

Media Hotline

August 18, 2022

NCPCR RELEASES GUIDELINES TO REGULATE CHILD PARTICIPATION IN ENTERTAINMENT INDUSTRY

- The National Commission for Protection of Child Rights (“**NCPCR**”) have published the ‘*Regulatory Guidelines for Child Participation in the Entertainment Industry or Any Commercial Entertainment Activity*’ (“**Draft Guidelines**”).
- The Draft Guidelines document that the reason for their introduction is (i) lack of specific regulation or rule for protection of child artists in the entertainment industry, (ii) need to bring new platforms under the ambit of the Draft Guidelines.
- However, the following key issues arise with the Draft Guidelines:
 - The Draft Guidelines appear to be introduced in excess of NCPCR’s powers under the *Commissions for Protection of Child Rights Act, 2005*¹ (“**CPCRA**”).
 - The Draft Guidelines reproduce provisions under various other statutes;
 - The Draft Guidelines have misinterpreted and erroneously enunciated provisions of existing laws, resulting in conflict with the provisions of the statute.
 - The Draft Guidelines seek to confer additional obligations, duties and power to various authorities, not contemplated under the principal law.
 - The Draft Guidelines place onerous obligations on the producers and parents, and can impact the ease of business

A. BACKGROUND

The Draft Guidelines were released by NCPCR on June 24th, 2022. The Draft Guidelines seek to supersede the “*Guidelines to Regulate Child Participation in the Entertainment Industry*” issued in 2011 (“**2011 Guidelines**”)

The deadline for submission of public comments on the Draft Guidelines was June 24th, 2022.

We have summarised our views and comments on the Draft Guidelines below.

B. ANALYSIS OF THE DRAFT GUIDELINES

1. NCPCR’s power to introduce Draft Guidelines, and evaluate complaints

- The NCPCR has introduced the Draft Guidelines in exercise of its powers under Section 13 of the *Commissions for Protection of Child Rights Act, 2005*² (“**CPCRA**”).
- It appears from a reading of the functions of the NCPCR set out under Section 13³ that it is a purely *recommendatory* body constituted to review safeguards under existing law and recommend measures for their implementation and enforcement. The NCPCR does not have general rule-making powers.
- Section 13(1)(a) of the CPCRA empowers the NCPCR to ‘*examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation.*’ Further, even upon conducting an inquiry, the NCPCR is only empowered to **recommend** that the Central Government take steps to initiate proceedings/grant relief⁴.
- The NCPCR’s residuary powers⁵ must also be interpreted in light of its overall functions of review, inquiry, and recommendation.
- Accordingly, it appears that the NCPCR does not have the authority to introduce the Draft Guidelines, and the Draft Guidelines goes beyond the NCPCR’s mandate under the CPCRA.
- Previously, the Bombay High Court has struck down product guideline advisories issued by the Food Safety and Standards Authority of India (“**FSSAI**”) on the ground that it did not have the force of law, since the FSSAI did not have the power to issue advisories under the *Food Safety and Standards Act, 2006*⁶. The Supreme Court subsequently upheld this ruling⁷. Thus, the Draft Guidelines may be vulnerable to challenge similar grounds.
- If the intent of the NCPCR in introducing the Draft Guidelines is to make recommendations, then the tone and mannerism of the Draft Guidelines needs to be revisited to achieve that objective.

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2. Introducing obligations from special statutes alien to the subject-matter of Draft Guidelines

- The Draft Guidelines seek to import prohibitions and obligations from different statutes dealing with special subjects, i.e., the *Juvenile Justice (Care and Protection of Children) Act, 2015* (“**Juvenile Justice Act**”), the Child Labour Law and the *Prevention of Children from Sexual Offences Act, 2012* (“**POCSO**”).
- The POCSO is an Act to protect children from offences of sexual assault, sexual harassment and pornography⁸.
- The Juvenile Justice Act is a law relating to ‘*children alleged and found to be in conflict with the law*’ and children in need of care and protection, their rehabilitation and social re-integration, etc⁹.
- Accordingly, the subject-matter of the POCSO and Juvenile Justice Act have no nexus with the subject matter of the Guidelines (i.e., children’s participation in the entertainment industry).
- Recently, the Bombay High Court issued an interim stay¹⁰ on certain provisions of the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*, (“**IT Rules**”) in part because certain obligations under the Code of Ethics were imported from statutory regimes* alien to the principal Act (the Information Technology Act, 2000). [*i.e., the requirement to adhere to the *Norms of Journalistic Conduct, 2010* under the *Press Council of India Act, 1978* and the *Programme Code* under the *Cable Television Network Act*]. The Draft Guidelines are liable to challenge on similar grounds.

