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## **The Reform of India's Sexual Violence Laws**

*Submissions prepared by Professor Sandra Fredman FBA QC (hon), with the assistance of members of Oxford Pro Bono Publico, on the invitation of the Justice Verma Committee investigating the reform of India's sexual violence laws*

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## **Indemnity**

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## Introduction

1. Thank you for offering us the opportunity to make a submission to your esteemed committee.
2. These submissions are made by Professor Sandra Fredman FBA QC (hon), Pembroke College, Oxford University in conjunction with the following members of Oxford University's Pro Bono Publico Programme: Shreya Atrey, Meghan Campbell, Chintan Chandrachud, Ingrid Cloete, Laura Hilly, Miles Jackson, Dhvani Mehta and Chris McConnachie (all Oxford University graduate research students). We benefitted from comments from Professor Nicola Lacey FBA, All Souls College, Oxford University.
3. We recognise that you will have had numerous submissions. We therefore focus our contribution on issues where we hope that our expertise in international and comparative law will be of value to your committee. Cognisant of the shortage of time available to you, we concentrate on five central issues:
  - i. The framing of the issue in human rights terms;
  - ii. The removal of the exception for marital rape;
  - iii. The definition of rape:
    - a. Rape and Sexual Assault;
    - b. Consent;
  - iv. Discrimination under Article 15 of the Indian Constitution;
  - v. Services to support victims of rape.

## I A Human Rights Issue

4. We submit that it is essential to regard this issue as a violation of women's human rights to autonomy, agency and integrity, rather than a question of honour or decency; a crime against family or society; or protection of women.<sup>1</sup>

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<sup>1</sup> UN Division for the Advancement of Women *Handbook for Legislation on Violence against Women* (2010) p.26

<<http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>> accessed 12 January 2013.

5. This approach is in accordance with international human rights law. Under the Convention on the Elimination of Discrimination against Women (CEDAW), gender-based violence is recognised as ‘a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.’<sup>2</sup> Similarly, the United Nations UN Division for the Advancement of Women *Handbook for Legislation on Violence against Women* (UN *Handbook*) states that sexual assault should be defined as a violation of bodily integrity and personal autonomy.<sup>3</sup>
6. Framing the issue as one of rights rather than protection makes it clear that it is not appropriate to respond to violence against women by expecting women to stay at home or out of ‘harm’s way’.
7. Moreover, the law performs the crucial educational function of sending a message about the way women are regarded in society. Under Article 5 of CEDAW, States are required to take all appropriate measures ‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’ Similarly, CEDAW recognises that traditional attitudes towards women, by which women are regarded as subordinate to men or as having stereotyped roles, may perpetuate and justify gender-based violence ‘as a form of protection or control of women.’ Conversely, gender based violence helps to maintain women in subordinate positions.<sup>4</sup>
8. An immediate consequence of framing the issue as one of women’s human rights is the need to repeal the references to ‘outraging the modesty’ of women in ss. 354 and 509 of the Indian Penal Code. A broad definition of sexual assault should be included in s. 375 (see below).

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<sup>2</sup> CEDAW, ‘General Recommendation No. 19 Violence against women’ (11<sup>th</sup> Session 1992) <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>> accessed 12 January 2013.

<sup>3</sup> UN Division for the Advancement of Women, *Handbook for Legislation on Violence against Women* (UN 2009) p.26. <<http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>> accessed 12 January 2013.

<sup>4</sup> CEDAW General Recommendation No. 19, para 11.

## II Marital Rape

9. Under the Indian Penal Code 1860,<sup>5</sup> sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. This provision was retained by the Criminal Law (Amendment) Bill 2012, except that the minimum age was raised to sixteen years.
10. The exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands. According to the common law of coverture, a wife was deemed to have consented at the time of the marriage to have intercourse with her husband at his whim. Moreover, this consent could not be revoked. As far back as 1736, Sir Matthew Hale declared: ‘The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract’.<sup>6</sup>
11. This immunity has now been withdrawn in most major jurisdictions. In **England and Wales**, the House of Lords held in 1991 that the status of married women had changed out of all recognition since Hale set out his proposition. Most importantly, Lord Keith, for the Court, declared, ‘marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.’<sup>7</sup>
12. This was upheld by the European Court of Human Rights, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.<sup>8</sup> This was given statutory recognition in the Criminal Justice and Public Order Act 1994.<sup>9</sup>

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<sup>5</sup> S. 375.

