

Recommendations for the Justice Verma headed Commission of Inquiry by *Jawaharlal Nehru University*

The issues raised by the recent horrific instance of gang-rape go far beyond the tougher or better laws and better implementation, both of which are undoubtedly necessary. The exercise of framing more adequate laws and ensuring their implementation can succeed only if it is located within an understanding of the broader social, cultural, and economic context in which these crimes happen. Rape and other forms of aggravated sexual assault are only the extreme end of a spectrum of crimes against women that includes female foeticide, female infanticide, (and the resultant skewed male: female ratio), as well as honour killings, forced marriages, wife-beating as well as discrimination in access to food, medical facilities, education, employment, inheritance and much more. The basic assumption about the inherent inferiority of the female sex is at the root of the mind-set that perpetrates, condones and even valorises violence against women. In addition, the poor quality and unequal access to education, extreme economic inequality, caste oppression, communal and ethnic discrimination, all contribute to the brutalization of our society. An effective policing and criminal justice system needs to be aware of and sensitive to this overarching social frame.

At least as notified, the terms of Reference of the J. Verma headed Commission of Inquiry are quite narrow and if the analysis and inquiry is confined to these terms, the reforms suggested will not meet the desired objective of making the legal system more just or sensitive towards the sexual violence and harassment faced by women. Our proposals, prepared by the Gender Sensitisation Committee against Sexual Harassment of the University, women's groups, and other constituents, attempt to address these issues in a more comprehensive manner. We appeal to the Commission to extend its deliberations to the issues raised in the document.

I. Measures to address Sexual Assault

The Criminal Law (Amendment) Bill 2012

A. With regards to the Criminal Law (Amendment) Bill 2012, we strongly underline that the Bill must not be passed in its current form because of its many serious

loopholes and lacuna. In its current form, the Bill does not recognise the structural and graded nature of sexual assault, based on concepts of hurt, harm, injury, humiliation and degradation. The Bill also does not use well-established categories of sexual assault, aggravated sexual assault and sexual offences.

- i. The changes proposed in **Section 375 to broaden the definition of rape and to include within it all forms of penetrative sexual assault is a first step** in the right direction. **The section has however been made gender neutral**, which is a reversal of what the government had proposed in 2010. This seems to imply that women can commit sexual assault against men for which there is no empirical evidence at all. **The proposed government bill in 2010 rightly made the law gender specific as far as adults were concerned and the accused persons could only be men while the complainants/victims were women. Transgender persons, who are routinely subject to sexual violence, must also be included as a special case of complainants/victims.**
- ii. However, there has been no amendment to the flawed definition of consent under Section 375 IPC. **Consent must be defined as the unequivocal voluntary agreement by a person to engage in the sexual activity in question.** One major reason for defining consent in this way is to distinguish it from mere passiveness. Case law concerning rape is replete with examples in which it has been said that the victim has consented when she has merely remained passive due to a variety of reasons.
- iii. **Section 375 defines statutory rape** as rape of a complainant less than 18 years of age. However, taking note of the social reality that many instances of consensual sexual activity between young girls above 16 years of age and young boys, an amendment by way of **a proviso should be inserted to exempt such consensual activity from the purview of statutory rape provided the accused person is not more than 5 years older.**
- iv. **The Bill exempts marital rape as an offence if a wife is not under 16 years of age. This exemption is unreasonable and must be remedied.** Marriage is not a licence to rape, and a woman who marries does not sign away her sexual autonomy forever.
- v. **Section 376 A must be deleted;** we see no reason why the punishment for sexual

assault on a separated wife should not be the same as ordinary sexual assault.

- vi. **We strongly recommend the inclusion of perpetration of sexual assault by the police personnel of armed forces and paramilitary and other allied forces under Section 376(2).** They should be tried within the regular judicial system and no protection or legal immunity, providing for prior sanction of the government/competent authority for prosecution of a public servant, should be available to them in crimes of sexual violence under any general law provision (Sec. 197 and 132 CrPC) or special laws like Armed Forces Special Powers Act.
- vii. In **clause (b) of Section 376(2) sexual assault at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity should also be added as an aggravated form of sexual assault.**
- viii. **Penetrative and non-penetrative sexual assault at the time of or together with other forms of communal, ethnic, caste, and political, extremist violence should be categorised as an aggravated form of sexual assault.**
- ix. **Section 377, which deals with ‘unnatural offences’, but in fact targets consensual sexual intercourse should be deleted.** As sexual assault can take place in same-sex contexts, we recommend that once Section 377 is deleted, another section be added to the Indian Penal Code to address penetrative sexual assault in same sex relationships.
- x. **The amendment to Section 273 CrPC by way of an insertion stating that the victim should not be confronted by the accused is welcome. However, the method of cross-examination needs to be specified so that the victim is not harassed and further victimised.**
- xi. We appreciate that the amendments to section 154 and section 161 of the CrPC but feel that **the questioning of the victim must also be carried out by a woman and that if a female police officer is not available, a female government servant or a woman authorized by an organization working in the relevant area** should carry out the questioning
- xii. **The definition of sexual harassment in 354 and 509 IPC as "outraging the modesty of a woman" is obsolete and insulting to women.** Both provisions must be replaced

by a graded offence of attempts **to violate the bodily integrity of a woman with a sexual intent or purpose**. Acts within the gradation that must be included are public stripping and parading of women, groping and pinching of women, and also non-contact acts such as flashing, gesture, stalking, blackmailing via electronic media like MMS, etc.

- xiii. **The amendment Bill doesn't recognise the continuum of sex crimes — from "eve-teasing" (a sexist appellation that must be abandoned) to stalking to assault**. It defines aggravated sexual assault (by policemen, public servants, remand home in-charges and hospital management), but fails to treat non-penetrative crimes like molestation as separate offences. This is a glaring gap, considering the evidence that sexual harassers can become potential sex offenders. In Priyadarshini Matoo's case, Santosh Singh, her rapist and murder started out as a stalker. **Stalking should be categorised as an aggravated sexual assault, as should acid attacks**.

