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READING MATERIAL

Volume - 3

TRAINING OF EMPANELLED LAYERS IN JHARKHAND ON VIOLENCE AGAINST WOMEN & VIOLENCE AGAINST CHILD

19th & 20th September, 2015 (Saturday & Sunday)
at Jamshedpur

Organized by
Jharkhand State Legal Services Authority (JHALSA)
in association with
Lawyer's Collective Women's Rights Initiative, (LCWRI)
&
District Legal Services Authority, Jamshedpur

This Reading Material is also available on official website of JHALSA "www.jhalsa.org"

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Introduction

Article 15 of the Constitution of India ("Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth") allows for **positive discrimination**. Article 15 (3) of the Constitution of India states, "*Nothing in this article shall prevent the State from making any special provision for women and children.*"

Article 39 ("Certain principles of policy to be followed by the State") directs State policy towards securing "*that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment*" [Article 39 (f)].

The Convention on the Rights of the Child (CRC) 1989 was ratified by India on 12th November 1992. The CRC specifies that in all actions concerning children, "the best interests" of the child shall be a primary consideration [Article 3 (1)].

The POCSO Act, 2012 is a step forward in providing special procedures for children who are survivors of sexual violence. The Preamble to the POCSO Act upholds the principles of the Constitution of India and International Law:

Preamble to the Act

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

WHEREAS clause (3) of Article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India had acceded on the 11th December 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interest of the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child; AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State Parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent –

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Based on a reading of the Constitution of India, Judicial Pronouncements in the Supreme Court of India, the CRC and the POCSO Act, the following Charter of Rights of child survivors has been developed in relation to child survivors of sexual violence:

CHARTER OF RIGHTS OF CHILD SURVIVORS

1. **Right to Privacy and Confidentiality** – The name of the child, the family, educational institution wherein s/he is enrolled, and other information capable of identifying her/him shall be kept confidential [Article 3 of the CRC, Preamble to the POCSO Act, Shankar Kisanrao Khade vs. State of Maharashtra 2013 (6) SCALE 277]
2. **Right to Dignity**- The child survivor shall be treated with dignity and respect at all stages in the matter and by all players including health care workers, police, judiciary, prosecutor, translators, etc. [Article 39 (f) of the Constitution of India, Preamble to the CRC]
3. **Right to Non-Discrimination** – There shall be no discrimination against any child based on religion, race, sex, or caste. For example, girl children cannot be discriminated against by blaming them for their dress / attire for the incident of sexual offence. At the same time, all stakeholders shall be sensitive to any special needs of a child. For instance, disabled children, medically unfit children or very young children will need to be accorded special treatment [Article 15 (1) of the Constitution of India, Article 2 of the CRC].
4. **Child has the right to express his /her views in all matters affecting the child:** The wishes of the child shall be given priority when decisions regarding institutionalization, medical examination of the child and appointment of a support person. The views of the child shall be given due weight in accordance with the child's age and level of maturity (Article 12 of the CRC).
5. **Right to Safety and Well Being** – The best interest and well being of the child survivor must be regarded as being of paramount importance at every stage of the trial. Each stakeholder under the Act shall act with sensitivity to the healthy physical, emotional, intellectual and social development of the child (Preamble to the POCSO Act). In Shankar Kisanrao Khade vs. State of Maharashtra 2013 (6) SCALE 277, the Supreme Court laid down various guidelines for stakeholders under the Act, and held that in cases where the perpetrator of the crime is a family member, utmost care must be taken bearing in mind the best interest of the child is of paramount consideration.

6. **Child has a right to be protected from all forms of sexual exploitation by the State:** There can be no exemption for committing sexual intercourse with a child – not even if the accused is married to the child (Article 34 of the CRC, Section 42A of the POCSO Act)
7. **Right to Medical Treatment:** The child survivor shall not be denied medical treatment (section 27 of the POCSO Act). The dynamics of child sexual abuse differ from those of adult sexual abuse. In particular, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behavior. Therefore, the evaluation of children requires special skills and techniques in history taking, forensic interviewing and examination; the examiner may also need to address specific issues related to consent and reporting of child sexual abuse [The International Covenant on Economic Social and Cultural Rights, General Comment 14, Right to Health (11th August 2004), Guidelines for medico-legal care for survivors of sexual violence, World Health Organization, 2003].

The NCPCR and all State Commissions have been given the onerous responsibility of monitoring the implementation of the Protection of Children from Sexual Offences Act 2012 under Section 44 of the Act and Rule 6 of the Central POCSO Rules. To take this mandate forward, Monitoring Guidelines for the Police, Special Courts, Special Prosecutors have been prepared by Lawyers Collective Women's Rights Initiative as a technical partner for NCPCR with support from UNICEF.

In order to conduct the exercise of Monitoring and Evaluation, NCPCR or SCPCR are mandated to systemize the process of data collection by compiling information from the implementing agencies functioning under the Act. Questionnaires, which correspond with the duties and statutory obligations of the agencies, can be used to collect data. Accordingly, the data collected can be contextualized and evaluated by any concerned person to gauge the effectiveness, efficiency and impact of measures taken to implement the Act. These Monitoring Guidelines contain questions for monitoring the fulfillment of roles of the stakeholders under the Act. The purpose of providing monitoring questions for stakeholders is to increase efficiency in service delivery and prevent instances of child sexual abuse. The list of monitoring questions provided at the end of each chapter can be used for quarterly collection of data by the NCPCR, which can be compiled to form the Annual Report under section 44 (3) of the POCSO Act.

Cases of child sexual abuse can be brought to the notice of the NCPCR through various sources. For example, information may reach the NCPCR through print media and newspapers, through NGOs, or through complainants approaching the Commission directly. Such cases require monitoring by the NCPCR as well. In this regard, it is recommended that:

- i. As far as possible NCPCR / SCPCR should try and follow a case till the conclusion of the trial.
- ii. For each case a Fact Sheet, Action Taken by NCPCR/SCPCRs and a Response sheet should be prepared
- iii. Monitoring of complaints received from agencies like NGOs, institutions, RWAs, Unions etc: They require monitoring as they have not yet reached the criminal justice functionaries. These have to be followed till they are registered as FIR's in the police system. If they have not been registered, then it has to be examined why not. Once the NCPCR/SCPCR has the information then regular updates of cases can be automatically asked from the authority/ organization till the case reaches its logical conclusion Also the role of State Legal Services Authority can be roped in for giving legal and para legal help to the victim and family. The role of State Commission can also be reviewed, and the good practices noted and shared.

- iv. There should be separate monitoring system for the complaints received directly by NCPCR/SCPCR
- v. With regard to cases reported in the media, it is the duty of the Commission to follow the case until FIR is registered. In case the FIR is not registered, the reasons must be monitored by the Commission.

OBJECTIVES OF THE MONITORING GUIDELINES FOR THE CWC'S AND HEALTH PROFESSIONALS

- The objectives of the Guidelines for CWC's / Support Persons are:
 - Identifying the roles and responsibilities of the CWC with regard to assisting the child in need of care and protection including general rules of procedure;
 - Identifying indicators to assess the response of CWC's to child survivors;
 - Identifying who are Support Persons under the Act, and indicators to assess their response to child survivors.
- The objectives of the Guidelines for Health Institutions are:
 - To clarify provisions of comprehensive medical care, carrying out history seeking medico legal examination, and evidence collection, preservation of medical evidence and maintaining chain of custody and provision of psycho social support to survivors of sexual assault;
 - Identifying indicators for assessing the response of health institutions to child survivors

In the Monitoring Guidelines, clarifications of the scope of the POCSO Act and promoting the best interest of the child are primary objectives.

LIST OF ABBREVIATIONS

CEHAT: Centre for Enquiry into Health and Allied Themes

CFCA: Children Found Co-Habiting with Accused

CLA Act: The Criminal Law (Amendment) Act 2013

CRC: The United Nations Convention on the Rights of the Child, 1990

Cr.P.C: The Code of Criminal Procedure, 1973

CSA: Child Sexual Abuse

CWC: Child Welfare Committee

DCPU: District Child Protection Unit

FIR: First Information Report FSL Report: Forensic Science Laboratory Report

G.P: General Practitioner

IPC: The Indian Penal Code, 1860 ITPA: The Immoral Traffic (Prevention) Act, 1956 J.J Act: The Juvenile Justice (Care and Protection of Children) Act, 2000

LCWRI: Lawyers Collective, Women's Rights Initiative

MCU: Medical Care Unit

MOHFA: Ministry of Health and Family Welfare

NGO: Non-Government Organization

NCPCR: The National Commission for Protection of Child Rights

PCPP: Police Care and Protection Report

POCSO: The Protection of Children from Sexual Offences Act, 2012

RI: Rigorous Imprisonment

SCPCR: State Commission for Protection of Child Rights

SJPU: Special Juvenile Police Unit

SOP: Standard Operating Procedures

STI: Sexually Transmitted Infection

UNICEF: The United Nations Children's Fund

U/s: Under section

INTRODUCTION TO THE POCSO ACT

The Figures

There were a total of 24,915 victims of rape out of 24,923 reported rape cases during the year 2012. Out of these, 1051 rapes were perpetrated on children under 10 years of age. 12.5% (3,125) of the total victims of rape were girls under 14 years of age, while 23.9% (5,957 victims) were teenaged girls in the age group of 14 to 18 years. (National Crime Records Bureau 'Crimes in India' 2012).

Why a separate law on Child Sexual Abuse?

The Rationale

As there was no other law governing child sexual abuse until 2012, sections 354, 509, 377 and where appropriate, section 376 of the Indian Penal Code, 1860 (IPC) were invoked to cover cases of child sexual abuse. Sections 4 (1), 5 (d), 7 of the Immoral Traffic (Prevention) Act, 1956 (ITPA) applied to children in prostitution. The Juvenile Justice (Care and Protection of Children) Act, 2000 applies to sexual offences by children.

- Prior to the Criminal Law (Amendment) Act of 2013, Section 376 of the IPC only covered penetration of the penis into the vagina in the definition of "rape".
- Sexual offences in the IPC are gender specific. The provisions (with the exception of section 377) only apply to women as victims, while the perpetrators are male.

Key Features of POCSO, 2012

- **The definition of sexual offences is broad** and not restricted to rape. The Act protects children of both sexes from offences of sexual assault, sexual harassment, and pornography – for example, penetration by objects, touching with sexual intent, or showing pornography to a child.
- The POCSO Act ensures **effective access to justice**. The Act provides for the establishment of special procedure for reporting of cases, special procedures for recording statement of a child, and Special Courts for the trial of such offences.
- The POCSO Act makes **abetment of, and attempt to commit an offence under the POCSO Act** punishable.

Duty to Inform (Sections 19 and 20)

- The Act provides for mandatory reporting of sexual abuse of a child or apprehended sexual abuse of a child. Any person (including a child) who has apprehension that an offence is likely to be committed, or has knowledge that an offence has been committed shall provide such information to the Special Juvenile Police Unit or the local police [section 19 (1)].
- In case any personnel of the media or hotel, lodge, hospital, club or a studio or photographic facilities comes across any child pornography (through any medium), he shall provide such information to the Special Juvenile Police Unit or the local police (section 20).
- False complaints with the intention to humiliate, extort, or threaten or defame someone are punishable under the Act. However, a person who provides information about the occurrence of a sexual offence in good faith will not incur any liability [section 19 (7)].

Against whom can a complaint be filed?

- Both men and women can be offenders under the Act. Offences under sections 3 (a) and 5 (j) (ii) involve penetration by the penis and can be perpetrated only by men. Specifically:
 - Section 3: A person is said to commit “penetrative sexual assault” if (a) *“he penetrates his penis, to any extent, into the vagina, mouth, urethra, or anus of a child or makes the child to do so with him or any other person”*;
Since the words *“any other person”* are used in section 3 (a), women may also be offenders or victims under the second part of section 3 (a).
 - Section 5 (j): Whoever commits penetrative sexual assault on a child, which - (ii) in the case of female child, makes the child pregnant as a consequence of sexual assault.

In offences under sections 3 (a) and 5 (j) (ii), women can be joined as abettors under section 16. Moreover, in case of commission of such offences by men in conspiracy with women, section 120-B, IPC, may be invoked to prosecute such accused women.

The other clauses in section 3 and section 5 may be committed by women as well.

Offences under section 11 (—sexual harassment²) and section 13 (—use of child for pornographic purposes) are gender neutral and may be committed by a man or a woman against a male or a female child.

- The POCSO Act is only applicable to child survivors and adult offenders. In case two children have sexual relations with each other, or in case a child perpetrates a sexual offence on an adult, the Juvenile Justice (Care and Protection of Children) Act, 2000, will apply.

What is a Child? [Section 2(d)]

- A child under the Act means any person below the age of eighteen years.

What is Child Sexual Abuse?

For the sake of convenience, offences may be divided into two specific categories: (i) Penetrative; and (ii) Non penetrative sexual offences.

- **Penetration** is defined in section 3 as penetration of the penis into any orifice of a child’s body, insertion of an object into the vagina, urethra, or anus of a child,

manipulating the body of a child so as to cause penetration into the vagina, urethra or anus, and applying the mouth to the vagina, penis, anus or urethra of a child.

- **Non penetrative sexual offences are sexual assault (section 7), sexual harassment (section 11).** Sexual assault involves any form of physical contact without penetration with a child with sexual intent. Sexual harassment constitutes verbal acts, showing pornography to a child, constantly following or watching a child, threatening to use depiction of a child involved in a sexual act, and enticing a child for pornographic purposes.

Degrees of Child Sexual Abuse

- Under the Act, certain acts committed along with penetrative sexual assault are listed as 'aggravated' and stricter punishment is accorded to these offences.
- **Aggravated penetrative sexual assault (section 5):** For example, penetrative sexual assault by a police officer within the limits of the police station at which he is posted, or gang rape by any person committing penetrative sexual assault, or penetrative sexual assault by any person leading to grievous hurt, or bodily harm and injury or injury to the sexual organs of a child.
- **Aggravated sexual assault (section 9):** For example, sexual assault by a police officer within the limits of the police station at which he is appointed, gang sexual assault by any person, or sexual assault by any person leading to grievous hurt, or bodily harm and injury, or injury to the sexual organs of the child.

Table 1. List of offences under the Act and the Punishment for the offence:

S.No	Offence and Description	Punishment under POCSO
1.	Section 3 Penetrative Sexual Assault Inserting body part or object in a child, or making a child does this with another.	Section 4 Not less than seven years of imprisonment which may extend to imprisonment for life, and fine
2.	Section 5 Aggravated Penetrative Sexual Assault Penetrative sexual assault by a police officer, member of armed forces, public servant, staff of remand home, jail, hospital or school. It includes penetrative sexual assault committed by any other person through gang penetrative assault, penetrative sexual assault using deadly weapons, fire, heated substance or corrosive substance, penetrative sexual assault which physically incapacitates the child or causes child to become mentally ill, causing grievous hurt or bodily harm and injury to the sexual organs of the child, making girl child pregnant, inflicting child with HIV or any other life threatening disease, penetrative sexual assault more than once, penetrative sexual assault on a child younger than 12 years, by a relative, owner / manager or staff of any institution providing services to the child, by a person in a position of trust or authority over the child, committing penetrative sexual assault knowing the child is pregnant, attempts to murder the child, by a person previously convicted for a sexual offence, penetrative sexual assault in the course of communal or sectarian violence, penetrative sexual assault and making the child strip or parade naked in public.	Section 6 Not less than ten years of imprisonment which may extend to imprisonment for life, and fine

3.	Section 7 Sexual Assault With sexual intent touching the private parts of a child	Section 8 Not less than three years of imprisonment which may extend to five years, and fine
4.	Section 9 Aggravated Sexual Assault Sexual assault by a police officer, member of armed forces, public servant, staff of remand home/jail/hospital/school, etc, and other acts of sexual assault by any person as mentioned in the second part of section 5, except making a girl child pregnant.	Section 10 Not less than five years of imprisonment which may extend to seven years, and fine (Section 10)
5	Section 11 Sexual Harassment of the Child With sexual intent: <ul style="list-style-type: none"> • showing any object/body part, or making any gesture aimed at a child • making a child exhibit her body • enticing or threatening to use a child for pornography 	Section 12 Up to three years of imprisonment and fine
6	Section 13 Use of Child for Pornographic Purposes	Section 14 (1) Imprisonment up to five years and fine and in the event of subsequent conviction, up to seven years and fine
7	Section 14 (2) Penetrative sexual assault by directly participating in pornographic acts	Section 14 (2) Not less than ten years of imprisonment, which may extend to imprisonment for life, and fine
8	Section 14 (3) Aggravated penetrative sexual assault by directly participating in pornographic acts	Section 14 (3) Rigorous imprisonment for life and fine
9	Section 14 (4) Sexual assault by directly participating in pornographic acts	Section 14 (4) Not less than six years of imprisonment which may extend to eight years, and fine
10	Section 14 (5) Aggravated sexual assault by directly participating in pornographic acts	Section 14 (5) Not less than eight years of imprisonment which may extend to ten years, and fine
11	Section 15 Storage of pornographic material involving a child for commercial purposes	Section 15 Three years of imprisonment and / or fine

12	<p>Section 21 Punishment for failure to report or record a case by (i) Any person; (ii) Any person, being in charge of any company or an institution. (This offence does not apply to a child)</p>	<p>Section 21 (i) Imprisonment of either description which may extend to six months or with fine or with both (ii) Any person, being in charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub section (1) of section 19 in respect of a subordinate under his control shall be punished with imprisonment for a term which may extend to one year and with fine.</p>
13	<p>Section 22 (1) Punishment for false complaint or false information in respect of an offence committed under sections 3, 5, 7 and section 9 solely with the intention to humiliate, extort or threaten or defame him. (3) False complaint or providing false information against a child knowing it to be false, thereby victimising such child in any of the offences under this Act. (This offence does not apply to a child)</p>	<p>Section 22 (1) Imprisonment for a term which may extend to six months or with fine or with both. (3) Imprisonment which may extend to one year or with fine or with both.</p>

The POSCO Act is a special law and it has not specified which offences are cognizable and, therefore, to determine which of the POSCO Act offences cognizable and non-bailable, reliance are must be placed exclusively on Part II (“Classification of Offences against Other Laws”), First Schedule of the Code of Criminal Procedure, 1973. **Whenever the punishment is less than 3 years of imprisonment, the offence would be non-cognizable and bailable. Any higher term of imprisonment beginning from 3 years and above would make such offence cognizable and non-bailable.**

Hence all sections are cognizable, with the exception of section 21 and section 22 which are non cognizable and bailable offences.

The Criminal Law Amendment Act of 2013 amended the IPC so as to include sexual offences other than penetration as penal offences. Many of the POSCO offences are now also covered in the Indian Penal Code (IPC) following the Criminal Law Amendment Act of 2013.

Section 42 of POSCO states **“Alternate Punishment”** *Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”*

Section 42A states **“Act not in derogation of any other law”** *The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”*

The following table compares provisions of IPC with POSCO to check which statute will apply where offences overlap.

Table 2: Applicability of IPC or POCSO in overlapping offences

S.No	Offence and Description	Punishment under IPC	Whether Punishable under IPC or POCSO
1	Section 166 A Public servant disobeying directions under law - A public servant who- (a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence, or (b) knowingly disobeys to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or (c) fails to record any information given to him u/s 154 (1) of the Cr.P.C in relation to cognizable offence punishable u/s 326 A, 326B, 354, 354B, 370, 370A, 376, 376A, 376B, 376C, 376D, 376E, 509,	Six months rigorous imprisonment which may extend to two years, and shall also be liable to fine	IPC. Failure to record an offence u/s 19 (2) of POCSO shall be punished with imprisonment of either description which may extend to six months or with fine or with both.
	Commits an offence under the section..		
2	Section 354 A Sexual Harassment consists of; Any of the following offending acts of a man (i) physical contact and advances including unwelcome and explicit sexual overtures; (ii) a demand or request for sexual favours; (iii) showing pornography against the will of the woman; (iv) making sexually coloured remarks.	Rigorous imprisonment which may extend to three years or with fine, or with both for clause (i) to clause (iii). Imprisonment of either description which may extend to one year or with fine or both for clause (iv)	The definition of sexual harassment is different under POCSO. POCSO carries the greater punishment for uttering any words or sounds with sexual intent under section 11 (i). Showing pornography against the will of the woman carries the greater punishment under IPC. Under section 11 (iii) of POCSO showing pornography to a child with or without its consent is an offence. Physical contact is covered under "sexual assault" (s.7) of POCSO, which carries the greater punishment.

	<p>Section 354B Assault or use of criminal force to woman with intent to disrobe is an offence.</p>	<p>Not less than three years imprisonment which may extend to seven years and shall also be liable to fine?</p>	<p>POCSO Act, section 9 (u) makes it an offence to commit sexual assault on a child and to make it strip or parade naked in public and punishes it with imprisonment not less than 5 years but which may extend up to 7 years and fine. When such offence is accompanied by penetrative sexual assault as defined under section 5 (u) of the POCSO Act, the same is punishable under section 6 of the POCSO Act with RI for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.</p>
	<p>Section 354C Voyeurism – is an offence by a man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed.</p>	<p>First conviction – One year imprisonment which may extend to three years and fine Subsequent conviction – Three years imprisonment which may extend to seven years and shall also be liable to fine</p>	<p>IPC. No such offence exists under POCSO.</p>
	<p>Section 354 D Stalking is an offence by a man who (i) follows a woman and contacts or attempts to contact her to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or (ii) monitors the use by a woman of the internet, email, or any other form of electronic communication.</p>	<p>First conviction – Imprisonment which may extend to three years and shall also be liable to fine Subsequent conviction – Imprisonment which may extend to five years and shall also be liable to fine</p>	<p>Under section 11 (iv) of POCSO repeated or constant following, watching, contacting a child with sexual intent is punishable with three years imprisonment and fine. IPC carries the greater punishment for subsequent offence.</p>

	<p>Section 370 Trafficking of Persons is an offence committed by a person who for the purpose of exploitation (a) recruits (b) transports (c) harbours (d) transfers or (e) receives a person/s by firstly using threats, secondly, using force / coercion, thirdly, by abduction, fourthly, by practicing fraud, fifthly, by abuse of power or sixthly by inducement commits the offence of trafficking. Exploitation includes sexual exploitation.</p>	<p>Section 370 (4), 370 (5), 370 (6) deal with trafficking of minors. The offence is punishable with rigorous imprisonment for not less than ten years imprisonment but which may extend to life and shall also be liable to fine</p>	<p>IPC. No such offence exists under POCSO.</p>
	<p>Section 370 A Exploitation of a trafficked person is an offence by anyone – who knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation.</p>	<p>Rigorous imprisonment for not less than 5 years which may extend to seven years and shall also be liable to fine</p>	<p>IPC. No such offence exists under POCSO.</p>

<p>Section 375 A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will. Secondly.—Without her consent. Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent. Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora. Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exception 1.—A medical procedure or intervention shall not constitute rape. Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]</p>	<p>Section 376 Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine. (2) Whoever,— (a) being a police officer, commits rape— (i) within the limits of the police station to which such police officer is appointed; or (ii) in the premises of any station house; or (iii) on a woman in such police officer’s custody or in the custody of a police officer subordinate to such police officer; or (b) being a public servant, commits rape on a woman in such public servant’s custody or in the custody of a public servant subordinate to such public servant; or (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or (d) being on the management or on the staff of a jail, remand home or other place of custody established</p>	<p>Under section 5 (m) of POCSO whoever commits penetrative sexual assault on a child below 12 years shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life and shall also be liable to fine. Under section 376 (i) of the IPC rape of a woman under 16 years of age is punishable for a term which shall not be less than ten years but which may extend to life and shall also be liable to fine. Hence, rape of a girl aged 12 years to 16 years carries greater punishment under IPC. Exception 2 of section 375 IPC is inconsistent with POCSO. Hence POCSO has overriding effect and marital rape of a minor is an offence under POCSO.</p>
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		<p>by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or (g) commits rape during communal or sectarian violence; or (h) commits rape on a woman knowing her to be pregnant; or (i) commits rape on a woman when she is under sixteen years of age; or (j) commits rape, on a woman incapable of giving consent; or (k) being in a position of control or dominance over a woman, commits rape on such woman; or (l) commits rape on a woman suffering from mental or physical disability; or (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or (n) commits rape repeatedly on the same woman,</p>	
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		shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine	
	<p>Section 376 A Punishment for causing death or resulting in persistent vegetative state of victim- Whoever commits an offence punishable under subsection (1) or (2) of S 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state</p>	Rigorous imprisonment for not less than 20 years, but which may extend to imprisonment for life (remainder of that person's natural life) , or with death	IPC. No corresponding section in POCSO.
	<p>Section 376 C Sexual intercourse by a person in authority- Whoever, being- (a) in a position of authority or in a fiduciary relationship; (b) a public servant; (c) superintendent or manager of a jail, remand home or other place of custody or a women's or children's institution; or (d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape.</p>	Rigorous imprisonment of either description for a term which shall not be less than five years, but may extend to ten years, and fine	POCSO [section 5 (p)]
	<p>Section 376 D Gang Rape- When a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape</p>	Rigorous imprisonment for not less than 20 years and may extend to life (remainder of that person's natural life), and with fine (the fine shall be paid to the victim and shall be just and reasonable to meet the medical expenses and rehabilitation of the victim)	IPC. Under section 5 (g) of the POCSO if the offence is committed on a child it is punishable with minimum imprisonment of 10 years which may extend up to life imprisonment and fine as provided under section 6.

	<p>Section 376 E Punishment for repeat offenders- Whoever has been previously convicted of an offence punishable under 376, 376A or 376D and is subsequently convicted of an offence punishable under any of the said sections</p>	<p>Imprisonment for life (remainder of that person's natural life), or with death</p>	<p>IPC. Under sections 5 (t) and section 9 (t) of the POCSO Act a previous convict of an offence under the POCSO Act when commits penetrative sexual assault or sexual assault on a child, as the case may be, is liable to severe punishment, and these offences cover a wider sphere than under section 376 E, IPC.</p>
	<p>Section 509 Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, of that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman,</p>	<p>Simple imprisonment for a term which may extend to three years, and also with fine</p>	<p>Section 509 IPC and section 11 (i) POCSO carry the same punishment</p>

Special Procedures under the Act

- Recognizing that children survivors of sexual assault are vulnerable, the Act puts in place special child friendly procedures to assist a child in recording his/her statement at all stages (for details, please see the recommendations and guidelines below).

Continuing Obligations

- Training and sensitization of the police and other stakeholders, such as health professionals and Child Welfare Committees in handling cases under POCSO;
- Training and sensitization programs for members of the judiciary;
- Establishment of Special Courts and appointment of Special Prosecutors;
- **Supreme Court in Exploitation of Children in Orphanages in State of T.N vs. Union of India 2013 (1) SCALE 260** directed the State Governments to indicate what measures have been taken for setting up Special Courts. In case the Special Courts have been set up, the Court directed that the status report shall indicate the number of such Special Courts established. In the event, Special Courts have not been established, the status report should indicate the maximum time limit within which such Courts will be established.

Note: *The primary responsibility for dissemination of the law is on the Central and State governments (section 43).*

ROLES AND FUNCTIONS OF THE CWC'S UNDER THE POCSO ACT ROLE OF NCPCR IN MONITORING: WHAT TO MONITOR AND HOW TO MONITOR

The following are in the nature of guidelines to Child Welfare Committees in discharge of their functions under the Protection of Children from Sexual Offences Act, 2012.

GENERAL GUIDELINES

1. Definitions

1.1 In these Guidelines, unless otherwise stated or otherwise required in the context, words and expressions listed hereunder shall have the following meaning:

- (a) "Claimant Relatives" means Relatives who ask to be granted custody of the child;
- (b) "Code" means The Code of Criminal Procedure, 1973;
- (c) "Concerned Relatives" means Relatives that are summoned to appear before the CWC or who apply to be heard by the CWC;
- (d) "Guardians Acts" means The Guardians and Wards Act 1890 and / or The Hindu Minority and Guardianship Act 1956 as amended from time to time;
- (e) "Immediate Relative" means parents (including accused parents), grandparents and siblings (including child siblings);
- (f) "Other Relatives" means any relative other than an Immediate Relative;
- (g) "POCSO Rules" means rules notified under POCSO;
- (h) "Relatives", "family", "family members" and cognate expressions refer to Immediate Relatives and Other Relatives collectively or individually as determined in the context;
- (i) "SCPCR" means State Commission for the Protection of Child Rights;
- (j) "Support Person" means a person or organization assigned by the CWC, in accordance with sub-rule (8) of rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act;
- (k) "Survivor" in these guidelines, means a child who was a victim of any of the offences under the POCSO Act and is recovering, or has recovered from the sexual offence.

2. Legal Background & Managing Multiplicity of Legal Regimes

2.1 In cases of sexual offences against children, recourse is provided under the following statutes:

- (a) The Protection of Children from Sexual Offences Act, 2012
- (b) The Juvenile Justice (Care and Protection of Children) Act, 2000
- (c) The Guardians and Wards Act 1890 or The Hindu Minority and Guardianship Act 1956
- (d) The Indian Penal Code, 1860
- (e) The Code of Criminal Procedure, 1973

2.2 Child Welfare Committees are advised to familiarize themselves with each of these statutes, so that decisions may be taken in each case keeping in view the overall legal regime that governs sexual offences against children. In cases involving pornography,

the internet and stalking, CWCs are advised to familiarize themselves with the relevant laws in addition to the statutes listed above.

- 2.3 Where there are multiple statutes governing a particular issue, there is the challenge of conflicting rules and overlap of jurisdiction of different authorities. This result in the legal and regulatory regime provided for dealing with a particular class of offence being clogged with disputes on interpretation of rules and decisions on substantive issues being stalled owing to confusion on technical issues such as jurisdiction. Child Welfare Committees are therefore advised to construe the multiple legal regimes governing children facing sexual offences in a manner that avoids such complications so that such children are given speedy and efficacious support as envisaged under POCSO.
- 2.4 Keeping the above principle in mind, CWCs should adopt the following approach when applying POCSO:
- (a) POCSO should be construed as far as possible harmoniously with the other statutes governing this area of the law, keeping in mind the rule stated in Section 42A of POCSO which provides that the provisions POCSO “shall be in addition to and not in derogation of the provisions of any other law for the time being in force”
 - (b) If there is a conflict between what is stated in POCSO and what is stated in some other law, then as per Section 42A of POCSO, it shall override any such other law. However, ordinarily, laws should not be interpreted as being inconsistent with each other.
 - (c) Since POCSO is a special law for dealing with sexual offences against children, if a special procedure is laid down in this Act then, it will apply and procedures prescribed under general laws will to this extent be treated as having been modified.
 - (d) Where POCSO is silent on recourse that may be had in relation to a child in a particular set of circumstances, the CWC shall refer to the other laws as referred to in Guideline 2.1, above to provide redress to the child, and where applicable, its family.
 - (e) In cases where the law provides a remedy but the CWC is itself not authorised to pass decisions (as for instance under the Guardians Acts), the CWC shall refer the parties before it to the appropriate authority and shall use its good offices with the District, State and National authorities and government officials constituted or designated for dealing with issues of child welfare to assist the child and its family in obtaining redress before the appropriate forum.
 - (f) In cases where the CWC has powers to give redress, but under a different law than POCSO (as for instance under the JJ Act), it shall without any delay take steps to initiate redress under such other law, including by advising the police or other parties before it to make a formal application under such law. In such cases, while the CWC shall follow the rules and procedures under the relevant law, it shall at all times attempt to supplement such rules and procedures, as far as possible, with the rules laid down in POCSO and apply these Guidelines in making its decision under such other law. By way of illustration: Say there is a case where the CWC turns to the JJ Act for a remedy not provided in POCSO, when making its decision under the JJ Act, the CWC should ordinarily apply

the time limits provided in POCSO or these Guidelines for grant of remedy to children.

3. Overview of powers of CWC in cases of sexual assault against children

Main Role of CWC

- 3.1 The main role of the CWC under POCSO is to provide assistance to children who are alleged to be victims of sexual assault and, where applicable, their families, in obtaining care and protection. This role has been given to the CWCs in recognition of the fact that in cases of sexual assault it is important to look beyond the investigation and trial of the alleged perpetrator to providing assistance to the children in such cases who are in need of care and protection.

Who initiates the case before the CWC?

- 3.2 Under section 19 (6) of POCSO, it is the SJPU or local police that will report and produce a child before the CWC. So cases before the CWC will be initiated by the SJPU or local police. If the case under POCSO is brought to the notice of the CWC directly, the CWC shall inform the police / SJPU of the case.

In what circumstance can a child be brought before the CWC?

- 3.3 Rule 4(3) of the POCSO Rules lists the following circumstances in which a child is to be brought before the CWC. The child is:
- (a) living in the same or shared household with a person who the police allege has committed or is likely to commit or attempt to commit an offence under POCSO (such children are hereinafter referred to as “Children Found Co-Habiting with Accused” or “CFCA”);
 - (b) living in a child care institution and does not have parental or other family support, i.e., is either orphaned or abandoned in such institution (such a child is hereinafter referred to as “Institutionalized Child/Children”); or
 - (c) is found without any home or parental or other family support (such a child is hereinafter referred to as “Destitute Child/Children”).

In addition, Section 19(5) of the POCSO and Rule 4(3) of the POCSO Rules state that such a child should be determined by the SJPU or local police for reasons recorded in writing to be a child in need of care and protection (this report is hereinafter referred to as the “Police Care and Protection Report” or “PCPP”). Monitoring Questions for the NCPCR in a case referred to the CWC 1. Under what circumstances was the case referred to the CWC for inquiry/ assessment?