<sup>6</sup> Sir Matthew Hale History of the Pleas of the Crown, 1 Hale PC (1736) 629. See further S Fredman Women and the Law (OUP, 1997) pp. 55-57.

<sup>7</sup> *R. v R* [1991] 4 All ER 481 at p.484.

<sup>8</sup> *C.R. v UK Publ.* ECHR, Ser.A, No. 335-C; see Palmer Feminist Legal Studies Vol.V no.1 [1997] pp. 1-7

<sup>9</sup> S. 142 abolished the marital rape exception by excluding the word 'unlawful' preceding 'sexual intercourse' in s. 1 of the Sexual Offences Act 1956.

13. The same is true in Canada, South Africa and Australia. In **Canada**, the provisions in the *Criminal Code* which denied criminal liability for marital rape were repealed in 1983.<sup>10</sup> It is now a crime in Canada for a husband to rape his wife. **South Africa** criminalised marital rape in 1993, reversing the common law principle that a husband could not be found guilty of raping his wife. Section 5 of the Prevention of Family Violence Act 1993 provides: ‘Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.’ In **Australia**, the common law ‘marital rape immunity’ was legislatively abolished in all jurisdictions from 1976.<sup>11</sup> In 1991, the Australian High Court had no doubt that: ‘if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.’<sup>12</sup> According to Justice Brennan (as he then was): ‘The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse.’<sup>13</sup>
14. These jurisdictions have also gone further and recognised that consent should not be implied by the relationship between the accused and the complainant in any event. In the Canadian 2011 Supreme Court case of *R v. J.A.*, Chief Justice McLachlin emphasised that the relationship between the accused and the complainant ‘does not change the nature of the inquiry into whether the complainant consented’ to the sexual activity.<sup>14</sup> The defendant cannot argue that the complainant’s consent was implied by the relationship between the accused and the complainant.<sup>15</sup> In South Africa, the 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act (‘Sexual Offences Act’) provides, at s. 56 (1), that a marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.

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<sup>10</sup> R.S.C. 1985, c. C-46.

<sup>11</sup> Criminal Law Consolidation Act 1935, s. 73(3). See also s. 73(4) which provides that ‘No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to an indecent assault by that other person.’ The Crimes (Sexual Assault) Amendment Act 1981 (NSW) inserted s. 61A(4) into the Crimes Act 1900 (NSW), which provided that the fact that a person is married to a person on whom an offence of sexual assault is alleged to have been committed is no bar to conviction for that offence. The Crimes (Amendment) Ordinance (No 5) 1985 (ACT) inserted s 92R into the Crimes Act 1900 (NSW), as it applied to the ACT, which provided that the fact that a person is married to a person upon whom an offence of sexual intercourse without consent contrary to s. 92D is alleged to have been committed shall be no bar to the conviction of the first-mentioned person for the offence. In Victoria, the Crimes (Amendment) Act 1985 (Vic) substituted for s 62(2) of the Crimes Act 1958 (Vic) a new sub-section providing that the existence of a marriage does not constitute, or raise any presumption of, consent by a person to a sexual penetration or indecent assault by another person.

<sup>12</sup> *R v L* [1991] HCA 48; (1991) 174 CLR 379 at p. 390 per Mason CJ, Deane and Toohey JJ.

<sup>13</sup> *R v L* [1991] HCA 48; (1991) 174 CLR 379 at p. 402.

<sup>14</sup> [2011] 2 SCR 40, para 64.

<sup>15</sup> *ibid* para 47.

