

## CHAPTER VIII

### SUGGESTIONS

**“Childhood should be carefree, playing in the sun; not living a nightmare in the darkness of the soul”**

*---Dave Pelzer<sup>1</sup>*

#### **A) Suggestions to Govt. of India and the Parliament:**

1. The offence of Rape under section 375 IPC and its aggravated form are all gender centric, that means; law presumes that the offence of rape can be committed only by a male against a female, but in the present day situation it is seen that rape is a offence that can be committed even against a male or transgender by a man or women or transgender. Hence, the definition of rape should be amended to such an extent that it is made gender neutral, so that; a victim irrespective of his gender can lodge a FIR against the culprit who may be a male, female or transgender. A Criminal Law Amendment Bill, 2019 is already placed in the Rajya Sabha by as a Private member Bill by KTS Tulshi with the sole object to bring gender neutrality in sexual offences. Moreover, similar suggestion and recommendation were also made by-

- Justice Verma Committee in the year 2013
- The Law Commission of India in its 172<sup>nd</sup> report
- Hon’ble Supreme Court in the case of Criminal Justice Society of India v. Union of India & Ors. W P (Civil) No. 1262/2018, Dated 12th November 2018

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2. At present the proviso to Section 273 of Cr.P.C which provides for special measures to ensure that a female child below the age of 18 who is alleged to be victim of rape or any other form of sexual offence including abuse is not confronted by the accused is applicable only to female and hence it does not cover a male child victim of sexual assault or abuse which is quite common nowadays in the society. Thus this provision should be made gender neutral so it will have wide application and would cover even male child or a transgender child within its scope which will help the child victim to keep himself/herself away from the accused during the stage of examination of witness in the trial procedure.
3. Section 3 of the Prohibition Of Child Marriage Act declares a child marriage as voidable at the option of the parties due to which, parties do not bother to commence child marriage because the marriage does not get nullified automatically or *suo mottu*. As a result, child sexual abuse continues to flourish under the gaze of child marriage. Hence, it is suggested that Section 3 of Prohibition Of Child Marriage Act should be amended so as to replace the word 'voidable' to '*void ab initio*'.
4. The Prohibition of Child Marriage Act is in contradiction to some personal laws such as the Muslim personal law, which allows a girl to get married once she attains puberty. In such circumstances, appropriate steps should be taken by the Parliament of India as well as the Apex Court to bring a harmony to the contradiction whereby, the provision of Prohibition of Child Marriage Act shall prevail over the personal laws regarding age of marriage.
5. There is no provision for punishment to the Child marriage Prohibition Officer appointed under the Prohibition of Child Marriage Act even for dereliction of his/her duty which reduces the accountability of such officer in enforcement of the law. To make the Child marriage Prohibition Officer accountable it is necessary to insert provision which shall state that; non performance of duty or neglect in

performance of duty by the Child marriage Prohibition Officer would attract punishment under the said act.

6. The Immoral Traffic (Prevention) Act has differentiated the term ‘child’ from ‘minor’ on the basis of age under two separate definition, which contradicts the definition of ‘child’ under the POCSO Act. Again, due to the difference in definition between child and minor, punishment prescribed under section 5 also differs. As per the proviso of section 5, if the offence of procuring, inducing or taking of a person for the purpose of prostitution takes place against a child *i.e.* below 16 years the maximum punishment that can be imposed upon the offender is imprisonment for life whereas, if the same offence is committed against a minor *i.e.* above 16 but below 18 years of age the maximum punishment is imprisonment for a term of 14 years. This difference on the basis of age is by no means justifiable and hence it is recommended to amend the Immoral Traffic (Prevention) Act in the following manner-
  - Definition of child under section 2 (aa) should be changed to cover a person who have not completed 18 years of age as that of the definition of child under the POCSO Act.
  - The concept of ‘minor’ should be removed by removing it from the definition clause *i.e.* section 2(cb)
  - Section 5 should be changed to such an extent that equal punishment is provided to offender for committing a offence under section 5 irrespective of the age of the victim.
7. Section 75 of the Information Technology Act confers extra territorial jurisdiction, which is potent enough to generate conflict of jurisdiction. It is because when a citizen of India commits any offence outside India prior sanction of the Central Govt. is required to prosecute the offender as per Section 188 of Cr.P.C which provides that “*no such offence shall be inquired into or tried in India except with the previous sanction of the central Government*”. Therefore, Section 75 of the

Information Technology Act and section 188 of the Cr.P.C are to be reconciled by necessary amendment of Cr.P.C and for prompt and speedy investigation of cyber crime the provision of prior sanction of the Central Government shall be removed.

