

IMPLEMENTATION OF THE POCSO ACT

GOALS, GAPS AND CHALLENGES

Study of Cases of Special Courts in Delhi & Mumbai (2012 - 2015)

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Challenges

STUDY OF CASES OF SPECIAL COURTS IN
DELHI & MUMBAI (2012 - 2015)

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Foreword

It gives me great pleasure to provide the foreword to this very important piece of research on the “Implementation of the POCSO Act: Goals, Gaps and Challenges - Study of cases in Special Courts in Delhi & Mumbai (2012 - 2015)”. The study comes at a crucial time when key actors as well as the general public would like to know more about how effective is the implementation of the main law protecting children from sexual abuse. I am convinced the findings of this report will inform future action.

The study further confirms that a large majority of perpetrators of sexual offences against children are known to the victim, and that a large majority of the victims are girls. In an interesting development, the study analyses the low incidence of reported cases of sexual abuse against boys. Far from being uncommon, social attitudes may result in sexual offences against boys not being perceived and treated with the seriousness it deserves. In this context, it is imperative to conduct a careful and continuous analysis of the obstacles to the reporting of sexual abuse by children as well as of the implications of compulsory reporting in light of their best interest. It is essential to understand the specific obstacles boys and girls may face when reporting sexual abuse from people known to them and the tremendous social stigma and feelings of shame and guilt that most of the victims experience.

The lack of required support to the victims, once a case is reported, in terms of legal representation and appointment of a support person raises important questions about the responsiveness of the justice system in sensitive sexual abuse cases.

I am happy to see that a lot of recommendations are also emerging on the practical implementation issues. The issue of data recording and management, availability of specialised services for children, and capacity development of all stakeholders are also emerging as issues needing focused attention.

I would like to commend HAQ: Centre for Child Rights (Delhi) and FACSE (Mumbai) for the diligent work in collection of data, analysis and, most importantly, linking the findings to concrete and action oriented recommendations.

My sincere gratitude to the HAQ team for facilitating a learning programme for UNICEF Child Protection colleagues on the POCSO Act and to Hon’ble Justice Gita Mittal, Acting Chief Justice, High Court of Delhi, to facilitate a special court visit for the UNICEF colleagues. The experience has helped us advocate for such child friendly courts in other states. I would also like to place on record my gratitude for Hon’ble Justice Madan B Lokur, Judge, Supreme Court of India, for the focus on the POCSO Act implementation during the roundtables and emphasising on their link with the implementation of the JJA as also providing an opportunity for the findings of this study to be shared in the national consultation held in Bengaluru in August 2017.

I look forward to more evidence on the implementation of the law to be presented and discussed as a critical step towards a child-sensitive justice system.

Aguilar Javier

Chief, Child Protection
UNICEF, India Country Office

Preface

The journey from “no” law to deal with sexual abuse of children to having a “special” law like the POCSO Act and efforts to implement it, has witnessed contribution from various actors. The POCSO Act is meant to be a socio-beneficial piece of legislation, whose objective is to provide justice to the child. However, it has also opened up several debates which call for continued research to strengthen existing knowledge, information and evidence that can help inform and chart out the course of justice for children.

Therefore, the purpose of this study was not only to examine the implementation of the POCSO Act during the first few years of its enforcement, but also whether its goals were being attained - in content, in implementation and in impact.

Official data in the public domain was scanty. The source for the study has mainly been the material available on the courts’ and the National Crime Records Bureau’s websites. The analysis and scripting of the present report was completed when *Crime in India 2016* was published. The 2016 data has been weaved into the study wherever possible, and may not be reflected in all Charts and Tables. The available data was limited in as much as it did not cover all the aspects that we would have liked to include to give more soul to this report. Maybe perusal of the courts’ records, especially the witnesses testimonies, would have given further insights into the study, but we did not have access to the same. In order to personalise the study, references have been made to cases handled, and stakeholders interviewed by HAQ and FACSE.

The cases examined in the course of this study were from the time the Act came into force in November 2012 to 31 July 2015. As the cases examined were of the nascent years, the significance of the underlying objectives of the different enabling provisions of the POCSO Act seem not to be fully comprehended, and many continued being processed and weighed as any other criminal case. All the studies undertaken so far by different agencies point to differential response from the State Governments in establishing the infrastructure and appointing human resources - pre-requisites for the legislation’s implementation.

Given the limitation of the periodicity of court data analysed, the authors would like to acknowledge that the situation may have been continuously changing on the ground. However, some findings and recommendations remain relevant even today.

A child is not a mere ‘statistic’, and the court a mere ‘instrument’ for disposal of cases – other key factors are pivotal to assess a child’s journey towards justice. When demanding a separate legislation for sexual offences against children, child rights’ practitioners consistently reiterated that while working with children, it is the CHILD who should be at the centre-stage. Sadly, even after the advent of the POCSO Act, the child continues to be just a ‘case’ – not an individual with a distinct personality, history and circumstances. It is this uniqueness of every child and her / his case that requires to be considered – the motives for non-disclosure, or for not registering an FIR, or for not consenting to medical examination, or being tight-lipped in cross-examination, or turning hostile to the prosecution’s case. To ensure justice to

a child, it is essential to sensitively delve into her / his circumstances – towards this end, the import of a support person or lawyer, cannot be undermined. Their role is crucial in safeguarding the child's interests and presenting the child's nuances before the authorities at different stages of the process.

Raising the age of consensual sexual activity from 16 years to 18 years, exposes an unwilling child into the criminal justice system, with its pitfalls. Instead of criminalising expected, and till recently, acceptable behaviour in such age-group, should we not explore other options, such as age-appropriate sex education in schools? Mandatory Reporting is another such provision requiring debate. Other child-related legislations too have been pushing children into the criminal justice system – such practice is counter-productive. 'Child protection' includes protecting a child from the rigours of the criminal justice system and restoring a sense of justice to the victim child.

Acknowledgement

It is going to be five years since the POCSO Act came into force. While implementation of any law is bound to mature over time, it is not a natural corollary. Research that is undertaken in the earlier phases often contributes to this process significantly. Several organisations and individuals have since studied the implementation of the POCSO Act, each making a significant contribution to assessing the various aspects of law, procedures, and the rights and protections it offers. The study by HAQ: Centre for Child Rights and the Forum Against Sexual Exploitation of Children (FACSE) is another such attempt. Although it has taken longer than envisaged, HAQ and FACSE peg this study around the need to invest in support services for children who come in contact with the criminal justice system. Data management challenges and the need to address the debate on age of sexual consent and mandatory reporting are the other focus areas.

A round of peer review after the initial data analysis and sharing of preliminary findings with various stakeholders from time to time have helped the study reach its final shape. We thank every individual and organisation who have been part of this process, particularly Anuroopa Giliyal from the Centre for Child and the Law, National Law School of India University, Bangalore.

We thank UNICEF India Country Office for believing in HAQ and FACSE and extending their support and cooperation. Our special thanks in this regard to Joachim Theis, former Chief, Child Protection and Javier Aguilar, current Chief, Child Protection at UNICEF India, Tannistha Datta, Child Protection Specialist, UNICEF India and Alpa Vora, Child Protection Specialist, UNICEF Mumbai.

A study like this would not have been possible without inputs from the Judicial Officers, Members of the Child Welfare Committees, Police officials, NGOs, lawyers, mental health professionals and other experts who have been at the core of the child protection system.

It is important to mention that many young people who were associated with this report during their internship worked tirelessly and took back with them a better sense of what justice for children should entail. While most helped with data collation and data entry, a few met survivors and their families to capture their reality. We thank each one of them, the observations they shared as they browsed through the data and the stories they penned down, though not all of it could find its way into this report given practical constraints as also the need to stay focussed on the most crucial findings.

We take this opportunity to extend our gratitude to those who tend to be taken for granted - our very own colleagues and teammates. Enakshi Ganguly from HAQ and Vidya Apte from FACSE have been fantastic colleagues, who stood by us guiding the research with their critical insights and advice, and extending their relentless support.

Ms. Preeti Singh, Mr. Tekchand and Mr. Tarcitius Baa who are part of the Office Administration at HAQ too deserve special appreciation for managing all logistics and accounts efficiently and making it a smooth experience for the research teams in Delhi and Mumbai.

We also extend our gratitude to Nishant Singh, Sukhvinder Singh and Gyan Prakash from Aspire Design, who had to redo, undo and redo the study design and layout before it could be finally printed.

Last few years have seen more and more people from different corners taking a stand against sexual abuse of children and contributing to the cause in their own little way. The cover image for this publication is one such pro bono contribution from a friend and well wisher, Shrivastava Nydu, who is a film maker and writer by profession. Our heartfelt thanks to him for his unconditional support.

We need more people like Shrivastava to align with the cause and hope this report will convince individuals from different walks of life to do the same.

Bharti Ali
Maharukh Adenwalla
Sangeeta Punekar

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Abbreviations

Addl. P.P.	Additional Public Prosecutor
Adv.	Advocate
B.A. B.Ed.	Bachelor of Arts, Bachelor of Education
CrPC / Cr.P.C.	Code of Criminal Procedure
CWC	Child Welfare Committee
DCPCR	Delhi Commission for Protection of Child Rights
DCPU	District Child Protection Unit
DLSA	District Legal Services Authority
Ex.	Exhibit
FSL	Forensic Science Laboratory
HIV	Human Immunodeficiency Virus
ICPS	Integrated Child Protection Scheme
IEA	Indian Evidence Act
IEC	Information, Education and Communication
INR	Indian National Rupee
IO	Investigating Officer
IPC / I.P.C.	Indian Penal Code
ITPA / ITP Act	Immoral Traffic (Prevention) Act 1956
JJ Act	Juvenile Justice (Care and Protection of Children) Act 2015
JJB	Juvenile Justice Board
LGBT	Lesbian, Gay, Bisexual, and Transgender
MDC	Mentally Deficient Child(ren)
MIS	Management Information System
NCPCR	National Commission for Protection of Child Rights
NCRB	National Crime Records Bureau
NGO	Non-governmental organisation
NLSIU	National Law School of India University
P.S. / PS	Police Station
PM / pm / p.m.	Post meridiem: After noon
POCSO	Protection of Children from Sexual Offences
PP	Public Prosecutor
PW	Prosecution Witness
r/w	read with
Retd.	Retired
RI	Rigorous Imprisonment
RTI	Right to Information
SI	Simple Imprisonment
SLL	Special and Local laws
SLSA	State Legal Services Authority
Ss.	Sections
u/s or u/sec.	under section
UT	Union Territory

List of 21 Disposed Cases – Mumbai

Case A	State of Maharashtra vs. Suresh Arun Thakkar @ Dholya [POCSO Special Case No. 35 of 2014]
Case B	State of Maharashtra vs. Suraj Manik Thombre [POCSO Special Case No. 36 of 2014]
Case C	State of Maharashtra vs. Vijaypratap Virendra Singh [POCSO Special Case No. 58 of 2014]
Case D	State of Maharashtra vs. Rakesh Madan Lahore [POCSO Special Case No. 59 of 2014]
Case E	State of Maharashtra vs. Azad Imtiyaz Shaikh [POCSO Special Case No. 77 of 2015]
Case F	State of Maharashtra vs. Mohammed Sher Ali Mohammed Siddiqui Shaikh & Kaniza Badlur Shaikh @ Hasina [POCSO Special Case No. 99 of 2014]
Case G	State of Maharashtra vs. Anwar Hussain Mohd. Harnan Khan @ Sunil [POCSO Special Case No. 103 of 2014]
Case H	State of Maharashtra vs. Dharmvir Ramjav Upadhye [POCSO Special Case No. 157 of 2014]
Case I	State of Maharashtra vs. Bala @ Pravin Ramesh Kadam [POCSO Special Case No. 201 of 2014]
Case J	State of Maharashtra vs. Pravin Radheshyam Saroj [POCSO Special Case No. 221 of 2015]
Case K	State of Maharashtra vs. Sayyed Ibrahim @ Chota Sayyed Muluk Miya [POCSO Special Case No. 226 of 2014]
Case L	State of Maharashtra vs. Manejar Bachau Yadav [POCSO Special Case No. 228 of 2014]
Case M	State of Maharashtra vs. Santu @ Ramesh Chitharu Gupta [POCSO Special Case No. 238 of 2014]
Case N	State of Maharashtra vs. Ashok Bharat Patil [POCSO Special Case No. 307 of 2014]
Case O	State of Maharashtra vs. Sayyad Narul Nasir Hussain [POCSO Special Case No. 324 of 2014]
Case P	State of Maharashtra vs. Mohd. Shammi Mohd. Issar Shaikh [POCSO Special Case No. 383 of 2014]
Case Q	State of Maharashtra vs. Suryanath Ramdular Singh [POCSO Special Case No. 361 of 2014]

-
- Case R** **State of Maharashtra vs. Sachin Mahavir Patil**
[POCSO Special Case No. 362 of 2014]
-
- Case S** **State of Maharashtra vs. Sharad Dadu Raghuvanshi**
[POCSO Special Case No. 408 of 2014]
-
- Case T** **State of Maharashtra vs. Bimlesh Kumar Nanakke Yadav**
[POCSO Special Case No. 484 of 2014]
-
- Case U** **State of Maharashtra vs. Johnny Shantan Fernandis**
[POCSO Special Case No. 516 of 2014]
-

List of 21 Randomly Selected Disposed Cases – Delhi

-
- Case 1** **State vs. Jay Prakash** [SC No. 89 of 2013]
-
- Case 2** **State vs. Suman Dass** [SC No. 66 of 2013]
-
- Case 3** **State vs. Suraj** [SC No. 20 of 2014]
-
- Case 4** **State vs. Gulab Kant Yadav** [SC No. 71 of 2013]
-
- Case 5** **State vs. Rajesh Shah** [SC No. 44 of 2013]
-
- Case 6** **State vs. Babu Yamin** [SC No. 153 of 2013]
-
- Case 7** **State vs. Badruddin** [SC No. 40 of 2014]
-
- Case 8** **State vs. Sannu Lal** [SC No. 26 of 2013]
-
- Case 9** **State vs. Nitin Ruhela @ Chintu** [SC No. 98 of 2014]
-
- Case 10** **State vs. Raju Ansari** [SC No. 04/02/13]
-
- Case 11** **State vs. Rameshwar Dayal** [SC No. 07/02/2013]
-
- Case 12** **State vs. Sohan Prakash** [SC No. 161 of 2013]
-
- Case 13** **State vs. Satvinder Singh @ Mohit** [SC No. 186 of 2013]
-
- Case 14** **State vs. Sunil @ Jai Parkash** [SC No. 88 of 2013]
-
- Case 15** **State vs. Tola Ram** [SC No. 93 of 2013]
-
- Case 16** **State vs. Tej Kumar @ Tinku** [SC No. 53 of 2013]
-
- Case 17** **State vs. Dinesh Sharma** [SC No. 155 of 2013]
-
- Case 18** **State vs. Mohd. Irshad @ Mona, Titu & Rinku @ Suraj Chandra Agarhari** [SC No. 212 of 2014]
-
- Case 19** **State vs. Sarvesh Gupta** [SC No. 95 of 2013]
-
- Case 20** **State vs. Rampal & Mohd. Imran** [SC No. 109 of 2013]
-
- Case 21** **State vs. Sita Ram** [SC No. 122 of 2013]
-

CHAPTER 1

The Need for a Study on Implementation of the POCSO Act, 2012

India's children constitute 37% of the country's population and 20% of the world's child population. Sexual abuse of children has become a subject of great community concern and the focus of many legislative and professional initiatives. Compared to adults, children find it much more difficult to disclose abuse. There is enough evidence to show that those who have faced abuse in their childhood continue to deal with its consequences well into their adulthood, shaping their relations with others and their image of self. Over the years, several attempts

have been made to draw attention to child sexual abuse and break the conspiracy of silence surrounding it.

