

To  
Shri Vayalar Ravi,  
Honorable Member of Parliament  
Chairperson, Parliamentary Standing Committee of  
The Commissions for Protection of Child Rights Bill, 2005  
New Delhi

30<sup>th</sup> June 2005

**SUB: Submission on the Commissions for Protection of Child Rights Bill, 2005**

Dear Sir,

This is in response to your request to submit suggestions/views/comments on 'The Commissions for Protection of Child Rights Bill, 2005'. We commend the Ministry of Human Resource Development, in its effort to take this critical agenda forward. Setting up a special Commission for Children, by statute, will have a tremendous impact on the lives of millions of children in our country, and will help enormously in taking forward our commitments and obligations under the Constitution of India, the United Nations Convention on the Rights of the Child, the UN Committee of the CRC and other international treaties.

The Centre for Child and the Law, National Law School of India University, is a specialized research centre established in April 1996, working on child rights. In response to your request, we had prepared a First Draft of recommendations on this Bill and circulated it to Professors within the NLSIU as well as to child rights experts. We have received feedback from most of these persons, but await responses from a few more. In this regard, due to the fact that today was supposed to be the deadline for submissions, we are sending you this First Draft. However, we are continuing to work on this document and will have further consultations in order to prepare a more comprehensive response.

We hope to send you another draft in the coming days, preferably in ten days time. We sincerely hope that due regard will be taken to the urgency of enacting such a Bill. However, we would humbly suggest that the Ministry also bear in mind the responsibility to ensure adequate consensus through democratic debate with all beneficiaries, actors and stakeholders. This will help to build the support that is necessary to make such an institution function effectively, while itself spurring the movement to institutionalize a culture of rights in the country.

We did try to speak to you on the phone today, but understand that you are out of the country at the moment. We hope to speak to you on your return and offer our support for this important initiative.

Yours sincerely,

Arlene Manoharan  
(Research Officer, Co-ordinator – Juvenile Justice)

# **‘The Commissions for Protection of Child Rights Bill, 2005’ Critique and Recommendations<sup>1</sup>**

**‘Every State needs an independent human rights institution with responsibility for promoting and protecting children’s rights.’**

Committee on the Rights of the Child, General Comment No. 2, “The role of independent national human rights institutions in the promotion and protection of the rights of the child,” 2002<sup>2</sup>

‘In 2000, the United Nation’s Committee welcomed India’s intention to establish a National Commission for Children and encouraged the establishment of a statutory, independent body with the mandate of regularly monitoring and evaluating progress in the implementation of the Convention at the federal, state and local levels. It further suggested the commission be empowered to receive and address complaints of violations of child rights, including violations from the security forces (UN CRC/C/15/Add.115). Again, in 2004, the Committee recommended that India expedite the process and establish the Commission on the basis of Paris Principles (UN CRC/C/15/Add.228).’<sup>3</sup>

**Introduction:** The Government of India needs to be commended for having undertaken this bold step of working towards establishing National and State level Commissions for children. The legal status of these Commissions as established by a special Act of Parliament ensures formal authority and status as well as its independence from government.<sup>4</sup> Separate Commissions for Children that have an exclusive focus on children (separate from and not merely as a sub commission of the Protection of Human Rights Act) is another welcome and special highlight<sup>5</sup>. There are advantages of an integrated institution, for example a set up within the National Human Rights Commission or the Women’s Commission, especially in the context of a developing country. However, the case for an Independent Human Rights Institution for Children, is a strong one<sup>6</sup> and therefore the attempts to set such a Commission is laudable. This is an expression of its commitment not only to respect the rights of children, but also to be held to account on that commitment. It is a courageous step for our government to take.

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<sup>1</sup> First Draft working document prepared by Arlene Manoharan, with additional inputs from Anuradha Saibaba. A few comments have been provided by Dr. Niranjana Aradhya as well. Centre for Child and the Law, National Law School of India University, Bangalore. June 2005. A second draft is being prepared.

<sup>2</sup> *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child*. CRC/GC/2002/2, GENERAL COMMENT NO. 2, 4 October 2002

<sup>3</sup> Input on draft suggested by Dr. Archana Mehendale and extract from her article, ‘Children’s Commission: Re-opening the Debate’ in *Economic and Political Weekly*, Vol. XXXIX No. 34, August 21-27, 2004, pp.3791-3793. Also recommended by Prof. Vijaykumar (NLSIU)

<sup>4</sup> There are various models of Ombudswork or Commissions for children. This model of a Commission set up by law is followed in Sweden, Norway, Costa Rica, Guatemala, Peru and Luxembourg. In most countries an Ombudsman is appointed supported by team members. However Luxembourg and Denmark have Ombudscommittees similar to the concept of a Commission.

<sup>5</sup> Pg 11, ‘*Safeguarding independence in ‘Ombudswork For Children’*, Gerison Lansdown, Innocenti Digest No. 1, UNICEF International Child Development Centre, 1997

<sup>6</sup> Making the case for an independent Human Rights Institution for Children, Pg 10, *Independent Institutions Protecting Children’s Rights*, Innocenti Digest no. 8, UNICEF 2001

The 1993 World Conference on Human Rights affirmed the importance of institutions to protect rights, advise governments, address violations and raise awareness. In the same year, the UN General Assembly endorsed the Paris Principles, setting out the essential responsibilities of institutions dedicated to promoting and protecting human rights (resolution 48/134). The passing of law to set up such Commissions will place India on the International map of those countries, numbering more than 38 states around the world and set up more than 60 individual independent human rights institutions for children in fulfillment of the obligations under the Paris Principles<sup>7</sup>. However, it is critical that this new law is enacted in such a manner that the Children's Commission receives the same status and powers as the NHRC, rather than the watered down provisions of the National Commission for Women Act (1990). This is in keeping with the ideology that child rights should not be subsumed within the broader gamut of Human Rights, and that children are accorded the special attention they deserve as subjects of law, rather than 'human becomings'.

The following analysis has been made on the basis of Draft Bills that have been made on this issue, the Protection of Human Rights Act 1993, recognized standards governing ombudswork, insights from some comparative research, reports and recommendations from various sources footnoted where possible. Some discussion on the Bill did take place in Delhi at the recently concluded three day Consultation on Review of Laws for Children, organized by the Ministry of Human Resource Development, Government of India along with Human Rights Law Network. Some of these recommendations have already been proposed at this consultation but due to non-availability of the minutes, these have not been footnoted. The first draft was presented at a city level consultation on the Bill organized by the Child Rights Trust, Bangalore on the 24<sup>th</sup> June and circulated to the participants. It is being circulated again, with a request for feedback at [ccl@nls.ac.in](mailto:ccl@nls.ac.in). This is in order that such further insights will inform a final document that will be submitted to the Ministry of Human Resource Development, Government of India, in response to its request for feedback on its official website. This will be sent officially from the Centre for Child and the Law, NLSIU, with due credits given to contributions made.

**KINDLY NOTE:** Recommendations for text to be included in the Bill are indicated by words in *italics* in the main body of the paper. In some cases suggestions for text have not been specified, though recommendations have been made. (Example Point 2 dealing with Constitutional guarantees)

**1. Short title, extent and commencement (Section 1):**

- **The Title:** This could read as '*The Commission for Children Act, 2005*'

**Rationale:** The title need not specify both National and State. Further, the role of the Commission is not only to protect but also to promote the rights of children and therefore it is not necessary to state either. The purpose of the Act could be clarified in the Statement of objects and reasons, the Preamble and in the substantive provisions of the Act itself and not necessarily in the title.

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<sup>7</sup> Pg 9, Summary Report, *Study on the Impact of the Implementation of the Convention on the Rights of the Child*, UNICEF Innocenti Research Centre, 2004

- **The Scope:** *'It extends to the whole of India.*

**Explanation:** *'Provided that it shall apply to the State of Jammu & Kashmir only in so far as it pertains to the matters relatable to any of the entries enumerated in List I or List III in the Seventh Schedule to the Constitution as applicable to that State. Provided further that it shall come into force in the State of J & K on such date as the Central Government may, by notification in the Official Gazette.'*<sup>8</sup>

2. **Constitutional guarantees: (Preamble)** Constitutional rights and other applicable legally binding law, aside from the UNCRC need to be the normative framework for the Act. Similarly in Section 2 b), the definition of child rights to include Constitutional guarantees as well (See Def. 2 d) of Protection of Human Rights Act 1993 (Henceforth referred to as the PHRA)

3. **Definitions (Section 2)**

- **'Child'** to be *'any person who has not attained the age of 18 years'* to be included.

- **'Commissioner'**: *'The Commissioner for Children shall mean a person appointed under Section 4, who shall be an independent, impartial statutory authority under this Act heading a Commission to fulfill the purposes of this Act, especially to promote and protect the rights and interests of all children in India.'*

**Rationale:** It is therefore recommended that in order to facilitate better accessibility to children as well as to connote a more dynamic image of the position, the word 'Chairperson' is deleted and the word 'Commissioner' be used instead. A suitable definitional clause may be inserted as follows – 'Commissioner' means the Commissioner for Children's Rights appointed under Section 4, in accordance with the recognized concept of an 'Ombudsman' (See definition of Ombudsman).

- **'Commission'**: *'The definition 2(c) shall have a general meaning and will apply to both the National and the State Commissions unless specifically indicated under specific Sections under this Act.'*

**Rationale:** In order to enable a more reader friendly statute it would be appropriate to use a generic term instead of using the word 'Commission/s'. Separate definitional clauses may be included for National Commission and State Commission while referring to the relevant sections.

- **Definition of Children's Court** shall be as under Section 25

- **'Deputy Commissioners'**: *'Every person appointed under sub-section (1) as Deputy or Assistant Commissioner shall exercise her/his powers and discharge her/his functions, subject to the general - superintendence, direction and control of the Commission. In the case of the absence of the Commissioner, a Deputy Commissioner shall exercise all powers of the Commissioner'*

**Rationale:** (See Section 3 (4) of 2001 Draft and suggested amendment to NCW). Such a provision will facilitate better decisions and prevent the arbitrariness that is being provided for in Section 10 (2) proviso that enables 'the person presiding to exercise a second or casting vote in situations where there is no majority.