8. Although, Section 75 of the Information Technology Act enables prosecution of any person irrespective of his nationality, if he commits the offence outside India is to be noted that prosecutorial co-operation among nations in the international level greatly depends on bilateral treaty between nations. Therefore, it is recommended that India should take steps for entering into such treaties with as much country as possible to protect children from cyber pornography.
9. A woman cannot be accuse of committing offences under section 3 and 5 of POCSO Act, which is clear from the language of the provisions. However, as per the definition of penetrative sexual assault provided under section 3 of the POCSO Act, penetration can be by any means such as inserting any object or other body part, which can also be done by a female on a female, male or third gender person. Thus, apart from the condition put forth in section 3(1) of the POCSO Act all other condition should be made applicable to male, female as well as transgender culprits.
10. Section 24(1) is a special provision inserted in the POCSO Act that deals in recording of statement of a child victim under POCSO Act preferably by a women police officer not below the rank of sub inspector in civil dress so that the child victim do not find it uncomfortable or frightened from a male police officer, but if the child victim is a male child and in the age of adolescence i.e. above 14 years and below 18 years in such cases a male child victim of sexual exploitation or abuse would rather hesitate or feel more uncomfortable to depose the statement regarding the incidents that happened with him before a female police officer in comparison to a male police officer. So in order to make the situation comfortable for both the gender child victim the Section 24(1) should be amended and provisions should be such that for female victim and male victim below 14 years

the investigating officer should be a female police officer but in case of child victim above 14 the investigating officer recording the statement should be a male police officer specially trained to handle such sensitive cases.

11. The object of section 26(4) is to preserve the statement made by the child before the magistrate or the police officer through audio-video electronic means so that the defence cannot take the plea that the statement of the child is taken and recorded out of force and hence cannot be a good piece of evidence. Similarly, it will also be helpful to ensure that the person recording the statement of the child specially the police officer is not pressurising the child victim and is following the child friendly procedure suggested under the POCSO Act. But, the problem with this provision is that, it is not made mandatory for the police or the magistrate to use audio-video means to record the statement of the child due to which in majority of cases the police or the magistrates don't bother to use such techniques while recording of statement. So it is recommended that section 26(4) should be amended and makes it mandatory for the police or magistrate to use audio-video means while recording statement from the child victim of sexual abuse.
12. There is no minimum punishment prescribed for the offence of sexual harassment under section 12 of the POCSO Act, which means that the offender may get very little punishment which will not have any deterrent effect. Hence, it is recommended that the provisions should be amended whereby minimum punishment shall be prescribed.
13. Rape has been defined under Section 375 IPC with two exceptions stating the conditions when an act would not be covered under the definition of rape. The second exception namely; Exception 2. goes as "*sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape*" which means that if a man commits sexual intercourse with his minor wife above 15 years but below 18 years he will not be booked for committing the offence of rape because as per the definition of rape he will fall under the second

exception. This exception to the definition of rape is without any reasonable basis as because if the object of this definition is to stop or protect a girl child from being sexually abused the age should have been 18 years instead of 15 years. It is because the definition of child as per the Indian Majority Act, 1875 is below 18 years. Again the exception seems to be contradictory to the Prohibition of Child Marriage Act, 2006 as because the act legalise the marriage of a girl child only after she attains the age of 18 years and not 15 years. Apart from the above it has been found that section 376(2)(i) provides extended and severe punishment for rape of a girl child below 16 years of age which is a praiseworthy provision but it again seems to be contradictory to the Exception 2 because the only difference between the two provision is that in one case the minor girl is married and in the other case she is unmarried which doesn't make any sense as because the consequences of such sexual abuse will be the same upon the girl. Moreover, this exception will a boost the mentality of those persons who still will to marry a tender age girl may be above 15 but below 18 years which will dilute the object of the Prohibition Of Child Marriage Act, 2006. Hence it is suggested to the parliament to make necessary changes to the Exception 2 of section 375 of IPC in the following words:

