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**Chandigarh Commission for Protection of Child Rights (CSCPCR)**  
Administration of Union Territory of Chandigarh

**Delhi Commission for Protection of Child Rights (DCPCR)**  
Government of NCT of Delhi

**Punjab Commission for Protection of Child Rights (PSCPCR)**  
Government of Punjab

**Rajasthan Commission for Protection of Child Rights (RSCPCR)**  
Government of Rajasthan

**West Bengal Commission for Protection of Child Rights (WB-SCPCR)**  
Government of West Bengal

Date: .03.2022

Dear Shri Indavar Pandey,

We, the undersigned representing State Commissions For Protection of Child Rights (SCPCRs) from 5 different states and union territories, have resolved, and therefore, write to you to bring your kind attention to our serious concerns with respect to Juvenile Justice (Care and Protection of Children) Amendment Act 2021 (hereafter referred as "*Amendment Act*") which has amended the Juvenile Justice (Care and Protection of Children) Act 2015 (hereafter referred as "*Principal Act*").

The Amendment Act has also received the Presidential assent and has been notified as well. However the date of the commencement of the Amendment Act is yet to be notified.

Though the Amendment Act has several features, our concern is limited to the amendment of Section 86(2) of the Principal Act which has now been made non-cognizable.

We produce below the sub-section 86 of the Principal Act before substitution by the Amendment Act:

...

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(2) Where an offence under this Act is punishable with imprisonment for a term of three years and above, but not more than seven years, then, such offence shall be cognizable, non-bailable and triable by a Magistrate of First Class.

...

(emphasis ours)

We now reproduce the same sub-section after substitution by the Amendment Act:

...

(2) Where an offence under this Act is punishable with imprisonment for a term of three years and above, but not more than seven years, then, such offence shall be non-cognizable and non-bailable.

...

(emphasis ours)

Thus the Amendment Act results in making the following offences (hereafter referred as "serious offences") under the Principal Act as non-cognizable and denuding the police of power to investigate and arrest offenders:

- a. Section 75 - Cruelty to child by the CCI staff (punishment <5 Years)
- b. Section 76 - Employment of child for begging (punishment < 5 Years)
- c. Section 77 - Giving intoxicating liquor or narcotic drug of psychotropic substance to a child (punishment <7 Years)
- d. Section 78 - Using a child for vending, peddling, carrying, supplying or smuggling any intoxicating liquor, narcotic drug of psychotropic substance (punishment < 7 years)
- e. Section 79 - Exploitation of a child employee (punishment < 5 years)
- f. Section 81 - Sale and procurement of children for any purpose (punishment < 5 years)
- g. Section 83 - Use of children by militant groups or other adults for legal or illegal purposes (punishment < 7 years)

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Section 2(l) of the Criminal Procedure Code (hereafter referred as "CrPC") defines non-cognizable offence as *an offence for which, and "non-cognizable case" means a case in which a police officer has no authority to arrest without warrant.*

The effect of the amendment is that the bar under S. 155 CrPC applies as a non cognizable offence is an offence in which the police officer cannot start an investigation without the permission of the court nor arrest without warrant.

We draw further attention to the 14<sup>th</sup> Report of Law Commission of India on Reform of Judicial Administration<sup>1</sup> which while examining the distinction between cognizable and non-cognizable offences stated as follows:

*"1. For the purpose of police investigation, offences under the Indian Penal Code are divided into cognizable and non-cognizable offences. Cognizable Offences are defined as those in which a police officer can effect an arrest without a warrant. Such cases are specified in column 3 of Schedule II of the Criminal Procedure Code.*

*2. The principal difference between cognizable and non-cognizable offences is that a police officer on receipt of information of a cognizable offence has the power of investigation, including the power of arrest. But in non-cognizable offences, a police officer has no such power, unless the investigation is authorised by a competent magistrate. In the case of offences against laws other than the Indian penal code, a broad classification is, that those which are punishable with imprisonment for three years*

<sup>1</sup> Pg. 733-734.





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and upwards are cognizable while those with lower limits of punishment are non-cognizable.

[...]