- **'Children's Court'** means a Children's Court as defined under Sec. 25'

- **'Public servant'** shall have the meaning assigned to it in section 21 of the Indian Penal Code (45 of 1860)

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<sup>8</sup>The Protection of Human Rights Act, 1993 provides for it. A similar amendment has been proposed for the National Commission for Women Act, 1990 (henceforth referred to as the NCW)

Rationale: Though this definition has been provided for in Section 32, in the Miscellaneous Chapter, it would be more appropriate to include it in the Definitional Section.

4. **Qualification of Chairperson (Commissioner): Section 3 (2) (a)**

- *The Commission shall consist of:*

- (i) A Commissioner who has been a Judge of the Supreme Court;*
- (ii) One Member who has made a mark either as a Judge of a High Court, or a person drawn from the legal fraternity and is an academic who has worked consistently on the area of Child and Law for at least seven years;*
- (iii) One person who is a social activist who has had at least ten years of work experience in the area of child rights*
- (iv) One person who is an eminent expert in the field of child psychology or who is an eminent expert in child participation*
- (v) One person drawn from the field of child health, education or welfare with a minimum of ten years work experience with children*
- (vi) There shall be a Secretary-General who has been actively associated with the work of child care, child welfare or child rights, who shall be nominated by the Central Government and who shall be the Chief Executive Officer of the Commission. The Secretary General shall exercise such powers and discharge such functions of the Commission as it may delegate to him/her.*
- (b) The Commissioner shall be deemed to be a Member of the National Human Rights Commission under the Protection of Human Rights Act 1993'*

Rationale: The office of the Children's Commission needs to be constituted in such a manner that it has the authority, credibility and expertise it needs to fulfill its goals as an Ombudsman (used in a generic sense). The Commissioner should be deemed to be part of the National Human Rights Commission, which is designed as the Apex National Human Rights body. The recommendations are based on Section 3 of the PHRA, earlier draft bills and feedback on the draft of this document.

**Staff and Organization:** As regards subclause vi) above, an additional sub clause may be added as follows: *'A full time Secretary of the rank of Secretary to the Government of India, who will be the administrative head. She/he shall be supported by a multi-disciplinary staff with appropriate expertise in order to fulfill the goals and functions of the Commission'*.

Rationale: This will help provide the Commission with effective access to and interaction with Government of India, State Governments and their organizations. The Commission would also need a multi-disciplinary staff with a background and expertise in administration, sociology, economics, law, etc., to carry out its multifarious functions of research; examination of legislation, and workshops; designing of training programmes, etc. The staff would belong to and would be fully responsible to the Commission, although the terms and conditions of appointment should be broadly in consonance with comparable levels of Central Government staff. The selection may be made through UPSC. . (See Point 38.1 and 38.3, Background Note, GOI).

5. **Qualification of members: Section 3 (2) (b) and Section 17 (2) (b)** need to be rephrased in lines with the following:.. *‘The composition of the Commission and the appointment of its members shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights. This shall be particularly by powers which will enable effective co-operation to be established, or through the presence of, representatives of: Non-Governmental organizations actively engaged in human rights work, trade unions, committed social and professionals/organizations with competence in child rights, representatives from organizations committed to promote pluralism and secularism; Universities and qualified experts; Parliament, and Government Departments (in an advisory capacity). A minimum of three members shall be women.’*
- Rationale: The universally recognized Paris Principles<sup>9</sup> should be the normative framework for the setting up of National Human Rights institutions. The basis for the above recommendation is Point 4 of the Principle ‘Composition and guarantees of independence and pluralism’. Also see the European Network of Ombudspersons for Children<sup>10</sup> which have adopted a set of Standards and Principles for independent children’s rights institutions in 2001, based on these principles. See Section 4 of the PHRA.
6. **Head quarters of the Commission: Section 3 (3):** This section should be reworded to delete the word ‘office’ and include the word ‘headquarters’ instead.
7. **Appointment of Chairperson and Members: (Section 4 and Section 18):** *‘The Commissioner and members shall be appointed by the President by warrant under his hand and seal. A Selection Committee comprising of the Prime Minister, Ministry in charge of the Ministry of Home Affairs, Speaker of the House of the People, Leader of the Opposition of the House of the People, Leader of the Opposition in the Council of States, and four experts of high standing, integrity and experience in the field of child rights. These shall be drawn from recognized Child Rights campaigns, Academic Institutions and Human Rights Organizations shall make a recommendation to the President. Nominations for the Commission shall be sought through the mass media and the all nominations so received shall be placed on a website set up for the Commission. Guidelines and procedures for selection Committee shall be prescribed but shall ensure that the highest standards are followed. The advice of the Chairperson of the NHRC, shall be sought in this regard and given due regard.’*
- Rationale: This will accord the Commission the status it warrants in line with Section 4 (1) of the PHRA 1993. It will help to ensure that the Selection Committee procedures follow certain mandatory normative standards and guidelines. (Also see Section 4 of 2001 Draft Bill). Other, core non-negotiable norms and procedures for the functioning of the Selection Committee could be included in the Act itself.
8. **Term of Office: (Section 5)** An additional clause should be inserted under this section as follows: - ‘On ceasing to hold office, a Chairperson or a Members shall be ineligible for further employment under the Government of India or under the Government of any State.’

<sup>9</sup> In 1993, following a series of workshops and seminars throughout the UN System, the General Assembly endorsed a set of “Principles relating to the Status of National Institutions” (known as the Paris Principles”)

<sup>10</sup> See <http://www.ombudsnet.org/documents/Standards.htm>

Rationale: See Section 6 (3) of the PHRA. This provision will further strengthen the Commission's stature as an independent and impartial authority.

9. **Removal from office: (Section 7)** This section needs to be reworded and brought in line with Section 5 of the PHRA and Section 5 of the 2001 Draft Bill, which necessitates the involvement of the President of India, with procedures outlined by the Supreme Court. For example – *'An enquiry may be made by a Committee of three Judges of the Supreme Court to be nominated by the Chief Justice of India. The President of India may take a final decision on the basis of their report. Further, where any proceeding/enquiry for removal is pending, the concerned Member will not participate in the work of the Commission.'*

Rationale: This will help to fulfill the standards set by the Paris Principles to ensure independence of this institution, while also ensuring parity with the NHRC.

10. **Procedure for transaction of business (Section 10):**

-**Section 10 (1)** The Section should be reworded as follows: *'...at such time and such place as the Chairperson thinks fit but at least once in every month.....'*

Rationale: Considering the vast child population, the high rate of violations and the need to institutionalize a culture of rights in our society, it is important that the frequency of meetings is increased. Also see Section 10 PHRA.

-**Section 10 (4):** The following should be included in place of the existing section – *'The Commission shall regulate its own procedure.'*

Rationale: -See Safeguarding Independence in 'Ombudswork for Children' <sup>11</sup>

-Also See Section 9 (2) of the 2001 Draft Bill and Section 10 (2) of the PHRA.

-The United States Ombudsman Association's<sup>12</sup> (USOA) Government Ombudsman Standards (GOS) has listed 'Credible Review Process' as another core non-negotiable standard that should be followed by the Commission. This deals with issues such as the powers and responsibilities inherent in a credible review process, the discretion to act informally to resolve a complaint, the authority to delegate power to a deputy, sufficient access without a fee, clear jurisdiction, grounds for Commission review, to conduct investigations, to publish findings, to offer subjects of the complaint an opportunity to respond to the report before it is published, timeliness etc. It is of utmost importance that the Commissions should, in practice and appearance, uphold the highest standards of public service without outside interference. The Commissions should exemplify the standards used to measure the government agencies under its jurisdiction. This is its most critical test of its trustworthiness, credibility and competence.

11. **Salaries and allowances to be paid out of grants (Section 12):** Payment from Central Government or State Government could affect the independence of the body. The Innocenti Study has underscored the need for funding to be 'removed from political control and be guaranteed over a given period. The level of resourcing should be decided by Parliament rather than government.'<sup>13</sup>

12. **Responsibilities and Functions of the Commission (Section 13):** (See responsibilities of a National Human Rights Commission listed below which is an

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<sup>11</sup> See box table on Pg 10, Gerison Lansdown, Innocenti Digest No. 1, UNICEF International Child Development Centre, 1997,

<sup>12</sup> United States Ombudsman Association, GOS 2003. See [www.usombudsman.org](http://www.usombudsman.org)

<sup>13</sup> Pg 10, Supra 5, Innocenti Digest No.1, 1997

extract from Point 3 of the Paris Principles. It is suggested that these Principles be included in the text of the Act in toto. Also see detailed functions of the Human Rights Commission in Section 12 of the PHRA.)

*'A national institution shall, inter alia, have the following responsibilities:*

*(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights of children; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:*

*(i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights of children; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights of children; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;*

*(ii) Any situation of violation of human rights of children, which it decides to take up;*

*(iii) The preparation of reports on the national situation with regard to human rights of children in general, and on more specific matters;*

*(iv) Drawing the attention of the Government to situations in any part of the country where human rights of children are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;*

*(b) To promote and ensure the harmonization of national legislation regulations and practices with the relevant international human rights instruments to which the State is a party, and their effective implementation;*

*(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;*

*(d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;*

*(e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights of children;*

*(f) To assist in the formulation of programmes for the teaching of, and research into, human rights of children and to take part in their execution in schools, universities and professional circles;*

*(g) To publicize human rights of children and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.'*

The following additional suggestions are made for Section 13:

- a) **All children and not only marginalized children (Section 13 c)** needs to be reworded to include the words *‘all children, especially...’*.  
Rationale: It is important that the Commission’s mandate is extended to all children in India, in conformity with the Fundamental right to equality and right against discrimination. It is also in line with the theory of ‘full protection’ as proposed by Emilio Garcia Mendes<sup>14</sup> and as recommended in the Chapter on Essential Characteristics of Ombudswork in the Innocenti Study.<sup>15</sup>
- b) **Section 13 d)** lists children in conflict with law separate from ‘juveniles’ and both these are classified as children in need of care and protection. This classification differs from the definitions under the Juvenile Justice (Care and Protection of Children) Act 2000. These definitions need to be harmonized keeping in mind the philosophy that all children are vulnerable and in need of care and protection, each in accordance with their circumstances, age and degree of maturity and balanced with the principles of autonomy and participation.
- c) **Review of law (Section 13 e):** *‘review of laws to bring them in harmony with the provisions of Part 3 and Part 4 of the Constitution of India, the UNCRC, the national policies for children and other such normative frameworks’*  
Rationale: (See Section 13 b) of 2001 Draft Bill) and the Paris Principles.
- d) **Children in residential care (Section 13 h)** should cover *‘any residential care facility for children who are out of home’*. In this context, the Orphanages and Charitable Homes (Supervision and Control) Act 1960 needs to be reformed and harmonized with this Act in order to best serve the interests of these children.
- e) **Negligence (Section 13 i):** This section to include *‘negligence in the prevention of such violation by a public servant’*  
Rationale: See Section 12 a) (ii) of the PHRA and Section d (ii) of 2001 Draft Bill. This provision will help to build accountability for acts of omission that amount to negligence as well. Children are unable to voice their concerns and grievances and with the often-apathetic attitude or rationalizations that are given in support of such non-action, the culture of accountability to children is still to be recognized in our society.
- f) **Protection (Section 13 j):** The words *‘protection and...’* to be included before promotion of child rights.
- g) **Section 13** could also include the following sub clauses:
  - *‘Accessibility to children: The Commission shall constantly endeavor to understand the prevailing as well as the continuously evolving reality of children in India, especially those in difficult circumstances. Such understanding may be gained through interaction with specialized Governmental and No-Governmental agencies, researchers, professionals, institutions or well-meaning individuals working consistently for the best interests of the child. Above all, this should be accomplished by directly relating to children through various means including visits, direct interactions, free telephone lines, special advisory groups consisting of children and*

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<sup>14</sup> Child Rights in Latin America – from ‘irregular situation’ to full protection; Emilio Garcia Mendes, UNICEF International Child Development Centre; 1998

<sup>15</sup> See para – ‘Accessibility to children’, page 10, Supra 5, Innocenti Digest No.1, 1997

*other such strategies. Records of these interactions should be archived in order to serve as a store house of knowledge for future Commissions as well'*

**Rationale:** It is not enough for the Commission to commission studies on children's lives. If the Commissioner and the members are not in direct touch with the realities of children, their aspirations and their representatives, the institution could become just another bureaucratic structure without a soul, one that has failed to be a 'friend and advocate for children.'

**-'Accessibility for children:** *The Commission/s shall ensure that children are supported and encouraged to access the Commission/s. A clear strategy shall be put in place to establish and strengthen the structural and other supportive services that will enable children to be involved in the running of the institution through advisory groups, representation on the management board and in the monitoring and evaluation.'*

**Rationale:** without this direct involvement, the institution will not be able to reflect effectively the concerns and priorities of children, nor will it fulfill the core principle of Participation as enshrined in Article 12 of the UNCRC. In fact, this is one of the most crucial spaces for children to influence and monitor the functioning of a body that itself is to influence and monitor the participation principle, among other rights.

- **Individual complaints:** *'The Commission shall entertain individual complaints and may intervene in any complaint/proceeding involving any allegation of violation of child Rights pending before a Court with the approval of such a Court. The Commission shall focus its energies on developing comprehensive opportunities for children to challenge breaches of their rights through independent complaints procedures linked to all services. '*

**Rationale:** Such a function would enable the Commission to seek legislative change to allow that where a violation of rights is found to have occurred, and the relevant body fails to act on the finding of the complaints body, a right of appeal to the courts exists. The role of the Commission would be to monitor the accessibility, availability and effectiveness of such procedures and to use the evidence of the nature of children's complaints to inform its work in seeking to promote children's rights.

The Commission should however retain 'the power to initiate formal investigations or public inquiries into organizations or the implementation of policies that might be operating in violation of children's rights. Such an investigation will often be triggered by a series of individual complaints which will provide the focus for the scrutiny but will not serve as a investigation on behalf of individuals.'<sup>16</sup>

Also See Section 13 (k) of the 2001 Draft Bill.

- **Review of all policy, law and programmes of the State:** *'The Commissions shall review all policies, laws and programmes of the State within three years from the date of commencement in order to arrive at a revised National Policy for Children and a revised Child Code Bill. These shall then become the basis for comprehensive law reform for children. Expertise from a wide variety of sources including the opinions of children, civil society, child rights campaigns and organizations, academic institutions and state Departments, studies undertaken on the issue and other sources. The UNCRC and the Constitution of India, along with relevant*

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<sup>16</sup> Challenging individual breaches of rights, Pg 7, Supra 5, Innocenti Digest No.1, 1997

*recognized guidelines and standards should be the basis for recommendations in this regard.'*

**Rationale:** The USOA, in its GOS standard of Impartiality, has identified the need that these institutions do not become predisposed as advocates for the complainant nor apologists for the government, but may, based on investigation, support the government's actions or advocate for the recommended changes. The Commission's primary interest should therefore be in assuring that laws, rules, and policies are adhered to and the outcome is fair. Again, while it may advocate changes that benefit a complainant, it is the objective of the Commission to improve government performance.

- **Convergence and Complementarity:** *'The Commission shall give a priority to studying and recommending changes in law, policy, executive and judicial functioning, to ensure that they are compliant with Constitutional guarantees and international law and guidelines. It shall also attempt to bring about convergence and mutual complementarity at all levels for the effective promotion and protection of child and child rights.'*

13. **Powers relating to inquiries: (Section 14):** Include the following sub clauses:

- a) *'The Commission shall have the power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code.'*

**Rationale:** With the passing of the Right to Information Act 2005, it should become a lot easier for the Commission to get the information it needs. However, it is important that this provision be included in this Act. (See Section 14 (2) of the 2001 Draft Bill)

- b) *'The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorized in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies there from subject to the provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974), insofar as it may be applicable.'*

**Rationale:** This in line with Section 13 of the PHRA and is critical to the effective functioning of the Commission.

- c) **Members of the Commission to be public servants:** *The Commission shall be deemed to be a civil court and when any offence as is described in Section 175, Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code (45 of 1860) is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, (2 of 1974) forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under Section 346 of the Code of Criminal Procedure, 1973.'*

- e) **Impounding of documents:** To be included in Sub clause (e) *'Impounding of documents and retaining in custody for a specified period.'*

f) ***Initiation of Prosecution:*** *If after investigation into any complaint under Section 10, the Commission is satisfied that a person has committed any criminal offence, then it may pass an order to that effect and initiate prosecution of the person concerned, if there is no necessity for prior sanction. And if prior sanction of any authority is required for such prosecution, then notwithstanding anything contained in any other law for the time being in force, such sanction shall be granted by that authority within thirty days of the request by the Commission and if such sanction is not granted within the said period, such sanction shall be deemed to have been granted by the authority.'*

14. **Other essential statutory powers**<sup>17</sup>: In addition to the powers listed in Section 14 and the recommendation above, it is essential for the following to be included as well:

- a) **Powers to investigate breaches of children's rights**, which should include rights of access to documents, and the power to require individuals to give evidence, and to enter and inspect institutions
- b) **Powers to take support legal action** when it is not possible or appropriate for the child to do so on his or her own behalf
- c) **Power to issue reports without interference**, using all appropriate routes for their dissemination and publicity. Ideally, Ombudsmen should report regularly to parliament. Many will be required to report through a particular ministry, but this should not impede their autonomy to publish independently of the minister
- d) **Powers to require that the office be consulted** by government and other bodies whenever ministers are considering proposals to change or repeal existing legislation or to introduce new legislation likely to affect children's lives. There should be a requirement to pay serious attention to the ombudsman's comments and recommendations and explain publicly their reasons for not following its advice.
- e) **Powers to require that government departments/other bodies issue 'child impact statements'** indicating the likely repercussions of proposed legislation/policy on children
- f) **Powers to be consulted over the reporting obligations under the Convention.** Governments should be required to consult ombudsmen in the process of drafting their reports to the Committee on the Rights of the Child and to give due consideration to their comments.'

15. **Procedure for inquiries:** A separate chapter needs to be included that details the essential procedures to be followed by the Commissions while conducting inquiries.

Sections that make it mandatory for principles of due process and natural justice are followed will need to be included. For example –

- ***Statement made by persons to the Commission:*** *No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in any civil or criminal proceeding except a prosecution for giving false evidence by such statement. Provided that the statement (a) is made in reply to the question which he is required by the Commission to answer, or (b) is relevant to the subject matter of the inquiry.'*

- ***Persons likely to be prejudicially affected to be heard:*** *If, at any stage of the inquiry, the Commission (a) considers it necessary to inquire into the conduct of any person; or (b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry; it shall give to that person a reasonable opportunity of being heard in the*

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<sup>17</sup> See box – Essential statutory powers and authority, Pg 11, Supra 5, Innocenti Digest No.1, 1997

*inquiry and to produce evidence in his defense. Provided that nothing in this section shall apply where the credit of a witness is being impeached.'*

*-**Reports and action taken reports:** The Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission.'*

**'Inquiry into complaints:** *'The Commission while inquiring into the complaints of violations of child rights may*

*(i) Call for information or report from the Central Government or any State Government or any other authority or organization subordinate thereto within such time as may be specified by it: Provided that -*

*(a) If the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;*

*(b) If, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;*

*(ii) Without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.'*

Rationale: This is in line with Section 17 of the PHRA. It is important that this power be given to all independent human rights institutions. Also see Point 43 (vii) of the Background Note on Setting up of a National Commission on Human Rights, Issues and Tentative Framework

**15. Steps after Inquiry (Section 15):** Include Section 15 of 2001 Draft Bill that empowers the Commission to *'utilize the services of any officer or investigation agency .....*

**16. Annual and Special Reports of Commission (Section 16):** The following sub clauses should be included in this section:

a) *' The Commissioner shall not be compelled to testify or release records. All reports that the Commission decides to publish shall be made public and accessible through all appropriate means, including the translation into official languages. The annual report and as far as possible all publishable reports shall also be summarized and disseminated in a language that children understand. '*

Rationale: Confidentiality is a Commissioner for protection of child right's tool. The standard of Confidentiality outlined in the GOS of the USOA explains why and how this principle is to be followed. Point 3 clearly states that 'the Ombudsman (Commissions) should not be compelled to testify or release records'. This is explained in point c) under this paragraph as follows – 'The inability of the Ombudsman to maintain control over the information gathered during an investigation may well have the effect of discouraging cooperation and openness on the part of complainants, agency employees and/or witnesses'. All reports that the Commission decides to publish should be made public on a website and through other suitable forms. Efforts shall be made to translate these reports into the main official languages of the country and the respective states.