Other amendments:

- xiv. **Sections 363 and 366 of the IPC**, which make no exceptions to the rights of minors who may run away from home, upon facing neglect, abuse, sexual assault, and physical and mental violence must be amended to include these exceptions, as guardians /parents often abuse these provisions.
- xv. **Age of consent should not be changed from 16 to 18 years**. The police routinely misuses sections 376, 363 and 366 IPC when they counsel parents whose daughters have run away to file criminal cases under these sections. *Habeas Corpus* petitions are routine in this criminalisation of love affairs, which arises from the regulation of sexuality based on class, caste and community based patriarchies. In such cases, women are sent to shelter homes to reflect on whether they wish to continue living with their husbands or return to their parents. These shelter homes are not safe. There is routine sexual violence and other forms of violence which women in shelter homes face. There should be a plan to construct temporary, short and long stay safe homes for women survivors of violence. There is a need to shift focus away from protection to safety.
- xvi. Laws such as Delhi's Eve Teasing Act and other special laws which include eve-

teasing in goonda/anti-social laws in different states must be amended in terms of their title. Eve-teasing is a sexist term, which undermines the gravitas of sexual harassment and sexual assault.

Justice rather than retribution

- B. **We urge the government not to heed to the cries for retribution**, as this is not becoming of a civilised society. **The death penalty or, even chemical castration, must NOT be imposed for sexual assault, as there is no evidence to suggest that they will actually act as a deterrent.** Available data shows that there is a low rate of conviction in rape cases and it is a strong possibility that these punishments would lower this conviction rate even further. **Moreover, there are at least three reasons why the death penalty will exponentially increase the risk of adverse circumstances to victims and their witnesses:**
- i. By government assessments, about **96% of women are sexually assaulted by people known to them**, which often include near or distant family, friends and partners. **It is reasonable to believe that many will be unable to face the psychological and social trauma of having reported against their own relatives or acquaintances**, especially if marital rape is (rightfully) recognised as sexual assault. Imposing the death penalty or chemical castration is quite likely to discourage the reporting of sexual assault itself.
 - ii. **The imposition of these punishments is also quite likely to encourage aggressors to murder or otherwise disappear their victims and witnesses**, in a bid to silence the testimony that will convict him.
 - iii. **In cases of sexual assault where the perpetrator is in a position of power**, we believe that with the death penalty at stake, **the 'guardians of the law' -- army, police, paramilitary forces, and other high-ranked civil and political officials -- will make sure that no complaints against them get registered in the first place.** In cases of custodial rape or caste and communal violence, conviction is already notoriously difficult; these punishments would make conviction next to impossible.

Surgical castration is a cruel and unusual punishment and has been categorised as torture by international law. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment notes that "Surgical castration is a mutilating, irreversible intervention and cannot be considered as a medical necessity in the context of the treatment of sexual offenders." **With regards to chemical castration** (the inhibition of testosterone production in men by drugs), we note that **this step has been considered by countries like the US in the specific case of paedophiles and only in the context of exploring the release of such perpetrators from incarceration in prisons back into the community.** The Indian criminal justice system allows no such provisions, and therefore such a measure is not warranted. Additionally:

- i. Very little is scientifically known of the psychological and physiological consequences of administering Depo-Provera to men. Forced chemical castration may have the adverse affect of angering a criminal, increasing his violent tendencies and lead to additional sexual abuse.
- ii. Moreover, Depo-Provera is reversible. Therefore, unless injections are mandatory and monitored -- highly unlikely given our public health reality -- rapists will not be "cured" by the drug therapy.
- iii. Most important of all, the assumption behind chemical castration is that it is the sex androgens that lie at the root cause of sexual violence against women, whereas the truth is that sexual assault is embedded in a framework of power. In the instant rape and murder of the Delhi victim, the accused sexually assaulted her with both their bodies and iron rods to "teach her a lesson" for resisting their attack on her male friend, rather than from any feelings of sexual "lust" or "desire".
- iv. Finally, chemical castration is also an invasive procedure and goes against the right to life and bodily integrity of a person as enshrined in the Indian Constitution.

A law on honour killings

- C. **We urge the government to incorporate specific provisions relating to "honour killings",** prevalent in particularly in the northern and western states. Apart from a provision that addresses killing in the name of honour, **the law should address the range of violent and abusive acts designed to stop women from exercising her right to choose her partner in marriage or have a relationship outside her caste or community or religion.** In many cases, caste, Khap or community based panchayats and the couple's parents, uncles, etc., either acting together or alone, harass and intimidate anyone who disobeys them by various acts such as: banishing the couple and/or their families, by exiling them from their homes; by declaring a couple brother and sister; by levelling illegal fines; by imposing social and/or economic boycott on them or their family, and several other acts. **There are no provisions in the penal code that deal with these acts, or with those who glorify them.** Instead frequently, false charges of kidnapping are registered and acted on by the police; therefore any amendments must also devise means by which the police are held accountable. Provision must be made for protective homes where the couple can take shelter to escape the wrath of her relatives or those conspiring with them.
- D. **In our view, the most important factor that can act as a deterrent is the certainty of punishment, rather than the severity of its form.** We believe that reducing the question of justice on sentencing outcomes in cases of sexual assault is an easy, and essentially patriarchal, 'quick-fix' dismissal of the real issues that sexual assault raises. The actual steps that are needed are:

Recommendations for the Procedure of Addressing Crimes of Sexual Violence

Given below are a host of specific measures that we recommend must be put into place to ensure the just redressal of the crime of sexual assault. **A precondition for these measures to be effective is that representation and inclusion of women in the judiciary, Police, bureaucracy, state legislatures, Parliament and all other institutions needs to be improved and increased drastically.** This should be a real and effective representation and not merely cosmetic or symbolic.

