



# Responding to a Separate Category of Offence: Laws relating to Sexual Violence against Women

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## Recommendations to the J.S. Verma Committee

**Society of Women Lawyers – India**

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## INTRODUCTION

The Society of Women Lawyers – India (“SOWL”) lauds the Government of India’s constitution of a special committee to examine the laws relating to and punishments for sexual violence against women. The horrific gang rape in New Delhi in December 2012 that resulted in the death of the victim has highlighted the lack of safety of even an educated and independent woman in an urban center, not to talk of the victimization faced on a regular basis by women in rural areas, dalit women, tribals, adivasis, women with disabilities and other disadvantaged women. SOWL is aware of other organizations that are submitting recommendations relating to women who face the oppression of being a women and belonging to another disadvantaged class. Our recommendations are largely focused on the laws relating to sexual violence.

We address our comments under the following categories:

1. Criminal justice system
2. Administrative machinery
3. Police role and accountability
4. Monitoring and documentation of repeat offenders
5. Medical testing and response protocol

In addition, **Annex A** to this document contains the text of existing or currently-proposed legal provisions, which we have annotated to reflect our proposed amendments.

In drafting our suggestions, we have sought the views of our members who consist of women who are litigators, corporate attorneys, in-house counsel and other practicing and non-practicing lawyers, largely based in urban centers in India. In addition to receiving written recommendations from our members and stakeholders, we have received input through a Stakeholder Meeting held in New Delhi on 2<sup>nd</sup> January 2012. SOWL would like to especially thank **Siddharth Aggarwal** for his invaluable guidance and wisdom at the Stakeholder Meeting that went a long way in shaping this report.

We have also surveyed our members and stakeholders on matters of personal conscience such as the appropriateness of the death penalty. Having said that, the views expressed here are the individual views of certain of our members and the members of the governing council of SOWL. The positions taken are taken by us individually as well as by SOWL, and should not be imputed to the law firms or other organizations with which any of our individual members or members of the governing council are affiliated.

Apart from working on this report, SOWL also conducted a poll to ascertain the response of its members and other non-member lawyers on three issues of personal conscience that have been hotly debated in

the mainstream media: (i) death penalty for rape, (ii) reversal of the burden of proof, and (iii) a public database of convicted sex crime offenders. The results of the poll are **Annex B** to this document.

Our members and members of the governing council would be glad to offer any other input and assistance to the committee that we can. Questions can be addressed to [contact@sowlindia.com](mailto:contact@sowlindia.com) and a list of the members of our governing council is available at [www.sowlindia.com](http://www.sowlindia.com). The names of the members and stakeholders who submitted individual views are set forth on **Annex C** to this document.

## **1. CRIMINAL JUSTICE SYSTEM**

Since the era in which the Indian Penal Code (the IPC) was legislated, there has been a recognition in academic literature that sexual crimes against women have less to do with the sexual act and more to do with assertion of power. Therefore, references in the IPC to “outraging the modesty” of a woman, and the frequent almost universal inquiry by courts into the character of the woman are meaningless and should be recognized as such. At the same time, societal norms and beliefs have the effect of chilling victims’ willingness to come forward, delay in the commencement of an investigation while members of the victims’ families resist involvement of the authorities, and the resulting destruction of evidence. The laws of evidence as well as courts’ interpretation of the laws of evidence must recognize this limitation in sexual crimes against women.

Our recommendations in this area are under the heads:

- Definition of the Criminal Acts
- Inference of Consent
- Laws of Evidence
- Sentencing and Punishment

### **A. Definition under the Criminal Acts**

As previously noted, we firmly believe that sexual crimes have their basis in the assertion of power over a woman on the basis of her gender. Therefore, first and foremost, the need of the hour is to define the scope of the crimes/acts which are committed against women on the basis of gender. Although rape can be committed on a man, society and the law recognize that in a large majority of the cases it is a woman that is the victim. In this document our concern is with such crimes, that are committed predominantly against women, and where the intention involved is sexual or physical threat or assault on a person in a manner that would affect her as a woman. It is for this reason that the scope of criminal acts that we believe should have the benefit of the legal and administrative reforms we recommend in this document are broader than rape, and include acid attacks, stalking and “eve-teasing” as described below.