**b) Time limit for tabling of reports:** *'The Central Government/State Government shall within three months, cause the annual report and special reports of the Commission to be*

*laid before each House of Parliament along with a memorandum of action taken or proposed to be taken on recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.'*

**Rationale:** The Commission needs to be accountable to Parliament and the Government needs to be accountable to the Commission. Further, the public has a right to know the achievements/failures of the Commission and to in turn build up pressure from below and through Parliament that the institution functions effectively.

**16. State Commission (Section 17 (1)):** Delete the 's' from the word Commissions

- Section 17 (2) (a) The Chairperson shall be a person who has been a Chief Justice of High Court
- Section 17 (2) (b) (See Point 4 (ii) – (vi)) in this note

**17. Children's Court (Section 25):** Further research and debate is necessary to evolve an appropriate 'Children's Court', bearing in mind that the Sessions Court may not be the best option and would perhaps become merely a euphemism for a genuinely child friendly court. The functioning of the Human Rights Courts needs to be studied and insights gained. This will also require judicial reform in order that there is clarity in terms of the linkages with such a Court. (See Annexure 1 for initial reflections.)

**18. Special Public Prosecutor (Section 26):** Include the phrase '*for not less than seven years and significant experience in handling cases of child abuse*'

**19. Grants by Central Government (Section 27):** '*Allocation for the National Commissions and Grants for State Commissions shall be made by Parliament.*'

**Rationale:** The Commission should be an independent authority. As mentioned earlier, the funding of the Commission should be removed from political control and be guaranteed over a given period. Parliament rather than Government or any particular Minister should decide the level of resourcing.

**20. Status of the Commission (Section 33 (1)):** This Section needs to be deleted.

**Rationale:** In its current form it will have a very critical impact on the independence, fairness and impartiality of the Commission and make it in effect come under the control of Central Government. The very purpose of the Commission, in line with the concept of the 'Ombudsman'<sup>18</sup>, is to monitor, scrutinize and advise government and to ensure that the rule of law is preserved and made more effective. 'Ombudsmen (Commissions) must be independent and not subject to manipulation by government or political parties, nor should government officials be able to interfere with their functioning.... to ensure the optimum freedom to serve the interests of children and not those of government, ombudsmen or commissioners must have the independence to comment adversely, with impunity and without interference or censorship, on the impact of government policy on children. They must not only be free to advocate forcefully for the rights of children but, if they are to gain the confidence of children, must also be seen to have that freedom.'<sup>19</sup>

The United States Ombudsman Association (USOA) has evolved a more detailed list of Standards in 2003, known as the Governmental Ombudsman Standards. The core

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<sup>18</sup> This is a Scandinavian term that is generally defined as an independent statutory body established to promote the rights and interests of citizens. It has no gender connotation and does not necessarily define the individual concerned, but may refer to an office or function, rather to any particular person. The usage of the term is compatible with the recommendations of UNICEF and the Committee on the Rights of the Child. See *The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child*. CRC/GC/2002/2, GENERAL COMMENT NO. 2, 4 October 2002

<sup>19</sup> Para on Independence, Pg 10, Supra 5

standards identified here are Independence, Impartiality, Confidentiality and Credible Review Process and each of these have been fleshed out with indicators.

‘The authority of the office will rest on the ability of the Commissioner to act independently, produce well-researched information, exhibit a credible and respected public presence and respond effectively to important issues affecting children.’<sup>20</sup> All the above and the increasing body of research on the functioning of Independent Human Rights institutions provide clear arguments as to why this Section needs to be deleted.

**Section 33 (2):** This section clarifies that the Government will have supremacy in matters of policy. However, the Act should clarify that this does not impinge on the independent functioning of the Commission as a whole. In addition to these provisions, it is recommended that the following should be inserted: - *‘The Commission shall be consulted by government and other bodies on all proposals for policy, law or programme that will affect the lives of children. It shall function as an independent and impartial authority and the comments and recommendations of the Commission/s shall be given due regard. A public response shall be given as to the reasons why such advice was not taken.’*

Rationale: ‘The office of the Commission cannot be part of the government’s decision making apparatus and will therefore not have direct control over any area of policy in respect of children. It would not be constitutionally appropriate that an un-elected official could make binding recommendations on elected bodies that are accountable to voters.’<sup>21</sup>

On the other hand, the Commission should have the ‘powers to require that the office be consulted by government and other bodies whenever ministers are considering proposals to change or repeal existing legislation or to introduce new legislation likely to affect children’s lives. There should also be a requirement to pay serious attention to the ombudsman’s (Commissions’) comments and recommendations and explain publicly their reasons for not following the advice given.’<sup>22</sup>

**21. Statement of Objects and Reasons and the Preamble of the Act:** *‘The purpose of this Act is to monitor, scrutinize and ensure that the State and civil society organizations dealing with children are in the exercise of their functions and duties, in compliance with constitutional guarantees, the United Nations Convention on the Rights of the Child (1989), relevant international treaties and other applicable law with regard to the monitoring, promotion and protection of child rights. The Act is a response to the state’s obligations to abide by the Paris Principles. Its primary purpose is to set up an independent, impartial and fair statutory authority along with standard minimum procedures to influence law, policy and practice towards greater compliance with children’s rights; to challenge breaches of rights; encourage or undertake research and promote awareness of rights of children in society.’*

**22. Financial Memorandum: (Point 3):** *‘The Central Government shall provide a substantial grant to the State Commissions in order to encourage and support their work. The Commission/s shall undertake a Budgetary Analysis at the National and State level and recommend to Parliament an appropriate amount in this regard. Child Impact*

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<sup>20</sup> Hassall, Ian B., ‘The Office of Commissioner for Children in New Zealand’, paper given at a conference held in Bristol to commemorate Children’s Rights Commissioner Day, organized by the Institute of Child Health and the Children’s Rights Office, London, 1995

<sup>21</sup> Rosenbaum, M. and Newell, Peter, *Taking Children Seriously: A Proposal for a Children’s Rights Commissioner*, Calouste Gulbenkian Foundation, London, 1991

<sup>22</sup> See Box on Pg 11, Supra 5, Innocenti Digest No.1, 1997

*studies will also be used as an indicator of the effectiveness of the Commission, and to endorse and enhance such expenditure where necessary.'*

**Rationale:** The lack of financial resources has always come in the way of the effective fulfillment of Article 4 of the UNCRC. It goes without saying that in order to function properly the ombudsman would need staff with the relevant qualifications and other resources as well as support structures. Funding should be sufficient and come from steady sources with predictability. Information activities are costly and infrastructure needs to be in place. In order to be visible and accessible, the Commission and his/her staff need to be able to travel within the area of its mandate, develop opportunities for interaction with children and others, and be supported by a strong media support centre. (The earlier draft had included a recommendation that possibility for including such external funding from recognised international donor organisations such as UNICEF and Save the Children in the statute itself. However, a dissent was received from Dr. Archana Mehendale who recommended that funding for the Commission be the sole responsibility of the State in keeping with its statutory responsibilities under the UNCRC and the Constitution. This recommendation has been incorporated.)

However, the most convincing argument is that the costs of supporting such a Commission is an investment in a more responsive state as regards its vulnerable children and is but a small price to pay for the cost of not protecting 42 percent of our population. Finally, such costs could amount to much less than the costs related to other regular programmes of international donor agencies.<sup>23</sup>

**Additional Sections that may be included:**

**23. 'Child Friendly Commission:** *'The Commissions shall constantly strive to be a genuine ally of all children, providing them with opportunities to be heard, independent of adults. The Commission shall make every effort to ensure that information about the Commission is disseminated widely through age related materials and strategies in all relevant languages, and that children are supported and encouraged to understand and use the services provided for by the Commissions.'*

**Rationale:** Since the Commission is meant to be an advocate for the 'voice' of children in order to promote and protect their rights and interests; it should be designed and function in such a way that it children relate to. It should provide children the opportunity to be heard, independent of adults.

**24. Principles and key elements for the effective functioning of the Commissions:**

*'The principles of independence, accessibility, co-operation, operational efficiency and accountability shall guide the functioning of the Commission in order to ensure its effectiveness. Standards and indicators for each of these shall be prescribed in accordance with recognized international norms.'*

**Rationale:** The principles identified by the European Network of Ombudspersons for Children<sup>24</sup> may also be referred to while drafting this Section as well as the Guidelines that should accompany this Act. The GOS standards of the United States could inform this Section of the Act as well. One example of such a standard, is as follows:

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<sup>23</sup> Peter Miljeteig, Child Rights Consultant, *Independent institutions protecting children's rights, experience from SCN programme countries*, 2005

<sup>24</sup> See ENOC website – [www.ombudsnet.org/](http://www.ombudsnet.org/)

**i) Standard of Independence:** The GOS lists a number of indicators for this standard such as: the Commission's authority should be established by law through a statute; the Commissioner should be appointed by an entity not subject to the Commissioner's jurisdiction and which does not have operational or administrative authority over the programmes or agencies that are subject to the Commissioner's jurisdiction; appointment by a legislative body is the preferred means and this process along with the procedure for removal needs to be defined and transparent; the compensation, status, budget, resources and staff should indicate that the office has meaning and importance; the Commission should have discretion to determine which conclusions and recommendations are reached and freedom to determine what to publish; the Commission office should be physically and organizationally separated from those entities subject to its jurisdiction; the Commissions should be immune from discovery and prosecution for claims arising out of the lawful performance of duty; and the findings and recommendations of the Commissions are not appealable to any other authority, recognizing that these do not affect substantive rights and are not binding decisions.

**25. Special Committees/appointments:** *'The Commission may appoint such Committees, amicus curie or any other such bodies for dealing with special issues as may be taken up by the Commission from time to time. Co-opted members may be allowed to attend the sittings of the Commission but not given the right to vote'*

Rationale: (See Section 12 of the 2001 Draft Bill.) The Commission may also co-opt members, and such members will have a right to attend meetings but not to vote. These members may be given such allowances as may be prescribed.