4. General Rules of Procedure for CWCs

- 4.1 To ensure a fair and just proceeding, the CWC considering a case initiated under POCSO may look for guidance to the procedures laid down for CWCs in cases initiated under the JJ Act. The JJ Act provides in Section 54 that the procedures for enquiries by the CWC should be, to the extent possible, as provided for in a summons-case for trial under the Code. The CWCs considering POCSO cases are advised to proceed in their inquiries according to these rules.
- 4.2 CWCs acting under POCSO are also advised, when conducting searches or other investigations, to act within the procedures and limits of the powers of a magistrate of the first class under the Code as has been provided for CWCs under the JJ Act in Section 29(5) thereof.

- 4.3 The constitution of the CWC shall be as provided in the JJ Act, subject to the following: The quorum for CWCs considering cases under Rules 4(4), 4(5) and/or 4(6) of the POCSO Rules shall include at least two members each having not less than 10 years of active experience as litigator (pleader) or judge, or a combination of experience as litigator (pleader) and judge totaling 10 years. Any decision under the said rules that does not have the concurrence of at least one such member shall require consent of all other members of the CWC. Subject to the foregoing, all decisions by the CWC may be taken by a majority of those present and voting.
- 4.4 In making any decision (whether at the initiation of proceedings under POCSO, or thereafter, including when reviewing previous decisions) as to the custody of the child, of whatever duration, the CWC should facilitate participation in such decision of the non-accused parents and where they are both dead, unable to participate or untraceable, of the non-accused Relatives (other than the parents) of the child. The CWC should also give the accused parent an opportunity to be heard in relation to the custody of the child. To the extent that the CWC is considering refusal of custody or permanent or temporary termination of custody of a Claimant Relative, it must treat the Claimant Relative as a respondent in a judicial proceeding who is contesting denial of custody to them with all attendant rights of natural justice, due process and a fair hearing. In order to achieve this, the CWC should in relation to any proceedings under or ancillary to Rule 4(4) or (5):
- (a) give notice of such proceedings, where possible in advance, to the parents and where they are both accused, dead, unable to participate or untraceable, to all other non-accused Relatives;
 - (b) make efforts to trace the non-accused parents and where they are both accused, dead, unable to participate or untraceable, to trace all other non-accused Relatives (including minor siblings) and to issue and publish summonses upon them;
 - (c) conduct proceedings in the mother tongue of the Concerned Relatives or provide them with competent translators so as to ensure that they follow the proceedings;
 - (d) assist Concerned Relatives in obtaining legal representation;
 - (e) furnish Concerned Relatives with the entire case record and all documents or other evidence or materials being considered by the CWC in arriving at any decision in such proceedings;
 - (f) ensure a full and fair hearing to Claimant Relatives prior to passing any orders;
 - (g) permit Claimant Relatives to cross-examine any party (other than the child) testifying before the CWC against grant of custody to them;
 - (h) keep the parents and Immediate Relatives, and where they are all accused, dead, unable to participate or untraceable, the other Concerned Relatives informed as to where the child has been placed by the CWC; and
 - (i) give full copies of all orders passed by it to the Concerned Relatives and arrange for official translations thereof in a language known to such parties upon their request.

5. Action to be taken by CWC on receipt of report or production of child before it

- 5.1 On being apprised of a case by the SJPU or local police, the CWC should first ascertain whether the PCPP has been filed.

5.2 If the PCPP has not been filed, the CWC must insist that the PCPP be produced without further delay and in any event within the period of 24 hours as prescribed under Rule 4(3) of the POCSO Rules. This is an important safeguard to ensure that the SJPU or local police adhere to the procedures laid down under POCSO. Requiring the police to officially state their reasons for producing the child before the CWC will also help to curb misuse of POCSO provisions for fraudulent purposes, such as illegal trafficking of children or failure of the police to make adequate efforts to trace the parents and relatives of Destitute or Institutionalized Children.

6. Action to be taken by CWC where the child produced before it is not a CFCA, Institutionalized Child or Destitute Child

6.1 The CWC should commence its assessment by first verifying whether the child is a CFCA, Institutionalized Child or Destitute Child. If the child does not fall into any of these categories, the CWC should ask the SJPU or police, as the case may be, to explain why the child has been produced before it and also ask for the children's current guardians or Relatives to be produced before it, so that they may be enabled to take over custody and care of the child. In such cases, the CWC may also advise the guardians or relatives as to what recourse they may have for financial, medical or legal assistance. In case of any objection to the current guardian or custodian, the party raising the objection may be advised to take action under the appropriate Guardian Act.

7. Detailed Assessment by CWC under Rule 4(3) of POCSO Rules

7.1 Under Rule 4(3) of the POCSO Rules, the CWC is required to make a "detailed assessment" of the CFCA, Institutionalized Child or Destitute Child, as the case may be, who is reported to it as needing care and protection by the SJPU or local police.

7.2 The Rules do not expressly state what matters are to be assessed or what recommendations are to be made in the detailed assessment called for under Rule 4(3). The CWCs are advised to be guided in this respect by the underlying principle of POCSO that children who are victims of sexual assault, and their parents or other guardians be given the widest possible support in bringing the perpetrator to justice and securing medical and legal assistance for the child.

7.3 Section 47 of the Juvenile Justice (Care and Protection of Children) Act, 2000, gives discretion to the Committee in relation to a child in need of care and protection to dispense with his attendance during the inquiry. Rule 27 (2) of the Juvenile Justice (Care and Protection of Children) Central Rules 2007¹ provides for sending written report to the CWC with the photograph of a child instead of producing him/her, when the child is under 2 years of age and medically unfit. Thus, the presence of a disabled, severely injured or a child below 2 years before the CWC is not necessary for beginning with the statutory inquiry, and the CWC has powers to dispense with attendance of such child. The CWC should be apprised by the police in writing of cases involving such children. In cases where for example, due to severe injuries or illness it would be detrimental for a child to travel to appear before the CWC and the child is not in a position to state whether he wants to live with his family, rule 4 (3) of the Rules of 2012 and section 19, sub-section (6) of the Act shall not be read as mandatory. In such cases, the CWC should form a panel that will visit the child at its habitual place of

1 Rule 27 (2) of the JJ Rules 2007 states "In case of a child under two years of age, who is medically unfit, the person or the organization shall send a written report along with the photograph of the child to the Committee within twenty-four hours and produce the child before the Committee as soon as the child is medically fit along with a medical certificate to that effect." Rule 27 (3) of the Delhi Juvenile Justice (Care and Protection of Children) Rules 2009 reproduces this same Rule.

residence in order to satisfy itself as to the veracity of any claims or requests made by any party in relation to the child.

- 7.4 The assessment report shall state whether the child is a CFCA, Institutionalized Child or a Destitute Child and shall record reasons thereof. It may be noted that this categorization is only for assisting the CWC in finding the appropriate legal regime for providing support for the child and its family or other guardians. Therefore, if the parents or guardians of an Institutionalized Child or Destitute Child are found, or if the alleged perpetrator ceases to share a home with the child after submission of the assessment report, the status of the child shall, for the purpose of these Guidelines, be treated as having been so altered from that point in time and the CWC shall issue orders or alter its previous orders accordingly. In this regard, reference may also be had to the Guidelines provided under the heading "Powers where child's family are in the process of being traced or are untraceable", below.
- 7.5 As a starting point in making its assessment, the parents or, where the child's guardian is someone other than its parents, such guardian should be traced and summoned before the CWC in order that their concerns and requirements for the care and protection of the child be taken on record. CWCs should note that even Institutionalized Children who are alleged to have suffered sexual assault in their care institutions or child victims of sexual assault who are found as Destitute Children may have living parents or other family members. Therefore even in such cases, and not just in CFCA cases, the CWC must take immediate steps to contact the parents and, where they are dead or untraceable, the other Relatives of the child and facilitate in placing the child in the immediate care and custody of its willing Relatives as it is in the best interests of such a child to be given the comfort and care of his family. To avoid the risk of fraud or illegal trafficking, CWCs are advised to verify whether persons stating to be Relatives of a child are indeed so related to the child. In this regard, reference may be had to the Guidelines provided under the heading "Verification of claimed relationship to child", below.
- 7.6 A copy of the PCPP should be given to the parents (one each to the mother and father) or other guardian as the case may be, preferably at the time of issuing notice to them to appear before the CWC. The notice summoning them should also state that they are entitled to appear before the CWC with a legal representative.
- 7.7 Proceedings should ordinarily be conducted in the mother tongue of the parents (and where this is different, in the mother tongue of the mother) or other guardian. Where this is not possible a translator should be provided, including for translating the contents of the PCPP, the notice, the assessment report of the CWC prepared under Rule 4(3) and any other orders of the CWC.
- 7.8 The assessment report should detail the submissions of the parents or other guardian as to the requirements for care and protection of the child. Where the CWC disagrees with any submission, it should state reasons thereof in the assessment report.
- 7.9 The assessment report should also record if the CWC is unable to provide assistance requested by the child, its parents or its other guardian for reason of inadequate funds or inadequate access to the requisite expertise or medical facilities in the area.
- 7.10 If the PCPP or the parents or other guardian of the child expresses apprehensions that the alleged perpetrator will carry out further sexual assault on the child, the CWC should inquire with the police as to why such perpetrator has not been arrested so that the child can continue safely in the environment to which it is accustomed. Where such arrest is not possible, the CWC will discuss with the parents or other

guardian of the child as to what assistance they need in keeping the child secure from the perpetrator. The submissions of the parents or other guardian of the child in this regard shall be included in the assessment report.

- 7.11 In making its assessment, the CWC may include recommendations to the SJPU or police initiating the case as to emergency medical treatment that the child may require in aid of the duties of the SJPU or police under Rule 4(5) of the POCSO Rules. The CWC may also recommend non-emergency medical treatment that they may deem desirable given the physical and emotional state of the child.
- 7.12 In making its assessment, the CWC may also, acting under its powers provided in Rule 4(7) of the POCSO Rules provide a support person to render assistance to the child through the process of investigation and trial of the case against the POCSO-accused. In addition to such support, the support person will also be under a duty as per Rule 4(12) of POCSO to inform the child and its parent or guardian or other person in whom the child has trust and confidence as to the availability of public and private emergency and crisis services as well as the availability of victim's compensation benefits. Rule 4(12) states that the information to be provided by the support person to the child and its parent, guardian or other person in whom the child has trust and confidence is not limited to the items listed therein. Therefore, CWCs are advised to take advantage of the provision for appointment of support persons to enable, through the support person, as wide a range of assistance to the child and its family or other guardian in obtaining medical, legal and financial assistance that may be necessary as a result of the sexual assault or apprehension of sexual assault on the child in its current circumstances. Appointment of a support person requires the consent of both the child and the child's parent, guardian or other person in whom the child has trust and guidance (For further guidelines as to appointment of support persons, refer to Guidelines for Support Persons, Paragraph 14 below).
- 7.13 A copy of the assessment report shall be given to the parents or other guardian of the child. Where the report is not written in the mother tongue of the parents or other guardian, the CWC shall make available an official translation of the report along with the original report to them. Where the parents have different mother tongues, the translation shall be in the mother tongue of the mother.

Monitoring Questions for the NCPCR in a case where CWC has made its assessment report

1. Did the CWC constitute a panel for conducting preliminary visits to the place of residence of the child during its assessment/ inquiry?
2. On what grounds did the CWC refuse grant of custody to the parents?
3. On what grounds did the CWC consider institutionalization of the child?
4. What evidence was relied upon by the CWC while conducting the assessment?
5. Did the CWC take into account any preference or opinion expressed by the child on the matter?
6. What procedure was followed by the CWC for inquiry in a case where the child was below the age of 2 years and / or medically unfit?

8. Powers where child's family is in the process of being traced or are untraceable

- 8.1 In cases where the child is found without any family or other legal guardian or any home or the child has a non-family legal guardian but such legal guardian is himself or herself an accused under POCSO, the CWC has no explicit powers under POCSO,

but may have the child declared as a child in need of care and protection under the JJ Act and pass orders for the child's immediate living arrangements and other care in accordance with its powers there under. If, during the course of proceedings in such a case, the parents or other relatives of the child are traced and they express a willingness to take care of the child, then the CWC shall immediately ensure that the child is placed in their care and shall assist them in participating in the investigation and trial under POCSO.

- 8.2 Even if the child has lost both its parents, or if neither parent is traceable, the Committee must Endeavour to find other relatives of the child willing to take care of the child. Section 39 of the Juvenile Justice (Care and Protection of Children) Act, 2000, makes it clear that even children's homes or shelter homes shall have restoration of the child as their prime objective and shall take steps for a child deprived of family atmosphere to live with its family.
- 8.3 Under Rule 27 (7) of the Juvenile Justice (Care and Protection of Children) Central Rules 2007 whoever produces a child before the Committee shall submit a report on the circumstances under which the child came to their notice and efforts made by them on informing the police and the missing persons squad and in cases where a recognized voluntary organization or any police personnel produce a child before the Committee, they shall also submit a report on the efforts made by them for tracing the family of the child. The CWC may be guided and seek the assistance of the police in accordance with the steps as laid down by the Supreme Court in such cases. "In *Hori Lal vs. Commissioner of Police, Delhi and Ors W.P (CrI) 610 of 1996*, the Supreme Court laid down the steps to be taken by Investigation Officers for tracing missing girls. These steps include, publishing photographs of the missing child with the permission of the parent/guardian, making inquiries in the neighbourhood, contacting the school and making inquiries on incidents of violence in the family." In *Bachpan Bachao Andolan vs. Union of India and Ors W.P (C) 75/2012*, the Supreme Court passed interim directions that that in case a complaint with regard to any missing children is made in a police station, the same should be reduced into an FIR and appropriate steps should be taken to see that follow up investigation is taken up immediately thereafter. The Supreme Court directed the National Legal Services Authority the para-legal volunteers, recruited by the Legal Services Authorities, should be utilized, so that there is, at least, one paralegal volunteer, in shifts, in the police station to keep a watch over the manner in which the complaints regarding missing children and other offences against children, are dealt with. The CWC may be guided and seek the assistance of the police in accordance with the steps as laid down by the Supreme Court in this case.

9. Verification of claimed relationship to child

- 9.1 CWC must satisfy itself that persons claiming to be relatives of the child are indeed so related to the child. In order to establish the relationship of a person to a child before it, the CWC may refer to any one or more of the following materials: medical records, school records, civic registrations (such as birth certificates, ration cards, adhar cards, municipal or panchayat records), DNA tests, or any other materials establishing the claimed relationship. The CWC may also call upon any one or more of the following persons to confirm such relationship: the child's school teachers, doctors, the relevant panchayat, district magistrate or other local authority, neighbours, or any other persons in order to satisfy itself in this regard. It is clarified that the foregoing is in the form of guidelines to the CWC and none of these are mandatory requirements for verifying claims of filial relationship by parties before the CWC in relation to the child

whose case is being considered under POCSO. CWC shall not ordinarily question birth certificates or court orders granting guardianship/custody that are produced before it as proof of a party's relationship to the child in question.

10. Change of custody of the child

- 10.1 Where the child is a CFCA, the CWC is required under Rule 4(4) of the POCSO Rules to make a determination as to whether the child should be removed from the custody of his family or shared household and placed in a children's home or shelter home. In making such decision, CWCs are required to consider the factors listed in Rule 4(5) of the POCSO Rules. For further Guidelines as to how Rule 4(4) is to be applied, refer to "Removal of child from family home", below.
- 10.2 Rule 4(4) is silent on action that may be taken as to custody if the child is an Institutionalized Child or a Destitute Child. But change in custody of an Institutionalized Child who has no family, or whose family is yet to be traced or is untraceable, may be required for instance when the care home itself is implicated in the alleged offences. Similarly, for Destitute Children alleged to have suffered sexual assault, a custodian will have to be designated so that the child can be taken care of. In such cases, the CWCs are advised to exercise their powers regarding Institutionalized and Destitute Children under the JJ Act. The CWC may direct Childline or some other recognised party under the JJ Act to initiate proceedings under the JJ Act in relation to the child and pass orders for change of custody of an Institutionalized Child or institutionalisation of a Destitute Child, should this be deemed fit.
- 10.3 In addition, the CWC should exercise its powers under POCSO to appoint a support person for the child.
- 10.4 Simultaneously, the CWC must take immediate steps to contact the parents and, where they are dead or untraceable, the other Relatives of the child and facilitate in placing the child in the immediate care and custody of its willing Relatives as it is in the best interests of such a child to be given the comfort and care of his family.

11. Removal of CFCA from family home

- 11.1 Under Rule 4(4) of the POCSO Rules, within three days of receipt of a PCPP under Rule 4(4) in relation to a CFCA, the CWC is required to make a determination as to whether "the child needs to be taken out of the custody of his family or shared household and placed in a children's home or a shelter home."
- 11.2 Under the law, there is no concept of custody of a "family" as custody belongs to the parents or other guardian of a child. A child residing with its family is in the custody of its parents or other guardian and not strictly speaking in the custody of its family as a whole. However, in order not to render this provision of POCSO meaningless, CWCs are advised to construe "custody of his family or shared household" as referring to residence of the child in the family home. In other words, in cases of FCAs, the CWC has to consider whether continued residence of the child in the family home along with the alleged perpetrator would be against the best interests of the child and its non-accused family members and consider whether placement of the CFCA in a children's home or shelter home is required.
- 11.3 The guiding principle in such cases should be that since the CFCA has committed no wrong, it should not be deprived of its family or removed from the familiar surroundings of its home, except in the rarest of rare cases.

- 11.4 CWC shall at all times regard institutionalisation of all forms, for whatever period, as a measure of last resort and not as a substitute for placement of the child with a Relative.
- 11.5 CWC shall at all times regard institutionalization of all forms, for whatever period, as an interim measure contingent upon arrangements being made for the child to be restored and replaced within his or her family in custody of a Relative.
- 11.6 CWC shall act on the principle set out in Section 39 of the JJ Act which provides that placement in a children's home or shelter home shall be temporary measures, with the objective being at all times to enable restoration of the child to its family.
- 11.7 Deprivation of a child of custody in the family shall have to be justified by the CWC in a reasoned order for each day that such deprivation is ordered.
- 11.8 The power of the CWC under Rule 4(4) of the POCSO Rules to remove the CFCA from its habitual place of residence or to deprive it of parental custody are primarily emergency powers to be used in exceptional cases where:
 - (a) there is strong evidence that the child is totally unprotected in its home from being subjected to further assault or threats of such assault from the alleged perpetrator; and
 - (b) it is not possible for the alleged perpetrator to be prevented from accessing the child in the said home.
- 11.9 Ordinarily, placement in a care home or shelter of a CFCA under Rule 4(4) would be considered by the CWC only in cases where the person accused of the offence against a child under POCSO is:
 - (a) a parent or other Relative of the child; and
 - (b) lives in the same household or (in case the parents are separated or the child has more than one home) lives in one of the households where the child habitually resides.
- 11.10 CWCs shall at all times regard the ability of a child to live with its family as an inalienable part of the child's best interests and welfare. CWCs should first explore and comprehensively exhaust all options of a family placement with Relatives before considering placement of the child in a children's home or shelter home.
- 11.11 Ordinarily, the child should be permitted to remain in the custody of its non-accused parent. So long as a non-accused parent applies for or has custody of the child, no other Relative shall be permitted custody of the child by the CWC.
- 11.12 Where parents are both accused under POCSO or dead or untraceable, the child should be permitted to remain in the custody of its non-accused Relatives who state they wish to remain in custody of or to obtain custody of the child. The mother ought to be restored custody of the child should she be acquitted, her conviction be reversed on appeal or charges against her dropped. Similarly missing parents should be granted custody of the child as soon as they are traced.
- 11.13 Where parents are both accused under POCSO or dead and untraceable and there are competing Claimant Relatives, the order of preference for grant of custody shall be as follows:
 - (a) Mother of non-accused parent;
 - (b) Father of non-accused parent;

- (c) Maternal grandmother;
- (d) Paternal grandmother;
- (e) Adult female sibling;
- (f) Maternal aunt;
- (g) Paternal aunt;
- (h) Maternal grandfather;
- (i) Paternal grandfather;
- (j) Adult male sibling;
- (k) Other Relative not listed above.

- 11.14 Where there is a threat of further sexual assault or other victimization of the child by the alleged perpetrator in its home, the CWC should ask the police why it is not arresting the alleged perpetrator before making any decision that would interfere with the current living arrangements of the child.
- 11.15 Where the alleged perpetrator is not a Relative of the child and can be removed from the family home, there would ordinarily be no need to alter the present residence of the child.
- 11.16 Where the alleged perpetrator is not a Relative of the child, but for some reason cannot be excluded from the family home and there is an imminent threat of further victimization of the child by such alleged perpetrator, the CWC should explore with the child's Relatives alternatives for accommodation of the child in another family home with such Relatives.
- 11.17 If the accused in the POCSO case undertake to or are under court orders to remove themselves from the home of the child, then there would ordinarily be no necessity for the CWC to order removal of the child from its home/habitual place of residence or from the custody of its non-accused Relatives. If the CWC has passed orders removing the child from the family home or from the custody of a Relative, such orders should be reversed where the accused undertake to or are ordered to remove themselves from the family home.
- 11.18 If the accused in the POCSO case are sentenced to prison, then there would ordinarily be no necessity for the CWC to order removal of the child from his or her home/habitual place of residence or from the custody of his or her non-accused Relatives as the child will not be exposed to the perpetrator.
- 11.19 Where the accused is not a parent, or where one of the child's parents is a non-accused, the CWC shall not disrupt custody if the non-accused parents undertake that the accused shall not be granted access to the child. Where the CWC believes the child must be removed from its home, custody of non-accused parents shall not be disrupted where such parent(s) can find an alternative home where they can live with the child. If the alternative home is outside the jurisdiction of the CWC, then the CWC or other equivalent authority in the relevant area shall be informed accordingly and involved in the matter. No CWC shall interfere with parental custody solely on the ground that the alternate home found by the non-accused parent(s) is outside of its jurisdiction.
- 11.20 If the child is under the age of six months, then it should not under any circumstances be deprived for any period of time of the custody and company of its mother, even if

she is an accused in the POCSO case. In such cases if the child has to be removed from the family home, it shall be accompanied at all times by its mother who may be placed under supervision if it is felt necessary by the CWC.

- 11.21 CWC proceedings shall terminate and custody orders reversed upon acquittal or reversal of conviction on appeal or dropping of a complaint under POCSO. If the child or its mother (whether or not accused) or a non-accused father or other non-accused Relative of the child (including a minor or adult sibling) expresses apprehensions about restoring the child to the formerly accused parent or other custodian or remaining in the same household with the formerly accused party, the CWC should assist them in identifying lawyers and other persons experienced in these issues for advice and assistance.
- 11.22 In the event the accused in the POSCO case is found guilty and sentenced to prison, if the child or its mother (whether or not accused) or a non-accused father or other non-accused Relative of the child (including a minor or adult sibling) expresses apprehensions about restoring the child to the custody of the offender or being in the same household as the offender after completion of his or her prison sentence, the CWC should assist them in identifying lawyers and other persons experienced in these issues for advice and assistance.
- 11.23 If the child is old enough to speak and express its wishes clearly, the CWC must place on record the wishes of the child after speaking to it. The wishes of the child in favour of living with parents or other Relatives must be accorded priority. When the child is unwilling to live with its parent or other Relatives, the CWC should ascertain reasons for such refusal and make efforts to determine whether apprehensions of the child in this regard can be set at rest by taking appropriate measures. In such a case, the CWC is advised to consider whether the custody of the child with Relatives should be temporarily under supervision, and full-fledged custody be given to the family once the CWC is satisfied that the child has been able to settle in with the parent or other Relative as the case may be.
- 11.24 When making a determination under Rule 4(4), the CWC shall take into account the factors listed in Rule 4(5) with a view to enabling the child's family to help the child recover from the assault, to rehabilitate the child in its school and with its peers and to otherwise best care for the child in the circumstances, including by giving counselling to the child's Relatives and assisting them in obtaining financial sponsorship for the child where the accused in the POCSO case was a breadwinner for the family. It is clarified that poverty or illness or disability, whether of the child or of a Claimant Relative, shall not be taken as factors justifying removal of a child from its home or denial of family custody. Rather, such factors shall be considered by the CWC to formulate ways and means by which the non-accused Relatives can be aided and counselled in better caring for the child. A history of violence alone shall not be a reason for depriving the child of the custody of a Relative unless such violence is apprehended against the child or its Relatives in connection with the prosecution of the case against the POCSO accused. Relatives being granted custody shall be counselled against harsh treatment or infliction of physical pain as a measure of disciplining the child.
- 11.25 Being an emergency power, Rule 4(4) shall be exercised primarily to safeguard the child in the immediate aftermath of a proceeding being invoked under POCSO. Therefore Rules 4(4) and 4(5) shall not be applied to make long term or permanent custody arrangements for a CFCA. Where the CWC is not satisfied with the arrangement made by the CFCA's parents or other Relatives for the long term residence or custody of the

child, action shall be initiated through the appropriate parties under the applicable Guardian Acts.

11.26 Bearing in mind the principles that the best interests of the child are paramount; that orders as to custody of a minor are always open to alteration where this would be in the best interests of the child; and that institutionalization of a child under Indian juvenile laws is seen as temporary measure with the ultimate objective of restoring and rehabilitating a child in its family environment, the CWC shall at all times make efforts to ensure that the child is not deprived of enjoyment of the custody and company of its Relatives except for the duration and to the extent strictly necessary. Therefore, orders passed under Rules 4(4) and 4(5) shall be subject to immediate reconsideration on application by any one or more non-accused Claimant Relatives and shall in any case be subject to weekly reconsideration by the CWC with a view to enabling placement of the child in the custody of its non-accused Relatives whom the CWC shall actively seek out and encourage to take custody of the child.

12. Case Management and Care of the Child While Institutionalized

12.1 The CWC shall hold itself responsible for the welfare of the child so long as it is subject to orders of the CWC placing it in any institution or interfering with the child's continuous enjoyment of the company of its Relatives. Therefore, CWC shall not consider the case as closed once an order for placement of the child in a care home or shelter is passed whether such order is in relation to a CFCA under Rule 4(4) of POCSO, or in relation to an Institutionalized Child or Destitute Child.

12.2 Support persons and care home personnel shall be directed by the CWC to provide weekly status reports as to the physical and emotional status and the developmental and educational progress of any Institutionalized Child or Destitute Child subject to a care order of the CWC under the JJ Act.

12.3 In case of institutionalization of a CFCA, the following Guidelines shall be applied for the duration of its institutionalization:

(a) The child's parents and Concerned Relatives shall be kept fully informed of where the child has been placed, the living conditions where it has been placed, including the food given and the sleeping arrangements for the child and the identity and child-care experience of the persons entrusted with the care of the child. The parents, and where they are both accused or dead or unable to participate or untraceable, the other Immediate Relatives of the child, and where they are all accused or dead or unable to participate or untraceable, other Concerned Relatives shall be: (i) given weekly reports as to the physical and emotional state and developmental and educational progress of the child; (ii) informed immediately in case the child falls ill or suffers any injury; and (iii) given access to the medical records and doctors engaged by new custodians of the child in case of any injury or health issues in the child.

(b) The parents, and where they are both accused or dead or unable to participate or untraceable, the other Immediate Relatives of the child, and where they are all accused or dead or unable to participate or untraceable, other Concerned Relatives shall have the right to seek alternative medical advice in the event any surgery or other medical procedure or medication is prescribed for the child.

(c) If the child is being breast-fed, the mother shall be allowed to breast-feed it at all times if she so wishes. Feeding the child expressed milk pumped by the mother

through a bottle shall not be considered a substitute for breast-feeding where the mother expresses a wish to breast feed.

- (d) To minimize the trauma of dislocation on the child, if the child is below the age of ten years, the mother, and where she is dead, untraceable or unable to do so, any other Concerned Relative known to the child shall be allowed to feed it all meals, bathe it, groom it (including making its hair and cutting its nails) and put it to sleep. CWC shall be sensitized to the fact that for a young child to have these functions attended to by strangers would be additionally traumatic.
- (e) The parents and where they are dead, untraceable or unable to do so, any other Concerned Relative family shall be permitted to supply food to the child so as to maintain the diet to which it is accustomed.
- (f) For all children, and particularly in case the child is below ten years of age, the CWC shall ensure that the routine, feeding preferences, playing and resting habits and toys to which the child is accustomed are made known to its new custodians and are maintained to the greatest extent possible.
- (g) Placement of the child shall be, as far as possible, within easy distance of its family and home.
- (h) Placement of the child shall be such that it is able, as far as possible, to continue in the same school and be cared for by the same doctors as prior to initiation of the POCSO case and in the event a break is necessary, that the child be restored to its former school and to the care of its former doctors as soon as possible.
- (i) If a child has to be removed from the home, its mother or failing her, atleast one other adult Immediate Relative, or failing them atleast one other adult Concerned Relative shall be allowed to accompany and live with the child wherever it is placed.
- (j) In all situations the child shall have the widest possible regular access to its non-accused Relatives, especially its mother, grandparents and siblings.
- (k) Even where Relatives express themselves as unable or unwilling to take over guardianship of a child, this must not result in a total severance of the child's relationship with these Relatives. The child must be enabled to know them, recognise them, visit them and foster bonds with them even while in an institution, children's home or shelter or in foster care.
- (l) Even while in an institution, children's home, shelter or in foster care every effort will be made to encourage and nurture the child's relationships with his non-accused Relatives, both by in-person interaction and through written, telephonic, video telephonic and other means of communication available.
- (m) The CWC shall ensure that care home personnel and foster careers are trained to encourage and foster the child's relationship with all Relatives. Children's homes, shelter and foster careers shall be sensitized to the fact that family interaction can be unsettling for the child, but such behavior is natural in the circumstances and will not derogate from their duty of fostering the child's ties with its Relatives. In this regard reference may be had to the general principle of law that negative reactions or responses of a child during visitation with a parent shall not be the deciding factor in maintaining such visitation or grant of custody to the visiting parent. This principle shall be extended to all Relatives of the child who wish to maintain ties with it. CWCs shall be sensitized to the

fact that and shall sensitize care home personnel and foster caregivers to the fact that temper tantrums, crying or some degree of resistance and resentment are expected to occur in Relative-child interactions; that younger children may act in a rejecting or hostile or fearful manner towards visiting Relatives owing to their inability to understand why they are being kept away from the family home or why the Relatives go away or do not take them home with them. In such situations assistance should be taken from child specialists and persons in whom the child demonstrates trust and confidence in helping the child develop a positive attitude towards all visiting Relatives, in particular visiting parents.

- (n) CWCs shall be sensitive to the fact that in cases of sexual assault by male family members on a child, where the mother is accused as an accomplice, the mother is herself often a victim of sexual and other violent assault by the same parties. Such mothers have typically themselves been subjected to long years of physical abuse and extreme emotional trauma and intimidation by the offending male family members. Where the CWC is satisfied that the mother did not act wantonly towards the child but was co-erced in her acts or omissions by the main accused under POCSO, CWC may permit her access to the child and facilitate re-establishment of trust and mutual confidence between mother and child to the extent possible, taking the assistance of child specialists and persons in whom the child has trust and confidence so as to minimise the trauma and confusion of the child in such circumstances. If a mother is convicted as an abettor or accomplice and not as the direct perpetrator of the sexual assault on the child, then she should be allowed atleast such access to her child as is generally permitted under the law to women prison inmates.
- (o) Even while in an institution, children's home, shelter or in foster care, the cultural and religious heritage of the child of the family and community into which it was born shall be fostered and nurtured in that child. The child shall be enabled to be with its family on all festival days and to participate in all religious observances with them.

12.4 Time limit for inquiry by CWC: When a child has been placed by the police in a shelter home under section 19 (5) of the Act, the CWC must conclude the inquiry within the prescribed time limit of 3 days [Rule 4 (4) of the Rules of 2012]. If a child placed temporarily in a shelter home is released in the interim custody of his family, the compulsion for the CWC to conclude the inquiry within three days may not be necessary. Strict adherence to the time schedule should not lead to sacrificing just and fair nature of the proceeding or giving hasty decision. In such cases, the inquiry should be concluded expeditiously without any unnecessary delay.

13. Reporting to NCPCR and SCPCR

13.1 CWCs are required under Rule 6(2) of the POCSO Rules to furnish, at their request, the NCPCR or SCPCRs, as the case may be, with reports on cases of child abuse falling within their jurisdiction. Such reports must include the full case file, including the PCPP, minutes of all hearings and deliberations and copies of orders passed. CWCs should mention in such reports if they face any paucity of resources or disability in accessing expert legal, medical or other advice in such cases so that the NCPCR or the SCPCR, as the case may be is apprised of institutional difficulties facing the CWC in deciding particular cases.