*“Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape”*

14. It has been found that the qualification and experience prescribed for appointment of a Special Public Prosecutor under POCSO Act is differing to the qualification and experience required under the Cr.P.C provision because under Section 32(2) of the POCSO Act an advocate having an experience of 7 years practice in the Bar is eligible to be appointed as SPP whereas Section 24(8) provides that in order to deal with special class of cases an advocate having an experience of 10 years practice in the bar can be appointed. The cases of CSA being special category of case due to its nature and sensitivity during trial it should be prosecuted by well

experienced prosecutor who have special skill and knowledge in dealing with such cases and hence it is suggested that the Section 32(2) should be immediately amended to increase the experience to 10 years instead of the existing 7 years so that much more experienced persons are appointed to prosecute such sensitive cases which will be helpful for the victim to get justice.

15. Section 28(1) of the POCSO Act should be amended so that it becomes mandatory for the State Govt. to establish separate Special Court instead of designating the Session Court as Special Court.
16. The parliament should amend the POCSO Act and insert a new provision which shall state the list of documents that can be considered for determining the age of a child or shall amend Rule 12 of the JJ Rules extend the list of documents eligible for proving the age of the child. This is necessary because presently there is no specific listed out documents which can be considered by the court to determine the age of the child victim and hence the court follows the guiding principles of Rule 12 of the JJ Rules and in case where the child don't have the documents like Birth certificate or school leaving certificate the only option is to go for bone ossification test which gives a rough estimate of the child age.
17. The guideline issued by the Apex Court to the Central Govt. in the case of **Re – Alarming Rise in the number of Reported Child Rape Incidents**(Suo Motu Writ Petition(Criminal) No.01/2019 Dated 13-08-2019) should be complied for giving financial support to the state governments in setting up of exclusive Special Courts under POCSO Act.

#### **B. Suggestions for State Government of Assam:**

1. The police are always overloaded with work due to multiple work entrusted to them as well as shortage of manpower which have negative impact in investigation of crime and prevention of any crime. The situation is same with the child welfare officer or the Juvenile police officer who need to perform multiple task in addition

to the cases relating to child which results in poor investigation, delay in filling charge sheet and failure in prevention of crime. In order to tackle all these problems the State government should take the following steps: firstly, the government should fill up the vacant post and increase the number of police specially in the rank of Sub-Inspector because it is the Sub Inspectors who are basically entrusted with the duty of investigation. Secondly, in every police station a separate wing should be created namely investigation wing, which shall comprise of the senior police officers who will be specially trained in the skills of investigation. A police officer once appointed in the investigation wing should not be transferred to any other branch of police force. The CWO/ Juvenile Police Officer should also be appointed in the said wing of the station.

2. It had been found that the police face problem in the case of child trafficking where he need to take immediate step to prevent commission of the crime by going to some distance place where the child is harboured due to scarcity of fund in the form of '*cash in hand*' with the officer in charge of the station or fund at district headquarter at the disposal of Superintendent of Police. In majority of cases the police officer should he have to travel to distance place at his own expenses. Although the officer can claim for reimbursement of the expenses later but practically speaking when a person have to travel out of state or far away district he requires lot of money and it is not possible for a police officer to make immediate arrangement which may be within a hour or 24 hours depending on the case for such sum which becomes a reason for delay in investigation or rescue of the child before victimisation even though the police gets the information before hand. In order to overcome this problem the state government could create a mini separate fund at least for every district headquarter if not at every police station which can be utilised for such cases by the Police officer engaged in the duty of recovery. The mini fund should be operative either at the hands of Superintendent



of Police of the respective district or the District Magistrate whoever the State government think fit for the purpose.