**26. 'District and Ward level bodies to support the Commission:** *NGO run ombudsmen may be initiated in phases to ensure that the services of such an independent body are made available to all children. Suitable Panchayat and Ward level representatives or appointees may be identified to support the work of the State Commissions.'*

Rationale: 'According to CRC, the main responsibility for the implementation of the Convention lies with the government of a country, representing the State party that has ratified it...When the ombudsman's office is in place, NGOs can be important partners in the work, and even give active support. However, NGOs should refrain from getting actively involved in the work of the ombudsman. That might infringe both the independency of the ombudsman's office and of the NGO. If NGOs are too involved in the internal affairs of the ombudsman, it can raise questions about his / her integrity. It should also be kept in mind that NGOs also have an important role to play in terms of monitoring the performance of the ombudsman, and particularly keep an eye on the independence from government.'<sup>25</sup>

**27. 'Matters not subject to jurisdiction of the Commission:** *Matters not subject to jurisdiction of the Commission: The Commission shall not inquire into any matter that is pending before any other Commission duly constituted under any law for the time being in force.'*

Rationale: It is not advisable for the Commission to duplicate the work of another Commission.

**28. 'Social Audit of the Commissions:** *An evaluation of the National and State Commissions, along with a child impact study shall be undertaken by a suitable Social Audit Team set up under the Rules under this Act. This shall be done not less*

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<sup>25</sup> Per Milijeteig, Supra 24

*than once in five years. Suitable reforms shall be undertaken in accordance with these recommendations to ensure that the Commission fulfills the goal of abiding by the Paris Principles and that they are impartial, independent and effective Ombudsmen for children'*

Rationale: Given the scarcity of resources, it will be important to ensure that the Commission is audited and evaluated by an independent body. This could provide the opportunity to enhance the functioning of the Commission while also justifying its existence. Most importantly, this could provide the tool to justify additional funding where necessary. An audit team should be constituted which includes representatives from National Forums/Campaigns, Academic institutions, NGOs, experts from international organizations having the expertise in such evaluations and especially children. 'In the light of available information, only two institutions have been independently evaluated to date – in Norway and Sweden. Moreover, there has not been any systematic analysis of the legislation establishing institutions, to determine to what extent it is compliant with the Paris Principles. The UN Secretary General's End-Decade Review, *We the Children*, called for such evaluations...'<sup>26</sup>

**NOTE: The following recommendations were not included in the earlier draft circulated for feedback but has emerged out of subsequent in house research.**

**29: Power To Investigate Armed Forces' Atrocities:** The Bill should include the following: *'The Commission shall be allowed to inquire into violations by the armed forces in areas where they have been deployed by the Central Government and to submit a report to the government. In preparing these reports, the Commission shall name the Commanding Officer of the concerned areas where the army would have been called. The commanding officer shall be empowered to add his dissent to the report, if he so decides, along with reasons for his dissent.'*

Rationale: "It was adverse international opinion against the armed forces' brutal atrocities that led to the establishment of NHRC. The armed forces have sweeping powers when they are called to quell internal disturbance, giving them ample scope to commit human rights abuses. Despite these factors, the PHRA precludes the NHRC from investigating violations committed by the armed forces. When the Commission receives a complaint of human rights violations by the armed forces, the only weapon in its meager arsenal is to call for a report from the government. The Commission may make recommendations on the basis of this report. Indeed, this restrictive procedure that it lays down for the Commission's investigations into violations by the armed forces has "driven a huge hole in the jurisdiction of the Commission." (Pg, 9 Vijayashree Sripati)

-The Human Rights Committee's concluding observations on its examination of India's periodic report on its implementation of the ICCPR are worth repeating in this regard:

'The Committee regrets that the National Human Rights Commission is prevented by Clause 19 of the Protection of the Human Rights Act from investigating directly complaints of human rights violations against the armed forces, but must request a

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<sup>26</sup> Supra 5, Pg 13, Summary Report, UNICEF

report from the Central Government. . . . The Committee recommends that these restrictions be removed.’

-India has not yet signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflicts (2002). It will be critical for the Commission to work towards this goal.

Also See K.G. Kannabiran, Suggestions for Amendment to the Protection of Human Rights Act, PUCL Bull., Feb. 1999, at 9.

### **30. Refugees and foreigners:**

**‘Definition of child** (to be included in Point 3): *‘to be any person of any nationality residing in India and who has not attained the age of 18 years.’*

Rationale: ‘By approaching the Supreme Court under Article 32 for seeking the protection of Chakma refugees from possible expulsion from India by the All Arunachal Pradesh Students Union ("AAPSU"), the Commission made a case for bringing foreigners within the expanding ambit of Article 21. (See National Human Rights Commission v. State of Arunachal Pradesh, A.I.R. 1996 S.C. 1234, 1236). Amenable to the NHRC's argument, the Supreme Court ruled that the State was bound to protect the life and liberty of every human being, including non-citizens and groups of persons, e.g., the AAPSU, from any assaults.’ (Pg. 14 Vijayashree Sripati)

-This definition would emanate from the fundamental right to life, contained in the Constitution, which is guaranteed to ‘every person’ and not restricted only to ‘citizen’s’ of the country. (Article 21)

**31. Section 13 e) Country reports to UN Bodies:** *The Commission shall comment on and contribute to the State reports to the United Nations Committee on the Rights of the Child, and other such bodies under various International Treaties, with respect to issues concerning children.’*

Rationale: As an independent and impartial authority, the Commission is in an excellent position to comment on and contribute to these reports. It must take the initiative to establish contact with various ministries regarding the various aspects of the effective implementation of the treaties.

**32. Government’s Non-compliance with findings of the Commission:** *‘The State shall give full and faithful consideration to the findings of the Commission. The Commission shall refer to judicial authority cases where the government authorities fail to comply with its recommendations.’*

**33. Limitation period:** *‘There shall be no limitation period for receiving complaints.’*

Rationale: The Act should specifically include such a provision in order to take care of complaints from children who may have not been able to make a complaint due to various reasons. This would include the fact that they rarely have a voice or the power to do so without fear of negative consequences.

- (See Rule 38 (4) (iii) (b) of the Karnataka Rules under the Juvenile Justice (Care and Protection of Children) Act 2000, which was recommended by the Centre for Child and the Law, NLSIU and subsequently included in the Rules 2002. It states – ‘If the child reports sexual abuse/rape after leaving the institution to any person, the person shall bring the same to the notice of the Juvenile Justice Board, who will then institute an inquiry.)
- Also See Annexure 2 on this point

34. **Investigation:** *‘The Commission may, for the purpose of conducting any investigation pertaining to the investigation pertaining to the inquiry, utilize the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be. The Commission may also appoint civil society representatives such as members from reputed non-governmental organizations to aid in its investigations as investigators or observers. The Commission shall, as soon as possible set up permanent Special Investigation Teams consisting of as many police officers as it sees fit for investigating and prosecuting offences arising out of violations of human rights. In making all appointments for this team, the government shall act in consultation with the NCC. All transfers from the SIT shall be made in consultation with the Commission. Appointments to this SIT shall be made from new recruits at least for a decade, and these officers shall undergo training for a period of three to five years’*

Rationale: Providing the Commission with an impartial and professional investigation team will contribute immensely to making the Commission a powerful guarantor of civil liberties. The Indian government may do well to emulate the Philippines Human Rights Commission and provide for "Quick Reaction Teams" comprised of a lawyer, an investigator and a medical doctor, operating around the clock to respond to cases requiring immediate attention. (See Pg 17 Vijaya Sripati)

-See Mario Gomez, Sri Lanka’s New Human Rights Commission 20 Hum. Rts. Q. 281, 283 (1998)

-See PHRA Section 14 (1) which provides for this.

### **Changes in draft after feedback**

#### **Feedback from Dr. Archana Mehendale, child rights expert.**

She appreciated the draft and made the following comments.

**a) Title of the Act:** The first draft had suggested that the title of the Act be ‘The Commissioner for Children Act 2005.’

The Rationale for this initial recommendation was –‘the use of the language of ‘Commissioner’ rather than ‘Commission’ is significant in that it defines the role as a person and not just a bureaucratic office. It implies a person who belongs to or is working for children directly.’<sup>27</sup> Despite the further arguments as supported by Footnote 27. The recommendation has been noted. (To be called a Commission and not the Commissioner. This is because it is ‘likely to give an individualistic person focussed aura and hence may keep the Commission completely at the mercy of the person occupying the position. It would be preferable to support an entity, which is closer to the ‘Commission’ model and not so much an ‘Ombudsman’ model, although the Commission should pick up essential principles on which the Ombudwork takes place....)

**b) Constitution of Commission:** A greater number of experts should be provided for rather than the initially proposed three members from judiciary. She also suggested that the member Secretary to be some high standing government official, so that there

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<sup>27</sup> See Pg 10, Supra 5

is some government ownership of the body and hence greater credibility with the government. This has been incorporated.

- c) **Children's Commission and Child abuse:** It was highlighted that one of the earlier Bills 'provided for several stringent provisions for ensuring the protection of child rights. For example, it had an entire chapter on 'Elimination of Worst Forms of Child Abuse and Exploitation' wherein it listed down various violations that required severe treatment of offenders. It provided that 'habitual offenders' should be directed to desist from abusive actions. If this was not respected, the Commission was proposed to have the powers to name the offender as a 'child abuser', give his conduct wide-scale publicity through the media and if such a 'child abuser' continued with his abusive actions, the Commission could direct him to be removed from a particular area for up to two years. Another provision suggested was that of rehabilitation of victims of child abuse, through a single relief package to be expeditiously implemented by the state government, free of charge.' Extract from Dr. Archana Mehendale, 'Children's Commission: Re-opening the Debate' in Economic and Political Weekly, Vol. XXXIX No. 34, August 21-27, 2004, pp.3791-3793. (This recommendation would need further debate and research)
- d) **To be called a Commission and not the Commissioner.** This is because it is 'likely to give an individualistic person focussed aura and hence may keep the Commission completely at the mercy of the person occupying the position. It would be preferable to support an entity which is closer to the 'Commission' model and not so much an 'Ombudsman' model, although the Commission should pick up essential principles on which the Ombudsmork takes place. (Suggestion incorporated)
- e) **Constitution of the Commission:** Greater number of experts, and member Secretary to be some high standing government official, so that there is some government ownership of the body and hence greater credibility with the government. (Incorporated)
- f) **Funding:** Discourage reference to international private donors as it is the responsibility of the Government. (Incorporated)
- g) **Linkages:** Ensure linkages between several statutory bodies that exist today. (Incorporated)
- h) **Supporting arguments:** Root the note in Indian sources and commitments, refer to Government's official statements before the CRC Committee, quotes from NHRC reports, Children's Code document, etc (Incorporated to some extent)

**Arvind Narrain, Practising Advocate and expert in Child rights (Alternate Law Reform, Bangalore)**

He appreciated the draft as being 'very good critique...it seems very thorough and well through out.' The only comment he made was with regard to the composition of the NHRC, which compared to the NCW has been the main reason why the latter has come in for heavy critique. He endorses and actively encourages the need to have a former retired Chief Justice to head the Commission.

