of the age of the victim.-

We may in this connection refer to another suggestion of Sakshi that a similar presumption be created in respect of the age of the victim. We however do not see any necessity for such a provision since the question of age is really and ultimately a matter of evidence and be better left to the judgment of the court.

5.2.1. Suggestion No.2.- For a proper appreciation of the suggestion for amendment of section 155, it would be appropriate to set out section 155 in full (omitting the illustrations). It reads as follows:

"155. Impeaching credit of witness.- The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the court, by the party who calls him:-

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.- A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though if they are false, he may afterwards be charged with giving false evidence."

5.2.2. Section 155 sets out the manner in which the credit of a witness may be impeached. Clause (4) specifically deals with prosecution for rape. In such a prosecution, the Act permits the man prosecuted for rape (or an attempt to ravish) to show that the prosecutrix was of generally immoral character. We are of the opinion that this clause ought to be deleted. We see no relevance or reasonable connection between offence of sexual assault (mentioned under sections 375 to 376E) and the general immoral character of the victim. No one can claim to have a right to have forced sexual intercourse with a woman even if she is generally of an immoral character. In this

context, we may refer to the pertinent observations of the Supreme Court in State of Punjab v. Gurmit Singh (AIR 1996 SC 1393) which are to the following effect:

"15. We must express our strong disapproval of the approach of the trial Court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial. The Courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole - where the victim of crime is discouraged - the criminal encouraged and in turn crime gets rewarded. Even in cases, unlike the present case, where there is some acceptable material on the record to show that the victim was habituated to sexual intercourse, no such inference like the victim being a girl of "loose moral character" is permissible to be drawn from that circumstance alone. Even if the prosecutrix, in a given case, has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit

herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. No stigma, like the one as cast in the present case should be cast against such a witness by the Courts, for after all it is the accused and not the victim of sex crime who is on trial in the Court."

5.2.3. Deletion of clause (4) of section 155 of the Evidence Act recommended.- Reference may also be made in this context to the 84th Report of the Law Commission which, inter alia, deals with this aspect. In chapter 7 of the Report under item "V. Past Sexual History" the Commission had emphasised the desirability of amending clause (4) in section 155 (to make such questions permissible only to the extent of her previous sexual relationship with the accused but otherwise to bar any questions regarding the prosecutrix's general immoral character or previous sexual experience) as well as addition of a new clause, clause (4) in section 146. Indeed the Commission had recommended insertion of a new section, section 53A in the Act. It is not necessary to set out the entire reasoning given in the 84th Report in support of amendment of clause (4) in section 155 inasmuch as the purport of such amendment is now incorporated by us in section 146. In that view, clause (4) in section 155 becomes untenable. We therefore recommend deletion of clause (4) of section 155.

5.3.1. Suggestion No.3.- So far as the addition of a new clause, namely, clause (4) in section 146 is concerned, the 84th Report of the Law Commission had suggested the following addition:

"(4) In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the prosecutrix as to her general immoral character, or as to her previous sexual experience with any person other than the accused for proving such consent or the quality of consent."

5.3.2. The 84th Report of the Law Commission had further recommended the addition of a new section, section 53A, to the following effect:

"53A. In a prosecution for rape or attempt to commit rape, where the question of consent to sexual intercourse or attempted sexual intercourse is at issue, evidence of the character of the prosecutrix or of her previous sexual experience with any person other than the accused shall not be relevant on the issue of such consent or the quality of consent."

5.3.3. Obviously, section 53A was recommended to be inserted for the reason that section 146 is confined to questions that may be put in cross-examination and is therefore of a limited operation, whereas section 53A is much wider and bars such evidence to be adduced in any manner whatsoever.

5.3.4. Reiteration of the recommendations made in the 84th Report and reference to the New South Wales Law Reform Commission's recommendations.- We are in agreement with the above recommendations contained in the 84th Report of the Law Commission and do herewith reiterate them. In this context, however, we may refer to a set of recommendations proposed by the New South Wales Law Reform Commission to amend section 409B of the Crimes Act, 1900 (New South Wales). Sub-section (2) of section 409B of the New South Wales Act provides that "in prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible". Sub-section (3) makes evidence of any sexual experience or lack of sexual experience of the complainant equally inadmissible except in certain specified situations. The New South Wales Law Commission has proposed retaining the existing sub-section (2) as clause (a) of sub-section (2) and to add a new clause, clause (b) in sub-section (2). It has also proposed addition of sub-sections (3) to (11).

We do not however propose to set out all the said proposed sub-sections, except sub-section (2), which reads as follows:

"(2)(a) In proceedings to which this section applies, evidence relating to the sexual reputation of the complainant is inadmissible.

(b) Notwithstanding sub-section (2)(a), evidence about any sexual experience or sexual activity, or lack of experience or activity, of the complainant shall not be inadmissible merely because it also relates to the sexual reputation of the complainant."

5.3.5. For ready reference, we are enclosing both section 409B as it now stands as well as the recommendation for its amendment as suggested by the New South Wales Law Reform Commission. (The recommendation was made in November 1998.) (Annexure-F)

5.3.6. We do not think that we need to draw any inspiration from the highly involved and intricate provisions suggested by the New South Wales Law Reform Commission by way of clause (b) of sub-section (2) or by way of sub-sections (3) to (7) of S.209-B. The provision as suggested herein are sufficient. It is, of course, for

the government to decide whether any provisions on the lines of the suggestions made by the New South Wales Law Commission should be made.

5.3.7. In the light of changes proposed by us in section 375, the language of section 53A and of clause (4) in section 146, recommended in the 84th Report of the Law Commission, have to be modified and adapted.

5.3.8. Consequential amendments recommended in proposed section 53A and proposed clause (4) of section 146 of the Evidence Act.- Accordingly, we recommend that the following amendments be made in the Evidence Act:

5.3.8.1. After section 53, the following section be inserted:

"53A. In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

5.3.8.2. In section 146 of the Evidence Act, the following clause shall be added after clause (3):

"(4) In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his/her general immoral character, or as to his/her previous sexual experience with any person for proving such consent or the quality of consent."

CHAPTER SIX

Miscellaneous Suggestions of Sakshi

6.1. The representatives of Sakshi have made three other suggestions which we have set out under items 11, 12 and 13 in chapter two of this Report. So far as suggestion under item 11 is concerned, we may refer to section 273 of the Criminal Procedure Code, which requires that "except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding, shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader". We do not think that this general principle, founded upon natural justice, should be done away with altogether in trials and enquiries concerning sexual offences. In an appropriate case, it may be open to the prosecution to request the court to provide a screen in such a manner that the victim does not see the accused, while at the same time providing an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his advocate for an effective cross-examination. However, with a view to allay any apprehensions on this score, a proviso can be added to section 273 of the Criminal Procedure Code to the following effect:

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused".

The proviso can be placed above the Explanation to the Section.

6.2. The suggestion mentioned under item 12 is, in our opinion, impractical; it is not possible to accede to the said request. The same comment holds good with respect to the proposal under item 13. We are therefore unable to make any recommendation for the present in terms of or on the basis of the aforesaid requests of Sakshi.

CHAPTER SEVEN

CONCLUSION

7.1. On the basis of the discussions contained in the preceding chapters, the Commission is of the considered opinion that the following amendments need to be carried out in the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

7.2. Changes recommended in the Indian Penal Code, 1860

7.2.1. Substitution of existing section 375 of the IPC recommended.- The existing section 375 be substituted by the following:

"375. Sexual Assault: Sexual assault means -

(a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with -

- i) any part of the body of another person or
- ii) an object manipulated by another person

except where such penetration is carried out for proper hygienic or medical purposes;

- (b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;
- (c) introducing any part of the penis of a person into the mouth of another person;
- (d) engaging in cunnilingus or fellatio; or
- (e) continuing sexual assault as defined in clauses (a) to (d) above

in circumstances falling under any of the six following descriptions:

First- Against the other person's will.

Secondly- Without the other person's consent.

Thirdly- With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly- Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly- With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly- With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault."

Further we are not satisfied that the Exception should be deleted.

(paragraphs 3.1.2 and 3.1.2.1, supra)

7.2.2. Recasting of section 376 of the IPC recommended.-

Section 376 shall be recast as follows:

"376. Punishment for sexual assault - (1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the person subjected to sexual assault is his own wife and is not under sixteen years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

If the sexual assault is committed by a person in a position of trust or authority towards the person assaulted or by a near relative of the person assaulted, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than minimum punishment prescribed in this sub-section.

(2) Whoever,-

(a) being a police officer commits sexual assault-

(i) within the limits of the police station to which he is appointed; or

(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 person in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital; or

(e) commits sexual assault on a woman knowing her to be pregnant; or

(f) commits sexual assault on a person when such person is under sixteen years of age; or

(g) commits gang sexual assault,

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

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- Where a person is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang sexual assault within the meaning of this sub-section.

Explanation 2.- "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.- "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."

(paragraph 3.2.3, supra)

7.2.3. Modification in section 376A of the IPC recommended.- Section 376A shall read as follows:

"376A. Sexual assault by the husband upon his wife during separation.- Whoever commits sexual assault upon his wife, who is living separately from him under a decree of separation or under any custom or usage, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to seven years and shall also be liable to fine."

(paragraph 3.3.1, supra)

7.2.4. Amendment of sections 376B, 376C and 376D.- We recommend enhancement of punishment - with a minimum punishment of not less than five years. We have also added an Explanation which will govern all these three sections. The Explanation defines "sexual intercourse" to mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 will however apply even in the case of sexual intercourse as defined by the Explanation to this section.

Accordingly, the modified sections 376B, 376C and 376D of the IPC shall read as follows:

"376B. Sexual intercourse by public servant with person in his custody.- Whoever, being a public servant, takes advantage of his/her official position and induces or seduces any person, who is in his/her custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation: "Sexual intercourse" in this section and sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

"376C. Sexual intercourse by superintendent of jail, remand home, etc.- Whoever, being the superintendent or manager of a jail, remand home or other place of custody

established by or under any law for the time being in force or of a women's or children's institution takes advantage of his/her official position and induces or seduces any inmate of such jail, remand home, place or institution to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation 1.- "Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he/she can exercise any authority or control over its inmates.