***Monitoring Questions for the NCPCR regarding
Case-Management and Care of the Child by CWC***

1. *What was the quantum of temporary financial support provided to the child to cater to his immediate needs?*
2. *On what basis was the quantum of financial support determined?*
3. *Were copies of all orders passed by the CWC furnished to the concerned relatives/guardians?*
4. *What was the approximate time taken for conclusion of inquiry since the receipt of the report from the police or any other person? State the reasons for delay, if any?*
5. *Nature of services provided by the CWC to the affected person?*
6. *Were arrangements made by CWC to ensure availability of qualified personnel as translators/ interpreters/ special educators?*
7. *Were there any other restorative measures taken for the child by the CWC?*

14. Roles and Functions of Support Persons under the POCSO Act

- 14.1 The journey through the medical and legal process can result in secondary victimization to the concerned child. This re-victimization takes the form of delays at every stage, lack of sensitivity by the actors, the survivor being expected to communicate with multiple personnel for various services. These barriers can be overcome by having a coordinated mechanism with a single point contact person who can be engaged in dealing with the case. The support person will handhold the child and his /her parents or guardians through the entire law enforcement/judicial process, thus making it easy for him / her to navigate the system as there is one person coordinating the entire effort, and acting as the link between the survivor and the court process. It is, therefore, recommended that the CWC's offer to assign a Support Person to the child survivor in all cases under Rule 4 (7) of the POCSO Rules.
- 14.2 The child and his parents / guardian or other person in whom the child has trust and confidence may, on their own, seek the assistance of a support person or organization for proceedings under the Act. The Special Court can assign a Support Person to the child as well.
- 14.2 The DCPU's and the CWC's are advised to keep a list of persons / organizations who can be appointed as Support Persons. It is suggested that Support Persons can be drawn from the State Legal Services Authorities. In Delhi, it is suggested that Support Persons can be drawn from the Crisis Intervention Centers functioning under the Delhi Commission for Women.
- 14.3 A support person should preferably have a minimum of four years work experience on issues related to violence against children / women. It is advised that Support Persons comprise of people with the following qualifications:
 - Persons with legal or para-legal qualifications;
 - Persons who can offer counseling and emotional support;
 - The Support Person must comprise of an individual who is conversant in the mother tongue of the child and the family to help them fully participate in the CWC proceedings.
 - The DCPU's and CWC's must hold training workshops every year with the Support Persons to upgrade their skills in dealing with survivors.

- 14.4 The support person should walk the child from the start of the case to the end, and keep in touch with the child at the community level. Specifically, it is recommended that the Support Person be responsible for performing the following functions:
- The support person should accompany the child for the medical examination;
 - The support person should accompany the child for recording of FIR;
 - The support person shall create a report of the child's case noting the details of the crime as well as the child's personal information. The support person shall record compensation and / or rehabilitation requirements and forward the same to the State Legal Service Authority;
 - The support person should provide the child with immediate requirements, such as, food, clothing or medicines etc;
 - The support person is required to intimate the lawyer associated with the court about the case and forward all the documents including the medical examination report, FIR, and other relevant documents;
 - The Investigating Officer (IO) conducting the investigation will be required to update the support person about the progress of investigation at least once a week;
 - *Witness Protection:* The support person will be responsible for communicating and coordinating with the police, Lawyer and the Public Prosecutor to ensure that the child and all the other witnesses are safe and assist the survivor in filing a fresh FIR in case of threats as well as coordinating with other agencies to ensure alternative custodial arrangements.
 - *Child Protection Plan:* After the Support Person has had an opportunity to interact with the child, she / he should formulate a Child Protection Plan in respect of the child. This plan will be submitted to the CWC and can serve as a working tool that should enable the family and professionals to understand what is expected of them and what they can expect of others. The aims of the plan are: To keep the child safe; to care for the child and promote his welfare; and to support his / her family.
 - The support person will coordinate with the concerned police official to ensure that the Police report under section 19 is sent to the Special Court for grant of interim compensation, if required.
- 14.5 The Support Person must be present in the court room during the course of the trial, and should accompany the child to the witness stand. However, the support persons cannot prompt, sway, or influence the child during his / her testimony.
- 14.6 The Support Person shall keep all information pertaining to the case confidential. The right to privacy of the child must be respected.
- 14.7 The Support Person must keep the child survivor and his / her parents / guardians informed of the court proceedings. For example, the child and his / her parents or guardians may require information on how courtroom proceedings are conducted, which the Support Person should be able to provide.
- 14.8 In case the child or his / her parents / guardians are concerned about the safety of the child – and express this apprehension to the Support Person - the information must be brought to the notice of the court or another relevant authority [Rule 4 (8)]. A safety plan must be drafted by the Support Person and submitted to the CWC.

14.9 The prosecution, Police, Special Judge, and CWC's shall cooperate with the Support Person and provide him/her with relevant information as and when necessary. Relevant information that needs to be conveyed to the child and his/her parents or guardians includes, information on crisis intervention cells, procedural steps involved in criminal prosecution, victims' compensation benefits, the status of investigation of the crime, arrest of the accused, the filing of charges against a suspected offender, the schedule of court proceedings, the status of the accused, and the verdict of the Court [Rule 4 (12)].

14.10 The child or his/her parents or guardians can request the CWC or the Court to have the services of the Support Person terminated. As per Rule 4 (10) of the POCSO Rules no reasons have to be recorded for terminating the services of the Support Person. In such cases, the CWC should offer to provide another Support Person to the child.

Monitoring Questions in a case where Support Person has been appointed

1. *Did the support person provide timely updates of the proceedings of the case and its potential outcome to the child and his non accused parent or guardian?*
2. *Did the support person apprise the child of the role he has to play in the judicial process?*
3. *Did the support person inform the child/ non accused parents/ guardian of the information specified within Rule 4(12) of the POCSO?*
4. *What other concerns of the child did the support person address?*

**List of Monitoring Questions for the CWC / Support Persons for
Quarterly Collection of Data by the NCPCR**

1. *No. of cases referred to CWC by the police, NCPCR or SCPCR?*
2. *No. of cases where the police or person producing the child has submitted a written report while reporting the case to the CWC?*
3. *No. of cases referred by the CWC for: Medical care Mental health support Protection/ shelter Sponsorship services*
4. *No. of support persons designated by the CWC to render support to the child in the process of investigation and trial?*
5. *What is the criterion for appointment of support person by the CWC?*
6. *Quantum of financial or office assistance provided to the Support Persons by the CWC for performing their duties under the Act?*
7. *No. of cases where the CWC has refused grant of custody to the parents?*
8. *No. of cases where the CWC has institutionalized the child?*
9. *No. of cases where the CWC has conducted preliminary visits to the place of residence of the child during its assessment/ inquiry?*
10. *No. of cases where the CWC has provided temporary financial support to the child to cater to his immediate needs?*
11. *No. of cases where the CWC has undertaken follow up of cases after passing an order under Rules 4(4) & 4(5)?*

Roles and Functions of Health Professionals under the POCSO Act
Role of NCPCR in Monitoring: What to Monitor and How to Monitor

The following are in the nature of guidelines to Health Professionals in discharge of their functions under the Protection of Children from Sexual Offences Act, 2012.

A. Definitions

In these Guidelines, unless otherwise stated or otherwise required in the context, words and expressions listed hereunder shall have the following meaning:

- (a) *“Health Professionals”* means both individuals and institutions that provide health care services and includes, but is not limited to, general practitioners, specialists, nurses, mental health practitioner and / or public health practitioners.
- (b) *“Medico-Legal”* means a combination of medical and legal aspects. A medico legal case in these guidelines means a case under the POCSO Act which has medical implications.
- (c) *“Psychological First Aid”* means skills to assist a child from recovering from an offence perpetrated under the POCSO Act. Psychological First Aid limits the distress experienced by the child survivor.
- (d) *“Survivor”* means a child who was a victim of any of the offences under the POCSO Act and is recovering, or has recovered from the sexual offence.

Children are very likely to be victims of sexual assault due to vulnerability related to age. The prevalence of child sexual abuse in India is known to be high. A National Study on Child Abuse conducted by the Ministry of Women and Child Development showed that more than 53 percent children across 13 states reported facing some form of sexual abuse while 22 percent faced severe sexual abuse. Both boys and girls reported facing sexual abuse. Most commonly, it has been observed that abusers are persons who are well known to the child and may even be living in the household. Children are considered soft targets for sexual abuse because they may not realize that they are being abused. Abusers are also known to use chocolates and toys to lure children. Further, children are more easily threatened and less likely to speak out about the abuse. In our society, children are also taught to respect and obey authority. It is this culture that abusers take advantage of, to coerce children and commit them to silence. Therefore disclosing sexual abuse for children is extremely difficult. Further families and care givers due to shame, stigma and notions of honor, fail to report such incidents. However the contact of children with the health systems is inevitable because sexual abuse has several health consequences both emotional and physical. These invariably bring the child for health care to a hospital or any other health institution.

It is therefore imperative for health professionals to be equipped with the knowledge, perspective and skills related to responding to the issue of child sexual abuse. There are several pathways by which a child sexual abuse survivor may come in touch with the hospital.

B. Pathways for entry of a child into a health centre/ hospital

1. Health consequences reported by the child makes the health professional suspect that the child has been subjected to sexual abuse;
2. Child in the course of treatment and communication with the health professional may disclose that he/ she was sexually abused;
3. Child may be brought to the hospital immediately after a sexual assault for treatment.

Indicators of Child sexual abuse

Physical	Behavioral
Unexplained Genital injury	Regression in school performance behavior, developmental milestones
Recurrent vulvovaginitis	Unusually clingy behavior
Unwanted Pregnancy	Sleep disturbance, eating disorders
Bed wetting	Problems at school
Pain in urination, defecation	Poor self esteem
Anal complaints (fissures , pain, bleeding)	Inappropriate sexual behavior for a specific age
Bed wetting	Depression
Urinary tract infections	
Sexually transmitted infections	
Discharge from the vagina	

Source – Guidelines for medico legal care of victims of sexual violence, WHO, 2003

- The above described health complaints can come to a General Practitioner (GP), Pediatrician or a Gynecologist in any health setting whether private or public. If such symptoms are seen in a clinical setting, it is important to ask if there has been sexual abuse. Sensitive clinical enquiry and therapeutic care may enable the child to disclose sexual abuse. Certain techniques can be used to explore whether the presenting health complaint is related to the issue of sexual abuse after ruling out all aspects of clinical enquiry.
- The child and parents should be taken in confidence and explained the reason for it. It must be explained to the parents that if the medical complaint is not being controlled in spite of medications and precautions, there is a need to assess for sexual abuse. Health professionals need to use different techniques for communicating with children. Use of non technical language, to discuss if there was sexual abuse showing male and female dolls to explain genitals of a boy and a girl, providing a child with colors and paper to show where she was touched, books with pictures to probe about the nature of abuse can become important tools for communication.

Example – A 6 year child reports to a health professional with persistent burning micturition and refusal to urinate. The child has been brought for the 3rd time with the same medical complaint in a span of 2 months. The doctor has noticed that the parents have given the prescribed medications, in spite of which the child continues to have the same complaint. The doctor explained to the parents about the need to speak to the child about the possibility of being sexually abused. This was done with the help of showing a doll and asking whether the 6-year-old child was touched on her genital area and whether the pain occurred after that. The doctor also enquired about the child’s daily routine and noticed that the child would complain of pain in urination after school. After probing gently about whether she was touched by anybody in the school on the genitals with the help of a doll, the child revealed that she was abused by the school watchman and was also able to show on the doll the areas of body where she was touched.
- Sometimes the indicators of sexual abuse may not be as specific as mentioned in the table above. In spite of this a health professional may have an index of suspicion that a child could have been sexually abused. This is especially true when the child reports vague aches and pains which don’t have any underlying cause. In such situations, it is best to probe about

sexual abuse, but if the child doesn't report any such act, it would be important to have a follow up visit from the child. Additionally parents/care givers also need to be taken in to confidence and explained that the symptoms showed by the child could be connected to sexual abuse and so they should also probe if the child has faced any such episode. While carrying out such probing/ enquiries, health professionals should also be mindful of the fact that perpetrators could also be members of the family / parents / care givers accompanying the child. Therefore such a general assessment related to the accompanying person should also be carried out by the health professional before embarking upon probing for abuse

- If the doctor – child interaction brings out the issue of child sexual abuse, as a first care response the health professional must assure the child and parents that treatment and care will reduce the clinical symptoms of abuse and counseling will help in overcoming trauma too. This reassurance can go a long way especially when they have to pursue police and legal action.

C. Steps to Provide Psychological First Aid

- As a critical component of care, health professionals must include the component of psychological first aid in their interaction with survivors of sexual abuse. This would include listening without judging, encouraging the child to reveal her feelings about the episode, providing basic messages to communicate that the sexual abuse was not her fault, assessing safety of the child, and encouraging her to follow up for counseling.
- Health professionals should communicate the next steps once disclosure of sexual abuse has occurred. Aspects of examination, treatment, counseling, medico legal information should be shared with child and care givers in a simple non technical language. This would make the child comfortable and have her participate in decision making along with her parents.
- While examination and treatment is in progress, health professionals should encourage the child to reveal her feelings. This should be done with the aim of enabling the child to ventilate her feelings and emotions about the episode. However while doing so, health professionals must have the knowledge that each child would cope with the assault differently. Many survivors may not show outward distress and crying. It is therefore important that providers don't make assumptions about a child's psychological distress, but understand that every person copes differently after a traumatic episode.

Snap shot of Psychological First Aid-

- Establish rapport with the child and encourage the child to reveal feelings without intruding.
- Assess needs of the child and her family and concerns that they may have. These could range from health concerns, safety concerns and fear of societal reactions.
- Help survivor and her/ his family to address basic needs such as emergency shelter and assistance in filing a police complaint.
- Help the family and child to deal with their feelings related to sexual assault. Discuss with the family that it is not she who should be ashamed but the perpetrator and help them to understand sexual assault as an extreme physical violence and not an act that leads to loss of honor.
- Discuss with the family about threats to safety and create a plan which helps them to safety safe. Discuss potential feelings that the child may experience such as fear, nervousness, anxiety, thoughts of ending one's life and ways to handle these feelings

- Help the survivor and family to connect to resources such as legal aid agencies, schools, programs that help children deal with sexual abuse and the like. Encourage them to seek counseling to overcome the trauma faced.

(Adapted from WHO "Psychological first aid- guide for field workers" 19th August 2011)

- The age category of 0 – 18 years is varied and each age group brings different challenges to the health setting. Depending on the age, children may experience a range of feelings such as worthlessness, shame, inadequacy and helplessness post the assault. In the adolescent age group which is 12 years and above, such feelings may trigger thoughts of ending their lives. As health providers, it is therefore critical to probe for such feelings and address suicide ideation with survivors. Straight forward explanations such as discussing assault as an abuse of power and not an act of lust can encourage adolescents to place the onus of abuse on the perpetrator. Positive messaging by health providers such as "you are not responsible for rape", "It is not about the clothes you wear" etc can help in rebuilding the survivor's confidence in herself.
- Survivors of child sexual abuse should also be reassured and encouraged to seek counselling. The importance of counselling to deal with feelings must be emphasized. Simultaneously children should also be encouraged to resume their routine lives whether it is attending school/ college, playing with friends, interacting with peers, watching films and the like. It is important to bring back "normalcy" to the child's life. However this should not be understood as wanting to dismiss the sexual abuse. Health professionals should discuss with children that they may experience certain feelings such as anger about the perpetrator, shame, despair and disgust. These feelings will go away with counselling and time. Parents and friends should encourage adolescent survivors to seek counselling and crisis intervention support. Adolescence is an age of turbulence and the survivor may not be comfortable talking about several issues with parents/carers such as "contraception", "healthy sexual relationships", fears of contracting infections such as STI/HIV, anxiety about how they are perceived by others in the school/ college. They may also not discuss these feelings with friends as there is a need to fit in and avoid stigma. Such feelings can be discussed in a series of counseling sessions, which can help in rebuilding their lives and achieve a sense of normalcy.
- Before the child survivor leaves the hospital, health providers must assess physical safety of the survivor along with parents / care givers. One of the fears that child survivors grapple with is related to separation from the family and institutionalization. Therefore plan should focus on ways in which the child can be safe in her own surroundings. This could be in the form of making a police complaint about threats received, building support strategy with neighbors/ community and temporary relocation from the old residence.
- Some family members and friends may be helpful while others may blame the survivor for the assault. Providers can play a crucial role by dispelling notions about the assault. It must be discussed with all care givers that survivor should not be held responsible for the assault. Judgments such as - "she wears such clothes so it happened to her", "she is careless", "she/ he doesn't listen to us" - make the survivors journey to recovery more difficult. As Health Providers are greatly respected, they are best suited to engage with family and discuss ways of promoting survivors well being.

In situations of sexual abuse by family members –

- Health providers must seek time and discuss safety of the child survivor in privacy with him/ her.
- Safety assessment of the child must be undertaken. If the child doesn't have a guardian or another non abusive parent, provision for shelter must be made with based on discussion held with child survivor. As a stop gap, child may be admitted to the hospital till such a shelter is arranged.
- As providers, it is important to remember that a child survivor may not want to be sent to a child welfare home and therefore a dialogue must be held with the child to seek alternate arrangements where the child feels comfortable.
- Informing the police and interface with CWC members may be required in some cases.

D. Medico Legal Responsibilities of a Health Professional –

The following steps should be followed to carry out a comprehensive medico legal care for a child facing sexual abuse

- History seeking

After seeking informed consent, attending to immediate medical needs and providing therapeutic care, health professional must seek the details of the episode. The techniques discussed in the section above would be extremely useful for health professionals to strike a dialogue with the child. It is important to create a relationship of trust with the child and believe in her/ his narration.

1. History provided by the child must be recorded in the child's words as far as possible.
2. Along with history, circumstances under which the assault occurred should be documented.
3. The duration and the number of episodes of the sexual abuse need to be probed.
4. Details about whether the child was administered drugs/ alcohol/ any other substance which may have rendered her unconscious, or he/ she was extremely scared, shocked and numbed to resist the assault or was promised a candy/ toffee / gift must be mentioned.
5. History should also mention the number of hours/ days after which the child has reached the health facility. Such documentation greatly assists the doctor in interpreting lack of injuries to the child.

- **General Examination and Genital Examination**

1. When medical examination of a girl child is to be conducted, the examining doctor must be a lady doctor [section 27 (2) of POCSO]. In a case decided by the Himachal Pradesh High Court a minor girl child victim of rape was taken by the police officer for medical examination to three medical establishments one after another before she could be examined at 5:40 am after undergoing trauma for 15 hours (*Siksha Vs. State of Himachal Pradesh, 2013 Cri L.J. 2036*). **Such a situation must be avoided at all costs.** Lady doctors/health care professionals may not be present in smaller towns or villages. It is advisable for all stakeholders under the Act to be prepared in advance with telephone/ cellular phone numbers of hospitals and doctors.

2. While head to toe examination is being carried out, only fresh injuries on the body and genitals should be recorded.
3. Old injuries in the hymen such as “old tear”, “healed scar”, “hymen absent” should not be recorded as they are unscientific and perpetuate stereotypes about sexual assault.
4. As health professionals, it is important to understand that old tears in the hymen can occur due to several forms of vigorous activities such as cycling, swimming, horse riding and therefore their documentation has no connection to the reported sexual assault. Documentation should also not mention results of the 2 finger test or comments on laxity of the vagina. Such documentation has been considered as invading the privacy of the survivor and has no scientific relevance to the medical examination of sexual assault. This is especially true for the older adolescents (10 – 17) years old (as per Guidelines for health and psycho social services by UNICEF 2012, “Caring for Child Sexual Abuse Survivors”).
5. It is important to understand that presence of injuries is seen in only 1/3rd of the cases of sexual assault as per WHO. Therefore, health professionals should not disbelieve a child just because she doesn’t have genital or physical injuries. Therefore circumstances surrounding sexual assault should be taken in to account while documenting and interpreting lack of injuries.

- **Evidence collection**

1. Only relevant evidence must be collected. Collection of evidence is relevant only for 72 to 96 hours after the sexual assault episode. This is because the evidence rapidly erodes with time as well as after undertaking activities such as bathing, urinating, defecating etc.
2. The nature of swabs taken is determined to a large extent by the history and nature of assault. For example, if the child has not been subjected to anal intercourse; anal swabs need not be taken.
3. Blood and urine samples should be collected if the child reports within 3 days of the assault and shares that she was offered a drink which made her unconscious / drowsy. Blood and urine samples can help in identifying the stupefying drug given to the child.

- **Conclusions in the Report**

1. Sec 164 A (3) Cr.P.C vests the examining doctor with the responsibility of preparing a report stating the reasons for each conclusion arrived at. Therefore she must record a provisional medical conclusion immediately after examination, which essentially means interpretation of medical examination and collected evidence. The conclusion should ordinarily be able to collate the results of the examination with the history of the alleged sexual assault as narrated by the survivor.

The report must mention the number of hours / days after which the survivor reached the hospital for examination and treatment. This is critical to note as medico legal evidence from the body rapidly erodes with time.

2. Examining doctor must refrain from recording medical opinion as “No signs of Rape/Sexual assault or Rape/Sexual assault did not occur”. This is because Rape/Sexual assault is a legal term and it is for the judiciary to decide.

The MOHFW has drafted a protocol for medical examination of sexual abuse. The same proforma should be used by all health facilities across the country for responding to child sexual abuse once it is finalized.

3. **Mandatory Reporting:** Any person who has an apprehension that an offence under the Act is likely, or has knowledge that such offence under the Act has been committed must fulfill the responsibility to report to the local police or SJPW under section 19 of the POCSO Act. The obligation u/s 19 of the Act is on every person and there is no exemption from this responsibility to inform under the Act, except that a child cannot be punished for such default.

Health Professionals must unconditionally provide appropriate treatment with informed consent before doing anything else. If the Health Professionals has information that an offence has been committed he/she must provide the information to the police. Before providing information, the person concerned has to be informed of the fact that the Health Professional has to provide such information to the police of such offence. If the person declines to share such information, then the Health Professional must inform the police of such refusal. If the health Professional has no such information, then the question of informing the police does not arise.

- Psychological first aid and/or counseling, where necessary, may be provided to the child in order to empower the child and his/her parents or guardians to report the offence.
- Information u/s 19 can be given to the police official attached to the hospital, and a medico legal certificate made to the police is sufficient compliance with section 19.
- **In case the child and his parents/guardians do not wish to report the offence, their informed refusal must be documented and the same communicated to the police by the health professional.**
- **Confidentiality of the child must be maintained.**
- A failure to report is a non-cognizable offence under section 21 of the Act. The police cannot investigate the offence without magisterial permission under section 155 (2) of the Cr.P.C which is a discretionary act. Health professionals must perform their duty of providing medical care first, while reporting is a secondary duty.

Monitoring Questions in a case where the Child has visited a Health Professional

1. Did the case reach the hospital without an FIR being filed?
2. Was the survivor provided with health care and medico legal examination free of cost?
3. Were the families of the child survivors provided the medical certificate? If yes, was it given free of any charge?
4. What was the waiting time from the period the survivor and family entered the hospital, till she/he was attended to for examination and treatment by doctor?

E. Interface of Health professionals with Agencies responding to Child sexual abuse –

Inter – agency coordination requires interface of several functionaries such as police, public prosecutors, judiciary and child welfare committees with each other. Each one also has the responsibility of coordinating with other functionaries to provide a comprehensive response to sexual assault survivors. Each of these players has an invariable link with the health system

as sexual assault survivors are brought to health systems for medico legal examination and care. Specific guidelines have been provided in this section for each functionary for smooth inter-agency coordination.

Interface of health systems with police –

- A standard operating procedure outlining the interface between the police and health systems is critical to ensure comprehensive care to survivors of sexual assault. Whenever a survivor reports to the hospital, police must take her/ him to the nearest health facility for medical examination, treatment and care. Delays related to medical examination and treatment can jeopardize the health of the survivor. It is therefore crucial to understand sexual assault as a medico legal emergency and police must also treat it like wise.
- Police must be informed of changes in the law. CLA and POCSO both recognize that any registered medical practitioner can carry out a medico legal examination and provide treatment and records of that health provider will stand in the court of law (section 164A Cr.P.C). Health professionals should also find out whether the child was examined elsewhere before starting the examination and if they are carrying documentation of the same. If this is the case, health providers must refrain from carrying out an examination just because the police have brought a requisition and also explain the same to them. This would greatly help in reducing the trauma of a child related to re-examination.
- Health sector is distinct from justice response system because of the therapeutic nature of services provided by the sector. Therefore while seeking details of the assault, examination, evidence collection and treatment, police should be asked to stay outside. Doctors must not ask police to give any history or details and must directly speak to the survivor and/ or family. Further healthcare provider must offer confidentiality of information and privacy in the entire course of examination and treatment.
- Police should not interfere with the duties of a health provider. Even if a medico legal examination and evidence collection has taken place, they should not take away the survivor before she receives complete treatment and care.
- In case of unaccompanied survivors brought by the police for sexual assault examination, police should not be asked to sign as witness because they are considered as an “interested party”. In such situations, a senior medical officer or any health professional should sign as witness in the best interest of the child survivor.

Police must be equipped to understand the role of medico legal evidence, its limitations as well as the role of examining doctors as expert witnesses .Even if police ask health professionals to opine on whether rape occurred or not they should refrain from commenting on “whether rape occurred”, “whether survivor is capable of sexual intercourse” and the like . This is because such “Rape” is a legal term and outside the expertise of health care provider. Similarly, comments on whether the survivor is capable of having sexual intercourse or nor are totally unscientific and irrelevant.

Interface of Health Systems with Public prosecutors –

- Health professionals must ensure that they meet Public prosecutors. This would mean that they should explain and interpret the medical evidence and the reasons for lack of medical evidence to the public prosecutor. It is therefore important for prosecutors to interact with health providers to understand reasons for negative evidence as well as doctors with the prosecutors to understand the role they have to play in the court.

- The doctor must review the notes of the case to equip him/herself with the history that has been provided by the survivor to the doctor, the police and the magistrate. In case there is a difference in the histories, the same should be clarified in advance with the public prosecutor. It is possible that a survivor revealed additional information to the doctor based on her comfort with the doctor as compared with the police or the magistrate.
- Examining doctors should prepare themselves well in time with the case documents before reaching the court. Efforts must be made by doctors to dialogue with the public prosecutor and also ask them about the role that they need to play. This would help them to be well prepared and respond to questions asked in the court.
- A public prosecutor must also understand that an examining doctor as an expert witness would also have limitations especially when the evidence is negative and therefore must also seek corroborative evidence. Such an opportunity must also be taken to discuss with the courts for the reason that no evidence was found in medical examination.

Interface of Health Systems with the Judiciary –

- Doctors are termed as “expert witness” by Law. As per 164 A, Cr.P.C, an examining doctor has to prepare a reasoned medical opinion without delay.
- A medical opinion has to be provided on the following aspects -
 - Evidence that survivor was administered drugs/ psychotropic substance / alcohol etc
 - Evidence that the survivor has an intellectual , or psycho social disability
 - Evidence of physical health consequences such as bruises, contusions, contused lacerated wounds, tenderness, swelling, pain in micturition, pain in defecation, pregnancy, etc.
 - Age of the survivor if she / he doesn't have a birth certificate or if mandated by the court.
- Absence of injuries on the survivor has to be interpreted by the examining doctor in the courtroom based on medical knowledge and details of the episode provided by child to the doctor. Lack of injuries have to be based on the time lapse between the incident and reporting to hospitals, information pertaining to luring the child, or factors such as fear, shock and surprise that rendered the child unable to resist the perpetrator.
- The examining doctor will also have to provide a medical opinion on negative findings related to forensic lab analysis. Absence of negative laboratory results may be due to:
 - Delay in reaching a hospital / health centre for examination and treatment
 - Activities undertaken by the child after the assault such as urinating, washing, bathing, changing clothes or douching which leads to loss of evidence
 - Use of condom/vasectomy or diseases of vas of the perpetrator
 - Perpetrator did not emit semen if it was a penetrative sexual act
- Examining doctors must also ensure that comments on past sexual history, finger test, status of vaginal introitus must not be made as these are unscientific and the courts too have determined them as biased.

- In most health centres because of the constant turn over, the doctor appearing in the court room could be different from the one who carried out the medical management of the child. In such instances, it is critical that the doctor making the court appearance be thorough with the case file of the child survivor such as documentation of history examination findings and clinical inference drawn by the examining doctor.

Interface of the Health System with the Child Welfare Committee -

- As per the Juvenile justice Act 2000, every district has a mandate of setting up a CWC. The committee has been vested with the powers of a first class judicial magistrate or metropolitan magistrate. A child can be brought to this committee by police, public servant, social worker, public-spirited person or the child herself.
- In instances, where a child is produced in front of the CWC after an act of sexual violence, the committee must ensure that the health care of the child is given priority and issue a memo to make arrangements so that the child is referred to a health facility and is provided comprehensive health care.
- Under the Juvenile Justice Act (JJA, 2000) all childcare institutions are expected to have medical care units (MCU) either in the same campus or in the absence of MCUs, create a well-coordinated system of referral for regular health assessment of children residing in institutions. It is critical to ensure that when MCUs are present in child care institutions, they be fully functional and have well trained staff to undertake the medical assessment and provide therapeutic care.
- CWC's must be oriented and acquainted with the health consequences of sexual abuse and the importance of provision of complete health care. At the same time they must also understand the limitations of medical evidence, thus even if medical evidence of sexual assault is not found, this in no way should be construed as a child lying about sexual abuse .
- MCUs must include indicators for assessing whether a child has been subjected to sexual violence. Such an enquiry must be included as a component of routine medical check ups. A standard operating procedure for routine medical examination, care and management must be adopted by all child welfare homes and they must be asked to provide reports of these assessments to the child welfare committee.
- Health professionals must make a note of the following aspects while screening for sexual abuse. Assurance of confidentiality and provision of privacy are keys to enabling children to speak about the abuse. However genital and anal examination should not be conducted mechanically or routinely. A few indicators for routine enquiry are -
 - Pain in urination and /or defecation
 - Abdominal pain/ generalized body ache
 - Inability to sleep
 - Sudden withdrawal from peers/ adults
 - Feelings of anxiety, nervousness, helplessness
 - Inability to sleep
 - Weight loss
 - Feelings of ending one's life

- Health professionals should communicate to the child the need for her/him (health professional) to disclose the abuse to the child welfare committee (CWC) so that the latter can take immediate steps to protect the child from abuse.

Monitoring Questions for assessing gender sensitivity in examination and documentation

1. *Is there any mention of the finger test results in the medico legal report?*
2. *Is there a mention on elasticity of vagina/ anus in the medico legal report?*
3. *Is there a mention on old tears in the hymen in the medico legal report?*
4. *Is there a comment on built and weight of survivor in the medico legal report?*

**List of Monitoring Questions for Health Professionals
for Quarterly Collection of Data by the NCPCR**

1. *No. of child sexual abuse cases handled by the health professional for the three month period?*
2. *No. of cases where the survivor was provided with health care?*
3. *No. of cases where the survivor was provided with psychological first aid/ counseling along with health care services?*
4. *What are the physical as well as psychological health consequences suffered by survivors?*
5. *No. of cases where the child and his parents/ guardians do not wish to report sexual offence, subject to their informed refusal being communicated to the police by the health professional?*
6. *Whether adequate provisions/ infrastructural facilities have been made available in order to undertake proper MLC examination of sexual assault victims?*
7. *No. of capacity building workshops/ trainings of individual health professionals on "sexual assault health care" carried out by the hospital / health centre?*
8. *Has the hospital implemented a standard operating procedure for sexual assault response management?*
9. *Are there any particular practice/ method adopted by the Medical Health Professionals that have proven to be an effective sexual assault response management?*
10. *What are the hurdles/ challenges that the Medical Professionals face while providing health care services in child sexual abuse cases?*

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MONITORING GUIDELINES FOR NCPCR / SCPCR FOR ROLES AND FUNCTIONS OF VARIOUS STAKEHOLDERS

Police, Special Courts, and Special Prosecutors

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Introduction

Article 15 of the Constitution of India (“Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”) allows for positive discrimination. Article 15 (3) of the Constitution of India states, —Nothing in this article shall prevent the State from making any special provision for women and children.”

Article 39 (“Certain principles of policy to be followed by the State”) directs State policy towards securing “*that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment*” [Article 39 (f)].

The Convention on the Rights of the Child (CRC) 1989 was ratified by India on 12th November 1992. The CRC specifies that in all actions concerning children, —the best interests” of the child shall be a primary consideration [Article 3 (1)].

The POCSO Act, 2012 is a step forward in providing special procedures for children who are survivors of sexual violence. The Preamble to the POCSO Act upholds the principles of the Constitution of India and International Law:

Preamble to the Act

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

WHEREAS clause (3) of Article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India had acceded on the 11th December 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interest of the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

AND WHEREAS it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State Parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and multilateral measures to prevent –

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials; AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Based on a reading of the Constitution of India, Judicial Pronouncements in the Supreme Court of India, the CRC and the POCSO Act, the following Charter of Rights of child survivors has been developed in relation to child survivors of sexual violence:

CHARTER OF RIGHTS OF CHILD SURVIVORS

1. **Right to Privacy and Confidentiality** – The name of the child, the family, educational institution wherein s/he is enrolled, and other information capable of identifying her/him shall be kept confidential [*Article 3 of the CRC, Preamble to the POCSO Act, Shankar Kisanrao Khade vs. State of Maharashtra 2013 (6) SCALE 277*]
2. **Right to Dignity**- The child survivor shall be treated with dignity and respect at all stages in the matter and by all players including health care workers, police, judiciary, prosecutor, translators, etc. [*Article 39 (f) of the Constitution of India, Preamble to the CRC*]
3. **Right to Non-Discrimination** – There shall be no discrimination against any child based on religion, race, sex, or caste. For example, girl children cannot be discriminated against by blaming them for their dress / attire for the incident of sexual offence. At the same time, all stakeholders shall be sensitive to any special needs of a child. For instance, disabled children, medically unfit children or very young children will need to be accorded special treatment [*Article 15 (1) of the Constitution of India, Article 2 of the CRC*].
4. Child has the right to express his /her views in all matters affecting the child: The wishes of the child shall be given priority when decisions regarding institutionalization, medical examination of the child and appointment of a support person. The views of the child shall be given due weight in accordance with the child's age and level of maturity (*Article 12 of the CRC*).
5. **Right to Well Being** – The best interest and well being of the child survivor must be regarded as being of paramount importance at every stage of the trial. Each stakeholder

under the Act shall act with sensitivity to the healthy physical, emotional, intellectual and social development of the child (Preamble to the POCSO Act). In *Shankar Kisanrao Khade vs. State of Maharashtra* 2013 (6) SCALE 277, the Supreme Court laid down various guidelines for stakeholders under the Act, and held that in cases where the perpetrator of the crime is a family member, utmost care must be taken bearing in mind the best interest of the child is of paramount consideration.

