

A Comparison of two drafts on:

“The Protection of Children from Sexual Offences Bill, 2010”

The following is a comparison between two drafts, one prepared by the Ministry of WCD and the other by the NCPCR.

1. The task of comparing two drafts, both inspired by the same policy considerations is a delicate and difficult task, but since it is required under the circumstances, it is being undertaken “in the best interests of the Child”.
2. There are great similarities between the two drafts (e.g. Special Courts, Standalone legislation) and indeed quite a large area of overlap and commonality, but for purposes of comparative evaluation, we proceed to focus on what the differences are.
3. This comparison is done by drawing up six tables in order to facilitate an easy scrutiny of the two drafts
4. The six tables drawn up are under the following heads:

Table 1: “Fair Labelling” and clear definitions

Table 2: Consent and Criminalisation

Table 3: Services under the Act

Table 4: Investigation and Procedures for reporting/recording child statements

Table 5: Special Measures/Procedures for recording evidence

Table 6: Compensation

5. The overlap between Table 4 and Table 5, flows from the structure of the Ministry’s draft.
6. In the spirit of protecting the ‘best interest of the child’ NCPCR feels, that the system of Criminal Justice Administration for adults needs to be rendered ‘child friendly’ through adequate elaboration in the proposed law.
7. The above comparisons, however, are not exhaustive since such an attempt would be tedious. Matters omitted are either covered in both drafts or not of much consequence.

Table 1: "Fair Labelling" and Clear Definitions

SI No	NCPCR's list	Punishment	Ministry's list	Punishment
1.	Child rape	7 years to life time	Penetrative sexual assault	7 years to life
2.	Unlawful anal sex	7 years to life time		
3.	Making child engage in unlawful penetrative sexual act	7 years to life time		
4.	Unlawful oral sex	7 years to life time		
5.	Unlawful sex pen. of bodily orifice	7 years to life time		
6.	Bestiality	7 years to life time		
7.	Child molestation	Upto 5 years	Sexual assault	3 to 5 years
8.	Unlawful sexual contact with a child	Upto 3 years		
9.	Unlawfully stripping a child	Upto 3 years		
10.	Unlawfully stripping a child in public view	3 to 7 years		
11.	Child porno	3 to 10 years	Pornography	Upto 3 years
12.	Blackmailing	Upto 1 year		5 to life
13.	Sexual harassment	Upto 1 year	Sexual harassment	
14.	Stalking	Upto 1 year		
15.	Failure of authorities to report	Upto 1 year		
16.	Aggravated forms	Attract higher punishment	The same	

In the Ministry's draft – offences are clubbed together. There is greater advantage in 'fair labelling' with precise definition of each offence as elaborated in the NCPCR draft. Helps the state to prosecute an offender for the particular offence/s committed and therefore enhances successful prosecution

Table 2: Consent and Criminalisation

SI No	Ministry's	NCPCR's
1.	Dealt with under second part of Section 3 & 7	Dealt with under Section 3
2.	Silent, but burden of proving innocence where victim is below 16 years, is on the accused (Sec.29)	Any sexual act with a child below the age of 16 years is unlawful with or without consent
3.	Nil	Certain forms of consensual sex activity between 'young offenders' is not an offence
4.	Court will have to consider whether consent was vitiated by fraud, deceit, coercion, undue influence, threats, etc.	Any sexual act with a child between 16-18 years, with or without consent is unlawful if any of the nine circumstances in sec.3 are present
5.	Consent would have to be 'unequivocal voluntary agreement' expressed clearly by consenting child through words, gestures or any other form of non-verbal communication	If any of the above circumstances are proved sexual act will be unlawful. Consent will be relevant only if first eight circumstances are absent
6.	Absence of physical resistance above would not be construed as giving consent	Silence or inaction of child enough to show absence of consent. Absence of physical resistance, physical injury or past sexual conduct will not be construed as consent.

In the NCPCR draft – (i) certain sexual acts between children of tender age is not criminalised; (ii) complexity of dealing with consent is simplified by relying on a set of circumstances which makes certain sexual acts unlawful. (iii) the nine circumstances are Force, Coercion, Threat, Impersonation, Mistake, Intoxication, Undue advantage or when child is asleep/ unconscious or against the will/consent of the child.

Table 3: Services under the Act

SI No	NCPDR's	Ministry's
	1. Case worker	
(a)	To be appointed by state government	
(b)	Support child through investigation	
(c)	Advice child about services available	
(d)	Assist child to access services	
(e)	Help child to access welfare committee	
(f)	Coordinate with police	
(g)	Inform child and family about progress	
	2. Child support services	
(a)	State government shall empanel team of multi-disciplinary professionals	
(b)	CSS shall include social workers, medical and mental health professionals	
(c)	Inform child of legal rights	
	3. Guardian ad litem	
(a)	To be appointed by court in each case	
(b)	Support child through entire judicial process	
(c)	Make recommendations to court concerning welfare of child	
(d)	Shall maintain confidentiality and enjoy privilege	
(e)	Help access compensation	

Support services are critical for child friendly implementation. There is almost nothing in the Ministry's draft corresponding to 'services under the Act' provided for in the NCPDR draft? It is impossible for a child to obtain justice under a system of Criminal Justice Administration meant for adults without providing 'statutorily empowered adult supporters' for the child through investigation, trial and restitution.

