

**Refugee Review Tribunal
AUSTRALIA**

RRT RESEARCH RESPONSE

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This response was prepared by the Country Research Section of the Refugee Review Tribunal (RRT) after researching publicly accessible information currently available to the RRT within time constraints. This response is not, and does not purport to be, conclusive as to the merit of any particular claim to refugee status or asylum.

Questions

- 1. Are persons who have been convicted of sexual offences against children overseas and served their sentences likely to face any criminal charges under Indian law for the same offences upon return to India?**
- 2. Are persons who are known convicted sexual offenders against children likely to face any harm from officials, authorities or the general public?**
- 3. What are the prevailing community attitudes in India towards sexual offenders against children who have been released into the community after serving any applicable prison sentence?**
- 4. Any other information about the attitude towards and treatment of sexual offenders against children in Indian society would be useful.**
- 5. Is a person's race or religion a relevant factor in the way that they will be treated as a known sexual offender against children?**
- 6. What are the ranges of penalties available in India for sexual offences against children that may have been committed in India?**

RESPONSE

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No report has been located of anyone who had been convicted of sexual offence against children overseas and served his/her sentence facing any further criminal charges under the Indian law for the same offences on return to India. It appears that India is not ready to deal effectively with such sex offences committed in India, not to mention offences committed overseas.

In the past there have been a few isolated cases where child sex offenders were effectively punished. However, the general situation is so dismal that many social workers and child rights activists are seeking more effective and holistic approach at the level of the government, society and family.

Commenting on the difficulties in bringing the offenders to justice, an Indian child advocate states that:

Not one in 10,000 cases gets reported, let alone investigated, prosecuted and convicted (Srinivasan, Sandhya 2006, 'RIGHTS: India Off Paedophile Destinations, Warns Judge', 20 March <http://ipsnews.net/news.asp?idnews=32553> - Accessed 21 September 2006 – Attachment 1).

Another Goa-based child rights activist notes that there are numerous cases of foreigners being found with young children in situations that indicate inappropriate and abusive conduct, but prosecutions of 'sex tourists' have rarely resulted in conviction (Srinivasan, Sandhya 2006, 'Rights: India Off Paedophile Destinations, Warns Judge', 20 March <http://ipsnews.net/news.asp?idnews=32553> - Accessed 21 September 2006 – Attachment 1).

After discussing the Indian legal frame in the area of child abuse, Sairam Bhat, Coordinator at G R Kare College of Law, Margao, Goa concludes that:

The state's response to these crimes has been appallingly indifferent ...the problems in addressing child abuse are not so much related to the absence of law, but more due to the lack of a system of awareness, the lack of information, and poverty ('Too little for the little ones' 2004, India Together website, December <http://www.indiatogether.org/2004/dec/chi-abuse.htm#continue> - Accessed 26 September 2006 – Attachment 2).

Shiv Kumar, a social worker with Delhi-based Child Line states that although the Indian penal code imposed penalties for what are considered "unnatural offences," including rape and pederasty, convictions were all too scarce. Even though charges are brought against offenders they manage to jump bail and leave the country. There have been very few convictions ('Foreign paedophiles prowl India beaches and tourist hot spots' 2001, *AFP*, 11 April – Attachment 3).

Causes for India incapable effectively to deal with child sex offenders include, as quoted by an expert on the issue, an excessively greedy tourism industry, a lack of political will, absence of specific laws, a lax police force and local apathy ('Foreign paedophiles prowl India beaches and tourist hot spots' 2001, *AFP*, 11 April - Attachment 3).

While reporting on the kidnapping and raping of a 12 year old girl by two men in their mid-twenties, *Time of India* commented in 1996 that such brutal cases of child rape are constantly occurring but are rarely reported to the authorities due to apprehension about societal attitude, the fear that the child will be persecuted by the authorities and the offender absolved of the crime ('Pedophiles and child sex tourism' 1996, *The Times of India*, 14 June http://www.hsph.harvard.edu/grhf-asia/repro2/compendium_on_child_prostitution.html#HC%20tells%20state%20to%20housed%20sex%20workers%20in%20shelters – Accessed 25 September – Attachment 4).