6. **Child has a right to be protected from all forms of sexual exploitation by the State:** There can be no exemption for committing sexual intercourse with a child – not even if the accused is married to the child (*Article 34 of the CRC, Section 42A of the POCSO Act*)
7. **Right to Medical Treatment:** The child survivor shall not be denied medical treatment (section 27 of the POCSO Act). The dynamics of child sexual abuse differ from those of adult sexual abuse. In particular, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behavior. Therefore, the evaluation of children requires special skills and techniques in history taking, forensic interviewing and examination; the examiner may also need to address specific issues related to consent and reporting of child sexual abuse [*The International Covenant on Economic Social and Cultural Rights, General Comment 14, Right to Health (11th August 2004), Guidelines for medico-legal care for survivors of sexual violence, World Health Organization, 2003*].

The NCPCR and all State Commissions have been given the onerous responsibility of monitoring the implementation of the Protection of Children from Sexual Offences Act 2012 under Section 44 of the Act and Rule 6 of the Central POCSO Rules. To take this mandate forward, Monitoring Guidelines for the Police, Special Courts, and Special Prosecutors have been prepared by Lawyers Collective Women's Rights Initiative as a technical partner for NCPCR with support from UNICEF.

In order to conduct the exercise of Monitoring and Evaluation, NCPCR or SCPCR are mandated to systemize the process of data collection by compiling information from the implementing agencies functioning under the Act. Questionnaires, which correspond with the duties and statutory obligations of the agencies, can be used to collect data. Accordingly, the data collected can be contextualized and evaluated by any concerned person to gauge the effectiveness, efficiency and impact of measures taken to implement the Act. These Monitoring Guidelines contain questions for monitoring the fulfillment of roles of the stakeholders under the Act. The purpose of providing monitoring questions for stakeholders is to increase efficiency in service delivery and prevent instances of child sexual abuse. The list of monitoring questions provided at the end of each chapter can be used for quarterly collection of data by the NCPCR, which can be compiled to form the Annual Report under section 44 (3) of the POCSO Act.

Cases of child sexual abuse can be brought to the notice of the NCPCR through various sources. For example, information may reach the NCPCR through print media and newspapers, through NGOs, or through complainants approaching the Commission directly. Such cases require monitoring by the NCPCR as well. In this regard, it is recommended that:

- i. As far as possible NCPCR / SCPCR should try and follow a case till the conclusion of the trial.
- ii. For each case a Fact Sheet, Action Taken by NCPCR/SCPCRs and a Response sheet should be prepared
- iii. Monitoring of complaints received from agencies like NGOs, institutions, RWAs, Unions etc: They require monitoring as they have not yet reached the criminal justice functionaries. These have to be followed till they are registered as FIR's in the police

system. If they have not been registered, then it has to be examined why not. Once the NCPCR/SCPCR has the information then regular updates of cases can be automatically asked from the authority/ organization till the case reaches its logical conclusion Also the role of State Legal Services Authority can be roped in for giving legal and para legal help to the victim and family. The role of State Commission can also be reviewed, and the good practices noted and shared.

- iv. There should be separate monitoring system for the complaints received directly by NCPCR/SCPCR v. With regard to cases reported in the media, it is the duty of the Commission to follow the case until FIR is registered. In case the FIR is not registered, the reasons must be monitored by the Commission.

OBJECTIVES OF THE MONITORING GUIDELINES FOR THE POLICE AND JUDICIARY

- The objectives of the Monitoring Guidelines for the Police are:
 - Identifying the roles and responsibilities of the Police with regard to recording information under section 19, recording an FIR, recording the statement of the child and extending care and protection to the child;
 - Identifying indicators for assessing the response of the police to child survivors.
- The objectives of the Monitoring Guidelines for the Judiciary are:
 - Identifying the judicial functionaries under the Act and their roles and responsibilities – including dealing with a police report, procedure for bail / remand of an accused, procedure for recording the statement of the child, and principles for trial in a Special Court;
 - Identifying indicators to assess the response of the judiciary to child survivors.
- The objectives of the Monitoring Guidelines for Special Prosecutors are:
 - Identifying the roles and responsibilities of Special Prosecutors under the Act including dealing with a private complaints case, dealing with a closure report, hostile witnesses and role of legal aid;
 - Identifying indicators to assess the response of the Special Prosecutors to child survivors.

In the Monitoring Guidelines, clarifications of the scope of the POCSO Act and promoting the best interest of the child are primary objectives.

LIST OF ABBREVIATIONS

CEHAT: Centre for Enquiry into Health and Allied Themes

CLA Act: The Criminal Law (Amendment) Act 2013

CRC: The United Nations Convention on the Rights of the Child, 1990

Cr.P.C: The Code of Criminal Procedure, 1973

CSA: Child Sexual Abuse

CWC: Child Welfare Committee

FIR: First Information Report

IPC: The Indian Penal Code, 1860 **ITPA:** The Immoral Traffic (Prevention) Act, 1956 **J.J Act:** The Juvenile Justice (Care and Protection of Children) Act, 2000

LCWRI: Lawyers Collective, Women's Rights Initiative

NGO: Non-Government Organization

NCPCR: The National Commission for Protection of Child Rights

PCPP: Police Care and Protection Report

POCSO: The Protection of Children from Sexual Offences Act, 2012

RI: Rigorous Imprisonment

SCPCR: State Commission for Protection of Child Rights

SJPU: Special Juvenile Police Unit

SOP: Standard Operating Procedures

UNICEF: The United Nations Children's Fund

U/s: Under section

INTRODUCTION TO THE POCSO ACT

The Figures

There were a total of 24, 915 victims of rape out of 24,923 reported rape cases during the year 2012. Out of these, 1051 rapes were perpetrated on children under 10 years of age. 12.5% (3,125) of the total victims of rape were girls under 14 years of age, while 23.9% (5,957 victims) were teenaged girls in the age group of 14 to 18 years. (*National Crime Records Bureau "Crimes in India" 2012*).

Why a separate law on Child Sexual Abuse?

The Rationale

As there was no other law governing child sexual abuse until 2012, sections 354, 509, 377 and where appropriate, section 376 of the Indian Penal Code, 1860 (IPC) were invoked to cover cases of child sexual abuse. Sections 4 (1), 5 (d), 7 of the Immoral Traffic (Prevention) Act, 1956 (ITPA) applied to children in prostitution. The Juvenile Justice (Care and Protection of Children) Act, 2000 applies to sexual offences by children.

- Prior to the Criminal Law (Amendment) Act of 2013, Section 376 of the IPC only covered penetration of the penis into the vagina in the definition of "rape".
- Sexual offences in the IPC are gender specific. The provisions (with the exception of section 377) only apply to women as victims, while the perpetrators are male.

Key Features of POCSO, 2012

- **The definition of sexual offences is broad** and not restricted to rape. The Act protects children of both sexes from offences of sexual assault, sexual harassment, and pornography – for example, penetration by objects, touching with sexual intent, or showing pornography to a child.
- The POCSO Act ensures **effective access to justice**. The Act provides for the establishment of special procedure for reporting of cases, special procedures for recording statement of a child, and Special Courts for the trial of such offences.
- **The POCSO Act makes abetment of, and attempt to commit an offence under the POCSO Act punishable.**

Duty to Inform (Sections 19 and 20)

- The Act provides for **mandatory reporting of sexual abuse of a child or apprehended sexual abuse of a child**. Any person (including a child) who has apprehension that an offence is likely to be committed, or has knowledge that an offence has been committed shall provide such information to the Special Juvenile Police Unit or the local police [section 19 (1)].
- In case any personnel of the media or hotel, lodge, hospital, club or a studio or photographic facilities comes across any child pornography (through any medium), he shall provide such information to the Special Juvenile Police Unit or the local police (section 20).
- False complaints with the intention to humiliate, extort, or threaten or defame someone are punishable under the Act. However, a person who provides information about the occurrence of a sexual offence in good faith will not incur any liability [section 19 (7)].

Against whom can a complaint be filed?

- Both men and women can be offenders under the Act. Offences under sections 3 (a) and 5 (j) (ii) involve penetration by the penis and can be perpetrated only by men. Specifically:
 - Section 3: A person is said to commit “penetrative sexual assault” if (a) *“he penetrates his penis, to any extent, into the vagina, mouth, urethra, or anus of a child or makes the child to do so with him or any other person”*;

Since the words “any other person” are used in section 3 (a), women may also be offenders or victims under the second part of section 3 (a).

Section 5 (j): Whoever commits penetrative sexual assault on a child, which - (ii) in the case of female child, makes the child pregnant as a consequence of sexual assault.

In offences under sections 3 (a) and 5 (j) (ii), women can be joined as abettors under section 16. Moreover, in case of commission of such offences by men in conspiracy with women, section 120-B, IPC, may be invoked to prosecute such accused women.

The other clauses in section 3 and section 5 may be committed by women as well.

Offences under section 11 (“sexual harassment”) and section 13 (“use of child for pornographic purposes) are gender neutral and may be committed by a man or a woman against a male or a female child.

- The POCSO Act is only applicable to child survivors and adult offenders. In case two children have sexual relations with each other, or in case a child perpetrates a sexual offence on an adult, the Juvenile Justice (Care and Protection of Children) Act, 2000, will apply.

What is a Child? [Section 2(d)]

- A child under the Act means any person below the age of eighteen years.

What is Child Sexual Abuse?

For the sake of convenience, offences may be divided into two specific categories: (i) Penetrative; and (ii) Non penetrative sexual offences.

- **Penetration** is defined in section 3 as penetration of the penis into any orifice of a child’s body, insertion of an object into the vagina, urethra, or anus of a child, manipulating the body of a child so as to cause penetration into the vagina, urethra or anus, and applying the mouth to the vagina, penis, anus or urethra of a child.

- Non penetrative sexual offences are **sexual assault (section 7)**, **sexual harassment (section 11)**. Sexual assault involves any form of physical contact without penetration with a child with sexual intent. Sexual harassment constitutes verbal acts, showing pornography to a child, constantly following or watching a child, threatening to use depiction of a child involved in a sexual act, and enticing a child for pornographic purposes.

Degrees of Child Sexual Abuse

- Under the Act, certain acts committed along with penetrative sexual assault are listed as ‘aggravated’ and stricter punishment is accorded to these offences.
- **Aggravated penetrative sexual assault (section 5):** For example, penetrative sexual assault by a police officer within the limits of the police station at which he is posted, or gang rape by any person committing penetrative sexual assault, or penetrative sexual assault by any person leading to grievous hurt, or bodily harm and injury or injury to the sexual organs of a child.
- **Aggravated sexual assault (section 9):** For example, sexual assault by a police officer within the limits of the police station at which he is appointed, gang sexual assault by any person, or sexual assault by any person leading to grievous hurt, or bodily harm and injury, or injury to the sexual organs of the child.

Table 1. List of offences under the Act and the Punishment for the offence:

S.No	Offence and Description	Punishment under POCSO
1.	Section 3 Penetrative Sexual Assault Inserting body part or object in a child, or making a child does this with another.	Section 4 Not less than seven years of imprisonment which may extend to imprisonment for life, and fine
2.	Section 5 Aggravated Penetrative Sexual Assault Penetrative sexual assault by a police officer, member of armed forces, public servant, staff of remand home, jail, hospital or school. It includes penetrative sexual assault committed by any other person through gang penetrative assault, penetrative sexual assault using deadly weapons, fire, heated substance or corrosive substance, penetrative sexual assault which physically incapacitates the child or causes child to become mentally ill, causing grievous hurt or bodily harm and injury to the sexual organs of the child, making girl child pregnant, inflicting child with HIV or any other life threatening disease, penetrative sexual assault more than once, penetrative sexual assault on a child younger than 12 years, by a relative, owner / manager or staff of any institution providing services to the child, by a person in a position of trust or authority over the child, committing penetrative sexual assault knowing the child is pregnant, attempts to murder the child, by a person previously convicted for a sexual offence, penetrative sexual assault in the course of communal or sectarian violence, penetrative sexual assault and making the child strip or parade naked in public.	Section 6 Not less than ten years of imprisonment which may extend to imprisonment for life, and fine
3.	Section 7 Sexual Assault With sexual intent touching the private parts of a child	Section 8 Not less than three years of imprisonment which may extend to five years, and fine

4.	Section 9 Aggravated Sexual Assault Sexual assault by a police officer, member of armed forces, public servant, staff of remand home/jail/hospital/school, etc, and other acts of sexual assault by any person as mentioned in the second part of section 5, except making a girl child pregnant.	Section 10 Not less than five years of imprisonment which may extend to seven years, and fine (Section 10)
5	Section 11 Sexual Harassment of the Child With sexual intent: showing any object/body part, or making any gesture aimed at a child making a child exhibit her body enticing or threatening to use a child for pornography	Section 12 Up to three years of imprisonment and fine
6	Section 13 Use of Child for Pornographic Purposes	Section 14 (1) Imprisonment up to five years and fine and in the event of subsequent conviction, up to seven years and fine
7	Section 14 (2) Penetrative sexual assault by directly participating in pornographic acts	Section 14 (2) Not less than ten years of imprisonment, which may extend to imprisonment for life, and fine
8	Section 14 (3) Aggravated penetrative sexual assault by directly participating in pornographic acts	Section 14 (3) Rigorous imprisonment for life and fine
9	Section 14 (4) Sexual assault by directly participating in pornographic acts	Section 14 (4) Not less than six years of imprisonment which may extend to eight years, and fine
10	Section 14 (5) Aggravated sexual assault by directly participating in pornographic acts	Section 14 (5) Not less than eight years of imprisonment which may extend to ten years, and fine
11	Section 15 Storage of pornographic material involving a child for commercial purposes	Section 15 Three years of imprisonment and / or fine
12	Section 21 Punishment for failure to report or record a case by (i) Any person; (ii) Any person, being in charge of any company or an institution. (This offence does not apply to a child)	Section 21 (i) Imprisonment of either description which may extend to six months or with fine or with both (ii) Any person, being in charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub section (1) of section 19 in respect of a subordinate under his control shall be punished with imprisonment for a term which may extend to one year and with fine.
13	Section 22 (1) Punishment for false complaint or false information in respect of an offence committed under sections 3, 5, 7 and section 9 solely with the intention to humiliate, extort or threaten or defame him. (3) False complaint or providing false information against a child knowing it to be false, thereby victimising such child in any of the offences under this Act. (This offence does not apply to a child)	Section 22 (1) Imprisonment for a term which may extend to six months or with fine or with both. (3) Imprisonment which may extend to one year or with fine or with both.

The POSCO Act is a special law and it has not specified which offences are cognizable and, therefore, to determine which of the POSCO Act offences cognizable and non-bailable, reliance are must be placed exclusively on Part II ("Classification of Offences against Other Laws"), First Schedule of the Code of Criminal Procedure, 1973. **Whenever the punishment is less than 3**

years of imprisonment, the offence would be non-cognizable and bail able. Any higher term of imprisonment beginning from 3 years and above would make such offence cognizable and non-bail able.

Hence all sections are cognizable, with the exception of section 21 and section 22 which are non cognizable and bail able offences.

The Criminal Law Amendment Act of 2013 amended the IPC so as to include sexual offences other than penetration as penal offences. Many of the POCSO offences are now also covered in the Indian Penal Code (IPC) following the Criminal Law Amendment Act of 2013.

Section 42 of POCSO states *“Alternate Punishment”* Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376C, 376D, 376E or section 509 of the Indian Penal Code (45 of 1860), then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”

Section 42A states *“Act not in derogation of any other law - The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”*

The following table compares provisions of IPC with POCSO to check which statute will apply where offences overlap.

Table 2: Applicability of IPC or POCSO in overlapping offences

S.No	Offence and Description	Punishment under IPC	Whether Punishable under IPC or POCSO
1	Section 166 A Public servant disobeying directions under law - A public servant who- (a) knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence, or (b) knowingly disobeys to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation, or (c) fails to record any information given to him u/s 154 (1) of the Cr.P.C in relation to cognizable offence punishable u/s 326 A, 326B, 354, 354B, 370, 370A, 376, 376A, 376B, 376C, 376D, 376E, 509, Commits an offence under the section..	Six months rigorous imprisonment which may extend to two years, and shall also be liable to fine	IPC. Failure to record an offence u/s 19 (2) of POCSO shall be punished with imprisonment of either description which may extend to six months or with fine or with both.
2	Section 354 A Sexual Harassment consists of; Any of the following offending acts of a man (i) physical contact and advances including unwelcome and explicit sexual overtures; (ii) a demand or request for sexual favours; (iii) showing pornography against the will of the woman; (iv) making sexually colored remarks.	Rigorous imprisonment which may extend to three years or with fine, or with both for clause (i) to clause (iii). Imprisonment of either description which may extend to one year or with fine or both for clause (iv)	The definition of sexual harassment is different under POCSO. POCSO carries the greater punishment for uttering any words or sounds with sexual intent under section 11 (i). Showing pornography against the will of the woman carries the greater punishment under IPC.

			Under section 11 (iii) of POCSO showing pornography to a child with or without its consent is an offence. Physical contact is covered under "sexual assault" (s.7) of POCSO, which carries the greater punishment.
	Section 354B Assault or use of criminal force to woman with intent to disrobe is an offence.	Not less than three years imprisonment this may extend to seven years and shall also be liable to fine.	POCSO Act, section 9 (u) makes it an offence to commit sexual assault on a child and to make it strip or parade naked in public and punishes it with imprisonment not less than 5 years but which may extend up to 7 years and fine. When such offence is accompanied by penetrative sexual assault as defined under section 5 (u) of the POCSO Act, the same is punishable under section 6 of the POCSO Act with RI for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.
	Section 354C Voyeurism – is an offence by a man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed.	First conviction – One year imprisonment which may extend to three years and fine Subsequent conviction – Three years imprisonment which may extend to seven years and shall also be liable to fine	IPC. No such offence exists under POCSO.
	Section 354 D Stalking is an offence by a man who (i) follows a woman and contacts or attempts to contact her to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or (ii) monitors the use by a woman of the internet, email, or any other form of electronic communication.	First conviction – Imprisonment which may extend to three years and shall also be liable to fine Subsequent conviction – Imprisonment which may extend to five years and shall also be liable to fine	Under section 11 (iv) of POCSO repeated or constant following, watching, contacting a child with sexual intent is punishable with three years imprisonment and fine. IPC carries the greater punishment for subsequent offence.
	Section 370 Trafficking of Persons is an offence committed by a person who for the purpose of exploitation (a) recruits (b) transports (c) harbors (d) transfers or (e) receives a person/s by firstly using threats, secondly, using force / coercion, thirdly, by abduction, fourthly, by practicing fraud, fifthly, by abuse of power or sixthly by inducement commits the offence of trafficking. Exploitation includes sexual exploitation.	Section 370 (4), 370 (5), 370 (6) deal with trafficking of minors. The offence is punishable with rigorous imprisonment for not less than ten years imprisonment but which may extend to life and shall also be liable to fine	IPC. No such offence exists under POCSO.

	<p>Section 370 A Exploitation of a trafficked person is an offence by anyone – who knowingly or having reason to believe that a minor has been trafficked, engages such minor for sexual exploitation.</p>	<p>Rigorous imprisonment for not less than 5 years which may extend to seven years and shall also be liable to fine</p>	<p>IPC. No such offence exists under POCSO.</p>
	<p>Section 375 A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:— First.—Against her will. Secondly.— Without her consent. Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.— With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.—With or without her consent, when she is under eighteen years of age. Seventhly.—When she is unable to communicate consent. Explanation</p>	<p>Section 376 Whoever, except in the cases provided for in sub-section (2), commits rape shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine. (2) Whoever,— (a) being a police officer, commits rape— (i) within the limits of the police station to which such police officer is appointed; or (ii) in the premises of any station house; or (iii) on a woman in such police officer’s custody or in the custody of a police officer subordinate to such police officer; or (b) being a public servant, commits rape on a woman in such public servant’s custody or in the custody of a public servant subordinate to such public servant; or (c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or (d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women’s or children’s institution, commits rape on any inmate of such jail, remand home, place or institution; or (e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or (f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or (g) commits rape during communal or sectarian</p>	<p>Under section 5 (m) of POCSO whoever commits penetrative sexual assault on a child below 12 years shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life and shall also be liable to fine. Under section 376 (i) of the IPC rape of a woman under 16 years of age is punishable for a term which shall not be less than ten years but which may extend to life and shall also be liable to fine. Hence, rape of a girl aged 12 years to 16 years carries greater punishment under IPC. Exception 2 of section 375 IPC is inconsistent with POCSO. Hence POCSO has overriding effect and marital rape of a minor is an offence under POCSO.</p>

	<p>1.—For the purposes of this section, “vagina” shall also include labia majora. Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Exception 1.—A medical procedure or intervention shall not constitute rape. Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.]</p>	<p>violence; or (h) commits rape on a woman knowing her to be pregnant; or (i) commits rape on a woman when she is under sixteen years of age; or (j) commits rape, on a woman incapable of giving consent; or (k) being in a position of control or dominance over a woman, commits rape on such woman; or (l) commits rape on a woman suffering from mental or physical disability; or (m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or (n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and shall also be liable to fine</p>	
	<p>Section 376 A Punishment for causing death or resulting in persistent vegetative state of victim- Whoever commits an offence punishable under subsection (1) or (2) of S 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state</p>	<p>Rigorous imprisonment for not less than 20 years, but which may extend to imprisonment for life (remainder of that person’s natural life) , or with death</p>	<p>IPC. No corresponding section in POCSO.</p>
	<p>Section 376 C Sexual intercourse by a person in authority- Whoever, being- (a) in a position of authority or in a fiduciary relationship; (b) a public servant; (c) superintendent or manager of a jail, remand home or other place of custody or a women’s or children’s institution; or (d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape.</p>	<p>Rigorous imprisonment of either description for a term which shall not be less than five years, but may extend to ten years, and fine</p>	<p>POCSO [section 5 (p)].</p>
	<p>Section 376 D Gang Rape- When a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape</p>	<p>Rigorous imprisonment for not less than 20 years and may extend to life (remainder of that person’s natural life), and with fine (the fine shall be paid to the victim and shall be just and reasonable to meet the medical expenses and rehabilitation of the victim)</p>	<p>IPC. Under section 5 (g) of the POCSO if the offence is committed on a child it is punishable with minimum imprisonment of 10 years which may extend up to life imprisonment and fine as provided under section 6.</p>

	<p>Section 376 E Punishment for repeat offenders- Whoever has been previously convicted of an offence punishable under 376, 376A or 376D and is subsequently convicted of an offence punishable under any of the said sections</p>	<p>Imprisonment for life (remainder of that person’s natural life), or with death</p>	<p>IPC. Under sections 5 (t) and section 9 (t) of the POCSO Act a previous convict of an offence under the POCSO Act when commits penetrative sexual assault or sexual assault on a child, as the case may be, is liable to severe punishment, and these offences cover a wider sphere than under section 376 E, IPC.</p>
	<p>Section 509 Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, of that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman,</p>	<p>Simple imprisonment for a term which may extend to three years, and also with fine</p>	<p>Section 509 IPC and section 11 (i) POCSO carry the same punishment</p>

Special Procedures under the Act

- Recognizing that children survivors of sexual assault are vulnerable, the Act puts in place special child friendly procedures to assist a child in recording his/her statement at all stages (for details, please see the recommendations and guidelines below).

Continuing Obligations

- Training and sensitization of the police and other stakeholders, such as health professionals and Child Welfare Committees in handling cases under POCSO;
- Training and sensitization programs for members of the judiciary;
- Establishment of Special Courts and appointment of Special Prosecutors;
- **Supreme Court in Exploitation of Children in Orphanages in State of T.N vs. Union of India 2013 (1) SCALE 260** directed the State Governments to indicate what measures have been taken for setting up Special Courts. In case the Special Courts have been set up, the Court directed that the status report shall indicate the number of such Special Courts established. In the event, Special Courts have not been established, the status report should indicate the maximum time limit within which such Courts will be established.

Note: The primary responsibility for dissemination of the law is on the Central and State governments (section 43).

Roles and Functions of the Police under the POCSO Act Role of NCPDR in Monitoring: What to Monitor and How to Monitor

DEFINITIONS

1. “Code” means The Code of Criminal Procedure, 1973
2. “Expert” means a person trained in mental health, medicine, child development or other related discipline, which may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability.

3. "Mandatory reporting" means any person who has apprehension that an offence under the Act is likely, or has knowledge that such offence under the Act has been committed must fulfill the responsibility to report it under section 19 of the Act.
4. "Special Court" means the Court of Session designated in each district to try offences under the Act, as per section 28 of the POCSO Act.
5. "Survivor" means a child who was a victim of any of the offences under the POCSO Act and is recovering, or has recovered from the sexual offence.
6. "Special Educator" means a person trained in communication with children with special needs in a way that addresses the child's individual differences and needs, which include challenges with learning and communication, emotional and behavioral disorders, physical disabilities and developmental disorders.
7. "Special Juvenile Police Unit" means a police unit which consists of police officers dealing primarily with juveniles under the Juvenile Justice (Care and Protection of Children) Act, 2000. Such police officers are specifically trained for the purpose of handling cases involving children. At least one such police officer with proper training and aptitude, designated as the "juvenile or child welfare officer", shall handle juveniles and coordinate with the police. Such units may be created in every district and city

Procedure for Recording Information

When dealing with a child victim of sexual abuse, the police must adopt a sensitive approach in order to meet the objects of the Act. While dealing with a child the police officer's actions must conform to the provisions of the Act in letter and spirit. The Act puts in place certain statutory obligations for sensitive handling of the child by the police.

Under the Act, the police officer concerned has to have continuous and uninterrupted communication with a child. In this regard, there are specific responsibilities for the police officer to discharge. For instance: The police must act in the best interest of a child by protecting the child's freedom and dignity; The police must enable treatment and medical examination, respecting the child's sensitivities at all times; The police must extend help and give relevant information to the child or its parents throughout till the conclusion of the criminal prosecution; The police must respect the right to privacy and confidentiality of the child.

Law enforcement by investigation into cognizable offences has traditionally been (subject to specialized investigating agencies as exceptions) the responsibility of the local police. The procedure regulating such law enforcement is governed by the Cr.P.C. While the Cr.P.C applies to cases under the POCSO Act, this Act introduces additional procedures to be followed by the police and the courts.

The police have been entrusted with more responsibility under the POCSO Act than those entrusted by the Cr.P.C, the Police Act, 1861, and other State specific Police Acts/Rules.

Section 19 "Reporting of offences" - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, -

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under sub-section (1) shall be -

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant; (c) shall be entered in a book to be kept by the Police Unit.

(3) Where the report under sub section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents are being recorded in the language not understood by a child or wherever it is deemed necessary, a translator or interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith, for the purpose of sub-section (1).

1. Recording relevant information under section 19 is mandatory: The POCSO Act imposes the responsibility of recording reported information under section 19 upon the police - as also upon the special juvenile police unit - to enable them to proceed in accordance with law and take urgent action including the extension of care and protection to a child.¹ There are four steps to be followed by police when information is given about (a) commission of offence or (b) expressing apprehension that such offence is likely to be committed:
 1. Record such information in writing.
 2. Ascribe an entry number to the recorded information.
 3. Read it to the informant.
 4. Enter the information in a book kept by the police unit.

Obligation of the local police and SJPU u/s 19

- The fact that section 19 imposes parallel obligation upon the special juvenile police unit to make a similar record cannot be used as a justification for the police to direct the informant to the special juvenile police unit or vice-versa.
- The police cannot, like-wise, ask the informant to approach the SJPU on the ground that section 19 imposes parallel obligations on both the bodies.
- The obligation of recording information under section 19 cannot be avoided by citing provisions of the Cr.P.C

1 A "child" in these recommendations means a victim of offence under the Act or a child apprehending commission of any such offence.

- Since not recording of information by the police under section 19 is a penal, non-cognizable offence under section 21 – it is clear that the police have to necessarily and without exception record the information envisaged under sub-section (1), section 19 of the Act.
- The record under section 19 can be the basis of further police action including registration of FIR under section 154 of the Cr.P.C. The information recorded under section 19 is not automatically an FIR. The pre-FIR record under section 19 is made to stop or prevent commission of any offence under the Act against a child by rescuing the child before it is late and envisages extension of emergency care and protection to such child under such apprehension.

What is the Status of a section 19 report?

The status of a statement under section 19 of the POCSO would depend upon its contents. The report may be used for the following purposes:

- (1) As the basis of registration of FIR and commencement of investigation under Chapter 12 of the Code in case it is not cryptic and a cognizable offence is reported;
- (2) For initiating inquiry under the Juvenile Justice (Care and Protection of Children) Act, 2000, against a juvenile in conflict with law; and
- (3) The person providing the statement under section 19 may be confronted with it during the cross-examination in accordance with section 145 of the Evidence Act, 1872.
- (4) If such person turns hostile, the prosecution may put the contents of the statement to such child or witness, as the case may be, and conduct cross-examination of the hostile witness.

Section 19 precedes recording of an FIR. Although recording a statement under section 19 is mandatory, the mandatory character of a FIR must be determined by interpreting the provisions of the Cr.P.C.

2. *Police should not postpone responsibility to record under section 19:* The information under section 19 of the Act may be given by any person, even a person other than the child.

- The police cannot avoid the immediate obligation to prepare the record under section 19 (1) in order to verify or confirm the information received from the child.
- Information given by any person under section 19 in good faith is over and above any civil or criminal liability.

Mandatory Reporting:

Any person who has apprehension that an offence under the Act is likely, or has knowledge that such offence under the Act has been committed must fulfill the responsibility to report under section 19 of the Act.

- The obligation under section 19 of the Act is on every person and there is no exemption from this responsibility to inform under the Act, except that a child cannot be punished for such default.
- However, **the apprehension or knowledge of an informant under section 19 of the Act has to have reasonable basis.** For example, hearsay from strangers who have no knowledge cannot form reasonable basis.
- When the information envisaged under section 19 of the Act has already been conveyed and recorded by the police or special juvenile police unit at the instance of any person, the failure to re-report by any other person would not have penal consequences.

- In **Shankar Kisanrao Khade vs. State of Maharashtra** 2013 (6) SCALE 277, the Supreme Court directed *“Hospitals, whether Government or privately owned, or medical institutions where children are treated or admitted when they come to know that children were subjected to sexual abuse, must immediately report to the nearest J.J. Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with law safeguarding the interest of child.”*
- **Confidentiality of the child must be maintained.**
- A failure to report is a non-cognizable offence under section 21 of the Act. The police cannot investigate the offence without magisterial permission under section 155 (2) of the Cr.P.C which is a discretionary act.

[For details of the role of Health Professionals in reporting sexual offences, please see the “Roles and Functions of Health Professionals under the POCSO Act (Part ‘D’)”]

3. **Manner of recording information from child:** When a child gives information to the police under section 19, the special procedure of recording it, in the interest of justice, consists the use of: (i) simple sentences in reducing information to enable the child to understand contents of the record [section 19 (3)]; (ii) language understood by the child; and (iii) qualified and experienced translator or interpreter when necessary on payment of fees prescribed [section 19 (4)]. Further, the statement must be recorded in the presence of the parents or any person having the trust and confidence of the child. *(For procedural requirements to be followed in recording any statement of the child by the police see Recommendation 17).*

It is important to follow this procedure as u/s 145 of the Evidence Act, 1872, the victim can be cross-examined by the defence counsel in respect of this record during the trial. Thus, when the initial steps are taken as envisaged by the Act, a just and fair trial can be ensured avoiding technical difficulties.

4. **Information received through telephone to be recorded:** The obligation imposed by section 19 of the Act is not limited to making record of the requisite information by the police only when the informant is physically present before the concerned officer. Such information given by telephone or cellular phone must be (i) reduced to writing by the police; (ii) ascribed a number and (iii) read-over to the informant, and there is no requirement to take the signature of the informant or to give him copy of the report. Even anonymous information must be recorded under section 19 (2).
5. **Police officer recording information under section 19 to provide personal particulars:** A police officer reducing information into report under section 19 of the Act has to immediately give to the informant the details of his name, designation, address and telephone number and of his supervising officer.

Monitoring Questions in a case where information about the survivor has reached the Police/ SJPU

1. *Whether the complaint made to the police was ascribed an entry number?*
2. *Was a case-diary maintained by the police station and unit comprising of written statements of the informant and entry no.?*
3. *Did the police read the recorded statement to the informant for validation?*
4. *Whether a copy of the FIR was furnished to the person making the complaint, free of cost?*
5. *What safeguards were undertaken by the police while recording the statement of the child?*

6. *Whether child/ parents/ guardians have been informed of the availability of support services, including counseling by the police?*
7. *What assistance has been provided by the police to the child/ guardian/ parents in availing the support services?*

Care and Protection of the Child to be extended by the Police

6. *After recording information under section 19 the police to take steps for care and protection of the child:*

The purpose of recording the report under section 19 of the Act is to enable immediate necessary steps to be taken for the benefit of the child and to secure care and protection to a child. **When the police are satisfied that an offence has been committed affecting a child or there is apprehension of commission of offence under the Act, they must make arrangements within 24 hours, after recording reasons, to give such child requisite care and protection.** After recording a report under section 19 (2) of the Act, the police must make immediate arrangements to give the child necessary care and protection, specified in sub-section (5) of section 19.

Further, if the child has no home or no satisfactory arrangements can be made for his secure stay within the family, or such child already living in care institution apprehends maltreatment, he must immediately be placed by the police temporarily in a children's home or shelter home. Placing the child in a shelter home for his/ her care and protection must be the last option.

