



HAQ: Centre for Child Rights' Submission to the Law Commission on Decriminalising Non-Exploitative Consensual Intimacy involving minors aged 16-18 years

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At the very outset, HAQ: Centre for Child Rights would like to thank the Law Commission for engaging with civil society organisations on the issue of decriminalising adolescent sexuality and age of consent. HAQ: Centre for Child Rights has been providing psychosocial and legal support to children whose cases are up for trial before the Special Courts under the POCSO Act across all districts in Delhi. These cases are marked to HAQ mostly by the Child Welfare Committees to provide support person services. In meeting our responsibilities as support persons, we carry out a needs assessment for every child on various aspects, which include medical needs, emotional and psychological needs, shelter and protection needs, educational needs, financial and victim compensation needs, legal and para-legal support required, other needs of the family that directly impact the child's well-being. Once the needs are identified, we draw out a plan for their fulfilment and work towards it. Besides, HAQ has also been engaged in research on implementation of the POCSO Act.

We are grateful to the Commission for the online interaction held on 17 July, 2023 as also for allowing us to make written submissions in addition to the oral submissions made during the interaction. Accordingly, the following issues, concerns and suggestions are being presented herewith for the Commission's kind consideration.

A. Goals of child protection cannot be met without decriminalising adolescent sexuality, especially non-exploitative consensual sexual relationships or intimacy involving minors aged 16-18 years

As India is committed to securing protection for all children up to the age of 18 years from situations of violence, harm, abuse, exploitation and neglect, an over protective approach is actually taking away some of the protections from a large section of adolescents in non-exploitative consensual intimate relationships. The current legal and policy framework as well as its implementation thus present a dichotomy and the contradictions need to be remedied. **The remedy does not lie in lowering the age of the child, but in decriminalising adolescent non-exploitative consensual sexual relationship or intimacy.**

A better understanding requires attention to the following issues:

i) A significant number of cases under the POCSO Act are cases of 16-18 year old adolescents in non-exploitative consensual intimate relationships

According to the NCRB's crime statistics for 2021, out of 33,186 girls who were victims of cases under the POCSO Act, 16,206 (49%) were aged 16-18 years.¹ Out of 33,348 cases under Section 4 and 6 of the POCSO Act, in 15,005 cases, the accused is a friend/online-friend or live-in partner.² A qualitative study of 15 adolescent girls from three cities (Delhi, Mumbai and Jaipur) by Partners for Law in Development³ shows that most girls run away to marry because of the stigma attached to premarital sexuality, disapproval of their relationship by parents and society, fear of being forced into arranged marriage if the relationship is discovered by the parents, and pregnancy and fear of the same being discovered by their parents. Parents are often the informants and the complainants in these cases, which are initially registered as complaints of missing child or under sections of kidnapping. Another recent study by the Enfold Proactive Health Trust reiterates this.⁴ The study indicates that 24.3% of the total cases disposed by the Special Courts in Assam, Maharashtra and West Bengal between 2016-2020, were cases of "romantic relationship". In 70.8% cases, the informants to the police were the girls' parents and in another 9.4% they were the girls' relatives. 64.9% (1113) girls eloped with their partner due to parents' disapproval of their relationship, being pushed into marriage against their will by their parents and violence or threat of violence at home. In 85.5% (1467) cases, the facts do not reflect any abuse or exploitation of the girl at the hands of the accused.

ii) The POCSO Act criminalises adolescents in non-exploitative consensual sexual relationships and allows for an unfair treatment of such adolescents

The POCSO Act makes all sexual activity with a minor a sexual offence with strict liability. Reporting is mandatory and therefore we find an increase in the number of cases reported under the POCSO Act. While this is a positive impact of the law, it also has negative consequences for a significant number of adolescents, whose cases qualify as cases of "romantic relationship" or "non-exploitative consensual sexual intimacy".