3. Erroneous interpretation of provisions under Juvenile Justice Act, Child Labour Act, and POCSO

- The provisions of the Juvenile Justice Act, Child Labour Act, and POCSO have been erroneously interpreted while importing them into the Draft Guidelines
- By way of illustration:

Sr. No.	Provision of Draft Guideline	Provision under Statute cited
1)	Draft Guideline 5(d) states that ‘ <i>No child should be engaged in any situation involving nudity (either of the child or other person</i> ’, while citing Section 11(i) and (ii), and Section 13 of the POCSO.	Section 11(i) and (ii) of the POCSO prohibits and penalizes instances of sexual harassment, for instance, making a child exhibit body/part of their body ‘ <i>with sexual intent</i> .’ Section 13 penalizes use of children for creation of pornographic purposes, i.e., <i>for sexual gratification</i> . Nudity of children <i>per se</i> is not prohibited under either of the aforesaid provisions of POCSO.
2)	<i>Draft</i> Guideline 5(c) states that ‘ <i>No child should be shown to be imbibing alcohol, smoking or using any other substance or shown to be indulging in any sort of antisocial activity or delinquent behavior</i> ’, while citing Section 77 of the Juvenile Justice Act.	Section 77 of the Juvenile Justice Act prohibits actually giving intoxicating liquor, narcotic drugs, tobacco products or psychotropic substances to any child, except on order of a qualified medical practitioner, not the <i>depiction</i> of the same in entertainment content. In film, such depiction may be required in certain content to demonstrate social evils. Further, Section 77 of the Juvenile Justice Act is silent on antisocial/delinquent behavior.
3)	Guideline 4(b) seeks to empower the District Magistrate to conduct an inspection of the workplace and issue permits to producers, while citing Section 17B of the Child Labour Act.	Section 17B of the said Act simply empowers the appropriate Government to make periodic inspection at places where ‘ <i>employment of children is prohibited and hazardous occupations or processes are carried out</i> .’ The employment of children as child artists is in fact permitted and regulated under Child Labour Law, and accordingly this provision cannot be applied to producers under the Draft Guidelines.
4)	The Child Labour Act defines a ‘child’ as a person who is below the age of 14 ¹¹ , and an ‘adolescent’ as a person who is between the age of 14-18 ¹² . The Child Labour Law regulates <i>children</i> (i.e., below the age of 14) working as artists in the audio-visual industry, by mandating compliance with conditions prescribed under the Child Labour Rules. Adolescents are not subject to these regulations.	The Draft Guidelines define ‘child’ as a person under the age of 18, and accordingly apply obligations under Child Labour Law to adolescents as well (Guideline 4(a), 4(b)).

If the intention of NCPCR is to protect children during shooting from these issues, then NCPCR may recommend steps to be taken to safeguard such interest. This could include counselling children and their parents before /while shooting stressful or difficult scenes.

4. Vesting authorities with powers in excess of that under statutes

- The Draft Guidelines seek to (i) vest authorities appointed under statutes with additional duties, and powers which they don't have under such relevant statutes, and (ii) constitute additional authorities not provided for under such statutes.

■ To illustrate:

Sr. No.	Provision under Guideline	Provision under Statute
1)	Guideline 24 empowers the inspector appointed under Section 17 of the Child Labour Act to carry out periodical inspections at places where employment of children is prohibited and hazardous occupations or processes are carried out. It further requires inspectors to maintain records of such inspections, as well as number and details of the offences compounded, and details of rehabilitation services provided to children and adolescents under the Act.	The Child Labour Act under which such inspector is appointed, does not vest them with such powers.
2)	Guideline 26 empowers the District Magistrate to appoint nodal officers to exercise duties of the District Magistrate. The District Magistrate is required to ensure rehabilitation of children through such nodal officers.	The Child Labour Act does not contemplate appointment of nodal officers.

- The Draft Guidelines cannot vest the inspector or District Magistrate with such additional powers and obligations sanction, not completed under the principal statute.
- Further, the Child Labour Law, POCSO and Juvenile Justice Acts are special laws with effective procedural machinery for their implementation and enforcement. The NCPCR is not empowered to introduce a new machinery for implementation of existing statutes.

5. Multiplicity of authorities

- The Draft Guidelines reproduce obligations under multiple statutes. Firstly, the statutes already recognizes authorities enforcement under the relevant statute. Therefore, Guideline 25, which seeks to confer NCPCR, the District Magistrate, or the State Commission for the Protection of Child Rights of the relevant State with the authority to hear complaints regarding violations committed against a child under the Draft Guidelines or '*any other law in force*' during a child's participation in the entertainment industry, is overreaching in nature and confers powers and imposes obligations on authorities which were not contemplated by the statutes in the first place.
- Secondly, this potentially creates multiple obligations and multiple regulators to deal with the same issues, resulting in duplicity and complexity. For instance, issues pertaining to child sexual abuse must be dealt with in a holistic manner vide a comprehensive legislation like POCSO.
- Further, such overlap may result in conflict in the jurisdiction of two separate Ministries or regulators. To illustrate:
 - In November, 2021, it was reported¹³ that the NCPCR sought removal of a Netflix series on grounds that it 'normalised minors indulging in casual sex and drug abuse.' It also filed a complaint with the Mumbai Police and the MIB asking them to issue directions against Netflix to remove the scenes. There were accordingly three authorities reviewing the same issue.
 - Accordingly, multiple authorities relating to the same issues, may result in multiplicity of proceedings and duplicity of functions.