7. *Report to the Child Welfare Committee or the Special Court to enable financial assistance / interim compensation to be given to a child:* The police must report at the earliest, but within 24 hours of getting information under section 19 of the Act, if the child needs immediate care and attention - to the Child Welfare Committee, and to the Special Judge for interim compensation or, when there is no designated Judge, to the Sessions Judge.
 - After recording FIR, the Special Court under sub-section (6), section 19 read with rule 7 (1) of the Protection of Children from Sexual Offences Rules, 2012, can order interim compensation to meet the immediate needs of a child for relief and rehabilitation.
 - The CWC, under sub-section (1), section 31 of the Juvenile Justice (Care and Protection of Children) Act, 2000, have powers to provide for basic needs of such child and protect its human rights, and order temporary financial assistance to cover its basic and immediate needs, before the Special Court decides the question of interim compensation.
8. *Production of child before CWC by police:* Rule 4 (3) of the Protection of Children from Sexual Offences Rules, 2012, and section 19 (6) of the Act provide for the production of a child by the police before the CWC within 24 hours after the receipt of information under section 19 of the Act, if the police have reasonable apprehension that an offence under the Act has been committed or attempted.
 - A child is to be produced by the police before the CWC after receiving the information - within 24 hours and recording of reasons - when (i) the police reasonably apprehend likely commission of an offence against such child under the Act and the child lives in the same or shared household as that of the accused or (ii) it is under institutional care or has no home and additionally, in either case, has no parental support [Rule 4 (3)].

- Upon satisfaction (and after recording the reasons in writing) that the child needs care and protection, the police shall request the CWC for a detailed assessment [Rule 4 (3)]. The facts recorded by the police need to be taken into consideration by the CWC.
 - The responsibility of the police to produce a child before the CWC is in order to enable the CWC to determine within 3 days whether the child needs institutionalized care and protection [Rule 4 (4)]. **In this regard, the wish of the child and its welfare are the most important considerations for the CWC to take into account.**
9. *Child unable to communicate due to young age or suffering from severe physical or mental disability including severe injury shall not be produced before the CWC to the discomfort of the child unless directed:* Section 47 of the Juvenile Justice (Care and Protection of Children) Act, 2000, gives discretion to the Committee in relation to a child in need of care and protection to dispense with his attendance during the inquiry. Rule 27 (3) of the Delhi Juvenile Justice (Care and Protection of Children) Rules 2009² provides for sending written report to the CWC with the photograph of a child instead of producing him, when the child is under 2 years of age and medically unfit. Thus, the presence of a disabled, severely injured or a child below 2 years before the CWC is not necessary for beginning with the statutory inquiry, and the CWC has powers to dispense with attendance of such child. The CWC should be apprised by the police in writing of cases involving such children. In cases where for example, due to severe injuries or illness it would be detrimental for a child to travel to appear before the CWC and the child is not in a position to state whether he wants to live with his family, rule 4 (3) of the Rules of 2012 and section 19, sub-section (6) of the Act shall not be read as mandatory. In such cases the child may either be in a hospital, in a shelter home, or living with his/her family.
10. While escorting a girl child to the CWC preferably a female shall accompany her. Rule 27 (15) of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009, provides for this expressly.³

Procedure for Recording FIR

11. Recording FIR is compulsory under section 154 of the Cr.P.C in cognizable offences. A copy of the FIR shall be given free of cost to the informant. Refusal to register FIR involving cognizable offence under the Act is not in accordance with law.
- Recording FIR in cognizable offences under the Act cannot be refused or differed on the ground of lack of territorial jurisdiction.
 - The police should waste no time after receiving information about the commission of cognizable offence under this Act, and must act immediately and conduct investigation after registering FIR.
 - Incoming reliable telephone or cellular phone calls giving detailed information of cognizable offence must be recorded as FIR.

2 Rule 27 (3) of the Delhi JJ Rules 2009 states “In case of a child under two years of age, who is medically unfit, the person or the organization shall send a written report along with the photograph of the child to the Committee within twenty-four hours and produce the child before the Committee as soon as the child is medically fit along with a medical certificate to that effect.”

3 27 (16), Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009 under the Juvenile Justice (Care and Protection of Children) Act, 2000 state that —The child may be escorted by the police officer or representative of the voluntary organization or by any other arrangement as considered appropriate by the Committee with support from the District Child Protection Unit and in case of a girl child, a female escort shall accompany the child.” You are advised to check the JJ Rules of your State.

- In case the FIR is based upon the statement of the child recorded under section 19, then the police must record the FIR in conformity with the guidelines for recording information under section 19.
- When FIR is recorded, the particulars of the officer recording it and that of the investigating officer must be mentioned in the FIR and a copy has to be given, as per law, to the informant.

Under section 154 of the Cr.P.C the police may conduct preliminary investigation in any cognizable offence without registering FIR [Rajendra Singh Katoch Vs. Chandigarh Administration 2008 Cr LJ 357 (SC)].⁴ Under the Act, reporting of offences is mandatory (section 19), and section 21 makes failure to report and record a punishable offence. In such cases, in the event FIR is not lodged immediately:

- (i) *the child and its parent should be informed;*
- (ii) *the information must be recorded in the daily diary and;*
- (iii) *Superior officer shall be contacted immediately, apprised of the situation, and necessary instructions shall be obtained.*

12. *Police officer recording information under section 19 to record FIR in the following circumstances when it:*

- a) discloses one or more offences under sections 3, 5, 7, 9, 11, 13 and 15 of the Act;
- b) discloses attempt to commit any offence under section 3, section 5, section 9 or
- c) section 13 [under section 14 (1) [only when repeated], section 14 (2), section 14 (3), section 14 (4) and section 14 (5)];
- d) discloses abetment to commit a cognizable offence under the POCSO Act and any act is committed in consequence of the abetment, as specified under section 17; or
- e) Discloses non-cognizable offence under the Act along with any other cognizable offence under the Indian Penal Code.

Under section 154 of the Cr.P.C information given to the police disclosing commission of cognizable offence must be recorded as FIR. All the offences under sections 3, 5, 7, 9, 11, 13, 14 and 18 are punishable with imprisonment for 3 years or above, and, in the absence of a contrary provision under the Act, the first schedule, part II of the Code, makes them cognizable. Therefore, when the information discloses one or more of the above offences, FIR must be lodged.

Table 3: Maximum permissible imprisonments for cognizable offences under the POCSO Act

Cognizable Offences	Maximum Punishment
Section 3 Penetrative Sexual Assault	Imprisonment for life
Section 5 Aggravated Penetrative Sexual Assault	Imprisonment for life
Section 7 Sexual Assault	Imprisonment for five years
Section 9 Aggravated Sexual Assault	Imprisonment for seven years

4 However, for a clear enunciation of law a three Judge Bench of the Supreme Court referred to a larger Bench the question of mandatory FIR under section 154 of the Code: Lalita Kumari v Government of UP , 2012 (3) SCALE 152.

Section 11 Sexual Harassment	Imprisonment for three years
Section 13 Use of child for pornographic purposes	Imprisonment for five years but seven years if repeated
Section 14 (2) Penetrative sexual assault by directly participating in pornographic acts	Imprisonment for life
Section 14 (3) Aggravated penetrative sexual assault by directly participating in pornographic acts	Rigorous imprisonment for life
Section 14 (4) Sexual assault by directly participating in pornographic acts	Imprisonment for eight years
Section 14 (5) Aggravated sexual assault by directly participating in pornographic acts	Imprisonment for ten years
Section 18 Punishment for attempt to commit an offence	One half of the imprisonment for life

Offences forming part of the same transaction can be inquired into or tried jointly. When a cognizable offence is committed under a special law or IPC, along with a cognizable offence/s under the Act, FIR is mandatory. In such a situation, offences under a special law or IPC and the POCSO Act may form part of the transaction. The meaning of the expression “offences forming part of the same transaction” can be gathered from the provisions of sub-section (1), section 220 of the Cr.P.C which allow joint trial of different offences “arising out of a series of acts connected together as to form the same transaction.”

Legal aid information to be provided by the Police

- Police to inform child and its parent of legal aid entitlement A police officer recording information under section 19 shall immediately inform the child and its parent of their right to receive free legal aid and be represented by a legal aid lawyer.

Medical care and examination of the child

- Medical care and examination of a child in respect of whom the police have received information about commission of any offence under the Act and who needs emergency care is to be done through the admission of a child in the nearest hospital or its treatment there or medical care centre, and such examination of a child - whether before or after the registration of FIR - against whom an offence under the Act has been committed is to be done by medical expert of a government or local authority run hospital and if not possible by a private registered medical practitioner.
 - The police are duty bound to arrange for the access of care to the child and escort it for medical care or examination, as the case may be, keeping in view that their conduct and behaviour are child friendly and above reproach.
- Police station to have necessary information about hospitals and doctors:* Police officials are advised to keep telephone numbers of the CMO's and doctors nearby where a victim may be taken for medical examination or treatment. When medical examination of a girl child is to be conducted, the examining doctor must be a lady doctor [section 27 (2)].

In a case decided by the Himachal Pradesh High Court a minor girl child victim of rape was taken by the police officer for medical examination to three medical establishments one after another before she could be examined at 5:40 am after undergoing trauma for 15 hours (*Siksha Vs. State of Himachal Pradesh*, 2013 Cri L.J. 2036). **Such a situation must be avoided at all costs.**

Lady doctors/health care professionals may not be present in smaller towns or villages. In order to avoid situations as in the above mentioned case, it is advisable for the police to be prepared in advance with telephone/cellular phone numbers of hospitals and doctors.

Police stations should also keep telephone numbers of translators, interpreters, special educators and experts as their services are required when recording information under section 19 which deals with reporting of offences and section 26 dealing with additional provisions for recording statements.

Support Services Information to be provided by the Police

16. Police to inform of support services: In all cases where information has been received by the police under section 19 of the Act (whether such information pertains to an offence already committed under the Act, or an attempt or likely commission of such offence) the police have to inform the child and its parent or guardian or other person having child's trust and confidence about the support service including counseling available and assist the child and its parent etc., to establish contacts with responsible persons providing services and relief.

To ascertain that such information has been conveyed by the police to the child and her/his family, perhaps mode of communication may be specified— whether it be through brochures compiling information about support services including counselling, to be prepared by CWCs in each district and made available to the local police or SJPU, or a simple compilation of nature of services and contact number to be handed over by the police or any other suitable method. Verbal communication may or may not take place, depending on the sensibilities of the officer concerned.

Monitoring Questions to ascertain care and protection extended by the police

1. *Did the police maintain a list of nearest medical care facilities and doctors and was the child provided with quick medical attention?*
2. *Did the police report the case to the CWC and the Special Court? In how many hours was the case reported to the CWC?*
3. *Did the police inform the child and his parents/ guardians of the child's legal right and right to be represented by a lawyer?*
4. *Did the police provide a written report and photo during an inquiry conducted by CWC in cases where the child is below the age of 2 years and/or medically unfit?*
5. *Did the SJPU/ Police Stations maintain a list of interpreters, translators and special educators with their names, addresses and other contact details?*
6. *Does the police or SJPU keep the child/ parent/ local guardian/ support person informed about the developments, including arrest of the accused applications filed and court proceedings?*

Procedure for Recording the Statement of the Child

17. Statement of child to be recorded in conformity with law: The provisions of the Act mandate a special procedure for recording a statement of a child by the police.

All statements of the child have to be recorded by the police, whether at pre or post-FIR stage, during the investigation under section 161 of the Code, irrespective of whether it is the first or a subsequent statement. The officer recording any such statement must, among other, ensure that:

- (a) *It is at the residence or usual residence of the child or the place of its choice;*
- (b) *It is under no circumstance recorded in the police station;*
- (c) *The child is not taken to the police station;*
- (d) *The child is not detained in the police station during the night for any reason whatsoever;*
- (e) *Audio-video record may also be made if the statement is during the investigation;*
- (f) *The police officer recording statement should preferably be and if practicable a woman police officer;*
- (g) *In case of girl child, when the facts, constitutes one or more offences under sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E, 509, IPC, or attempt to commit any such offence, the statement must be recorded, in view of the 2nd proviso to sub-section (3), section 161 of the Cr.PC without exception, by a woman police officer, and a police officer or Magistrate, as the case may be, when possible, shall make audio-video recording of statement of a child under the POCSO Act;*
- (h) *The child does not come into confrontation or contact with the accused for any reason including identification whether before or after recording such statement; and*
- (i) *The contents of the statement are read-over and explained to the child; and*
- (j) *She / he is not in uniform while recording statement of the child.*

Monitoring Questions where Statement of the Child has been recorded

1. *What measures/ precaution have been taken by the police to ensure that the child is not exposed to the accused at the time of recording the statement?*
2. *What steps are taken by the police to ensure that the child is not intimidated at the time of recording of statement?*

18. *Uniform of police officer:* Sub-section (2), section 24 of the Act states that a police officer shall not be in uniform while recording the statement of a child. However, the Act does not specify when an officer may be in uniform. For example, the Act does not state whether the officer should be in uniform when he/she is escorting the child for medical examination, or when producing it before the CWC, or taking it to a Magistrate for recording statement under section 164 of the Code.

- It is advised that a police officer should not be in uniform except whenever required to promote dignified treatment of a child.
- A police officer dealing with a child is advised to use civil dress except when it is in dereliction of duty. It may be noticed that Rule 75 of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009, reads:
“While dealing with a juvenile or a child under the provisions of the Act and the rules made there under, except at the time of arrest, the Police Officer shall wear plain clothes and not the police uniform.”
- All the concerned officials should be directed by the officer in charge of police station to keep a set of civil dress ready in the police station.

Police Responsibility during the course of trial

19. *Police responsibility continues throughout till trial concludes:* Under the POCSO Act the responsibility of the police towards a child is continuous and ends only after the conclusion of trial by the Special Court. It must in particular be ensured by the police that:
- (a) The identity of the child is not made public and also protected from media throughout till directed otherwise by the Special Judge;
 - (b) Samples for forensic tests are sent to concerned laboratory at the earliest and without delay; and
 - (c) The child and its parent or guardian or other person having its trust shall be given following among other information about—
 - (I) available emergency public/private crisis services;
 - (II) benefits available for compensation;
 - (III) progress in investigation (but not disclosure which interferes with investigation and trial), including arrest of accused, bail or his detention status, filing of charge sheet against accused, schedule of court hearing that the child must and may attend, and the judgment after trial, and sentence imposed, if any.

List of Monitoring Questions for the Police for Quarterly Collection of Data by the NCPCR

1. No. of Special Juvenile Police Units setup till date? At what level is the unit setup? What does the unit comprise of?
2. No. of female police officers on and above the rank of a Sub Inspector appointed in each Unit?
3. No. of cases reported to the Special Juvenile Police Unit and local police on sexual violence of children.
4. No. of complaints recorded by the police as per Section 19 of the Act.
5. No. of complaint filed for child sexual offence received by: Public servant Private Affected person
6. No. of FIRs registered by the police in cases where a sexual offence under the Act is committed.
7. No. of CSA cases referred to the shelter home by the police?
8. No. of CSA cases referred to medical facilities by the police?
9. No. of cases referred to an emergency medical care, where an offence has been committed under sections 3, 5, 7 or 9 of the Act?
10. No. of CSA cases reported to the CWC by the police?
11. No. of CSA cases referred to the District Legal Services Authority by the Police?
12. Under what circumstances do the police produce the child before the concerned CWC?
13. Is there a format in place for reporting a case of child sexual offence to the CWC?
14. No. of CSA cases disposed through acquittal?
15. No. of CSA cases disposed through conviction?
16. No. of CSA cases in which interim compensation has been granted?
17. No. of CSA cases in which final compensation has been granted?

18. No. of sensitization trainings imparted to police officials on matters relating to implementation of the Act?

Roles and Functions of the Judiciary under the POCSO Act
Role of NCPCR in Monitoring: What to Monitor and How to Monitor

Definitions:

1. *“Child in need of care and protection”*: A child in need of care and protection under the POCSO Act is different from a child in need of care and protection under the Juvenile Justice (Care and Protection) of Children Act, 2000. A child in need of care and protection under the POCSO Act is one against whom an offence under the POCSO Act has taken place, and (i) where the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child; or (ii) the child is living in a child care institution and is without parental support, or (iii) the child is found to be without any home and parental support.
2. *“Code”* means The Code of Criminal Procedure, 1973
3. *“In Camera Trial”* means criminal matters or part thereof wherein the public and press are not allowed to participate, for good reason as adjudged by the court.⁵
4. *“Intention”* is commonly understood as aim, design or will etc. This culpable state of mind of individual or a group of persons is generally ascertained from how individual committed an offence or group of people committed one or more acts constituting such offence and whether the offence committed was the intended result of an individual or members of such group.
5. *“Knowledge”* is the acquisition of facts retained by the mind of a person. Such knowledge can be shared with another person or that other person may acquire the knowledge from the original or other sources.
6. *“Motive”* prompts a person to form an intention but it is not a necessary ingredient of every offence - but is taken into judicial consideration to decide upon the sentence to be imposed on a convict.
7. *“Video Conferencing”* or *“Video Link”* is the use of computers, videos, audio or other means or arrangements to enable recording of evidence of a witness who is not present in the courtroom. It does not include use of mobile phones or other means limited to connecting individuals to record the evidence.

Guiding Principles for the Child Welfare Committees

According to section 29 (5) of The Juvenile Justice (Care and Protection of Children) Act, 2000, the Child Welfare Committee *“shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class.”* There is an obligation under the POCSO Act to produce a child in need of care and protection before the CWC **and the CWC performs judicial functions.**

- (1) *Production of child before Child Welfare Committee (CWC)*: Section 19 (6) of the Act and rule 4 (3) of the Protection of Children from Sexual Offences Rules, 2012, provide for production of a child by the police before the Child Welfare Committee within 24 hours of recording information under section 19.

5 Guidelines for recording of evidence of vulnerable witnesses in criminal matters, Delhi High Court Committee

- The role of the police under rule 4 (3) in producing a child before the CWC is to allow a detailed assessment to be made of its requirements for care and protection and follow-up directions.
 - The police or the special juvenile police unit are entrusted with the responsibility of producing the child within 24 hours before the Child Welfare Committee –
 - Upon receiving and recording the information under section 19 of the Act and after satisfying themselves an offence under the POCSO Act has been committed or attempted by a person living with the child;
 - Where the SJPU or the local police has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the shared household, or the child is living in any child care home without parental support [Rule 4 (3)];
 - The reasons must be recorded by the police [Rule 4 (3)].
- (2) *Main Role of CWCs under the POCSO Act:* The main role of the CWC under the POSCO Act is to provide assistance to children who are alleged to be victims of sexual assault and, where applicable, their families, in obtaining care and protection. This role has been given to the CWCs in recognition of the fact that in cases of sexual assault it is important to look beyond the investigation and trial of the alleged perpetrator to providing assistance to the children in such cases who are in need of care and protection.
- While deciding whether a child needs care and protection the Committee must:
- (i) hear the parent or guardian likely to be affected by the decision,
 - (ii) place on record the wish of the child after speaking to it,
 - (iii) the wishes of the child in favour of living in the family or with parents must be accorded priority,
 - (iv) allow a parent or guardian of such child to place material on record showing institutionalized care unnecessary,
 - (v) take the decision in the best interest of the child as provided based upon material on record, and
 - (vi) Give reasons in support.
- When the parents are living separately from each other, the child shall normally be allowed to live with his/her mother as the first option by the CWC.
 - When the child is unwilling to live with its parents, guardian or other relative, the Child Welfare Committee should find reasons for such refusal and see whether apprehensions of the child in this regard can be set at rest by taking appropriate measures. In such a case, the CWC is advised to consider whether the custody of the child with the family should temporarily be under supervision. Full-fledged custody may be extended if the child is taken proper care of.
 - Rule 4 (5) of the Protection of Children from Sexual Offences Rules, 2012, apart from the preference of the child, lay down other considerations to be taken into account by the Child Welfare Committee conducting the inquiry:
 - (a) Capacity of the parents etc. to fulfill immediate needs of, including medical care to, the child;

- (b) Need that the child must remain within the family;
 - (c) Age, maturity, gender, and social and economic background of the child;
 - (d) Disability, if any, of the child;
 - (e) Chronic illness a child may suffer;
 - (f) History of family violence of the child or a member of its family; and
 - (g) Other relevant factors in the interest of the child.
- (3) ***Institutionalization of the child: A decision in favor of institutionalizing the child by the Child Welfare Committee should be taken as the last resort.***

Even if the child has lost both its parents or neither parent is traceable, the Committee must endeavor to find other relatives of the child willing to take care of the child. Section 39 of the Juvenile Justice (Care and Protection of Children) Act, 2000, makes it clear that even children's homes or shelter homes shall have restoration of the child as their prime objective and shall take steps for a child deprived of family atmosphere to live with its family.

- (4) *Child unable to communicate due to young age, suffering from severe physical or mental disability including injury shall not be produced before the CWC to the discomfort of the child unless directed:* Section 47 of the Juvenile Justice (Care and Protection of Children) Act, 2000, gives discretion to the Committee in relation to a child in need of care and protection to dispense with his attendance during the inquiry. Rule 27 (3) of the Delhi Juvenile Justice (Care and Protection of Children) Central Rules 2009,⁶ provides for sending written report to the CWC with the photograph of a child instead of producing him/her, when the child is under 2 years of age and medically unfit. Thus, the presence of a disabled, severely injured or a child below 2 years before the CWC is not necessary for beginning with the statutory inquiry, and the CWC has powers to dispense with attendance of such child. The CWC should be apprised by the police in writing of cases involving such children. In cases where for example, due to severe injuries or illness it would be detrimental for a child to travel to appear before the CWC and the child is not in a position to state whether he wants to live with his family, rule 4 (3) of the Rules of 2012 and section 19, sub-section (6) of the Act shall not be read as mandatory.
- (5) *Time limit for inquiry by CWC:* When a child has been placed by the police in a shelter home under section 19 (5) of the Act, the CWC must conclude the inquiry within the prescribed time limit of 3 days [Rule 4 (4) of the Rules of 2012]. **If a child placed temporarily in a shelter home is released in the interim custody of his family, the compulsion for the CWC to conclude the inquiry within three days may not be necessary.** Strict adherence to the time schedule should not lead to sacrificing just and fair nature of the proceeding or giving hasty decision. In such cases, the inquiry should be concluded expeditiously without any unnecessary delay.
- (6) *Tracing Missing Children:* Under Rule 27 (7) of the Juvenile Justice (Care and Protection of Children) Central Rules, 2007, whoever produces a child before the Committee shall submit a report on the circumstances under which the child came to their notice and efforts made by them on informing the police and the missing persons squad and in cases where a recognized voluntary organization or any police personnel produce

⁶ Rule 27 (3) of the Delhi JJ Rules 2007 states "In case of a child under two years of age, who is medically unfit, the person or the organization shall send a written report along with the photograph of the child to the Committee within twenty-four hours and produce the child before the Committee as soon as the child is medically fit along with a medical certificate to that effect."

a child before the Committee, they shall also submit a report on the efforts made by them for tracing the family of the child.

- In *Hori Lal vs. Commissioner of Police, Delhi and Ors* W.P (CrI) 610 of 1996, the Supreme Court laid down the steps to be taken by Investigation Officers for tracing missing girls. These steps include, publishing photographs of the missing child with the permission of the parent/guardian, making inquiries in the neighborhood, contacting the school and making inquiries on incidents of violence in the family.
- In *Bachpan Bachao Andolan vs. Union of India and Ors* W.P (C) 75/2012, the Supreme Court passed interim directions that that in case a complaint with regard to any missing children is made in a police station, the same should be reduced into FIR and appropriate steps should be taken to see that follow-up investigation is taken up immediately thereafter. The Supreme Court directed the National Legal Services Authority and the para-legal volunteers, recruited by the Legal Services Authorities, should be utilized, so that there is, at least, one paralegal volunteer, in shifts, in the police station to keep a watch over the manner in which the complaints regarding missing children and other offences against children are dealt with.

(7) *Interim measures by the CWC:* The Child Welfare Committee, have powers to provide for basic needs of such child, protect its human rights, and order temporary financial assistance to cover its basic and immediate needs [section 31 (1) JJ Act, 2000].

Procedure for dealing with a police report by the Magistrate

(8) *Supply of statements and documents to the child:* Sub-section (2), section 25 of the POCSO Act mandates that a Magistrate shall provide a child or its parents etc. a copy of the documents and statements specified under section 207 of the Code after the filing of a final/closure report.⁷ However, at the stage of recording the statement of the child under section 164 of the Code or till the conclusion of investigation, no copies can be supplied under section 207 of the Code.

When the police after investigation file final/closure report, the supply of copies to the child and his parents under sub-section (2), section 25 of the POCSO Act must be seen in the context of the right of a victim to effectively oppose recommendation of the police.

Under section 33 of the POCSO Act, the Special Court can take direct cognizance of an offence under the POCSO Act upon a police report.⁸ The power to take cognizance of an offence under section 33 (1) of the POCSO Act, whether upon a police report or a criminal complaint, remains with the Special Court – and not with a Magistrate.

Procedure for bail/remand of an accused by the Magistrate

(9) *Remand and bail by Magistrate:* The police can arrest and produce the accused before a Magistrate. A nearest Magistrate, can remand the accused to judicial or police custody during investigation under section 167 of the Code. During an investigation, when an

7 A report with a recommendation for no prosecution is called —final report. Rule 4 (12) (iv) of the Protection of Children from Sexual Offences Rules, 2012, uses the expression —charge-sheet and sub-section (2), section 25 of the POCSO Act the expression —final report, and, therefore, the construction that —final report in sub-section (2), section 25, POCSO Act includes —charge sheet seems impermissible.

8 A police report, defined under section 2 (r) of the Code includes a report with recommendation of the police for prosecution and is also called “charge-sheet”

accused appears or is produced before a Magistrate, she/he may release such accused on bail under section 437 of the Code if the offence is not punishable with death or life imprisonment.

Section 437, Cr.P.C

Section 437. **When bail may be taken in case of non-bailable offence.**— (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—

- (i) such person shall not be released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
- (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or for imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:..."

However, after the police report/charge-sheet is filed before the Special Court and it takes cognizance of the offence, an accused may appear or be produced only before the Special Court and it alone will have powers to consider pleas of bail and remand him/her to judicial custody under section 309 of the Code. Under sub-section (2), section 167 of the Code if a police report is not filed:

- (i) within 90 days of grant of first remand in offences punishable with death, life imprisonment or imprisonment up to 10 years and more; and
- (ii) Within 60 days in other offences.

The accused is entitled to bail as a right if he/she seeks bail before filing police report. This "default bail" can be granted by a Magistrate even in an offence under the POCSO Act.

Recording statement by Magistrate u/s 164 Cr.P.C

(10) Recording statement of a child by a Magistrate: The statement should be recorded by a Magistrate as spoken by the child: (i) in the language of the child; (ii) using qualified and experienced translator, interpreter or special educator necessary on payment of fees prescribed; (iii) recording it when possible by audio-video electronic means; and (iv) recording it in the presence of the parents or person having the trust and confidence of the child.

- The child can be confronted with its previous statement made under section 164 of the Code, section 161 of the Code or the FIR at the time of cross-examination. Hence, the proper procedure must be followed to avoid any contradictions.
- The fees of the translators / interpreters or special educator must be from the respective accounts of the authority that utilizes their services. In order to avoid

ad hoc determination of fees payable, the Central Government may frame rules under section 45 (2) (a) of the POCSO Act and fix the amount so payable to translators, interpreters etc.

Guiding Principles for Trial by the Special Court

(11) *Conduct of trial and recoding evidence of child:* The following measures have been incorporated in The Delhi High Court Committee 'Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters.'⁹ All High Courts must be encouraged to develop similar guidelines for Special Courts. All trials before the Special Court:

- Should begin by informing the child, if not represented by a counsel, of its entitlement to avail the services of a private lawyer or a legal-aid lawyer. The Police/SJPU should have informed the child of this entitlement. The Special Court may not come to know who is representing the child if no counsel appears, and hence it is important for the Court to inform the child as well, prior to the child's deposition.
- The role of child's lawyer in the trial is subject to section 301(2) of the Code: (i) to act under the instructions of the special public prosecutor; (ii) after the evidence of all the witnesses is recorded to submit written arguments to the Special Court with its permission.
- The permission of the Special Court for a private lawyer to assist the prosecution would also be necessary [section 24 (8) proviso].
- Trial must be in camera and in the presence of the parents of the child or other person the child trusts. No media report shall disclose any details of a child which may lead to the disclosure of its identity without the Special Court's permission.
- Shall record evidence of the child by the Presiding Judge putting questions, by reformulation if necessary, of the special public prosecutor or the counsel for an accused - whether during the examination-in-chief, cross-examination or re-examination.
- Shall record evidence sufficient to prove that the victim was below 18 years of age at the time of commission of the offence.
- Must record the evidence of the child within 30 days of the Special Court's taking cognizance of the offence. If delayed, the Court shall give reasons.
- Shall ensure while recording evidence that the child is not exposed to the accused. The Court shall ensure that the accused is in a position to hear the deposition and communicate with his/her advocate. It is recommended that the evidence is recorded through video-conferencing or using single visibility mirrors or curtains. In *State of Maharashtra Vs. Praful B. Desai* [2003 SCC (Cr) 827] the Supreme Court interpreted the law and accepted the argument that evidence of witness through video conferencing is permissible. The following procedures should be adhered to when recording such evidence through video-conferencing or video-link—
 - (i) Connect the courtroom and the children's room by live video-link and video-conference facilities. This will ensure that a traumatized or a child of tender age

9 The 'Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters' are available at: http://delhihighcourt.nic.in/notifications_practice_directions.asp (last visited 5.8.2013)

is able to depose without being overwhelmed by the court surroundings and/or the accused. The video-link/video-conferencing shall be so arranged that the child does not see the accused, though those present in the courtroom are able to see the child depose in the children's room, and the going-on in each room can be heard by those in the other.

- (ii) The persons who can remain in the room during the deposition of a child witness are parents or guardian, or friend or relative in whom the child has trust or confidence; support person appointed by the Child Welfare Committee; translator or interpreter or special educator or person familiar with the manner of communication of child or an expert in the field; any other person representing NGO/professionals/experts/persons having knowledge of psychology, social work, physical health, mental health and child development deemed necessary by the Court for the welfare and well-being of the child; an officer of the court; and persons necessary to operate the live video-link and video-conferencing equipment. When such evidence is not recorded by video-conferencing the Judge, accused, the special public prosecutor, the defense lawyer, the child's lawyer, police personnel other than witnesses in the case, the administrative staff of the Court can remain in the Court.
- (iii) When the child witness is examined and cross-examined, a video monitor will record and transmit the child's deposition to those in the courtroom; and
- (v) Other child friendly measures are:
 - i. The child should identify the accused, by entering the courtroom for the limited purpose of identifying the accused or by observing the live image of the accused on video-link. When the child so enters the courtroom for identification it should be accompanied by a family member or guardian or friend or relative in whom the child has trust or confidence, or by the support person appointed by the Child Welfare Committee or parent or guardian.
 - ii. Children deposing directly before the Special Court shall do so in the courtroom. In such case –
 - a. screen, curtain/one-way mirror or such arrangement should be made in the courtroom so that the child does not see the accused, ensuring at the same time that the accused can hear the child and instruct her/his advocate; and
 - b. the child may be allowed to depose from a place other than the witness-box.
 - iii. Testimonial aids, such as, dolls, anatomically correct dolls, puppets, drawings, mannequins or appropriate demonstrative device should be available with the Special Court to provide a child with appropriate assistance during its deposition. The testimonial aids should be kept in the children's room.
 - iv. Children's room: (a) child witness awaiting her/his turn to depose before the Special Court should be in the children's waiting room, which should be equipped with toys, books, drawing and painting material, indoor games and recreational equipment; (b) the children's waiting room should have attached toilet and facilities for drinking water, electricity, light and ventilation, and cooling or heating arrangement [depending on

the climate], and arrangements to provide the child with appropriate food so that the child is comfortable; (c) the children's waiting room should have security for the protection of children, and the entry of the accused, defense lawyer or other person detrimental to the interest of the child should be barred.