Girls who run away or elope, seldom want to go back to their parents when they are recovered. They fear legal action against their intimate partner and being punished in

¹ NCRB, Crime in India, 2021 Table 4A.9, Age Profile of Child Victims of POCSO Act (State/UT-wise) – 2021.

² NCRB, Crime in India, 2021 Table 4A.10, Offenders Relation to Child Victims of POCSO Act (Section 4 & 6) - 2021.

³ Partners for Law in Development (PLD). (2019). Why Girls Run Away To Marry: Adolescent Realities and Socio-Legal Responses in India. Number 1, Adolescent Sexuality and Early Marriage Series. Available at: <https://ajws.org/wp-content/uploads/2020/09/why-girls-run-away-to-marry.pdf>

⁴ Enfold Proactive Health Trust. (2022). "Romantic" Cases under the POCSO Act: An Analysis of Judgments of Special Courts in Assam, Maharashtra & West Bengal. Available at: <https://enfoldindia.org/wp-content/uploads/2022/12/Romantic-cases-under-the-POCSO-Act.pdf>

the form of being forced into immediate marriage and/or being beaten up and losing their freedom of movement, or other threats to life and liberty. These young girls end up before the Child Welfare Committees and in childcare institutions. In the childcare institutions, they are segregated from other girls of their age on the grounds that they are “exposed to sex” and can be a “bad influence on the other girls”. We are all aware that the childcare institutions are custodial in nature, where several freedoms that children can otherwise enjoy are restricted. However, in the case of girls who are there because of being in a romantic intimate relationship, even the limited freedoms are taken away and they are subjected to labelling and stigma in addition. On the other hand, their male partner is also sent to custody being accused of committing an offence. Some of these girls are pregnant and married or were on the verge of getting married. They often long to reunite with their partner and continue a family life, which is denied to them in the name of child protection, without realising that they go into depression and other forms of mental illnesses in the process. According to a study titled, 'Suicide Mortality in India, published in the Lancet, suicide is the third leading cause of death in the age group of 15 to 24 years.⁵ Suicide statistics from the NCRB⁶ show that “love affair” is the second largest cause for suicides among persons below the age of 18 years. The number of under-18 suicides due to love affairs has gone up from 1,327 (573 boys and 764 girls) in 2020 to 1,495 (585 boys and 910 girls) in 2021, comprising 12% and 14% of all under-18 suicides in the years 2020 and 2021 respectively. In 2021, another 35 children (13 boys and 22 girls) are reported to have committed suicide due to suspected/illicit relation, 7 girls under 18 years committed suicide due to illegitimate pregnancy, and 60 children (37 boys and 23 girls) committed suicide due to fall in social reputation. The India Torture Report, 2020 reveals that among suicides by youth in custody for alleged involvement in a sexual offence / romantic relationship, 2 boys were aged 15 to 20 years and 11 others were aged 20-30 years.

iii) The rigours of the POCSO Act make it difficult for adolescent girls in consensual sexual relationships to access sexual and reproductive health services

Specific data on access to sexual and reproductive health services by adolescents engaging in consensual sex is not available. According to NFHS-5, 59.1% women aged 15-19 years are anaemic. The rate of teenage pregnancy and childbearing (women aged 15-19 who have given birth or are pregnant with their first child) is 7%, which is just a one percent decline from 2015-16. The number of girls above 15 and under 18 years of age who have had a live birth or are pregnant with their first child is 1,45,866.⁷

⁵ <https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/teenage-suicides-the-calamity-of-the-mind-and-how-to-control-it/articleshow/64191555.cms>

⁶ NCRB. Accidental Deaths & Suicides in India 202, Table 2.0, Age and Gender – wise Distribution of Suicides during 2021. Available at: https://ncrb.gov.in/sites/default/files/ADSI-2021/ADSI_2021_FULL_REPORT.pdf and https://ncrb.gov.in/sites/default/files/ADSI_2020_FULL_REPORT.pdf