1. Investigation/ Pre-trial Stage

- i. Institutional and procedural reform within the next 3 months to be made in the

Police functioning to ensure a swift, professional and sensitive investigation. A clear and transparent protocol to be formulated to ensure that every complaint of sexual violence by a woman – whether pertaining to sexual harassment, molestation, aggravated sexual assault or penetrative sexual assault – is promptly recorded as an F.I.R. and an investigation commenced forthwith. No pre- F.I.R. enquiries are to be allowed. The next steps of investigation and manner of recording the statement of the woman complainant and witnesses must be laid down explicitly. These protocols must be displayed and available in the public domain through the electronic and print media and the Internet. The investigation must be conducted by a Sub Inspector of Police and supervised by the SHO. Any breach of the protocol must invite prompt punishment and action.

- ii. Special cells must be instituted in each police station with networks with psychotherapists, doctors, lawyers and women’s organisations. No survivor of sexual assault should be turned away from a police station on the ground that the police station does not have jurisdiction to register-a case. Immediate medical and other assistance must be rendered by the PS where the crime is reported.
- iii. CCTV cameras must be installed inside police stations. Disciplinary action against officials that err in terms of the standing operating procedures or fail in any other manner to protect women is a must.
- iv. No survivor of sexual assault should be turned away from a police station on the ground that the police station does not have jurisdiction to file a case. The first response of police is to turn away the complainant saying that it does not fall into their jurisdiction. This must be checked and punished, as must be the deliberate misinformation tactics by the police to avoid registering an FIR. They usually tell the complainant that calling on the police helpline or giving a written complaint is the same as an FIR and that no separate procedure is required, which is false.
- v. There should be a directive to all Hospitals about the manner in which the medical examination is to be conducted for sexual assault and how the medical report is to be prepared. Absolute prohibition of the two-finger test of a victim of sexual assault. Furthermore, there is a need for separate wards in hospitals for the treatment and

rehabilitation of rape survivors. Training and sensitisation of Doctors to ensure that bias and prejudice does not govern the manner in which the test is conducted or the findings recorded.

- vi. Forensic tests must include DNA tests. Victims should not be subjected to lie detector tests as is done in some parts of the country. Furthermore, a medical examination of the accused person(s) as well must be mandatory.
- vii. Women who are sexually assaulted are required to submit their clothes for forensic analysis but are not provided with a set of clothes to wear. It should be mandatory for each hospital to provide women with clothes. Such *muddamal* should not be confiscated in police stations but if it is, then spare clothes must be provided to the survivor.
- viii. A multi-disciplinary agency must be constituted in each District comprising of medical Doctors, qualified Counsellors and representatives of women's organisations. This agency must be contacted in each complaint of sexual violence.
- ix. A witness/victim protection programme has to be constituted particularly for assistance in these cases. Rape survivors who are forced by parental or societal pressure to compromise or turn hostile should not be made vulnerable to perjury or contempt. Guidelines for victim and witness protection should be available for victims of violation of bodily integrity as well.
- x. A fund must be constituted to ensure reparative justice for the victim/survivor of sexual assault. This should include medical assistance, counselling of survivor and family, relocation if required and desired by the survivor, skills training. Serious efforts to ensure that the survivor is treated with respect and dignity in society.
- xi. The survivor and her family (or friends) must be provided economic support. Often survivors have to move out of the neighbourhood they were living in, pay for transport to courts and police stations, lose their daily wages, or pay huge hospital bills for treatment. The procedures for securing this form of legal aid should not be humiliating and difficult to access. This should be configured as legal aid rather than compensation since the word "compensation" is commonly understood in our society as if women want to "get paid" in lieu of rape. This sexist interpretation of

compensation needs to be re-named as repatriation and/or legal aid. Such repatriation must be given to the victims, computed on the basis of injury received, with the first instalment to be paid within 15 days of filing of FIR. This should be independent of the outcome of the trial or the victim retracting her statement at a later point due to whatever reason. Proactive enforcement of Section 357A of the CrPC, which talks about awarding compensation (renamed as repatriation) to the victims of crime, must be mandatory.

2. Trial

A. Resources and Infrastructure

- xii. A special cadre of Public Prosecutors must be trained to prosecute cases of sexual assault. The trainings should include understanding of the crimes of sexual assault, gender sensitivity in the conduct of the trial and a comprehensive understanding of the laws relating to sexual assault. Prosecutors should be free of political and other forms of interference. Otherwise the additional public prosecutor may be pressurised to withdraw a complaint, as was reported in a Tis Hazari Court on 20 December 2012.
- xiii. It is extremely important to evolve ethical guidelines about how to defend rape cases. The model of defence lawyering in rape trials needs to be radically revised, since criminal law practice remains male dominated and to be a successful defence lawyer, women defence lawyers often imitate male defence lawyers. Model manuals should be prepared for defence lawyers, educating them about the ethics of legal practice, with illustrations of what kind of questions would be considered amounting to harm and injury. Often rape survivors experience the process of testifying as re-rape. The responsibility of thinking how to develop guidelines for fair and sensitive cross-examination must lie with this Judicial Commission. Defence lawyers who humiliate and harass rape survivors should be disbarred from legal practice. Defence lawyers must not pressurise complainants to compromise rape cases. The Judge must proactively monitor the trial and dissuade/ disallow any kind of humiliation/badgering of the victim/witnesses and must record such attempts in the record of proceedings. Bar Associations should not be allowed not to represent men accused of rape on moral grounds. Rather they should work out ethical guidelines on

how defence lawyers will conduct rape trials. Lawyers who have served any sexual assault sentence should be disbarred from legal practice. The Vishaka guidelines should be implemented in all courts, police stations and hospitals.