- v. *Miscellaneous:* (a) A child during deposition should be allowed to have emotional security item, such as, blanket, toy or doll. (b) The presiding judge of the Special Court should not be dressed in judicial robes and should sit on an appropriate platform so that the child is able to take him/her as a friend/well wisher and no artificial psychological barrier is created.
- May be conducted, while recording evidence of the child, with the assistance of a translator, interpreter or special educator if it is suffering from mental or physical disability.
- Must be conducted by undertaking following child friendly measures under the POCSO Act—
 - (a) Permitting frequent breaks for the child during the trial.
 - (b) Allowing family member, guardian, friend or relative, in whom the child has trust or confidence, to be present.
 - (c) Ensuring that the child is not called repeatedly to testify in court and its evidence is concluded on the day it began.
 - (d) Allowing significant and relevant omissions in previous statements of the child - whether recorded under section 19 (1) of the Act, or in FIR, or under section 161 of the Code or otherwise - to be brought on record, and not any and every omission.
 - (e) Disallowing aggressive questioning or character assassination of the child and ensuring that its dignity is maintained at all times.
 - (f) Ensuring speedy conclusion of a trial within one year from the date of taking cognizance of the offence, as far as possible.
12. *Statement of accused:* The Special Court shall, after conclusion of the prosecution evidence, record the statement of each accused person under section 313 of the Code. In order to prepare relevant questions the Special Court may take the help of the special public prosecutor and the defense counsel. The Special Court may permit any of the accused to file written statement which would be taken by the Special Judge, in accordance with sub-section (5), section 313 of the Code, as sufficient compliance with law.
13. *Burden of proof (section 29):* In a prosecution under sections 3, 5 7 and 9 of the POCSO Act or for abetting or attempting such offence, the Special Court shall presume that the accused committed or abetted or attempted such offence unless contrary is proved. Thus, during the trial for any such offence, the child-victim should give evidence first and then shall be cross-examined by the lawyer of the accused. The evidence should be concluded, if possible, on that very day. Thereafter, the medical and forensic evidence should be led by the prosecution and it should plead in such prosecution that under section 29 of the POCSO Act, there is a presumption that the accused committed the offence and, the burden to prove the innocence, as per the special law, is upon the accused.
14. *Presumption of culpable mental state:* Section 30 of the Act raises rebuttable presumption against an accused in a prosecution of an offence under the Act and presumes the existence

of “culpable mental state” which includes intention, motive or knowledge or reason to believe a fact. A closer look at the above expressions dealing with the state of mind of an accused may be of some advantage, and they read:

- In the context of commission of an offence, criminal intention or knowledge is narrowed down to specific intent or knowledge required to commit the acts constituting the offence.
- **Common criminal intention and knowledge:** Under section 34, IPC, when a crime is a pursuit of common intention of several persons, and the commission of crime involved one or more acts constituting the offence, each person committing one or more such acts would be liable for the offence as if committed by him/her alone. Under section 35, IPC, whenever criminal knowledge or intention is a necessary ingredient of offence and the offence is committed by several accused, any accused who joins other accused in doing one or more acts constituting the offence would be guilty of the offence as if the crime was committed by him/her alone with necessary intention or knowledge.
- The Supreme Court held (in *State of Maharashtra v Mayer Hans George* AIR 1965 SC 722) that the legislature can legislate an offence without an ingredient of mens rea and the requirement of actual knowledge/mens rea that the act is in contravention of law can be done away with in respect of an offence. The POCSO Act has not done away with mens rea in offences which require a culpable mental state. The specific intent of an offender to do the acts constituting the offence must be seen as constituting mens rea. The defense that the offender had no knowledge that his/her acts constituted an offence under POCSO is no valid excuse.
- The presumption raised against an accused, under section 30 of the Act, as to the existence of motive, intention; knowledge etc can be rebutted by an accused. It may be noticed that under section 30 (2) of the Act a fact must be proved, like in all criminal prosecutions, beyond reasonable doubt.

Monitoring Questions where Orders have been passed by the Special Court

1. *What were the documents accepted as evidence by the Court during the trial?*
 2. *On what grounds did the Court question the credibility of evidence submitted – if at all?*
 3. *On what ground did acquittals taken place in the case under the POCSO Act?*
 4. *On what ground did conviction take place in the case under the POCSO Act?*
 5. *Were arrangements made by the court to ensure availability of qualified personnel as translators/ interpreters/ special educators*
15. *Value of the testimony of a child witness:* Important guidelines were laid down recently to test the competency of a child witness by the trial court were directed to be circulated to all judges in the District Courts in Delhi for compliance.¹⁰ As to the value of the evidence of a child witness it was observed by the Supreme Court in *Suryanarayana v State of Karnataka* (2001) 9 SCC 129, that:

“... (The witness) who at the time of occurrence was about four years of age, is the only solitary eye-witness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eye-witness. The evidence of the child witness cannot be rejected per se, but the Court, as a rule of prudence, is

10 *State Vs. Rahul* CrI P. 250/2012 decided by Hon'ble Gita Mittal and JR Midha JJ of the Delhi High Court on 15 April 2013.

required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. ...If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the Courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the Courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not."

16. *Interim compensation order by the Special Court:* The police or the special juvenile police unit, as the case may be, is obliged to report to the Special Court within 24 hours of recording the information under section 19 of the POCSO Act. Upon the receipt of such report or an application of the victim, the Court has powers to order interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after the registration of FIR. This interim compensation shall be adjusted against the final compensation.

- Rule 7 (4) of the POCSO Rules state that the compensation awarded by the Special Court shall be paid by the State Government from the Victim's Compensation Fund or such other scheme including the fund created under section 357A of the Code. Where no such fund or scheme exists, it shall be paid by the State Government. In Union Territories, this function may have to be performed by the Central Government.

17. *Compensation:* Special Courts can direct the State to pay compensation to a victim-child out of the Victims Compensation Fund, established under section 357A of the Cr.P.C. If no such fund exists, compensation can be paid by the State for any loss or injury suffered, whether physical or mental, for rehabilitation.

Compensation can be paid while the case is pending at the interim stage as well as after the conclusion of trial, irrespective of whether the accused is discharged, acquitted or untraceable.

After the conviction of the accused and before sentencing him/her a plea can be raised on behalf of the victim-child before the Special Court for:

- (i) an order of adequate compensation out of the fine imposed on the convict under section 357 (1) or; (ii) such compensation under section 357 (3) of the Cr.P.C without imposing any fine on the convict. Under the law the Special Court may also order such compensation on its own accord.

Monitoring Questions where Compensation Orders are granted

1. *Did the court on its own provide an interim compensation to meet the immediate needs of the child for relief and rehabilitation?*
2. *At what stage was the interim compensation granted by the court?*
3. *On what grounds did the court grant interim compensation to the victim?*
4. *On what grounds did the court deny interim compensation to the victim?*

**List of Monitoring Questions for Special Courts for
Quarterly Collection of Data by the NCPCR**

1. *Have special courts been notified in each district? If no, what alternative arrangements have been made for dealing with cases of child sexual offences?*
2. *No. of cases where the special court has taken direct cognizance of an offence upon police report?*
3. *Total no. of cases disposed off through acquittals?*
4. *Total no. of cases disposed off through conviction?*
5. *Total no. of cases in which the witness turned hostile?*
6. *No. of cases in which interim compensation has been granted?*
7. *No. of cases in which final compensation has been granted?*
8. *No. of cases in which appeal has been filed?*
9. *No. of cases where default bail has been granted to the accused? On what grounds do the courts grant bail to the accused?*
10. *Do the courts inform the child/ guardian of its entitlement to avail the services of a private lawyer/ legal aid lawyer?*

**Roles and Functions of the Special Prosecutors under the POCSO Act
Role of NCPCR in Monitoring: What to Monitor and How to Monitor**

Definitions

1. "Code" means The Code of Criminal Procedure, 1973
2. "Final" or "Closure report" in these recommendations refers to the report filed by the police after completion of investigation into an alleged offence committed under the POCSO Act, 2012 dropping charges against the accused.
3. "Intention" is commonly understood as aim, design or will etc. This culpable state of mind of individual or a group of persons is generally ascertained from how individual committed an offence or group of people committed one or more acts constituting such offence and whether the offence committed was the intended result of an individual or members of such group.
4. "Knowledge" is the acquisition of facts retained by the mind of a person. Such knowledge can be shared with another person or that other person may acquire the knowledge from the original or other sources.
5. "Motive" prompts a person to form an intention but it is not a necessary ingredient of every offence - but is taken into judicial consideration to decide upon the sentence to be imposed on a convict.
6. "Public Prosecutor" is the prosecutor appointed under S. 24 of the Cr.P.C.
7. "Special Public Prosecutor" mean the public prosecutor appointed by the State government u/s 32 of the POCSO Act, to prosecute offences committed under the Act.
8. "Survivor" means a child who was a victim of any of the offences under the POCSO Act and is recovering, or has recovered from the sexual offence.

General Guiding Principles

1. *Some General Recommendations:*

Public Prosecutors are appointed under section 24 of the Cr.P.C. A public prosecutor so appointed by the State Government can conduct a prosecution involving an offence under the POCSO Act.

- a) If a special public prosecutor is absent or unavailable, the public prosecutor in charge of a case can conduct the prosecution in the absence of the special public prosecutor. This is because the Special Court is a deemed Court of Session and under sections 225 and 226 of the Cr.P.C, the prosecution shall be conducted by the public prosecutor.

Special Prosecutor must act with sensitivity respecting the right to privacy of the child:

- b) When dealing with a child survivor of sexual abuse, the special prosecutor must adopt a sensitive approach in order to meet the objects of the Act. While dealing with a child the special prosecutor's actions must conform to the provisions of the Act in letter and spirit.
- c) To strive to be well informed and be impartial;

Some other general principles for special public prosecutor would be:¹¹

- d) To respect and protect rights, interests and privacy of survivors and witnesses, and make reasonable efforts to minimize their inconvenience;
- e) To perform duties independently, impartially and without fear, favour or prejudice;- this perhaps takes care of points (d) to (i) but altering them in case it is deemed best to break it down further.
- f) To remain free from political or judicial interference;
- g) To avoid participation in activities, political or others, prejudicial to impartiality;- to abstain from participation in any activity which violates the neutrality of her/his office
- h) To avoid taking decisions when there is a conflict or clash of interest or such conflict is likely;- to ensure there is no conflict of interest caused by any scenario, situation of decision
- i) To refuse gifts, donations, favours or sponsorship that may compromise or perceived to compromise their professional integrity;- to reject any favours and considerations, monetary or otherwise, which can violate the neutrality of her/his office
- j) To remain unaffected by individual, sectional or communal interest and public or media pressure, and protect public interest; - to abstain from being influenced by any interests, concerns or ideology that can affect the neutrality of her/his office
- k) To refrain from engaging in incompatible activities affecting professional functions including accepting any occupation or employment. A full time special public prosecutor conducting prosecutions relating to the POCSO Act cases and advising the Government, should not defend the accused in prosecutions under the POCSO Act offences as thereby a clash of interest is likely to occur and the conduct may reflect adversely on the office of the prosecutors.
- l) To avoid making inappropriate public comments outside the court or speak to media about the merits of a case being conducted by him before the court or state about the

11 These Guidelines draw from the South African Code of Conduct for Prosecutors (2011) and the Draft Code of Conduct for Prosecutors of International Criminal Court.

guilt or innocence of the accused before the judgment by the court. – to refrain from commenting on the matter beyond the necessity of her/his office to any person or organization.

- m) Meeting the child by the Special Prosecutor prior to the trial does not amount to “tutoring” the child.
2. *Child’s right to privacy and confidentiality:* Under section 228A of the Indian Penal Code, the printing or publishing of the name or identity of a survivor in offences of rape is a punishable offence. **This section applies to the police and the prosecution.** Exceptions are made for acts in good faith for the purpose of investigation. Printing or publishing any matter in relation to any proceeding before a court with respect to an offence under this section is punishable under sub-section (3).

Procedure for filing complaint where Police have not filed an FIR

3. *A public servant can file a complaint case:* The Special Court, deemed a Court of Session, can take cognizance of a complaint filed by a public servant, who is discharging her/his official duty. The Special Court shall secure the attendance of the accused, if a prima facie offence under the POCSO Act is made out. The Special Court is not required to record pre-summoning evidence. On the appearance of the accused, the Special Public Prosecutor can initiate prosecution as per sections 225 and 226 of the Cr.P.C.
4. *Private complaint can be filed by relative or friend:* Where the police fail to file FIR despite being informed by a private person, such or any other person can file a complaint with the Special Court. The POCSO Act allows anyone to file a complaint. In fact, as per section 19 of the Act, any person who has apprehension that an offence under the Act is likely, or has knowledge that such offence has been committed, must report it. In case of a child survivor, it is advisable that a person having best interest of the child in mind, file the complaint. Such a measure will ensure reduced legal formalities/obligations to be fulfilled by the child. The child’s role will be limited to being a witness in the case.

Procedure when FIR is filed, but the police wish to close the case

5. *Special public prosecutor to conduct prosecution if cognizance taken upon final/closure report:* When, after investigation, the police file a final/closure report, the informant has a right to oppose the acceptance of the final/closure report.

Whenever final/ closure report is filed, the Special Court must give notice to the first informant.

If upon the plea of the first informant the Special Court takes cognizance of the offence based upon the material in the final/ closure report and case-diary, the Special Court must ensure presence of the accused to face the prosecution through appropriate process. After the appearance of the accused the trial must be conducted by the special public prosecutor.

Legal Aid

6. The legal aid lawyer’s role in the prosecution is subject to sections 24 (8) proviso and 301(2) of the Code: Specifically,
- (i) To act under the instructions of special public prosecutor and assist the prosecution after taking permission of the Special Court; and
- (ii) After the evidence of all the witnesses is recorded in the case to submit written arguments to the Special Court with its permission.

Under section 2 (u) of the Code any person acting under a public prosecutor must be considered a public prosecutor, and, therefore, the general responsibilities and obligations of public prosecutor will apply to a private or legal aid lawyer to the limited extent of the case in which he/she is assisting the prosecution.

Monitoring Questions where Legal Aid was approached

1. *How did the Legal Services Authority lawyer support/assist the public prosecutor during prosecution?*
2. *Did the Legal Services Authority lawyer prepare or submit the written arguments for court?*

Guiding Principles for the Special Prosecutor during the Course of the Trial

7. *Role of the Special Prosecutor during the course of the trial:*
 - a) After the appearance of the accused and production of copies of the documents and statements mentioned in section 207 of the Code, the special public prosecutor shall open the case describing the charges against the accused and the evidence with which he /she proposes to prove the guilt of accused.
 - b) After the charge is framed and the plea of the accused is recorded, the special public prosecutor shall prepare a list of documents filed by the prosecution with particulars, and the accused or his/her advocate should be called upon to admit or deny the genuineness of each such document. Any document including MLC, which is not disputed, may be read in evidence without the proof of signature of the person signing it under section 294 of the Cr.P.C.
 - c) The age of the child on the date of commission of the offence shall be proved.
 - d) The child shall be put into the witness box. The child shall be asked to identify the accused, either before beginning the evidence or soon thereafter when the child refers to the accused.
 - e) Character based evidence cannot be led. The two-finger test has been declared to be unconstitutional by the Supreme Court in the case of Lillu @ Rajesh and Anr vs. State of Haryana 2013 (6) SCALE. **There is no question of the two finger test being considered relevant in a deposition under POCSO Act.**

The special public prosecutor shall assist the Special Court in preparing relevant questions to be put to the accused under section 313 of the Code.

8. *Burden of proof (section 29):* In a prosecution under sections 3, 5 7 and 9 of the POCSO Act or for abetting or attempting such offence, the Special Court shall presume that the accused committed or abetted or attempted such offence unless contrary is proved. **Thus, during the trial for any such offence, the child-survivor should give evidence first and then shall be cross-examined by the lawyer of the accused.**
 - The evidence should be concluded, if possible, on that very day.
 - Thereafter, the medical and forensic evidence should be led by the prosecution and it should plead in such prosecution that under section 29 of the POCSO Act, there is a presumption that the accused committed the offence and, the burden to prove the innocence, as per the special law, is upon the accused. Only if this burden is discharged by the accused would the prosecution be obliged to lead the rest of the evidence to prove its case.

Monitoring Questions where the Special Prosecutor has concluded arguments

1. What was the nature of documents submitted/ filed by the Public Prosecutor as evidence during the course of the trial?
 2. How much time was taken for conclusion of evidence?
 3. What were the grounds for withdrawal of prosecution by the special prosecutor, if any?
9. *Presumption of culpable mental state:* Section 30 of the Act raises rebuttable presumption against an accused in a prosecution of an offence under the Act and presumes the existence of “culpable mental state” which includes intention, motive or knowledge or reason to believe a fact.
- **Common criminal intention and knowledge:** Under section 34, IPC, when a crime is a pursuit of common intention of several persons, and the commission of crime involved one or more acts constituting the offence, each person committing one or more such acts would be liable for the offence as if committed by him alone. Under section 35, IPC, whenever criminal knowledge or intention is a necessary ingredient of offence and the offence is committed by several accused, any accused who joins other accused in doing one or more acts constituting the offence would be guilty of the offence as if the crime was committed by him alone with necessary intention or knowledge.
 - The Supreme Court held (in *State of Maharashtra v Mayer Hans George* AIR 1965 SC 722) that the legislature can legislate an offence without an ingredient of mens rea and the requirement of actual knowledge/mens rea that the act is in contravention of law can be done away with in respect of an offence. The POCSO Act has not done away with mens rea in offences which require a culpable mental state. The specific intent of an offender to do the acts constituting the offence must be seen as constituting mens rea. The defense that the offender had no knowledge that his/her acts constituted an offence under POCSO is no valid excuse.
- The presumption, under section 30 of the Act, as to the existence of motive, intention, knowledge etc. can be rebutted by an accused. It may be noticed that under section 30 (2) of the Act a fact must be proved, like in all criminal prosecutions, beyond reasonable doubt.
10. *Withdrawing prosecution:* The general procedure for withdrawing prosecutions apply to a prosecution before the Special Court under the POCSO Act. Criminal prosecution can be withdrawn following the provisions of section 321 of the Code. The withdrawal is permitted (i) if the public prosecutor receives instructions from the State Government; and (ii) if the public prosecutor receives the consent of the Court and makes-up his/her mind to withdraw the prosecution upon consideration of the material on record and taking relevant circumstances into account.
 11. *Hostile witness:* When any prosecution witness turns hostile the prosecution should adduce the rest of the evidence after cross-examining the hostile witness. Any believable evidence given by a hostile witness can be considered and used against the accused. In a criminal trial before the Court of Session, the prosecution must be allowed to adduce all evidence, and accused shall be examined under section 313 of the Cr.P.C during which any incriminating statement made by him can be considered along with other evidence. The accused person’s acquittal before that stage would not be permissible.

Under section 232 of the Cr.P.C, in a trial before the Court of Session, acquittal is permissible only after the prosecution evidence has been recorded and the statement of the accused under section 313 of the Cr.P.C has been taken.

**List of Monitoring Questions for Special Prosecutors for
Quarterly Collection of Data by the NCPCR**

1. No. of Special Public Prosecutors appointed/ notified under the POCSO Act by the State?
2. No. of cases dealt with by the public prosecutor for prosecution under the POCSO Act?
3. No. of sensitization trainings imparted to Special Public Prosecutors on matters relating to implementation of the Act?
4. No. of cases where court has taken cognizance of the offence after submission of final/ closure report?
5. No. of cases where the informant has opposed the acceptance of the final closure report?
6. Total no. of cases disposed off through acquittals?
7. Total no. of cases disposed off through conviction?
8. Total no. of cases in which the witness turned hostile?
9. No. of cases in which interim compensation has been granted?
10. No. of cases in which final compensation has been granted?
11. No. of cases in which appeal has been filed?
12. No. of cases where prosecution has been withdrawn under Section 321Cr.P.C specifically in cases of POCSO?
13. No. of sensitization trainings imparted to LSA Lawyers by the Legal Services Authority on matters relating to implementation of the Act?

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BRINGING RIGHTS HOME: REVIEW OF THE CAMPAIGN FOR A LAW ON DOMESTIC VIOLENCE IN INDIA

Indira Jaisingⁱ

I. Introduction

On 26th October 2006, the Protection of Women from Domestic Violence Act (hereinafter PWDVA) came into effect, with the stated objective of providing “for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family”.ⁱⁱ This invocation of the Constitution in the Preamble of a law on domestic violence is significant, for the application of Constitutional principles to the private domain of the family and the home has often been resisted by the lawmakers and the judiciary. As the Delhi High Court (in) famously stated, in *Harvinder Kaur vs. Harmander Singh*,ⁱⁱⁱ “introduction of Constitutional Law in the home is the most inappropriate. It is like introducing a bull in a china shop. ... In the privacy of the home and the married life neither Art 21 nor Art 14 have any place”.

While the legislature has enacted the law with a view to bring equality into the home, its success depends on the extent to which the required support services are put in place by the State, on how the law is interpreted by the judiciary and the extent to which women are able to invoke the protection of the law or at least, internalise the view that violence in intimate relationships is something that cannot be tolerated. The PWDVA is informed by the vision that the “home” is a shared space even if there is no shared ownership, and hence it imagines the “domestic” in a different manner. In the last three years, the appellate judiciary has delivered a number of important judgments under the Act which have upheld this vision. However there have also been judgments that betray a lack of appreciation of the purpose and function of the Act.

For instance, in *SR Batra & Another vs. Taruna Batra*,^{iv} the Supreme Court considered the question whether the wife had a right to reside in the premises owned by the mother-in-law, where she had been living with her husband after marriage. The court interpreted the term “shared household” in the Act and held that since the house was owned by the mother-in-law, the wife could not claim a right to reside in that house. Despite the Act stating clearly that a woman has the right to reside in the shared household, “irrespective of whether the respondent or the aggrieved person has any right, title or interest” in the same, the judges felt that the concept of ownership of property was the only factor decisive of the right to reside in the shared space. Secondly, the judges held that the phrase “lived or has lived” in the definition of “shared household” would lead to absurd results, with the woman claiming several places as her “shared household” on the ground that she had lived there at some point of time or the other. Such a view completely negates the fact that as per the scheme of the Act the term “shared household” is tied to the concept of “domestic relationship” which again has a specific meaning in the Act. Additionally, there is a difference between living in a house as a cohabitee and living as a visitor/guest; in relation to the cohabitee, the expression “lived” ought to have been given the same interpretation as “reside” which has a recognised legal meaning. Given that the object of the provision was to prevent dispossession of women from their matrimonial homes, interpreting the phrase “lived or has lived” as “resided” would prevent against absurdities from taking place, as feared by the judges in this case.

At the heart of the decision in *Batra* is a deep rooted commitment to the right to property, which trumps all other considerations. This narrow conception of property and ownership is the foundation of capitalist societies, not shared by other systems of jurisprudence. In Hindu law for example, the notion of the coparcenary quite clearly vested the right to ownership of property and the right of usage in a multiplicity of users, who were entitled to use it by virtue of being in the domestic relationship. While ownership was vested with three generations of males, the women of the coparcenary married into the family, in their capacity of mothers and daughter-in-laws, had the undisputed right to reside in it. The coparcenary was quite literally the “shared household”; a joint family was defined as being “joint in food and worship”. The PWDVA built on these notions and secularised this concept, thus making the right to reside available to women of all religious communities. The broad definition of the “shared household” in the PWDVA is in keeping with the family patterns in India where married couples continue to live with their parents in homes owned by the parents. All this and much more was ignored by the court.

Against this background, it is important to revisit the issue of domestic violence in India and explain why the law was enacted, what ends were intended to be served and what gaps in the existing legal framework it was intended to plug. It needs to be appreciated, particularly by the judiciary that every provision of the PWDVA was meant to address a particular need. Thus, this article is partly meant to be a chronicle of the campaign for the law on domestic violence and partly an occasion to reflect on how best the law has been able to serve the purpose with which it was enacted. Section two gives a brief background to the feminist campaigns that led to revisions in criminal law thus forcing the State to intervene in cases of violence in the home, while section three details the problems in the criminal law regime that led to the conceptualization of a civil law to deal with domestic violence. Sections four and five, offer a detailed chronicle of the campaign for the PWDVA, the drafting history and the legislative process that it went through. This is followed by a discussion on the post-enactment developments and the monitoring of the law that, Lawyers Collective has been a part of. The article ends with some reflections on the current challenges that the law is faced with.

II. Feminist Campaigns against Violence in the Home

While the PWDVA itself was the culmination of a sustained campaign spanning over a decade, broadly speaking it was also part of a longer history of feminist engagement with violence against women, beginning in the 1970s. The campaign against dowry and related violence, in the mid-seventies was possibly the first time the issue of violence at home was discussed in public. The agitations by feminist groups across the country were able to attract the attention of the State to the growing incidents of the so called death-by-fire. Such incidents were (and even now are) seen as accidents and not investigated properly. The campaign highlighted the difficulties in invoking the law in cases of dowry related violence, for a range of reasons. For instance, dying declarations by women were seldom treated as evidence against the husband and in-laws; and even in cases that were registered on the basis of dying declarations were later dismissed by the courts on the ground of inadequacy of evidence. Thus charges of murder or abetment to suicide could not be successfully invoked. Similarly, police would be reluctant to intervene, arguing that it was not the task of the police to intervene in “family quarrels”.

The campaign led to the Criminal Law (second amendment) Act in 1983 which introduced Section 498A in the Indian Penal Code. Under this provision, “cruelty” to the wife by the husband or his relatives was made a cognizable, non-bailable offense punishable with imprisonment upto three years and fine. Cruelty was defined as including both physical and mental cruelty, or any harassment associated with demand for dowry. Similarly, Section

304B was introduced in the IPC in 1986 which created a new offence of “dowry death”. This provision made it possible to prosecute the husband and in-laws of a woman, if she died as a result of burns or any other injury within seven years of marriage, under suspicious circumstances and if it could be shown that she was subjected to cruelty or harassment by the husband/in-laws in relation to demand for dowry.

However it was only after the new provisions were sought to be activated in the courts, that the women’s movement realised that the focus on dowry related violence and death had been rather narrow, for it ended up distracting attention from the other numerous instances of violence that women were faced with in the home, which were not necessarily dowry related. While it was still possible to bring cases of everyday violence against women in the home within the scope of Section 498A, it was not possible to use 304B if the violence and the eventual death were not linked with dowry. Secondly, only married women facing violence at the hands of the husband or their families could claim relief under 498A. Thus a lot of other forms of violence faced by unmarried women, old women and children could not be brought under this Section. It did not protect women from violence in natal relationships or in relationships that have not received the legal sanction of marriage.

The other problematic aspect of this provision was the definition of “cruelty” itself. Cruelty was defined to mean any willful conduct which could have driven the woman to commit suicide or caused grave injury to her or posed a danger to her life, limb or health (either mental or physical). The definition was worded in such vague terms that it was difficult to bring issues of sexual violence, economic violence or even threats of violence within the ambit of the Section. The experience with using this Section in cases showed that the threshold of the impact of violent conduct on the woman, required to be proved was so high that many forms of cruelty fell through the net. A woman had to prove that she was driven to contemplate suicide, or that her life was in danger before she could access the law. Ultimately, it was entirely on the discretion of the police as to whether the conduct of the husband was of such a nature as mentioned above. Section 304B came into play only after the woman was dead, and Section 498A which was meant to protect her from harassment and violence was assailed by the problems discussed above, thus making the relevance of law for women facing violence at home, rather limited.

III. The Need for a Civil Law on Domestic Violence

It is relevant to note that criminal law is geared towards the prevention and deterrence of the crime. While classifying certain practices detrimental to women as “crimes” is relevant from the point of view of putting the issue on the agenda of the State, criminal law itself has little to offer with respect to taking care of the woman’s immediate needs of protection, shelter and monetary relief. Also, relying on criminal law remedies alone, to address domestic violence does not fully recognise the responsibility of the State towards the victims of violence.

On the other hand, existing civil law remedies were unable to provide effective and timely reliefs to women facing violence. A persistent problem in cases of domestic violence is that women are thrown out of the homes and then the house is sold or rented to dispossess the women indirectly. Although sometimes, the court can be convinced to give injunction orders to prevent women from being thrown out, proceedings under civil law are slow-moving and time-consuming. Even when injunction orders are available, the enforcement is weak due to absence of penalties for violation. Additionally, there is no provision for granting injunction orders or protection orders on an emergency basis, with the result that the women do not have any relief during the course of the proceedings. Often the remedy can only be exercised when it is coupled with a petition for divorce.

All these considerations made it imperative to conceptualise a law on domestic violence that would be a combination of both civil and criminal law elements. A civil law that would on the one hand restrain the abuser from committing violence and on the other provide for the other needs of the woman faced with violence. At the same time, punitive provisions would ensure the enforcement of the orders of the courts. The following sections describe in some detail the process of framing such a law, and some of the key issues that were encountered on the way.

IV. The Campaign

The involvement of Lawyers Collective (LC) with the process of formulating a law on domestic violence began when the National Commission for Women (NCW) requested us to prepare a draft Bill on domestic violence in 1993. The first draft for a civil law on domestic violence was prepared and presented to the NCW in 1994. But, a more focused campaign for the law began only in 1998. It was realised that the first step should be to give greater visibility to the issue of domestic violence and introduce the legal community to the issues at stake. For example, it was essential to create a consensus among the lawyers and the judges that domestic violence was indeed a serious issue, but without effective legal remedies. It was essential for the legal community to appreciate the realities of domestic violence, the inadequacies in the then existing discourse of cruelty/dowry harassment/dowry death and the demands of the women's movement with respect to a specific law on domestic violence. This led to a national-level colloquium on domestic violence, involving lawyers, academics, activists and most importantly the appellate judges. The colloquium entitled "Empowerment through Law" was an important milestone as there was a wide acknowledgment that what set apart domestic violence from other forms of violence against women was that it occurred within the framework of intimate relationships in a situation of dependency, making reporting and access to legal aid and other support services difficult. Moreover, the fact that domestic violence exists was not even recognised by the law. The Bill drafted by LC was extensively discussed at the colloquium and given a more concrete shape.

The Lawyers Collective Bill on Domestic Violence

The draft bill was visualised as an emergency law providing immediate and effective relief to a woman facing domestic violence. When a woman is faced with domestic violence, the primary aim of any intervention – legal or otherwise – should be to stop the violence and provide for ways to protect her from further violence. Additionally, she would require shelter, medical aid, legal aid, monetary relief etc. that will help her to build a life away from an abusive relationship. In the absence of violence, a woman may be encouraged to think of her long-term options including divorce, maintenance, reconciliation or criminal prosecutions. The following were some of the salient aspects of the LC Bill.

(a) Definition of Domestic Violence

The Bill had a fairly broad definition of what constituted domestic violence. The experience with using Section 498A in cases of domestic violence showed that it was extremely difficult to convince judges of the existence of violence in a relationship. Although the term "cruelty" in 498A encompassed both physical and mental cruelty, it was difficult to bring the subtleties of everyday violence in intimate relationships within the ambit of the law. Even when the judges were convinced of the existence of "cruelty", they tended to play down the possible impact of it and often asked the women to "forgive and forget". In order to address the judicial subjectivity in determining what constituted as violence and to counter the trivializing discourses that downplay the severity and seriousness of violence at home, the LC Bill included the un-named aspects of everyday violence. Thus, the definition of domestic violence

named a range of harms, injuries and threats that degrade and terrorise women. The definition included physical, sexual, verbal, emotional and economic abuses, with each aspect further defined with illustration. The point of providing such an expansive definition was not to put a seal on the conceptualization of “violence”, but to indicate that certain forms of behaviour must be seen as exercise of sexual power and hence, must be condemned. It is surprising that for a country that has non-violence as its foundational faith, it took more than fifty years to put in place a definition of violence against women.

(b) Domestic Relationship

The Bill was an innovation over the traditional understanding of domestic violence, in that it did not limit the protection against violence to marital relationships alone. Thus, it introduced the concept of “domestic relationship” which included all relationships based on consanguinity, marriage, adoption and even relationships which were “in the nature of marriage”. Including relationships outside the marital context within the scope of this law was necessary in view of the absence of compulsory registration of marriages in India, which leaves a majority of women outside the domain of legal protection. Hence the term “matrimonial relationship” was replaced with “domestic relationship”. The site of violence, the home, being the private domain was intended to be brought within the purview of the law. Daughters who are thought to have little or no rights in ancestral homes or in any event are seen as outsiders and waiting to be married off; widows who are seen as having no right to continue to live in the house after the death of the husband; mothers and old parents, seen as a nuisance by children are all vulnerable to abuse in the home, and hence were included within the purview of the law.

(c) Shared Household and the Right to Residence

The most important aspect of the Bill was the concept of right to residence. Usually, this right either vests in those owning the premises or those in whose name the premises are leased. As it happens in most cases, it is the male members of the family who have effective control over the premises. The unequal power relations in the private sphere increases the vulnerability of women, who continue to be in violent relationships for fear of dispossession and destitution. As has been observed, when a woman is thrown out of the house, there is little that she can do in the absence of her formal legal title to the house or a stated right to reside in the house belonging to the husband, partner, in-laws etc. In fact, married women have less protection against being thrown out of the house than tenants have against being evicted. While tenants and trespassers can only be evicted by “due process of law”, women could simply be pushed out of the house. The objective of the law was therefore to provide the “due process” protection to the women in domestic relationships.

Given that women in non-matrimonial relationships were to be covered by the law, the term “matrimonial household” was replaced with “shared household”. The Bill gave the women the right to reside in the “shared household”, even in the absence of a formal title over it. What makes it the “shared household” is not the ownership pattern of the home, but the fact of residence in the home in a conjugal or family relationship. This does not create a substantive right over the property but is a safeguard against dispossession. Unfortunately, the intent behind this provision has been undermined in the *Batra vs. Batra* judgment discussed earlier.

(d) Protection Officers

In the feminist campaigns to have more and more laws to address violence against women, what was entirely missed was the fact that the entire justice delivery system – the Police and the courts – were largely inaccessible to the women. Prior to the enactment of the PWDVA, the women faced with domestic violence could either approach the Police or their natal families. Because of the strict divide between the public and the private spheres, and the deference that the “family” has traditionally enjoyed as a “private space”, the Police would be reluctant to intervene. Even the natal families would often persuade or coerce the women to return to the abusive home. Recognizing this to be a major barrier between the women seeking justice and the legal remedies, the Bill provided for Protection Officers. It was proposed that the Protection Officers would play the role of being the link between the aggrieved women and the legal system. The role of the Protection Officer was envisaged as assisting the woman in accessing the court and other support services (such as legal aid, medical facilities, shelter homes, etc.); assisting the court during the course of the proceedings; and in the enforcement of orders. The Protection Officers were to be the “eyes and ears” or in other words, the “outreach arm” of the court who would help the aggrieved women gather evidence to support her case in the court.

(e) Reliefs under the Law

In keeping with the objectives of the law and the rights recognised, the Bill provided civil reliefs in the form of protection orders or “stop violence” orders, residence orders including orders restoring her to the shared household, preventing dispossession, restraining the respondent from entering the shared household etc., orders for monetary reliefs including maintenance, compensation orders that are aimed at providing damages for the mental injury suffered by the aggrieved person, and temporary orders for custody of the children. The civil nature of the reliefs was deemed appropriate in recognition of the fact that a woman facing domestic violence requires holistic support, which cannot be met through a criminal proceeding or a divorce petition.