Explanation 2.- The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376.

376D. Sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital.-

Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his/her position and has sexual intercourse with any person in that hospital, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation.- The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376."

(paragraphs 3.4 & 3.4.1, supra)

7.2.5. Insertion of new section 376E recommended.- A new section, namely, section 376E be inserted in the IPC in the following terms:

"376E. Unlawful sexual contact.- (1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of

another person, not being the spouse of such person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.

(2) Whoever, with sexual intent, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites, or touches, with sexual intent, directly or indirectly, with a part of the body or with an object any part of the body of a young person, shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

(3) Whoever being in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine.

Explanation: "Young person" in this sub-section and sub-section (2) means a person below the age of sixteen years."

(paragraphs 3.5 & 3.5.1, supra)

7.2.6. Deletion of section 377.- Section 377, IPC deserves to be deleted in the light of the changes effected by us in section 375 to 376E. We leave persons having carnal intercourse with any animal, to their just deserts.

(paragraph 3.6, supra)

7.2.7. Amendment of section 509, IPC.- We recommend that the existing section 509 be amended as follows:

"509. Word, gesture or act intended to insult the modesty of a woman:

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years and shall also be liable to fine."

(paragraph 3.7, supra)

7.2.8. New section 166A, IPC recommended.- We recommend that a new section 166A be introduced in the IPC in the following terms:

"166A. Whoever, being a public servant-

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

(paragraphs 3.8 & 3.8.1, supra)

7.2.9. No definition of the expression "consent" is called for at this stage.

(paragraph 3.9, supra)

7.3. Changes recommended in the Code of Criminal Procedure, 1973

7.3.1. Insertion of sub-sections (3) and (4) in section 160 of the Code of Criminal Procedure, 1973.- We recommend that the following two sub-sections be inserted in section 160 of the Code of Criminal Procedure:

"(3) Where under this chapter, the statement of a female is to be recorded either as first information of an offence or in the course of an

investigation into an offence and she is a person against whom an offence under sections 354, 375, 376, 376A, 376B, 376C, 376D, 376E or 509 of the Indian Penal Code is alleged to have been committed or attempted, the statement shall be recorded by a female police officer and in case a female police officer is not available, by a female government servant available in the vicinity and in case a female government servant is also not available, by a female authorised by an organisation interested in the welfare of women or children.

(4) Where in any case none of the alternatives mentioned in sub-section (3) can be followed for the reason that no female police officer or female government servant or a female authorised by an organisation interested in the welfare of women and children is available, the officer in charge of the police station shall, after recording the reasons in writing, proceed with the recording of the statement of such female victim in the presence of a relative of the victim."

(paragraphs 4.2.3 & 4.2.3.1, supra)

7.3.2. Modification of the proviso to sub-section (1) of section 160.- We recommend raising the age mentioned in the proviso to sub-section (1) of section 160 from fifteen years to sixteen years.

(paragraph 4.3, supra)

7.3.3. Substitution of the proviso to sub-section (1) of section 160 recommended.- We recommend that in addition to the above modification, the proviso to sub-section (1) of section 160 be substituted to read as follows:

"Provided that no male person under the age of 16 years or woman shall be required to attend at any place other than the place in which such male person or woman resides. While recording the statement, a relative or a friend or a social worker of the choice of the person whose statement is being recorded shall be allowed to remain present. The relative, friend or social worker so allowed to be present shall not interfere with the recording of statement in any manner whatsoever."

(paragraphs 4.3.1 & 4.3.2, supra)

7.3.4. Insertion of a new section, namely, section 164A in the Code of Criminal Procedure, 1973.- We recommend that the following section 164A be inserted in the Code of Criminal Procedure:

"164A. (1) Where, during the stage when any offence under section 376, section 376A, section 376B, section 376C, section 376D or section 376E is under investigation and it is proposed to get the victim examined by a medical expert, such examination shall be conducted by a registered medical practitioner, with the consent of the victim or of some person competent to give such consent on his/her behalf. In all cases, the victim should be sent for such examination without any delay.

Provided that if the victim happens to be a female, the medical examination shall be conducted by a female medical officer, as far as possible.

(2) The registered medical practitioner to whom the victim is forwarded shall without delay examine the person and prepare a report specifically recording the result of his examination and giving the following details:

(i) the name and address of the victim and the person by whom he/she was brought,

(ii) the age of the victim,

(iii) marks of injuries, if any, on the person of the victim,

(iv) general mental condition of the

victim and

(v) other material particulars, in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the victim or of some person competent to give such consent on his/her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(6) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or any person competent to give such consent on his/her behalf."

(paragraphs 4.5.1 and 4.5.2, supra)

7.3.5. Insertion of new section 53A in the Code of Criminal Procedure recommended.- The proposed section 53A shall read as follows:

"53A. (1) When a person accused of any of the offences under sections 376, 376A, 376B, 376C, 376D or 376E or of an attempt to commit any of the said offences, is arrested and an examination of his/her person is to be made under this section, he/she shall be sent without delay to the registered medical practitioner by whom he/she is to be examined.

(2) The registered medical practitioner conducting such examination shall without delay examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:

(i) the name and address of the accused and the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused, and

(iv) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report, and the registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section."

(paragraph 4.6.2, supra)

7.3.6. Consequential amendments in the First Schedule to the Code of Criminal Procedure, 1973 recommended.-

Consequent upon the proposed amendments in the IPC, the existing entries in respect of sections 376 to 376D, 377 and 509 will have to be substituted and entry in respect of new section 376E, IPC will have to be inserted as under:

376	Sexual assault	Imprisonment for life or imprisonment for 10 years and fine	Ditto	Non-bailable	Court of Sessions
	Sexual assault by a man on his own wife	Imprisonment for 3 years and fine	Non-cognizable	Ditto	Ditto

being
under 16 years
of age.

Sexual assault
committed by
a person in a
position of
trust or
authority
towards the
person assaulted
or by a near
relative of the
person assaulted.

Imprisonment
for life and
fine

Cogni- Non-
zable bailable

Ditto

Sexual assault
by a police
officer or by a
public servant
or by a person
being on the
management or on
the staff of a
jail, remand
home or other
place of custody
or women's or
children's
institution or
by a person on
the management
or on the staff
of a hospital,
taking advantage
of his official
position.

Imprisonment
for life and
fine

Cogni- Non-
zable bailable

Ditto

376A Sexual assault
by the husband
upon his wife
during separation.

Imprisonment
for 7 years
and fine

Cogni- Non-
zable bailable
(but only
on the
complaint
of the
victim)

Ditto

376B Sexual
intercourse by
public servant
with person in
his custody.

Imprisonment
for 10 years
and fine

Cogni- Non-
zable bailable
(but no
arrest
shall be
made
without a
warrant or
without an
order of a
Magistrate)

Ditto

376C	Sexual intercourse by Superintendent of jail, remand home etc.	Ditto	Ditto	Ditto	Ditto
376D	Sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital.	Ditto	Ditto	Ditto	Ditto
376E	Unlawful sexual contact.	Imprisonment for 2 years, or fine or both	Non-cognizable	Bailable	Magistrate of the First Class
	Unlawful sexual contact with a young person.	Imprisonment for 3 years	Cognizable if information relating to the commission of the offence is given to an Officer-in-charge of a Police Station by the person aggrieved by the offence or by any person related to her/him by blood, or adoption or if there is no such relative, by any public servant belonging to such class or category as may be notified by the State Government in this behalf	Non-bailable	Ditto
	Unlawful sexual contact by a person in a position of	Imprisonment for 7 years and fine	Ditto	Non-bailable	Court of Session

trust or
authority
towards a
young person.

377	Delete	Delete	Delete	Delete	Delete
509	Uttering any word or making any gesture intended to insult the modesty of a woman etc.	Simple imprisonment for 3 years and fine	Cognizable	Non-bailable	Magistrate of the First Class

(paragraph 4.7, supra)

7.3.7. Amendment of sub-section (6) of section 198 of the Code of Criminal Procedure, 1973.- Consequent upon proposed amendment of section 376 of IPC, sub-section (6) of section 198 CrPC shall be amended in the following manner:

The words "sexual intercourse" shall be substituted by the words "sexual assault" and the word "fifteen" shall be substituted by the word "sixteen".

(paragraph 4.8, supra)

7.3.8. Insertion of new section 198B of the Code of Criminal Procedure, 1973.- After section 198A of the Code of Criminal Procedure, 1973, the following new section 198B shall be inserted:

"Prosecution of offences under sub-sections (2) and (3) of section 376E of the Indian Penal Code

No court shall take cognizance of an offence punishable under sub-sections (2) and (3) of section 376E of the Indian Penal Code (45 of 1860) except upon a police report of facts which constitute such offence or upon a complaint made by the person aggrieved by the offence or by his/her father, mother, brother, sister or by his/her father's or mother's brother or sister or, by any other person related to him/her by blood or adoption, if so permitted by the court".

(paragraph 4.9, supra)

7.3.9. Amendment of section 273, Code of Criminal Procedure, 1973.- A proviso to the following effect be added under section 273 above the Explanation clause therein:

"Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused".

(paragraph 6.1, supra)

7.4. Changes recommended in the Indian Evidence Act, 1872

7.4.1. Modification of section 114A of the Evidence Act recommended.- We recommend that section 114A be modified to read as follows:

"114A. Presumption as to absence of consent in certain prosecutions for sexual assault.- In a prosecution for sexual assault under (a) or clause (b) or clause (c) or clause (d) or clause (e) or clause (g) of sub-section (2) of section 376 of the Indian Penal Code (45 of 1860) where sexual intercourse by the accused is proved and the question is whether it was without the consent of the other person alleged to have been sexually assaulted and such other person states in his/her evidence before the court that he/she did not consent, the court shall presume that he/she did not consent.