**Jayna Kothari, practising advocate, ASHIRA, Bangalore:**

**Constitution of the Commission:** Why should the Commission be headed by a retired Chief Justice and that too only of the Supreme Court? What about the State Commissions?

**Appointment of members:** Including Leaders of the opposition etc on the Selection Committee could itself facilitate political influence in the appointments to the Commission. These should be deleted. (This recommendation has not been incorporated, as it is in line with Section 4 of the NHRC)

‘Pluralist forces...’ (I think the highlighted portion is extremely subjective and vague. Instead, either specific categories should be mentioned or should be left out altogether) (*Recommendation to be taken note of*)

**Sec. 13 (b)** Perhaps here you can consider imposing a time period eg. every 3 months or 6 months, for submitting a report on the working of the safeguards).

**Section 13 c)** ‘All children, especially children affected by terrorism, disability.... But not limited to them. (Incorporated)

**Individual complaints:** The draft had included provisions that provide for the Commission to handle individual complaints but focus its energies on cases that involve matters of principle. Her feedback on this point was as follows: ‘Individual complaints in many instances are extremely important, and very often may lead to larger issues. Therefore individual complaints cannot be given second priority. One instance is that of the Disability Commissioner under the Persons with Disability Act – the Commissioner takes up individual complaints regularly and it is one of the most significant ways in which persons with disability have their rights addressed. Very often, the Disability Commissioner refers important complaints for legal redressal to the appropriate courts etc.’ (Incorporated)

**Children’s Courts:** ‘The idea of having special courts for particular sections of the population has been quite unsuccessful in India. The best example is that of the establishment of Family courts under the Family Courts Act 1984. The Family Courts were set up for all matrimonial, maintenance and custody issues to help women. Instead of helping women and making the court process easier, these separate family courts have caused more difficulties to women litigants. Under the guise of informal procedures, even the strict rules of the CPC are not adhered to, and cases are dragged on for years together. Women who do not have lawyers cannot handle their cases effectively because the procedure of filing documents, applications etc still remains. By making a special family court, most importantly, matrimonial cases and women’s cases are marginalized and these matters are not given the seriousness of mainstream legal issues. Therefore, even judges do not like being posted in the family courts, enough infrastructure and budgetary allowances are not made, and overall, these courts are given an inferior status.’

There have been several studies done on the working of family Courts in several states in India, which may be of relevance.

Therefore, instead of setting up special Children’s courts, the provisions regarding the powers of the Commissioner to directly take up matters before the various courts may be sufficient.

## Feedback from Prof. Vijaykumar (NLSIU)

1. Check whether the recommendations of the UN Committee on the Rights of the Child, based on country reports of India are addressed effectively in this Bill (u/s 2 (b) of this Bill.
2. Definition of Children's Courts to be included. (Incorporated)
3. Definition of Member Secretary to be included (To be noted)
4. Chairperson shall be either a judge of the Supreme Court or retired from the SC or he/she is or has been a Chief Justice of a High Court. Accordingly the procedure for appointment would need to be redrafted in Section 4. (Incorporated)
5. Section 3 (b) vi) is too vague as i. – v. would also include knowledge of relevant laws.
6. The Bill needs to be redrafted in gender sensitive language. *(To be noted)*
7. Section 5 (2): The section would need to include the phrase – ‘...to the Central Government designate, i.e. the Ministry of Human Resource and Development. The members shall submit their resignation to the Chairperson in addition to the Ministry of Human Resource Development. *(To be noted, and will be incorporated in second draft)*
8. Section 6: This section needs to include the phrase - ...prescribed by the Central Government from time to time.’ *(To be noted, and will be incorporated in second draft)*
9. Section 8 could be deleted, as it is self-explanatory. *(To be noted, and will be incorporated in second draft)*
10. Section 9 (a): Delete the comma after ‘of’. *(To be noted, and will be incorporated in second draft)*
11. Section 10: Sitting of the NCC every six months is inadequate – should be every month or once in two months. (Had been included in first draft)
12. Section 10 (4): The Commission should regulate its own rules of procedure (specify in last Section as well) *(Had been included in earlier draft, but should be specified in the concluding section of the Act as recommended)*
13. To review all laws, national and state, that are relevant to the better protection of children's rights and make recommendations for improvement/amendments. (Had been addressed in the first draft)
14. Section 16 3) to be deleted. (Had been addressed in first draft)
15. Despite the fact that the PHRA was enacted in 1993, there are only about 14 States in India who have set up State Human Rights Commissions. It would perhaps be appropriate to suggest that Children's Commissions be linked to these State Human Rights Commissions, if they are present in the State. *(To be debated)*
16. Section 17 vi): See comment on Section 3 b) *(To be noted, and will be incorporated in second draft)*
17. Section 19 (2): See Comment on Section 5 (2) *(To be noted, and will be incorporated in second draft)*
18. Section 23 (3): See comment on Section 16 (3) *(To be noted, and will be incorporated in second draft)*
19. Section 25: The Children's Courts should be linked up to the Human Rights Courts in the States where they have been set up. *(To be debated)*

General comments:

20. The Power to impose fines on violators and those abetting – quantum of fine, to be collected and deposited in a separate pool which may be used for Academic, Training and other research purposes of the Commission. (A fund should be set up, and though some of this should go to the victim as compensation to supplement what the State should mandatorily pay, the remaining could go in to such a Fund. *(To be noted, and will be incorporated in second draft)*)
21. Chairman of the proposed Commission to be the ex-officio member of the NHRC and similarly the PHRA needs to be amended. (Incorporated)

### **Feedback from other Professors at the NLSIU and at the Bangalore Consultation**

Though the draft had been sent to the following Professors at the NLSIU, their feedback could not be given in time. (Prof. Babu Mathew (on sabbatical), Ms. Sarasu Thomas, Dr. Elizabeth, Prof. Devidass, Dr. Sitharamam, Ms. Roopa M and Dr. S. Japhet)

The original draft of this document was also circulated at the Bangalore consultation of the India Alliance for Child Rights, organized by the Child Rights Trust Bangalore. A detailed presentation on the key recommendations was also made and most of these were incorporated in the recommendations that were made to the Ministry at the meeting. A few recommendations that emerged from those discussions have also been incorporated into this draft (Commission to inquire into violations by the armed forces, three members should be women and the limitation clause)

**Conclusion:** ‘While children are among the heaviest users of public services, they remain the people who are least able to influence the actions of governments. The main task for such institutions is to close the gap between the rights rhetoric and the realities of children’s lives, ensuring that rights are translated into law, policy, and practice.’<sup>28</sup>

If India is to genuinely abide by its commitment to its children, it is only too clear that the task of setting up this Commission itself should also be such that it reflects a process of democratic dialogue and research that goes beyond rhetoric. It is important therefore that the Standing Committee adopts inclusive and participatory processes as a fundamental principle to arrive at Policy as a basis for Law making or Reform. There should be a genuine and concerted attempt to bridge the divides between different disciplines, between academia and experiential knowledge and between the worlds of adults and children. Lessons need to be drawn not only from insights emerging from experiential and grounded knowledge from below, but also from the Constitution of India, the Bill of Rights, the Paris Principles, International binding and non-binding standards, and comparative jurisdictions. Essentially such knowledge needs to be derived from and contribute to a wider rights discourse that

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<sup>28</sup> Nigel Cantwell, Editorial to Independent Institutions Protecting Child Rights, Innocenti Research Centre, UNICEF, 2001

incorporates the voices of children and their families. If such a wide consensus has to be achieved, it is naturally essential that appropriate strategies and processes are designed to elicit the knowledge and perspective from these various stakeholders. It is preferable that such discourse is facilitated through sensitively designed phase wise processes that help all participants, especially children, to understand and engage with concepts and ideas at their own pace. Such collective knowledge could provide the sound base for policy and law on this issue, while also generating the public support and commitment to further the cause of children's human rights in India.

At the first global meeting of such independent institutions in 2002, the Ombudsmen committed to develop a global network to promote exchange of information and strategies. It was agreed that this would be supported by (UNICEF'S Innocenti Research Centre (IRS) who would collect and make available through its website, basic information about all institutions, links to existing websites including that of the European Network for Ombudspeople for Children. It was also agreed that regular contact through email would be established to a) Highlight international developments of relevance to all institutions; b) Share information on positive initiatives they have taken and to seek advice and information from other institutions; and c) Enable those involved in establishing new institutions to seek information and support.<sup>29</sup>

In this context, it is imperative that prior to legislating on this Bill, the Government of India seeks a policy consensus that reflects the opinions of all actors and stakeholders, especially children. It is also important that the insights from the experience and expertise within and outside the country are ploughed into this critical venture. This would include the insights gained from the implementation of the PHRA and the Women's Commissions; the advice of the IRS and other recognized bodies/experts at various levels. This will help to ensure that this bold step is a step in the right direction, informed by experience, public debate and endorsed by those who have the expertise on this matter.

Finally, it is hoped that such processes are undertaken in the time that is necessary for it to be done effectively. This is in order that we fulfill our obligations to our children, their families and communities and to our commitment to contribute to a 'World Fit for Children.' There is no doubt that the process and the final outcome, if undertaken on the basis of recognized principles and standards, will help to strengthen the hands of all those committed to the cause of institutionalizing a culture of rights in our country.

#### **Questions for further research:**

1. What is the experience of the functioning of various Commissions in India? What are the different models and what is most suitable for Children? The Innocenti Studies have recommended a Statutory, independent, impartial authority that makes recommendations that are not legally binding. Research also recommends setting up separate independent institutions for protection the human rights of children rather

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<sup>29</sup> Pg 14, Supra 6, Summary Report, UNICEF

than mere addendums to other General Commissions. What would be the most prudent recommendation, bearing in mind the costs, the degree of autonomy and specialization, the appropriateness given the current socio-political scenario and rights culture in India today? Section 13 (5) of the PHRA states 'Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. ' What are the implications of this provision, in the light of the fact that the Ombudsman normally does not pass legally binding orders, but recommendations which have to be taken seriously?