The Protection of Children from Sexual Offences Act, 2012, hereafter the POCSO Act, is a landmark law that resulted from years of civil society struggles and the Government of India's acknowledgement of the problem. A detailed historical backdrop to the enactment of this legislation is provided in Chapter 2 of this report.

While every new law takes time to be enforced in letter and spirit, within one year of the enactment of the POCSO Act, several gaps in the legislation as well as its implementation came to be reported by the national media.

According to Section 46 of the Act, any difficulty arising in giving effect to the provisions of the Act can be removed by the Central Government within two years of the Act coming into force. However, the first two years went into laying down the guidelines for service providers and designating the Special Courts mandated under the POCSO Act. Those engaging with the law had already started documenting their experiences in the form of micro-studies and reports, and were also using their experiences to sensitise police, public prosecutors and judges.

The Protection of Children from Sexual Offences Act, 2012, is a landmark law that resulted from various civil society struggles and Government of India's acknowledgement of the problem of child sexual abuse.

By the end of 2014, a strong need was felt to collect evidence through systematic and empirical research that would help inform policy and lawmakers on what needs to be changed or improved in order to meet the objectives of the POCSO Act. The present study is one such attempt based on extensive research of cases registered under the POCSO Act in Delhi and Mumbai.

According to Section 46 of the Act, any difficulty arising in giving effect to the provisions of the Act can be removed by the Central Government within two years of the Act coming into force.

About the Study

Partnering Organisations

The study is undertaken jointly by HAQ: Centre for Child Rights, Delhi and Forum Against Child Sexual Exploitation (FACSE), Mumbai with support from UNICEF.

HAQ¹ is a Delhi-based NGO that strives towards mainstreaming child rights into all development agenda. While focussing on children and governance, and child protection, HAQ undertakes action-research to inform law and policy, works with the system to improve its response through development of training curriculum and conducting training programmes for various stakeholders, organises and supports campaigns and networks that promote child rights, and engages with children to bring their voice into policy decisions affecting them. As part of its work on access to justice and restorative care, HAQ has been providing legal support, counselling and rehabilitation assistance to children who come in contact with the law. Until 2010, HAQ's support was confined largely to legal aid and counselling. However, it was found that many of the children needed additional assistance in the form of emergency medical care, support to access victim compensation from the Court/Legal Services Authority, educational support to ensure continuity in education, and linking children or their families to existing schemes and services that could help reduce their vulnerability and risk to further exploitation.

FACSE² is an unregistered forum of professionals and NGOs working on the issue of child rights, who have come together to address the issues of child sexual exploitation and child protection in Maharashtra since 1996. It has a wide experience of dealing with cases of child sexual abuse. FACSE began with a campaign "Let's Talk About It", getting various professionals and civil society organisations to share their views and understanding on the issue and has worked with the State Department for Women and Child Development (DWCD) and UNICEF, Maharashtra in carrying out trainings as well as preparation of IEC materials on the POCSO Act in regional language.

Locations for the Study

Delhi and Mumbai are two major cities witnessing a significant number of cases of child sexual abuse. A review of secondary data was undertaken before selecting Delhi and Mumbai for the purpose of this study. The 2013 crime statistics published by the National Crime Records Bureau (NCRB), Ministry of Home Affairs, Government of India, the latest available at the time of commencing the study, was the main source of data.

According to the NCRB's *Crime in India 2013*, 52.5% of all rape cases in Delhi were cases of child rape; in Maharashtra this figure stood at 50.5%. NCRB's data pertaining to the number of child victims of rape (incest + other rape) also put Delhi and Maharashtra among the 10 states with the highest number of child

victims. Maharashtra was second in the list (with 1564 child victims) and Delhi was sixth (with 792 child victims). A closer examination of data on child rape cases in various cities, puts Delhi at number one with 658 cases and Mumbai at number two with 221 cases.

At the end of 2013, 84.5% cases of child rape in the country were pending trial. Only 4.8% of these resulted in conviction of the offender. The percentage of pendency of trials against persons arrested for crimes against children was 95% in Maharashtra and 84.8% in Delhi.

While the available statistics supported selection of Delhi and Mumbai for undertaking research on implementation of the POCSO Act, factors such as initiatives taken in different states to implement the Act, access to critical stakeholders, and the possibility of strategic partnership required for carrying out meaningful research, also guided the decision.

Purpose, Objectives, Methodology, Scope and Limitations

The purpose of research was to collect evidence on the following key aspects relating to child sexual abuse:

1. Implementation of the POCSO Act -
 - a. Process
 - b. Time taken
 - c. Orders
2. Perceptions of the abused, their families, their communities and service providers;
3. Role of stakeholders.

Detailed objectives of the study

- To examine and review the legal provisions of the POCSO Act and the Rules under it
- To review the implementation of the POCSO Act based on hands-on experiences, interviews with critical stakeholders, and analysis of case records and relevant documentation available from official sources, covering the following aspects:
 - Right of the victim/survivor to get a support person and legal representation
 - Delay in filing FIR, recording of statement of the victim/survivor under Section 164 CrPC and the Final Report from the Police (charge sheet)
 - Delay in completion of trial
 - Rate of conviction and acquittal
 - Sentencing by Special Courts
 - Mandatory reporting
 - Victim compensation – interim and final
- To analyse the role of all stakeholders in the implementation of the POCSO Act
- To identify areas requiring improvement and make suitable recommendations

Methodology

Both primary and secondary data have been used to present a qualitative and quantitative analysis.

Primary Data

Primary data from both Delhi and Mumbai was gathered from the websites of the Special Courts and through interviews with stakeholders.

Both state and non-state actors were interviewed, subject to their agreement to participate in this research. They include:

1. Chairpersons and Members of the Child Welfare Committees (CWC)
2. Police Officers (Investigating Officers, Members of the Special Juvenile Police Units and Juvenile Welfare Police Officers)
3. Public Prosecutors (Delhi only)
4. Legal Aid Lawyers
5. State and District Legal Services Authorities
6. NGOs involved in providing support to victims
7. Judicial Officers/Judges (Delhi only)

1803 cases in Delhi and **154 cases** in Mumbai have been researched and analysed. In addition, an indepth analysis was carried out for 21 judgments available from the 154 Mumbai cases and a similar sample of 21 judgments selected randomly from Delhi cases.

Fifty cases were followed up through interviews with affected children and their families - 40 from Delhi and 10 from Mumbai. The 40 cases from Delhi are those where HAQ has provided legal and/or psychosocial support to the child victims. Stories of adult survivors of child sexual abuse who wished to share their journey form part of the analysis. Identity of children and adult survivors has been kept confidential.

RTI applications had to be filed to get basic information for the study. Even the Delhi Commission for Protection of Child Rights had to seek information from Delhi Police to present the first analysis of the implementation of the POCSO Act. The police stations needed to be matched with the jurisdictions of district courts, not an easy task as such information is never available in public domain.

In addition, 40 stakeholders were interviewed in Mumbai, including members of 4 CWCs, 10 police personnel (randomly selected), 1 lawyer from the District Legal Services Authority (Adv. Manisha Tulpule), 1 forensic expert from a public hospital who has been training the judiciary (Dr. Shailesh Mohite), and the Chairperson of the Maharashtra State Commission for Protection of Child Rights. Views of 4 NGOs and 2 individuals who have been working with victims and survivors formed part of these interviews and include Majlis, Arpan, Prerana and SNEHA (Society for Nutrition, Education and Health Action), Adv. Flavia Agnes and Adv. Michelle Mendonca.

Stakeholders interviewed in Delhi include eight adult survivors of child sexual abuse, one police officer, one Special Public Prosecutor, one lawyer engaged with providing legal aid to the victims and five judges, who very kindly agreed to share their experiences and views, though unofficially.

RTI applications were also filed in both cities to collect data from police and the Special Courts designated to deal with cases registered under the POCSO Act.

Since the POCSO Act came into force on 14 November 2012, data was accessed from the websites of the courts for the period of 14 November 2012 to 31 July 2015.

Selection of Courts

While Delhi has 11 Courts designated as Special Courts to deal with cases under the POCSO Act, Mumbai has 4 such Special Courts.

Data from 5 Special Courts in Delhi and 3 in Mumbai was collected, collated and analysed.

In Delhi ...

The selection of courts in Delhi was based on district-wise statistics on child rape available on the NCRB portal, response to RTI applications on pendency of cases in the courts, and access to daily orders. Out of 11 special courts in Delhi, 5 were selected as given in Table 1.1.

Table 1.1 Selection of Courts – Delhi

District	Court	POCSO Pendency as percentage of Total Pendency (as on 30 June 2015)
New Delhi	Patiala	50.0
Central	Tis Hazari	58.0
South East	Saket	75.9
South West	Dwarka	76.4
Shahdara	Karkardooma	91.9

All case records of the 5 selected courts in Delhi for the period of 15 November 2012 to 31 July 2015 were downloaded and analysed.

In Mumbai...

As per RTI information, there are 4 POCSO courts in Mumbai. Three of these courts fall under the City Civil and Sessions Court, Greater Mumbai, covering police stations from Cuffe Parade to Andheri in the Western suburbs and to Mulund in the Eastern suburb.

The fourth Court, the Dindoshi Court, is located at Goregaon and has geographical jurisdiction beyond Andheri up to Dahisar, after which the Thane district starts.

At the time of this study, data was available only for the 3 Greater Mumbai Special Courts under the POCSO Act. Given the fewer number of cases compared to Delhi, a decision was taken to select all the 3 courts for the purpose of this study. Table 1.2 gives the RTI information received from the Mumbai Special Courts.

Table 1.2 RTI data on Pendency in Special Courts under the POCSO Act – Mumbai (as on 30.06.2015)

S. No.	Name of Judge Presiding over the Special Court under the POCSO Act	Court Room No.	Tenure From	Jurisdiction Types of cases handled by the Judges	Total Cases filed under POCSO Act, 2012 (up to 30.06.15)	Disposal of POCSO cases / Cases handled (up to 30.06.15)	No. of POCSO cases pending (as on 30.06.15)
City Civil & Sessions Court, Greater Mumbai							
1	HHJ Smt. S.K.S. Razvi	18	22/06/15	Appeals and M.A.	1135*	1	196
2	HHJ Smt. S.D. Tulankar	35	01/01/14	A.B.A., B.A., M.A., R.A.		31	364
3	HHJ Smt. C.A. Nathani	40	05/05/14	A.B.A., B.A., M.A., R.A.		41	471
Sessions Court, Borivali Division at Dindoshi, Goregaon (E), Mumbai							
1	HHJ Smt. U.S. Joshi Phalke	12	June 2012 to 07/06/2014	Sessions Cases, Cases of Women Atrocities, Criminal Appeal, Criminal Revision, B.A., A.B.A., M.A., R.A.	256	1	242
	HHJ Smt. S.K.S. Razvi		09/06/2014 to 19/06/2015			12	
	HHJ Smt. V.A. Raut		From 22/06/2015			1	

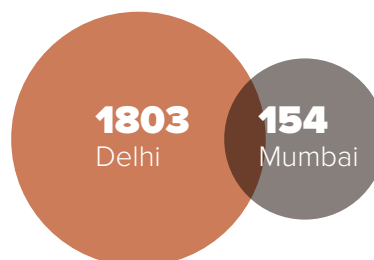
**Note: RTI Response from City Civil and Sessions Court, Greater Mumbai states that, "Record of cases under POCSO Act, 2012 is maintained separately since January 2014 and earlier record of such cases was not maintained separately".*

Total cases analysed

The response to RTI applications filed in Mumbai did not help much in deciding the sample size of cases for analysis. This is because the courts did not provide a separate figure for POCSO cases handled by them since the Act came into force. Therefore, based on the information available from the courts' website, all 154 cases under the POCSO Act were selected for research and analysis.

In Delhi, we noticed a discrepancy between the information received from police and that from the courts in response to the RTI applications. So, we decided that although it was a large number, all 1803 cases filed before the selected 5 courts between the date of enforcement of the POCSO Act and 31 July 2015 would be analysed. Another reason for the large selection was inadequacy of the right information. A cursory glance at the court information system revealed that information on the parameters and variables required to meet the

Total cases for which data was collected and analysed



objectives of the study was not available for every case. To ensure we had a decent sample for making a cross-variable analysis on the relationship between one or more variables, it was imperative to move forward with all the 1803 cases.

A sample of 21 judgments of disposed cases from Delhi and Mumbai has been analysed in depth. Since Mumbai had only 21 disposed cases, a random sample of 21 judgments was selected from all 5 courts in Delhi. Various other judgments or orders from the selected courts in Delhi have also been quoted to highlight specific issues wherever necessary.

Secondary Data

Secondary research was also undertaken on several issues. We have taken help of existing studies and reports published by government bodies, such as the Delhi Commission for Protection of Child Rights, academic institutions such as the Centre for Child and the Law, National Law School of India University (NLSIU), Bangalore, and NGOs such as the RAHI Foundation, Arpan and Majlis, besides referring to newspaper reports and other documents.

Scope of the study

We hope the study will throw light on the challenging areas of the implementation of the POCSO Act and inform policy decisions to help strengthen it. This is indeed one among the various attempts made by different authorities and organisations that have engaged with the law, undertaken research and filed PILs. The report goes beyond looking at pendency and disposal rates to throw light on the nature of offence, relationship between child and accused / offender, and the reasons for acquittal.