⁷ International Institute for Population Sciences (IIPS) and ICF. 2021. *Table 4.10, Teenage pregnancy and motherhood, National Family Health Survey (NFHS-5), 2019-21: India: Volume I*. Mumbai: IIPS. Available at: <https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf>

According to UNICEF, pregnancy-related complications are the number one cause of death among girls between 15 and 19 years of age.⁸

There is no separate record of minor abortions in India and the NFHS clubs minors and women in the 15-49 age bracket while reporting on abortions. Even if one goes by that data, according to NFHS-5,⁹ the percentage of pregnancies in the five years preceding the survey that ended in a non-live birth varied from 8% to 16%, with 10% in the age 15-19 years. A majority of the abortions were performed in the private health sector (53%), whereas 20 percent were performed in the public health sector. More than one-fourth (27%) of the abortions were performed by the woman herself at home, indicating unsafe methods other than medication abortion. In a country like India where social mores continue to guide women's access to sexual and reproductive health services, it is unimaginable for an unmarried woman to approach a health care provider for such services and next to impossible for minors in consensual sexual relationship outside of marriage.

Such data raises several concerns for both the government and civil society organisations. However, **any solution for a desired change sought in making laws stricter so that adolescents can be deterred from early entry into sexual activity is misplaced.** The NFHS have time and again pointed to the fact that a significant number of adolescents in India are sexually active, be it in marriage or outside of marriage. According to NFHS-5, 2019-21, 10% women in the age group of 25-49 years had their first sexual intercourse before the age of 15, and 39% had their first sexual intercourse before the age of 18 years.¹⁰

For pregnant minors, seeking any pregnancy related advice or abortion would lead to a police case under the POCSO Act, irrespective of whether the pregnancy is a result of a consensual or non-consensual sexual relationship.

A three-judge bench of the Supreme Court extended the right to abort a pregnancy up to 24 weeks to all women and minors and allowed the identity of a pregnant minor to be concealed, stating that "It could not possibly be the legislature's intent to deprive minors of safe abortions." The Supreme Court had to say this because mandatory reporting provisions of the POCSO Act take away the right to privacy and confidentiality of pregnant minor girls, who are subjected to further trauma with the institution of a legal case due to mandatory reporting and raising of the age of sexual consent to 18 years under the POCSO Act. Despite this judgement, the situation for pregnant girls does not change on the ground as their identity may be protected but the fear of institution of a legal case that is bound to lead to incarceration of their

⁸ <https://www.unicef.org/india/what-we-do/maternal-health>

⁹ Supra, n7, pp- 212-213.

¹⁰ Supra, n 7, page 210.

partner (boyfriend or husband) continues to hang on their heads unless the age of consent is lowered.

Here are a few case studies based on real cases dealt by HAQ: Centre for Child Rights to explain how access to sexual and reproductive health is impacted due to raising the age of sexual consent under the POCSO Act.

Case Study 1:

Child 'Y', aged 16 years, got married in her neighbourhood to a 19-year-old. She got pregnant and went to the hospital with her husband and mother. As luck would have it, her pregnancy of six months got reported by the attending doctor and her husband was sent to judicial custody. The doctors who attended the child at the hospital treated them very badly, calling the girl and her mother 'jaahil' and 'ganwaar' when they found out about the marriage. This deterred the girl from taking proper prenatal care since she didn't want to cause any further embarrassment for her family. With counselling and great persuasion from the support person, the girl agreed to deliver her baby in a hospital. However, she is adamant about not going to the hospital for postnatal care or vaccinations for her new born. She has lost all trust in doctors. Her husband is still in judicial custody.

Case Study 2:

Child 'L' was 16 years when she eloped with her boyfriend aged 21 years, out of the fear that her parents will not accept her relationship. When 'L' went missing, her father filed a missing child's complaint in the police station and after approximately 5 months 'L' was traced and brought back to Delhi. When she came back to Delhi she was taken to the hospital for medical examination and it was found that she is pregnant. 'L' was then produced before the CWC where she stated that she married her boyfriend and consented for the sexual relationship. She was then informed about the POCSO case and later she was taken to the hospital with the consent of the family for the MTP. However, she ran away from the hospital. For two years, there was no information about her whereabouts.

