

Medica Afghanistan- Women Support Organization



[URGENT]

To: Her Excellency the First Lady Ms Rula Ghani  
Office of the First Lady  
The Presidential Palace

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**LETTER OF APPEAL**  
**THE DRAFT PENAL CODE OF**  
**THE ISLAMIC REPUBLIC OF AFGHANISTAN**

Your Excellency,

*A. Letter of Appeal*

1. My name is Humaira Ameer Rasuli I am the Executive Director of Medica Afghanistan – Women Support Organisation (“MA”) a national non-governmental and legal aid organisation in Kabul, Herat and Mazar-e-Sharif. Today, I write on behalf of 17 lawyers and 20 social workers, mediators and psychologists from MA. A profile of MA’s work is annexed herein for your reference.
2. This Letter of Appeal concerns the draft Penal Code finalised by the Ministry of Justice and the EVAW Decree (2010).
3. We write to address Your Excellency on two points:
  - (1) We had submitted to the Criminal Law Reform Working Group (“CLRWG”) our amendments to the draft Penal Code in September 2016. The amendments were not adopted by the CLRWG. As the amendments are of significant importance to the object of the law, we write to appeal the CLRWG’s decision.

The amendments we refer to relate to (1) crimes of violence against women (2) sexual-related offences and (3) general provisions. The amendments are enclosed herein for your consideration;

- (2) Notwithstanding the above, we oppose the bifurcation of the EVAW Decree and the incorporation of its punitive parts into the Penal Code. Instead, we propose that:
  - a. The punitive and preventive parts of the EVAW Decree should be amended and passed as a standalone law; and

- b. That the Penal Code should make explicit reference to the EAW Decree and state that all crimes against women and children shall be strictly governed by the EAW Decree.

### ***B. Timeline of events***

4. On 1 June 2015, the *Afghanistan and EU Human Rights Dialogue* was held and the Afghanistan Government and EU member states agreed to incorporate all penal provisions of the EAW Decree into the draft Penal Code (“DPC”). It was agreed that the remaining preventive provisions from the EAW Decree would remain in force as a Decree. According to the table of deliverables and indicators by all parties, the incorporation was to be completed by the end of December 2016.
5. On 13 July 2016, we published a Position Paper on the EAW Decree and DPC, annexed herein for your record. In our Position Paper, we stated that the EAW Decree should remain a standalone legislation separate from, but read in conjunction with, the Penal Code. We also proposed some amendments to the DPC.
6. Mr Ashraf Rasouli who heads the CLRWG agreed to consider our amendments to the DPC by September 2016. We grabbed the small window of opportunity and amended the DPC.
7. In the period between July and September 2016, we researched best practice laws, CEDAW indicators and interviewed several of our staff including our lawyers, on the ground realities which they confront day-to-day in the courts. With our findings, we amended the DPC and justified each of our amendments with a detailed narrative. They were translated to English and Dari and forwarded to key stakeholders, by email, on 30 September 2016.
8. Our amendments were forwarded to Ms. Esmati Drukshan, Legal Advisor to the Presidential Palace, by email, on 11 January 2017 and to Ms. Habiba Wahaj the consultant for Second Vice President on 30 September, 2016.
9. Several stakeholders including the UN Mission to Afghanistan, UN Women, European Union, Dutch Embassy, Swiss Agency for Development, Afghanistan Ministry of Women’s Affairs, Afghanistan Independent Bar Association, EAW Prosecution Unit and UN Development Program, praised us for providing critical amendments to the DPC.

### ***C. Current status***

10. In February 2017, we received a semi-final copy of the DPC by Mr. Sohrab Ahmad from the President's Office. Most of our amendments were not adopted. This was unfortunate as the amendments were essential to the object of the law, to safeguard and uphold the rights of women.
11. Further, we were informed that the preventive provisions of the EAW Decree would remain in force under “civil law”. However, the Ministry of Justice did not clarify how an amended EAW decree would be incorporated into civil law or if it were to remain a Decree, how it would remain legitimised under the law once the Penal Code was enacted.

12. Our amendments were based on:

- (1) Interviews with 10 of our lawyers and 20 of our social workers, mediators and psychologists from Kabul, Mazar-e-Sharif and Herat;
- (2) A review of the systemic issues our clients have faced in prosecution and defence cases including cases of miscarriages of justice;
- (3) EVAW laws and best practices from several countries;
- (4) CEDAW indicators, case law and CEDAW General Recommendations;
- (5) Legislative drafting handbooks and manuals.

***D. Our amendments to the DPC and its importance to the elimination of violence against women***

13. Our amendments to the DPC can be broadly characterised as follows:

- (1) We have included language in the law to limit judicial discretion and direct Courts on the interpretation of the law, in order to prevent gender-discriminatory interpretations;
- (2) We have included “survivor-centred remedies” like (1) restraining orders [to stop the offender from doing something or prevent the offender from a place], (3) expulsion orders [to expel the offender from an institution] and (3) compensation orders [to compensate the victim], in order to, prioritise women’s *real* immediate and long-term needs;
- (3) We have included provisions to hold the State accountable and/or liable when they fail to take reasonable action to prevent violence, in order to, address systemic failures by the State;
- (4) We have also improved upon the definition of crimes of violence against women and redefined “consent” in sexual-related offences, in order to improve the interpretation of the law and ensure certainty and consistency in its application.