Explanation: "Sexual intercourse" in this section and sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

(paragraph 5.1.4, supra)

It goes without saying that the aforesaid presumption is a rebuttable presumption of law ("shall presume") within the meaning of section 4 of the Evidence Act.

(paragraph 5.1.4.1, supra)

7.4.2. Deletion of clause (4) of section 155 of the Evidence Act.- We recommend deletion of clause (4) of section 155 of the Evidence Act.

(paragraphs 5.2.2 and 5.2.3, supra)

7.4.3. Amendments recommended in proposed section 53A, Evidence Act.- We recommend that after section 53, the following section be inserted:

"53A. In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of his/her previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent."

(paragraph 5.3.8.1, supra)

7.4.4. Insertion of clause (4) in section 146 of the Evidence Act recommended.- In section 146 of the Evidence Act, the following clause shall be added after clause (3):

"(4) In a prosecution for an offence under section 376, 376A, 376B, 376C, 376D or 376E or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to his/her general immoral character, or as to his/her previous sexual experience with any person for proving such consent or the quality of consent."

(paragraph 5.3.8.2, supra)

We recommend accordingly and urge the Government to initiate steps to amend all the three Acts, namely, the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act on the lines suggested by us.

(MR. JUSTICE B.P. JEEVAN REDDY)(RETD)

CHAIRMAN

(MS. JUSTICE LEILA SETH)(RETD)(DR. N.M. GHATATE)(DR. SUBHASH C. JAI

MEMBER

MEMBER

MEMBER SECRETARY

Dated: 13.03.2000

In The Supreme Court of India
Criminal Original Jurisdiction
Writ Petition (criminal) No. 33 of 1997

In the matter of:

Sakshi

Petitioner

Versus

Union of India

Respondent

PART I: Precise Issues submitted for consideration of the Law Commission and the Government of India

1. Given the widespread prevalence of child sexual abuse and bearing in mind the provisions of the Criminal Law (Amendment) Act 1983 which specifically inserted section 376 (2)(f) envisaging the offence of "rape" of a girl child howsoever young below 12 years of age, whether the expression "sexual intercourse" as contained in section 375 of the Indian Penal Code should correspondingly include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration; and whether the expression "penetration" should not be so clarified in the Explanation to section 375 of the Indian Penal Code. (Reference is invited to Note #1 at Appendix "A" attached to this Part).

2. Whether a restrictive interpretation of "penetration" in the Explanation to section 375 (rape) defeats the very purpose and intent of the provisions for punishment for rape u/s 376 2(f) "Whosoever commits rape on a woman when she is under twelve years of age" (Reference is invited to Note #2 at Appendix "A" attached to this Part)

3. Whether, penetrative abuse of a child below the age of 12 should no longer be arbitrarily classified according to the 'type' of penetration (ignoring the 'impact' on such child) either as an "unnatural offence" u/s 377 IPC for penile/oral penetration and penile/anal penetration) or otherwise as "outraging the modesty of a woman" u/s 354 for finger penetration or penetration with an inanimate object). (Reference is invited to Note #3 (a) at Appendix "A" attached to this Part)

4. Whether non-consensual penetration of a child under the age of 12 should continue to be considered as offenses u/s 377 ("Unnatural Offenses") on par with certain forms of consensual penetration (such as consensual homosexual sex) where a consenting party can held liable as an abettor or otherwise. (Reference is invited to Note 3(b) at Appendix "A" attached hereto)

Appendix 'A'

Note #1:

Prior to 1983 the law of rape provided *inter alia* as under:

- a. Under section 375 and 376 IPC, rape was defined as non-consensual sexual intercourse with a woman. The explanation to section 375 IPC provides:

"Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. "

Under section 376 IPC, the punishment for rape as aforesaid was for a term which could extend to ten years or imprisonment for life and a fine.

- b. Subsequent to the Criminal Law (Amendment) Act 1983, the law for the first time provided that "Whoever... commits rape on a woman when she is under twelve years of age... shall be punished with rigorous imprisonment for a terms which shall not be less than ten year but which may be for life and shall also be liable to a fine" (section 376(2)(f). Not content with section 375 which limited abuse to females under 16 years of age, the provision introduced in 1983 for the first time envisaged the offense of rape of a girl child howsoever young below twelve years of age. The possibility of 'penetration' vaginally/anally/orally of a girl child by any body part or object not necessarily penile cannot now be ruled

out. To do so would be to view the sexual abuse of minors in terms of an adult yardstick rather than in terms of the child's experience of it. On the contrary, since a girl child of even one year of age falls within the scope of section 376(2)(f) the word "penetration" in the Explanation in section 375 cannot be restricted to penile/vaginal penetration

Note # 2:

The petitioner draws support from the well established view that the vast majority of criminal "child sexual abuse" does not necessarily involve penile-vaginal penetration. A large body of research confirms that non-penile/vaginal sexual contact can cause lasting psychic damage. A restrictive definition of sexual intercourse to penile/vaginal penetration therefore would vastly undercount the number of children severely harmed by this practice (Reference is invited to pg. 22/23 and 108-112 of the paperbook)

Note #3 (a)

The Law Commission of India in its 156th report has recommended that child sexual abuse in the form of penile/ oral penetration and penile/anal penetration be covered u/s 377 IPC while finger penetration and penetration of inanimate objects into the vagina or anus of a female child can be adequately covered u/s 354 with a more severe punishment. The petitioner submits that such a recommendation requires reconsideration. Arbitrary classification of 'penetration' in the Explanation to section 375, not only fails to take into account the perceived intent of the Criminal Law (Amendment) Act of 1983 which specifically included section 376 (2)(f) "rape of a woman

when she is under 12 years of age" but also fails consider the social context reality of child sexual abuse wherein sexual abuse of children is most often by a person known to them (Reference is invited to pg. 22/23, 109-112 of the main paper book). It is submitted that under an existing contemporary understanding, rape has been understood in terms of its impact- as an intention to humiliate, violate and degrade a woman sexually and therefore adversely affect the sexual integrity and autonomy of women and children.

While admitting that sexual abuse of children, particularly minor girl children by means other than penile/vaginal penetration is common and may take the form of penile/anal penetration/penile/oral penetration, finger/anal penetration, finger/vaginal penetration or object/vaginal penetration, the said recommendation of the Law Commission defeats the very intent of the amendment of section 376 IPC 2(f) (inserted by the 1983 Amendment).

Such an arbitrary classification of penetration of a child of young years fails to recognise the impact of sexual abuse on a child of tender years regardless of which orifice is penetrated and how. It further assumes that a child under the age of twelve, for instance who is 2 years old, would in each instance be able to discern the degree of difference in terms of which of its orifices are penetrated and how.

The petitioner wishes to cite the following instances to illustrate the present impact of a narrow and restrictive interpretation of 'penetration' u/s section 375 when applied to child sexual abuse:

- a. A six year old child was sexually molested. The 18 year old accused has not succeeded in penetration with her and hence inserted an iron rod in her vagina which caused serious injuries to her, including a ruptured uterus and she had to be hospitalised for a month.
- b. A five year old girl was raped by a youth from her neighbourhood. The girl was made to lie down on her stomach and was raped from behind. The girl suffered severe injuries. At the time of evidence in the court, the girl, not knowing anything about the penis or genital organs of the male and too young to understand the difference between a penis and finger, coupled with the fact that she was raped from behind admits a suggestion in cross-examination that a finger was inserted.
- c. Over a period of two time, the father of a young female child who is now six years of age repeatedly penetrates her vagina and anus with his finger and asks the child to suck his penis.
- d. An accused was charged under section 354 IPC for fondling the private parts of the 1 year old baby girl. The argument advanced was that a 1 year old baby cannot be said to possess a sense of modesty. Hence there could be no question of outraging his/her modesty.

It is submitted that each of the aforesaid cases would not be considered rape if a narrow and restrictive meaning is given to "penetration" in the Explanation to section 375 IPC. This would defeat the very purpose and intent of specifically adding section 376(2)(f) to address the widespread prevalence of child sexual abuse.

Note # 3(b)

Under the present recommendation of the Law Commission in its 156th report, the examples cited above in Note 3 (a) would be understood as follows:

- Examples (a), part of (c) and (d) would be seen as offences falling within section 354 IPC ("outraging the modesty of a woman" punishable with imprisonment which may extend to two years).
- Examples (b) and the second part of example (c) would be considered offenses u/s 377 IPC (carnal intercourse against the order of nature.) In other words, the nature of penetration and not the impact on a child of tender years would determine the severity of the offense.

Further, certain types of penetration (penile/oral and penile/anal) of a child would be tried as offenses on par with crimes of consensual sexual relations u/s 377 in which a consenting party may be held liable as an abettor (See *D.P. Minwalla v. Emperor* Vol 36 (1935) Cr.LJ 877, AIR 1935 SIND 78) or otherwise bestiality (*Khanu v. Emperor* (1924) 19 SLR 327, a case of penile/nostril penetration with a bullock).

As stated by the Law Commission of India Report (No.42) of 1971 section 377 was created to punish certain kinds of 'moral turpitude' as "Indian society, by and large, disapproves of homosexuality and this disapproval is strong enough to justify it being treated as a criminal offense even where

adults indulge in it in private". (Reference is invited to page 15 of the main paperbook).

In view of the above, the petitioner submits that the focus of section 377 is to punish the 'unnaturalness' of certain kinds of sexual behaviour irrespective of consent. It can not have been the intent of the legislature to club together offenses of consensual intercourse and moral turpitude with those of non-consensual sexual violence such as child sexual abuse, more so when the latter has been specifically provided for in 1983 when it included a special provision for sexual abuse of girls under the age of twelve under section 376(2)(f).