Case Study 3:

Child 'K' (aged 17 years) eloped with her boyfriend (aged 20 years) and got married to him in a small temple. After a few months, she went to a private hospital due to issues with her menstrual cycle and the private hospital refused to conduct a proper examination and referred her to a government hospital. After tests at the government hospital, she was found to be pregnant and her pregnancy got reported to the police due to her being underage. Her husband who had accompanied her to the hospital, was taken in police custody. Soon after, the girl relocated to her native village along with her family without informing anyone and stopped responding to any phone calls

from the Investigating Officer in the case or the support person assigned by the Child Welfare Committee. After three months, the support person managed to get through to the girl's mother, who remained suspicious of the support person's involvement in the case as she believed that the police would take her away. Because of the fear of authorities, the girl and her family did not go to any government hospital and she delivered her new-born at home.

Adolescent body and mind are developing bodies and minds and with a natural urge to explore. A biological need cannot be curbed through a law.

While in the case studies shared, the girls were married, it is imperative to recognise and acknowledge that age of sexual consent cannot be equated with age of marriage as adolescents are in sexual relationships irrespective of marriage and cannot be punished for the same.

Clearly none of this can be about protecting adolescents who make certain choices in life that may or may not be acceptable to the adult minds. **The POCSO Act was not designed to make adolescents suffer for exercising their agency according to their evolving capacities.**

B. Mandatory reporting and raising the age of sexual consent to 18 years has led to increased court caseload, delay in trials, high pendency and a huge cost on the state exchequer

All existing data and research are telling us that our Special Courts under the POCSO Act are overburdened with a large number of cases of 16-18 year olds in non-exploitative consensual intimate relationship, where the so called "victims" are not interested in legal action against the accused and hence turning hostile.

It would be travesty of justice if children whose cases deserve utmost attention have to suffer because of unnecessary cases coming to the courts and consuming the courts' time and attention.

Data and research findings that need to be considered for law and policy reform may be summed up as follows:

- (i) According to the NCRB's crime statistics, in 2015, 61% of total victims of kidnapping of minors for marriage were in the 16 to 18 years age group. In 2016, this came down to 57%. 2017 onwards NCRB stopped providing age and gender data for victims of kidnapping by purpose of kidnapping, but that will not change the fact that amongst all cases of kidnapping and abduction of children, kidnapping for marriage has always comprised the highest proportion and most victims are in the age group of 16-18 years.

- (ii) Another Study by HAQ & CivicDataLab¹¹ of 19,783 POCSO cases from Assam, Delhi and Haryana available on E-Courts shows that 37% cases of aggravated penetrative sexual assault and 39% cases of penetrative sexual assault are also booked under sections 363/366/366A of IPC, implying that these cases were instituted by the girl's parents when she eloped.
- (iii) Findings from a study by HAQ: Centre for Child Rights and the Forum Against Child Sexual Exploitation (FACSE)¹² of 1957 cases from Delhi and Mumbai between 2012 and 2015 under the POCSO Act reveal that in 82.5% cases where information about proximity between the child and the accused was available, the accused was known to the child. Most such cases were booked for a sexual offence of a serious nature involving penetration or physical contact. 26% of these cases were cases of romantic relationships. In 94% of these cases, the girls were aged 16 to 18 years.