6. As pointed out earlier, a police officer is not competent to investigate non-cognizable offences without the orders of a magistrate. If a complaint of the commission of such an offence is made to him, he notes the substance of the complaint in a book kept for that purpose and refers the informant to the magistrate. It is open to the magistrate on taking cognizance of such complaint, to direct a police officer to make an investigation even if it is a non-cognizable offence; but in the absence of such a direction the police officer is not competent to undertake the investigation thereof."

[Emphasis added]

Offences are classified depending upon their nature and gravity.<sup>2</sup> As per the schedule to the CrPC in part ... Cognizable offences are punishable with imprisonment for more than three years whereas non-cognizable offences are punishable with imprisonment for up to three years.

Further, as per Section 154 of the CrPC, and dicta of the Hon'ble Supreme Court of India, it is mandatory for the police to register the FIR in case the information received discloses commission of a cognizable offence. In non-cognizable cases, police can neither register the FIR nor can investigate or effect the arrest without the order of a judicial magistrate as per Section 155 of the CrPC.

Now these principles and operational realities will apply to the aforementioned 7 offences under the Principal Act.

<sup>2</sup>Govt of NCT of Delhi and Ors vs Robin Singh 171 (2010) DLT 705 [para 25].

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One might argue that the Indian Penal Code (IPC) carves out some of these offences and makes them cognizable anyway. This would be a misplaced inference borne out of little understanding of the law and the history of the Juvenile Justice jurisprudence.

If one were to accept the proposition, it would essentially mean that the entire chapter titled "*Other Offences Against Children*" under Principal Act is useless and was uncalled for. We believe that the chapter on offences against children was one of the progressive components of the Juvenile Justice (Care and Protection of Children) Act 2015. It created many new offences against children, and enhanced punishment for some others. Take, for example, the sale and procurement of the children.

The Law Commission of India in its 146<sup>th</sup> report in 1993, highlighted the case in which a child was sold for Rs. 12000 & which resulted in acquittal, decried the fact that sale and procurement of the children was not an offence and recommended to insert this as offence under the IPC.

In 2013 Kerala High Court reiterated the need for implementation of the recommendation of the Law Commission in this regard.

There are estimated 3,00,000 child beggars in India (although some organisations claim the number to be higher). A 2014 study by Ms. Anupma Kaushik titled "*Rights of Children: A Case Study of Child Beggars at Public Places in India*" stated that nearly 44,000 children fall into the clutches of the gangs annually. However, by this amendment the use of children for the purposes of begging will not invite an FIR and investigation except with order of Magistrate which is essential in crimes of this nature.

We further note that possession or consumption of drugs is a cognizable offence under the Narcotic Drugs and Psychotropic Substance Act 1985 but the Amendment Act now classifies use of children for drugs peddling and smuggling as a non-cognizable offence which will not even attract action under S. 154 CrPC & investigation. Clearly, the Amendment Act makes a significant,





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and rather regressive, departure from the settled jurisprudence in this country.

This delay in starting investigation allows offenders time to influence evidence or thwart investigations. Children who are vulnerable to pressure, may not be able to provide coherent testimony as time goes by

Further, the vast majority of crime against children is committed against those children who are especially vulnerable by virtue of caste, class, religion and gender. Children living in poverty, and socially deprived are among the most likely to face abuse, and among the least likely to have the resources to pursue it. To obtain a Magistrate's assent for an investigation requires resources in terms of time, money, access to lawyers, and perseverance, that disadvantaged children do not possess. Given their social and economic disadvantage, this amounts to gross injustice towards those who need the protection of justice the most.

We further note that the rationale being offered for the reclassification of serious offences as non-cognizable is that it shields the children in conflict with law from arrest without warrant. This is an erroneous and misplaced inference.

Children's protection from arrest does not come from section 86 of the Principal Act but from Rule 8 of the Model Rules notified under the Act. Even if we disregard that, if this was the intention, then the legislation should have explicitly made a distinction between adults and children but it did not. The statute in its current form effectively shields the perpetrators, nearly all of which are adults!

We also observe that the Amendment Act's provision of reclassifying the cognizability of serious offences runs contrary to India's international obligations.