The 156th Report unwittingly negates any distinction between section 354 and 377 IPC which were intended to punish hurt and moral turpitude respectively and sections 375/376 which were intended to punish sexual violence.

In 1968 a similar ambiguity arose with respect to section 377 of the Indian Penal Code which penalises "unnatural offenses" which are basically consensual in nature. The section penalises "Whoever voluntarily has carnal intercourse against the order of nature..." A single judge of the High Court of Gujarat allowing for change in social conditions etc. since the passing of the law construed the expression "carnal intercourse" as not just "sodomy" (with which it was associated at the time of drafting the Penal Code) but also as including oral intercourse (see AIR 1968 Guj 252)

It is well settled that in light of the rule in *Heyden's* case, that the language permitting, as in the present case, a penal statute may also be construed to avoid a lacuna and to suppress the mischief and advance the remedy. It follows that the substance and reality of section 376(2)(f) and not merely the form ought to be taken into consideration for appropriately construing "penetration" in the Explanation to section 375 read with section 376(2)(f)

PART II: Existing inadequacies

Because of existing inadequacies in the system, the questions have been posed with suggested answers at Appendix 'B' to this Part. The instances cited at Appendix 'B' of this Part show that even though each incident related therein may cause severe and untold psychological trauma for the girl child, under the existing provisions of the Indian Penal Code, it becomes difficult to identify the precise offense. In each of the cases cited in the Appendix, while it may not amount to rape u/s 375/376 IPC, it would also not amount to an "unnatural offense" u/s 377 or to "outraging the modesty of a woman" u/s 354 IPC but might just be a limited form of assault or criminal force, if at all. Such offenses cannot possibly come within the confines of a particular offense under the IPC namely given the limited parameters of the existing law. It is imperative therefore that there be a re-thinking on this issue and that an offense of "sexual assault" should be more precisely defined and its parameters indicated. An attempt has been made in this regard below.

APPENDIX 'B': The following questions are posed and suggested answers furnished.

1. A three year old child has been ejaculated on but in no way penetrated by a neighbour. How do we categorise this offense?

Ans: At most the offense might be categorised as an offence u/s 509 IPC "Whoever, intending to insult the modesty of any woman.... intrudes upon the privacy of such woman... shall be punished with simple imprisonment for a term which may extend to one year...."

2. The elderly neighbour person, daily calls the small male child of 5 years in his house, exposes his genitals to him and asks him to do the same. What offense, if any, has he committed?

Ans: As there is no provision under the Indian Penal Code for sexual abuse of a male child, the offence may, if at all, fall within the meaning of "Criminal Force" u/s 349/350 for which punishment "may extend to three months" provided there has not been any "grave and sudden provocation" on the part of the child.

3. The accused was charged u/s 354 IPC for fondling the private parts of the 1 year old baby girl. The argument advanced was that a 1 year old boy cannot be said to possess any sense of modesty. Hence there ~~can~~^{could} be no question of outraging his/her modesty.

4. The uncle of a 5 year old male child frequently undresses him, touches his genitals and asks the child to do the same. Categorise this offense.

Ans. This offense is limited to the same extent as example #2. At most this situation might be punished as Criminal Force u/s 349/350 and 352 IPC.

5. Over a period of time, when no one is at home, a six year old girl is lovingly asked by her father to masturbate him. What would you call this offense, if any?

Ans: There is no offense under the existing Indian Penal Code.

6. The uncle of an 11 year old invites her over to his house, offers her expensive gifts and asks her to undress so that he can photograph her in different poses. How would you categorise this offence?

Ans.: There is no provision in the Indian Penal Code which would describe this practise as an offence.

PART III: Suggestions for amendment to the Indian Penal Code

The petitioner suggests the following amendment to the offense of "rape" in the Indian Penal Code to cover the broad experiences of "sexual assault."¹

1. Delete existing sections 354/375/376 and 509 of the IPC and add the following:

2. Proposed definition of "Sexual Assault"

"375. Sexual Assault

1. A person commits sexual assault against another where such person engages in any of the activities set out in subsection 2(a) to 2(c) against the will or without the consent of the other person against whom such offence is committed,

Provided that where such sexual assault is committed against a minor, the question of consent is irrelevant.

EXPLANATION : A minor is a person who is ___ years of age or under.

¹ Reference is invited to the law of Western Australia and Canada where the offence of "rape" has been eliminated and an offence of "sexual assault" has evolved. Further reference is invited to the draft "Sexual Assault Against Women and Children" legislation prepared by a Subcommittee of the National Commission for Women, 1992.

Reference is also invited to the following assessment of "sexual assault" law reform in Canada:

- Confronting Sexual Assault: A Decade of Legal and Social Change Edited by Julian v. Roberts and Renate M. Mohr, 1994 (Provides inter alia, a comprehensive analysis of the redefinition of rape as "sexual assault" and its impact on child sexual abuse cases)
- "the New Sexual Assault Law: What Has Been Its Effect" by K. Edward Renner and Suresh Sahjpaui Canadian Journal of Criminology, pp. 407-413 (provides statistical support for increased reporting under a new law of sexual assault as opposed to an earlier law of rape)
- "Inconsistencies and Contradictions in Canada's Sexual Assault Law" by R. Hinch, Canadian Policy XIV no.3 September, 1988 (pp. 282-294)

3. "Sexual Assault" includes

- a) The introduction (to any extent) by a man of his penis, into the vagina , the external genitalia, anus or mouth of another person
- b) The introduction (to any extent) by a person of any object or a part of the body (other than the penis) into the vagina or anus of another person.
- c) Where any person, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person.
- d) Where any person for a sexual purpose, invites, counsels or incites a minor person to touch, directly or indirectly , with a part of the body or with an object, the body of any person including the body of the person who so invites counsels or incites and the body of the person invited. counseled or incited.
- e) Where any person with a sexual purpose utters any word. makes any sound or gesture, or exhibits any object or part of the body intending that such word or sound shall be heard, or that such gesture or exhibition shall be seen by a person or intrudes upon the privacy of such a person.

4. (a) For the purposes of section 375 (1) "consent" means the unequivocal voluntary agreement of the woman to engage in the sexual activity in question.

(b) No consent is obtained for the purpose of section 375 (1):

- i). When the consent has been obtained by putting the woman or any person whom the woman is interested in fear of death or of injury.

- ii). When such consent is given because the woman believes or is given to believe that the man is her husband.
- iii). When at the time of giving such consent, by reason of unsoundness of mind or intoxication or because of the administration by him personally or through another of any stupefying substance, the woman is unable to understand the nature and consequences of the act.
- iv) When the agreement is expressed by the words or conduct of a person other than the woman.
- v) The woman is mistaken about the identity of the man.
- vi) The woman is mistaken about the sexual nature of the act or mistakenly believe that the sexual activity is for medical, ritualistic purificatory, therapeutic, psychological or spiritual purpose.
- vii) The person is or appears to be a minor"

(3) " 375 A. Aggravated sexual assault

A person commits an aggravated form of sexual assault when-

- 1(a) Such person being a police man/ woman commits sexual assault on a women or minor;
 - i) within the limits of a police precinct.
 - ii) in his or her custody or in the custody of a police person subordinate to him or her; or
 - iii) in his or her custody or in the custody of a police person subordinate to him or her; or
 - iv) while such person is in uniform

b) Being a personnel in the armed forces commits sexual assault on a person while on duty.

c) Being a public servant, commits sexual assault on a person in his custody or in the custody of a public servant subordinate to him.

d) Being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution commits sexual assault on any inmate of such jail, remand home or institution; or

e) Being on the management or on the staff of a hospital commits sexual assault on a person in that hospital .

f). Being in a position of trust, authority , guardianship or of economic or social dominance commits sexual assault on a person under such trust, authority or dominance.

(2)(a) Such person commits a sexual assault on a women who is pregnant.

(b) Such person commits a sexual assault on a woman who is suffering from mental or physical disability.

(c) Such person commits sexual assault on a minor.

(3) While committing a sexual assault causes grievous bodily harm, maims, disfigures or endangers the life of a women or minor.

(4) Such person commits or has committed protracted sexual assault on a women or minor.

(5) Where more than one person commits sexual assault on a women or minor.

EXPLANATION 1: Where a person is sexually assaulted by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed sexual assault within the meaning of this sub-section.

EXPLANATION 2: "Women's or children's institutions " means an institution, whether called an orphanage or a home for neglected women or children or widow or by any other name, which is established and maintained for the reception and care of women or children.

EXPLANATION 3: "Hospital" means the precincts of the hospital and includes the precincts or any institution for the reception and treatment of person during convalescence or of persons requiring medical attention or rehabilitation.

New Delhi

Dated:

For the Petitioner

IN THE SUPREME COURT OF INDIA
CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRIMINAL) NO. 33 OF 1997

IN THE MATTER OF:

SAKSHI

...PETITIONER

Versus

UNION OF INDIA

...RESPONDENT

AFFIDAVIT

I, Dr. Hemlata, w/o Shri Sunil Kumar, aged 30 years, Project Co-ordinator, Sakshi, B- 67, South Extension Part 1, New Delhi do hereby solemnly affirm and state as under:-

1. I am Project Co-ordinator of the Petitioner organization and fully conversant with the facts and circumstances of the present case and competent to affirm this affidavit.

2. I state that I have read over and understood the contents accompanying Written Submissions/ Issues and state that the same have been prepared on the basis of records and texts available in the office of the Petitioner organization and advise obtained from legal counselors.

Hemlata

DEPONENT

VERIFICATION:

I, the deponent do hereby verify that the contents of this affidavit are true and correct to the best of my knowledge. It conceals nothing and no part thereof is false.

375. Sexual Assault: Sexual assault means -

(a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with -

i) any part of the body of another person or

ii) an object manipulated by another person except where such penetration is carried out for proper hygienic or medical purposes;

(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;

(c) introducing any part of the penis of a person into the mouth of another person;

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses (a) to (d) above

in circumstances falling under any of the six following descriptions:

- 2 -

First- Against the other person's will.