15. Even when marital rape is recognised as a crime, there is a risk that judges might regard marital rape as less serious than other forms of rape, requiring more lenient sentences, as happened in South Africa.<sup>16</sup> In response, the South African Criminal Law (Sentencing) Act of 2007 now provides that the relationship between the victim and the accused may not be regarded as a ‘substantial and compelling circumstance’ justifying a deviation from legislatively required minimum sentences for rape.
16. It is also important that the legal prohibition on marital rape is accompanied by changes in the attitudes of prosecutors, police officers and those in society more generally. For example, in South Africa, despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion.<sup>17</sup> Rates of reporting and conviction also remain low, aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.<sup>18</sup> Changes in the law therefore need to be accompanied by widespread measures raising awareness of women’s rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in *Vertido v The Philippines*, a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasised the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.<sup>19</sup>

**17. We therefore recommend that:**

- i. The exception for marital rape be removed.**
- ii. The law should specify that:**
  - a. A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation;**

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<sup>16</sup> See, for example, *S v Moipolai* [2004] ZANWHC 19 (Mogoeng J) and *S v Modise* [2007] ZANWHC 73.

<sup>17</sup> Gender Links and the South African Medical Research Council, ‘The War at Home’ (2010) <<http://www.mrc.ac.za/gender/gbvthewar.pdf>> accessed 12 January 2013.

<sup>18</sup> See further Gemma Hancox, ‘Marital Rape in South Africa: Enough is Enough’ (2012) BUWA! Journal on African Women’s Experiences 70 <<http://www.osisa.org/buwa/south-africa/marital-rape-south-africa>> accessed 12 January 2013.

<sup>19</sup> *Vertido v The Philippines* Communication No. 18/2008, Committee on the Elimination of Discrimination against Women July 2010.

- b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
  - c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.
- iii. Training and awareness programmes should be provided to ensure that all levels of the criminal justice system and ordinary people are aware that marriage should not be regarded as extinguishing the legal or sexual autonomy of the wife.

### III The Definition of Rape

#### *a) Rape and Sexual Assault*

18. Section 375 of the Indian Penal Code has traditionally defined rape in narrow terms as ‘sexual intercourse’ or ‘penetration’ in the circumstances defined in the statute. The Indian Criminal Law Amendment Bill 2012 proposes replacing the offence of ‘rape’ with that of ‘sexual assault’. However, while the new provisions widen the definition of ‘penetration’ beyond vaginal penetration, the new offence remains limited to that of ‘penetration’. Other types of sexual assault are not subject to appropriate legal sanction.
19. Two contrasting positions on this issue have been taken in other jurisdictions examined here.
- i. **A wide definition of sexual assault to replace the offence of rape and indecent assault:**
    - a. The *UN Handbook* recommends that existing offences of ‘rape’ and ‘indecent assault’ be replaced with a broad offence of ‘sexual assault’ graded according to harm.<sup>20</sup> However, its definition of ‘sexual assault’ is significantly wider than that of the proposed Indian approach. The *Handbook* recommends that ‘sexual assault’ be defined as a violation of bodily integrity and sexual autonomy. Moreover, it recommends the removal of any requirement of proof of penetration.
    - b. This follows the approach in **Canada**, which does not have a separate definition of rape. Instead, s. 271 of the *Criminal Code* prohibits ‘sexual assault’. Section 265 defines ‘sexual assault’ as non-consensual touching in circumstances of a ‘sexual

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<sup>20</sup> *UN Handbook* (n 1) p. 26.



nature'.<sup>21</sup> The law does not distinguish between different types of touching from groping to penetration. All are sexual assaults and criminal offences.

- c. The **advantage** of this approach is that it does not require complex definitions of 'penetration', which are inevitably unable to capture the full range of violations to which a woman could be subject. Such definitions also considerably increase the evidential burden of the prosecution to prove penetration.
- d. The **disadvantage** of this approach is that the epithet 'rape' continues to bring with it a high degree of moral and social opprobrium, which is not conveyed by the words 'sexual assault.' By removing the epithet 'rape', there is a risk of diluting the extent of moral condemnation.