#### ***i. Defining Categories of Rape and Sexual Assault***

The IPC goes to some extent in recognizing that not all rape is the same, and instance of “seduction” involving abuse of the perpetrator’s fiduciary relationship with the victim, such as by a public servant with a woman in his custody, superintendent of a jail, staff of a hospital, etc. deserve to be criminalized even when not technically rape. However, there is a need to go much further.

It is imperative that new classes of offences, with separate definitions be developed for each of the following:

- Sexual assault/sexual battery;
- aggravated sexual assault;
- threats to a third party of causing bodily harm or actually causing bodily harm sexual assault involving the use of foreign objects-not limited to penile penetration;
- incestuous rape or rape by a family member (where family members should be defined to include members of a foster home);
- gang rape involving or not involving brutalization;
- custodial rape;
- rape of a minor;
- rape of a disabled woman or woman having special needs;
- marital rape; and
- rape when consent has been withdrawn by the woman.

Each of these evaluated for the kind of punishment that would be consistent with the gravity or brutality of the offence for each class. The punishment should also be increased if the crime results in death or suicide or severe incapacity of the victim or a family member of the victim. Suicides by the victim or a family member of the victim have occurred sufficiently frequently in the past that it should be reasonably foreseeable by a perpetrator.

Where relevant, lack/withdrawal of consent of the victim should be: (i) subject to proof (e.g., date rape), (ii) presumed but subject to rebuttal or (iii) not relevant (e.g., rape of a minor, rape along with brutalization). We have not attempted to define each category in our specific legislative recommendations in **Annex A**, but are at the disposal of the committee should this be desired.

The recently enacted Protection of Children from Sexual offences Act, 2012 and the Rules framed for its implementation has included categories of sexual offences against minors, which we suggest should be looked into in the context of amendment of the laws relating to sexual assault generally as well.

**ii. Penetration is Not Required for Rape**

The explanation to Section 376 of the IPC which states that “penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape” should be struck off. Our recommendations on **Annex A** recommend deletion of this explanation.

**iii. Marital Rape**

It is disheartening that marital rape is legitimate in India. Marital rape is a gross violation of a woman’s right over her own body. It is high time that marital rape should be explicitly included under the definition of violence against women.

Additionally, in the limited instances where the law does recognize the crime of rape within a marriage, there is no justification of the distinctions drawn by the IPC. Section 375 of the IPC provides that sexual

intercourse by a man with his own wife not being under the age of 15 years is not rape. Section 376 of the IPC prescribes the punishment for rape and a lesser punishment for rape of a woman by her own husband if she is not under 12 years of age. Since the legal age of marriage is 18, and the legal age for consent is 16, we see no justification, either for making a distinction in the punishment based on whether the wife is less than 12 years of age, or between 12 and 15, or, in prescribing a maximum punishment lesser than that prescribed for rape generally where the wife is between 12-15 years of age. This odd categorization based upon the age of the wife should be done away with. The age of the wife can be an aggravating factor for award of a higher sentence but is no justification for lowering the sentence on a crime that would, in any other situation, be rape without even the need to prove consent of the minor.

***iv. Inference of 'Consent' of the Victim***

An explanation to Section 375 should be included that legislatively puts to rest the ability of courts to look at the character and circumstances of the victim. Being a crime of dominance rather than a crime of lust, it is irrelevant to the inquiry of consent as to whether or not the victim wore “provocative” clothes, was outside her home after dark, had consumed alcohol, her profession or whether she was present at a specific place.

Lack of consent results from forcible compulsion, incapacity to consent, or, where the offence charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or implicitly acquiesce in the actor’s conduct.