India is a signatory to the United Nations Convention on the Rights of the Child ("UNCRC"), as well as the Optional Protocols thereto on the sale of children, child prostitution and child pornography and the optional protocol on the involvement of children in armed conflict.

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These instruments validate the rights guaranteed to children by the Constitution of India and various laws, policies and programmes emanating there from, and impose an obligation on India to act decisively against the very offences implicated in the present amendment, in particular, offences pertaining to cruelty and abuse, exploitation of children for begging or other labour, supplying children with narcotics or use of children in supply of narcotics, sale of children, use of children in militant activities. We list some of the specific provisions detailing India's international obligations below along with our observation:

- i. Article 32 of the UNCRC recognizes the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, and obliges States Parties to take legislative, administrative, social and educational measures to ensure the implementation of the present article. There is a specific obligation to "*Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.*" However, the classification of Section 79 of the Principal Act that deals with exploitation of child employees as non-cognizable runs directly in contradiction to the Article 32 of the UNCRC.
- ii. Similarly, Article 33 of the said Convention obliges States to take appropriate legislative measures against the illicit use of narcotics in children, including their use in production and trafficking of such substances. Similarly, Article 4 of the Second Optional Protocol states that armed groups should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years, and that States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices. However, the classification of section 79 of the

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Principal Act that deals with exploitation of child employee as non-cognizable is in the teeth of the Article 33 of the UNCRC

iii. Article 38 requires States to take "*all feasible measures*" to ensure that children do not take part in any armed conflict or hostilities. However, much to our horror and shock, the section 83 that makes terrorists' use of children even for legal purposes as an offence is now non-cognizable because of the Amendment Act.

iv. Article 10 of the Optional Protocol on the Sale of Children states that States Parties shall take all necessary steps to strengthen the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children. On the contrary, the Amendment Act dilutes a provision making the sale and procurement of the children a non-cognizable offence.

By making such offences non-cognizable, the amendment makes prosecution of the offence more difficult, expensive, and time consuming, for no apparent reason, and this militates against India's international obligations on this front.

The Amendment Act insofar as it categorises serious offences as "non-cognizable" is antithetical to the Statement of Object and Reasons of the Juvenile Justice (Care and Protection of Children) Act 2015 which states that aims at meeting the standards prescribed in Convention on the Rights of the Child which Government of India acceded on the 11<sup>th</sup> December 1992 .

We further studied the legal system in other countries including Europe and South Asia. We find that though many democratic countries have a higher threshold for arrest, the threshold is not high for registering a complaint or commencing investigation.

We also find the incongruence and incoherence in the drafting of the provision as this category of offence mentioned in Section 86(2) of the Principal

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Act is both non-cognizable and non-bailable, as non-bailable offences are ordinarily those that are serious enough to also be cognizable. On one side, the offences are non-serious enough to be non-cognizable, and on the other serious enough to be non-bailable. This is clearly a contradiction that we find no reconciliation for.

We now turn our attention to the moral consequences of the Amendment Act and what it signals to nearly 30 crore children currently in our country. It signals to the children that offences as grave as their sale and purchase, their use by terrorists and their exploitation are not deemed grave by the State.

The Amendment Act will further encourage the militant groups and organised criminal gangs to recruit children for pursuing their illegal activities and get away. This Amendment Act comes in the backdrop of the US Congressional mandated 2020 Trafficking in Persons report on India that states that children as young as 14 are recruited by militants and Maoists to handle weapons and IEDs.

There are several worrying administrative consequences of the Amendment Act. Amongst many, take for instance, the Amendment Act will further burden the already burdened courts of magistrates as the victims will have to approach courts seeking order for registration of FIR and investigation which thus far is the default and automatic approach given the cognizability.

We have very carefully examined the Amendment Act insofar as it classifies the serious offences as "non-cognizable", referred to Parliamentary debates on the subject, paid special attention to Law Commission reports, studied the different UN covenants & resolutions, undertaken literature review of international norms and laws.