**ii. Retaining an offence of 'rape' within a wide offence of sexual assault.**

- a. This approach retains the specific offence of rape but includes it in a cluster of offences under the category of sexual assault. This is the approach of the legislation in England and Wales, which specifies offences of 'rape', 'assault by penetration', 'sexual assault' and 'causing a person to engage in sexual activity without consent'.
  - (1) 'Rape' occurs when a person (A) 'intentionally penetrates the vagina, anus or mouth of another person (B) with his penis' without consent. This carries a maximum sentence of life imprisonment.<sup>22</sup>
  - (2) 'Assault by penetration' occurs when (A), without consent, 'intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,' and the penetration is sexual. This carries a maximum sentence of life imprisonment.<sup>23</sup>
  - (3) 'Sexual assault' occurs when (A) 'intentionally touches another person (B),' and the touching is sexual. This carries a maximum sentence of 10 years' imprisonment.<sup>24</sup>
  - (4) 'Causing a person to engage in sexual activity without consent' occurs when (A) intentionally causes another person (B) to engage in a sexual activity without consent.<sup>25</sup> Where the activity is equivalent to rape or assault by

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<sup>21</sup> In certain circumstances- aggravated sexual assault or sexual assault with a weapon- there are increased penalties but this does not change the underlying nature of the offence (ss. 272-273 of the *Criminal Code*).

<sup>22</sup> Sexual Offences Act 2003 (UK), s. 1.

<sup>23</sup> Sexual Offences Act 2003 (UK), s. 2.

<sup>24</sup> Sexual Offences Act 2003(UK), s. 3.

<sup>25</sup> Sexual Offences Act 2003 (UK), s. 4.

penetration, the maximum sentence is life imprisonment. In other cases, the maximum sentence is 10 years.

- b. A similar approach is taken by the **South African** legislation, which distinguishes between rape and other forms of sexual assault. Under the South African law,<sup>26</sup>
  - (1) ‘Rape’ is defined as all *penetrative* offences. ‘Sexual penetration’ is defined in broad and gender-neutral terms which go well beyond the prior common law restriction to penile-vaginal penetration.<sup>27</sup>
  - (2) ‘Sexual assault’ replaces the common law offence of ‘indecent assault’. Section 5 of the Act provides that sexual assault is committed where a person (‘A’) unlawfully and intentionally sexually violates a complainant (‘B’). ‘Sexual violation’ has a wide definition.
- c. The **advantage** of this approach is that it retains the moral opprobrium attached to the common understanding of rape. Notably the separation of rape from other forms of sexual assault was supported by the South African Law Reform Commission in its 1999 Discussion Paper on the reform of South African sexual violence laws.<sup>28</sup> The Commission argued that sexual violence involving the penetration of the body using sexual organs is qualitatively different from non-penetrative forms of sexual assault and therefore should be treated as a more severe offence.<sup>29</sup> To combine penetrative acts with non-penetrative acts in a single offence, it argued, would reduce the gravity of the offence. Furthermore, it argued that the division between penetrative and non-penetrative sexual offences would provide a better guide to judicial officers in sentencing.<sup>30</sup>
- d. The **disadvantage** of this approach is that there will still be disputes as to when an act is penetrative and when it is not, potentially making it more difficult to prove a rape case.

20. **The meaning of ‘sexual’:** In both cases it is necessary to give some guidance as to when an assault is a sexual as against an ordinary assault.

- i. The Canadian Criminal Code is silent as to the definition of ‘sexual’. The Supreme Court in *R v Chase* gave a broad definition: ‘viewed in the light of all the

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<sup>26</sup> Sexual Offences Act 2007 (SA), s.3.

<sup>27</sup> See *Masiya v Director of Public Prosecutions, Pretoria and Another* [2007] ZACC 9; 2007 (5) SA 30 (CC) para 26.