14. We amended the law in great detail as some of the provisions of the DPC were general and open to multiple interpretations. We have experienced that generality in legislation give judges the rein and discretion to introduce discriminatory interpretations and reinforce the status quo. As such, in our amendments, we limited judicial discretion by providing clear interpretive directions for the courts to follow.

***E. EVAW Decree should be amended and passed as a standalone law***

15. Our Position is that the EVAW Law should be amended and passed as a standalone legislation.

16. Several countries in South and East Asia have standalone laws on violence against women in addition to their Penal Codes:

- (1) Pakistan

- (2) Malaysia
- (3) India
- (4) Singapore
- (5) Indonesia
- (6) Bangladesh
- (7) Mongolia
- (8) Sri Lanka
- (9) Nepal
- (10) Japan
- (11) Vietnam
- (12) Cambodia

17. There are several reasons as to why some countries have passed standalone legislation to eliminate violence against women. A critical difference between a traditional Penal Law and a standalone EVAW law is this: The Penal law is mainly concerned with two things (a) punishment and (b) liability of private individual actors, i.e. it punishes individual offenders. On the other hand, a standalone EVAW law is concerned with (a) prevention, punishment and positive action and of (b) liability of private actors and the State. This difference is important because it is a recognition that in order to eliminate violence, we have to legislate beyond punishment of individuals.
18. The EVAW Law must encompass preventive and punitive provisions to effectively address women's multifaceted needs. Punishment alone is not sufficient to eliminate violence against women as it deals with violence post facto (after the fact) and its focus is on the perpetrator and not on, the needs of the survivor. The criminal courts must be granted the competence to order civil remedies which are "survivor-centered" and which prioritize survivors' immediate and long-term needs.
19. In addition, the law should hold the State accountable and liable to take *all reasonable action* to prevent and punish violence and remedy victims. Presently, our laws make the State *responsible* but it falls short of making the State *accountable* and *liable*. The difference between responsibility, accountability and liability is as follows:
  - a. **Responsibility:** The State is responsible to prevent violence. However, the failure to take all reasonable action prevent violence will not attract civil and/or criminal consequences.
  - b. **Accountability:** When the State is accountable to prevent violence, the failure to take reasonable action will require the State to *inquire* into why appropriate action was not taken and *provide an official reply* and apology to the victims and their families. This is how the State is held to account.
  - c. **Liability:** When the State is liable to prevent violence, the failure to take reasonable action will lead to civil and/or criminal consequences against the relevant state department and individual officer(s), including liability to compensate victims.
20. We have to move from the State being (1) *responsible* to (2) being *accountable* and *liable*. State accountability and liability is in line with Article 51 of the Afghanistan Constitution which

recognises a right of action against the State for compensation in the event of violation without due cause.

21. It is also in line with General Recommendation 19 of CEDAW which states that the State must act with **due diligence**.

#### ***F. Conclusion***

22. We believe that to truly achieve gender equality in Afghanistan, we cannot draft laws the way we traditionally do (brief, general and passive). To truly achieve gender equality, we have to ensure that the law is purposeful and deliberate. The law has to introduce language which prevents and corrects existing gender discrimination, and, promotes gender-equal outcomes.
23. We have explained each of our amendment in great detail in the documents enclosed herein.
24. We shall be much obliged to make ourselves available to answer any questions Your Excellency may have in relation to the same.
25. We remain guided by Your Excellency's decision.

#### **Contact:**

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Medica Afghanistan

We strive to end violence against women in Afghanistan.

## **Annex 1**

### **About Medica Afghanistan – Women Support NGO (“MA”)**

Medica Afghanistan started operating in Afghanistan in 2002 as a programme of Medica Mondiale, a non-governmental women’s rights organisation based in Germany that is specialised in providing holistic support to women survivors of sexual violence in war-torn countries and crisis zones around the world.

In 2010, MA became a fully independent women’s rights organisation and was officially registered as an independent national NGO. Today MA is one of only a handful of women’s organisations in Afghanistan whose sole mission is to protect and promote women’s rights and end violence against women. The main focus of its work is to provide psycho-social counselling, legal aid and mediation services to women and girls who have survived domestic violence and conflict. We also professional training to lawyers, doctors, social workers and the religious leaders on the ramifications of violence against women and trauma and gender-sensitive approaches. We conduct independent research programs, public awareness, and lobby for local and national policies to end violence against women and girls. Since 2002, we have provided assistance and advice to approximately 10,000 survivors of violence through their legal aid, mediation, and awareness raising work and counselled 7347 patients.

We are headquartered in Kabul and we have branches in Mazar and Herat Provinces.

**[www.medica-afghanistan.org](http://www.medica-afghanistan.org)**

## **Annex 2**

Position Paper on the bifurcation of EVAW Decree dated 16 July 2016 [attached in email]

## **Annex 3**

Amendments to the DPC dated September 2016 [attached in email]

