WOMEN'S ORGANISATIONS JOINT MEMORANDUM

ON THE 'POINTS OF DISCUSSION'

Date: February 9, 2022

Sub: Review of Criminal Law

To,

Chaiperson,

National Commission for Women

Dear Rekha ji,

This is with reference to the 'points of discussions' raised by you regarding proposed changes in some provisions of the Criminal Law. We, the All India Democratic Women's Association (AIDWA), National Federation of Indian Women (NFIW) and All India Progressive Women's Association (AIPWA) are sending you our memorandum on the same. As the NCW letter itself points out, any suggested amendments should be made keeping in view "the perspective and position of women in India". In fact the mandate of the NCW is to represent the rights of women in India and to provide a voice for their issues and concerns. It thus has to act to improve the status of women. Apart from taking remedial legislative measures to remove any injustice and discrimination against women it also has to ensure that any law or action which is discriminatory or unjust is not enacted against women. We are saying so because some of the questions in the 'discussion points' lead to the inevitable conclusion that they are meant to dilute the provisions of Criminal law in favour of men. These provisions have been

enacted after a great deal of struggle and campaign by women's organizations and groups. Our answers to the 'points of discussion' are as follows:

Section 498A

A question has been asked whether Section 498-A "be amended with respect to scope, punishment, cognizability, bailability and compoundability". Please note that any amendment with respect to Section 498-A will lead to its dilution and is unacceptable to us.

There are more than one lakh cases which are filed under this section every year and this in itself shows the pervasive nature of domestic violence which exists in our society. Even in the year 2015, the NCRB data showed that chargesheets were filed in around 90% of the cases, which clearly showed that they were genuine. Abysmally low conviction rates under this Section point to the fact that investigations are not properly conducted and that the statements of material witnesses are omitted. We know that women find it hard to even file a case due to the corruption and gender bias which exists at the level of the police and the 243rd Law Commission Report also attests to this fact. We do not want the offence to be made bailable and noncognizable as it is a serious offence. We are against the compoundability of this offence as women are very often coerced into settlements against their wishes.

We also feel no pre-arrest or other procedural safeguards be added specifically with reference to Section 498-A as these are merely being done at the behest of certain anti-women groups who are against punishing even gross forms of domestic violence against women. Your own report on Section 498-A, plus studies by the

TISS, show that women normally file complaints under the Section after years of harassment and domestic violence. In any case, the Supreme Court in Lalita Kumari's case has said that a preliminary enquiry will be conducted by the police prior to the registration of an FIR under Section 498-A and in these cases, mediation is also carried out by various Crime Against Women Cell, prior to the court action. Thus it would be an anti-women measure to amend Section 498-A Indian Penal Code, 1860.

Marital Rape, definition of Consent and Gender Neutrality

We also wish to point out that after a sustained campaign by women's organizations and groups for several years since 1993 and the Verma Committee Report after the Nirbhaya Case, the IPC was changed to include an expanded definition of rape and certain other crimes against women. These included digital and oral rape in S375, voyeurism (354-C), stalking (354-D), sexual harassment (354-A) etc. Apart from changing certain outdated terminology, stemming from certain patriarchal norms in 354 and 509 IPC, we feel that none of the sexual offences needs any addition or modification.

The definition of consent in Section 375 IPC and the proviso added to it has been amended after a great deal of thought and campaign by all those involved in women's rights. The Verma Committee also recommended the change, and the 2013 change in the definition of consent is also in tandem with the definition of consent in several democratic countries. The fact that consent could only mean unequivocal agreement by the woman and that passive consent was no consent was recognized by the Indian law after the experience in Mathura and other cases and in accordance with the definition approved by the International Criminal Court. We

therefore feel that the definition of consent should not be tinkered with in any manner.

We are firmly in favour of the marital rape exception being excluded from Section 375 IPC. This has also been a long standing demand of women's organisations and groups. We feel that there can be no distinction between a woman being subjected to rape within marriage or outside it. The exception was engrafted into the IPC in 1860 and is a product of an antiquated British morality which held that upon marriage, a woman accorded perpetual consent for sexual intercourse whenever the husband desired it. Though it has been done away with or repealed in England and in several democratic countries, the marital rape exception unjustifiably continues in India. It is premised on the fact that a woman has no right to not consent to sexual intercourse when her husband demands it. It, thus, denies to a woman her rights under Article 21 of the Constitution which recognizes her as an individual whose autonomy, bodily integrity and dignity, within and outside marriage, has to be guaranteed. AIDWA and other women groups, including the National Commission for Women, have been asking for the deletion of this exception for several years now and this is why AIDWA and some other have filed a petition in the Delhi High Court challenging this. We do not feel that there is a need for any special procedure or standard of evidence in relation to marital/spousal rape as asked, particularly if these are meant to extend so called "safeguards" to the offender.