Consultations on the Bill with Women’s Groups

Between 1998 and 2001, LC began a dialogue within the women’s movement on the draft proposal. The dialogue involved a series of consultations and meetings with different women’s organizations in various parts of the country on each aspect of the law. The draft Bill was also widely circulated among lawyers for their feedback and criticisms. The draft proposal was thus revised after every such consultation. It is instructive to visit some of the debates that ensued at these meetings and the questions and doubts that were raised. For one, it helps to understand the context of the law better and brings greater clarity vis-à-vis the nature and scope of the law. Secondly, it attests to the fact that the law has emerged from a wide process of debate and deliberation within the women’s movement.

A much debated issue was whether the proposed law should be gender-neutral and extend its protection to men faced with violence in the home, as well. The wide consensus from all groups involved was that the Bill had to be gender specific in nature since the objective was to protect women due to the pervasive problem of gender inequality. The violence faced by women is a gendered phenomenon that reproduces and reinforces gender inequality and hence a gender-neutral law would defeat the purpose of a law on domestic violence. And given the power relations in the home, the men could use a gender-neutral law to dispossess women from the homes. It is in recognition of this gendered power imbalance, that the Constitution enjoins upon the State to make “special provisions” for women and children in its pursuit of prohibiting discrimination on grounds of sex.

Keeping in mind the fact, that often children are also victims of domestic violence, one of the initial drafts of the law allowed a child to bring an application under this law, if represented by a parent or guardian. Accordingly, there was a definition of “applicant” in the draft. There were however concerns raised by women’s groups, that if such power of representation of a minor child is given to both parents, there may be a possibility of the father (if he is the abuser) using this law against the child’s mother. The father could tutor the child to depose against the mother. He could indirectly achieve what he is forbidden under the law to do – i.e., depriving the woman of her right to reside in the house. Therefore, as a safeguard against misuse in the law, the draft was amended to provide that only a mother who was herself an aggrieved person under the law could bring an application on behalf of her minor child who has also faced domestic violence.

Another major area of contestation was whether women could be made respondents in a case of domestic violence? Initially the Bill had defined the “aggrieved person” as a woman, and the “respondent” as a man. However, it was felt that the new law had to be consistent with Section 498A which allowed a criminal complaint for cruelty to be filed against all relatives and the husband including female relatives. Hence, a proviso was added to the definition of “respondent” by which the aggrieved women were enabled to bring action against a “relative” of the husband/male partner so that both men and women committing violence could be made respondents and relief sought against them. The intention was to allow married women to file applications under the law against their mother-in-law or sister-in-law or other female relatives through marriage, if they were responsible for the violence.

Similarly, an earlier draft of the Bill allowed dispossession orders to be passed against both men and women, if they are abusers. However, a concern was expressed that a man might set his mother up as an aggrieved person under this law to dispossess his wife of her residence – thereby indirectly achieving what the law had sought to prevent. And also the opposite, with the dispossession of old mothers by their sons through their wives or sisters. At the same time, it was important to ensure that the protection of the law was not weakened in any way. The intention of this law was not to classify offenders according to their sex. It emerged, however, that an effective compromise would be if the order directing the respondent to remove himself from the shared household, was not made available against women respondents. After extensively debating the issue of possible misuse of the law vis-à-vis reliefs against women offenders, it was agreed to include a proviso, which limited the effect of dispossession to men alone, while all other reliefs would equally apply against both men and women.

V. The legislative Process

After going through a series of consultations and meetings, the final version of the Bill was submitted to the National Commission for Women, the Department of Women and Child Development and other Government agencies.

The Government Introduces its Own Bill

On 8th March 2002, the National Democratic Alliance (NDA) Government, introduced a separate Bill entitled, Protection from Domestic Violence Bill, 2001 (hereinafter, GOI Bill) in the Lok Sabha. At one level the GOI Bill was an acknowledgement that domestic violence was a serious issue requiring specific legal intervention. There has been a consistent denial of the existence of domestic violence against women and a refusal to address the issue. To that extent, the introduction of the GOI Bill was a significant victory. However in terms of content, the GOI Bill, not only fell short of what the women’s movement had been asking

for, but it was feared that if enacted, it might have dangerous implications for women facing domestic violence.

The emphasis of the GOI Bill, it appeared was the preservation of family rather than preventing violence against women and protecting their right to a life free from violence. The scope of the GOI Bill was much narrower than the LC Bill, in terms of categories of aggrieved persons and limited with respect to the nature of reliefs available. The definition of domestic violence in the GOI Bill, among other things required the conduct/assault of the respondent to be “habitual” or what made the “life of the aggrieved person miserable by cruelty”. This was totally unacceptable as every single act of violence degrades the woman even if the abuser is not “habitual” in his behavior, and she should be entitled to seek legal redress against the same. The other elements of the definition were also vague as the Bill did not define what would constitute “cruelty” or how to assess “misery” of the aggrieved person. As per the GOI Bill, the respondent was required to be a “relative” of the aggrieved person, the term “relative” defined as persons related by blood, marriage or adoption. The implication of this was that women who were in relationships other than legally valid marriage were excluded from the purview of the law.

Section 4(2) of the Bill allowed the respondent to take the plea of self-defence in cases of domestic violence. Normally, the plea of self-defence is available to the victims of a crime; however, the GOI Bill gave the defence to the alleged perpetrator of the crime. The respondent thus, could get away even after brutally assaulting a woman on the pretext that such conduct was meant for his own protection or for the protection of his or even another person’s property.

A major shortcoming of the GOI Bill was that there was no declaration of rights of the aggrieved person. There was no provision indicating that the woman in a domestic relationship had the right to reside in the shared household. One of the major lacunae in our matrimonial laws is the fact that none of them, whether Hindu, Muslim, Christian or Parsi, contain any such declaration of a right to reside in the matrimonial home . As explained earlier, this is the root cause of the vulnerability of a woman in her matrimonial home. To provide against such situations, the LC Bill had conceptualised the right to reside in the shared household coupled with the stop-violence orders. The GOI Bill however, did not have any provision of immediate relief to the woman.

It also did not provide a time frame within which to complete the proceedings. It is important that interim relief is provided immediately on application, by the Magistrate, pending the hearing. This may or may not be confirmed after the hearing. However the GOI Bill followed the usual practice as per the Code of Civil Procedure and thus it meant that women will get relief only after summons was served to the respondents. As a result, it could take months for the women to get relief as most often the respondents devise ways to avoid service of summons. Thus, the critical importance of providing immediate interim relief was not addressed by the GOI Bill.

The GOI Bill also had a provision requiring mandatory counseling for the aggrieved person and the alleged abuser. This was unacceptable as it put the abuser and the victim on the same plane. Counseling is definitely one of the methods of correcting abusive behaviour. But why empower the Magistrate to insist on “mandatory” counseling of the aggrieved person as well? Clearly the mandatory nature of the counseling was not meant to help the woman address the trauma of violence. Rather it could easily be a means to convince her to “adjust” to her situation and continue in an abusive relationship.

The Parliamentary Standing Committee

In response to the obvious outrage expressed by women's groups against the GOI Bill, it was referred to the Parliamentary Standing Committee on Human Resource Development to examine the provisions of the Bill. Between May and December, 2002 the Committee heard the views of the Department of Women and Child Development, invited memoranda from individuals and organizations and also received oral evidence and presentations by different women's groups. LC put forth its submissions before the Committee, wherein it pointed out the flaws and omissions in the GOI Bill and contrasted them with provisions of the LC Bill. It was impressed upon the Committee that arriving at settlements and salvaging marriages should not be the function of a law on domestic violence. The Report of the Standing Committee, submitted in December 2002, reflected that most of the suggestions made by LC were accepted by the Committee.

On the issue of not including women falling outside the narrow scope of the term "relative" within the ambit of the Act, the response of the State was that "such women as have been living in relationship akin to marriage without legal marriages were not included simply because the prevailing cultural ethos of the nation did not encourage such relationship". The Committee in its report stated that there were in fact numerous cases of men and women living together without valid marriages and yet having social sanction. Besides, the primary issue in providing relief to women faced with domestic violence was the recognition of the woman's human right to a dignified life and not the propriety of the relationship she was in. Thus, it concluded that providing relief under the Bill to a woman whose marriage is not legally valid won't be in conflict with the existing laws and will not give any legal sanction to the illegal marriages.

The Committee also opined that there was no need to enable the respondent to take the plea of self defense in the Bill, and hence the clause should be deleted. Similarly, the Committee accepted the suggestion that the Bill ought to carry an unambiguous declaration of the women's right to reside in the shared household and the Magistrate should be obligated to pass orders accordingly. In addition to accepting the major demands of the women's groups, the Committee also asked for better enforcement mechanisms to be incorporated in the Bill and asked the State to address the issue of violence against women through other means in addition to the law.

However, the campaign was not able to achieve anything substantial in the two years following the recommendations of the Standing Committee, as there was no initiative from the government to reformulate the bill in accordance with the Report of the Standing Committee. We continued with our efforts during this time, simultaneously trying to emphasise the need for this law with the Government and sustaining the consensus on the issue among the women's groups. Petitions were sent to the Minister of Human Resources Development by different women's groups, urging the Government to introduce the Bill in the Parliament with amendments suggested by the Standing Committee. However, in February 2004 the Lok Sabha was dissolved and with it the Bill also lapsed.

Lobbying with the New Government

In May 2004, the United Progressive Alliance (UPA) coalition came to power after the election. It was regarded as a progressive step and a new beginning when the enactment of a civil law on domestic violence was included in the Common Minimum Programme of the UPA coalition. This was an important step as it gave political significance to the issue of domestic violence. In July the same year, a final draft of the Bill, after extensive consultations, was presented to the Minister of Human Resources development, which was then accepted and referred to the Department of Women and Child Development. For the next one year (July

2004 – June 2005), the Bill kept moving back and forth between Government departments and as a result certain things got left out from the final Bill that was presented to the cabinet. One such instance was the definition of the “applicant” that was removed from the Bill. The implication of this deletion is that it is still unclear as to how applications on behalf of minors can be moved under the Act. Similarly there were certain additions that were not in keeping with our demands. For instance, the provision for joint counseling of the parties in Section 14 and Section 15 authorizing the Magistrate to take help from persons involved in “promoting family welfare” in any proceeding under the Act are provisions that could lead to coerced reconciliation, that we had been opposed to from the very beginning.

In June 2005, the draft Protection of Women from Domestic Violence Bill received cabinet approval and the Bill was tabled in the Parliament in July. Members of LC, along with a number of other women’s organizations were present in the Parliament when discussions on the Bill took place. Surprisingly, no questions were asked about the need for a law on domestic violence by any political party. One did not know if it was a reflection of a gradual social recognition of domestic violence as an issue of immediate concern or was it plain apathy towards a law which was being enacted simply to fulfill an election promise. Certain members of the house expressed reservations regarding the inclusion of “relationships in the nature of marriage” within the purview of protected categories of women under the law. It was said that we were introducing concepts alien to “Bharatiya Sanskriti”, which would send across the wrong message to the society. However, the Bill was unanimously passed by the Lok Sabha on 22nd August 2005 and by the Rajya Sabha on 24th August 2005. On 13th September, it received the accent of the President and the Protection of Women from Domestic Violence Act, 2005 entered the statute book.

VI. Post Enactment Developments

The PWDVA provides for an inbuilt mechanism to facilitate the entire system of access to justice. It identifies specific functionaries such as the protection officers and services providers whose primary duty is to assist women in accessing reliefs provided under the law. A crucial step towards ensuring the success of any law is monitoring its implementation. Monitoring a law is essential in order to put in place the basic infrastructure required to guard against non-implementation and also to assess whether the law is able to fulfill the objective that it was enacted for. LC has taken the initiative to monitor the implementation of the Act, in the absence of any such initiative from the State. One hopes that eventually, this role would be taken up by the Government to monitor the progress of its own duties and obligations under the law.

1st Monitoring & Evaluation Report (2007)

The 1st M & E Report analyzed the performance of the PWDVA, in the first year of its existence. The primary inquiry of this report was to what extent the State had put in place the necessary infrastructure needed for the implementation of the Act, like appointment of Protection Officers, service providers, medical facilities etc. We also wanted to know how the law was being used by lawyers and interpreted by the judiciary, particularly what kind of orders were being passed by the lower courts. Knowing fully well that it was too soon to make an assessment of the law, we decided not to arrive at conclusions but only to document some of the trends that could be observed with respect to the implementation of the Act.

Looking at the available data, we observed that the implementation of the Act was not uniform across the country. In most states, the Protection Officers were appointed at the District level, and in fact existing administrative officials were doubling up as Protection Officers. There were states like Rajasthan, Punjab and Haryana where Protection Officers had not been appointed. Protection Officers have a specific role to play in facilitating the

women's access to courts and a range of other services that the Act refers to. The absence of Protection Officers and negligible state-provided infrastructure meant that the aggrieved persons had to rely on the police and the existing machinery of the courts for activating the law. In most of the other states, women who could afford to hire lawyers, approached the courts directly, while the others approached the Protection Officers first. Sometimes the courts sought the assistance of the Protection Officers, if the situation demanded. However, the lack of general information about the existence of Protection Officers and/or their inadequate numbers was seen as a serious handicap to women accessing the law. Andhra Pradesh seemed to have the best system in place, where the police, Protection Officers, Service Providers and Legal Aid Service Authorities coordinated their services to facilitate women's access to courts. The police, which continue to be the first port of call for women in distress, were trained to set the Act in motion.

Data from the orders of the lower courts showed that primary users of the law were married women, although in a small number of cases, the petitioners were widows and unmarried daughters. As of 31st July 2007, 7913 cases were filed across the country, under the PWDVA. Rajasthan had the highest number of cases filed under the Act (3440) although Protection Officers had not been appointed in the state. Also, we found that the most commonly granted relief was for maintenance followed by residence orders and protection orders. This was possibly because Magistrates are familiar with granting maintenance orders under Section 125 of the Code of Criminal Procedure (CrPC). But the overall pattern of orders sought and granted was too diverse for drawing broad conclusions.

2nd Monitoring & Evaluation Report (2008)

In the 2nd M & E Report, we asked the same questions as the 1st one. In addition, we wanted to know the extent to which gaps identified in the 1st report were being fulfilled; whether the "best practices" recommended in the 1st M & E Report still stood; how effective was the infrastructure in facilitating women's access to court and other services; and what was the jurisprudence that was being evolved by the High Courts and Supreme Court on the PWDVA.

By the second year of its existence, there were 22 reported judgments under the Act delivered by various High Courts. Significant among these, was a judgment of the Delhi High Court upholding the constitutional validity of the PWDVA on the ground that the gender-specific nature of the law does not violate the guarantee of equality as it is a "class legislation" aimed at protecting women as a class that is disproportionately vulnerable to violence .

A judgment of the Madhya Pradesh High Court showed that the question of whether women could be respondents under the law, which was a hotly debated issue prior to the enactment, had continued to be a contentious issue even after the law had come into force. The case, *Ajay Kant & Others vs. Alka Sharma* arose in the context of an application filed by a wife against her husband and mother-in-law after she was dispossessed from her matrimonial home, following dowry-related harassment. Based on a literal interpretation of the provision, the court held that a proceeding under the Act can only be initiated against an adult male person. The rationale provided by the court makes it clear that the interpretation of the term "respondent" is actually based on what the Court perceives to be essential for safeguarding women's interests. Interestingly, however, in its attempt to provide protection to women, the Court failed to recognise the specific gender-neutral language of the proviso to Section 2(q), which uses the term "relative of husband or male partner". Thus defined, a relative can be male or female and, consequently, the Act also protects women from violence perpetrated by the female family members of a male respondent.

Significantly, a Madras High Court judgment held that the Act could be invoked even in cases arising before the Act came into force. In *Dennison Paulraj & Others vs. Mrs. Mayawinola*, the

wife was forced to leave the matrimonial home following continuous harassment and dowry demands by her husband and in-laws. Although she left the matrimonial home prior to the enactment of PWDVA (2005), she claimed that the threat and harassment continued. The Court concluded that the respondent had suffered part of the abuse after the commencement of the Act in form of anonymous phone calls threatening violence. The court pointed out that in any case, the issue of retrospective application of penal statutes does not hold true in the case of PWDVA as Section 31 penalises the breach of a protection order rather than the act of domestic violence itself.

In the 1st M & E Report, we had noted that in a number of cases the Magistrate had refused to grant residence orders to the aggrieved women based on the Batra Judgment. The 2nd M & E however found that a few High Court judgments had interpreted “shared household” based on the factual context and not on the basis of semantics. In *P Babu Venkatesh & Ors. v. Rani* the Madras High Court held that the ratio laid down by the Supreme Court in *Batra* could not be applied as the facts clearly demonstrated that the husband had transferred the household into the name of his mother with the intention of defeating the rights of the wife, after the matrimonial dispute arose. In arriving at its conclusion, the Court recognised the fact that, before the wife’s dispossession, both parties resided jointly in the said household. Similarly, in *Vandana vs. Mrs. Krishnamachari*, the Madras High Court held that a narrow interpretation of the provisions would leave many women in distress and without remedy. The judgment held that the question is not whether the woman had “lived” in the shared household, but whether she has a right to live in the same. In another case appearing before the Delhi High Court, although the marriage was solemnised, the wife was not allowed to enter the matrimonial home. She filed a suit claiming the right to reside in the matrimonial home. The husband argued that she had no such right as she had not “lived” in the matrimonial home. Although the judge concluded that the woman did not have a right to reside as the house was owned by the mother-in-law, it was held that she could be dispossessed only with “due process” of law and can not be physically thrown out. This judgment actually shows a keen appreciation of the rule of law and respect for rights, and thus makes available to the woman, safeguards that are otherwise granted to tenants and trespassers.

VII. Concluding Thoughts

While “domestic violence” has now become a legally recognised category, violence against women in domestic relationships still persists. We are often asked how law can protect a woman from facing violence, inside the home as the home cannot be policed all the time. The question however fails to understand the nature of rights and the role of law in negotiating relationships. Law performs a normative function whereby it indicates what behaviour must be deemed unacceptable. Having a law on domestic violence has the merit of putting in place a norm that violence against women is unacceptable, and such a norm is backed by State sanctions. But having a norm will not by itself end violence. It is also necessary to facilitate access to justice by the endowment of material resources. Although the institution of Protection Officers had been created for this purpose, no permanent cadre of Protection Officers has been created, thus substantially diminishing the utility of the institution. Courts are unaccustomed to deal with agencies such as the Protection Officers and treat them in a hierarchical manner, not realizing that it takes more than judges to protect women from violence.

The other area of concern is that in a number of cases the courts refer the matter for counseling as a first resort, with the objective of reconciliation. Caution must be exercised in adopting the view that conciliation is the first and most viable approach that the Court should take, before initiating legal proceedings. Cases where the issue at hand is domestic violence, an approach prioritizing conciliation could adversely affect the safety and security

CONCERN FOR THE DEAD, CONDEMNATION FOR THE LIVING : INDIRA JAISING

INDIRA JAISING

While ruling that women were increasingly misusing Section 498A of the Indian Penal Code, the Supreme Court ought to have been more conscious of the prevalence of domestic violence, and the difficulties women face in approaching the police. When faced with evidence of a poor conviction rate, instead of inquiring whether the prosecution was poorly conducted, the Court assumes that the “disgruntled wives” filed false cases. Ironically, while the courts convict husbands and their families in cases of dowry deaths, the woman’s invocation of Section 498A when she fears for her life or demands her share of the matrimonial home, earns her the accusation of being a “disgruntled wife”.

In the mid-1980s, the legal category of “domestic violence”, which we use today to describe violence in the intimate sphere, did not exist. The expression first found its place in Indian law in 2005. This is not to say that domestic violence did not exist before 2005, but rather, that an injury was not an injury until it had a legal name and definition. This was also the case with sexual harassment at the workplace. It was not until the 1970s when Catherine Mackinnon conceptualised the first sexual harassment claim as an action under the Civil Rights Act, 1964 as being a form of discrimination against women based on sex, that it became an actionable wrong. Such is the defining power of the law.

In the mid-1980s, there were cases of women dying in the matrimonial home in what came to be described as “stove bursts” in the kitchen. The polyester king, Reliance, contributed the nylon saree which clung to the body resulting in instant death. These deaths were routinely recorded by the police as “accidental”. It was the foresight and historic campaigns of the mothers of these women who died which led them to demand the reopening of the “closed” police files and call for an investigation of these deaths as murder. Satyarani Chaddha was one of the foremost among those brave mothers who refused to accept that her daughter, Kanchanbala, had died an accidental death within months of her marriage. It is ironic that the judgment of the Supreme Court in *Arnesh Kumar vs State of Bihar & Ors*¹ (henceforth *Arnesh Kumar*) was delivered on the very day that Satyarani Chaddha died, 2 July 2014. Her son-in-law had just been convicted of abetting the suicide of his wife but he absconded on the very day the judgment was delivered, never having seen the inside of a jail. This fact will have to be borne in mind when discussing the subtext of the judgment in *Arnesh Kumar*, which is quite plainly in response to the cry “women misuse the law” which is heard from the “save-the-family” lobby. Indeed, there are observations in the judgment which are a giveaway; for instance even before commencing a discussion on legal provisions, the Court states that “(t)he institution of marriage is greatly revered in this country”.

Bold Provision

Alarmed by the daily headlines of women dying of “stove bursts”, in 1983 the then Congress government of the day introduced Section 498A into the Indian Penal Code (IPC). It was a bold and brave provision, introducing the offence of cruelty by a husband and his family against a wife as an offence. It was bold for several reasons. One, that it introduced criminal offences in intimate relationships, which thus far were considered beyond the reach of the law, and two, because cruelty was not confined to the demand for dowry alone nor confined to physical mutilation or injury but extended also to mental cruelty. Cruelty is defined as any wilful conduct which is likely to drive a woman to commit suicide, or cause grave harm or injury to or danger to her life or health, mental or physical. It includes harassment of a woman with a view to coercing her or anyone related to

her from meeting an unlawful demand. It is obvious that the threshold of behaviour required to constitute cruelty is high and hence there is an inbuilt safeguard in the Section itself for invoking it.

The offence is not confined to the giving and taking of dowry, but extends to all conduct which causes mental or physical injury of a high order to the woman by a husband or her family members. The word "harassment" itself refers to a continuous coercive conduct, which causes mental anguish to the woman. However, although it made several innovations, it made the threshold of cruelty required to invoke the law too high. While the conduct which qualifies as Economic & Political Weekly EPW July 26, 2014 vol XLIX no 30 35 cruelty is of a grave nature, to place it so high as to expect police intervention only when there is an actual attempt at suicide by the woman would be to defeat the purpose of the law. Hence, the Section is and must be invoked when women are oppressed in the matrimonial home behind closed doors, to the extent that they find it impossible to live a life of dignity. Denial of food, locking up and preventing communication with the outside world, and repeated threats to drive her out of the matrimonial home, will all qualify as mental cruelty, especially so in the case of women who are stay-at-home housewives with no independent income of their own. Another very common reason for harassment is to call a woman a *baanjh* (infertile) or blame her for not producing a male child, a reflection of the pronounced son-preference in our society. Apart from these circumstances, the proverbial demand for dowry is ever present in Hindu marriages, and has now spread to other communities as well.

Section 498A includes cruelty by a husband's relative, and although the word "relative" is not defined, it is obvious that the mother-in-law and the father-in-law would be included in this definition. Grandmothers and grandfathers of the husband, be they "bedridden", are very much contemplated by the Section as being responsible for cruelty towards a married woman. Given that the primary form of living in most homes is a joint family this should not surprise anyone. Moreover, the pervasive domination of the mother over the son in most Indian households is also a phenomenon that the Court should have taken note of while delivering the judgment in *Arnesh Kumar*.

What is noteworthy, however, is that the cruelty by a husband or his relatives was made an offence punishable with imprisonment for a period of upto three years, and the offence was made cognisable. A cognisable offence is one for which an arrest can be made without a warrant from a magistrate. Ordinarily, offences punishable with imprisonment of less than seven years are non-cognisable, but if the legislature feels that an offence is sufficiently significant to curb a social evil, such offence is made cognisable even though punishable with imprisonment of less than seven years. Offences against women fall into this category. Outraging the modesty of a woman, using obscene words and gestures, and now, after the amendments to the IPC in 2013, voyeurism, stalking, acid attacks and sexual harassment are all cognisable offences, though punishable with less than seven years imprisonment.

In 1986, the IPC was once again amended to introduce Section 304B, which provided that if the death of a married woman occurs in unnatural circumstances within seven years of the marriage, and it is shown that just before her death she was treated with cruelty in relation to a demand for dowry, it shall be presumed that her husband or his relatives caused the death. We must appreciate that the two sections are part of a composite scheme; one is invoked before the woman dies and is preventive in nature (Section 489A), the other after she is dead (Section 304B). Surely, the purpose of law must be to keep the woman alive, and if Section 498A were properly invoked at an appropriate time, we would not see the number of dowry deaths that we continue to see till this day.

Difficulties of Filing an FIR

While rendering the judgment in *Arnesh Kumar*, the Court ought to have been more conscious of the prevalence of domestic violence, and the difficulties women face in approaching the police. Filing a first information report (FIR) is indeed an ordeal as the police invariably try numerous techniques to avoid registering one, ranging from sermons to reconcile, to threatening the abuser – everything but filing a FIR! Hence, it is hard to imagine that the police are registering frivolous FIRs leading to acquittals. There is no reliable data on prevalence of domestic violence, and whatever data is available varies widely owing to the differences in research methodologies. The estimates from community-based studies vary from 18% to 70% while National Family Health Survey (NFHS)-3 indicates a lifetime prevalence rate of domestic violence to be 35% among women of reproductive age. The NFHS is a large survey conducted across India in a representative sample of households throughout the country and so, arguably, these rates are only the tip of the iceberg. According to NFHS-3 data, 25% of women experienced physical or sexual violence in the 12 months preceding the survey. Among those women who reported physical violence by their husbands, 36% experienced injuries in the form of cuts, bruises or aches, while 18% suffered from severe injuries in the form of sprains, dislocations, broken bones and severe burns.

As per the National Crime Records Bureau (NCRB), which is relied upon by the Court, in 2011 a total of 1,14,372 cases were registered under crimes against women in matrimonial homes. However, the estimate derived from NFHS-3 data indicates that in the same year there were at least 59 million women who experienced some form of physical or sexual violence in the preceding 12 months. As per NFHS, a mere 2% of these women may have sought police support, which translates into 2.8 million women. This number is 2.5 times more than what the NCRB reports.

This is evidence that a large number of women experiencing domestic violence are not reaching the police. Further evidence of reluctance on the part of women to register police complaints emerges from analysis of service records of a public hospital-based crisis intervention centre, Dilaasa. Of all the women registered at the centre between 2001 and 2010, a total of 1,675 married women were considered for the purpose of this analysis. The findings are illuminating:

- 47% of the women had sought police support against violence before coming to Dilaasa; of these, almost all had only registered a NC. Merely 2% had filed a FIR.
- 53% of the women had never gone to the police. Among women who did not seek police support, one-third had experienced violence for three to five years; 64% of them reported violence during pregnancy; 32% reported that they had attempted suicide in the past as a consequence of the ongoing abuse; 39% experienced physical violence in the form of pulling of hair and banging of head while 29% were abused by punching in the chest, face and abdomen. Sexual violence was also experienced by 27% women in the form of forced sexual intercourse. Additionally, 26% of them were abused with instruments which include hitting with blunt and sharp objects, use of belt and inserting objects into vagina.

A Curious Phenomenon

Considering the severity of abuse reported by women, it is evident that these women may have sought treatment for the injuries caused but they had not filed a police complaint. The contact of these women with the hospital helped them to access a crisis intervention department for psychosocial services, thus underscoring the need for health systems to recognise domestic violence as a public health issue and offer services to them to mitigate consequences of violence.

Even in the case of dowry deaths, there is a discrepancy. The NCRB reports a sharp rise of 6.4% in dowry deaths from 2007 to 2012, when the figure stood at 4,946 deaths. But a study

reported by The Lancet estimates over 1.63 lakh annual fire deaths in India, 2% of all deaths in the country. Of these, 1.06 lakh occur among young women. The authors conclude that death due to burns is not only behind most deaths among women between 15 and 34 years of age, the number is six times higher than the official national statistics in India, compiled by the NCRB.

Yet in our courts we see a very curious phenomenon. Courts are quick to convict for dowry death. Our law reports are replete with cases of husbands and their family members convicted for dowry death under Section 304B. No court has ever suggested that the dead woman lied, or misused the law, as indeed the dead body is proof of the cruelty she faced when alive and dead women tell no lies. Judges, when convicting under Section 304B, are quick to condemn the institution of dowry and bemoan the fact that it exists till today. Yet when it comes to the invocation of Section 498A, the first suggestion is that “disgruntled wives” are misusing the law to put “bed-ridden grandfathers and grandmothers” behind bars. Hence the misuse of Section 498A consists of putting people behind bars. But is that not the essence of all crime? Are all cognisable offences not such that arrests are made for custodial interrogation?

How does one explain this concern of the courts for the dead and condemnation for the living? Could it be that dead women exercise no rights nor claim a right to reside in the shared household? And what does one understand by the expression “disgruntled wife”, a wife claiming her right to reside in the shared household?

We must turn to the Protection of Women from Domestic Violence Act, 2005 (PWDVA) for an answer to this question. The Lawyers Collective has been analysing judgments and orders passed under the PWDVA consistently since 2007, the very first year of its implementation. The Act itself was enacted to provide a civil remedy for domestic violence, a legal category which emerged in our jurisprudence for the first time in 2005. As one scholar has noted, it is surprising that a country which has non-violence as its founding faith took over 60 years to get a definition of violence included in the law. The PWDVA defines domestic violence as follows:

Definition of domestic violence. For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it –

- (a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or
 - (b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or
 - (c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or
 - (d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.
- Explanation I – For the purposes of this section –
- (i) ‘physical abuse’ means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force;
 - (ii) ‘sexual abuse’ includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman;
 - (iii) ‘verbal and emotional abuse’ includes –
 - (a) insults, ridicule, humiliation, name calling and insults or ridicule specially with regard to not having a child or a male child; and

- (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested.
- (iv) 'economic abuse' includes –
 - (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
 - (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
 - (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household. Explanation II – For the purpose of determining whether any act, omission, commission or conduct of the respondent constitutes 'domestic violence' under this section, the overall facts and circumstances of the case shall be taken into consideration.

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The PWDVA was exceptional in that it not only defined domestic violence to capture the experience of women in intimate relationships without narrowing the scope of the law, but it also put in place public-supported protection officers whose role it was to assist women to access the law. The theory behind the law was that it is part of the due diligence of the state to support women facing violence through assistance in legal proceedings. The Act tried to introduce multidisciplinary personnel to assist a woman, as a protection officer would be a qualified social worker with appropriate experience. She would not only assist the woman but also provide much needed assistance in collecting evidence, to which the woman would have no access, on behalf of the Court. It was thus an attempt to depart from the ordinary adversarial approach of the judicial process when applied to domestic relationships.

The PWDVA was successfully operated in the first year of its existence in Andhra Pradesh. The police were sensitised to the law and they made referrals to the protection officers who were in turn recruited and trained as public servants to assist the woman from the commencement to the conclusion of the case. These protection officers met the woman, filled in the domestic incident report, filed applications before the Court, and argued cases, providing the perfect public model for justice delivery. In accordance with the role visualised for them under the law, they were functioned as mirror images on the civil side of the public prosecutor in criminal cases. Unfortunately, the Advocates Act, 1961, which gives only advocates the right to address the Court,

cut their progress short. In all other parts of the country, the system did not function simply due to non-appointment of protection officers. Those that were appointed had to contend with the traditional hostility of judges while dealing with non-lawyers, and the protection officers found themselves marginalised.

Significantly, thanks to the Supreme Court, the Lawyers Collective has had access to judgments and orders passed under the PWDVA in different states. It has been presenting its analysis in the form of annual monitoring reports. In the sixth such report⁴ while analysing the orders, we found that courts were denying relief by interpreting the words “domestic violence” in a restrictive way, and contrary to the definition in the Act itself. One judgment, for example, said that refusal to maintain a wife was not economic violence. The expression “domestic relationship” was also restricted to current relationships by ignoring the clear definition in the law which indicated that former relationships are also covered. This ensured the elimination of divorced women on the ground that they were not in a domestic relationship. The judgment of the Supreme Court in *Batravs Batra*⁵ is too well known to invite further comment. The single most important contribution of the law was a clear and specific mandate that every woman in a domestic relationship has a right to reside in the shared household. The shared household was defined as the household where the persons lived or had lived and the definition specifically excluded all consideration of ownership of the property as being irrelevant to deciding whether the right existed. In *Batravs Batra* the Supreme Court reinstated the right to property with a vengeance in the law of matrimony and said that the right of a woman to reside in the shared household only existed if the husband owned the property in question.

Do we see here the concern once again for “bedridden grandfathers and grandmothers”? We will return to this theme later. What we noticed in subsequent years was that the courts were reluctant to reinstate a woman in the shared household if she has left as a consequence of the violence or has been thrown out of the shared household. This became a “heads I win, tails you lose” situation.

‘Property’ Cases

Slowly a picture started emerging. Courts were basically implementing personal laws with marked determination in proceedings under the PWDVA, forgetting that this is a secular law applicable to all communities regardless of religion. One of the most important provisions of the Act, the right to reside in the matrimonial home, lost its lustre. You had it if you had it; if you did not have it, you did not have it. Slowly but surely, we started getting orders which stated, in many different ways, that women were misusing the law, and the old argument made previously in the context of the criminal law resurfaced. But this time, the nature of the misuse was a demand for a share of the matrimonial home. Courts started characterising the cases under the PWDVA not as cases of domestic violence, but as cases of “property”. A woman demanding the right to reside in the matrimonial home became a “disgruntled wife” demanding property.