***v. Sexual Harassment***

If surveyed, we are confident that this committee will not find one woman who has ever travelled in a Delhi Transport Corporation bus who has not been groped. What in other parts of the world, including parts of the world that are poorer, more disadvantaged and more backward than India, would be seen as a serious societal and legal infraction, is here given the rather playful term of “eve-teasing., when in fact it is a threat of sexual assault or sexual assault.

We strongly condemn the impunity with which this crime occurs on a daily basis, and urge this committee to use its mandate and visibility to adopt zero tolerance for this crime among the police, the administration, courts, as well as society at large.

As a first and concrete step, the offence should be spelled out and meaningless terms like “outraging a woman’s modesty” in Section 354 of the IPC be replaced with the term “threatening the bodily integrity of a person” such that it is viewed from the perspective of the doer rather than the recipient. Using value judgemental terms like “modesty” open up survivors of such crimes to character assaults by defence attorneys and it is imperative that the language of the statute pre-empts that. Similar amendments are proposed to Section 509 of the IPC.

**vi. Voyeurism**

We have proposed the inclusion of a new offence as Section 509A of the IPC of Voyeurism. It is increasingly common for men to capture the image of women, whether or not with their knowledge, and share the images with others. There are various situations, all of which involve a violation of the women. The victim may be engaging in consensual intercourse with the perpetrator but not be aware of him recording the act. She may even consent to the recording but not to its dissemination. The most egregious of course is the recording of a woman by a stranger, without her knowledge and consent. The penalties should be increased for aggravating factors such as broad dissemination, or if the act has foreseeable consequences such as suicide of the victim or a family member.

We have attempted to define some limits to the proposed offence in Section 509A in order to exclude from it situations such as capture of images of celebrities at public events. We believe that further consultation with stakeholders is required in order to define the offence in a way as to grant it teeth but without creating a new offence with a mandatory minimum punishment that can be utilized by putative victims for reasons it was not intended to cover.

**vii. Other Hate Crimes**

Hate crimes against women, such as acid attacks, should be considered within the group of offences loosely termed sexual crimes. Although not on the face of it sexual, in many instances acid attacks are actuated by a similar power-dominance reaction as rape, and in many cases are in response to rejection of sexual advances.

We urge this honorable committee to include acid attacks and other hate crimes within the purview of its recommendations for: (i) conceptual, and (ii) practical reasons.

Conceptually, including such crimes within the purview of the report will go a long way in establishing within the government/administration/court structure that hate crimes, as well as rape are actuated by power-dominance rather than lust-sex. We urge the committee to adopt a strong statement to this effect, which we hope will be viewed by courts as a reason to end the humiliating and unnecessary inquiry into the character and circumstances of the victim.

Practically, viewing hate crimes as a continuum with other forms of violence against women including rape will give the victims of such crimes the benefit of the other recommendations of the committee, such as, for instance, access fast track procedures.

**viii. Role of Juvenile Perpetrators**

“Adult time for adult crime” is both a catchy phrase and a morally problematic concept that appears to unfortunately have found widespread social acceptance in the current day in our country. While international standards and treaties recognize that children, are entitled to special care and protection



because they are still developing physically, mentally, and emotionally, India's treaty obligations merely require us as a country to offer a range of alternatives to institutionalization. The imprisonment of a child though a measure of last resort and usually recommended for the shortest suitable period of time, is not anti-thetical to our treaty obligations. Incarceration may even be proper for youth convicted of very serious crimes such as rape and murder and juveniles who commit or participate in sexual assault on women should not be exempt from punishment altogether purely due to their age. If a juvenile offender has participated in a crime or offence with other majors or as a group including other minors, then they should not get the benefit of a statute such as the Juvenile Justice Act, which is protectionist and not penal in nature.