This study aims at throwing light on challenging areas and informing policy decisions that can help strengthen the implementation of the POCSO Act.

Limitations of the study

The limitations of this research emerge largely from circumstances beyond our control: the absence of all daily orders on the courts' websites, lack of access to case files, poor response to RTI applications, reluctance of stakeholders in giving interviews, differences in the manner in which information is maintained by the authorities in Delhi and Mumbai as well as within each city.

Since the data analysed is based on what was available on the courts' websites and not the actual case files, certain facts and procedural aspects of trial could not be ascertained or accessed and some information remained incomplete, despite our best efforts.

The online court records system varied greatly in Delhi and Mumbai. While the Delhi courts were uploading the daily orders pertaining to a case as well as a brief case status, the Mumbai courts provided only the case status. In Delhi, despite daily uploading of orders, all orders could not be traced.

Even when daily orders were available in Delhi, the number of cases that could be analysed was dependent on the availability of all relevant information from the court records. Where a case had been concluded and the judgment was available, we managed to put together the missing facts and information. But in

pending cases the information remained incomplete. Some of the types of information missing were: the date on which charge sheet was filed, the date on which charges were framed, information pertaining to bail, the number of victims and accused, their age and gender. As a result, cross-variable analysis to assess the relationship between two or more variables was possible only where information on every variable was available.

Endnotes

- 1 www.haqcrc.org
- 2 <http://www.facse.com/>

CHAPTER 2



History of the Law on Child Sexual Abuse

This chapter is divided into two parts. Part A deals with the markers in child sexual abuse that existed in India before the POCSO Act was passed. Child sexual abuse cases were then litigated under the provisions of the Criminal Major Acts¹ and judicial precedents. Several NGOs and individuals played a dedicated role in highlighting the issue and ensuring that a child received justice by way of conducting research studies and approaching the courts. This experience contributed to a nuanced understanding of child sexual abuse, in turn recognising the insufficiency of the existing law, which fed into the deliberations leading to the POCSO Act.

Part B sketches the voyage and the process that resulted in enactment of the POCSO Act. However, it does not portray the complete picture - several civil society organisations, academic institutions and individuals played a crucial role during this time, some of who may not have been specifically named here but they deserve our salute all the same.

PART A

Magnitude of the Problem

The *Crime in India* report published annually by the National Crime Records Bureau, Ministry of Home Affairs, Government of India, shows that 5,368 cases of child rape (22% of 'crime against children') were registered in 2009; 5,484 cases (20.5% of 'crime against children') in 2010; and 7,112 cases (21.5% of 'crime against children') in 2011. The incidence of sexual offences against children continued to increase. *Crime in India 2013* shows that 12,363 cases of child rape were registered. *Crime in India 2014* shows that 8,904 and 13,766 cases were registered under the POCSO Act and child rape, respectively.² *Crime*

in India 2015 shows that 14,913 cases were registered under the POCSO Act and another 10,854 as cases of child rape. *Crime in India 2016* shows that 36,022 cases were registered under the POCSO Act and other relevant IPC provisions.³

The **RAHI study** published in 1998, *Voices from the Silent Zone*, threw light on the extent of sexual abuse in general, and incestuous sexual abuse in particular, in India. RAHI is an organisation focused on women survivors of incest and child sexual abuse.⁴

Six hundred questionnaires filled by middle and upper middle class English-speaking women, 75% of whom were graduate and post-graduate students, formed the basis of this study. Majority of the respondents were from Bombay (49%) and Delhi (34%), and the remainder were from Kolkata, Chennai and some small towns. The study revealed that 76% of the respondents had been sexually abused before the age of 18 years – the rest had not been abused.⁵

Out of the respondents who had been sexually abused as children, 40% were abused by at least one family member, 31% by person/s known to the victim but not a family member, and 29% abused by strangers⁶ The data revealed “that a very high number of respondents have experienced some form of sexual abuse as children or adolescents. Most of it has been perpetrated by someone known or close to them.”

The RAHI study rejects the myth that children are the safest with the family and known people. Fifty-two per cent of the respondents had multiple abusers⁷ – 30% were sexually abused by two abusers, and 22% by three or more.⁸ “Significantly, the majority of the respondents have had multiple abusers.”⁹ Who were these abusers? The highest percentage of incestuous abusers were uncles and cousins at 42% each, and fathers and brothers were at 4% each.¹⁰ The percentage of abusers who were known but not part of the family were: neighbours at 26%, the highest, followed by male family friends and male servants at 23% each, and male teachers at 10%.¹¹ “Family members of the respondents and/or people known to them clearly form the majority of abusers.”¹²

The findings of the RAHI study are reflected in *Crime in India 2015*. It records a total of 8800 cases under the POCSO Act [Ss. 4 & 6], out of which, in 8,341 cases (94.8%), the offenders were ‘known’ to the victims, being grandfathers, fathers, brothers, other family members, other relatives, neighbours, employers, co-workers, and other known persons.

The RAHI study, 1998 revealed that 76% of the respondents had been sexually abused before the age of 18 years - 71% of them by a family member or by a person known to them.

Crime in India 2015 showed that in 94.8% of cases the offenders were known to the victims.

First of its Kind

That children are at risk of sexual exploitation by caregivers was highlighted by the **Freddy Peats case**, especially as it resulted in successful prosecution. The enormity of the conviction in this case is reflected in the first paragraph of the trial court judgment: “The concept of Justice and the art of Justicing are on trial in this case, which, with its apprehended International linkages and ramifications is reportedly the first of its kind in India, and perhaps the entire SAARC region.”¹³ Freddy Peats, a paedophile of German

descent and running a *gurukul*¹⁴ in Goa, was convicted for life under Section 377 of IPC, and sentenced for diverse periods for other varied offences. His victims were boys staying in a child care institution established and managed by him.

His sexual perversity is reflected in the boys' evidence, reproduced by the trial court. "The witnesses have deposed that the accused No.1 would always be naked while being in his room in the boarding. He had also a standing instruction to all the boys that each one of them would remove all his clothes before going to bed. Accordingly, when the night fell, all the boys would lie down in their respective beds fully naked. Likewise, the accused No.1 would also remove all his clothes while going to bed. Thus, accused No.1 was sleeping with the boys naked. After lying down, the accused No.1 used to kiss those boys and play with them, i.e. he used to play with their penis. He used to suck their penis and they were masturbating him, upon being told to do so. Like this, he was doing to many boys....he used to have the practice of sucking the penis, and asking them to suck that of his....In addition to the oral sex, the accused No.1 had also anal sex with the boys". The boys were prostituted to foreigners. "Many foreigners would call on the accused No.1, and after talking to him, would take with them the boys. A foreigner who would so take a boy or two with him to his room, would do the same thing which the accused No.1 was doing, like penis sucking, getting masturbated, anal sex, etc."

Sheela Barse, a Mumbai-based freelance journalist, played a stellar role in the conviction of Freddy Peats for which she was applauded by the trial court, "Before parting with this case, I have to keep on record the great appreciation for the endless efforts taken by Ms. Sheela Barse in propelling the prosecution to its logical and legal conclusion. She has played the most leading and salutary role in the operation of law on the devastating conduct of the accused No.1 as against the tiny tots. I whole-heartedly compliment her for her down-to-earth involvement in this case."

Freddy Peats' appeal before the Panaji Bench (Goa) of the Bombay High Court was dismissed on 2 April 1998.¹⁵ Freddy Peats died in 2005 while serving his sentence in Aguada Central Jail.

It is important to applaud **Sheela Barse**, whose efforts resulted not only in the prosecution and conviction of Freddy Peats, but also in providing relief to those deprived of their constitutional rights. As a journalist-activist, Barse raised several human rights and child rights issues in public interest before the Supreme Court, such as providing free legal aid to undertrial prisoners,¹⁶ identification and release of children detained in jails,¹⁷ improper working of the Observation Home at Mumbai managed by the Children's Aid Society,¹⁸ and committing of children and adults as lunatics in Kolkata prisons.¹⁹ Most importantly, it was in response to a petition filed by her that the Supreme Court suggested to the Central Government to enact juvenile legislation uniformly applicable throughout the country, replacing the existing practice of each state having its own Children Act.²⁰

Inadequacy of the Law

The substantive law was very inadequate to deal with cases of child sexual abuse. The diverse types of sexual offences committed against children were not finely calibrated. Sections 375²¹ and 376 (2)²² of the IPC were invoked in cases of penetrative sexual abuse of a girl, and Section 377 of IPC²³ when the victim was a boy. If no penetration had taken place, sexual crimes were reported under Sections 354²⁴ and 509²⁵ of the IPC, when the victim was a girl, but there was no such corresponding provision for a boy.

The **Sakshi case**²⁶ in the Supreme Court highlighted the IPC's inadequacy to deal with child sexual abuse. It also attempted to widen the meaning of "rape" to provide justice to a child victim. Through a Public Interest Litigation, Sakshi, an NGO functioning from Delhi, drew the attention of the court to the "existing Sections 375 / 376 of the Indian Penal Code and various other sections, and it was pointed out that the interpretation being placed by courts on these sections cannot be said to be in tune with the current state of affairs existing in the society, particularly in the matter of sexual abuse of children." The petitioner, Sakshi, pleaded that the term "'sexual intercourse' as contained in Section 375 of the Indian Penal Code" should "include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration."²⁷ Though the court held that the definition of 'rape' cannot be altered "by a process of judicial interpretation", its intervention led to the 172nd Report of the Law Commission of India, *Review of Rape Law*.²⁸ The Law Commission of India invited and took into account suggestions from Sakshi and other organisations.²⁹ The Supreme Court stated, "Keeping in view the rise in crime and the growing menace of sexual abuse of the child, we consider it appropriate to once again³⁰ request the Law Commission to examine the issues submitted by the petitioners and examine the feasibility of making recommendations for amendment of the Indian Penal Code or deal with the same in any other manner so as to plug the loopholes."

Mitigating the Struggles of a Child Victim

The Supreme Court, in the Sakshi judgment,³¹ laid down special procedures to allow a child to depose without fear in a suitable environment. The reasons for such special procedures are also mentioned. "The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing."³² The Supreme Court also agreed with the contention of the petitioner to hold trials relating to child sexual abuse cases in camera, as it "would enable the victim of the crime to be a little comfortable and answer the questions with greater ease and thereby improve the quality of evidence of a prosecutrix because there she would not be so hesitant or bashful to depose frankly as she may be in an open court, under the gaze of the public."³³ To enable a child to communicate the details of an incident, the Supreme Court passed the following directions:

"34. The writ petition is accordingly disposed of with the following directions:

- (1) The provisions of sub-section (2) of Section 327 CrPC shall, in addition to the offences mentioned in the sub-section, also apply in inquiry or trial of offences under Sections 354 and 377 IPC.
- (2) In holding trial of child sex abuse or rape:
 - a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

- the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
- the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.”

Section 327 (2) of CrPC provides for “in-camera” trials³⁴ in respect of rape cases. By the Sakshi judgment, Section 327 (2) of CrPC has been made applicable also to offences committed under Sections 377 and 354 of IPC. The Supreme Court, in conclusion, stated, “The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at an alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.”³⁵ The Sakshi judgment became a landmark judgment, and prosecution and child rights advocates frequently referred to it, while trying to ease the child’s discomfort when deposing in court. All of the above directions of the Supreme Court have been incorporated in the POCSO Act.

The **Gurmit Singh judgment** of 1996,³⁶ in which the Supreme Court discussed weighing the evidence of a rape victim by the court, was another judgment mentioned by those representing the child victim. The trial court had disbelieved the version of a less than 16 year old victim of gang rape, and acquitted the accused. The Supreme Court observed, “They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case, and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars.”³⁷ In the **Freddy Peats case**, the trial court observed, while referring to the defence argument in relation to the testimony of a child witness, “A word more from him was termed as a deliberate commission to improve the case, and a word less, a fatal omission.” It is important for the courts to distinguish that the deponent is a child who is giving evidence in unfamiliar surroundings in respect of a horrific personal incident.

With regards to badgering of the prosecutrix in cross-examination, the Supreme Court observed in the **Gurmit Singh case**, “The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as ‘discrepancies and contradictions’ in her evidence.”³⁸

Importance of conducting a rape trial “in camera” was emphasised as it enabled “the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she

would not be so hesitant or bashful to depose frankly as she may be in an *open court*, under the gaze of public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood.”³⁹

The Supreme Court castigated the trial court whilst overturning its verdict, “The trial court not only erroneously disbelieved the prosecutrix, but quite uncharitably and unjustifiably even characterized her as ‘a girl of loose morals’ or ‘such type of a girl’⁴⁰ ...We must express our strong disapproval of the approach of the trial court and its casting a stigma on the character of the prosecutrix. The observations lack sobriety expected of a Judge. Such like stigmas have the potential of not only discouraging an even otherwise reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society suffer by letting the criminal escape even a trial. The courts are expected to use self-restraint while recording such findings which have larger repercussions so far as the future of the victim of the sex crime is concerned and even wider implications on the society as a whole — where the victim of crime is discouraged — the criminal encouraged and in turn crime gets rewarded!”⁴¹

Law Commission of India on Child Sexual Abuse

The chapter on *Offences against Women and Children* in the Law Commission’s 156th Report, *The Indian Penal Code (Volume I)*, contains a Section related to child sexual abuse. However, the report’s recommendations did not holistically cover the issues, particularly those raised by Sakshi before the Supreme Court. Sakshi’s counsel had argued that the 156th Report of the Law Commission “did not deal with the precise issues raised in the writ petition”. This made it important to thoroughly examine these issues.

In March 2000, the Law Commission of India published the 172nd Report on *Review of Rape Laws* after consultations with Sakshi, Interventions for Support, Healing and Awareness (IFSHA), All India Democratic Women’s Association (AIDWA) and the National Commission for Women (NCW). The Law Commission recommended amendments to the Indian Penal Code (IPC), the Criminal Procedure Code (CrPC) and the Indian Evidence Act (IEA). It recommended substitution of the word “rape” with “sexual assault”, making the offence “gender neutral”, and widening its scope so as to include “not only penile penetration but also penetration by any other part of the body (like finger or toe) or by any other object.”⁴² For reasons, the Commissions cited that “young boys are being increasingly subjected to forced sexual assaults”, and that sexual offences included “not only penile penetration but also penetration by any other part of the body (like finger or toe) or by any other object.” The Law Commission further recommended that the punishment should be more severe when the perpetrator is “the father, grandfather or brother” or “any other person being in a position or authority towards the other person” because they “more often than not commit the offence of sexual assault on the members of the family or on unsuspecting and trusting young persons.” The recommendations for changes to the Criminal Procedure Code were mainly pertaining to special procedures for recording child’s statement by the police, medical examination of the child victim, and the child’s deposition in court.