A document entitled 'Compendium on Child Prostitution' - Section: Conclusion, compiled by Socio Legal Information Centre for UNICEF Maharashtra makes an open indictment of the Indian society as follows:

Sexual abuse of children is a major problem in India and is being escalated due to the inadequacy and non implementation of current laws...

It is naïve to think that the problem of sexual child abuse can be solved by amending or implementing existing laws. What is required is a holistic change which includes change [change] in societal attitude, attitude of authorities and familial attitude.

It is essential to clearly define crimes against children and provide in law, remedies for these wrongs. The existing laws require to be amended and fresh legislation enacted to redress these crimes. The Indian law requires to be brought into conformity with the United Nations Convention of the Rights of the Child which the Indian Government has ratified in 1992. Strong and comprehensive legislation is necessary to combat sexual exploitation of children. Child victims should be provided with free legal assistance and the offenders punished. But merely amending and enacting laws is not enough, these must be conveyed to society...

A concerted effort should be made to increase public awareness with regard to child abuse... ('Compendium on Child Prostitution' (undated), Section: Conclusion, compiled by Socio Legal Information Centre for UNICEF Maharashtra http://www.hsph.harvard.edu/grhf-asia/repro2/compendium_on_child_prostitution.html#HC%20tells%20state%20to%20housed%20sex%20workers%20in%20shelters - Accessed 25 September 2006 – Attachment 5).

Referring to the prosecution of the well-known British paedophiles, Duncan Grant and Allan Water, Yug Chowdhary, advocate for Childline India comments that:

'The police knew it was happening, but felt it was consensual although sex with a minor is statutory rape. And they rationalised that these children were earning some kind of living (Srinivasan, Sandhya 2006, 'RIGHTS: India Off Paedophile Destinations, Warns Judge', 20 March <http://ipsnews.net/news.asp?idnews=32553> - Accessed 21 September 2006 – Attachment 1).

Deploring the prevailing attitude of the Indian society, the same report states that the permissive environment in Goa was exposed by the news portal 'Tehelka' in 2004 which highlighted the fact that the provincial government, possibly fearing a loss in tourism revenue, did little about a report brought out by the British government in 2001 on the extent of the problem in the former Portuguese enclave (Srinivasan, Sandhya 2006, 'RIGHTS: India Off Paedophile Destinations, Warns Judge', 20 March <http://ipsnews.net/news.asp?idnews=32553> - Accessed 21 September 2006 – Attachment 1).

As an example that the Indian legal system is notoriously slow and the penalties are low in dealing with sex offenders against children, a case of a New Zealand paedophile is cited in a book, *Bitter Chocolate*. Having been convicted multiple times, he chose to be extradited to India and tried there, as he could get away with minimum penalties (Virani, Pink 2000, *Bitter Chocolate*, Viking Penguin <http://www.sawnet.org/books/reviews.php?Bitter+Chocolate> - Accessed 27 September 2006 – Attachment 6).

There appears, however, a sign of the increased awareness on the part of some section of the government. The US Department of States comments that the Indian government was responsive to some incident/claim of violence against children. It states that:

In September [2005] the juvenile justice court ruled that any failure by school management or teachers to protect students from sexual abuse or provide them with a safe school environment is punishable with a prison term of up to six months. In February the Supreme Court sentenced a man to death for the 2001 rape and murder of a six-year-old girl in Uttar Pradesh. Earlier the Allahabad High Court had acquitted the man (US Department of State 2006, *Country Reports on Human Rights Practices – India*, 8 March – Attachment 7).

In May [2004], a village Panchayat in the state of Uttar Pradesh sentenced a primary school teacher to death for allegedly molesting a minor student (US Department of State 2005, *Country Reports on Human Rights Practices – India*, 28 February - Attachment 8).

The current situation is somewhat summarized well in a comment made lately by Nishtha Desai, a child rights activist in Goa:

Today when NGOs lodge complaints with police officers they do not cast aspersions on the credibility of the complainants, as was often the case earlier. There are police officers in Goa who have investigated cases very effectively. The sad reality is that the will to effectively deal with this problem on the part of the State as a whole is still lacking ('Prosecution of paedophiles: not a state priority?' (undated), network of women in media, India (NWMI) website

http://www.nwmindia.org/Law/Commentary/prosecution_of_paedophiles.htm#search01 - Accessed 25 September 2006 – Attachment 9).