3. There are very few and negligent number of shelter homes and children homes directly established by the State Government as a result the DCPU & CWC are dependent on the private shelter homes recognised by the government which have poor infrastructure and lacks in the basic facilities required for the child who are accommodated in those shelter homes. Moreover, these homes suffer from shortage of fund resulting in derogation of the quality standard. Thus it is recommended to the State Government to take immediate step and establish at least one shelter home of its own with all necessary facilities directly under the control of the government department so that the child victim those are sent to these homes do not suffer from any problem in their day to day life.
4. The Schedule dated 5<sup>th</sup> March, 2016 bearing Ref. No. PLA.524/2015/16 of the Assam Victim Compensation Scheme, 2012 should be amended so that the victim of non-touch sexual offences (like Sexual harassment & pornography) under POCSO Act are also eligible to get compensation for the psychological injury that they suffered.
5. Immediate steps should be taken to establish full fledged mechanism under the POCSO Act and the JJ Act in the districts of Biswanath Charaideo; Hojai; South Salmara-Mankachar; West Karbi Anglong; Majuli and all other district where such mechanism is not available.
6. A permanent post of legal consultant should be created in the ASCPCR to give legal advice to the Commission members whenever they require while performing their duty and to assist the commission in monitoring compliance of law. The qualification for such post should be a law graduate with a minimum seven years practice in the Bar or a Master Degree in Law with minimum of three years of experience in Academics or Research.

7. Number of office staff in the ASCPCR should be increased for efficient working of the Commission and it should be seen that no post is left vacant.
8. Chairperson should be appointed to the CWC of Dibrugarh and all other district where there is vacancy in such post.
9. Protection Officer(Institutional Care) and other office staff should be recruited in Dibrugarh and Tinsukia and all other district where there is vacancy in such post.
10. Arrangement should be made to appoint Counsellor, Social Worker and Outreach worker in the District of Dhemaji and all other district where there is vacancy in such post.
11. Separate building should be constructed for sitting of Special Court so that the Child victim do not experience the hardcore Criminal Court atmosphere.
12. The number of Forensic Science Laboratory shall be increase in the State. There should be at least one forensic science laboratory at a convenient place for every 5 district for the ease of investigation, gathering evidence and speedy disposal of cases.
13. Special Public Prosecutor should be appointed in Dibrugarh, Dhemaji and all other district where there is vacancy in such post.
14. Sufficient number of CCI should be set up in each district depending on its requirements by the State Government with adequate facility as per the JJ Act and ICPS guidelines. However, until government establish their own CCI, the existing CCI managed by Organisations and recognised by State Government should be given regular and timely fund for their maintenance in an adequate manner.
15. Man power specially in the rank of Sub-Inspector in Police Department should be increased as it is these officers who are authorised to investigate sensitive cases like CSA. Moreover, the number of Women officer should also be increase to deal with child victim.
16. Sufficient number of vehicles should be provided to each police stations.

17. A separate fund should be created in each district at the disposal of the Superintendent of Police, so that it could be used in urgent situation, when any officer have to travel to distance places mostly out of state to recover any victim of sexual offence or trafficking, because at present there is no arrangement for advance payment.
18. The problem of frequent transfer of investigating police officer specially engaged in investigation of offence related to sexual abuse of child should be taken care of by the Home department.

**C. Suggestions to the Assam State Commission for Protection of Child rights(ASCPCR):**

1. The commission shall adopt measures for spreading awareness among the public.
2. The Commission shall formulate guidelines and publish handbook on POCSO Act and Rules stating the role of various stakeholders preferably in regional languages and shall be distributed among the stakeholders like Teachers, CCI management, NGO's, Police stations, Counsellors, Social Workers, Outreach Workers and so on so that the stakeholders become aware of their duties to fight against such offence.
3. Data on various aspects of POCSO Act shall be collected and reports should be prepared preferably on an annual basis which will help the State Govt., Central Govt. and NCPCR to understand the compliance of POCSO Act in Assam so that measures can be taken to rectify the problems.

**D. Suggestions to Police:**

1. The Superintendent of Police of each district should keep a check on the activities of the officer dealing with child victim of sexual offence so that they comply with the POCSO Act.
2. Every officer should provide information to the informant regarding the name, designation, phone number, & address of the officer recording the information.