The POCSO Act has incorporated many elements of the 172nd Law Commission Report

The Law Commission recommended:

- Amendments to the Indian Penal Code (IPC), the Criminal Procedure Code (CrPC) and the Indian Evidence Act (IEA).
- Substitution of the word 'rape' with 'sexual assault', to make the offence 'gender neutral'.
- Widen the scope of 'rape' to include penetration by any other part of the body or object.
- Harsher punishment when the perpetrator is in a position of trust and/or authority such as the father, grandfather or brother.

Reading Down of Section 377 of IPC

The campaign for the repeal of Section 377 of IPC was mounting. The Law Commission⁴³ accepted the suggestion of organisations such as Sakshi to repeal Section 377 of IPC. Around the same time, in 2001, **Naz Foundation** filed a Public Interest Litigation before the Delhi High Court, challenging the constitutional validity of Section 377 IPC "on account of it covering sexual acts between consenting adults in private", thus infringing upon "the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution. Limiting their plea, the petitioner submitted that section 377 IPC should apply only to non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors."⁴⁴ Women's groups, child rights groups and LGBT groups met to discuss the implications of the 172nd Report of the Law Commission and the Naz Foundation petition, and future strategy. One such meeting was held in Mumbai, which deliberated the contents of a proposed law to protect and promote the rights of each interest group, however, all those present were unanimous in that Section 377 cannot remain in its present form.

The Delhi High Court judgment read down Section 377, and held that penalising "consensual sexual acts of adults in private is violative of Articles 21, 14 and 15 of the Constitution. The provisions of Section 377 IPC will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors. By 'adult' we mean everyone who is 18 years of age and above. A person below 18 would be presumed not to be able to consent to a sexual act."⁴⁵

The Delhi High Court's **Naz Foundation judgment** is commendable because it acknowledges and balances the demands of the LGBT movement and the child rights groups. However, the Supreme Court reversed the judgment, "...we hold that Section 377 IPC does not suffer from the vice of unconstitutionality and the declaration made by the Division Bench of the High Court is legally unsustainable."⁴⁶ The review petition was also dismissed, without giving an oral hearing to the petitioners.⁴⁷ A curative petition is pending before the Supreme Court. It is hoped that this archaic and regressive provision of law criminalising consensual sexual activity between adults is fully struck down. As the 172nd report of the Law Commission rightly points out, with the enactment of the POCSO Act, "the only content left in section 377 is having voluntary carnal intercourse with any animal. We may leave such persons to their just desserts."⁴⁸

Need for Support to Child Victims within the Criminal Justice System

The support provided to children at the police station and during trial was looked upon with suspicion by the defence, and at times even by the courts. This is highlighted by what is commonly known as the **Anchorage case**, which ultimately vindicates those providing support to the child. After much ups and downs all the way to the Supreme Court, this case ended with the conviction of two British paedophiles, one of whom was extradited from the United States of America to face trial in India.

The support provided to children at the police station and during trial was looked upon with suspicion by the defence, and at times even by the courts.

In this case, the British nationals were accused of engaging in oral sex with the boys in the shelters,⁴⁹ and forced manipulation of the penis. An FIR was finally registered in November 2001, with intervention of the Bombay High Court. Two of the boys gave evidence before the trial court that resulted in the accused being sentenced to imprisonment.⁵⁰ It was mainly because of the support received from the Maharashtra State Monitoring Committee on Juvenile Justice,⁵¹ Childline India Foundation, and lawyers⁵² among others, that the children were able to narrate the incidents of sexual abuse before the police and the court.

This trial court's judgment was overturned by the Bombay High Court on the ground that the evidence of the victims was "unreliable" and "not credit-worthy". Reading the judgment indicates the court's mistrust of the role played by those supporting the children through the criminal justice system. The defence argued "that it did not appear that the case was investigated by the police, but it was investigated by Advocate Adenwalla⁵³The learned counsel for the accused – appellants submit that though the defence has no reason to question the bona fides of P.W. 2 Adenwalla, but, all the same, it becomes suspicious as to why the investigation was taken over by P.W.2, i.e., Adenwalla."⁵⁴

The Bombay High Court's judgment was challenged before the Supreme Court, which held that the evidence of those supporting the child is of a corroborative nature, and achieves significance in view of the victims' testimony, which was found creditworthy. While reversing the Bombay High Court order, the Supreme Court observed, "There is no doubt that when Cuffe Parade Police Station refused to investigate the matter, it was Ms. Maharukh Adenwalla and Ms. Meher Pestonjee⁵⁵ who recorded the statements and supplementary statements of the minor boys...In their respective statements, the boys have spoken of the sexual abuse at the hands of A-2 and A-3..."⁵⁶ With regard to the supportive role played, the Supreme Court stated, "As an activist, her intention was to protect the children⁵⁷The analysis of the evidence and the role played by PWs 2 and 3⁵⁸ show that they supported the boys in bringing to the notice of the relevant authorities what was happening in the Anchorage Shelters."⁵⁹ The Supreme Court pronounced that the work done by those supporting the children "laid the foundation for the investigation" and "the trial court has rightly considered their statements and actions. Unfortunately, the High Court ignored their statement as unacceptable."⁶⁰ The Supreme Court's judgment gives a fillip to the role played by those providing support to the child and acknowledges that they should not be perceived with distrust: "the role played by Ms Maharukh Adenwala (PW 2) and Mrs Kalindi Muzumdar (PW 3) undoubtedly supported

this case for taking the cause of vulnerable street children and they played their role in a responsible manner. Undoubtedly PW 3, like PW 2, had no enmity with the accused nor can any ulterior motive be attributed to them.”⁶¹

The facts of the **Anchorage case** show that a child, even in teenage, does not have the courage to go to the police station. Further, even when the child does complain, the police are most reluctant to register an FIR. It was only with the intervention of the High Court that the investigation was initiated. Earlier, in 1995, in a writ petition filed before the Bombay High Court (Goa Bench), Sheela Barse had represented “that a person such as a social worker be permitted to assist the abused children,” but such relief was not granted.⁶² The POCSO Act has attempted to resolve these lacunas by inserting provisions stipulating the role of NGOs, support persons and professionals within the criminal justice system in assisting the victim/s at the pre-trial and trial stage. As in the **Anchorage case**, a third party is sometimes compelled to take proactive measures because the police fails to perform their duty. The POCSO Act contains a provision that penalises the non-registration of FIR by the investigating agency.

The Goa Children’s Act

The Goa Children’s Act is a precursor to the POCSO Act. Goa is the only state in India that enacted a legislation “to protect, promote and preserve the best interests of children in Goa and to create a society that is child-friendly.”⁶³ The Act includes provisions relating to sexual offences committed against children, as also other entitlements of the child, such as, education, health and nutrition.

Goa is the only state in India that enacted a legislation “to protect, promote and preserve the best interests of children in Goa and to create a society that is child friendly.”

In Goa, tourism-related child sexual abuse, and the number of paedophiles were growing. Dr. (Ms.) Nishtha Desai,⁶⁴ who has studied this “phenomenon”, writes, “A growing number of paedophiles – seeking children as sexual partners – have discovered Goa to be a safe haven. They form part of a wider syndicate operating globally within a well-defined network.”⁶⁵ For the purpose of her study, Dr. Desai refers to paedophiles as “any adult who habitually seeks the company of a child / children for the gratification of his / her sexual needs”. This study “provided an understanding on the nature of the problem and recommended a programme of action.” In Chapter 8, *Some Recommendations*, under the section *Legislation*, Dr. Desai laments the absence of a “comprehensive set of law defining children’s rights and their violations”, and calls for “a separate law dealing with sexual offences against children.”

Child rights organisations in Goa formed the backbone of the campaign resulting in enactment of the Goa Children’s Act 2003. From August 2002, the then Secretary, Women and Child Development, Government of Goa, initiated a series of consultations in collaboration with NGOs. Jan Ugahi⁶⁶ facilitated the South Goa⁶⁷ consultation, and Children’s Rights in Goa, the North Goa consultation. Dr. Desai says,⁶⁸ “A positive feature of this process is that NGOs were seriously consulted.” However, she also acknowledges the difficulties “in terms of severe time constraints and the need for more feedback from those involved in the investigation and prosecution process.” The Goa Children’s Act 2003 was amended in 2005, mainly to address difficulties that hampered the achievement of its objectives.

'Sexual offences'⁶⁹ under the Goa Children's Act 2003 have been classified as 'grave sexual assault'⁷⁰, 'sexual assault'⁷¹ and 'incest',⁷² and have similarity with the offences contained under the POCSO Act. 'Grave sexual assault' is a combination of the offences of penetrative sexual assault and pornography under the POCSO Act, whereas 'sexual assault', under the Goa Children's Act 2003, is a combination of sexual assault and sexual harassment. 'Incest' falls in the aggravated form of sexual offence. The Goa Act also lays down setting up a Children's Court,⁷³ and its procedures.⁷⁴ It maintains that "cross-examining of child victims is avoided and the same, if necessary, is done through the judge," "child's testimony or statement should be recorded in the presence of a social worker / counsellor as early as possible after the abusive incident," and "adequate translations / interpretations and translators / interpreters who are sensitive to the children's needs should be provided wherever needed".

PART B

The POCSO Act was a response to both domestic and international events. It is therefore important to examine the triggers to and the process of enacting the POCSO Act.

Pursuant to a resolution of the General Assembly,⁷⁵ the Secretary-General of the United Nations appointed an Independent Expert⁷⁶ to conduct an in-depth global study on Violence Against Children. The study team visited several countries, including India, and the study was disseminated in 2006. It recommended "a national strategy, policy or plan of action on violence against children", and that "national laws... should comply with international human rights".

While this process was underway, a team from India representing government as well as civil society attended the *South Asian Regional Conference on Violence Against Children* held in May 2006 in Pakistan. India's commitments were manifold, including the review of existing child-related laws, and to "develop anti-child abuse legislation with adequate infrastructural support for its implementation."

The Ministry of Women and Child Development, Government of India, initiated the process to draft a law for prevention of offences against children. At a meeting called by the Ministry, NGOs led by RAHI, HAQ and Butterflies⁷⁷ suggested that it was important to have a white paper on offences against children in India before jumping into designing the law. In response to this suggestion, the Ministry undertook an all-India level empirical study on child abuse in 2006.⁷⁸ This study was also meant to complement the UN Secretary General's Global Study on Violence against Children, 2006. The report, titled "Study on Child Abuse: India 2007", revealed stunning facts on the extent and magnitude of the problem, especially child sexual abuse,⁷⁹ such as:

- 53.22% children reported one or more forms of sexual abuse.
- 20.9% reported facing severe forms of sexual abuse.

Study on Child Abuse: India 2007 revealed :

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- **20.9%** reported facing severe forms of sexual abuse.
- Children on street, children at work and children in institutional care reported highest incidence of sexual assault.
- **50%** abusers are persons known to children or in a position of trust or responsibility.

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The study also highlighted that sexual crimes against children seldom get reported. And when children muster the courage to report their abuse, they are disbelieved or told to forget the incident.

The process to enact the legislation that finally became the POCSO Act started in 2009, when the Ministry of Women and Child Development circulated the draft *Offences against Children Bill* among stakeholders.⁸⁰ In January 2010, the National Commission for Protection of Child Rights (NCPCR) invited a few NGOs working for children, such as, Tulir – Centre for the Prevention & Healing of Child Sexual Abuse and HAQ: Centre for Child Rights, to discuss the Bill. At the meeting, the Bill was criticised mainly because of its attempt to cover a vast range of offences committed against children. All stakeholders acknowledged that a legislation dealing with a wide gamut of offences may not be the best solution, and that the subject of child sexual abuse required focused attention through a separate law. Tulir,⁸¹ a Chennai-based NGO working against child sexual abuse that had played a pivotal role in the drafting and inclusion of Section 67-B of the Information Technology Act 2000,⁸² agreed to initiate the drafting of such a legislation.

Around the same time, the Ministry of Law & Justice, Government of India, called upon Tulir to forthwith start a consultative process to recommend contents for a law relating to child sexual offences. Tulir, in particular, Advocate Geeta Ramaseshan, a trustee of Tulir, and some others felt the first step in such a process would be to convince the bureaucracy of the need for and the relevance of a law relating to child sexual abuse. To strategise the way forward Tulir convened a meeting, which was attended by about 30 persons, including lawyers and representatives of NGOs, from all over India. Consultations were also held in Bengaluru, Mumbai, Delhi and Chennai, and a group of lawyers took the civil society's inputs to turn them into short and crisp recommendations. In June 2010, the recommendations were shared with the Ministry of Law & Justice. A subsequent consultation was held in Chennai on 4 July 2010, where the recommendations were placed for discussion before a larger group that included M. Veeraappa Moily, then Minister of Law & Justice. The minister asked for the recommendations to be widely circulated for comments / suggestions from civil society organisations. This too was coordinated by Tulir.

Over two decades, women's rights groups in India had been demanding the need for reform of rape laws. This demand reached a crescendo in 2010 in the protests against the injustice in the **Ruchika Girhotra case**.⁸³ This prompted the Ministry of Home Affairs to come out with the draft Criminal Law (Amendment) Bill 2010, which proposed changes to the IPC, CrPC and IEA in relation to sexual offences. The draft Bill also contained provisions regarding sexual abuse of a minor, which galvanised child rights groups to meet and discuss it. A Committee represented by all relevant ministries and headed by the then Secretary, Ministry of Home Affairs, was constituted to take forward the legal reform. Alongside, women's rights groups prepared an alternative draft Bill, based on their experiences and engagement with the issue and with the legal processes. The women's rights groups sought suggestions from child rights groups and the NCPCR, incorporated them in this draft bill, and submitted it to the Committee.

Child rights groups also separately submitted their response to the Committee. Under the banner of the Mumbai Working Group, Arpan⁸⁴ led the gathering of the responses via regular meetings. Around June 2010, comments / suggestions to the Bill were submitted by the Mumbai Working Group to the Secretary, Ministry of Home Affairs, as well as the Minister for Law & Justice, Government of India.