Given the prevailing situation in India, it is not a surprise to see that no report has been found that any child sex offender was harmed, abused or stigmatized for the offence committed outside India by the Indian authorities, general public or society. As clear above, the prevailing community attitudes towards sexual offences against children are still lax in India today although a sign of some improvement has recently been sighted on a part of the government.

In the light of the above, one of the important factors in considering the chance of a person being punished on return to India seems to be whether the media will pick them up and how much attention it will pay on them.

5. Is a person's race or religion a relevant factor in the way that they will be treated as a known sexual offender against children?

In a search through the sources consulted, no definitive information has been located that race or religion was a factor in the treatment of a known sex offenders against children.

6. What are the ranges of penalties available in India for sexual offences against children that may have been committed in India?

There is no single set of rules among the existing laws that is applicable for sexual offences against children throughout India due, among other things, to the fact that each state can have a separate penal code to deal with the offences under the federalism.

The 2004 'Report on Laws and Legal Procedures Concerning the Commercial Sexual Exploitation of Children in India' notes that:

The Indian legal system is based on the British Common Law system, in addition to state and central legislations in certain areas. All national laws passed centrally apply to the entire country, except the State of Jammu & Kashmir⁶⁰.

There are no established guidelines on the applicability of laws passed at the central and state levels. Normally, most state laws are considered special laws that apply only in those states where they are passed...

... State Special Acts ordinarily supersede Central Acts. Almost all special legislations have *non-obstante* clauses⁶², giving them precedence over other legislations. Where there are

several special legislations, all of which have *non-obstante* clauses, the Supreme Court has stated that the most recently enacted special legislation prevails⁶³.

B. National Legal Framework to Protect Child Rights in India

Several national statutes may apply to cases concerning the commercial sexual exploitation of children:

1. The Indian Penal Code, 1860
2. The Immoral Trafficking (Prevention) Act, 1956
3. The Indecent Representation of Women (Prohibition) Act, 1986
4. The Juvenile Justice (Care and Protection of Children) Act, 2000
5. Child Marriage (Restraint) Act, 1929
6. Information Technology Act, 2000

There are also a few state laws related to the commercial sexual exploitation of children:

1. The Andhra Pradesh (Andhra Area) Devadasis (Prevention of Dedication) Act, 1947
2. The Karnataka Devadasis (Prohibition of Dedication) Act, 1982
3. The Goa Children's Act, 2003

The Indian Penal Code, 1860 (Penal Code) is the primary code for all criminal offences and punishments granted by the Courts. The Penal Code, though archaic, is an exhaustive statute and is the main law relating to crimes in India; it defines offences and prescribes punishments. Complementing the Penal Code is the Code of Criminal Procedure, 1973, which prescribes the procedures that must be followed by police, prosecutors, judges and others in the course of prosecuting criminal cases⁶⁴. Similarly, the Indian Evidence Act, 1872 outlines procedures for recording and presenting evidence.

In addition to the Penal Code and Criminal Procedure Code, other laws such as the Juvenile Justice (Care and Protection of Children) Act, 2000 (Juvenile Justice Act); the Immoral Trafficking (Prevention) Act, 1956; Child Marriage (Restraint) Act, 1929; and the Information Technology Act, 2000 may apply in cases involving the commercial sexual exploitation of children. These Acts are special legislation that take precedence over more general laws. Some of these special legislations, like the Juvenile Justice Act, complement other legislations. In this situation, both the special and general law can be applied...

While this Act [Immoral Trafficking (Prevention) Act, 1956] does not directly state that prostitution is illegal, it penalises the act of prostitution...

The Indian Penal Code (Penal Code), framed during the time of the British, is the standard code with respect to all criminal offences, and it is the main legislation taught in police training schools. The Penal Code covers all criminal offences, and contains some sections relevant to the prostitution of children, although it does not define prostitution.