Secondly- Without the other person's consent.

Thirdly- With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly- Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly- With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly- With or without the other person's consent, when such other person is under fifteen years of age.

Explanation: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not sexual assault.

376. Punishment for sexual assault - (1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the person subjected to sexual assault is his own wife and is not under fifteen years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both :

Provided that if the sexual assault is committed by the father, grandfather or brother, he shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment.

Provided further that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-

(a) being a police officer commits sexual assault-

(i) within the limits of the police station to which he is appointed; or

(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 person in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital; or

(e) commits sexual assault on a woman knowing her to be pregnant; or

(f) commits sexual assault on a person when such person is under fifteen years of age; or

(g) commits gang sexual assault,

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

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- Where a person is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang sexual assault within the meaning of this sub-section.

Explanation 2.- "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.- "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.

376A. Intercourse by a man with his wife during separation.- Whoever has sexual intercourse with his wife, who is living separately from him under a decree of separation or under any custom or usage, without her consent, shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

376B. Sexual intercourse by public servant with person in his custody.- Whoever, being a public servant, takes advantage of his/her official position and induces or seduces any person, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation: "Sexual intercourse" in this section and sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375.

376C. Sexual intercourse by superintendent of jail, remand home, etc.- Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his/her official position and induces or seduces any inmate of such jail, remand home, place or institution to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation 1.- "Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates.

Explanation 2.- The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376.

376D. Sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital.- Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of

his/her position and has sexual intercourse with any person in that hospital, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation. - The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376.

376E. Unlawful sexual contact (1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person, not being the spouse of such person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to three years or with fine or with both. If, however, the other person is a person below fifteen years of age, such conduct, with or without consent of the other person, shall be punished with rigorous imprisonment which may extend to seven years or with fine or with both.

(2) Whoever, with sexual intent, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so

invites, counsels or incites, shall be punished with rigorous imprisonment which may extend to seven years or with fine or with both.

(3) Whoever being in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with rigorous imprisonment which may extend to seven years or with fine or with both :

Provided that if the offender happens to be the father, grandfather or brother, he shall be punished with rigorous imprisonment for a term which shall not be less than five years but which may extend to a term of ten years.

Explanation: "Young person" in this sub-section and sub-section (2) means a person below the age of fifteen years.

377. To be deleted.

509. Word, gesture or act intended to annoy or to insult the modesty of a woman:

Whoever, intending to annoy or to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, or with fine, or with both.

Where, however, such offence is committed with sexual intent, such person shall be punished with rigorous imprisonment for a term which shall not be less than two years but which may extend to five years, or with fine, or with both.

KEY TO READING THIS DOCUMENT

- The proposal given by The National Commission for Women is written in BLACK.
- It has been followed by the corresponding proposal of the Law Commission.
- The Law Commission's proposal has been written in BLUE.
- Comments/observations with regard to the comparison between the two have been written in RED.

COMPARISON – RAPE LAWS

Section 375 – Sexual Assaults

1. A person commits sexual assault against another where such person engages in any of the activities set out in subsection 2 (a) to 2 (c) against the will or without the consent of the other person against whom such offence is committed,

COMMENT – The underlined portion has been reproduced in S. 375 First and Secondly of the Law Commission's proposal.

Provided that where such sexual assault is committed against a minor, the question of consent is irrelevant.

EXPLANATION 1- A minor is a person who is 18 years of age or under.

COMMENT - A minor is taken to be a person who is under the age of 15 years for all purposes in the Law Commission's proposal.

EXPLANATION 2 – Any consensual sexual activity between two adults does not fall within the purview of this section.

COMMENT - Not mentioned in the Law Commission's proposal.

2. “Sexual Assault” includes:
 - (a) The introduction (to any extent) by a man of his penis, into the vagina, the external genitalia, anus or mouth of another person.
 - (b) The introduction (to any extent) by a person of an object or a part of the body (other than the penis) into the vagina or anus of another person.

Section 375 – Sexual Assault:

- Sexual Assault means –
- (a) penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with –
 - (i) any part of the body of another person or

- (ii) an object manipulated by another person except where such penetration is carried out for proper medical and hygienic purposes;
- (b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall also include the labia majora), the anus or the urethra of the offender by any part of any person's body;
- (c) introducing any part of the penis of a person into the mouth of another person;
- (d) engaging in cunnilingus or fellatio; or
- (e) continuing sexual assault as defined in clauses (a) to (d) above.)

COMMENT – The word 'external genitalia' has been deleted and the term 'urethra' has been inserted. Also, 'vagina' has been given to include the 'labia majora'. Besides this, the word 'penetrating' has been used instead of the phrase 'introduction (to any extent)'. S.375 (b) and (d) have been inserted to cover those acts of sexual assault.

- (c) Where any person, for a sexual purpose touches, directly or indirectly, with a part of the body or with any object, any part of the body of another person.

S. 376 E - 'Unlawful Sexual Contact'

- (1) Whoever, for a sexual intent touches, directly or indirectly, with a part of the body or with an object, a part of the body of another person, not being the spouse of such other person, without the consent of such other person, shall be punished be punished with simple imprisonment of a term which may extent to 3 years or with fine or with both. If, however, the other person is below 15 years of age, such conduct, with or without the consent of the other person, shall be punished with rigorous imprisonment which may extend to 7 years or with both.

COMMENT – The word 'intent' has been used instead of the word 'purpose'. The extent of the maximum punishment has been brought down to 3 years from 5 years. A minimum punishment has not been prescribed.

- (d) Where any person with a sexual purpose utters any word, makes any sound or gesture, or exhibits any object or part of the body, intending that such word or sound shall be heard or that such gesture or exhibition shall be seen by a person or intrudes upon the privacy of such person.

S. 509 – Word, gesture or act intended to annoy or to insult the modesty of a woman:

Whoever, intending to annoy or to insult the modesty of any woman, utters any word makes any sound or gesture, or exhibits any object or part of the body, intending that such word or sound shall be heard or that such gesture or exhibition shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, or with fine or with both.

Where, however, such offence is committed with sexual intent, such person shall be punished with rigorous imprisonment for a term which shall not be less than two years but may extend to five years or with fine or with both.

COMMENT – The new proposal has been divided into two parts:

- a) where gesture or remark is intended to annoy or insult the modesty of a woman, and
 - b) where it is committed with a sexual intent.
- Different punishments have been prescribed for the two offences.

- (e) Where any person for a sexual purpose invites, counsels or incites a minor to touch, directly or indirectly, with any part of the body or with any object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person invited, counselled or incited.

S. 376E – Unlawful Sexual Contact

- (2) Whoever, for a sexual intent invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites shall be punished with rigorous imprisonment which may extend to 7 years or with fine or both.

Comment - The punishment in this sub-section has been inserted by the Law Commission.

- (3) Whoever, being in a position of trust and authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with a sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with rigorous imprisonment which may extend to seven years or with fine or with both.

Provided that if the offender happens to be the father, grandfather or brother, he shall be punished with rigorous imprisonment for a term which shall not be less than 5 years but which may extend to a term of ten years.

Explanation – “Young Person” in this subsection and in subsection (2) means a person below the age of 15 years.

COMMENT – Sub-section (3) has been added by the Law Commission.

- 3. (a) For the purposes of S. 375(1) “Consent” means unequivocal voluntary agreement of the woman to engage in sexual activity in question. *in context*

COMMENT - ‘Consent’ has not been defined in the Law Commission’s proposal.

- (b) No consent is obtained for the purpose of S. 375 (1) :
 - (i) when the consent has been obtained by putting the woman or any other person whom the woman is interested, in fear of death or injury.
S 375 Thirdly – with the other person’s consent, when such consent has been obtained by putting such other person or any other person in whom such person is interested, in fear of death or hurt.

COMMENT – The word ‘woman’ has been replaced by the phrase ‘other person’ and the word ‘injury’ by the word ‘hurt’.

- (ii) When such consent is given because the woman believes or is given to believe that the man is her husband.
S. 375 Fourthly – Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be legally married.

COMMENT – Too confusing.

- (iii) When at the time of giving such consent, by reason of unsoundness of mind or intoxication or because of the administration by him personally or through another, of any stupefying substance, the woman is unable to understand the nature and consequence of the act.
S. 375 Fifthly – With the consent of the other person, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another, of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequence of that which such other person gives consent.

COMMENT – The word ‘woman’ has been replaced by the phrase ‘other person’ and the term ‘unwholesome’ has been added.

- (iv) When the agreement is expressed by words or conduct of a person other than the woman.
- (v) The woman is mistaken about the identity of the man.
- (vi) The woman is mistaken about the sexual nature of the act or mistakenly believes that the sexual activity is for medical, ritualistic, purificatory, therapeutic, psychological or spiritual purposes.
- (vii) The person is or appears to be a minor.

COMMENT – Cl. (iv) to (vii) have not been taken into consideration. However, the following clause has been added.

S. 375 Sixthly : “ with or without the other person’s consent, when such other person is under fifteen years of age”.

Explanation to S. 375 says – “ Sexual intercourse by a man with his own wife not being under fifteen years of age is, not sexual assault”.

S. 375A – Aggravated Sexual Assault.

A person commits an aggravated form of sexual assault when:

S. 376 - Punishment for Sexual Assault

- 1(a) such person being a police man/ woman sexually assaults a woman or minor;
- 2(a) **Whoever, being a police officer commits sexual assault -**
 - (i) within the limits of the police precinct
 - (i) **within the limits of the police station to which he is appointed; or**
 - (ii) **the premises of any station house whether or not situated in the police station to which he is appointed; or**
 - (ii) in his or her custody or in the custody of a police person subordinate to him or her ; or
 - (iii) **on a person in his custody or in the custody of a police officer subordinate to him; or**
 - (iii) while such person is in uniform

COMMENT - While a new cl. (ii) has been introduced, cl. (iii) of the N.C.W’s proposal has not been considered.