In July 2010, a draft Bill on Sexual Offences against Children was circulated by the Ministry of Law & Justice. Yet another draft Bill, the Protection of Children from Sexual Offences Bill 2010, was prepared by the Ministry of Women and Child Development. The Ministry of Women and Child Development requested the National Commission for Protection of Child Rights (NCPCR) to scrutinise the draft Bill. To get advice on the Bill, NCPCR set up a committee, which comprised lawyers⁸⁵ and legal academics, under the chairmanship of Justice (Mr.) Ajit Shah, former Chief Justice of Delhi High Court. The Committee rejected the draft Bill and prepared an alternative draft, dealing with substantive and procedural aspects of the proposed law, which was then submitted by the NCPCR to the ministry.

Almost simultaneously, three initiatives were on to frame a legislation on sexual offences against children, and child rights activists were responding to this as best they could. The whole of 2010 was spent by them in responding to these initiatives. Finally, the Ministry of Women & Child Development introduced the Protection of Children from Sexual Offences Bill 2011 in the Rajya Sabha.⁸⁶ Some of the demands of child rights activists were included in the Bill, while inclusion of certain provisions were vehemently opposed. Meetings were held to examine the Bill. In Mumbai, such meetings which were driven by FACSE.

As the 2011 Bill went to the Parliamentary Standing Committee for review, deliberations on the Bill were held in different parts of the country. HAQ: Centre for Child Rights submitted its objections, suggestions and comments, seeking a personal hearing, which was allowed.⁸⁷ HAQ represented that chapters relating to sexual offences against children should be inserted in the IPC, CrPC and the IEA, or appropriate modifications should be made to such laws. HAQ averred that this would ensure better implementation, especially at the stage of first response that invariably comes from the police, who are familiar and trained to deal with criminal laws. HAQ also put forth its concerns over raising the age of consent to sexual activity from 16 years to 18 years, mandatory reporting, and punishment for false reporting. HAQ was then called upon to answer a list of queries based on their submissions, which they did in detail. HAQ's submissions were shared by the Parliamentary Standing Committee with the Ministry of Women and Child Development, which led to a series of discussions between them.

Earlier too, HAQ had engaged with Parliamentary Standing Committees and / or Members of Parliament on critical child rights legislations and initiatives.⁸⁸

The Parliamentary Standing Committee, in its report, accepted some of the suggestions made by child rights groups, while rejecting some others. Anxious about the Ministry's response, FACSE held further meetings to examine the report, and in April 2012, submitted its concerns, amongst others, about the increase of age of consent and mandatory reporting.

The POCSO Act⁸⁹ and the Protection of Children from Sexual Offences Rules 2012⁹⁰ simultaneously came into force on 14 November 2012. Subsequent to the POCSO Act, another initiative of the Ministry of Health & Family Welfare resulted in formulation of *the Guidelines for Medical Examination of Child under*

the POCSO Act 2012. The Ministry of Women and Child Development also initiated and saw through the framing of *the Model Guidelines under Section 39 of the POCSO Act 2012*.

Child rights groups continued to debate the provisions of the new law, their impact on children, and the state's response towards its implementation, and came up with several concerns. It is this rigour that provoked the present study.

Endnotes

- 1 The Indian Penal Code 1860, the Code of Criminal Procedure 1973 and the Indian Evidence Act 1872.
- 2 Data regarding cases under the POCSO Act was for the first time published in Crime in India 2014.
- 3 Crime in India 2016 has for the first time clubbed sexual offences under the POCSO Act and under the IPC: Ss. 4 & 6 of the POCSO Act / S. 376 of IPC; Ss. 8 & 10 of the POCSO Act / S. 354 of IPC; S. 12 of the POCSO Act / S. 509 of IPC. S. 377 of IPC has been categorised separately.
Crime in India 2014 and 2015 contained as separate categories offences under the POCSO Act and sexual offences under the IPC.
- 4 rahifoundation.org.
- 5 RAHI Foundation, *Voices from the Silent Zone*, 1998; pg. 14.
- 6 *Ibid*; pg. 14.
- 7 *Ibid*; pg. 17.
- 8 *Ibid*; Table 3.2, pg. 18.
- 9 *Ibid*; pg. 17.
- 10 *Ibid*; Table 3.1b, pg. 17.
- 11 *Ibid*; Table 3.1b, pg. 17.
- 12 *Ibid*; pg. 17.
- 13 Judgment dated 15 March 1996 passed by the Sessions Court, South-Goa at Margoa in Sessions Case No. 24 of 1992, *State vs. Shri Freddy Albert Peats & Anr.*
- 14 Generally used for a residential schooling facility, in this case a children's institution.
- 15 Criminal Appeal No. 4 of 1996.
- 16 (1983) 2 SCC 96: *Sheela Barse vs. State of Maharashtra*.
- 17 (1986) 3 SCC 596, (1987) 1 SCC 76: *Sheela Barse vs. Union of India*.

- 18 (1987) 3 SCC 50: Sheela Barse vs. Secy., Children's Aid Society.
- 19 (1993) 4 SCC 204: Sheela Barse vs. Union of India.
- 20 (1986) 3 SCC 632: Sheela Barse vs. Union of India.
- 21 Rape.
- 22 Rape in specified situations.
- 23 Unnatural offences.
- 24 Assault or criminal force to woman with intent to outrage her modesty.
- 25 Word, gesture or act intended to insult the modesty of a woman.
- 26 Sakshi vs. Union of India: (1999) 6 SCC 591.
- 27 Sakshi vs. Union of India: (2004) 5 SCC 518.
- 28 March 2000.
- 29 Interventions for Support Healing and Awareness (IFSHA), All India Democratic Women's Association (AIDWA) and National Commission for Women (NCW).
- 30 The 156th Report of the Law Commission of India, The Indian Penal Code (Volume I), August 1997, briefly dealt with child sexual abuse [Chapter IX, Offences Against Women and Children, Part V, Child Sexual Abuse].
- 31 2004 judgment.
- 32 Paragraph 32.
- 33 Paragraph 33.
- 34 Where presence of the public is not permitted during proceedings – 'in-camera' trial is an exception to the rule of 'open court'.
- 35 Paragraph 35.
- 36 (1996) 2 SCC 384: State of Punjab vs. Gurmit Singh.
- 37 Paragraph 21.
- 38 Paragraph 22.
- 39 Paragraph 24.
- 40 Paragraph 14.
- 41 Paragraph 16.
- 42 Paragraph 3.1.
- 43 172nd Report of the Law Commission of India.
- 44 Judgment in W.P. (C) No. 7455 / 2001 dated 2 July 2009: Naz Foundation vs. Government of NCT of Delhi & Ors. [(2009) 111 DRJ 1].
- 45 On 2 July 2009, the date of the judgment, the age of consent to sexual intercourse was 16 years.
- 46 (2014) 1 SCC 1: Suresh Kumar Koushal vs. Naz Foundation.
- 47 (2014) 3 SCC 220: Naz Foundation (India) Trust vs. Suresh Kumar Koushal.
- 48 172nd Report of the Law Commission of India.
- 49 Three shelters in and around Mumbai that were established and managed by Accused No. 3. Accused No. 2, a friend of Accused No. 3, regularly visited the shelters.
- 50 Common final judgment dated 18-3-2005 passed by the Session Court, Mumbai in Session Case No. 87 of 2002, Session Case No. 886 of 2004 and Sessions Case No. 795 of 2005.
- 51 Constituted by the Bombay High Court in Criminal Writ Petition No.1107 of 1996. Its members included Justice (Mr.) Hosbet Suresh (Retd.), Dr. Asha Bajpai and Ms. Kalindi Muzumdar. Ms. Kalindi Muzumdar was examined as prosecution witness.
- 52 The Special Public Prosecutor, Mr. Vijay Nahar, and lawyer for Childline India Foundation, Dr. (Mr.) Yug Mohit Chaudhry.
- 53 A lawyer who brought the sexual abuse to the notice of the Bombay High Court in the first instance, and had facilitated the recording of the boys' statement by the members of the Maharashtra State Monitoring Committee on Juvenile Justice and the police, and testified before the trial court as prosecution witness.
- 54 Judgment dated 23-7-2008 passed by Bombay High Court in Criminal Appeal No. 476 of 2006.
- 55 A journalist.
- 56 Childline India Foundation vs. Allan John Waters: (2011) 6 SCC 261, para 23.
- 57 Paragraph 43.
- 58 Ms. Kalindi Muzumdar, former Vice Principal of College of Social Work, Nirmala Niketan, Mumbai.
- 59 Paragraph 46.
- 60 Paragraph 47.
- 61 Paragraph 45.
- 62 See the Evil – Tourism related Paedophilia in Goa, Nishtha Desai, Vikas Adhyayan Kendra (2001).

- 63 Preamble of the Goa Children's Act 2003.
- 64 Director of Children's Rights in Goa.
- 65 See the Evil – Tourism related Paedophilia in Goa, Nishtha Desai, Vikas Adyayan Kendra (2001).
- 66 A civil society organisation that works at the grassroots level with marginalised children, women, families and communities: www.janugahitrust.com.
- 67 An NGO that is dedicated to improve the status of children in Goa and to prevent abuse and exploitation of children: www.childrightsgoa.org.
- 68 The Goa Children's Act and its Implementation, Nishtha Desai, Children's Rights in Goa (CRG).
- 69 Section 2 (y) of the Goa Children's Act 2003.
- 70 Section 2 (y) (i) of the Goa Children's Act 2003.
- 71 Section 2 (y) (ii) of the Goa Children's Act 2003.
- 72 Section 2 (y) (iii) of the Goa Children's Act 2003.
- 73 Section 27 of the Goa Children's Act 2003.
- 74 Section 31 of the Goa Children's Act 2003.
- 75 GA Resolution No. 57/90 of 2002.
- 76 Paulo Sergio Pinheiro of Brazil.
- 77 A voluntary organisation that works with the most vulnerable groups of children, especially street and working children: www.butterflieschildrights.org.
- 78 Study on Child Abuse: INDIA 2007, Ministry of Women & Child Development, Government of India, Preface.
- 79 Ibid; pg. vi-vii and 73-83.
- 80 It dealt with all sorts of offences committed against children, including sexual offences against a child, offences relating to trafficking and commercial sexual exploitation, and economic exploitation of a child and child labour, offences relating to a child's body and restricting the freedom of a child's movements, and offences relating to pornography.
- 81 www.tulir.org
- 82 Punishment for publishing or transmitting of material depicting children in sexually explicit act etc. [Inserted by the Information Technology (Amendment) Act 2008].
- 83 In August 1990, a 14-year-old promising tennis player was molested by the then Inspector General of Police (Haryana), S.P.S. Rathore. After the registration of FIR, Ruchika, her family and friends were systematically harassed. Due to this harassment, Ruchika committed suicide on 28 November, 1993. It was 19 years after the offence that the trial court convicted Rathore to 6 months imprisonment under Section 354 IPC, later enhanced to 18 months. In 2016, the Supreme Court upheld the conviction, but reduced the sentence "to the period already spent by him as a special case considering his very advanced age."
- 84 An NGO whose vision is to have a world free of child sexual abuse: arpan.org.in.
- 85 Criminal law, women's rights, and child rights.
- 86 Upper House of Parliament.
- 87 Tulir-Centre for Prevention and Healing of Child Sexual abuse, Indian Council for Child Welfare, India Alliance for Child Rights, PRAYAS, MARG, Don Bosco National Forum for the Young at Risk, SOS Children's village, Save the Children and the ProChild Coalition.
- 88 In 2007, HAQ, along with two other NGOs, Ankuram (Hyderabad) and Sichrem (Karnataka), had made written representation before the Parliamentary Committee on Petitions on implementation of the policy for introduction of sex education in the CBSE affiliated schools. The Committee was urged to consider a wider perspective by including sexuality rights education in the school curriculum, which would take within its ambit gender violence and gender discrimination.
- 89 Gazette of India, Extraordinary, Part II, Section 3, dated 9 November 2012, published by the Ministry of Women and Child Development, Government of India.
- 90 Gazette of India, Extraordinary, Part II, Section 3, sub-section (1), published by the Ministry of Women and Child Development, Government of India.



Understanding the POCSO Act and Other Related Legislations

The key reason behind the campaign for a special legislation on sexual offences against children is that the existing laws were inadequate to deal with cases of child sexual abuse. The main demands were for a finer calibration of sexual offences committed against children, for a distinct procedure to be stipulated for children at the investigative and trial stage, and for support for children

in their journey through the criminal justice system.

The Preamble of the POCSO Act states, “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.”

Recognising the different kinds of sexual offences perpetrated upon a child, the Act has broadened the concept of sexual abuse of children to include sexual acts that involve physical contact, as well as those that do not. It treats as “aggravated” the sexual offences committed by specified persons, in a specified manner or in specified situations. Special Courts have been established to hear offences under the Act. It also provides for human resources to enable a child to communicate effectively and to support children in their journey through the criminal justice system. While most of the demands of child rights activists have been met, new provisions have been introduced, such as the raising of age of consent to

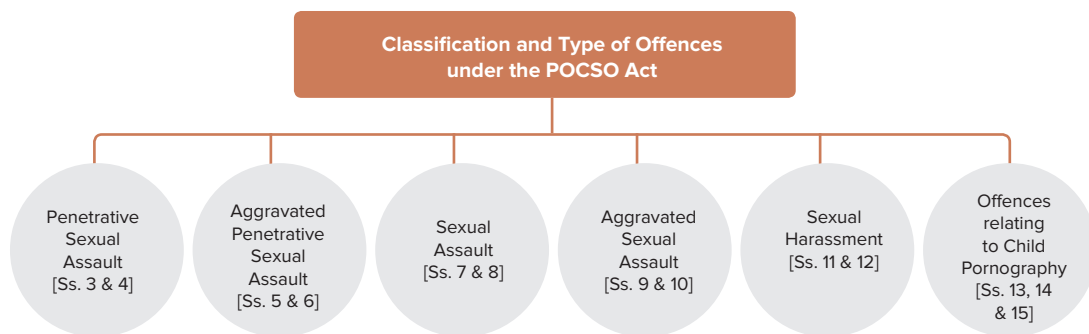
The POCSO Act, 2012 was enacted after a long struggle by and interventions from those working in child sexual abuse. The main demands were for a finer calibration of sexual offences committed against children, for a distinct procedure to be stipulated for children at the investigative and trial stage, and for support for children in their journey through the criminal justice system. There was also a need for a law that addressed sexual abuse of boys.

sexual activity and mandatory reporting. Working extensively and intensively with the POCSO Act is the only way of measuring its value and effectiveness.