- xiv. The prosecutor's office should feel like a safe place. Large offices with comfortable seating arrangements and enough light should be accorded to prosecutors for interviewing survivors and other witnesses. These should have glass doors, to prevent any possibility of sexual harassment/sexual assault. There should be active communication from the prosecutor's office with the rape survivors since they do not even know what the status of their case, unless the police tell them. For this dedicated personnel helping the prosecutor's office should be assigned. This should not be relegated to the court constable who routinely issues warrants and summons. Such personnel should make home visits in plain clothes, not in uniforms.
- xv. The reasons for not appealing an acquittal must be reported to the appellate court, and available to concerned parties in public interest.
- xvi. There is no space in most trial courts for rape survivors to sit and be interviewed without other people overhearing their conversations. There should be a woman lawyer present, if sufficient women prosecutors are not available, when a rape survivor is prepared for the rape trial. Preparation must be distinguished from tutoring. Sufficient explanation should be provided to rape survivors about the process of testifying. Such information should be on the website of every court.
- xvii. There should be provisions for rape survivors to sit down on a chair in the witness box. They should be offered a glass of water. They should be treated with courtesy. In many courts, there are either no bathrooms for women in courts, or if there, are unusable. Funds should be allocated to review the state of bathrooms in every court and sufficient clean bathrooms be built for women and children.
- xviii. Older versions of medico-legal textbooks, which have not been revised, should not be used in court, during the trial. All medico-legal textbooks should be reviewed and revised.
- xix. A dedicated website should be created to create awareness about the legal rights accorded to sexual assault survivors, steps on prevention and redress should be

provided as well as contacts to lawyers, counsellors, safe homes and so on.

B. *Judicial Responsibilities, Intervention, and Interpretation.*

- xx. All cases of sexual violence must be decided by the trial court, within 3 months of filing of the charge-sheet. Appeals in the High Courts and Supreme Court must also be fast-tracked and heard and decided expeditiously preferably within a period of three to six months.
- xxi. Judgments of all courts should not mention/disclose the survivor's name/identity especially since the judgments are now online.
- xxii. Identification and remedy of reasons for the nearly 75% acquittal rate is essential. Cases involving disabled women end in acquittal as their testimony is either not recorded at all or is recorded without the help of independent interpreters. Often the help of family members is taken in interpreting the testimony, which affects the case at the High Court stage as family members are interested parties.
- xxiii. Analysis of reported cases shows that a large number of cases are end in acquittal because key witnesses such as doctors are not examined in court. This trend must be remedied.
- xxiv. Better provisions for shielding the victim from the defence, including the accused, need to be devised. Often it is the harassment that rape survivors face on stand which leads to them not returning to court to finish their testimony or causing further mental trauma to them. Regular orientation of the Judiciary to ensure a proper understanding of sexual violence, its causes and consequences is a must.
- xxv. Proceedings held in *camera* intimidate rape survivors when defence lawyers walk in with a battery of male lawyers. Modern technology and electronic devices be put in place for recording the testimony of the victim to avoid bringing her face to face with the accused. Audio visual recording of the court proceedings would eliminate the sexist banter/remarks that abound during trial.
- xxvi. A large number of cases are compromised during the trial. Defence lawyers must be not be allowed to pressurise the victim into 'settling' the case. They must also be prevented from producing spurious defence witnesses who claim that the survivor

has “compromised” the case in a bid to introduce past sexual history. Compromise and settlement of rape cases is illegal and compromise documents, particularly those executed by parents, panchayats, and strangers, should not be a ground for quashing FIRs. The law must be sensitive to the fact that sexual assault survivors often do not have the power to take decisions in patriarchal families and communities who want to silence them by compromising the matter. Such documents should also not be grounds for bail, as in many cases from across the country. Rather compromise documents, pardons or statements on stamp paper should be grounds for cancellation of bail.

- xxvii. The court should intervene if the victim is asked to lie down on a bench to demonstrate the posture in which she was raped, repeatedly asked whether the man ejaculated (this is irrelevant), how long was she was raped (duration is irrelevant), whether the penetration was partial or not and so on. In asking questions, Judges should not repeat the details of how the woman was raped. She should not be called a liar repeatedly.
- xxviii. Directions must be issued to all judges not to suggest to rape survivors that they should marry the rapist. Gang rape is not first initiation into sex, or sexual rite of passage for young boys, as many judgments have held. Such judicial interpretations of rape must not be allowed. Judges should not also be allowed to distinguish between what they call “mere rape” and atrocity cases. Any judge who makes remarks or rulings that justify violence on women or displays a gender or caste/communal bias, must be held accountable by disciplinary action.
- xxix. To prove rape as atrocity, it should not be necessary to produce a caste/jati certificate. Other forms of evidence can be elicited to prove caste/tribal identity of the survivor.
- xxx. Cases of rape and atrocity should not be dismissed merely because a DSP did not investigate the case. A host of hyper-technicalities have defeated the implementation of the PoA Act.
- xxxi. Judges should intervene when defence lawyers insist that women should narrate whether the man ejaculated and where the semen fell. This is irrelevant.

- xxxii. Judges should intervene when defence lawyers bring in past sexual history, even in cases where burden of proof is reversed, by relying on the MLC which records that two-fingers are inserted (and hence, the woman is habituated).
- xxxiii. Judges should not repeat all the details of the rape while questioning the survivor. For example, the following is an excerpt from a transcript of a trial of a 12 year who was cross-examined for three hours, based on an ethnography of rape trials in Gujarat (excerpt from Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India*, forthcoming from OUP).

DL: When he climbed on top of you, he put his urine (peeshab) into your urine then did you cry out?

J (to N): He is asking that you screamed before or after inserting?

N: After putting (nakhane ke baad).

J (d): It is true that he lay me down and when he had inserted his place of urination (peeshab ki jagah) into my place of urination, I screamed only once.

DL: Look here you were lying down, then what did he do, how much did he do (penetrate) that you do not know. How much did he put his place of urination—half, full?

N: Full (akhi).

J (d): It is not true that when I was laid down and climbed upon I did not know how much my father (abba) Shakeel inserted his place of urination into my place of urination. But I am saying that he put his place of urination full into my place of urination.