As a result, whether women invoke the criminal law or the civil law, they are said to be misusing the law! Hence, use of the law per se becomes misuse; the impact of this argument is that access to justice is denied.

This brings us finally to an analysis of the judgment in *Arnesh Kumar*. The judgment offers statistics of the high rate of acquittals as evidence of the fact that these wives have misused the law. When faced with evidence of a poor conviction rate of 15% (juxtaposed with a high rate of charge-sheeting at 93.6%) the Court ought to have been alerted to the fact that the prosecution has not been properly conducted during the trial. Instead, by an inverted logic, these statistics are offered as evidence that an overwhelming majority of these cases, since they result in acquittals, were false cases brought by “disgruntled wives”.

Court's Sympathy Misplaced

A high rate of acquittal can result from a botched investigation, the benefit of the doubt being given to the accused, or plain bias against women accessing the law. Add to this the fact that the Supreme Court itself has encouraged settlements under Section 498A, thereby making a non-compoundable offence into compoundable one. A good deal of these acquittals could also be women turning "hostile" and not giving evidence against their husbands at critical stages of the case, due to pressure from July 26, 2014 vol XIX 38 no 30 EPW Economic & Political Weekly the family or due to such "settlements". The point is, without analysing the cause of acquittals, the sympathy of the Court for the husband's family is misplaced, as is its deprecation of the police in arresting them.

It is true that the police notoriously misuse their powers, and had the judgment come in the context of any other crime, it would have been welcome. The factors mentioned in Section 41 of the Criminal Procedure Code (CrPC) warranting arrest are the same for all offences – likelihood of interference with evidence, pressurising the woman to give up the case, to enable a proper investigation, and to prevent absconding. All these are even more likely to occur in intimate relationships rather than in traditional crimes, hence warranting an arrest of the accused.

Women are not particularly fond of the criminal law, nor interested in sending their in-laws behind bars, any more than any other aggrieved person. The law of bail is the same for offences punishable with imprisonment below seven years and above. It is also the same for "disgruntled wives" and those who are cheated, beaten or murdered. Hence one fails to comprehend why the Supreme Court casts wives as vindictive in the fact of accessing the criminal law. Civil law is notoriously expensive to access, and is often inherited by subsequent generations. If anything, the statistics point to a dysfunctional and moribund legal system, and the judges would do well to look within.

The issues that the Aradesh Kumar judgment raises are profound. When is a crime a crime? When is a civil wrong a wrong? What kind of legal system are we entitled to expect? When will women's rights be treated as women's rights?

Accountability for Judges

Throughout the implementation of the law, the judges are in search of a perfect victim, a woman who dutifully follows the patiparmeshwar (husband is god) tradition, tolerates violence, produces male children, and makes no demand for her rights. But why would such a woman need any protection from the law? On the contrary, it is the woman who is an "imperfect victim" – the divorced woman, the separated woman, the woman in a live-in relationship, the widow who is cast out of the shared household, the woman who fails to bear a male-child – who is most in need of protection of the law.

What then is the solution to the problem? One answer is obvious. Judges must be held responsible for their misogyny and made accountable for their judgments. Also, the recognition of full-fledged equal and economic rights for women within marriage is a must.



STANDARD PRACTICE DIRECTIONS FOR THE EFFECTIVE IMPLEMENTATION OF THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into subordinate position compared with men— Declaration on Elimination of Violence against Women, 1993

The Protection of Women from Domestic Violence Act, 2005 (herein after referred to as “the PWDVA”) is an Act to provide for more effective protection of the rights of women guaranteed under the constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto.

The key features of PWDVA are as follows:

- A clear declaration of the basic intent of the law, namely the prevention of domestic violence
- A clear and unambiguous statement of the right of women to be free from domestic violence and the recognition of domestic violence as violation of the human rights of women.
- A definition of domestic violence that captures women’s experience of abuse in its manifold form.
- A recognition of a woman rights to reside in the shared household and her protection from illegal dispossession
- Access to immediate orders to prevent further acts of violence, to provide remedies for violence faced and to prevent destitution of women
- Infrastructure available to women to facilitate access to justice both in terms of courtmandated remedies and other support services.
- Provision for coordinated response to domestic violence by recognizing and building upon the experience of other agencies that have traditionally provided assistance to women in distress.

Jurisdiction vested on the Magistrate (Metropolitan Magistrate/JMFC).¹

The Courts have been vested with considerable powers to adopt appropriate procedure, and an implementing structure at its disposal to ensure efficacious and emergency reliefs to women, facing domestic violence. The Protection officers who are vital link between the Court and Aggrieved person are in direct control and supervision of the Magistrate. In accordance with the objective of providing emergency reliefs, aggrieved person can directly approach the court with complaints of domestic violence². However, applications under this law may also be filed in pending proceedings³.

Overview of the Act:

The PWDVA is a civil law that defines domestic violence, recognizes women’s rights to reside in a violence-free-home and provides remedies in cases of violation of this right.

1 Section 12(1) read with Section 2(i)

2 Section 12

3 Section 26

The PWDVA operates in addition to all other existing criminal and civil laws.

PWDVA can be broadly divided into five components:

- (i) Preamble or Statement of Objects and Reasons
- (ii) Definitions
- (iii) Rights and remedies
- (iv) Mechanisms for implementation
- (v) Procedures to be adopted by the Magistrate during the proceedings under section 12 and for the enforcement of orders.

I) Preamble or Statement of Objects and Reasons:

In its Statement of Objects and Reasons, the PWDVA recognizes domestic violence as a serious human rights concern and deterrent to development. It further mentions that since existing criminal law does not address this phenomenon in its entirety, there is a need to enact a civil law aimed, “to provide for more effective protection of rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family”.

II) Definitions

Definitions provide the coverage and ambit of the law: i.e., to whom the law applies, the acts prohibited under the law and the authorities vested with the responsibility of implementing the law.

In the PWDVA, definitions are provided in Sections 2 and 3. Section 2 demarcates the coverage of the PWDVA, which includes:

- (i) **Aggrieved person**⁴ – defines who can initiate proceedings under the PWDVA. This includes:
 - 1. Any women who allege that they have faced domestic violence from the respondent/s
 - 2. Any woman on behalf of the child
 - 3. Any other person on behalf of the aggrieved person including the Protection officer.

For the purpose of this section:

Child⁵ being defined as “ any person below the age of eighteen years and includes any adopted, step or foster child⁶”, and is gender neutral.

- (ii) **Respondent** defines the person against whom proceedings can be initiated under the PWDVA.

The said definition⁷ includes:

- a) Adult male person who is, or has been in a domestic relationship with the aggrieved person.

4 Section 2(a)

5 Section 2(b)

6 Section 2(b)

7 Section 2(q)

b) Relatives of the husband or male partner of the aggrieved person.

In *Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade and Ors*⁸, the Supreme Court held that a woman could be a respondent under PWDVA.

Para 13 – *the expression “female” has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression “relative”, nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make specific to males only.*

Thus the term “relative” used in this definition includes female members of the husband’s family or male partner of the aggrieved person and said expression has not been restricted to males only⁹.

(iii) **Domestic Relationship¹⁰**

The elements of domestic relationship are:

- 1) The relationship must be between two persons who
 - a) live or
 - b) have at any point lived together in a shared household

The expression “who live or at any time have lived together” protects the rights and ensures reliefs under the Act to women who have been dispossessed or thrown out of their shared household.

Thus, on the basis of the said definition,

- Any woman, who has been in the past, in domestic relationship with the Respondent would be entitled to invoke the provisions of the Act¹¹.
 - Divorced Woman can also invoke the provision of PWDVA since she was in a domestic relationship with the Respondent¹².
- 2) The two persons must be related through marriage or a relationship in the nature of marriage, consanguinity, adoption, or are family members living together as a joint family.

Thus any woman, irrespective of her religion, who is in a:

1. Natal relationship
2. Marital relationship
3. Relationship in the nature of marriage

8 MANU/SC/00812011

9 Ibid.

10 Section 2(f)

11 *Maroti s/o Dewaji Lande v. Sau Gangubai w/o Maroti Lande and Prashant s/o Maruti Lande*, Bombay High Court [Criminal Writ petition No. 542/2010] [MANU/MH/1763/2011] and *Karim Khan v. State of Maharashtra through PSO and Nahid Akhtar*, Bombay High Court [MANU/MH/0990/2011]

12 *Bharti Naik v. Ravi Ramnath Harlarnkar and Anr* , Bombay High court [III (2011) DMC 747 2010, MANU/MH/2048/2010]

4. Women who were in the past in domestic relationship with the Respondent which includes divorced women
5. Women who are family members living together as a joint family

Relationship in the nature of marriage:

The PWDVA , “a relationship in the nature of marriage” includes :

- a. Women who are in relationships of cohabitation or live-in-relationships: In *D. Velusamy v. D. Patchaiammal*¹³, Supreme Court noted that “in our opinion a relationship in the nature of marriage is akin to a common law marriage. Common law marriages requires that although not being formally married:
 - a. The couple must hold themselves out to society as being akin to spouses
 - b. They must be of legal age to marry
 - c. They must be otherwise qualified to enter into a legal marriage, including being unmarried
 - d. They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time”

Presumption: Where the partners have lived together for a long spell as husband and wife, a presumption would arise in favor of a valid wedlock ¹⁴

- b. **Women in an annulled marriage** – The spouses who lived together for sometime in an annulled marriage can certainly be held to have shared a domestic relationship as defined under sec 2(f) of DVA¹⁵.
 - c. **Women in marriages which are void or voidable in law, where all other elements of marriage exists** - Second wife have been held to be entitled to maintenance under section 18 of Hindu Adoptions and Maintenance Act¹⁶
- (iv) **Shared household**¹⁷ is the household where the aggrieved person lives or at any stage has lived in a domestic relationship either singly or along with the respondent¹⁸.

Shared household includes households:

13 MANU/SC/0872/2010

14 *Chanmuniya v. Chanmuniya Virendra Kumar Singh Kushwala and Anr.*, Supreme Court, [2011 (1) ALD (Cri) 370, MANU/ SC/0807/2010]

15 *T.K. Surendran P. Najima Bindu & Ors*, Kerala High Court, [MANU/KE/0682/2012] – In this case, the Hon’ble Court while deciding an issue whether the wife in voidable marriage under section 12 of the Hindu Marriage Act is entitled to claim maintenance under section 125 CrPC and can the statutory compassion in favour of the woman in distress in a terminated marriage and the legislative anxiety and concern to prevent vagrancy against women persuade courts to bring such woman in an annulled marriage within scope of the definition of deemed wife in explanation to sec 125 CrPC , the High Court took a recourse to definition of domestic relationship in section 2 (f) of PWDVA and held that spouses who have lived together for sometime in an annulled marriage can certainly be held to have shared a domestic relationship as defined under section 2(f) of DV Act.

16 *Narinder Pal Kaur Chawla V. Manjeet Singh Chawla* , Delhi High Court [AIR 2008 Delhi 7] ,*Suresh Khullar V. Vijay Kumar Khullar*, Delhi High Court [AIR 2008 Delhi 1, MANU/DE/8505/2007] and *Sau Manda R. Thaore, w/o Sh. Ramaji Ghanshyam Thaore v. Sh. Ramaji Ghanshyam Thaore*, Bombay High Court [Criminal Revision Application No. 317/2006, MANU/MH/0427/2010]

17 Section 2(s)

18 *V. D. Bhanot v. Savita Bhanot*, Supreme Court in Special Leave Petition (Crl) No. 3916 of 2010.

- That are owned or tenanted either jointly by the AP and the Respondent, or by either of them;
- Where either aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity or
- Which may belong to the joint family of which the respondent is a member, irrespective of whether either of them have any right, title or interest in the shared household.

In *S.R. Batra & Anr V. Taruna Batra*¹⁹, the Supreme Court interpreted the expression of the shared household under section 2(s) of PWDVA and held that an aggrieved wife has the right to reside in the shared household, which was held to mean a house belonging to or taken on rent by husband, or house which belongs to joint family of which husband is a member.

Following are the circumstances in which Hon'ble High Courts have held that the aggrieved person has the right to reside in the shared household:

1. Where the property is in the name of husband and the in-laws, the wife has a right to reside²⁰
2. Where the property was owned by the husband but has subsequently been transferred in the name of the in-laws, with intention to deny the wife's rights, the women has a right to reside in shared household²¹
3. Where the husband has a right, title or interest in the property for the purpose of section 17 of PWDVA²² is shared household and hence the aggrieved person has a right to reside in the shared household.
4. In *Eveneet Singh v. Prashant Choudhury* and *Kavita Choudhury v. Eveneet Singh*²³, the Delhi High Court, while distinguishing the facts from *Batra v. Batra*, also pointed out that "in *Batra*, the dispute did not emerge or emanate from any provisions of the Domestic Violence Act;"

III) Rights and Remedies:

The PWDVA recognizes three important rights:

- Right to be free from violence, which is to be inferred from the definition of domestic violence contained in section 3
- Right to reside in the shared household as recognized in section 17 of the Act.
- Right to seek remedies as provided in section 12

Remedies prescribed are in the form of orders that can be obtained from the Courts:

1) Protection orders²⁴

- Injunctive orders to prevent domestic violence or the commission of any act that adversely affects the aggrieved person's right within home

19 *SR Batra v. Taruna Batra*, Supreme Court, [MANU/SC/007/2007]

20 *Jyotsana Sharda v. Gaurav Sharda*, Delhi High Court [Criminal Revision petition No. 132 and 133/ 2009, MANU/DE/3520/2009]

21 *P. Babu Venkatesh and Ors V. Rani*, Madras High Court, [MANU/TN/0612/2008]

22 *Rajkumar Rampal Pandey v. Sarita Rajkumar Pandey*, Bombay High Court [MANU/MH/1295/2008]

23 MANU/DE/3497/2010

24 Section 18

- Protection orders are chiefly in the nature of the “Stop Violence” orders designed to put an end to additional acts of violence by the Respondent against the Aggrieved person and/ or acts that adversely impact on her rights as recognized under PWDVA.
- Threat of violence is sufficient²⁵ for granting Protection Order Thus protection order can be issued upon a bonafide threat of violence or the reasonable apprehension of its occurrence. It is not necessary that the domestic violence has already occurred.
- Protection order should be granted in addition to the other reliefs under PWDVA

2) Residence orders:

Section 17 recognizes right to reside and 19 of PWDVA provides residence orders to prevent the aggrieved person’s dispossession as well as to prevent any act that adversely affects her peaceful occupation of the shared household.

In *Vandana V. T. Srikant Krishnamachari and Anr*²⁶, Madras High Court has held that where the husband has a right, title or interest in the property for the purpose of section 17 of PWDVA is shared household, it is immaterial whether the parties have cohabitated in the said property. In such cases, by virtue of being wife, the aggrieved woman has a de jure right of residence in shared household.

A residence order is sought in cases where

- a) The aggrieved person apprehends dispossession or
- b) She is already dispossessed and seeks to be restored to the shared household

In *Ishpal Singh Kahai v. Ramanjeet Kahai*, Bombay High Court²⁷, while upholding the injunctions orders by the Family Court directing the Respondent to remove himself from the shared household has made specific note on right to residence - The Human right of a person has little to do with her ownership rights in property. It is therefore immaterial to consider in whose name the matrimonial home stands. In a case of domestic violence the court has only to appreciate the abuse and protection against such abuse.

Section 17 of the PWDVA recognizes:

- Right to reside in shared household irrespective of right, title or ownership over, interest over the property²⁸
 - It puts the woman’s personal rights over proprietary interest of the Respondent, even if Respondent/s have title over the property
 - Residence order not only contains within itself injunction for protection against her dispossession, but statutorily follows as matter of corollary, the order of injunction for removal of the violator from such household and thereafter restraining him from entering thereto.
 - Such order of removal or injunction restraining him form entering in the shared household is therefore conditioned upon this abusive behavior violating the person of his wife or any woman in domestic relationship and not upon his proprietary rights therein.

25 Section 3 (c) defines “domestic violence” to include an act or conduct that ‘ has the effect of threatening the aggrieved person or any person related to her’.

26 (2007) 6 MLJ 205 (Mad)

27 MANU/MH/0385/2011

28 Ishpal Singh Kahai V. Mrs. Ramanjeet Kahai, Bombay High Court [MANU/MH/0385/2011]

- No woman may however, be directed to remove herself from the shared household²⁹
- Further section 19 apart from other reliefs also empowers the Magistrate:
- to reinstate the women in the shared household Error: Reference source not found
- To issue injunctive directions restraining the Respondent from dispossessing the Aggrieved person from the shared household³⁰

This Section shall be read in conjunction with the definition of the shared household.

3) Monetary relief:

Section 20 of PWDVA

- Provides for monetary orders.
- The aim of this provision is to ensure that women facing domestic violence have adequate financial support and are not rendered vulnerable due to their financial dependence on male members of the family.
- It is powerful tool for ensuring gender equality in economic terms. It does not contain any exception in favour of husband and in fact it recognizes moral and legal duty of the husband to maintain his wife.³¹

The reliefs available under this provision can be broadly divided into two parts:

- i) Payment for losses and expenses incurred as a consequence of domestic violence;
- ii) Payment for maintenance to meet daily needs and expenses of the aggrieved person and her children

Payment for losses and expenses incurred as a consequence of Domestic Violence³²

Under this category, the aggrieved person may seek orders directing the respondent to pay for:

- (i) Loss of earnings due to domestic violence.
- (ii) Medical expenses incurred to treat injuries sustained as a result of domestic violence, which includes treatment for both physical and mental injuries.
- (iii) Loss of property.
- (iv) Any other loss sustained as a result of domestic violence.

Payment of maintenance:

Section 20(1) (d) of the PWDVA specifies that the amount of maintenance granted can be in addition to maintenance / amount received on an order under any of other laws³³.

Quantum of Monetary Relief

Section 20(2) of the PWDVA provides that monetary relief under both categories – i.e. payment for loss and payment for maintenance

29 29 Section 19(1)(b) proviso r/w Section 2(q) proviso

30 Section 19(1)(a)

31 Sukrit Verma and ANr V. State of Rajasthan, Rajasthan High Court (Jaipur Bench) [MANU/RH/0337/2011], Om Prakash v. State Rajasthan, Rajasthan High Court (Jaipur Bench) [MANU/RH/0324/2011]

32 Section 20(1) (a),(b) and (c)

33 Rajesh Kurre V. Safurabai & others, Chattisgarh High Court at Bilaspur in Criminal Misc Petition No. 274 of 2008

- has to be “adequate, fair, reasonable and consistent with the standard of living to which the aggrieved person is accustomed³⁴” In *Jasbir Kaur Sehgal v Dist. Judge Dehradun*, the Supreme Court opined, “no set formula can be laid down for fixing the amount of maintenance. It has in the very nature of things to depend on the facts and circumstances of each case. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case.”
- It can be granted irrespective of whether she has separate income of her own or not. ³⁵
- It can be granted irrespective of whether the aggrieved person is currently living with the husband or not.³⁶

4) Orders granting temporary custody of children

The PWDVA deals only with temporary custody of children

- as an urgent measure to ensure that the Aggrieved person is not harassed by denying access to the children
- To protect the children
- To ensure that they are not used pawns to coerce the woman to stay in a violent domestic relationship.

It is important to emphasize that custody orders are temporary in nature and that issues of permanent custody have to be decided in accordance with provisions of the Personal law applicable to the aggrieved person or the Guardianship and Wards Act.

The best interest of the child shall be of paramount consideration to decide the temporary custody of the child.

5) Compensation order

For mental and emotional distress caused to the aggrieved person, which are in addition to orders for monetary relief.

The amount of compensation can be determined by the Court after assessing the facts and circumstances of the case and the extent of injuries sustained.

IV) Mechanisms for Implementation

i) *Protection Officers*³⁷(PO):

- Serve as vital link between the Court and women i.e. the aggrieved person.
- Facilitate a woman’s access to court remedies and other support services. In addition, POs are vested with the responsibility of assisting the Court in the discharge of its functions.

(ii) *Service Providers* ³⁸(SP):

34 [(1997) 7 SCC 7, MANU/SC/0835/1997]

35 *Anup Avinash Varadpande v. Anusha Anup Varadpande*, Bombay High Court, [MANU/MH/0042/2010]

36 *Om Prakash v. State of Rajasthan & Anr* [MANU/RH/0324/2011] it was said, “ the Act does not require that the aggrieved person must stay with the offending husband. Hence, merely because the Respondentwife is not staying with the Petitioner-husband, it would not absolve the husband from his liability under the Act.”

37 Section 8

38 Section 2 (r)

- Organizations, registered under the PWDVA, that provide assistance to aggrieved persons in terms of shelter, counseling, legal aid, medical aid, vocational training, etc³⁹.
- SPs are also authorized to receive and record complaints of domestic violence and to conduct Court directed counseling as provided under Rule 14

(iii) *Medical Facilities (MF):*

- Those facilities notified under the PWDVA by State Governments. ⁴⁰
 - Notified medical facilities cannot refuse to provide medical aid to an aggrieved person.⁴¹
- They are also authorized to record DIRs.⁴²

(iv) *Shelter Homes (SH):*

- Those notified under the PWDVA by the State Governments under the PWDVA. Notified shelter homes cannot refuse to provide shelter to an aggrieved person⁴³

(v) *Police:*

- Police are duty bound to provide information to the aggrieved person about the rights and remedies provided under PWDVA, facilitate her access to the PO44, initiate criminal proceedings when needed and act on the directions of the Court to provide protection and to assist in the enforcement of orders⁴⁴.

(vi) *Legal aid lawyer:*

- To provide free legal aid to the aggrieved person.
- To ensure effective legal representation in the court to effectuate her rights under PWDVA

V. Procedure to be adopted by the Magistrate under the PWDVA:

I) Domestic Incident Report:

The aggrieved person may approach PO, SP and MF with the complaint of domestic violence. This complaint is required to be recorded in the appropriate format – as a Domestic Incident report⁴⁵

- Domestic Incident Report is report made in the prescribed form on the receipt of complaint of domestic violence from an aggrieved person by PO, SP and MF .⁴⁶
- It acts as a record of domestic violence.
- Section 12(1) requires the Magistrate to take into consideration the Domestic Incident report.

39 Section 10
 40 Section 2 (j)
 41 Section 7
 42 Rule 17(3)
 43 Rule 16(2)
 44 Sectopm 19(5) & (7)
 45 Form I
 46 Rule 5(1) and (2) and 17 (3) r/w Form 1 of PWDVR.

However the Domestic Incident Report is not mandatory for passing orders and/ or shall be taken into consideration only in cases where it has been filed.⁴⁷

II) Application:

The Magistrate may receive an application under section 12 of the PWDVA with or without the DIR from⁴⁸:

1. Aggrieved person
2. Protection officer
3. Service provider
4. Woman on behalf of the child
5. Any other person on behalf of the Aggrieved person

Since the PWDVA is in addition to and not in derogation of any other law, the aggrieved person can also make an application for reliefs under PWDVA, in any pending litigation⁴⁹.

III) Ex-parte ad interim Orders:

Before issuing notice to the Respondent/s, the Magistrate may pass an ex-parte ad interim order on the basis of affidavit⁵⁰:

- a. On prima facie disclosure of commission of domestic violence or;
- b. If there is likelihood that the Respondent may commit domestic violence.

Note: Prima facie does not mean a case proved to the hilt but one which can be said to be established if the evidence in its support were to be believed.⁵¹ Further the term 'likelihood' should be measured against the reasonable apprehension of the aggrieved person.

The above elements under Section 23(2) are to be read with the general principles for grant of ex parte ad interim orders, which include⁵²:

- If urgent orders are warranted on facts and circumstances of the case Delay would defeat the purpose where an order is absolutely necessary to protect the aggrieved person or to prevent any domestic violence or to preserve the then existing position.

IV) Service of Notice

- i) Once the application is filed, the Court shall issue notice to the Respondent to appear in the court.

Section 13(1) of the PWDVA prescribes that the notice shall be given by the Magistrate to the PO, who will get it served by means as prescribed.

The means are further prescribed under Rule 12(2), which provide that the notice can be served either by the PO or any other person on her/ his behalf. The Rule specifically

47 Shambhu Prasad Singh v. Manjari, Delhi High Court [MANU/DE/0899/2012] , Nand Kishor v. Kavita and Anr, [MANU/MH/0957/2009]

48 Milan Kumar Singh & Anr V State of Uttar Pradesh, 2007 Cri LJ 4742 [MANU/UP/0827/2007]

49 Section 26

50 Section 23(2) r/w Form III. Affirmed in Preceline George @ Antony Preceline v. State of Kerala & ors Kerala High Court at Ernakulum in WP (C) No. 30948 of 2009 (Q) and Sri Sujoy Kumar Sanyal V. Smt Shakuntala Sanyal (Haldar) and Anr. , Calcutta High Court , (MANU/WB/0597/2010)

51 United Commercial Bank case V. Bank of India (1981) 2 SCC 766, AIR 1981 SC 1426; Bangalore Woolen, Cotton and Silk Mills Co Ltd V. B. Dasappa AIR 1960 SC 1352

52 Supra at 52

states that for service of notice, the procedure prescribed under the CPC or CrPC, as far as practicable, may be adopted⁵³.

In view of the above, the court may direct the notice to be served upon the Respondent, either :

- a. By the PO, with assistance from police officer of the concerned police station. In such cases, the PO shall provide a declaration of such service⁵⁴.
- b. Directly by the Police officer of the concerned Police station.

In view of the unambiguous mandate in Section 13(1), the courts should not direct the Aggrieved person to handover the notice to the PO or the Police officer of the concerned police station, as the case may be. The notice should be directly sent to the Po/ Police officer of the concerned Police station, as the case may be.

- ii) For the Respondents staying abroad or for interstate service, notice served through email / fax shall suffice and print out/acknowledgment of the same shall be adequate proof of notice⁵⁵

Time limit for service:

- a. The notice must be served, not later than two days, from the date on which it was received by the PO/Police.⁵⁶
- b. That the Police officer of the concerned police station or PO, as the case may be, is required to submit acknowledged copy of the Form VII to the Court before the next date of hearing.

c) Next date of hearing:

- a) The court should fix the next date of hearing within three days from the court's receipt of application under section 12.⁵⁷
- b) In case where the parties are from different states, fifteen days time should be fixed and notice should be served at least 3-5 days prior to date of hearing

V) Ex parte or interim orders should be passed, after service of notice:

- a) On non-appearance of the Respondent: If the notice is duly served and the Respondent fails to appear or file his written statement, the Court may pass an ex parte order on the basis of affidavit⁵⁸
- b) On appearance of the Respondent:

On the first date of appearance, he/ they shall file the written reply/ proceed to argue orally to the notice to show cause issued by the Court.

After hearing the party/ies the Magistrate shall pass interim orders on the basis of affidavits⁵⁹ In Morgan Stanley Mutual Fund v. Kartick Das with Arvind Gupta v.

53 Rule 12 (2) (c)

54 Rule 13(2)

55 The Delhi High Court in its Practice Direction (No. 29/Rules/DHC) dated 9th September, 2010 has stated that where email addresses of parties are available, process shall also be sent through email, in addition to other modes of service.

56 Section 13 (1) of PWDVA

57 Section 12 (5)

58 section 23(2) r/w Form III

59 Interim orders are the orders which are passed at the appearance of the Respondent as provided under section 23 (1) of the PWDVA.

Securities and Exchange Board of India and Ors, Supreme Court⁶⁰, it was held that while passing interim orders, the following factors may be taken into considerations:

- Whether irreparable or serious mischief will ensue to the aggrieved person if the application is not granted
- Whether refusal to grant orders would involve greater injustice than grant of it would entail

VI) During the proceedings:

a) Adjournments:

- Magistrate should avoid unnecessary adjournments to the Respondent/s that would delay the disposal of the case

b) Re-issuance of notice for subsequent hearings, after the appearance of the Respondent:

- Once the notice has been duly served and after appearance of the Respondent, for subsequent hearings, the court shall not re-issue notice to compel the appearance. This would exacerbate the possibility of delays in the completion of proceedings.

c) Effective use of machineries under the Act:

i) Direction to the PO:

The magistrate may direct the PO

- a. To be present for each and every date of hearing of proceedings under PWDVA
- b. To conduct a home visit and make preliminary inquiry prior to passing any orders⁶¹.
The court while directing the PO to conduct the Home visit / enquiry must specifically state:
 - The exact purpose and details of such home visit and specify the date for submission of report.
 - Specifically direct the Police to assist and accompany the PO, should the PO be under an apprehension of threats of violence or coercion at the time of Home Visit/ enquiry.
- c. To conduct an enquiry into assets, emoluments, bank accounts and assets and other documents of the Respondent/s and other financial details of respondent/s and file a report within the time as may be prescribed by the Court⁶².
- d. To restore the possession of personal effects belonging to the aggrieved person, with a specific direction to the Police officer of the concerned Police station to assist in the implementation of such order⁶³.
- e. To assist the aggrieved person to regain custody of her children, with specific direction to the Police officer of the concerned Police station to assist in the implementation of order⁶⁴

60 [MANU/SC/0553/1994]

61 Rule 10(1)

62 Rule 10(1)(b)

63 Section 19(8)

64 Rule 10(1)(d)

ii) Counseling and/or mediation

Section 14 (1) of PWDVA empowers the Magistrate to direct either or both parties to counseling at any stage of proceedings. Rule 14 further lays down the conditions under which such counseling is to be conducted. As part of this scheme for court-directed counseling, sub-rules (7), (9), (11), (12), (13) & (14) of Rule 14 envisage efforts to arrive at a settlement between the parties, only if the aggrieved woman so desires.

On a combined reading of Section 14 r/w Rule 14:

- The Court may direct the parties, jointly or singly for counseling. Counseling should be directed only after an interim order(s), specifically interim protection and residence order (if sought), have been passed.
- The free and informed consent of the woman for counseling should be taken into consideration prior to directing the parties for counselling
- During the stage of counseling, should the aggrieved person be desirous of arriving at a settlement, the Counselor shall make efforts in this regard⁶⁵, bearing in mind the procedure laid down in Rule 14.
- In case the parties arrive at a settlement during the course of counseling, the Court shall follow the procedure as laid down under Rule 14, and pass an order recording the terms of the settlement. Care must be taken to ensure the efficacy of the solution, which should also include ensuring that the aggrieved person has not been coerced into such settlement.⁶⁶
- For the purpose of court directed counseling, services of service provider shall be utilized⁶⁷.

The Court may also direct the parties to mediation⁶⁸ for settlement, should the aggrieved person be so desirous⁶⁹, without requiring the parties to first undergo counseling. However, in such cases too, the specific principles laid down under Rule 14 for arriving at a settlement, and recording of terms of settlement must be followed.

VII) While passing final orders:

- The courts shall follow summary procedure as prescribed under Sections 262-264 CrPC. Towards this, for purposes of the proceedings; it shall as far as possible, pass orders on the basis of affidavits.
- While passing final orders, where facts have already been admitted, no cross-examination may be required⁷⁰.
- The Magistrate should record substance of evidence in all cases, tried summarily.

Particular care must be taken in this regard in cases in which appealable sentence are likely to be passed.⁷¹

65 Rule 14(7)

66 Rule 14(13) & (14)

67 Rule 14

68 As per Section 89, CPC and in consonance with the Civil Procedure – Alternate Dispute Resolution and Mediation Rules of High Court of Bombay.

69 Supra at 65

70 Section 156, CrPC

71 Chapter 3, Maharashtra Criminal Manual, 2007

- The Magistrate should record the order/judgment with a brief statement of supporting reasons⁷².
- The Magistrate should endeavor to dispose off the application within 60 days from the date on which it was filed under Section 12 of the PWDVA⁷³.

VIII) Enforcement of orders

The following measures shall be adopted by the Courts to ensure enforcement of orders passed under PWDVA:

- 1) Rule 15 (7) provides that any resistance to the enforcement of the orders of the court under the Act by the Respondent or any other person purportedly acting on his behalf shall be deemed to be breach of the protection order or an interim protection order covered under the Act. Thus every order shall state that the breach of the order/s shall be deemed to be criminal offence under section 31 of PWDVA⁷⁴.
- 2) For the purpose of providing protection to the aggrieved person, the Magistrate may direct the Police officer of the concerned police station to give protection to the aggrieved person and her dependants⁷⁵.
- 3) For the purpose of implementation of orders,
 - The Magistrate may direct the Police officer of the concerned police station to assist the aggrieved person and/ or PO in the implementation of orders⁷⁶⁷⁷.
 - May direct the Protection officer, to restore the possession of personal effects belonging to the aggrieved person with specific direction to the police officer of the concerned police station to assist in the implementation of order.⁷⁸
 - May direct the Protection officer to assist the aggrieved person to regain custody of her children or supervise the visits with specific direction to the Police officer of concerned police station to assist in the implementation of order⁷⁹.
 - May direct the Respondent/s to execute bond, with or without sureties, for preventing domestic violence⁸⁰.
- 5) For the purpose of compliance of orders:
 - The Court may direct the PO to file a compliance report of the orders passed within prescribed time limit

72 Section 265(1), CrPC

73 Section 12(5)

74 Rule 15(7). For details on Breach of protection order, see the following sub-section VIII) Breach of Protection Order under Section 31 PWDVA

75 Section 19(7)

76 P. Babu Venkatesh and Ors V. Rani, Madras High Court, [MANU/TN/0612/2008] wherein it was held that residence order is one of the protection order and the Police was directed to break open the lock of the house and provide protection to the aggrieved person to reside in the shared household.

77 Section 19(5)

78 Section 19(8)

79 Section 10(1)(d)

80 Section 19(3)



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