Salient Features of the Pocso Act

- Children are defined as persons below the age of 18 years.
- The Act is gender neutral, i.e., it recognises that the victims and the perpetrators of the offence can be male, female or third gender.
- It raises the age of sexual consent from 16 years to 18 years, by making all sexual activity with a minor a statutory sexual offence.
- The POCSO Act broadens the understanding of rape (penetrative sexual assault) from penile-vaginal penetration to penetration by specific body parts or of objects into specified parts of the child's body, or making the child to so penetrate. It also penalises the person who may not engage in the penetration but may cause the penetration of a child by another person or cause the child to penetrate another.
- The Act recognises that sexual abuse may involve or may not involve bodily contact; it categorises these offence as 'sexual assault' and 'sexual harassment'.
- Under the Act, penetrative sexual assault and sexual assault becomes aggravated and is punished more severely when committed -
 - by specified persons such as a police officer, member of the armed forces or security forces; public servant; management or staff of place of custody or care and protection, hospital, educational or religious institution, upon a child therein etc.;
 - in a specified manner using deadly weapons, fire, heated or corrosive substance; by one or more persons etc.;
 - in specified situations such as offence committed more than once or repeatedly; on a child with physical or mental disability or resulting in physical or mental disability; on a child below 12 years of age, etc.
- The Act lays down special procedures to be followed by the investigating agency when recording the child's statement and by the Special Court during the child's deposition.
- Reporting to the police about commission of a sexual offence is mandatory under the Act for everyone, and the legislation includes a penal provision for non-reporting.
- The Act contains provisions to ensure that the identity of a child against whom a sexual offence is committed is not disclosed by media.
- It provides for designation of Special Courts and appointment of Special Public Prosecutors to deal with offences listed under the Act.
- Children are to be provided other special support in the form of translators, interpreters, special educators, experts, support persons and NGOs during the pre-trial stage and trial stage.
- Children are entitled to legal representation by a lawyer of their choice or free legal aid.
- The Act also contains rehabilitative measures, such as compensation for the child and involvement of the Child Welfare Committee.

Sexual Offences under the POCSO Act



Sentencing

The punishment / sentence depends upon the type of sexual offence committed. Certain sexual offences have a minimum and maximum term of imprisonment stipulated under the law, whereas others have only a maximum term stipulated. For example, the punishment for penetrative sexual assault, under Section 4, is imprisonment “for a term which shall not be less than seven years but which may extend to imprisonment for life”. The punishment for sexual harassment, under Section 12, is imprisonment “for a term which may extend to three years”. It is for the Special Court to determine the term of imprisonment within this range, but has no discretion to reduce the term below the minimum term of imprisonment stipulated under the law.

Under Sections 4, 6, 8, 10, 12, 14 and 15 the offender is also liable to pay fine. The Special Court has the powers of a Sessions Court, so there is no limit to the amount of fine it may order the offender to pay,¹ and a portion or whole of the fine may be directed to be paid as compensation to the person who has suffered loss or injury due to the offence.²

Section 42 makes it clear that for an act or omission that constitutes an offence under the POCSO Act as well as under Sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376B, 376C, 376D, 376E or 509 of IPC, the punishment awarded shall be that which is greater in degree.

Abetment of an offence is punishable under the POCSO Act [Sections 16 & 17]. It mentions the circumstances under which a person is said to abet an offence, as also its punishment-- “if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.”

Attempt to commit an offence under the POCSO Act is “punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both” [Section 18]. For “calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty years” [Section 57 of IPC].

Other Offences under the POCSO Act

- Failure of all adults to report the commission of an offence under the Act or failure of the police to record such an offence [Section 21 (1)]. The punishment is more severe if such non-reportage is by a person in-charge of a company or institution in a case alleging commission of offence by “a subordinate under his control” [Section 21 (2)].
- Personnel of media, hotel, lodge, hospital, clubs, studios or photographic facility have been specifically obligated to inform the police about “any material or object which is sexually exploitative of the child (including pornographic, sexually related or making obscene representation of a child or children) in any medium” that they come across [Section 20]. Failure to do so in an offence under the Act [Section 21 (1)].
- Making false complaint or providing false information regarding commission of an offence under Sections 3, 5, 7 and 9 “solely with the intention to humiliate, extort or threaten or defame,” except when done by a child is also an offence [Section 22].
- Reporting or commenting “on any child from any form of media or studio or photographic facilities” that may affect such child’s reputation or infringe upon such child’s privacy [Sections 23 (1), (3) and (4)].
- Disclosing the identity of a child (name, address, photograph, family details, school, neighbourhood or any other particulars) by any media [Sections 23 (2), (3) and (4)].

Cognizable and Bailable

While providing for a whole range of offences, the POCSO Act does not specify whether the offences are cognizable or not, or bailable or not. Section 19 of the POCSO Act and Rule 4 (2) (a) of the POCSO Rules imply that the sexual offences are cognizable as the police receiving information of commission of such offence is required to record and register a First Information Report (FIR), per the provisions of Section 154 of CrPC, and furnish a copy of it, free of cost, to the person making such report.

To determine whether a sexual offence is bailable or non-bailable, it is necessary to see the First Schedule of CrPC (Part II - Classification of Offences Against Other Laws):

- Whenever the punishment is less than 3 years of imprisonment, the offence is bailable.
- Any term of imprisonment equal to or more than 3 years, the offence is non-bailable.

All sexual offences under the POCSO Act are punishable with imprisonment up to 3 years or more and are, therefore, non-bailable.

Special Procedures and Mechanisms for Child Victims

Recording of FIR or the Statement of the Child Victim

- The recording by the police of the FIR and the statement of the child under Section 161 of CrPC should be “as spoken by the child” and in the presence of the child’s parents or a person in whom the child has trust or confidence. [Section 26 (1) of the POCSO Act].
- It is the duty of the police to read out the FIR to the child victim / informant as written down. [Section 19 (2) (b) of the POCSO Act and Section 154 (1) of CrPC].

- If the child does not understand the language in which the FIR is recorded, it is incumbent upon the police to seek assistance of a translator or interpreter whose qualifications and experience is prescribed under the POCSO Rules, to help the child communicate. [Section 19 (4) of the POCSO Act and Rule 3 of the POCSO Rules].
- If the child has a mental or physical disability, the police should “seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field” to enable such child to communicate [Section 26 (3) of the POCSO Act and Rule 3 of the POCSO Rules].
- Every informant has a right to get a copy of the FIR from the police free of cost as soon as it is registered. [Rule (4) (2) (a) of the POCSO Rules and Section 154 (2) of CrPC].
- The statement of the child shall be recorded by the police “at the residence of the child or at a place where he usually resided or at a place of his choice” [Section 24 (1) of the POCSO Act].
- The statement of the child shall be “recorded as far as practicable by a woman police officer” [Section 24 (1) of the POCSO Act]. The statement of a woman against whom a sexual offence is alleged to have been committed is to be “recorded by a woman police officer or any woman officer” [2nd proviso to Section 161 (3) of CrPC]. If the first informant is a woman against whom a sexual offence is alleged to have been committed, the FIR shall be “recorded by a woman police officer or any other woman officer” [1st proviso to Section 154 (1) of CrPC].
- The police officer recording the statement of a child should not be below the rank of sub-inspector [Section 24 (1) of the POCSO Act] and should not be in uniform [Section 24 (2) of the POCSO Act].
- Where the police is to record the statement of the child, use of “audio-video electronic means”, in addition to recording such statement in writing, is encouraged [Section 26 (4) of the POCSO Act and 1st proviso to Section 161 (3) of CrPC].
- An FIR has to be signed by the informant [Section 154 (1) of CrPC], but statements given to the police in the course of police investigation are not to be signed by the maker of the statement [Section 162 (1) of CrPC].
- While recording the statement of the child, the police should ensure “that at no point of time the child come in the contact in any way with the accused.” [Section 24 (3) of the POCSO Act].

Special Courts for Trying Offences under the POCSO Act

The purpose of a Special Court is to provide “a speedy trial” [Section 28 (1)]. It assures children of specialised and trained human resources to handle cases relating to sexual offences committed against them as well as the appropriate infrastructure that is most necessary to satisfy the objective of the Act as reflected in its Preamble [long]:

“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.”

Best interest and well being of the child are regarded as being of paramount importance at every stage of a legal proceeding

Special Courts [Sections 28 and 34 of the POCSO Act]

A Court of Sessions is to be designated as a Special Court [Section 28 (1) of the POCSO Act] to try the following cases:

- Offences under the POCSO Act [Section 28 (1)],
- Other offences that the accused may be charged with in the same trial [Section 28 (2)],
- Offences under Section 67B of the Information Technology Act [Section 28 (3)], and
- Age determination of the victim or accused in the event of such question arising before the Special Court in the course of the proceedings [Section 34 (2)].

Where Children's Courts have been notified under the Commissions for Protection of Child Rights Act, 2005, such courts shall be designated to function as Special Courts [proviso to Section 28 (1)].

Any other Special Court set up for similar purpose under any other law can also be designated as a Special Court to try offences under the POCSO Act [proviso to Section 28 (1)]. For example, the Children's Court under the Goa Children's Act, 2003, may also be designated as the Special Court to try offences under the POCSO Act committed within its jurisdiction. The Goa Children's Court has jurisdiction "to try all offences against children whether such offence is specified under this Act or not."³

The police, within 24 hours, should inform the Special Court about the registration of FIR of sexual offence under the POCSO Act [Section 19 (6)].

Special Public Prosecutors [Section 32 of the POCSO Act]

For conducting the prosecution of a case registered under the POCSO Act, the State Government is required to appoint Special Public Prosecutors with minimum 7 years' experience as an advocate. The Special Public Prosecutor conducts the case before the Special Court on behalf of the State. It is the State who prosecutes the alleged offender and the child is a prosecution witness in the case. Hence, the case is titled, *State (through CDE police station) vs. ABC (accused)*.

Right of the child to receive legal representation [Section 40 of the POCSO Act]

A child's family or guardian is entitled to engage the services of a lawyer "of their choice", but if unable to do so due to financial constraints, the District Legal Services Authority shall provide a lawyer. A child is entitled to free and competent legal services under the Legal Services Authorities Act, 1987.⁴ Such lawyer, whether privately engaged or provided by the District Legal Services Authority, shall act under the instructions of and assist the Special Public Prosecutor, and is empowered to submit written arguments at the conclusion of the trial with the permission of the Special Court.⁵

It is important to note that "public prosecutor" includes a person acting under the directions of a Public Prosecutor [Section 2 (u) of CrPC]. The child's lawyer should always keep herself / himself well-apprised of the case, because if the Special Public Prosecutor is not available on a particular day, the Special Court may call upon the child's lawyer to perform the duties and obligations of the Public Prosecutor.

Speedy trial under special courts [Section 35 of the POCSO Act]

The Special Court is required to complete recording of evidence of the child within 30 days of the Court taking cognizance of the offence. Any extension of this period must be recorded by the Special Court in writing, with reasons [Section 35 (1)]. The Special Court is required, as far as possible, to complete the trial within one year from the date of taking cognizance of the offence [Section 35 (2)].

When the offence is alleged to have been committed by a child, the case is to be dealt with under juvenile legislation [Section 34 (1)]. It is imperative that the Juvenile Justice Board accords the child victim the same safeguards as accorded by the Special Court. Under the Juvenile Justice (Care and Protection of Children) Act 2015 [the JJ Act], which came into force on 15 January 2016, trial of a child between 16 and 18 years who has committed a “heinous offence”⁶ may be waived by the Juvenile Justice Board for trial⁷ before the Children’s Court⁸ as an adult.

Rights of Child Victims

Right to receive assistance and support of various experts at the pre-trial and trial stage

Under the JJ Act⁹ and the Integrated Child Protection Scheme (ICPS) of the Central Government, District Child Protection Units (DCPUs) are to be set up in every district. DCPUs are supposed to maintain a list of interpreters, translators and special educators with their contact details, and make such list available to the Special Juvenile Police Units constituted in every district under the JJ Act to deal with crimes relating to children,¹⁰ local police, Magistrates or Special Courts [Rule 3 (1) of the POCSO Rules]. Such services are an entitlement, and are to be offered free of cost [Rule 3 (6) of the POCSO Rules]. If such measures cannot be made available by the DCPUs, they may be sought through the Special Court free of charge.

The assistance to be provided to the child victims at the pre-trial and trial stage includes:

- Translator and interpreter for children who speak their regional language or mother tongue or a local dialect, which is not the language of that State and / or understood by the police [Section 19 (4) of the POCSO Act] or the Special Court [Section 38 (1) of the POCSO Act], and for children with disabilities, such as sign language interpreters [Rule 3 (5) of the POCSO Rules].
- Special educator for children with special needs (mental or physical disability) [Section 38 (2) of the POCSO Act] that include “challenges with learning and communication, emotional and behavioural disorders, physical disabilities, and developmental disorders” [Rule 2 (d) of the POCSO Rules].
- Person familiar with the manner of communication of the child [Section 38 (2) of the POCSO Act], means a parent or family member of a child, or a member of child’s shared household, or any person in whom the child has confidence and trust, “who is familiar with the child’s unique manner of communication, and whose presence may be required for more effective communication with the child” [Rule 2 (d) of the POCSO Rules].
- Mental health expert to provide psychotherapy and help reduce the trauma or any other vulnerability of the victim child so as to facilitate communication [Rule 2 (c) of the POCSO Rules].
- Support person may be assigned by a Child Welfare Committee to assist the child through the process of investigation and trial [Rule 4 (7) of the POCSO Rules]. In lieu of assignment of such

support person, the child and parents or guardians, or other person in whom the child has trust and confidence may seek the assistance of any person or organisation [proviso to Rule 4 (7) of the POCSO Rules].

In addition to the Rules, Section 39 of the POCSO Act requires the State Government to prepare “guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child.” This provision of the POCSO Act implies that professionals and others working in the field of children and / or related fields, other than those specifically mentioned under the POCSO Act, also have a role to assist and support the child victim.

Right to legal representation

The family or guardian of a child victim has the right to take assistance of a legal counsel of their choice or of the District Legal Services Authority [Section 40 of the POCSO Act].

Right to access documents and information pertaining to a child’s case

There are explicit provisions under the POCSO Act and Rules obligating the police and the Special Court to provide the child with certain information and documents pertaining to the case.

Rule 4 (2) (a) requires the police that registers an FIR under the POCSO Act to furnish a copy of the FIR to the child, if such child is the informant.