<sup>28</sup> SALRC, ‘Project 105: Sexual Offences, Discussion Paper 85: Sexual Offences – The Substantive Law’ (1999) <<http://salawreform.justice.gov.za/dpapers/dp85.pdf>> accessed 12 January 2013.

<sup>29</sup> *ibid* p. 80.

<sup>30</sup> *ibid*.

circumstances, is the sexual or carnal context of the assault visible to a reasonable observer.<sup>31</sup> Courts will examine the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, threats, intent of the accused and any other relevant circumstances.<sup>32</sup> However, it is not a pre-requisite that the assault be for sexual gratification. The motive of the accused is just ‘simply one of many factors to be considered.’<sup>33</sup>

- ii. The UK legislation has a statutory definition, which like the Canadian, relies on the way in which a ‘reasonable observer’ might view the activity. Under s. 78, an activity is sexual if a reasonable person would consider that it is ‘because of its nature sexual’ or that ‘because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.’

**21. We submit that in the Indian context it is important to keep a separate offence of ‘rape’. This is a widely understood term which also expresses society’s strong moral condemnation. In the current context, there is a risk that a move to a generic crime of ‘sexual assault’ might signal a dilution of the political and social commitment to respecting, protecting and promoting women’s right to integrity, agency and autonomy. However, there should also be a criminal prohibition of other, non-penetrative forms of sexual assault, which currently is not found in the Indian Penal Code, aside from the inappropriate references to ‘outraging the modesty’ of women in ss 354 and 509, which, as we have argued above, should be repealed.**

**22. We therefore recommend that**

- i. The offence of *rape* be retained but redefined to include all forms of non-consensual penetration of a sexual nature. Penetration should itself be widely defined as in the South African legislation to go beyond the vagina, mouth or anus. ‘Sexual’ should be defined, as in the UK, as an activity which a reasonable person would consider to be sexual because of its nature or because the circumstances or the purpose of any person in relation to it (or both) is sexual.
- ii. An offence of *sexual assault* should be introduced to include all forms of non-consensual non-penetrative touching of a sexual nature. It is recommended

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<sup>31</sup> *R v Chase*, [1989] 2 SCR 293 para 11, citing *R v Taylor* (1985), 44 CR (3d) 263 at p 269.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

here that the Canadian approach be followed, according to which the ‘sexual nature’ of an act is established if: ‘viewed in the light of all the circumstances... the sexual or carnal context of the assault [is] visible to a reasonable observer.’<sup>34</sup> Courts will examine the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, threats, intent of the accused and any other relevant circumstances. It should not be a pre-requisite that the assault be for sexual gratification. The motive of the accused is ‘simply one of many factors to be considered.’<sup>35</sup>

- iii. There should be a separate offence of *sexual harassment* which prohibits unwelcome physical, verbal or non-verbal *conduct* of a sexual nature, regardless of whether there has been any touching. This should not be confined to employment relationships, but include the informal sector, education, goods and services, sporting activities and property transactions.<sup>36</sup> Whether or not the conduct is unwelcome should be depend on the subjective view of the victim.

## ***b) Consent***

23. The United Nations Handbook points out that the definitions of rape and sexual assault have evolved over time, from requiring use of force or violence, to requiring a lack of positive consent. However, experience has shown that definitions of sexual assault based on a lack of consent may, in practice, result in the secondary victimization of the complainant by forcing the prosecution to prove beyond reasonable doubt that the complainant did not consent.<sup>37</sup> In the Indian context, although the understanding of ‘consent’ under s. 375 has come a long way from the infamous *Mathura* judgment, crimes prosecuted under s. 375 are still marred with evidentiary struggles of proving that the complainant did not consent.
24. The United Nations recommends that the definition of rape should require the existence of ‘unequivocal and voluntary agreement’ as well as proof by the accused of steps taken to ascertain whether the complainant was consenting.<sup>38</sup> This has the advantage of shifting the

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<sup>34</sup> *R v Chase* (n 31).

<sup>35</sup> *ibid.*

<sup>36</sup> *UN Handbook* (n 1) pp. 27-28.

<sup>37</sup> *ibid* p.27.