Penal Code section 366A makes it illegal to procure a minor girl by any means and induce a girl under 18 years of age into prostitution or any form of "illicit sexual intercourse," and violators are subject to up to ten years' imprisonment and a fine. Similarly, Penal Code section 367 makes it illegal to bring a girl under 21 years of age into a situation with the intention or awareness that it is likely that the girl may be forced or seduced to have intercourse with another person; punishment for this violation is up to ten years' imprisonment and a fine. Finally, under Penal Code sections 372 and 373, it is illegal to sell or buy a minor for the purposes of prostitution, and violators are subject to up to ten years' imprisonment and a fine. In cases under this statute, the burden of proof

is shifted onto the person who allegedly sells or buys a girl knowing that the girl will be forced into prostitution.

d. Gaps and Discussion

Although the ITPA [Immoral Trafficking (Prevention) Act, 1956] is nearly 50 years old, there is a lack of jurisprudence on the commercial sexual exploitation of children⁸⁷. Most cases under the ITPA involve arrests of brothel owners and others. Some judgments address procedures to be adopted in cases of commercial sexual exploitation. But many procedures have not been addressed in any judgments, including definitions, treatment to be given to children, and the identification of child prostitution *per se* as a crime. At the time of writing, however, several cases related to the commercial sexual exploitation of children were pending before the Supreme Court⁸⁸...

The ITPA also fails to clearly identify who may be prosecuted. Under the ITPA, a victim of commercial sexual exploitation may be prosecuted because the law does not state whether children in prostitution are victims or offenders. A literal reading of the ITPA renders a trafficked and prostituted child liable for prosecution, which only exacerbates the plight of child victims of commercial sexual exploitation. If one were to look at the 'letter' of the ITPA, it does not distinguish between a child and an adult, and where punishments are prescribed, it does not state who should be punished and who should be given protection.

In addition, judicial interpretations of the status of children under the ITPA are not clear. Under both the ITPA and the Penal Code, sexual exploitation of a child below 16 years of age is statutory rape (consent is immaterial), so the law should be interpreted to treat children below 16 years of age as victims in need of care and protection. Unfortunately, the first direct interpretation of the ITPA in a case involving the sexual exploitation of a child contributes to the law's ambiguity. The Mumbai High Court found that children rescued from brothels should be treated as victims in need of care and protection, but that children 'soliciting' or 'voluntarily' in prostitution should be treated as child offenders under the Juvenile Justice Act⁹⁰ ('Report on Laws and Legal Procedures Concerning the Commercial Sexual Exploitation of Children in India' 2004, ECPAT International, November http://www.ecpat.net/eng/Ecpat_inter/projects/promoting_law/india_report/Laws_Legal_Procedures_India_Nov2004.pdf - Accessed 27 September 2006 - Attachment 10).

Sairam Bhat, Coordinator at G R Kare College of Law, Margao, Goa explains the current legal frame applicable for the sexual offences against children as follows:

The laws dealing with sexual offences do not specifically address child sexual abuse. It is disconcerting but true, the India Penal Code 1860 does not recognise Child abuse. Only rape and sodomy can lead to criminal conviction. Anything less than rape, as defined by the law, amounts to 'outraging the modesty'. These laws are problematic when applied to adult women, but they are even more difficult when applied to children. While sec. 376 IPC seeks to provide women redress against rape, it is rarely interpreted to cover the broad range of sexual abuses [particularly of children] that actually takes place. The word 'rape' is too specific, this does not include abuse on 'boys'; moreover, 'intercourse' is often interpreted to mean with an 'adult'. Most of these forms of abuse are sought to be covered under sec. 354 of the Indian Penal Code as a violation of a woman's modesty. Offences under Sec. 354 of the IPC is a cognisable offence but is also bailable, which allows foreigners to simply leave the country before prosecutions begin. While Andhra Pradesh, by a state amendment, has made the offence cognisable, non-bailable and to be tried by a court of session [where

the minimum punishment is imprisonment for 7 years, and a fine], other states have not followed. What is also lacking is a central law on the subject. The Juvenile Justice Act was amended and rewritten in 2000, but it makes no attempt to identify sexual abuse on children. Sec. 23 of the Act deals with assault, exposes, wilful neglect, mental and physical suffering, for which imprisonment for a term of just 6 months is prescribed. Sec. 5 of the Immoral Traffic Prevention Act 1956 prescribes punishment of not less than 7 years for inducing a child into prostitution, but does not directly address child abuse...