DL: How did you see, you were saying that you were lying down then how did you come to know?

N: Blood came out.

J: He inserted that's why blood came out.

N: Yes.

J (d): I started to bleed, on that basis I am stating that my place of urination was penetrated fully by my father (abba) Shakeel's place of urination. That my place of urination was penetrated fully by my father's place of urination that I did not know because blood came out but I am saying that I came to know that my place of urination was penetrated by my father's (abba's) place of urination.

DL: How do you know that he had inserted?

N: (quiet initially) Because he penetrated me, that's why.

J (d): He inserted inside me, that's why.

DL: When he inserted, you screamed, then he lay down upon you, after that you kept lying and did not scream for a second time?

APP objects: (The question should be) did you cry at that time?

DL (to J in Gujarati): He has taken it in the chief, else I would not have asked.

J: He is asking that when he inserted climbed on you, lay down then did you scream. You do not understand? (Irritated). I am explaining four-four times. The faster you understand, the faster it will be over. You take your time and then speak.

N: I cried.

J (d): It is not true that I screamed once and thereafter I kept lying silently but I am saying I cried.

APP (to DL in Gujarati): The style of questioning has to be different, if you ask small children as you would adults what will happen?



xxxiv. Tort jurisprudence in the arena of sexual assault must be given new direction. When sexual assault happens on account of the culpable liability of an employer, a government, the police, a hospital, an asylum, a shelter home, school, university, company, factory or any other state or non-state institution, courts should award prohibitive tort awards to survivors.

3. Sentencing

xxxv. Sentences of rigorous imprisonment should run consecutively instead of concurrently in sexual crimes.

xxxvi. In cases of aggravated sexual assault, punishment should be for life imprisonment with no remission.

Finally, it is extremely important that public servants, including elected representatives, police officers, or members of the judiciary who indulge in victim-blaming or make gender insensitive statements that seek to justify/normalise/ trivialise sexual assault and violence against women are brought swiftly and visibly to book. It is also important that legislatures and Parliament make provisions for the disqualification of MPs/MLAs and other elected representatives charge-sheeted in criminal offences of rape, sexual assault, and molestation. Provisions for lodging a complaint on the candidature and election of candidates with the Election Commission must also be put in place.

Specific recommendations for Universities and educational institutions

In cases where a medico-legal case of sexual assault, molestation, or rape has been made out in an F.I.R against a member of a University campus or community, University authorities must take the following measures within five working days:

If the accused is a student, officer, teacher, or non-teaching staff of the University, all facilities and privileges, including residential accommodation, will be withdrawn, and the campus will be declared out of bounds for him. All withdrawn rights and privileges shall be reinstated only upon acquittal by a court of law.

If the accused provides services is a resident on the campus in a private or public capacity, all facilities of the University, in terms of residence and/or commercial space

will be withdrawn, and the campus will be declared out of bounds for him. All withdrawn privileges shall be reinstated only upon acquittal by a court of law.

University Gender Sensitisation Committees must be entrusted with assisting in the relief and rehabilitation of victims affected by sexual violence. Such Committees provided with all forms of financial, legal, medical, and counselling support. Such provisions must also include the right of residence in the university provided hostels and residence, an exemption from attendance and examinations for as long as the medical professionals deem it necessary.

II. Measures to address Sexual Harassment

Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal)

Bill, 2012

The Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Bill, 2012 while making the institution of complaints committees mandatory in government and private organisations, is beset by several deficiencies with regard to the composition and procedure of Internal Complaints Committees (ICC). These need immediate attention and require to be urgently addressed.

- i. The definition of sexual harassment in the Bill is awkwardly worded and must be rephrased in keeping with the Vishaka judgement. A possible model is based on the JNU and Delhi University definitions of sexual harassment, and could read something as follows:

Sexual harassment in this context, includes any unwelcome sexually determined behaviour, whether directly or by implication, and includes physical contact and advances, a demand or request for sexual favours, sexually coloured remarks, and other unwelcome physical, verbal or non-verbal conduct of a sexual nature. It shall include, but will not be confined to, the following:

- a. *When unwelcome sexual advances, requests for sexual favours, and verbal or physical conduct of a sexual nature, explicitly or implicitly, are made a term of condition of instruction, employment, participation, or evaluation of a person's engagement in any academic or campus activity.*

b. *When unwelcome sexual advances and verbal, non-verbal, or physical conduct of a sexual nature have the purpose or effect of interfering with an individual's performance or of creating an intimidating, hostile or offensive campus environment.*

ii. Across India, in the fifteen years since the Vishaka judgement, University communities and authorities have proved to be more responsive than the government of India, and many, if not most, have already instituted ICCs by interpreting the Supreme Court guidelines. In JNU, the democratic and representative character of its ICC was won by sustained struggle and consultation, and its GSCASH now serves as the model for other universities across the country. **The law, must therefore, allow the GSCASH (and other similar institutions that pre-exist it) to continue to function its present form.** Among these are the popular character of its composition, its gender-neutral character in admitting complaints of sexual harassment from both women and men, and the adoption of a set of rules that are in keeping with the needs of a workspace as complex as a University.

① The minutes of a high-level meeting held under the chairpersonship of **Justice Shri J.S. Verma, Hon'ble Chairperson, National Human Rights Commission**, on 25 April 2001 to discuss the Role of Universities and Educational Institutions in Implementing the Supreme Court Guidelines, state under item (5), ***"The UGC should procure from the Jawaharlal Nehru University a copy of the guidelines which they had prepared in connection with combating the problem of sexual harassment in their University and examine whether the same could be replicated in other Universities as well"***.