Table 4: Investigation & Procedure for reporting and recording statement of the child

SI No	NCPCR's	Ministry's
(a)	In addition to Cr.P.C. duties police officer shall call upon case worker to provide support to child	Also follows Cr.P.C. procedures
(b)	Case worker shall submit report to special court within 24 hours	SJPU shall report matter to special court within 24 hours
(c)	Avoid contact with accused	Avoid physical contact with accused
(d)	Seek assistance of a facilitator if child has a disability	Provide translator, interpreter, special educator
(e)	Police Officer shall not be in uniform	Same provision as in NCPCR draft
(f)	Give copy of child's statement to support person	
(g)	Follow procedure for medical examination as detailed in sec. 43	Medical examination as per 164A or Cr.P.C.
(h)	State Government shall ensure 'safe kit' in every hospital	
(i)	Record statement of child under sec. 164 Cr.P.C. <u>in chambers</u>	Avoid advocate of the accused during 164 statement and ensure presence of parent or any other person in whom child reposes trust/confidence
(j)	Magistrate to provide copy of documents to child	
(k)	Statement of child shall be recorded at the residence of the child	
(l)		Compulsory reporting to SJPU or local police. Non reporting punishable
(m)		False complaint punishable

NCPCR draft clearly delineates 'Investigation' and provides commonly required types of protection to the victim child elaborately.

Table 5: Special Measures/ Procedure for recording evidence

SI No	NCPCR's	Ministry's
(a)	Special court to ensure that "the quality of evidence of the child is not diminished in any way"	
(b)	Special court may provide: Live video link One way mirror Use of screens	Similar provision
(c)	Ensure 'in camera' always	Also ensure 'in camera' proceedings
(d)	Child above 14 years may waive special measures	
(e)	Court may decide otherwise during course of evidence	
(f)	Ensure comfort of child witness	Court may issue commission to record evidence at a place other than court
(g)	Accused should be able to hear child witness	
(h)	Accused should be able to contemporaneously communicate with his counsel	
(i)	All questions to child shall be given in writing to court and Presiding Officer will put questions to child	All questions to be passed on orally and put through the special court
(j)	If child has a disability provide a facilitator	Magistrate may seek assistance of special educator
(k)	Details of how evidence must be recorded in case of live video link	
(l)	Measures to expedite hearing + time limits	Ensure that child is not called repeatedly to testify + time limit
(m)	Take steps to create child friendly ambience	Shall permit family member, guardian, friend of relative to be present
(n)		Age controversy, if any, shall be determined by special court

NCPCR draft conceptualises a comprehensive package of child friendly 'special measures' and balances the requirements of 'fair trial' (for the accused also) in careful detail. The provisions relating to age determination issue of the child in the Ministry's draft is valuable.

Table 6: Compensation

SI No	NCPCR's	Ministry's
1.	State government shall create a compensation fund for 'rehabilitation of victims' of child sexual offences'	
2.	Procedure for compensation is elaborated: <ul style="list-style-type: none"> (a) Creates jurisdiction (b) Application even if accused is not traced or identified (c) Order interim compensation before final compensation. (d) Compensation is by way of restitution for injuries caused and not as an ingredient of punishment. (e) Monies to be deposited in Court in case of appeal (f) <i>Guardian ad litem</i> will assist child 	Special court may in <u>addition to punishment</u> direct payment of compensation (Hence not payable without conviction..?)

NCPCR draft contemplates a 'compensation fund' to be accessed by the child as restitution for physical and mental injuries, caused, and completely delinks it from conviction of the accused.

Overall comments:

1. *NCPCR enumerates commonly occurring sexual offences against children by clearly defining each offence along with its aggravated form thus penalising particular forms of sexual violence and enhancing the chances of successful prosecution.*
2. *The NCPCR draft follows the natural sequence relating to the crime and its prosecution and ensures child friendly measures through each of these stages. In this regard there are too many gaps in the Ministry's draft.*
3. *After studying comparative laws in more than a dozen countries and after taking note of good practices by child rights activists and Supreme Court Judgements the NCPCR draft sows the seeds for the evolution of child friendly jurisprudence and organically integrates child friendly measures, without compromising on the requirements of 'fair trial', through each of its chapters.*
4. *Except for the 'age determination issue', there is nothing in the Ministry's draft which is not in the NCPCR draft. But on a reverse comparison there are too many gaps in the Ministry's draft compared to the more comprehensive draft of NCPCR.*
5. *The fundamental difficulty of making the system of Criminal Justice Administration for adults respond to the needs of the child (including the infant) can only be addressed by providing comprehensive statutory support for 'age appropriate' child friendly law and procedures*