6. Draft Guidelines may interfere with free speech, artistic liberty and ease of doing business

- The Draft Guidelines may have interfere with free speech, as they restrict the way in which children may be depicted in entertainment content.
- For instance:
 - Draft Guideline 5(c) states that '*No child should be **shown to be** imbibing alcohol, smoking or using any other substance or **shown to be** indulging in any sort of antisocial activity or delinquent behavior.*' First, the provision from the statute has been misinterpreted, as has been discussed above. Second, in films, context is very important. Such depiction may be required in certain content to demonstrate social evils, or ill-effects of alcohol or smoking on minors. The Supreme Court has recognized¹⁴ that a film illustrating consequences of social evils must necessarily show the social evil, and a film carrying a message that a social evil is evil cannot be made impermissible on the ground that it depicts the social evil.
 - The Bombay High Court had issued an interim stay on the Code of Ethics under the IT Rules (supra), in part because the indeterminate and wide terms of the Code of Ethics could bring about a chilling effect on the fundamental right to freedom of speech and expression of writers, editors and publishers. Similarly, the Draft Guidelines create impediment to artistic impression and free speech and may be liable to challenge.
 - In addition, the onerous obligations introduced by the Draft Guidelines, may hamper ease of doing business for

producers. For instance:

- Draft Guideline 4(c) requires producers to obtain permits from the District Magistrate, upon inspection of its workplace. This is not contemplated under xyz law and goes beyond the requirement of the said law.
- Draft Guideline 7(c) requires all persons involved in the production who may be in contact with a child to submit a medical fitness certificate for not carrying obvious contagious diseases before shooting with children. Guideline 7(c) further requires police verification of all staff to be carried out.
- A production requires a large staff, many of whom may be day workers. Such requirements cause administrative and cost burden on the producers.
- Draft Guideline 11 requires that the identity, personal details of the child should not be revealed without prior permission of parent/guardian. This is a vague requirement because the name and identity of a child acting in a film will be known to the public by way of credits and acknowledgments.

C. CONCLUSION

In view of the above, we are of the view that the Draft Guidelines do not serve the purpose as stated in its objective. It also has several issues, and inconsistencies with existing laws. The NCPCR has recommendatory powers. It may consider making non-binding recommendations to the industry to protect children's right in the media industry (independent of the existing laws). The NCPCR also consider making recommendations to the other ministries for enhancing child protection provisions under existing laws after due consultation with the industry.

— Tanisha Khanna, Aarushi Jain, & Gowree Gokhale

You can direct your queries or comments to the author

¹ Guideline 1(b)

² Guideline 1(b)

³ Section 13. Functions of Commission.-

(1) The Commission shall perform all or any of the following functions, namely:-

(a) examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation; (b) present to the Central Government, annually and at such other intervals, as the Commission may deem fit, reports upon the working of those safeguards; (c) inquire into violation of child rights and recommend initiation of proceedings in such cases; (d) examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures; (e) look into the matters relating to children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles, children without family and children of prisoners and recommend appropriate remedial measures; (f) study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children; (g) undertake and promote research in the field of child rights; (h) spread child rights literacy among various sections of the society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminars and other available means; (i) inspect or cause to be inspected any juvenile custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organisation; where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;

(j) inquire into complaints and take suo motu notice of matters relating to,- (i) deprivation and violation of child rights; (ii) non-implementation of laws providing for protection and development of children; (iii) non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with appropriate authorities; and (k) such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions.

(2) The commission shall not inquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.

⁴ 15. Steps after inquiry.-The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely:-

(i) where the inquiry discloses, the Commission of violation of child rights of a serious nature or contravention of provisions of any law for the time being in force, it may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;

...

(iii) recommend to the concerned Government or authority for the grant of such interim relief to the victim or the members of his family as the Commission may consider necessary.

⁵ Section 13(k) such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions.

⁶ 2014 SCC OnLine Bom 195

⁷ SLP(C) No. 014320 / 2014

⁸ Preamble, POCSO

⁹ Preamble, Juvenile Justice Act

¹⁰ Ajit Promotion of Nineteenonea Media Ltd. & Ors. v Union of India & Anr WP (L) No. 14172 of 2021, Nikhil Mangesh Wagle v Union of India PIL (L) No. 14204 of 2021

¹¹ Section 2[(ii) "child" means a person who has not completed his fourteenth year of age or such age as may be specified in the Right of Children to Free and Compulsory Education Act, 2009 (35 of 2009), whichever is more;]

¹² Section 2[(i) "adolescent" means a person who has completed his fourteenth year of age but has not completed his eighteenth year;]

¹³ <https://economictimes.indiatimes.com/news/india/childs-rights-body-mumbai-police-ib-ministry-spar-over-netflix-series/articleshow/87790510.cms>

¹⁴ Bobby Art International, Etc vs Om Pal Singh Hoon & Ors (1996) 4 SCC 1

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