Rule 4 (12) requires the police or the child’s support person to make the following information available to the child, or to the child’s parent or guardian, or person in whom the child has confidence or trust:

- public and private emergencies and crisis services;
- procedural steps involved in the process of criminal prosecution;
- victim compensation;
- status of investigation of the crime, to the extent appropriate, so that it does not interfere with the investigation;
- arrest of the alleged offender;
- filing of charges against the alleged offender;
- schedule of court proceedings, especially those which the child is required to attend;
- status of bail, detention or release of the alleged or guilty offender;
- court’s verdict after completion of trial;
- sentence imposed on the offender.

The Magistrate’s Court [Section 25 (2) of the POCSO Act] or the Special Court [Section 33 (1) of the POCSO Act],¹¹ as the case may be, is required to provide the child victim and the child’s parents or representative, a copy of the following documents specified under Section 207 of CrPC, on the police submitting the final report (i.e., the charge sheet):

- police report;¹²
- FIR recorded under Section 154 of CrPC;

- police statements recorded under Section 161 (3) of CrPC of intended prosecution witness(es);
- statements recorded by the Magistrate under Section 164 of CrPC;
- any other document or relevant extract of such document forwarded to the court by the police along with the police report.

In short, all documents submitted by the police to the Special Court on completion of investigation should be furnished to the child. Likewise, copies of any other document relied upon by the accused should also be given to the child. Needless to say, the lawyer representing the child should have access to copies of all the papers and proceedings before the Special Court to be enabled to safeguard the interests of the child, to advise the child and parent or guardian, to assist the Public Prosecutor, and to file written arguments on behalf of the child.

Protecting the child’s privacy and confidentiality

The POCSO Act makes it incumbent upon the following persons and authorities to ensure protection of privacy and confidentiality of a child victim of sexual offence, and to ensure non-disclosure of the child’s identity:

- Police Officer [Section 24 (5)];
- Special Court [Section 33 (7)];
- Any media [Section 23 (2)].

Non-disclosure of identity of the child includes revealing the name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of the identity of the child [Section 23 (2) of the POCSO Act]. Further, the printing or publishing of any matter relating to a sexual offence committed against a woman is also prohibited under Section 327 (3) of CrPC, unless it is permitted by the Court.

The Special Courts may permit disclosure of identity of the child, only if it feels that such disclosure is in the interest of the child, and the reasons for this must be recorded in writing [proviso to Section 33 (7) of the POCSO Act].

The Act prohibits any person from reporting or commenting on a child without having complete and authentic information, which may undermine the reputation of the child or infringing upon the child’s privacy [Section 23 (1)].

Failure of the publisher or owner or employee of media or a studio or photographic facility to protect the privacy, dignity and confidentiality of child victims is a punishable offence [Section 23 (4) of the POCSO Act]. Disclosure of identity of a victim of sexual offence is also punishable under IPC [Section 228A of IPC].

Victim protection and witness assistance measures

Pre-trial stage

Medical examination and treatment

- Medical examination, care and treatment of victims of sexual violence: The non-negotiables regarding medical examination and treatment are stipulated under the POCSO Act and Rules, the CrPC, and the *Guidelines & Protocols – Medico-legal care for survivors / victims of Sexual Violence* issued in 2014 by the Ministry of Health and Family Welfare, henceforth referred to as the Guidelines & Protocols.
- Medical examination of a child against whom a sexual offence under the POCSO Act has been committed should be conducted, irrespective of whether an FIR or complaint has been registered [Section 27 (1) of the POCSO Act].
- The examination should be conducted in accordance with Section 164A of CrPC, titled *Medical examination of the victim of rape* [Section 27 (1) of the POCSO Act] and without any delay--it should be conducted within 24 hours of the police receiving information about commission of such offence [Section 164A (1) of CrPC].
- Police should make arrangements to get the child victim admitted to the nearest hospital, within 24 hours of the FIR, if they are satisfied that such child requires medical treatment, after recording the reason in writing for such admission [Section 19 (5) of the POCSO Act].
- A female police officer should escort the victim to the hospital for medical examination. “Police should not be present during any part of the examination” [Chapter titled *Medical Examination and Reporting for Sexual Violence*, the Guidelines & Protocols].
- The child victim should be encouraged to seek help of a psychologist / psychiatrist. It is necessary to ensure that a psychiatrist is available to the child in the hospital itself as First Line support [Introduction and Chapter titled *Psycho-Social Care for Survivors / Victims*, the Guidelines & Protocols].
- Medical examination in case of rape or sexual offence under the Act should be conducted “by a registered medical practitioner employed in a hospital run by the government or a local authority hospital, and in absence of such a practitioner, by any other registered medical practitioner” [Section 164A (1) of CrPC].
- Medical treatment to victims of sexual offence should be immediately provided by hospitals run by state authorities or privately managed [Section 357C of CrPC]. Non-treatment of victims of sexual offences by a hospital is an offence punishable under Section 166B of IPC.
- In the case of a girl child, a woman doctor should conduct the medical examination [Section 27 (2) of the POCSO Act].
- The consent of the victim or of a person competent to give consent on her / his behalf must be taken before the medical examination [Section 164A of CrPC]. In the absence of parent / guardian, a child above 12 years may give consent for medical examination¹³. In case of a child below 12 years, the parent / guardian / person taking care of the child is required to give consent on behalf of the child [Chapter titled *Guidelines for Responding to Children*, the Guidelines & Protocols]. A child or the parent / guardian / person in whom the child has confidence or trust has the right to refuse medico-legal examination or collection of evidence or both, but such refusal should not result in denial of medical treatment.

- The medical examination should be conducted in the presence of a parent or a person in whom the child has confidence or trust [Section 27 (3) of the POCSO Act]. If such person is not available, “the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution” [Section 27 (4) of the POCSO Act].
- In addition to emergency care and treatment for injury, the child victim must be given medical treatment for possible pregnancies, exposure to sexually transmitted diseases, exposure to Human Immunodeficiency Virus (HIV), including prophylaxis for HIV [Rule 5 (4) of the POCSO Rules].
- Any previous medical history of the victim must be recorded by the examining doctor and made part of the medical examination report. “History seeking can be facilitated by use of dolls and body charts” [Chapter titled Guidelines for Responding to Children, the Guidelines & Protocols].
- No child victim should be refused emergency medical care by a medical practitioner or hospital or medical facility, nor should they demand any legal or magisterial requisition or documentation as a prerequisite for rendering such care [Rule 5 (3) of the POCSO Rules].

Recording of the victim’s statement under Section 164 of CrPC

- Any statement made by a child victim of any sexual offence before a Metropolitan Magistrate or Judicial Magistrate during the course of police investigation or before the commencement of trial must be recorded “as spoken by the child” [Section 26 (1) of the POCSO Act].
- Presence of the child’s parents or any other person in whom the child has confidence or trust is mandatory while recording the child’s statement under Section 164 of CrPC [Section 26 (1) of the POCSO Act].
- If required, assistance of translators and interpreters, and in case of child with special needs, assistance of special educators may be sought by the Magistrate to ensure that the facts as narrated by the child are recorded with greater precision [Sections 26 (2) and (3) of the POCSO Act].
- The child’s statement before a Magistrate may also be recorded through “audio-video electronic means”. Such measure ensures that all that the child narrates is accurately recorded [Section 26 (4) of the POCSO Act and proviso to Section 164 (1) of CrPC].
- When the victim is a child, the advocate of the accused is not required to be present at the time of recording such statement through “audio-video electronic means” [proviso to Section 25 (1) of the POCSO Act], as is necessary in the case of statement under Section 164 of CrPC [1st proviso to Section 164 of CrPC].
- Such statement made before a Magistrate by a victim who is temporarily or permanently mentally or physically challenged, with the assistance of an interpreter or special educator, shall be videographed, and such videography shall be used as the child’s examination-in-chief during the trial [Sections 164 (5A) (a) and (b) of CrPC].

Assistance and services of a support person

The POCSO Act recognises that a child and her / his family require assistance while navigating the criminal justice system. Such assistance mechanism introduced by the Act is the “support person”. The nature of a support person, the role played by the support person in the context of a child victim, and the linkages between the JJ Act and the POCSO Act are examined below.

- Section 19 (6) of the POCSO Act requires the police to report to the Child Welfare Committee, within a period of 24 hours of knowledge of the commission of a sexual offence under the POCSO Act.
- Rule 4 (3) of the POCSO Rules requires the following child victims to be produced before the Child Welfare Committee :
 - a child against whom a sexual 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;
 - a child living in a child care institution and without parental support; or
 - a child without any home or parental support.
- It is the duty of the Child Welfare Committee to ensure protection to the child. For such purpose, the Committee should assess whether the child needs to be removed from the custody of her/his family or shared household or child care institution where the sexual offence occurred. The Committee should conclude such assessment within three days of the child being produced before them [Rule 4 (4) of the POCSO Rules].
- The Child Welfare Committee may also provide the assistance of a support person to a child victim under the POCSO Act “to render assistance to the child through the process of investigation and trial” [Rule 4 (7) of the POCSO Rules]. The support person may be an individual or an organisation working in the field of child rights.
- The child’s need for a support person, the consent of the child and child’s parents / guardian / person in whom the child has confidence to such appointment [Rule 4 (7) of the POCSO Rules], and the capacity of the person selected to provide the necessary assistance, are the essential prerequisites for assigning and / or selecting a support person.
- The child and her/ his parents or guardian or the person in whom the child has confidence, has the right to seek from the Child Welfare Committee, termination of the services of the support person without giving any reasons for the same [Rule 4 (10) of the POCSO Rules].
- It is the responsibility of the support person to maintain confidentiality regarding information pertaining to the child; to keep the child and her/his parent / guardian / person in whom the child has confidence updated regarding the proceedings and developments in the case; to inform the child about the role she / he will be required to play in the judicial process; to inform the relevant authorities (police, Special Court, Special Public Prosecutor) about the child’s concerns and need for safety, if any; and to provide referral services for counselling, medical treatment, shelter and other needs of the child [Rule 4 (8) of the POCSO Rules].
- A child and her/his parent / guardian / person in whom the child has confidence has the right to independently seek support / assistance of any person or NGO. In that case, there will be no need for the Child Welfare Committee to assign a support person. “Provided that nothing in these rules shall prevent the child and his parents or guardian or other person in whom the child has trust and confidence from seeking the assistance of any person or organisation for proceedings under the Act” [proviso to Rule 4 (7) of the POCSO Rules].

Trial stage

In the **Sakshi case**, the Supreme Court observed (paragraph 31), “The whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witness are able to depose about the

entire incident in a free atmosphere without any embarrassment.” To achieve this, the Supreme Court passed several directions, most of which are contained in the POCSO Act.¹⁴

- In-camera trials in cases of sexual offences committed against children are mandatory [Section 37 of the POCSO Act]. Trials of sexual offences against women are also to be conducted in camera [Section 327 (2) of CrPC]. Under the POCSO Act, the child victim is entitled to the “presence of the parents of the child or any other person in whom the child has trust or confidence”.
- The Special Court is obligated to create a child-friendly environment, and for this, allow in the court room, the presence of the child’s parent or guardian or family member or friend of person in whom the child has confidence [Section 33 (4) of the POCSO Act]. A child may have trust or confidence in a support person, who should be allowed to be present to enable the child to depose without fear.
- A child may also be examined at a place other than the Special Court, if required in the interest of the child, through a commission¹⁵ [Section 37 of the POCSO Act].
- The examination-in-chief and cross-examination of the child victim should be taken up on the day the child has attended the Special Court for such purpose. This will ensure that the child is not required to be called repeatedly to testify [Section 33 (5) of the POCSO Act]. Likewise, if on a particular date a child is unable to remain present, the Special Court should ascertain the reason for such absence, and adjourn the matter to a convenient date.
- The court should allow frequent breaks to the child in the course of recording of evidence [Section 33 (3) of the POCSO Act].
- Use of screens, single visibility mirrors or curtains, video conferencing and such other devices is essential to “ensure that the child is not exposed in any way to the accused at the time of recording of the evidence” [Section 36 of the POCSO Act], to reduce the victim’s stress of testifying in a court. Keeping in mind the right of the accused, an accused should be “in a position to hear the statement of the child and communicate with his advocate.”
- There can be no direct questioning of the victim by the defence counsel. Under the POCSO Act, the defence counsel should communicate the questions to the Special Court, who shall “in turn put those questions to the child” so as not to frighten or confuse the child [Section 33 (2) of the POCSO Act]. The child’s dignity is to be maintained at all times during the trial, so the Special Court should control “aggressive questioning” and “character assassination of the child” [Section 33 (6) of the POCSO Act]. The court may “forbid any questions or inquiries which it regards as indecent or scandalous” [Section 151 of IEA], as also questions “intended to insult or annoy” or are “needlessly offensive in form” [Section 152 of IEA].
- In a trial for an offence of penetrative sexual assault [Section 3 of the POCSO Act], sexual assault [Section 7 of the POCSO Act], or such offence in its aggravated form [Sections 6 and 9 of the POCSO Act], or abetment or attempt to commit such offence [Sections 16 and 18 of the POCSO Act], there is a presumption that the accused committed the offence and the burden to prove innocence is upon the accused. Hence, the accused may be required to lead evidence in his favour [Section 29 of the POCSO Act]. This provision is contrary to the philosophy of criminal jurisprudence. Generally, the burden of proof is upon the prosecution to prove that the offence was committed by the accused [Section 101 of IEA] – an accused is “innocent until proven guilty”.
- When an offence requires a ‘culpable mental state’ on the part of the accused, the Special Court will presume that the accused had the same state [Section 30 (1) of the POCSO Act]. The “presumption of

culpable mental state” relates to intention, motive, knowledge of a fact, etc. [Explanation to Section 30 of the POCSO Act]. For example, ‘sexual intent’ is the core ingredient of the offence of ‘sexual harassment’ [Section 11 of the POCSO Act], so such ‘sexual intent’ shall be presumed on the part of the accused. It is for the accused to lead evidence to rebut the presumption by proving “beyond reasonable doubt”¹⁶ that there was no ‘sexual intent’ on his part. Proof of mere “preponderance of probability” shall not establish lack of ‘culpable mental state’ on the part of the accused [Section 30 (2) of the POCSO Act].

- The child must be present before the Special Court to give evidence. To ensure such attendance, the child and the family member accompanying the child should be provided with reimbursement of cost of travel to the court.