The Goa Children's Act

With sexual abuse of children becoming increasingly associated with the tourism trade, Goa formed a model law and proposed the establishment of a Children's Court. The idea of a Children's Court was first mooted in the Government of India Children Act 1960, which is today a forgotten piece of law. The Goa Children Act 2003 is legislation against child sexual abuse, especially those related to tourism. The legislation has specifically made any such cases of abuse non-bailable offences under section 2 (a) of the Criminal Procedure Code, 1973. The fines and jail terms are also severe -- Rs 100,000 with imprisonment between one to three years for sexual assault and incest, and Rs 200,000 with seven to 10 years jail term in case of a grave sexual assault. The setting up of a Children's Court to try all offences against children is a bold step prescribed by this law. ('Too little for the little ones' 2004, India Together website, December

<http://www.indiatogether.org/2004/dec/chi-abuse.htm#continue> - Accessed 26 September 2006 – Attachment 2).

On the subject, the Human Rights Watch comments that:

Section 377 of the Indian Penal Code, titled "Of Unnatural Offences," punishes "carnal intercourse against the order of nature" with penalties of up to 10 years of imprisonment. The law was originally introduced by British authorities under colonial rule in the 19th century. A challenge to the law, pending in the Delhi High Court, asserts that it violates constitutional protections on equality and personal liberty (HRW 2006, 'The Hall of Shame', 17 May

http://hrw.org/english/docs/2006/05/17/global13391_txt.htm - Accessed 26 September 2006 – Attachment 11).

A CONEXIONS website comments specifically on Section 377 of the Indian Penal Code as follows:

Section 377 of the Indian Penal Code reads:

"Unnatural Offences – Whoever voluntarily has carnal intercourse against the order of nature, with any man, woman or animal, shall be punished with imprisonment for life, or for imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine".

Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section".

This section is intended to punish the offence of sodomy, buggery and bestiality. The offence consists in a carnal knowledge committed against the order of nature by a person with a man, or in the same unnatural manner with a woman, or by a man or woman in a any manner with an animal.

It is punishable with ten years of imprisonment and fine. No one, so far is known to have been awarded ten years of imprisonment for having been found guilty of this offence. In the matters leading to conviction, the maximum punishment so far reported is two years ('Did you know what is Section 377, of the Indian Penal Code?' (undated), CONEXIONS, a quarterly web-forum. Oct – Dec 2005
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Databases:

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REFINFO (IRBDC (Canada) Country Information database)

ISYS (RRT Country Research database, including Amnesty International, Human Rights Watch, US Department of State Reports)

RRT Library Catalogue

List of Attachments

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2. 'Too little for the little ones' 2004, India Together website, December. (<http://www.indiatogether.org/2004/dec/chi-abuse.htm#continue> - Accessed 26 September 2006)
3. 'Foreign paedophiles prowl India beaches and tourist hot spots' 2001, *AFP*, 11 April. (FACTIVA)
4. 'Pedophiles and child sex tourism' 1996, *The Times of India*, 14 June. (http://www.hsph.harvard.edu/grhf-asia/repro2/compendium_on_child_prostitution.html#HC%20tells%20state%20to%20housed%20sex%20workers%20in%20shelters - Accessed 25 September)
5. 'Compendium on Child Prostitution' (undated), Section: Conclusion, compiled by Socio Legal Information Centre for UNICEF Maharashtra. (http://www.hsph.harvard.edu/grhf-asia/repro2/compendium_on_child_prostitution.html#HC%20tells%20state%20to%20housed%20sex%20workers%20in%20shelters - Accessed 25 September 2006)

6. Virani, Pink 2000, *Bitter Chocolate*, Viking Penguin.
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9. ‘Prosecution of paedophiles: not a state priority?’ (undated), network of women in media, India (NWMI) website.
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