① In the **Dr. B.N. Ray vs. Ramjas College & Ors** judgement on 21 May 2012, the **Hon. High Court** has ruled that members of a University ICC (in the instant case, Delhi University) that includes representatives from all the sections of the college community is welcome. The Court, on page 12 of 20, observed, that ***"In our view, such a composition also meets the objective of ensuring that all sections of the college community have full faith in the functioning of Committee on account of presence of their representatives on it. The findings of such a broad based Committee are likely to be better received and accepted by all the sections of the***

college community.”

- iii. In all other institutions as well, **members of the ICC should not be nominated by the employer**, thus possibly compromising on the independence of the Committee from pressure from senior levels. In the interest of all concerned, elections to the Committee should be provided for as an option and the concurrence of employee associations taken.
- iv. **This Bill must cover women at every kind of workplace.** Therefore, it must specifically cover women in the armed forces and police, as well as agricultural women workers, as well as women students of schools and colleges/universities/education institutions, who, while not being employees, are also subjected to rampant sexual harassment at educational institutions.
- v. **Eligibility criteria for membership of ICCs should be enumerated explicitly.** The fact of being implicated directly or indirectly in a complaint of sexual harassment should be explicitly mentioned as ground for disqualification. The Bill does not do so.
- vi. **In the Bill, workplace hierarchies are reinforced through mandating the seniority of the enquiring officer vis-à-vis that of the respondent, in a simple-minded extension of the model of departmental inquiries in government departments.** This is extremely problematic, as it undermines the very recognition of the fact that sexual harassment is often related to the exercise of institutional power. Therefore, it is essential that ‘junior’ levels also be represented in the ICC. Aside from the fact that **ICCs institute enquiries on the basis of a complaint by a member of the institution** as compared to departmental inquiries that the employer initiates for a variety of reasons, **it is also incorrect to impose the government departmental hierarchies across the board.**

❶ In this connection, we draw your attention to the observations of the Hon. High Court in the *Dr. B.N. Ray vs. Ramjas College & Ors* judgement on 21 May 2012. The Court, on page 11-12 of 20, observed that ***“Admittedly, the petitioner is not a Government servant. Hence, the rules made and instructions issued by Government of India from time to time, with respect to inquiries to be held against its employees, do not per se apply to complaints of sexual harassment by a teacher of the college, affiliated to the University, which is an autonomous***

body having its own rules and regulations. Hence, the instructions of the Government, stipulating that the Inquiry Officer should be higher in rank to the charged officer, do not apply to the case of the petitioner. The petitioner being a teacher in a college affiliated to Delhi University and governed by the rules and regulations of the University and the college, in which he is working, is not similar to the Government servants who form a class in themselves. ...Teaching staff, non-teaching staff and students of a University and/or a college affiliated to the University constitute a class which is altogether different from the class constituted by Government servants. Therefore, it cannot be said that fundamental right of the petitioner, W.P(C) 4427/2008 Page 15 of 28 guaranteed under Article 14 of the Constitution is violated on account of the Chairperson and/or members of the Committee/sub-Committee being inferior in rank to the petitioner. We also fail to appreciate how inclusion of students or representatives of students or non-teaching employees, including the representative of Group 19 D19 19 employees, can be said to be violative of Article 14 of the Constitution. It was very much in the domain and competence of the University to provide, by way of Ordinance, that the members of the Committee would include representatives from all the sections of the college community.”

- vii. In laying down that the complaint may be made by ‘legal heirs’ in case of ‘physical or mental incapacity or death’ of complainant, the Bill completely ignores the support provided by friends and colleagues. The Ruchira Gehrotra sexual harassment case is a case in point. Therefore, **provision for third party complaint is essential.**
- viii. **Clause 10 of the Bill mandates ‘conciliation’ between the aggrieved woman and the respondent as the first step in case of complaint, ignoring the need to first establish if indeed an act of sexual harassment has taken place,** and the extent of its nature and severity. Moreover it dilutes the gravity of the offence, making it appear to be a ‘mistake’ rather than an offence or crime.
- ix. **The Bill creates hostility for women complainants by turning the reconciliation into a normative and foremost expectation of law.** In mandating enquiry only in cases where reconciliation is not effected or the terms of settlement not adhered to, the Bill is in

direct contravention to the spirit of the Vishaka judgement.

- x. **By mandating complete silence on the part of the employers on matters pertaining to sexual harassment by Clause 16**, the Bill undermines the efficacy of any legislation on sexual harassment.
- xi. **Procedures for enquiry are weak. The Bill does not take any cognisance of the basic feature of intimidation that is characteristic of a sexual harassment complaint and therefore, there are no procedures to address this.**
- xii. **The aggrieved woman may according to Clause 12 of the Bill seek a transfer or request leave. A more effective mechanism would be to send the respondent on compulsory leave or suspend him pending inquiry.**
- xiii. **A further option should be to serve an order of restraint upon the respondent ensuring there is no direct or indirect contact with the complainant, her family or witnesses. Violation of the order of restraint should be viewed as aggravating the offence committed.** This provision is included in the JNU GSCASH Rules and Procedures.
- xiv. **The Bill does not take into account that some offences may reflect a caste or religious dimension.** In such cases the committee should be appropriately modified to reflect this aspect either through cooption of additional members or through joint inquiries with appropriate authorities. Further, clause 13(2) of the Bill states that if no case of sexual harassment can be established, the committee must recommend that 'no action is taken in the matter'. However, even if sexual harassment charges are not substantiated, and there is evidence of caste or religious abuse the matter should be referred to the appropriate authority for further investigation and appropriate action.
- xv. **To ensure that ICCs will deliver justice, the role and powers of NGOs/outside members must be clearly defined**, which the Bill in its current form does not do. Counsellors and legal assistance should be guaranteed by the employers to the ICCs, which again in its present form, the Bill fails to do.
- xvi. **The Bill should contain an explicit statement that natural justice will be observed in the enquiry proceedings**, modulated in terms of the overarching principle of gender-sensitivity and gender justice. Particularly vexed has been the issue of examination and cross-examination of prosecution witnesses, a core feature of the principles of natural

justice, and rules must be laid down for the same in the law. Case law in various judgements of the Supreme Court and the High Court of Delhi suggest that the Bill should contain the following provisions:

- a. **An explicit statement that an inquiry conducted without giving an opportunity to the respondent a copy of the complaint against him, to cross examine the prosecution witnesses, an opportunity to produce the witnesses in his defence does not conform to the basic principles of natural justice.**
- b. **The Bill should explicitly state that the complainants and other witnesses need to be examined in the presence of the respondent.** This can be derived from the High Court judgement in the Bidyug Chakraborty (Prof.) v. Delhi University & Ors.: 2009 VI AD, as modified by the Supreme Court, it is not obligatory for the ICC to examine the complainants and other witnesses who were to depose against the respondent, in his presence.
- c. **The Bill should explicitly state that the identity of other witnesses may not be revealed to the respondent.** Given however the special nature of cases of sexual harassment, the Supreme Court directed that the identity of witnesses need (W.P(C) 4427/2008 Page 20 of 28) not be revealed to the respondent or to his Counsel. For the purpose of cross-examination, respondents are therefore entitled to submit a questionnaire to be put to the witnesses for their answers in writing.
- d. **The Bill should explicitly state a procedure for cross-examination of prosecution witnesses.** The procedure suggested by the Delhi High Court in two recent cases is a possible model. In a recent decision, *Dr. Pushkar Saxena v. Govt. of NCT of Delhi & Ors.* WP(C) No. 7592/2001 decided on 16.5.2012, the Hon. High Court of Delhi has directed that in order to ensure that there is no possibility of witnesses getting influenced on account of the presence of the respondent at the time of their cross-examination, the witnesses may be cross-examined through a female defence assistant. If the respondent does not want to engage the services of such a female defence assistant, then the exercise of the right of cross-examination would require the petitioner to submit a

questionnaire, giving the questions he wanted the witnesses to answer, and the answers to the questions will be obtained by the Inquiry Committee. The Court also directed that the respondent will not be present at that time of either examination or cross-examination of the witnesses. Additionally, in the judgement of the Delhi High Court in the *Dr. B.N. Ray vs. Ramjas College & Ors* case on 21 May 2012. The Court has observed that in the case that the complainant is male, and then the cross-examination could be undertaken by a male defence assistant.

e. **The Bill should explicitly allow the complainant the same rights of cross-examination of the respondent and defence witnesses.** Unlike departmental proceedings, ICC enquiries are instituted on complaints of sexual harassment are made on the basis of the complaint of an individual, and ICCs are required to sit on judgement on whether her charges are true or without merit. Principles of justice demand that the same rights accrue to her as they do to the respondent.

xvii. **Clause 14 providing for punishment for false/malicious complaint should be removed** as the aggrieved woman may believe that her complaint may be perceived as false or maliciously motivated and therefore refrain from making a complaint. The provision that the ICC shall act on false complaints is completely unacceptable and unprecedented in law, as the ICCs should be entrusted with the powers to only address the issue of sexual harassment. As a comparison, note that no such provision for punitive action exists in The Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989.

xviii. **Clause 15 of the Bill for ‘determination of compensation’ appears to lay greater stress on compensation, which should not be the primary function of the ICC.** Every case does not merit payment of ‘compensation’, yet the Bill makes a recommendation for compensation mandatory for every ICC report.

xix. **With regard to compensation, the Bill overturns employer liability, which is foundational to sexual harassment law internationally by making the guilty party responsible for the compensation and making the compensation commensurate to the income and financial status of the respondent. The employer should in fact pay the compensation which may be recovered in part or in full from the respondent.** This

unprecedented cap on damages to be paid will surely be welcome to big corporations like Infosys who recently had to settle a sexual harassment lawsuit for \$3 million, because of their failure as employers to protect a woman from sexual harassment; but it will also be welcome to the smallest of workplaces like the small factory owner whose male employee has absconded after molesting a fellow woman employee.

- xx. **Clause 16 of the Bill seeks to keep identity of the respondent secret even after guilt is established. Major cases should be given publicity, particularly with regard to the quantum of punishment, for maintaining the health of the workplace.** In many cases, the information that there has been action against an employee may lead to further information and complaints. Moreover, the fact that alleged violations of clause 16 also apply as grounds for disqualification of ICC members will severely impact the enquiry process.
- xxi. **Publicity is also necessary for making the ICC accountable. Moreover in the interest of making an appeal by the concerned parties and for RTI purposes, the Bill must provide for access to the enquiry report to the respondent as well as the complainant, evidence etc while maintaining confidentiality.** Further, in the *Bidyug Chakraborty vs. Delhi University & Ors* judgement on 2 April 2007, on page 5 of 8, the Hon. High Court has laid down that “Mere supply of the report is meaningless unless the respondent is given an opportunity to make representation against it and if made, such a representation is considered by the Disciplinary Authority before recording its findings.” This aspect should be reflected in the Bill.
- xxii. **The Bill should also contain an explicit provision for holding ICCs accountable for unreasonable delays in proceeding on complaints.** In many instances, complaints remain trapped in the pre-enquiry stage, or even worse, enquiries take years to be completed. The Bill should make a provision that should an ICC fail to institute an enquiry proceedings within 30 days of the lodging of a complaint of sexual harassment, the employer will be liable to pay a penalty, as well as damages to the complainant.
- xxiii. **Clause 18 states that any appeal shall be preferred within a period of thirty days of recommendation. However, the employer is then provided ninety days to implement the recommendation.** This must be changed to preference of appeal within thirty days

of communicating the decision and provision of the inquiry report to the concerned party. Appeals mechanism within the workplace should be exhausted before approaching courts or any other tribunal.