**2. Should the findings of the Commission be Legally Binding?**

There needs to be further debate on the powers of the Commission, specifically with regard to the value given to their recommendations. Some reflections are as follows: *'Lacking powers to prosecute the delinquent public servants, to award compensation to the victims and to make enforceable recommendations, the National Human Rights Commission as it stands today, remains a shackled institution. In actual practice, it is an ineffective and woefully feeble protector of human rights.'* (Vijayashree Sripati, Pg 15)

'While Amnesty International emphasizes the important role human rights commissions can play in protecting human rights, it rightly points out that these institutions cannot and must not replace the traditional legal edifice provided by an independent and impartial judiciary.'

**3. Children's Court:** What is the conceptualization of the Children's Court in Chapter V and how does it fit into the legal regime? What is the special powers and procedures that are necessary to be included in the Statute in order to make a genuinely Child Friendly Court?

See Annexure 1 a) and b) for some initial reflections on this point.

**NOTE: A second draft is being prepared to respond to the above questions as well as to take on board the feedback expected from other sources mentioned earlier.**

## ISSUE OF CHILDREN'S COURTS<sup>30</sup>

### Annxure I A

The *Commissions For Protection of Child Rights Bill, 2005*, in Section 25 provides for the establishment of Children's Courts for the purpose of providing speedy trial of offences against children or of violation of children's rights. This Section also stipulates that the State Government may, with concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Children's court to try the said offences. The provisos to this section are provided that nothing in this section shall apply if-

- a) Court of Session is already specified as a special court or
- b) a Special court is already constituted, for such offences under any other law for the time being in force.

### *The following points need to be addressed with regard to the section-*

**1. What constitutes a Children's Court ?-** On plain reading, the Bill has provided for the establishment of Children's Court only to expedite the traditional redressal machinery. The Bill has not prescribed the guidelines or mandate and powers and procedures of this court.<sup>31</sup> By stipulating a Sessions court to be designated as a Children's Court, the Bill in actual is not creating a new system of courts specifically for addressing children's issues but merely providing a convenient interchange in nomenclature. The Bill does not contain any provisions pertaining to the procedures for trial of offences, or schedule of offences or penalties arising out of violations of children's rights. No special conduct is criminalised, no special procedure is laid down despite quick trial being the objective.

The Bill also provides for the same rigorous and insensitive procedures of the Criminal Procedure Code, 1973 and the processes employed in the adult criminal justice system to be adopted while dealing with children. This is not in compliance with a child friendly system and procedures envisaged and prescribed in *Convention of the Rights of the Child 1989* to which India is a party. Also apart from providing for appointment of a Public Prosecutor/Special Public Prosecutor, the method and manner in which they are to be appointed finds no mention in the Bill.

**Limited Powers-** By virtue of Section 25, the Bill confers on the Children's Courts to only try offences relating to violation of Children's rights or offences against children. The Bill does not guarantee non-criminal remedy against the State or compensatory redressal. Thus the approach and mandate of the proposed Children's Court is not comprehensive and has only a piecemeal role in addressing rights of children. Moreover, in order to get justice as well as an effective and appropriate remedy for a child whose rights have been violated by the state, the Court is compelled to approach the High Court/Supreme Court under the writ jurisdiction.

The Bill and its preamble by defining 'child rights' as rights inclusive of those embodied in the CRC, is placing a self imposed limitation on itself. It does not invoke other international conventions that India has ratified that have bearings on the protection and promotion of rights of

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<sup>30</sup> Note prepared by Anuradha Saibaba, Legal Researcher, CCL based on discussions held at the Centre with Aruna Kashyap and Anoop (NLSIU students) and Arlene Manoharan, Research Officer, CCL, June 05

<sup>31</sup> This is substantiated by academic research of Vijayashri Sripati in her article 'India's National Human Rights Commission: A Shackled Commission', 18 Boston University International Law Journal, 1, Spring 2002.

children.<sup>32</sup> A glaring lacuna has been the failures to invoke the constitutional rights and safeguards accorded to children under the Indian constitution.

**Plausible Practical Loopholes-** Since the Bill stipulates a Sessions Court to be designated as Children's Court, the implication is that no separate infrastructure or personnel shall be exclusively at the disposal of the Children's court. It is tantamount to sharing of the already prevailing meager space, personnel and resources. Also, the Sessions courts are already overburdened with the existing caseload and thus to place additional burden on them to try cases of offences against children or infringement of their rights, on a priority basis would not be a judicious approach.

The Children's courts are also not designated as distinct heads for the purpose of budgetary allocations unlike other courts. Moreover, though the Sessions courts have *ipso facto* been declared as Children's court, the Bill does not prescribe any special qualification or understanding of child rights for the authorities vested with the powers to deal with issues pertaining to children's protection and rights. Also since Sessions Judges have been authorized to dispense justice, their lack of sensitivity, understanding or attitude or special knowledge of child rights and protection could in actual have grave repercussions on child rights and their protection.

**2. What About Existing Mechanisms Addressing Children's Issues/ rights?** - Though the Bill provides for setting up of Children's courts to specifically address offences against children or of violations of children's rights, the Bill makes no reference with regards to its impact on the already existing mechanisms that are dealing with the children's rights/issues. The *Juvenile Justice (Care & Protection of Children) Act, 2000* provides for the establishment of the Juvenile Justice Boards and Child Welfare Committees that deal with children in conflict with law and children in need of care and protection respectively. The Bill is silent regarding how the Children's courts it proposes would inter-link with the prevailing judicial mechanisms dealing with child rights and protection

Another issue is whether the Children's court would have jurisdiction on similar or different issues concerning children, which other judicial and quasi-judicial bodies are addressing.<sup>33</sup> Also in the absence of a clear-cut mandate and powers the possibility of overlapping and duplication of work leading to conflict of interest and chaos is bound to happen. The Bill also fails to address the Children's courts that are purported to be set up under the respective State legislations advocating for children's rights.<sup>34</sup> In the *Children Rights Bill, 2005* tabled by the Government of Karnataka, human rights courts have been converted as children's courts. The *Commissions For Protection of Child Rights Bill, 2005*, makes no reference as to which court shall supersede or

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<sup>32</sup> GoI has acceded to various international human rights instruments that have generic and specific rights for men, women and children like CEDAW, ICCPR, ICESCR.

<sup>33</sup> Based on field experience at the sittings of the Child Welfare Committee, Bangalore Urban, we have encountered areas wherein two different judicial bodies are exercising jurisdiction on common issues. Eg Cases of child labour are produced before CWC, which by virtue of Section 32(1) under the *Juvenile Justice (Care & Protection of Children) Act, 2000* has been designated as the final authority to dispose of cases regarding children in need of care and protection. The CWC has also been forwarding cases of child labour to the Labour Department irrespective of the outcome of the cases at CWC. The Labour Department has also been exercising authority over child labour cases in terms of their prohibition, regulation and protection under the *Child Labour(Prohibition & Regulation) Act, 1986*.

<sup>34</sup> The Government of Karnataka, has tabled a Bill titled '*The Children Rights Bill, 2005*' wherein in Section 41 it is provided that the human rights courts in each district shall be constituted as children's court

prevail over existing or proposed courts. It does not point out one specific court at the state level that shall deal with children's issues.

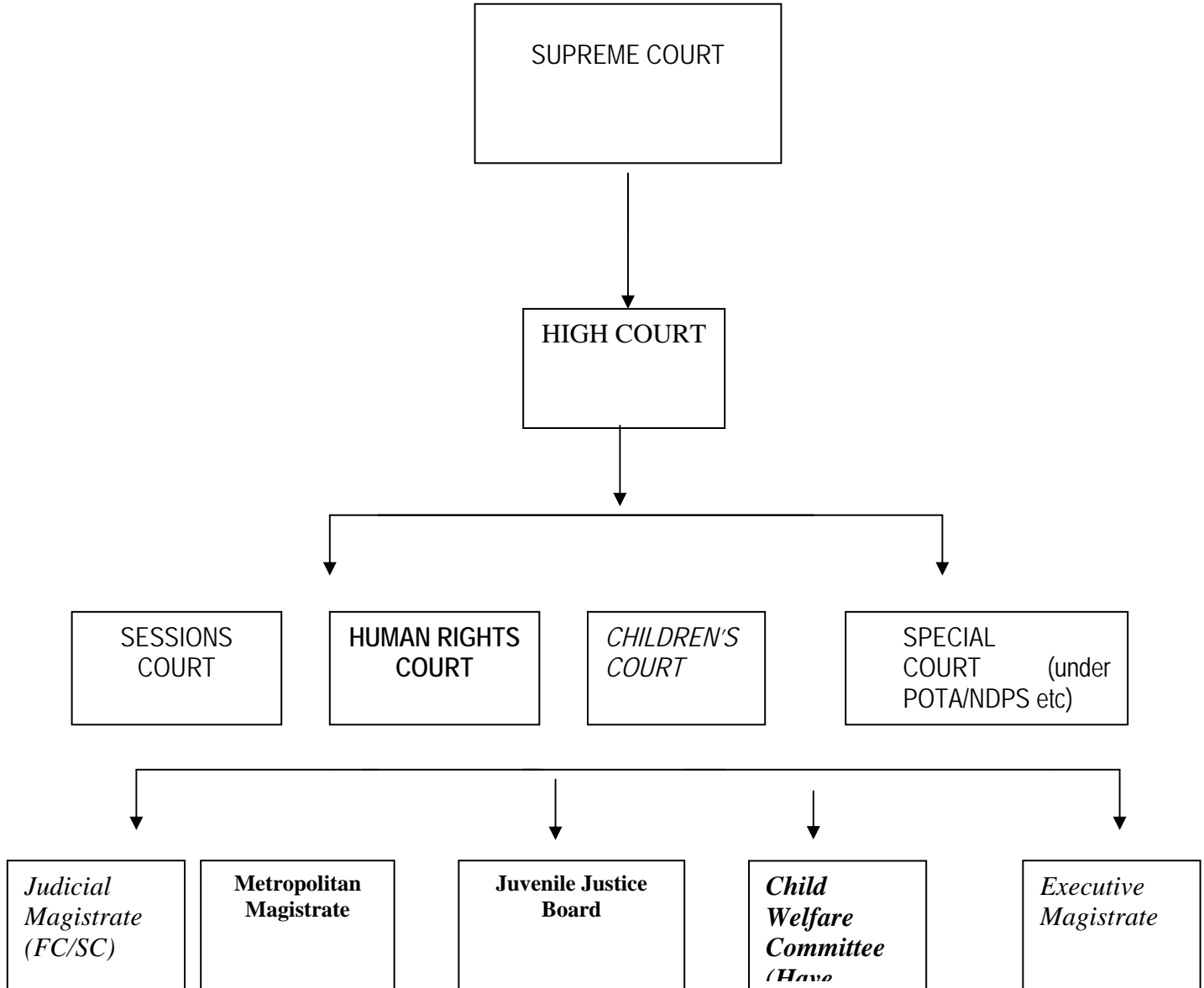
#### RECOMMENDATIONS-

1. It is not sufficient that a Sessions court be designated as a Children's Court. We have to in practice move beyond this mere modification in nomenclature and it is imperative that the establishment of a Children's courts does not remain eyewash. In order to ensure that the Children's courts are truly and effectively protecting and promoting rights of children and delivering justice to children, we have to either establish a separate court as a Children's court or appropriately modify and amend the procedures, processes, set up, ambience of a Sessions Court to facilitate its functioning as a Children's courts.