## **B. Reform of the Laws of Evidence**

The reaction of a number of criminal lawyers we spoke to has consistently been that a poor evidence gathering exercise coupled with a faulty chargesheet and not the absence of laws, are the primary reasons for the low rate of conviction for sexual offences. Reforms in practice guidelines relating to evidence collation and analysis will lead to better conviction rates and will eventually encourage an increase in the reporting of sexual crimes.

The key issues identified under this head are as under:

### ***i. Collection of evidence:***

Issue #1: Delay causing pollution of line of evidence.

Issue #2: Data collection by evidence is by someone who is not trained in the importance of examining clothes, etc.

Issue #3: Chain of custody of physical material is broken (it is kept in maal khana for well beyond the crucial period of 96 hours rather than being sent for analysis)

Issue #4: Delays at the stage of the analysis as well as faulty analysis owed to Issues #1 to #3 above.

For the purpose of this report, we have not prepared draft police guidelines that could be evolved in relation to the evidence gathering process but believe in their necessity. We will be happy to assist the Committee to undertake further research and offer recommendations on this issue if the Committee so desires.

As a general matter, Protection of Children from Sexual offences Act, 2012 contains welcome provisions for recording of evidence of victims of sexual abuse and we suggest that similar provisions be adopted for adult victims as well.

## **C. Sentencing and Punishment**

### **Death penalty**

We are against the death penalty and other extreme forms of punishment including chemical castration.

### **Sentencing**

However, we believe that the current minimum punishment for all categories of sexual assault should be raised to 10 years and the maximum punishment should be life imprisonment. The sentence should be rigorous and the convict should not be able to shorten the sentence through parole, President's mercy, good behaviour or any other ground. The proviso under Section 376 should be dropped and the judge should not be given an unfettered right to impose a sentence of imprisonment for a term which is lesser than the minimum sentence.

## **2. ADMINISTRATIVE MACHINERY**

### **A. Fast-track Investigations and process**

- Fast track investigation: There is an immediate need of increasing the number of laboratories engaged in collating and analysing the forensic evidence gathered in cases of rape. At present there are not enough laboratories and the number of people working in these laboratories is also not adequate. Thus, for fast tracking investigation, the aim should be to establish special laboratories which would also help in increasing transparency and accountability.
- Rape cases need to be fast tracked and a zero tolerance rule to adjournments by the accused should be followed.
- A special task force of women officers should be created to register and follow up cases of rape or sexual assault.
- The person who has been sexually assaulted should have a right to counsel during the hearing and the counsel should be given full access to the chargesheet and all case documents to recommend further investigation if glaring loopholes and lacunae emerge.

### **B. Functional Helplines**

We share the concerns that have been voiced by many concerned citizen groups that there is no functional helpline for sexual violence. To the extent necessary for the functioning of this system, private telephone operators should be involved in the process.

### 3. POLICE ROLE AND ACCOUNTABILITY

While we primarily intend to limit our suggestions to law reform; however, we have included some pointers on police and accountability below for the Committee's considerations that emerged from discussions amongst our members.

- We wonder if the Committee is prepared to explore accountability measures that are applied in international contexts, for (i) accountability of state officials to the public at large and the (ii) accountability of perpetrators to victims. On (i), as Princeton Professor of Politics, Robert Keohane has noted, there are seven 'types' of accountability, only a few of which coming into play in the current structures: legal, hierarchical, supervisory, market, fiscal, peer reputational, public reputational.<sup>1</sup>
- At the moment state officials are governed by legal, hierarchical, supervisory, and occasionally fiscal accountability, and those too not always very well. We need a bolstering of peer and public accountability, including by routine reporting to other agencies and civil society groups about the ways in which the other accountability mechanisms are functioning, sensitization programmes etc.
- On (ii), there may be scope for using public truth telling meetings as a way of bringing to light the truth of the violence against women in our country. While most adult women acknowledge having been groped/felt up at least once and 40,613 cases of molestation reported in the year 2010 alone<sup>2</sup>, it took a story for us to get as moved as we have been over the past two weeks. And we need more telling of stories, confronting both men and women with the truth about the way in which we now live with violence against women. We are not suggesting an unthinking replication of South Africa's *Truth and Reconciliation Commission*<sup>3</sup>, but it is worth exploring the role that at least more public truth-telling might play.
- In each police station, there should be a designated officer/officers who is in charge of recording complaints from sexual assault victims. This officer should undergo specialized training on how to handle sexual assault cases, including collection of evidence, conduct towards the victim etc.
- In every police station there should be a database with contact numbers of all NGOs/ health care workers. That list should be widely published by the government so that in case the police refuses to register the complaint, a nearby NGO can be approached. The list can also be used to identify a woman health or social worker to accompany the person who has been sexually assaulted during the recording of her statement or during her medical and forensic examination.
- The Indian Police should be trained in collecting, preserving and transporting the evidence from the crime scene.