The study further shows that out of 83 disposed cases of romantic relationship from Delhi and Mumbai, 67% were booked for penetrative sexual assault, 24% for aggravated penetrative sexual assault, around 2% for sexual assault, 1% for aggravated sexual assault and 5% for sexual harassment. 94% disposed cases of romantic relationships from Delhi (74 out of 79 cases) and 75% from Mumbai (3 out of 4 cases) ended in acquittal. The most common reason for acquittal in such cases was the child and other material witnesses turning hostile. Judicial Officers interviewed in the course of the study in Delhi were of the view that anywhere between 70% to 80% cases under the POCSO Act are cases of love affair/elopement/love marriage, involving children in the age bracket of 15-18 years. In most such cases the girl's family insists on filing a case. In many cases of romantic relationship, the accused languish in prisons as bail is not easy to come by. Among the cases where bail was granted before the charge sheet was filed, only 3% pertain to cases of romantic relationship. The reason for granting bail in these cases was that the "prosecutrix intends to marry the accused" or "having regard to marriage between the prosecutrix and the accused". Once the charge sheet is filed, even this becomes difficult. In one case of romantic relationship, where an offence of aggravated penetrative sexual assault was made out in the charge sheet, bail was rejected on the ground that it is an aggravated form of penetrative sexual assault under Section 5 (I) for committing sexual assault more than once or repeatedly. In another case, interim bail was granted for seven days subject to the condition that

¹¹ Ali, B. and Chudgar, U. (2021). *Unpacking Judicial Data to Track Implementation of the POCSO Act in Assam, Delhi & Haryana (2012 to April 2020)*. HAQ: Centre for Child Rights and CivicDataLab. Available at: <https://www.haqcrc.org/wp-content/uploads/2021/11/unpacking-judicial-data-to-track-implementation-of-the-pocso-act-in-assam-delhi-and-haryana-full-report.pdf>

¹² Ali, B., Adenwalla, M. and Punekar, S. (2018). *Implementation of the POCSO Act, Goals, Gaps and Challenges: Study of Cases of Special Courts in Delhi and Mumbai (2012-2015)*. HAQ: Centre for Child Rights and Forum Against Child Sexual Exploitation (FACSE). Available at: <https://haqcrc.org/wpcontent/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>

during the period of interim bail the accused shall perform nikah (marriage) with the prosecutrix and then surrender with evidence of the marriage.

The study also points out that only 28% of all cases completed trial within the stipulated timeframe of one year from the date of cognizance by court. 57% disposed cases in Delhi and 29% disposed cases in Mumbai took more than a year for completion of trial. In 38% cases from Delhi and 41% from Mumbai, trial was pending beyond the stipulated period of one year from the date of cognizance.

- (iv) A five-state study by the Centre for Child and the Law, NLSIU,¹³ Bangalore, based on judgments of Special Courts under the POCSO Act reveals that 21.2% cases in Andhra Pradesh, 15.6% in Assam, 21.5% in Delhi, 21.8% in Karnataka (in 3 districts), and 20.5% of the decided cases in Maharashtra were cases of “romantic relationship”, where the girls have admitted to being in a relationship with the accused.

The study also shows that in 81.5% (1398) cases, the girls did not say anything incriminating against the accused during their testimony, in 13.5% (228) cases (13.5%), the girl was declared hostile by the prosecution, in 1.3% (22) cases the girl did not depose at all. Of the 295 cases (17.2%) where the girls did testify against the accused, in 51.2% (151) cases, the court found the testimony unreliable. In the current situation, with the courts bearing the burden of a large number of cases of non-exploitative adolescent consensual sex booked under the POCSO Act, trials are delayed and the pendency is high despite new courts and fast track courts coming into existence.

Justice delayed is justice denied. The need to expedite trial in order to reduce a victim’s trauma and restore their faith in the justice system led to the setting of time frames in sections 35(1) and 35(2) of the POCSO Act for recording victim’s testimony and completion of trial respectively. Unless the burden of the courts is reduced, children deserving court’s attention and speedy trial will continue to suffer.

Criminalising adolescent sexuality implies not only waste of existing resources and added costs for court infrastructure and support to deal with the rising number of such cases, but also an added cost for police, prisons, forensic laboratories, hospitals and the juvenile justice and child protection system.