We conclude that the Amendment Act insofar as it deals with the classification of serious offences as non-cognizable does not serve the cause of children in any way and in fact violates and dilutes their rights guaranteed under the Constitution of India and the JJ Act, 2015. We find ourselves deeply concerned by the complete absence of any factual basis behind the Amendment

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Act's categorization of offences into cognizable and non-cognizable renders it without any determining principle. There is no reasonable justification or rationale or any other aim sought to be achieved by reclassifying the cognizable offences as non-cognizable offences.

The objective of the Principal Act is to provide for the care and protection of the children but the Amendment Act strikes at the very core of child care and protection regime under the Principal Act thereby directly resulting in an increased harm to the rights of children and dilution of safety standards.

Having carefully studied the provision, we hold that the decision to classify serious offences as "non-cognizable" in our understanding, is ultra-vires the Constitution, and puts children's life and liberty at risk. We are of the considered opinion that the Amendment Act in so far as it classifies serious offences as "non-cognizable" cannot survive the constitutional tests, if challenged.

AND, NOW THEREFORE, the 5 Commissions representing the States and Union Territories of Chandigarh, Delhi, Punjab, Rajasthan and West Bengal in exercise of powers vested in it under Section 15 of the Commission For Protection of Child Rights Act 2005 recommend to Government of India to not notify the date of commencement of the Amendment Act 2021 in so far as it deals with classification of serious offences as "non-cognizable".

We further recommend to the Government of India that the bill be tabled in the Parliament to further amend the Juvenile Justice (Care and Protection of Children) Act 2015 to restore the cognizability status of the serious offences.

We sincerely hope that we will be communicated with the Government position on our recommendation. It may kindly be noted that the Commissions shall be constrained to approach the High Court/Supreme Court seeking compliance of the recommendations tendered therein.

With Kind Regards,

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Your Sincerely

*Rajinder Kaur*  
Rajinder Kaur,  
CHAIRPERSON  
CHANDIGARH COMMISSION FOR  
PROTECTION OF CHILD RIGHTS

*Rajinder Singh*

Rajinder Singh,  
Chairman  
Punjab State Commission for  
Protection of Child Rights

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*Ananya Chakraborti*  
Chairperson, West Bengal State Commission For Protection of Child Rights

ANANYA CHAKRABORTI  
Chairperson  
West Bengal Commission for  
Protection of Child Rights  
Govt. of West Bengal

Shri Indevar Pandey  
Union Secretary (Women & Child Development)  
Government of India

Copy to:

1. Registrar, Juvenile Justice Committee, Supreme Court of India with the request to place it before the Hon'ble Chairperson, Juvenile Justice Committee, Supreme Court of India

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2. Attorney General of India with the request to kindly review the Amendment Act.
3. Secretary to Hon'ble Chief Minister, West Bengal with the request to place it before the Hon'ble Chief Minister for her kind information and consideration.
4. Secretary to Hon'ble Chief Minister, Rajasthan with the request to place it before the Hon'ble Chief Minister for his kind information and consideration.
5. Secretary to Hon'ble Chief Minister, Punjab with the request to place it before the Hon'ble Chief Minister for his kind information and consideration.
6. Secretary to Hon'ble Chief Minister, Delhi with the request to place it before the Hon'ble Chief Minister for his kind information and consideration.
7. Registrar, Juvenile Justice Committee, High Court of Delhi with the request to place it before the Hon'ble Chairperson, Juvenile Justice Committee, High Court
8. Registrar, Juvenile Justice Committee, High Court of Punjab & Haryana with the request to place it before the Hon'ble Chairperson, Juvenile Justice Committee, High Court
9. Registrar, Juvenile Justice Committee, High Court of West Bengal with the request to place it before the Hon'ble Chairperson, Juvenile Justice Committee, High Court
10. Registrar, Juvenile Justice Committee, High Court of Rajasthan with the request to place it before the Hon'ble Chairperson, Juvenile Justice Committee, High Court
11. Union Secretary (Law) for his consideration and review
12. Hon'ble Chairperson, Parliamentary Standing Committee on Home Affairs for his kind attention.
13. Chairperson, State Commissions For Protection of Child Rights (SCPCR) of all States for their kind consideration and review (as per list)
14. Guard Files of the respective Commissions and for uploading on their respective websites

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