Specific recommendations for Universities and educational institutions

- ❶ All school textbooks from primary level onwards to include chapters on equality for women and girls, and absolute prohibition of violence against girls and women. Review of all textbooks to weed out all instances of gender bias and stereotyping of both genders and promotion of masculinity and violence among boys.
- ❶ Universities and other institutions must undertake regular gender audits, as is the practice in Delhi University.
- ❶ A bi-annual audit of the University or educational Institution in terms of how the University administration and ICCs has responded to gender issues. The audit should be carried out by an independent body\committee and should be placed before the University Court, Executive Council, etc..
- ❶ Serious reviews must be done as to whether educational institutions have sufficiently included research and critique on sexual/gender violence in the curriculum. In addition, the UGC to institute Fellowships/research money for studying gendered violence.
- ❶ A compulsory course on gender sensitisation to be offered as part of all programmes of study at the University. Perhaps the UGC should formulate a policy to this effect.
- ❶ Legal literacy must be encouraged amongst students and teachers, and books on legal literacy, spanning a critical reading of laws from gender to labour, should be on every BA course. Critical legal literacy workshops must be organised in all Universities and public institutions.
- ❶ Large Public undertakings and Universities must have a panel of feminist lawyers, who can provide legal assistance. Telephone numbers for sensitive counsellors must also be provided.
- ❶ Special University Outreach Programmes on the matter of gender sensitization and the rights of women should be funded by the UGC. Universities must be encouraged to make not only their campuses but the localities in which they are situated safer for

women and free of sexual harassment.

III. Preventive Measures to Make our Cities Safer for Women

In addition to addressing the law and the process of the trial, we would also like to a few points on creating safer cities and addressing safety and inclusion in the working of public institutions.

Urban planning, design and governance

- Comprehensive women's safety guidelines/indicators for all plans and project proposals to be institutionally accepted and implemented by key urban planning bodies.
- All major planning documents (the Master Plan, Local Area Plans etc.) should be revisited to reflect the women's safety perspective in all interventions, including transport, street lighting, water and sanitation, slums and resettlement, environment etc.
- Training/ capacity-building: Training of all municipal staff involved in planning, through lectures, city walks/ safety audits, and FGDs.
- Regular data collection on women's safety: Make safety audits a regular planning tool and an integral part of the master planning process, with a commitment from local authorities to implement their recommendations.
- Provision of clean, safe and usable public toilets in all public areas including streets, markets, parks, public transport points, schools, colleges etc.
- Improvement of night shelters: Night shelters are an important public service provided by the state for the homeless. Safety of homeless women is a huge issue in Delhi, both within and outside the night shelters. Standards to improve night shelters from a safety standpoint as part of 'caring collective', several NGOs and right based advocates have come forward to guarantee safer spaces – shelters – for homeless across the city in 2010.
- Compliance: Detailed checklist on women's safety to be provided to all service providers. Compliance and certification mandatory.
- Training/capacity-building: Training of all municipal staff involved in maintenance of urban infrastructure, through lectures, city walks/safety audits, and FGDs.

Public Transport

- Improved infrastructure at bus stops, metro stations and subways: Enhanced lighting, electronic signage and audio announcements at major bus stops.
- Advertisement of helpline numbers: Clear written and audio announcement of helpline numbers. Electronic messaging on women's safety inside buses and at bus stops, as well as billboards outside buses.
- Visible police presence: Increased visible presence of marshals or police personnel at busy bus stops and metro stations, supplemented by plainclothes policemen and women. PCR vans to be parked near busy public transit points, especially during rush hours, and at night.
- Autos and taxis: Making the display of auto and taxi drivers' identification, service standards and helpline numbers mandatory, with random checks by mobile teams to enforce the same.
- Mobile teams: Expanding the mandate of the transport department's mobile teams to include response to safety issues and complaints, especially once they are linked to a central control room.
- Effective registration, monitoring and regulation of transport services (whether public, private or contractual) to make them safe, accessible and available to all.
- Emergency telephones: Installation of emergency telephones linked to a central helpline, at major bus and metro stations, in subways and selected pedestrian crossings, perhaps with sponsorship from one of the major mobile companies in Delhi.
- Training/ capacity-building: Sensitisation/training of public transport staff, including bus drivers and conductors, metro drivers and ticketing staff at metro stations, on the importance of ensuring women's safety, and actions to be taken when an incidence of sexual harassment is witnessed or reported.
- Zero tolerance: Zero tolerance policy towards sexual harassment of women by drivers and conductors of all public service vehicles, including buses, autos, taxis and other private hire vehicles registered in Delhi.

Police Helplines

- Police helplines need to be streamlined - having many different numbers is not practical and usable

- All calls should be reviewed to check the performance of the call operators. Cases should be tracked to check on adequacy of interventions made by the police. Appropriate and immediate disciplinary action against helpline staff and PCR staff for inappropriate/inadequate response amounting to negligence or dereliction of duty.
- Systematic feedback, either of all callers.
- A grievance redressal mechanism for processing complaints by designated authorities.
- Training all levels of PCR staff as well as personnel in police stations require training on: Gender sensitization, understanding violence and its impact upon women, capacity development and communication skills to deal with sexual abuse and sexual harassment cases. Communication skills - how to communicate with sympathy and give the woman in distress a sense of comfort and confidence
- A comprehensive manual or guide should be prepared detailing the standard operating procedures of the helpline, roles and responsibilities. This should include information about procedures to be followed, forms to be filled, monitoring mechanisms and documentation.
- Creating a specialized and dedicated staff to run the helpline so that there are no disruptions/loss of learning due to frequent transfers. As the role of call takers is more that of counsellor/effective communicator, non-police personnel can also be part of this process.
- A more robust coordination between agencies, not limited to only taking survivors to Government hospitals for medical treatment, legal services etc.

In conclusion, Jawaharlal Nehru University would like to extend its support to the Commission of Inquiry in any manner that may be deemed necessary. This document is the result of the collaborative and voluntary effort of faculty members, students, lawyers and NGOs associated with the JNU GSCASH. We hope that the Commission will grant all of us an opportunity to depose before you in person, so that we may put our resources at your disposal.