<sup>38</sup> *ibid.*

burden to the defence to prove that such steps were taken. This approach was endorsed by the CEDAW committee in its views in *Vertido v The Philippines*,<sup>39</sup> which made it clear that such a definition would assist in minimizing secondary victimization of the complainant/survivor in proceedings.

25. Similarly, under **Canadian** law, the accused cannot argue that there was belief in consent if the accused did not take reasonable steps to ascertain that there was consent to the specific sexual activity. It is not enough that the accused subjectively believed there was consent. He must also demonstrate that he took reasonable steps to ascertain it.<sup>40</sup>

26. Under the law of **England and Wales**, a person consents if he or she ‘agrees by choice and has the freedom and capacity to make that choice.’<sup>41</sup> There are certain statutory presumptions regarding consent. For example, lack of consent is assumed if violence was used or threatened or the accused had induced a fear of violence; the complainant was unlawfully detained, asleep or unconscious; or the accused had administered a substance capable of causing the complainant to be stupefied or overpowered. Lack of consent is conclusively proved if the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act, or induced consent by impersonating a person known to the complainant.<sup>42</sup> The underlying principle is that consent to sexual activity ‘requires a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act.’<sup>43</sup> There are some similar presumptions in the Indian statute.

**27. It is submitted here that**

- i. There should be a generic statement in the legislation that the burden should shift to the accused to show that all reasonable steps were taken to ascertain whether free and fully informed consent to the specific sexual activity had been given.**
- ii. It should be made clear that consent can be withdrawn at any time even during the course of a specific sexual activity previously consented to.**

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<sup>39</sup> Above n 19.

<sup>40</sup> Canadian Criminal Code s. 273.2.

<sup>41</sup> Sexual Offences Act 2003 (UK) s. 74.

<sup>42</sup> Sexual Offences Act 2003, ss 75 and 76.

<sup>43</sup> *R v J.A.* (n 14).

- iii. **The law should list particular instances where a presumption of non- consent operates, and particular instances where lack of consent is deemed, along the lines of the model in England and Wales.**

#### **IV Discrimination under Article 15 of the Indian Constitution**

28. It is well known that in the Indian context, Dalit women and women from the Scheduled Tribes, as well as Muslim women, women with disabilities and minor women are particular targets for rape and sexual assault. Several cases such as the case of the tribal minor girl Mathura (the rape survivor in *Tuka Ram v State of Maharashtra*) and Bhanwari Devi, the Dalit Anganwadi-worker (the rape survivor in *Vishaka v State of Rajasthan*), are well-known. However, they are just the tip of the iceberg.
29. Under Article 15(1) of the Constitution of India, ‘The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.’ Since the *Naṛ Foundation case*, ‘sex’ also includes ‘sexual orientation’. CEDAW in its General Recommendation 19 makes it clear that ‘gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.’
30. Dalit women, women from the Scheduled tribes, Muslim women and women with disabilities suffer from multiple discrimination, on grounds not just of their sex, but also of their caste, religion, or disability. The *UN Handbook* emphasises the importance of making specific provision for appropriate and sensitive treatment of women complainants/survivors of violence who suffer from multiple forms of discrimination.<sup>44</sup>
31. Section 375 of the Criminal Code already provides that consent is nullified in cases in which the woman is under 16 years old or is of ‘unsound mind.’ The proposed Criminal Law (Amendment) Bill 2012 expands on this by including ‘mental and physical disability’ and increasing the age to 18 years. However, this does not include all the grounds protected against discrimination in Article 15, or the specific harms suffered by women with who belong to more than one of the protected groups. We submit that the Government has an obligation to protect these women against discrimination under Article 15.