- (b) being a personnel in the Armed Forces commits sexual assault on a person while on duty.

COMMENT - Not mentioned in the Law Commission’s proposal.

- (c) being a public servant, and commits sexual assault on a person in his custody or in the custody of a public servant subordinate to him.
- (b) being a public servant, takes advantage of his official position and commits sexual assault on a person in his custody or in the custody of a public servant subordinate to him.

COMMENT - The underlined portion is the only change/addition in this subsection.

- (d) being on the management or oh the staff of a jail remand home or other place of custody, established by or under any law for the time being in force or of a woman's or children's institution, commits sexual assault on any inmate of such jail, remand home, or institution ; or
- (c) being on the management or oh the staff of a jail remand home or other place of custody, established by or under any law for the time being in force or of a woman's or children's institution, takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place or institution ; or

COMMENT - The underlined parts are the additions made in this sub-section.

- (e) being on the management or on the staff of a hospital, commits sexual assault on a person in that hospital.
- (d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital.

COMMENT - The underlined portion is the only addition made in this subsection.

- (f) being in a position of trust, authority, guardianship or of economic or social dominance commits sexual assault on a person under such trust, authority or dominance.

COMMENT - Not mentioned in the Law Commission's proposal.

- 2(a) such person commits sexual assault on a woman who is pregnant.
- (e) commits sexual assault on a woman knowing her to be pregnant; or
- (b) such person commits sexual assault on a woman who is suffering from mental or physical disability.

COMMENT - Not mentioned in the Law Commission's proposal.

- (c) such person commits sexual assault on a minor.
- (f) commits sexual assault on a person when such person is under 15 years of age; or

- 3 while committing sexual assault causes grievous bodily harm, maims, disfigures or endangers the life of the woman or minor.

COMMENT - Not mentioned in the Law Commission's proposal.

- 4 such person commits or has committed protracted sexual assault on a woman or minor.

COMMENT - Not mentioned in the Law Commission's proposal.

- 5 where more than one person commits sexual assaults on a woman or minor.

- (g) commits gang assault,

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

Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1: Where a person is sexually assaulted by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed sexual assault within the meaning of this subsection.

Explanation 1: Where a person is subject to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed sexual assault within the meaning of this subsection.

COMMENT - The underlined portion is the only change made in this subsection.

Explanation 2: "Woman's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or widows' or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 2: "Woman's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or widows' home or by any other name, which is established and maintained for the reception and care of women or children.

COMMENT - The underlined word is the only change made in this subsection.

Explanation 3: "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.

COMMENT - Reproduced identically in Expl. 3 to S.376.

Section 376(1) – Punishment for Sexual Assault

- (a) Whoever commits sexual assault within the meaning of S.375 (2) (a) or S. 375 (2) (b) shall be punished with imprisonment of either description for a term that shall not be less than 7 years but which may be for life and with a punitive fine.

Provided that the Court may in exceptional circumstances to be recorded in the judgement, impose a sentence of imprisonment for a term of less than 7 years but not less than 5 years.

- (b) Whoever commits sexual assault within the meaning of S.375 (2) (c) shall be punished with imprisonment of either description for a term that shall not be less than 2 years but which extend to 5 years and with a punitive fine.
- (c) Whoever commits sexual assault within the meaning of S.375 (2) (d) or S.375 A (2) (a) read with S. 375 (2) (d) shall be punished with imprisonment of either description for a term that shall not be less than 1 year but which extend to 3 years and with a punitive fine.

Section 376 – Punishment for Sexual Assault

- (1) **Whoever, except in the cases provided in subsection (2), commits sexual assault shall be punished with imprisonment of either description for a term that shall not be less than 7 years but which may be for life or for a term which may extend to 10 years and shall be liable to fine unless the person subjected to sexual assault is his own wife and is not under 15 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine or both.**

Provided that if the father, grandfather or brother commits the sexual assault, he shall be punished with rigorous imprisonment for a term that shall not be less than 10 years but which may extend to life imprisonment.

Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than 7 years.

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COMMENT - A common punishment has been prescribed for the various acts of sexual assault. Sexual assault by a man on his wife has been differentiated from sexual assault by a man on any other woman. Not only that, the punishment prescribed for the two is also different. However, the paragraph underlined has been additionally added.

Section 376 (2) – Punishment for Aggravated Sexual Assault

- (a) Whoever commits sexual assault within the meaning of S.375 A (1) (a - f) read with S. 375 (2) (a) or (b) shall be punished with imprisonment of either description for a term that shall not be less than 10 years but which may be for life and with a punitive fine.

Provided that the Court may, in exceptional circumstances to be recorded in the judgement, impose a sentence of imprisonment for a term of less than 10 years but not less than 7 years.

- (b) Whoever commits sexual assault within the meaning of S.375 A (1) (a - f) read with S. 375 (2) (c) shall be punished with imprisonment of either description for a term that shall not be less than 2 years but which extend to 5 years and with a punitive fine.
- (d) Whoever commits sexual assault within the meaning of S.375 A (1) (a - f) read with S. 375 (2) (d) shall be punished with imprisonment of either description for a term that shall not be less than 2 years but which extend to 3 years and with a punitive fine.

COMMENT - The punishment for the acts of 'Aggravated Sexual Assault' has been given in S. 376 (2) of the Law Commission's proposal as a term that may be for life but shall not be less than 10 years along with a punitive fine.

Section 376 (3) - Punishment for Sexual Assault w/ S.375 A (2)

- (a) Whoever commits sexual assault within the meaning of S.375 A (2) (a), (b) or (c) where the minor is over 12 years of age, read with S. 375 (2) (a) or (b) shall be punished with imprisonment of either description for a term that shall not be less than 10 years but which may be for life and with a punitive fine.
- (b) Whoever commits sexual assault within the meaning of S.375 A (2) (a), (b) or (c) on a minor of over 12 years of age, read with S. 375 (2) (c) shall be punished with imprisonment of either description for a term that shall

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not be less than 5 years but which may be for 7 years and with a punitive fine.

- (c) Whoever commits sexual assault within the meaning of S.375 A (2) (a), (b) or (c) on a minor of over 12 years of age, read with S. 375 (2) (e) shall be punished with imprisonment of either description for a term that shall not be less than 7 years but which may be for 10 years and with a punitive fine.

Section 376 A - Punishment for Sexual Assault of a Minor up to the age of 12 years and u/ S.375 A (3)

- (a) Whoever commits sexual assault on a minor person up to the age of 12 years or under S.375 A (3) read with S. 375 (2) (a) or (b) shall be punished with imprisonment for life and with a punitive fine.
- (b) Whoever commits sexual assault on a minor person up to the age of 12 years or under S.375 A (3) read with S. 375 (2) (c) shall be punished with imprisonment of either description for a term that shall not be less than 3 years but which may be for 5 years and with a punitive fine.
- (c) Whoever commits sexual assault on a minor person up to the age of 12 years or under S.375 A (3) read with S. 375 (2) (d) shall be punished with imprisonment of either description for a term that shall not be less than 7 years but which may be for 10 years and with a punitive fine.
- (d) Whoever commits sexual assault on a minor person up to the age of 12 years or under S.375 A (3) read with S. 375 (2) (e) shall be punished with imprisonment of either description for a term that shall not be less than 2 years but which may be for 3 years and with a punitive fine.

The Chairperson
Law Commission of India
Shastri Bhawan
Gate #2
7th Floor

9/13/99

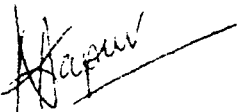
Dear Justice Reddy,

As requested by the Commission, please find enclosed recommendations to be considered by the Law Commission regarding amendments to investigation, procedure and evidence in Sexual Assault cases.

We do have some additional concerns which we would like to clarify with the Commission at the time of our next meeting. This includes examining implications of a "gender neutral" law.

Once again, we wish to ~~express our sincere gratitude for the time, co-operation~~ and serious concern shown by the Commission on this issue.

Best Regards,



For:

Naina Kapur
(Director, Sakshi)

Jasjit Purewal
(Director, IFSHA)

Kirti Singh
(AIDWA)

RECOMMENDED CHANGES FOR INTERROGATION, INVESTIGATION, MEDICAL EXAMINATION, EVIDENCE AND TRIAL PROCESSES IN CASES RELATING TO SEXUAL ASSAULT

The Law Commission in its 84th report has made several suggestions for the interrogation, investigation and medical examination in cases relating to rape and sexual assault against women. The suggestions with some modifications should be incorporated in the law. Certain other amendments to the law of Evidence which will facilitate the trial of a complainant of sexual assault are also being suggested.

1. The Law Commission has suggested that where the statement of a victim girl child below 12 years of age is to be recorded it should be done by a woman Police Officer or by a woman who belongs to an organisation interested in the cause of women or children.

Our Recommendation:

- i. The statement of any complainant of sexual assault should only be recorded by a woman police officer or by any other women interested in the cause of the women or children.
- ii. The statement of a complainant of sexual assault should be made in the presence of a relative or friend of the complainant's choice.
- iii. The interrogation of a complainant should only be carried out at her home or place of her choice and necessary clarification to Section 161 should be made as suggested by the Law Commission.

In view of the above we suggest the following changes:

- I. A new sub-section 3 to section 160 of the Code of Criminal Procedure be added as under:

"(3) Where under this Chapter, the statement of a complainant of a sexual offence is to be recorded such statement shall be recorded either by a woman police officer or by a woman social worker, in the absence of a woman police officer."

"(4) a) Where the woman police officer is not available to record the statement of the complainant of sexual assault, the officer in charge of the police station shall, to facilitate recording of the statement, forward a written request to a social worker who shall upon completion submit the same to the officer in charge."

b) Should the said statement require further clarification or amplification, the officer-in-charge may seek the same from the complainant either in person or through the social worker."

(5) a) The statement of the girl recorded and forwarded under sub-sections (3) and (4) above shall for the purpose of the law relating to the admissibility in evidence of statements made by any person, be deemed to be a statement recorded by a police officer."