C. The principle of best interest of the child cannot be followed without recognising the evolving capacities of children and their agency

¹³ Centre for Child and the Law, National Law School of India University (NLSIU). (2018). *Implementation of the POCSO Act, 2012 by the Special Courts: Challenges and Issues*, Based on CCL-NLSIU’s Studies on the Working of Special Courts in Five States. Available at: <https://ccl.nls.ac.in/wp-content/uploads/2021/10/8.-Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues.pdf>

One of the arguments given for criminalising all sexual activity with persons under the age of 18 years under POCSO Act is the principle of best interests of children. However, children are not a homogenous group and their age, development, social, economic, political, geographical contexts vary. The principle of best interests of the child must be understood and implemented in the context of these varying situations and circumstances of children, especially their evolving capacities.

India ratified the UN Convention on the Rights of the Child (CRC) in 1992 and has since embarked upon the path of strengthening its laws and policies for promoting and protecting children's rights. One of the guiding principles of the CRC is the principle of best interest of the child. However, little attention is paid to the guidance provided by the Committee on the Rights of the Child (CRC Committee) on this principle and its determination in **General Comment No. 14**.

In para 14(b) of General Comment No. 14, the CRC Committee reiterates the state's obligation to "ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision."¹⁴ The Committee explains that "Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned."¹⁵ In para 35, the Committee reiterates that "ensuring that the best interests of the child are a primary consideration in legislation and policy development and delivery at all levels of Government demands a continuous process of child rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to evaluate the actual impact of implementation."¹⁶

Emphasizing on the significance of children's contexts and circumstances in determining their best interests, the Committee is of the view that "For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general."¹⁷ The principle of best interest is established as the guiding principle in the interpretation of laws and policies and where a legal provision is open to more than one interpretation, the Committee guides that the "interpretation which most effectively serves the child's best interests should be

¹⁴ Committee on the Rights of the Children. *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)**, CRC/C/GC/14. Available at: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf

¹⁵ Supra, n 14, para 6(c)

¹⁶ Supra, n 14, para 35

¹⁷ Supra, n 14, para 32

chosen”.¹⁸ In the event of a conflict between the best interests of a child or group of children and other interests or rights (e.g. of other children, the public, parents, etc.), the Committee suggests that “Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise.”¹⁹

The Committee warns against a narrow interpretation of “protection and care” while determining the child’s best interests, stating that “The terms “protection and care” must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as “to protect the child from harm”), but rather in relation to the comprehensive ideal of ensuring the child’s “well-being” and development. Children’s well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.”²⁰

The Committee further highlights the need to take into consideration the evolving capacities of children when the child's best interests and right to be heard are at stake,²¹ and advises that “Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions.”²² Recognising the intrinsic link between children’s right to protection and their evolving capacities, the Committee is of the view that “There might be situations where "protection" factors affecting a child (e.g. which may imply limitation or restriction of rights) need to be assessed in relation to measures of "empowerment" (which implies full exercise of rights without restriction). In such situations, the age and maturity of the child should guide the balancing of the elements.”²³

The CRC **General Comment No. 20** on the implementation of the rights of the child during adolescence, also states in para 1 that “While the Convention recognises the rights of all persons under 18 years, the implementation of rights should take account of children’s development and their evolving capacities. Approaches adopted to ensure the realisation of the rights of adolescents differ significantly from those adopted for younger children.”²⁴ Other relevant extracts from General Comment 20 that need to be borne in mind are as follows:

¹⁸ Supra, n14, para 6 (b)

¹⁹ Supra, n 14, para 39

²⁰ Supra, n 14, para 71

²¹ Supra, n 14, para 44

²² Supra, n 14, para 84

²³ Supra, n 14, para 83

²⁴ Committee on the Rights of the Child. *General Comment No. 20 on the implementation of the rights of the child during adolescence, CRC/C/GC/20*. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/404/44/PDF/G1640444.pdf?OpenElement>