At the time of and prior to the changes in the Criminal law relating to sexual assault and rape we had extensively debated whether the law should employ gender neutral terms and come to the conclusion that it would be wrong in India to do so

given the situation on the ground. We had hitherto only come across sexual offences being committed by men against women. It is relevant to mention that as far as child rape and sexual assault is concerned, POCSO already employs gender neutral terms for the victim, as any child can be subjected to sexual assault and the offender wherever necessary. Further, Section 377 of the IPC is also couched in gender neutral terms and already deals with the offence in gender neutral terms for both offender and the victim. There is therefore no need to make the law of rape and sexual assault gender neutral as this would be a duplication of the already existing provisions and without any basis.

We would urge the present National Commission of Women not to interfere with the amendments that were brought about in 2013 after the Nirbhaya Case and on the basis of a national consensus, including the Justice Verma Committee Report. No dilution of the law with the aim of protection of men rather than women should be supported by the Commission in the name of so called “safeguards”.

Bigamy etc

As far as the offence of bigamy in Section 494 is concerned it would be wrong and regressive to extend this Section to live-in relationships. This will only result in a harassment of women and violation of the privacy and autonomy of individuals to enter into a relationship. In fact, the law in the country is moving in a different direction where live-in relationships are being recognized to ensure the rights of women in such relationships.

Maintenance and Section 125CrPc

As far as the Section 125 of the CrPC is concerned, we feel that sub section 4 & 5 of Section 125 should be deleted as maintenance is a right which accrues to a woman because of her contribution to the marital home during the time that the parties have lived together. It is now universally recognized that because of her primary contribution to the household and to the care of the children and elderly in the house, an overwhelming number of women have no or less time to have a career or opportunity to advance in her chosen career. Maintenance is also dependent on what a woman is earning and the principles for the grant of maintenance have been laid out both by the Court and the law. The grant of maintenance allows a wife to be able to live in the same lifestyle as she previously lived with her husband. Sub-section 4 of Section 125 CrPC makes this right dependent on the woman living with her husband or living separately by mutual consent or if she is living with someone else. This is totally wrong as the right to maintenance cannot hinge upon the behavior of a woman or behaviour subsequent to the separation if she does not have the wherewithal to live her life at the same level that she was used to. We agree that Magistrates must be given further powers to ensure timely enforcement of such orders. In fact, we had suggested that there should be a maintenance fund from which maintenance allowance should be given to a woman and there should be a proper enforcement mechanism to follow up on errant spouses. The recent Supreme Court judgment in Rajnesh v. Neha suggested that all maintenance should be granted from the date of the application by the wife. We feel that the limitation period of one year provided for issue of warrant under proviso to sub-section 3 of Section 125 CrPC should be done away with. Further we wish to point out that the Supreme Court has already laid down the criteria on the basis of which maintenance should be granted and this should be implemented

by the lower courts. However, an inclusive criteria along the lines suggested in Question No. 20 can be added.

Other suggestions by the NCW in its Introductory Note

We oppose some of the suggestions given by the NCW in the note. We are of the view that Section 354-D relating to the offence of Stalking should not be amended and made gender neutral as this would go against women and will be used to file false cases by men. The crime of stalking has various heinous consequences specific to women which we have seen in certain landmark cases like that of Priyadarshini Mattoo. This is why even the Verma Committee did not suggest that the crime should be made gender neutral probably also since this could be used as a weapon against a woman. This was another crime that women's organizations and groups have been campaigning to recognize for several years. We therefore oppose this suggestion of the NCW. We further believe that hate speech of any kind, whether on grounds of religion, race, caste, gender etc. or directed towards any minority community or other marginalized groups should be punished. The misogynist comments that are fuelled by hate should not be considered *only* offensive but also hateful because the intention behind use of such brazen means of objectification is to denigrate women. We are also opposed to the NCW's suggestion to insert a new clause (iii) in section 108 CrPC in the name of security for good behavior from persons disseminating seditious matters and submit that section 124-A of the IPC which provides for the offence of sedition should be struck down as it has been used to suppress differing opinions or criticism and has no place in a democratic country.

We once again urge the Commission not to act at the behest of men's groups or their vision of what the laws concerning women should be. We strongly reiterate that the mandate of the National Commission of Women is to provide women protection from violence and to strengthen their rights and no laws which dilute the already existing pro-women enactments should be suggested by the Commission.

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