2. In order to truly establish a child friendly and sensitive system, its imperative that the procedures incorporated in the Criminal Procedure Code, 1973 that essentially address the criminal justice system are amended or modified while being implemented on children or in the Children's courts. It is also vital that offences against children are added in the Indian Penal Code, 1860. Several offences mentioned in the IPC needs to be redefined in the context of it being perpetuated against children. Eg. The offence of child sexual abuse does not find a specific reference in the IPC.

The procedures and processes have to be more child oriented and sensitive. Additional safeguards and protection have to be incorporated while dealing with child victims, witnesses etc. Eg. The concept of Guardian ad Litem for a committed justice system for children's rights. Ms. Geetanjali Srikantan of *The Centre for Child and the Law, National Law School of India University, Bangalore* is currently working on a research study titled '*Achieving evidence while protecting the rights of Children in Criminal Proceedings in child sex related crimes*'. The research focuses on working in the context of law reform and procedural reforms with specific regard to offences against children and procedural safeguards of rights of children in the criminal justice system.

**INDIAN CRIMINAL COURT STRUCTURE  
(Annexure 1 B)**



- *In the Children Rights Bill, 2005 tabled by the Government of Karnataka, in Section 41 human rights courts have been designated as children's courts. The Commissions for Protection of Child Rights Bill, 2005, also in Section 25 provides for a Sessions's court to be established as a Children's court. Under the Protection of Human Rights Act, 1993 a session's court is to be designated as human rights court.*
- *There is no link between the session's court or the human rights court or the children's court.*

## ISSUE OF LIMITATION PERIOD<sup>35</sup>

### (Annexure 2)

The underlying objective of prescribing a limitation period is that it serves general welfare that a period be put on litigation. Moreover, it is a general and accepted principle of law that law is made to protect only the diligent and vigilant people. The latin maxim '*Vigilantibus non dormientibus jur A subventiunt*' means that law will not protect people who are careless about their rights. Also moreover, to ensure that there should be certainty in law that the limitation statute provides that Courts of Law cannot be approached beyond fixed period.

However, the prima facie demonstration of evidence should remain the guiding force for taking cognizance of an offence, without stipulating any time limit. Internationally the emphasis on a limitation period is for ensuring that claims are not made after the evidence is lost. The UN General Assembly in the year 1968 had adopted the *Convention on the Non-Applicability of Statutes of Limitation on War Crimes and crimes Against Humanity*. India had ratified the aforementioned Convention in January 1971.<sup>36</sup> Several countries in the world have no limitation period on crimes committed.<sup>37</sup>

The *Commissions For Protection of Child Rights Bill, 2005* does not mention any limitation period for receipt or investigation into complaints. India's National Human Rights Commission does follow a one-year time limit on accepting complaints after the offence has been committed.<sup>38</sup> This provision has been in total contravention of India's international human rights obligations especially after having ratified the above-mentioned UN Convention. This restriction of a one-year time frame also acts as an inherent constraint on the NHRC. The rationales justifying a limitation period has been varied- from preventing a plethora of complaints being filed or overburdening as well as slackening the pace of the Commission. Infact one of the major recommendations of the NHRC to the GoI in 1998 has been to bring article 36(2) of the PHRA 1993 in conformity with the international principle.

There are several other pertinent reasons that delineate that a limitation period is not prescribed in the *Commissions For Protection of Child Rights Bill, 2005*. In the very specific context of the vulnerable status of children by virtue of their tender years, mental immaturity and childhood, this particular provision is of great relevance. In typical cases of child sexual abuse, the child only in a later stage of life is able to comprehend that he was a victim of an offence during his childhood. It takes several years before which a child realizes and accepts that a wrong has been done to him and many more years before which the child is able to understand and articulate that his rights were violated. By including a limitation clause, the child would not be able to get justice or ensure that the culprit is punished for his wrongdoing. Similarly, children in a State run institution who have been victims of physical and sexual abuse may be more willing to speak out against the perpetrators once they have turned adults and left the confines of the institution.

*Therefore, in order to not only provide and protect rights of children comprehensively and effectively and to ensure that they receive justice if their rights have been infringed but also to be at par with international obligations, it is essential that the Bill does not lay down a limitation period.*

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<sup>35</sup> Note prepared by Anuradha Saibaba, Legal Researcher, CCL

<sup>36</sup> See United Nations Treaty Collection, website-<http://www.unhchr.ch/html/menu3/b/treaty6.htm>

<sup>37</sup> In UK, there is no general statute of limitation applicable to criminal actions. Similarly, in USA, there is no limitation on crimes involving genocide and murder. Under German laws, the duration ranges from 6 months for breaches of administrative regulations to a period of 30 years for crimes involving a life sentence.

<sup>38</sup> Section 36(2) of the Protection of Human Rights Act, 1993

## Appendix I<sup>39</sup>: SUGGESTED READINGS

Independent Institutions for the Protection of Children's Rights  
Experience of SCN Countries  
Per Miljeteig  
Child Rights Consultant  
29/03/2005

### **Study on the Impact of the Implementation of the Convention on the Rights of the Child. Summary report. UNICEF 2004.**

The report focuses on UNICEF Innocenti Research Centre (IRC) study on the impact of the Convention on the Rights of Child. The study aims to promote the universal realization of children's rights by documenting, analyzing and reflecting on positive experiences with the implementation of the Convention on the Rights of the Child as well as challenges that have been observed. The report looks at ombudsmen for children as one particularly element of the implementation of the Convention.

[http://www.unicef.org/why/files/CRC\\_Impact\\_webversion.pdf](http://www.unicef.org/why/files/CRC_Impact_webversion.pdf)

### **The New Handbook of Children's Rights: comparative policy and practice. Edited by Bob Franklin (2002).**

The New Handbook of Children's Rights provides up-to-date information on a topic of increasing importance across a range of disciplines and practices. It covers the debate concerning children's rights and developments in rights provision over the last twenty years. It includes issues and developments in Australia, Belgium, Scandinavia and China.

### **Implementation Handbook for the Convention on the Rights of the Child. Prepared by Rachel Hodgkin and Peter Newell, UNICEF (2002).**

This article-by-article analysis of the implications of the Convention on the Rights of the Child includes under Article 4 an analysis of the Committee on the Rights of the Child's comments on general measures for implementation, including development of independent offices for the protection of children's rights (ombudsmen for children).

[www.unicef.org/rightsresults/files/1\\_HANDBOOK.pdf](http://www.unicef.org/rightsresults/files/1_HANDBOOK.pdf)

### **Independent Institutions: Protecting Children's Rights Innocenti Digest No. 8. 2001, UNICEF.**

This publication focuses on independent human rights institutions for children. It points out the urgent need to create such institutions in every country to protect, promote, and monitor children's rights. The publication evaluates the effectiveness and impact of existing institutions, examines the essential characteristics required if such institutions are to fulfil their functions, and challenges the objections frequently presented. Information on existing independent, statutory bodies to monitor, promote and protect the rights of children.

[www.unicef-icdc.org/publications/](http://www.unicef-icdc.org/publications/)

### **Taking Children Seriously: A Proposal for a Children's Rights Commissioner. Peter Newell (2001).**

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<sup>39</sup> Appendix I and II extracted from paper written by Per Miljeteig, March 2005

This revised edition describes in detail the proposal for an independent Children's Rights Commissioner (Ombudsman) to promote and protect the human rights of children in the UK. It sets out the case for, and the functions of, a Commissioner, and considers the arguments for a separate institution for children or a Commissioner integrated within a human rights commission. It includes a draft bill and details of similar offices established in other countries.

**Children's ombudsmen and the promotion of children's rights.**

*Rädda Barnen, Save the Children Sweden, 1996.*

An overview of what ombuds offices for children do and how they are established with case studies of two ombuds offices in Costa Rica and Peru. In the conclusions, the author gives a list of points to consider in planning/advocating for an ombuds office for children.

**National Human Rights Institutions: A Handbook for the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights.**

*Professional Training Series No. 4, Centre for Human Rights (1995).*

This handbook provides detailed guidance and United Nations principles for development of National Human Rights Institutions.

**A Voice for Children: Speaking Out as Their Ombudsman.**  
*Målfrid Grude Flekkøy (1991).*

This analytical evaluation of the Norwegian experience covers historical and cultural background for establishing the ombudsman for children, administrative and practical issues. It shares the knowledge gained from eight years' work as the world's first ombudsman for children. The author covers in depth the range of cases that came up and discusses the ethical and practical questions these raised. It takes a closer look at the Convention on the Rights of the Child and its importance both in countries that ratify and those that do not.

**The European Network of Ombudsmen for Children (ENOC) website**

The ENOC's website is intended to share and promote the work of independent offices for children's rights and is designed to initiate discussion and debate. The website gives details of member-offices, their activities and information about ENOC and its policy positions. It also gives references to reports and other publications about ombudswork for children.

[www.ombudsnet.org](http://www.ombudsnet.org)

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