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<sup>1</sup> Grant, Ruth W. and Keohane, Robert O., *Accountability and Abuses of Power in World Politics*, American Political Science Review, Vol. 99 No. 1, February 2005.

<sup>2</sup> Manual for Medical Examination of Sexual Assault, Centre for Enquiry into Health and Allied Themes (CEHAT)

<sup>3</sup> See generally, <http://www.justice.gov.za/trc/>

- Since it is practically impossible for the police to be everywhere, it is important to create NEIGHBOURHOOD WATCH schemes.
- Create separate womens' wings or special task forces to follow-up the progress of investigations and filing of chargesheets.
- Provide for more women constables on night beat.
- Sensitization programs for male police constables and junior officers.
- Publication of a charter which lays down the rights of persons who have been sexually assaulted as well as procedures for filing an registering an FIR, and this charter be widely publicised by the Government through television so that women can be made aware of their rights.

#### 4. MONITORING AND DOCUMENTATION OF REPEAT OFFENDERS

Encourage the creation of a "sex offenders database" which will include people convicted of rape, sexual assault and sexual harassment. This database should be publicly searchable because naming and shaming of the offenders is very important. SOWL conducted an online survey of its members, and found that the members were overwhelmingly in favour of creation of such a database. Survey results as of 2.00 AM of the 5<sup>th</sup> of January 2013 are **Annex C**.

#### 5. MEDICAL TESTING AND RESPONSE PROTOCOL

Indian medical testing procedure and the immediate handling of a person who has suffered sexual assault, as well as the eventual conclusions as to her character and allegations of constructive consent have been widely identified by scholars as one of the key disincentives for reporting crimes of sexual assault.

Widely prevalent misconceptions suggest that medical evidence is in fact corroborative of sexual assault despite the Supreme Court's repeated assertions to the effect that the statement of the person assaulted is sufficient for conviction even if the medical evidence was to suggest to the contrary. Statements as to the presence or absence of injuries on the private parts of the person assaulted or on their body lead up to inferences as to consent, which some believe work as determinants in the quantum of punishment.

Consequently the need of the hour is threefold:

- (1) To adopt a gender sensitive forensic evidence gathering protocol in cases of sexual assault that does not violate the dignity of the person who has suffered such assault.
- (2) To provide rape kits to all hospitals engaged in examining a person who has suffered sexual assault.
- (3) To provide medical and therapeutic *after care* to the person who has suffered sexual assault.

To this end our detailed suggestions are as follows:

- a) Specifically abolish the two finger test - strict elimination from all report pro-formas circulated among hospitals and doctors that are involved in forensic evidence gathering.
- b) Government Forensic Science Laboratories (FSL) in India are inefficient in dealing with pending criminal cases in the country. It takes months to obtain the FSL report which delays and hampers the investigations and the samples collected at the crime scene are either contaminated, not in proper concentration, cross contaminated, improperly collected or not packaged or transported properly. There is just one FSL in the capital and a handful of experts and therefore it has become difficult to investigate and finish formalities.
- c) Therefore not only there should be establishment of more FSL's but also employment of more of technical staff to meet the already huge backlog and scarcity of trained staff at the FSL
- d) Private hospitals to be empanelled along with the government hospitals for gathering forensic evidence – this will ensure speedy and timely evidence gathering and better facilities for after care.
- e) A representative from an empanelled NGO/ health worker should accompany the person who has suffered sexual assault to the hospital for medical examination in the absence of a friend or next of kin or if the person additionally desires assistance. The victim should be informed of her rights at the initial stage.
- f) Medical examination should be conducted by a female doctor on a priority basis.
- g) A strict rule needs to be followed as to doctor-patient confidentiality and the doctors should be penalized if they give out any details to the media as to the evidence gathered and their conclusions.
- h) The forensic evidence cannot be shared by the investigating officer with any third party or the media. Any member of the investing team giving out such information or offering conclusions on its basis will be fined and a warning issued. Repeated violations should entail disciplinary action.
- i) Rape kits be provided to the hospitals.
- j) The main aims of obtaining an account of the violence inflicted should be to:
  - detect and treat all acute injuries;
  - assess the risk of adverse consequences, such as pregnancy and STDs;
  - guide relevant specimen collection;
  - allow documentation (the history should be precise, accurate, without unnecessary information that may result in discrepancies with police reports);
  - guide forensic examination.
- k) The examining professional should perform a top-to-toe examination looking for any signs of injury, conduct a thorough examination of the genito-anal area, treat any injuries (including STDs, hepatitis B and tetanus), an HIV test should be offered and the option of post-exposure

prophylaxis should be available. Follow-up care for wound healing, any prescribed treatments (including those for STDs), completion of medications and counselling should be offered. Anti-retroviral medicines are mostly given to people once they have AIDS but anti-retroviral medicines can help to prevent HIV infections if they are taken within 72 hours (3 days) of being raped

- l) Therapeutic care has to be mandatorily provided either through the hospital where the forensic evidence is being gathered or through a health worker/ NGO/ private hospital.
- m) Health workers, investigators and doctors conducting forensic examination have to be trained in relation to the use of insensitive language which not only contributes to patient distress during the examination/ investigation but also hinder long-term recovery; there should be no judgmental or critical comments – Any complaints in this regard must be treated with urgency and seriousness and disciplinary action taken against the perpetrator.

[SOWL has relied on the ***Guidelines for Medico Legal Care for victims of Sexual Violence*** published by the WHO, the ***Manual for Medical Examination of Sexual Assault*** published by the Centre for Enquiry into Health and Allied Themes and ***India: Dignity on Trial***, a report published by the Human Rights Watch to arrive at the above conclusions].

## CONCLUSION

In putting together this effort we recognized that the greatest chasm currently lies between the laws and their enforcement. Sweeping law reform is not mandated as much as practice guidelines for medical testing, law enforcement officials and investigating officers and gender sensitization across the board. Some members have strongly recommended sexuality education being introduced at the school level. In many cases young girls who have been victims do not even speak up out of fear, and there should be greater emphasis on mandatory inclusion of important themes into our education system.

Transparency and accountability of each arm of the administrative machinery will also ensure societal checks and balances in the curative stage of the crime. While as lawyers we are not qualified to comment on the preventive steps nor is this Committee mandated to address them, the general consensus among our members seemed to be that the impunity of sexual offenders was stemming from a sense that acquittals have become the rule and justice is too slow and too complex a process to offer any real gratification even in instances of conviction. Infusing confidence in the system is as important as correcting the system and we sincerely hope our suggestions are of some assistance in both the latter and the former regard.

## **Annex A – Proposed Revisions to Legal Provisions**

### **Proposed revisions to the Indian Penal Code**

[Please also see additional proposals for revisions to the Criminal Law (Amendment) Bill, 2012]

#### ***Proposed revisions to Section 375, IPC***

375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

First.— Against her will.