3. The officer in charge shall make necessary arrangement for production of the child in need of care and protection before the CWC within 24 hours.
4. The Investigating Officer shall mandatorily follow the provision like, not to wear uniform while interacting and recording statement of the child victim; record the statement of the child only in such place where the child feel comfortable at his/her wish; information to the child family regarding free legal aid & interim compensation.
5. The IO shall allow the parents or any other any person of child choice to remain with the child during the entire process of recording statement.
6. The guideline issued by the Hon'ble Supreme Court for the police in the case of **Alakh Alok Srivastava V. Union of India**(2018 SCC Online SC 212, Decided on March 12, 2018) should be complied. The Guideline goes as follows-

*“The Director General of Police(DGP) of every state shall constitute a special task force to monitor the investigation of a case related to POCSO Act as well as to ensure production of witness on the given date by the trial court.”*

#### **E. Suggestions for State Child Protection Society:**

The State Child Protection Society under the Social Welfare Department should periodically check the activities of DCPU and aid the Unit in with all possible help so that the DCPU's perform their duty without fail. Among the many, the State Child Protection Society shall specifically see that-

- the DCPU update the list of support persons, experts, Counsellors, translators etc. periodically and the same is be circulated to SJPU of the District, Police stations, CWC and Special Court.
- the DCPU of Dhemaji and all other district who had not arranged any training programme, make such arrangement at the district level for the

stake holders like police, teachers, social workers, panchayat members, doctors and so on.

**F. Suggestions for Assam State Legal Services Authority(ASLSA):**

1. The ASLSA shall give necessary direction to every DLSA to prepare and maintain a separate penal lawyer list for assisting the child victim of sexual offences under POCSO.
2. The ASLSA shall also make arrangement for providing special training to the penal lawyer so that they learn the skill to deal with child victims.

**G. Suggestion for Gauhati High Court:**

1. The Gauhati High Court should arrange for waiting room for children in the court complex of each district so that the child can wait peacefully away from the court environment till the time he/she is called for examination.
2. The Gauhati High Court shall monitor the trial of POCSO cases so that they are disposed of quickly within the statutory prescribed period of one year.
3. The Gauhati High Court shall arrange for suitable arrangement of audio-visual means in all the Special Courts so that the court can use such facility to record statement of the child victim without bringing the child to the court.
4. The guideline issued by the Hon'ble Supreme Court for the High Courts in the case of **Alakh Alok Srivastava V. Union of India**(2018 SCC Online SC 212, Decided on March 12, 2018) should be complied by Gauhati High Court as soon as possible.

**H. Suggestions for Special Courts:**

1. In no case, the Special Court shall allow direct questioning of the child victim.

2. Frequent break during examination of child should be made a customary practice in all cases.
3. The court shall not allow adjournment unless the reason is extremely unforeseen and unavoidable.
4. The Special Court shall follow the guidelines framed by the Hon'ble Supreme Court in the case of **State of Punjab V. Gurmit Singh and others**(AIR 1996 SC 1393).

**I) Creation of Mass awareness:**

Awareness is the key to fight against crime thus it has become necessary to make the common people and the children aware about such crime and the law available to safeguard them. This is necessary because in many cases specially in the cases of non-penetrative form of sexual abuse the child victim do not even realise that he/she had been sexually abused due to which the cases goes unreported and the offender unpunished. Similarly, due to lack of awareness the guardian of the victim child or even any other person who come to know of the abuse do not move the police or take legal help thinking that these are normal things or that there is no law to punish the offenders. Hence, it is suggested that the NCPCR, ASCPCR, DCPU and DLSA may be with the help of other institutions organise frequent awareness programs in various levels like school, college, village, block, district so that people come to know about such crime, the legal remedies available and the importance of lodging an FIR immediately. Apart from these above statutory authorities few other institutions like Bar Association, Lawyers Association, Legal Aid Cell of Law Colleges, Legal Literacy Club and so on can also play a vital role in creating sensitization among the general masses by organising legal awareness programs as a part of social responsibility.