II. The following proviso shall be substituted for the present proviso of Section 160(1):

"Provided that no male person under the age of 16 years or woman, shall be required to attend at any place other than his or her home or place of his or her choice."

III. The following sub-section should be inserted after Section 166 of the I.P.C. to punish a police officer who fails to record a statement as stated above

"166. Whoever being a public servant:

- (A) disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or
- (B) disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person,

"shall be punished with imprisonment for a term which may extend to one year or with fine or with both."

IV. A new Sub-section (6) should be inserted to Section 160 of the Code of Criminal Procedure:

"(a) Where, under this Chapter, the statement of a male person under the age of 16 years or of a woman is recorded by a police officer, either as first information of an offence or in the course of an investigation into an offence, a relative or friend of such male person or woman, and also a social worker of the complainant's choice shall be allowed to remain present throughout the period during which the statement is being recorded "

(6) To ensure that the offence relating to sexual assault is promptly recorded the following section should also be added to the I.P.C. as recommended by the Law Commission with slight variations:

"167A: Whoever, being an officer in charge of a police station and required by law to record any information relating to the commission of a cognisable offence

reported to him, refuses to record such information shall be punished with imprisonment of either description for a term which may extend to one year and with punitive fine."

(A) When a person is brought to a police station...

V. As regards the medical examination of the victim and the accused we recommend the following the following sections should be inserted in the Code of Criminal Procedure:

"164(A) Where a case of sexual Assault is reported to any police person, the complainant is reported to any police person, the said police person shall without any delay have the complainant medically examined by a registered medical practitioner.

(B) The registered medical practitioner(s) to whom such person is brought shall without delay examine the complainant and prepare a report specifically recording the result of the complainant, examination and giving the following details:

- i) the name and address of the victim and of the person by whom she was brought
- ii) the age of the person
- iii) the general mental and emotional condition of the complainant
- iv) any signs of sexual assault to the mouth, anus, genitalia
- v) any marks on or injuries to the body
- vi) other material particulars in reasonable detail"

(C) The report shall state precisely the reasons for each conclusion arrived at.

(D) The report shall specifically record that the consent of the victim or of some person competent to give such consent on her behalf to such examination has been obtained.

(E) The exact time of the commencement and completion of the examination shall also be noted in the report and the registered medical practitioner shall without delay forward the report to the complainant and the investigating officer. The investigation officer shall forward it to the Magistrate (referred to in Section 173(5)(a) as part of the documents.

(F) Nothing in this Section shall be construed as rendering lawful any examination without the consent of the victim or of any person competent to give such consent on her behalf."

VI. The following sections should be added to Section 53A of the Code of Criminal Procedure as recommended by the Law Commission:

"Sections 53 (1A), (1B), 1(C), and (1D), Code of Criminal Procedure, 1973 to be inserted.

(1A) When a person accused of sexual assault or an attempt to sexual assault is arrested and an examination of his person is to be made under this section, he shall be sent without delay to the registered medical practitioner by whom he is to be examined.

(1B) The registered medical practitioner conducting the examination shall (without delay) examine such person and prepare a report specifically recording the result of his examination and giving the following particulars:

- i) the name and address of the accused and of the person by whom he was brought
- ii) the age of the accused-
- iii) other material particulars including traces of blood, semen, and evidence of any recent sexual activity in reasonable detail and
- iv) any other marks of injury, if any, on the person of the accused.

(1C) The report shall state precisely the reasons for such conclusion arrived at

(1D) The exact time of commencement and completion of the examination shall also be noted in the report and the registered ~~medical practitioner shall without~~ delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in Section 173 ~~as part of the documents referred to in~~ clause (a) of sub-section (5) of that Section."

VII. While granting bail to an accused in a sexual assault case, the accused shall be restrained from being in proximity of the child from in any manner ~~whatsoever. The onus should be placed~~ on the accused to show compliance with this restriction.

VIII. In a case of sexual assault there shall be no interference with or disturbance of the complainant's natural habitat by/ through the criminal justice process.

IX. The investigation and trial of all sexual offences should be time bound and not take more than 6 months at the most. Particular care should be taken to address the memory needs of children who have been sexual abused.

X, It should be clarified that the "social worker" described above should be a woman interested in/working for the cause of women and/or children and familiar with issues of violence.

Our Recommendations for changes to the Indian Evidence Act, 1872

1) Section 114 of the Evidence Act s shall be amended to read as follows:

"114A In a prosecution for aggravated sexual assault under Section _____ where sexual intercourse (as defined thereunder) is proved and the question is

whether it was without the consent of the complainant and she states in her evidence before the Court that she did not consent, the court shall presume that she did not consent."

2) Section 155(4) of the Evidence Act which allows questions regarding the "general immoral character of a prosecutrix in a trial for 'rape' or 'attempt to ravish'" must be deleted.

3) The following clause 4 will be added to section 146 of the Evidence Act:

"4 In a prosecution for sexual assault - or attempt to commit sexual assault where the question of consent is at issue, it shall not be permissible to adduce evidence or to put question in the cross-examination of the complainant as to her previous sexual history, character and conduct for providing such consent or the quality of consent."

4) Given the existing reality and limitations of accessing proper health care systems, a special provision should provide that the absence of a medical report in a case of sexual assault shall not be used against the complainant.

SPECIAL PROVISIONS FOR CASES OF CHILD SEXUAL ABUSE

We strongly feel that a minor complainant of sexual assault should not have to give her/his oral evidence in the presence of the accused, as this will certainly traumatize the minor. Appropriate changes in the law to prevent a minor witness from being traumatized by court procedure should therefore be introduced.

While steps are essential to reduce "system abuse" of child complainants, it will be very difficult to totally eliminate this. Nevertheless, the use of the criminal justice system to its fullest extent must be an important part of the strategy for dealing with child sexual abuse.

The co-ordination and use of both social and legal interventions is necessary to minimize unnecessary interference with or disruption of the child complainant, to help create a safe environment in which the child can recover, and to provide maximum leverage for the control and treatment of the offender.

SUGGESTIONS

In this regard we wish to suggest the following for redress of child sexual abuse cases:

1. A minor's testimony in a case of child sexual abuse should be recorded in court at the earliest possible opportunity in the presence of a judge and child support person i.e. this may include a family/friend, relative or social worker that the minor person trusts.

For this purpose the court should take steps to ensure at least one of the following:

- i. permitting use of a videotaped interview of the child's statement by the judge (in the presence of a child support person)
- ii. allow a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.
- iii. The cross-examination of a minor should only be carried out by the judge based on written questions submitted by the defense upon perusal of the testimony of the minor.
- iv. Whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

2) All cases of sexual assault must be tried by Special Courts with court personnel including judges, prosecutors, counselors, specially trained/sensitised to issues of sexual assault.

NATIONAL COMMISSION FOR WOMEN

I attended the meeting with Mrs. Leela Seth, Member, Law Commission of India on 16.9.99 at 11.0 a.m on the subject of proposed legislative provisions pertaining to sexual assault. This meeting arose out of a petition made by Sakshi vs. Union of India drawing the attention of the Supreme Court to the fact that the present laws relating to rape, are not adequate to cover various sexual atrocities against women or child sexual abuse. Sakshi proposed a draft amendment to the present provisions in IPC and the same came up for examination by the Law Commission. Hence Law Commission also prepared a draft and wanted the comments of NCW. The Chairperson, NCW desired that I should attend this meeting on behalf of the NCW.

I have given following suggestions on behalf of the NCW:-

- 1) The present word rape is proposed to be replaced by word sexual assault. This is agreed to:
- 2) The provisions relating to child should be mentioned separately so that specific cases of child sexual abuse may get proper focus;
- 3) Under the draft only two levels of sexual assault have been recognised:
 - i) Which is equivalent to rape and hence punishable with punishment which is 7 years and upward;
 - ii) Cases coming under unlawful sexual contact for which maximum punishment proposed is simple imprisonment for three years. (sexual annoyance not involving physical contact is dealt with separately u/s 509)

I have suggested that we may recognise the three degrees of sexual assault:

- 1) Cases which are equivalent to present word rape as proposed under 375 (a) to (d)

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II) Cases of grievous sexual assault where actual rape may not have been performed but there is either an intention to kill the spirit of the victim and instil a fear psychosis or the trauma undergone by the victim is of extreme nature.

III) Other cases of unlawful sexual contact which need not necessarily invoke serious trauma or sever psychosis as I proposed under 376 of IPC.

Alternatively the proposed 376(E) should provide for a punishment of rigorous imprisonment upto 7 years for general category and for 10 years in case of children, so that it can effectively cover cases under category II above.

I have also put forward the view that the 2nd alternative will not be able to focus upon the trauma undergone by the victim and only if the case is handled with sufficient sensitivity then punishment upto 7 years and commensurate with the mental trauma undergone by the victim will be awarded.

4) The present draft lists out six circumstances of sexual assault and clarifies by way of explanation that "SEXUAL INTERCOURSE BY A MAN WITH HIS OWN WIFE (THE WIFE NOT BEING UNDER FIFTEEN YEARS OF AGE, IS NOT SEXUAL ASSAULT"

I have suggested that marital sexual intercourse by a man with his wife without consent should also be considered as sexual assault. At the most, unlike in other six categories the onus of establishing that consent was not given may lie with the wife. I have also suggested the inclusion of the 8th circumstance of sexual assault which would replace the proposed 376(A) and would read as below:

"Where a man has sexual intercourse with his wife who is living separately from him either under a decree of separation or under any custom or usage or for any other reason whatsoever, without her consent".

5) I have suggested that the provisions of proposed 376(B), 376(C), 376(D) may be combined together and be called custodial sexual intercourse (the word custodial having the suggested meaning only for the purpose of this section) so as to include sexual intercourse by any public servant, police officer, superintendent of jail, remand home, hospital incharge or other institutions by virtue of which a man can exercise authority or control over the inmates. This is only a drafting suggestion.