Secondly.—Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

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

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation

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

~~Exception.—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.~~

#### ***Proposed revisions to Section 376, IPC***

Punishment for rape.--

Whoever, except in the cases provided for by sub- section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than ~~seven~~ **ten** 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~~

~~woman raped is his own wife and is not under twelve 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 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.~~

***Proposed revisions to Section 376(2)(b), IPC***

(2) Whoever: -

...

(b) Being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him **or in exchange for the discharge of his official functions**; or

***Proposed revisions to Section 100, IPC***

When the right of private defence of the body extends to causing death.-- The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:- First.- Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault; Secondly.- Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault; Thirdly.- An assault with the intention of committing rape **or other hate crime**; Fourthly.- An assault with the intention of gratifying ~~unnatural~~ lust; Fifthly.- An assault with the intention of kidnapping or abducting; Sixthly.- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

***Proposed revisions to Section 354, IPC***

Assault or criminal force to woman with intent to threaten or violate her bodily integrity. Whoever assaults ~~or uses criminal force to~~ any woman, intending to ~~outrage~~ **create** or knowing it to be likely that



he will thereby ~~outrage her modesty to violate her bodily integrity~~, shall be punished with imprisonment of either description for a term **which shall not be less than one year** but which may extend to ~~two~~ **five** years, ~~or with fine, or with both~~ **and shall also be liable to pay a fine.**

***Proposed revisions to Section 509, IPC***

Word, gesture or act intended to ~~insult the modesty of~~ **to threaten the bodily integrity** a woman.--  
Whoever, intending to ~~insult the modesty of~~ **to threaten the bodily integrity 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 ~~one~~ **two** years, ~~or with fine, or with both~~ **and shall also be liable.**

***Proposed Inclusion of a new Section 509A, IPC***

**Voyeurism. – Whoever secretly watches a woman in circumstances where she would usually have the expectation of not being observed by the perpetrator, or not being observed by any person other than the perpetrator:**

**Firstly.— With or without her consent, when she is under sixteen years of age,**

**Secondly.— Without her consent,**

**Thirdly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent,**

**shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.**

**Explanation 1: The fact that the victim knew the perpetrator or was in a relationship with the perpetrator is not relevant.**

**Explanation 2: If the victim consented to being watched but not to capture of images of her or to their dissemination to third persons, such capture or dissemination shall be considered an offence within Section 509A.**

### **Amendment to the Information Technology Act**

In keeping with our proposed changes and inclusion of a Section 509A of the IPC, we recommend amendment of Section 67 of the Information Technology Act as follows:

**Publishing of information which is obscene in electronic form:** Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeal to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, **or which violates the privacy of any person or which constitutes a threat or assault of sexual nature on the victim** shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

**Explanation 1: The fact that the victim knew the perpetrator or was in a relationship with the perpetrator is not relevant.**

**Explanation 2: If the victim consented to capture of the images or other material but not to their dissemination to third persons, such dissemination shall be considered an offence within Section 509A of the IPC.**

### **Amendments to the IPC as proposed in the Criminal Law Amendment Bill 2012: Our comments and recommendations for further changes:**

3. After section 326 of the Penal Code, the following sections shall be inserted, namely:—

‘326A. Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables any part or parts of the body of a person or causes grievous hurt by throwing acid on or administering acid to that person, **or using any other means to achieve a similar purpose and result**

with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may be for life and with fine which may extend to ten lakh rupees:

Provided that any fine imposed under this section shall be given to the person on whom acid was thrown or to whom acid was administered.

326B. Whoever throws or attempts to throw acid on any person or attempts to administer acid to any person, **or uses any other means to achieve a purpose and result of permanent or partial damage or deformity or maiming, disfiguring or disabling any part or parts of the body of a person with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person** shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years and shall also be liable to fine.

*Explanation 1.* —For the purposes of sections 326A and 326B, “acid” includes any substance which has acidic or corrosive character or burning nature that is capable of causing bodily injury leading to scars or disfigurement or temporary or permanent disability.’.