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<sup>44</sup> *UN Handbook* (n 1) p.15

32. The *UN Handbook* recommends that the definition of sexual assault should provide for aggravating circumstances, including the age of the complainant. We propose that this should be extended to all the grounds protected against discrimination in Article 15 of the Constitution.
- 33. We submit that the law should recognise that rape and sexual assault constitute a form of discrimination aggravated in circumstances of multiple identity, contrary to Article 15 of the Constitution.**
- 34. We therefore submit that the definition of rape and sexual assault should include a provision for aggravating circumstances where the offence is perpetrated against a person who also falls within one of the protected grounds of religion, race, caste, place of birth, age, disability, sexual orientation or any of them. This should constitute a separate offence of ‘aggravated rape or sexual assault’ rather than being relegated to the punishment or sentencing provisions.**

## **V Survivor Support Services**

35. We submit that survivors of sexual violence must have a legislative right to State funded support services in order to obtain justice; to facilitate physical, mental and emotional recovery; to obtain monetary compensation for such harm; and to avoid secondary victimisation<sup>45</sup> by the criminal justice system and society.
36. Secondary victimisation is victimisation that occurs not as a direct result of a criminal act but through the inadequate response of institutions and individuals to the victim. Such victimisation can range from experiences of isolation and confusion due to a lack of support and information when navigating the criminal justice system, to the shaming and ostracising of survivors of sexual violence and their families.
37. In India, the Protection of Women from Domestic Violence Act 2005 empowers the State Governments to appoint Protection Officers whose duties include ensuring that aggrieved persons are provided with legal aid; maintaining a list of ‘service providers’ offering legal aid, counselling, shelter homes and medical facilities within different jurisdictions; and to make safe shelter homes available to such aggrieved persons. However, these measures are

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<sup>45</sup> See ‘Secondary victimization from the criminal justice system and society’ in United Nations Office for Drug Control and Crime Prevention *Handbook on Justice for Victims* (New York, 1999) pp. 9-10.

restricted to women who have been subjected to domestic violence and not sexual violence in general; nor do they encompass all the measures necessary to support survivors.

38. The *UN Handbook* recommends enacting legislative duties to oblige States to provide funding for and to establish support services to assist survivors of sexual violence and their children, such that they are equally accessible by urban and rural populations. These support services ought to include minimum facilities such as a phone hotline, a shelter/refuge, an advocacy and counselling centre for every 50,000 women which includes crisis intervention and legal advice, a rape crisis centre for every 200,000 women and access to health care.
39. Legislative provision for survivor support services, often in the form of a ‘Victims’ Charter,’ has been implemented in leading common law jurisdictions such as Canada, Australia and the United Kingdom.<sup>46</sup> Many of these are based on the framework set out by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations in 1985<sup>47</sup> (UN Declaration of Basic Principles of Justice).
40. A particularly important issue concerns the risk for victims of contracting HIV and other sexually transmitted diseases or becoming pregnant. In **South Africa**, victims are entitled to receive post exposure prophylaxis (PEP) at designated public health establishments.<sup>48</sup> Furthermore, victims are entitled to apply for an order that the alleged offender be tested for HIV, at state expense. Police and healthcare providers must ensure victims are aware of the services available to them.
41. Also key to minimizing secondary victimisation is the provision of support to survivors in relation to the rape or sexual assault prosecution. The UN Declaration of Basic Principles of

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<sup>46</sup> For example, each province in Canada has legislation providing support for victims of crime, such as the *Victims’ Bill of Rights* CCSM c. V55 (Manitoba); a detailed network of victim support legislation exists in each State and Territory in Australia: Victims’ Charter Act 2006 (Vic) and Victims’ Rights Act 1996 (NSW), Part 2; and more generally Victims of Crime Act 1994 (ACT), Victims of Crime (Financial Assistance) Act 1983 (ACT); Victims’ Rights Act 1996 (NSW), Victims Support and Rehabilitation Act 1996 (NSW); Victims of Crime Assistance Act (NT), Victims of Crime Rights and Services Act (NT); Victims of Crime Assistance Act 2009 (Qld); Victims of Crime Act 2001 (SA); Victims of Crime Assistance Act 1976 (Tas), Victims of Crime Compensation Act 1994 (Tas); Victims of Crime Assistance Act 1996 (Vic); and Victims of Crime Act 1994 (WA); In England and Wales the Code of Practice for Victims of Crime is issued by the Home Secretary under the Domestic Violence, Crime and Victims Act 2004, s. 32.