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I have also suggested that the punishment for this should be a minimum of three years which may extend upto 7 years and also liable for fine.

I would like to emphasise here that these proposed sections 376 (B), 376(C) and 376(D) are meant for covering cases of custodial sexual intercourse not amounting to offence of sexual assault i.e. not without the consent.

Hence, an express explanation should be added to say that in such cases sexual intercourse will be presumed to be sexual assault when the victim says that she had been assaulted without consent and the burden of proof will lie on the accused person.

This express explanation is available under the present Act but not proposed in the draft.

Above are the 5 points made by me. For information of New.
And for kind perusal of Mrs. Sethi.

(Leena Mehendale)
Jt. Secretary
17.9.99

Mrs. Leela Seth
Member
Law Commission of India
Shastri Bhavan
New Delhi
Fax No. 3388870

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श्रीमती लीना मेहेंदले
Smt. Leena Mehendale
IAS
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JOINT SECRETARY

Tel. : 3236110
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Recd on 11.10.99
3.5.99

By hand

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राष्ट्रीय महिला आयोग
National Commission for Women
4, दीन दयाल उपाध्याय मार्ग
4, Deen Dayal Upadhyaya Marg
नई दिल्ली-110 002
New Delhi-110 002

No. JS/NCW/LC/Network/99.

October 14, 1999.

Justice Mrs. Leela Seth.
Member,
Law Commission of India,
Shastri Bhawan,
New Delhi.

Subject: Proposed legislative provisions pertaining to sexual assault.

Madam.

This is in the furtherance to the suggestions made earlier on the behalf of the Commission on the above referred subject. I would like to bring in to your kind notice that the Commission has proposed following amendments in the Indian Evidence Act, to the Department of Women and Child Development, Ministry of Human Resource Development.

- Steps should be taken to delete section 155(4) of the Indian Evidence Act, 1872, which reads as:

“when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character”.

- Section 54 of Indian Evidence Act should be amended to include the following:

“In case of rape, the prosecution can adduce the evidence to establish the previous bad character of the accused which shall be relevant to the case.”

Yours faithfully,

(LEENA MEHENDALE)

Extract of section 409B of the Crimes Act, 1900 (New South Wales) and ~~recommendations of the New South Wales Law Commission~~ pertaining to it made in its Report 87 on Review of section 409B of the Crimes Act 1900 (NSW) (Nov. 1998)

LIST OF RECOMMENDATIONS

RECOMMENDATION 1

Section 409B should be retained.

RECOMMENDATION 2

Section 409B should be amended to provide as follows:

409B.(1)(a) This section applies to criminal proceedings for a prescribed sexual offence, whether those proceedings are for that offence alone, or together with any other offence (as an additional or alternative count).

(b) This section applies to all stages of criminal proceedings, including bail, committal, summary hearing, trial, sentencing, and appeal.

(c) This section applies to an inquiry into a conviction for a prescribed sexual offence under Part 13A of this Act.

(d) In this section:

“the accused person”, in relation to any proceedings, means the person charged with a prescribed sexual offence;

“the complainant”, in relation to any proceedings, means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person is charged is alleged to have been committed;

“prescribed sexual offence” means:

- (i) an offence under section 61B, 61C, 61D, 61E, 61I, 61J, 61K, 61L, 61M, 61N, 61O, 65A,

66, 66A, 66B, 66C, 66D, 66F, 73, 74, 78A, 78B, 78H, 78I, 78K, 78L, 78N, 78O, 78Q, 80A, 86, 87, or 89;

- (ii) an offence (such as an offence under section 37 or 112) which includes the commission, or an intention to commit, an offence referred to in paragraph (i); or
- (iii) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (i) or (ii).

(2)(a) In proceedings to which this section applies, evidence relating to the sexual reputation of the complainant is inadmissible.

(b) Notwithstanding subsection (2)(a), evidence about any sexual experience or sexual activity, or lack of experience or activity, of the complainant shall not be inadmissible merely because it also relates to the sexual reputation of the complainant.

(3)(a) In proceedings to which this section applies, no evidence shall be admitted about any sexual experience or activity of the complainant, or lack of sexual experience or activity, except with leave of the court.

(b) For the purposes of subsection (3)(a), "sexual experience or activity" includes sexual experience or activity to which the complainant did not consent.

(4) The court shall not grant leave under subsection (3)(a) unless:

- (a) the court is satisfied that the evidence has significant probative value to a fact in issue or to credit; and
- (b) the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice, taking into account the matters set out in subsection (6); and

(c) the party seeking to admit the evidence has complied with the requirements in subsection (7).

(5) Evidence of a complainant's sexual experience or activity is not admissible to support an inference that, by reason only of the fact that the complainant has engaged in sexual activity or has had sexual experience, the complainant:

- (a) is the type of person who is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief.

(6) In determining whether the probative value of the evidence sought to be admitted substantially outweighs the danger of prejudice to the proper administration of justice under s 409B(4)(b), the court shall take into account the following matters:

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) the distress, humiliation, or embarrassment which the complainant may suffer as a result of leave being granted;
- (c) the risk that the evidence may unduly arouse discriminatory belief or bias, prejudice, sympathy or hostility in the jury;
- (d) the need to respect the complainant's personal dignity and privacy;
- (e) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (f) any other factor which the court considers relevant.

(7) The party seeking leave under subsection (3)(a) must do so by application to the court in writing and must:

-
- (a) set out:
- (i) the nature of the evidence sought to be adduced; and
 - (ii) how the evidence has significant probative value to a fact in issue or to credit;
- (b) give a copy of the application to the other party within such time before the hearing of the application as the court may prescribe or considers to be appropriate in the interests of justice in the particular case.
- (8) The court must hear an application to grant leave under subsection (3)(a) in the absence of the jury (if any) and the public.
- (9) The complainant is not a compellable witness at the hearing of an application for leave under subsection (3)(a).
- (10) At the conclusion of the hearing of an application for leave under subsection (3)(a), the court must make a determination whether or not to grant leave to admit the evidence and must record or cause to be recorded:
- (a) the reasons for that determination;
 - (b) where the court grants leave to question the complainant, the nature of the evidence which may be elicited.
- (11) Where evidence of a complainant's sexual experience or activity is admitted at trial under this section, the judge shall give a warning to the jury to the effect that they must not infer, by reason only of the fact that the complainant has engaged in sexual activity or has had sexual experience:
- (a) that the complainant is less worthy of belief;
 - (b) where consent is an issue at the trial, that the complainant is the type of person who is more likely to have consented to the sexual activity that forms the subject-matter of the charge.

2.1 Section 409B currently provides as follows:

409B.(1) In this section:

“the accused person”, in relation to any proceedings, means the person who stands, or any of the persons who stand, charged in those proceedings with a prescribed sexual offence;

“the complainant”, in relation to any proceedings, means the person, or any of the persons, upon whom a prescribed sexual offence with which the accused person stands charged in those proceedings is alleged to have been committed.

(2) In prescribed sexual offence proceedings, evidence relating to the sexual reputation of the complainant is inadmissible.

(3) In prescribed sexual offence proceedings, evidence which discloses or implies that the complainant has or may have had sexual experience or a lack of sexual experience or has or may have taken part or not taken part in any sexual activity is inadmissible except:

(a) where it is evidence:

(i) of sexual experience or a lack of sexual experience of, or sexual activity or a lack of sexual activity taken part in by, the complainant at or about the time of the commission of the alleged prescribed sexual offence; and

(ii) of events which are alleged to form part of a connected set of circumstances in which the alleged prescribed sexual offence was committed;

(b) where it is evidence relating to a relationship which was existing or recent at the time of the commission of the alleged prescribed sexual offence, being a relationship between the accused person and the complainant;

(c) where:

(i) the accused person is alleged to have had sexual intercourse, as defined in section 61H(1).

with the complainant and the accused person does not concede the sexual intercourse so alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged to have been had by the accused person;

(d) where it is evidence relevant to whether:

(i) at the time of the commission of the alleged prescribed sexual offence, there was present in the complainant a disease which, at any relevant time, was absent in the accused person; or

(ii) at any relevant time, there was absent in the complainant a disease which, at the time of the commission of the alleged prescribed sexual offence, was present in the accused person;

(e) where it is evidence relevant to whether the allegation that the prescribed sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged prescribed sexual offence); or

(f) where it is evidence given by the complainant in cross-examination by or on behalf of the accused person, being evidence given in answer to a question which may, pursuant to subsection (5), be asked,

and its probative value outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission.

(4) In prescribed sexual offence proceedings, a witness shall not be asked:

(a) to give evidence which is inadmissible under subsection (2) or (3); or

(b) by or on behalf of the accused person, to give evidence which is or may be admissible under

subsection (3) unless the Court or Justice has previously decided that the evidence would, if given, be admissible.

- (5) In prescribed sexual offence proceedings, where the Court or Justice is satisfied that:
- (a) it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have, during a specified period or without reference to any period:
 - (i) had sexual experience, or a lack of sexual experience, of a general or specified nature; or
 - (ii) taken part or not taken part in sexual activity of a general or specified nature; and
 - (b) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication,

the complainant may be so cross-examined but only in relation to the experience or activity of the nature (if any) so specified during the period (if any) so specified.

- (6) On the trial of a person, any question as to the admissibility of evidence under subsection (2) or (3) or the right to cross-examine under subsection (5) shall be decided by the Judge in the absence of the jury.
- (7) Where a Court or Justice has decided that evidence is admissible under subsection (3), the Court or Justice shall, before the evidence is given, record or cause to be recorded in writing the nature and scope of the evidence that is so admissible and the reasons for that decision.
- (8) Nothing in this section authorises the admission of evidence of a kind which was inadmissible immediately before the commencement of this section.

2.2 Section 409B applies to two types of evidence:

- evidence of a complainant's "sexual reputation"; and
- evidence of a complainant's "sexual experience".