**Explanation 2: For the purposes of sections 326A and 326B permanent or partial damage or deformity shall not be understood as being irreversible.**

‘375. A person is said to commit “sexual assault” if that person—

- (a) penetrates, ~~for a sexual purpose~~, the vagina or anus or urethra or mouth of another person with—
- (i) any part of the body including the penis of such person; or
  - (ii) any object manipulated by such person, except where such penetration is carried out for proper hygienic or medical purposes;
- (b) manipulates any part of the body of another person so as to cause penetration of the vagina or anus or urethra or mouth of such person by any part of the other person’s body;
- (c) engages in “cunnilingus” or “fellatio”, under the circumstances falling under any of the following six descriptions:—

*Firstly.*—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 of hurt.

*Fourthly.*—When the person assaulted is a female, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes 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 that person personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that action to which such other person gives consent **or by virtue of any other circumstance by which such consent may be deemed to be vitiated.**

*Sixthly.*—With or without the other person’s consent, when such other person is under eighteen years of age.

*Explanation I.*—Penetration to any extent is “penetration” for the purposes of this section.

*Explanation II.*—For the purposes of this section, “vagina” shall also include labia majora.

**Explanation III. – Consent will not be deemed or presumed in the event of a prior consensual sexual relationship between the perpetrator and the person assaulted including when the person assaulted is the perpetrator’s own wife.**

**Explanation IV. – Marriage of the perpetrator and the victim, proposal by the perpetrator to marry the victim, or acceptance of a proposal by the court for the perpetrator and victim to marry will in no event be considered an accentuating circumstance or taken into account in commuting the sentence of the perpetrator in any manner.**

~~**Exception.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.**~~

376A. Whoever commits sexual assault on his own wife, who is living separately 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 but which may extend to seven years and shall also be liable to fine.<sup>4</sup>

376B. Whoever,—

(a) being in a position of authority, **supervision, trust or control**; or

(b) a public servant; or

(c) 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 a women's or children's institution; or

(d) being on the management of a hospital or being on the staff of a hospital, takes advantage of the position and induces or seduces any person either in the first mentioned person's custody or under the first mentioned person's charge or present in the premises and has sexual intercourse with that person, 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 but which may extend to ten years **rigorous imprisonment** and shall also be liable to fine.<sup>5</sup>

### **Proposed revisions to the CrPC**

#### **Amendments to the CrPC as proposed in the Criminal Law Amendment Bill 2012: Our comments and recommendations for further changes:**

**Proviso to Section 154:** "Provided that if the information is given by the woman against whom an offence under section 354, section 375, section 376, section 376A, section 376B and section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, as far as possible, by a woman police officer **and the woman shall be provided the assistance of an empanelled NGO or healthcare worker, lawyer and/ or women's organisation.**

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<sup>4</sup> No explanation why sexual assault by an ex husband is to be treated with leniency. Classify all categories equally with sentences of not less than 10 years RI.

<sup>5</sup> Recommend prescribing a higher punishment if the person assaulted is a child or an incapacitated (physically or mentally) woman

## **Annex B – Results of SOWL Survey**

(The survey is still open and the results captured here are on the basis of 42 responses received on 5<sup>th</sup> January 2013 at 2.00 am)

### **Question 1: Should the maximum penalty for rape (not culminating in murder) be the death penalty?**

**Results: Answered 41, Skipped 1**

Yes: 14

No: 27

### **Question 2: Should the burden of proof be reversed?**

**Results: Answered 40, Skipped 2**

Yes: 12

No, because it may be used to victimize innocent persons: 18

No, because it may result in unwillingness of police to diligently collect evidence: 14

### **Question 3: Should a public database of convicted sexual offenders be maintained?**

**Results: Answered 42, Skipped 0**

Yes: 32

No, because it has not been shown to prevent repeat offences: 5

No, because it results in double punishment – legal and then societal: 8

## **Annex C – List of Individual Contributors (in alphabetical order)**

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