<sup>47</sup> United Nations General Assembly Resolution 40/34, 29 November 1985.

<sup>48</sup> Sexual Offences Act 2007, s. 28



Justice<sup>49</sup> recommends that legislation should provide that women who have been subjected to violence should be assisted in lodging complaints by providing them with protection. Appropriate measures should be taken to prevent hardship during the detection, investigation, and prosecution process in order to ensure that victims are treated with dignity and respect, whether they participate in the criminal proceedings or not.

42. The CEDAW Committee in *Vertido v the Philippines*<sup>50</sup> held that States must ‘ensure that all legal procedures in cases involving crimes of rape and other sexual offenses are impartial and fair, and not affected by prejudices or stereotypical gender notions. To achieve this, a wide range of measures are needed, targeted at the legal system, to improve the judicial handling of rape cases, as well as training and education to change discriminatory attitudes towards women.’ Court proceedings involving rape allegations must be pursued without undue delay. Moreover, the State must put in place ‘appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid re-victimization of women having reported rape cases and to ensure that personal mores and values do not affect decision-making.’

43. In **Canada**, provincial legislation provides a detailed set of rights for victims of crime.<sup>51</sup> For example, under Manitoba’s *Victims’ Bill of Rights* a victim of a sexual offense has the right to be interviewed by officers of her own gender, the right to have their personal information kept confidential excepted where disclosure is required by law, the right to information on the status of the investigation, the name of any person charged, whether the person is detained or released, the right to information on prosecution, the court process and alternative means of resolution, the right to have their views considered by the prosecution, the right to apply for a publication ban, and time off (without pay) to attend trial.<sup>52</sup>

44. **South African legislation** includes provisions aimed at assisting victims of sexual offences in giving evidence in criminal proceedings against the alleged offender. For example the Sexual Offences Act provides that ‘... the court may not draw any inference only from the

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<sup>49</sup> Commission on Crime Prevention and Criminal Justice, Report on the 19<sup>th</sup> Session, Economic and Social Council, Official Records 2010, Supplement No. 10, ‘Strengthening Crime Prevention and Criminal Justice Response to Violence Against Women, (E/CN.15/2010/20), pp. 14-15.

<sup>50</sup> Above n 19.

<sup>51</sup> CCSM c. V55 [VBR].

<sup>52</sup> Ibid ss. 5, 6, 7, 12, 13, 14, and 26.

length of any delay between the alleged commission of such offence and the reporting thereof in criminal proceedings involving the alleged commission of a sexual offence.<sup>53</sup>

45. The UN Declaration also provides that there should be a right to seek restitution from the offender or the State. In Canada, provincial legislation establishes compensation for victims of crime. Section 47 of the Manitoba Victims' Bill of Rights provides for reimbursement for expenses incurred as a result of injury, compensation for related counselling services, any lost wages and any impairment.

46. The UN Declaration makes specific reference to women in particularly vulnerable positions. It recommends that States:

- i. Ensure that all services and legal remedies available to victims of violence against women are also available to immigrant women, trafficked women, refugee women, stateless women and all other women in need of such assistance and that specialized services for such women are established, where appropriate;
- ii. Refrain from penalizing victims who have been trafficked for having entered the country illegally or for having been involved in unlawful activities that they were forced or compelled to carry out.

47. Moreover, regard must be had in the design and implementation of survivor support services to the particular needs of the person adversely affected, particularly regarding differences such as race or indigenous background; sex or gender identity; cultural or linguistic diversity; sexual orientation; disability; religion; and age.<sup>54</sup>

**48. We therefore recommend that India should implement measures in accordance with the principles above to provide for an appropriate legislated package of support services for survivors of sexual violence.**

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<sup>53</sup> Sexual Offences Act, s. 59

<sup>54</sup> For example, see Victims' Charter Act 2006 (Vic), s. 6.