- “Generic policies designed for children or young people often fail to address adolescents in all their diversity and are inadequate to guarantee the realization of their rights.”²⁵
- “The Committee recommends that States introduce minimum legal age limits, consistent with the right to protection, the best interests principle and respect for the evolving capacities of adolescents. ... In all cases, the right of any child below that minimum age and able to demonstrate sufficient understanding to be entitled to give or refuse consent should be recognized. ... Consideration should also be given to the introduction of a legal presumption that adolescents are competent to seek and have access to preventive or time-sensitive sexual and reproductive health commodities and services”²⁶
- The CRC Committee in General Comment No. 20 “reminds States parties of the obligation to recognize that persons up to the age of 18 years are entitled to continuing protection from all forms of exploitation and abuse.”²⁷ At the same time recommends that “States parties should take into account the need to balance protection and evolving capacities, and define an acceptable minimum age when determining the legal age for sexual consent. States should avoid criminalizing adolescents of similar ages for factually consensual and non-exploitative sexual activity.”²⁸

Suggestions and Recommendations for consideration

In the light of available data and research highlighted above, we wish to make the following suggestions and recommendations for consideration by the Law Commission. In doing so, an attempt is also made to address some of the queries that were shared during the online interaction on 17 July, 2023.

1. Decriminalise non-exploitative consensual sexual relationships or intimacy involving minors aged 16 years and above

While the need for decriminalising non-exploitative consensual sex involving an adolescent in the 16 to 18 year age group has been voiced by Supreme Court of India and several High Courts and the Law Commission is also looking into this aspect, the obvious question requiring clarity is how to make this happen. Some suggestions in this regard are:

²⁵ Supra, n 25, para 3

²⁶ Supra, n 24, para 39

²⁷ Supra, n 24, para 40

²⁸ Supra, n 24, para 40

(i) No FIR where the girl does not wish to proceed with a police complaint and on the facts of the case no elements of exploitation and non-consensual sexual activity can be ascertained

The Juvenile Justice (Care and Protection of Children) Act, 2015 requires all Special Juvenile Police Units to have two social workers. These social workers may be appointed by the State Department of Women and Child Development / Social Welfare, as the case may be. Prior to registration of an FIR under the POCSO Act in cases involving children aged 16-18 years, it should be mandatory for these social workers to interact with children and ascertain if the sexual activity was consensual and non-exploitative and if the child wants to pursue legal case. Where the available facts suggest non-exploitative consensual sex and the child's wish to not proceed with a police complaint is clearly expressed, the same may be documented in writing and handed over to the officer-in-charge of the police station, whereupon the officer-in-charge shall instruct the concerned police officer not to register an FIR. Such cases may be periodically reviewed by the SP or DCP, as the case may be.

(ii) No arrest, time bound early investigation and filing of Final Report by police in cases where complaints are filed by the child's parent/guardian/relative or any other concerned person

In cases of non-exploitative consensual sex involving a minor aged 16 years and above, if the child does not wish to pursue the legal case but a complaint is filed by a parent/guardian, or relative, or any person other than the child, the police shall complete its investigation and file a Final Report in the court within 60 days.

Services of the social worker members of the SJPU may be used to understand and document the child's perspective and for ascertaining the non-exploitative and consensual nature of sexual activity involving such child.

In such cases, the police shall use its discretionary powers and refrain from arresting the accused.

(iii) Case closure by the concerned court

Where the concerned court receives a final report from the police stating the circumstances of offence and facts that point to non-exploitative consensual sexual activity involving a minor aged 16-18 years, the court may call upon such minor to verify the contents of the final report filed by the police, inform such minor about their rights and entitlements, ascertain if the minor wishes to continue with the legal case and the reasons for the same and accordingly decide to close the case.

The concerned court may seek assistance of the support person appointed by the Child Welfare Committee in such cases.

In such cases, if the accused is arrested and in judicial custody, the court proceedings should be expedited and should be concluded in a time-bound manner, as may be prescribed.

2. Fix the age of sexual consent at 16 years as it was prior to enactment of the POCSO Act and amend the IPC accordingly as protection for all children up to the age of 18 years and lowering the age of sexual consent can co-exist

Nobody is asking for lowering the age of the child and taking away the protections that all children up to the age of 18 years deserve. The ask is for lowering the age of sexual consent so that adolescents are not criminalised for expressing their sexuality and making certain choices and are not pushed into more difficult situations, depriving them of their basic freedoms and protection.

Nowhere does the UNCRC stipulate that the age of consent for sexual activities should be fixed at 18. This is borne out by the fact that an overwhelming majority of the countries, including advanced democracies, have adopted an age of consent that is below 18. A perusal of General Comment No. 20 of the Committee on the Rights of the child also suggests balancing of protection and evolving capacities of adolescents.

In several existing laws such as the Child and Adolescent Labour (Prohibition and Regulation) Act, a distinction can be found in the manner in which the law treats the offences committed against a child and adolescent. Such distinctions are clearly based on an understanding of age differentials, evolving capacities of adolescents and their physical, psychological and social circumstances.

For a long time prior to the enactment of the POCSO Act, the age of sexual consent in the IPC was 16 years and cases of non-consensual sexual activity were being registered and tried in courts. With increased provisions in the criminal law and the POCSO Act on witness protection pre-trial and during trial, the fear of girls being subjected to undignified and aggressive procedures stand allayed. If properly implemented, such provisions can go a long way in ensuring justice in all cases of minors aged 16-18 years where the sexual activity is non-consensual and the minor's testimony inspires confidence.

It is often argued that the instead of fixing an age of sexual consent, a close-in age or age proximity rule between the victim and the accused may fare better. However, there is no evidence to suggest so. On the contrary, it may actually allow for some adolescents and their partners to remain in unprotected and deprived conditions. As the well known legal maxim goes "Let hundred guilty be acquitted but one innocent should not be convicted".

3. Lay down guidelines for mandatory reporting in keeping with the need to ensure that mandatory reporting does not lead to denial of health services or impact an adolescent's access to sexual and reproductive health services.

Goals of child protection and decriminalising non-exploitative consensual sexual relationships or intimacy of minors aged 16 to 18 years cannot be achieved without addressing the mandatory reporting provisions under the POCSO Act. While there is a need to ensure reporting by those in authoritative positions and offices, such reporting may put the child at greater risk if the child does not wish to pursue a legal case and withdraws from seeking any further support. Sometimes children and their families go to the extent of relocating and disappearing as we have seen in one of the case studies shared in this submission. This impacts their access to all kinds of support services that they may be otherwise be entitled to. Clearly, the intention of legislators could not have been to instil fear in the minds of children who need assistance and support and keep them away from it.

Reporting cases where sexual exploitation is not apparent from the facts and version of the child, and where the minor does not wish to pursue a legal case despite counselling, require a clear set of rules and guidelines for service providers as well as for the police on how to manage such reports.

If our concerns are regarding teenage pregnancy and health related risks to minors in consensual sexual relationship, mandatory reporting provisions under the POCSO Act require a review and a set of guidelines that make it easy for children to continue to receive health services than be forced to stay away from such services.

4. Sexuality and Sexual and Reproductive Health Rights Education along with Strengthening Mental Health Services for Adolescents is the need of the hour.

All answers to complex situations not lie in the laws. There is ample research and evidence, including the NFHS data, which suggest that where children are provided age appropriate information and knowledge on sexuality and sexual and reproductive health rights, they are empowered to participate in their own protection.

Research by PLD and Enfold Proactive Health Trust indicate some of the reasons for girls running away with their intimate partners. Domestic violence, dysfunctional families and the craving for emotional bonding are some of the factors that have emerged and require attention. Biological changes in the body and emerging psychological needs during adolescence do not make it any easy for adolescents to deal with such changes. Access to sexually explicit material further adds to their curiosities. Absence of mental health services that can be reached to adolescents to help them cope with such developments and develop healthy coping strategies to deal with adversities is important. Programmes for adolescents must a mental health care component that is rolled out without further delay to meet this requirement.

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