Right to rehabilitation: Compensation

Under Section 33 (8) of the POCSO Act, in addition to punishment, the Special Court may “direct payment of such compensation as may be prescribed¹⁷ to the child for any physical or mental trauma caused to her / him for immediate rehabilitation of such child.” Rule 7 of the POCSO Rules lays down the details regarding payment of compensation. Compensation is payable to the child by the State Government, and not by the accused as in the case of fine. The awarding of compensation and the amount to be so paid is to be determined by the Special Court. The factors to be considered by the Special Court for computing the amount of compensation are contained in Rule 7 (3) (i) to (xii) of the POCSO Rules. The list is not exhaustive and includes: type of abuse; gravity of the offence and the severity of the mental or physical harm or injury suffered by the child; the expenditure incurred or likely to be incurred on medical treatment for physical and/or mental health; loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason; the relationship of the child to the offender, if any; financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation; etc.

- The Special Court may direct payment of compensation in the following form-
 - I. interim compensation to meet the immediate needs of the child;
 - II. final compensation taking into account the loss or injury suffered by the child as a result of the offence.
- The Special Court may pass an order directing payment of compensation on its own or on an application made by the Special Public Prosecutor or the child’s lawyer.
- Compensation may be provided at any stage after the registration of FIR, irrespective of whether “the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified” [Rule 7 (2) of the POCSO Rules].
- The interim compensation paid to the child is to be adjusted against the final compensation awarded by the Special Court, if the court decides to award any final compensation [Rule 7 (1) of the POCSO Rules].
- The needs and interests of the child should determine the amount of compensation payable.
- Once the amount of compensation is determined by the Special Court, it shall pass an order “for the award of compensation to the victim” [Rule 7 (3) of the POCSO Rules]. The order should mention the amount of compensation to be paid by the State Government to the child.

- For disbursement of the compensation, every State Government is required to prepare / create a Victim Compensation Fund or other Scheme or Fund for making payments towards compensation for rehabilitation [Rule 7 (4) of the POCSO Rules].
- Compensation awarded by the Special Court must be released to the victim within 30 days of the Special Court's order [Rule 7 (5) of the POCSO Rules].
- Awarding of compensation to a child under the POCSO Act shall not exclude such child from seeking relief, including compensation, under any other scheme of the Central Government or State Government [Rule 7 (6) of the POCSO Rules].

Section 357A of CrPC, titled *Victim Compensation Scheme*,¹⁸ is also invoked under the POCSO Rules [Rule 7 (3) of the POCSO Rules]. Section 357A of CrPC deals with the payment of compensation for rehabilitation to the victim or victim's dependants who have suffered loss or injury due to the crime. Similar to the POCSO Act, Section 357A of CrPC also obligates the State Government to pay the compensation on directions of the court.

The court, under Section 357A (2) of CrPC merely recommends payment of compensation. The quantum of compensation is decided by the District Legal Services Authority. It is important to note that under the POCSO Act, the quantum of compensation is determined by the Special Court [Rules 7 (3) and (4) of the POCSO Rules].

Under the CrPC, compensation is recommended by the court at the conclusion of trial, irrespective of whether the criminal case ends in conviction or acquittal [Section 357A (3) of CrPC]. If trial does not take place due to the offender not being traced or identified, the victim or victim's dependants may directly make an application for compensation to the District Legal Services Authority [Section 357A (4)].

The awarding of compensation under Section 357A of CrPC and the POCSO Act is founded on the necessity for rehabilitation due to the causing of physical or mental trauma or loss or injury, as a result of the crime.

The Women and Child Development Department, Government of Maharashtra, in 2013, framed the MANODHAIRYA Scheme for financial assistance and rehabilitation of women and children who are victims of rape, child sexual assault and acid attack. The scheme's aim is "to restore the dignity and confidence of the victimised women and children of such offences." It includes making available to the victims "psychological counselling", shelter, medical assistance, legal aid, education and vocational training.

Ongoing Debates

Most provisions of the POCSO Act, if implemented in its true spirit, should assure justice to the child. But there are a few provisions whose efficacy is debated, especially in the context of the principle of the best interest of the child. Two of such provisions are discussed here.

Raising the Age of Consent to Sexual Activity from 16 years to 18 years

Prior to its amendment in 2013, the IPC stated that sexual intercourse amounted to rape when committed upon a woman “when she is under sixteen years of age.”¹⁹ In such circumstance, consent of the woman was immaterial. The POCSO Act has increased the age of consent to sexual activity from 16 years to 18 years. Therefore, sexual activity described under the POCSO Act committed with a child above 16 years is an offence, even if such activity is consensual.

Some believe that the increase in the age of consent to sexual activity is in conformity with the subject of Child Protection, and the Convention on the Rights of the Child. But there is also a view that sexual activity among children between 16 and 18 years is expected behaviour at that age and should not be criminalised, especially as it might become a tool in the hands of those perpetuating patriarchy, casteism and religious bias.

At this stage, it is important to note that laws related to child sexual assault in several countries do not criminalise consensual sexual activity between children, when one child is below the age of consent but above a stipulated age, and the other child is above the age of consent, but the age gap between the two children is within a stipulated range. An example will help to better understand this. Legislation provides that the age of consensual sexual activity is 16 years, and it also provides that if a child is above 14 years and the age gap between such child and the other partner is less than 3 years, any consensual sexual activity between such persons will not be criminalised. Hence, consensual sexual activity between a 15 year old and a 17 year old will not be treated as an offence.

The POCSO Act has increased the age of consent to sexual activity from 16 years to 18 years. This makes sexual activity committed with a child above 16 years an offence, even if such activity is consensual.

Mandatory Reporting

The POCSO Act promotes mandatory reporting, that is, if someone is aware of a sexual offence committed against a child and does not report it to the police, he or she will have committed an offence under the POCSO Act.

Mandatory reporting has its pros and cons. The good thing is that since a child may not be in a position to register an FIR against the alleged offender, it makes adults accountable for children’s welfare. It allows a child victim to access services, such as medical treatment or mental health intervention. But there are problems too. Due to fear of registration of FIR, the child or child’s support structure may not seek help, such as medical treatment, because of which greater harm may be caused to such child. Interests of a particular child are not considered as every child is forced into the criminal justice system. Also, certain provisions of the POCSO Act do not justify mandatory reporting.

It is important to note that domestic laws in several countries apply the provisions of mandatory reporting only to designated professionals (doctors, teachers, caretakers), or in certain circumstances (when a child is below a stipulated age, residing in a child care institution), or when reporting is to a designated authority (not being the police).

These concerns will be discussed in subsequent chapters that examine implementation challenges resulting from legal anomalies as well as practical difficulties.

Mandatory reporting has its pros and cons. It makes adults accountable for child welfare and ensures that the case gets reported. But then, due to fear of registration of FIR, the child or child's support structure may not seek help or even medical treatment or mental health support.

Endnotes

1. Section 28 of CrPC: Sentences which High Court and Sessions Judges may pass.
2. Section 357 (1) of CrPC: Order to pay Compensation.
3. Section 30 (1) of the Goa Children's Act 2003.
4. Section 12 (c) of the Legal Services Authorities Act 1987.
5. Section 301 (2) of CrPC.
6. Section 2 (33) of the JJ Act 2015: "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.
7. Section 18 (3) of the JJ Act 2015.
8. Section 2 (20) of the JJ Act 2015; "Children's Court" means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.
9. Section 106 of the JJ Act.
10. Section 107 (2) of the JJ Act.
11. The Special Court has powers to take cognizance of offence upon receiving a complaint of commission of an offence under the POCSO Act or when the accused is committed to it for trial on filing of police report.
12. Section 173 (1A) of CrPC: The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer-in-charge of the police station.
13. Section 90 of IPC: "A consent is not such consent.... Consent of child,..... If consent is given by a person who is under twelve years of age."
14. Chapter VIII: Procedure and Powers of Special Courts and Recording of Evidence.
15. Under Section 284 of CrPC, an application for examination of a witness under commission is to be made by the court to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, as the case may be, who in turn will appoint a Magistrate to visit the place where the witness is present and record such witness' evidence, including cross-examination. Under the POCSO Act, the application for commission under the POCSO Act is to be made by the Special Court.
16. To satisfy the Special Court that there can be only one logical conclusion, viz., that the accused did not have the requisite sexual intent.
17. Section 2 (g) of the POCSO Act: "prescribed" means prescribed by the rules made under this Act
18. Inserted in 2009 (w.e.f. 31-12-2009).
19. Section 375 of IPC (prior to 2013 amendment).



Extent and Magnitude of the Problem and Data Challenges

The first step to understand the challenges in implementing a law is to recognise and assess the extent, magnitude and nature of the problem it is meant to address. Although reporting of crimes against children, especially sex crimes, has increased over the years, child sexual abuse continues to be shrouded in secrecy and often unreported. Legal recourse is still not a preferred option. Experience shows that while the middle and upper class people may prefer to see a therapist than

report abuse, those from lower socio-economic strata find their own ways to deal with the problem.

At the same time, unreliability of available data, duplication of data, multiplicity of data sources, and the lack of a standardised information management system (MIS), make it difficult to assess the magnitude and extent of child sexual abuse and delineate the factors contributing to a visible increase or decrease in the incidence.

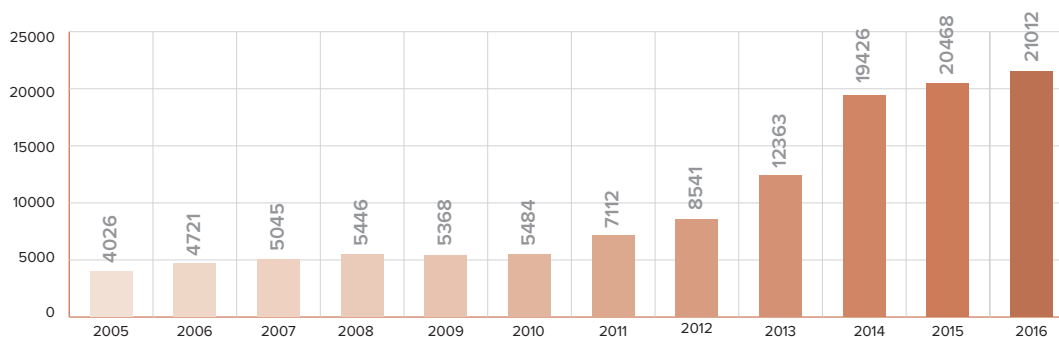
For example, it is difficult to say what proportion of the increase in sexual crimes against children is a result of enhanced reporting and how much of it can be attributed to other factors such as religion, caste and ethnicity, physical or mental ability, unacceptable romantic relationship, family/property disputes, or change in legislation. Relevant parameters and variables need to be factored into the data management systems to understand the relationship between the nature of offence, age group of victims and accused / offenders, proximity between victims and accused / offenders, socio-cultural and economic backgrounds of victims and accused / offenders, cultural and political ethos, and the effect of such factors on reporting as well as on the trial and its outcome. While an attempt is made in this study to examine some of these aspects through the research findings, this chapter concentrates on assessing the existing data and identifying key gaps in information and data management.

Child Sexual Abuse in the NCRB Data

In 2015, sexual crimes against children (cases under the POCSO Act and IPC together) were 38% of total crimes against children. Data on sexual offences under the POCSO Act were compiled for the first time by the National Crime Records Bureau (NCRB) in 2014. Until then, the same was recorded under the heading 'child rape'.

According to the NCRB, in the decade of 2005-15, while total crimes against children saw an increase of 529%, or over five times, the incidence of 'child rape' and 'penetrative sexual assault', including 'aggravated penetrative sexual assault', increased by 408%, or more than four times.

Chart 4.1 Child Rape and Penetrative Sexual Assault against Children 2005 - 2016



Source: *Crime in India, 2005 to 2016, NCRB*

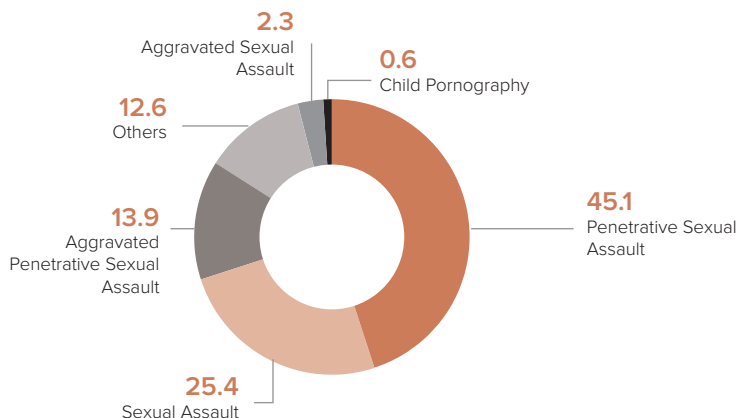
There was an increase of 44.7% in the recording of 'child rape' (Section 376 IPC) cases between 2012 and 2013. As the expanded definition of 'penetrative sexual assault' was not considered in 2012 and 2013, this increase may be attributed to higher reporting and registration of such offences.

Since 2014, the NCRB has changed its methodology for data compilation, computation and presentation of sexual crimes against children. Chart 4.1 indicates an increase of 57% between 2013 and 2014. Note that the figures for 2014 contain the figures under the heading 'rape', 'unnatural offences', 'Section 4 of the POCSO Act' and 'Section 6 of the POCSO Act'. Hence, this increase may be attributed to higher recording and reporting, as also to the widening of the scope of penetrative sexual offences. In 2016, the figures under the POCSO Act and IPC have been clubbed under the heading 'Child Rape (Sections 4 & 6 of POCSO Act / Section 376 IPC)', with a separate category for 'Unnatural Offences (Section 377 IPC)'.

Chapter 6 (Crimes against Children) of *Crime in India 2015* clearly says, "In order to avoid the duplicity of data, cases registered under section 376 of IPC exclude the cases registered under sections 4 & 6 of the Protection of Children from Sexual Offence (POCSO) Act 2012. Similarly cases reported under different sections of IPC like 354, 509 etc. exclude related section of the POCSO Act." Double counting, if any, stands addressed since 2015, as is reflected in the marginal increase of 5.4% between 2014 and 2015 and 2.7% between 2015 and 2016 in Chart 4.1.

In 2015, the 14,913 cases registered under the POCSO Act made up for 15.8% of crimes against children. Share of different types of sexual offences against children under the Act is presented in Chart 4.2.

Chart 4.2 Percentage Share of Different Types of Offences under the POCSO Act (All India - 2015)



Source: *Crime in India 2015, Tables relating to Chapter 6, Crime in India 2015, NCRB*

The highest number of cases registered under the POCSO Act in 2015 were of penetrative sexual assault (45.1%), followed by sexual assault (25.4%) and aggravated penetrative sexual assault (13.9%). While cases relating to child pornography made up for 0.6%, other POCSO cases including sexual harassment accounted for 12.6% of all cases under the POCSO Act.

A far greater number of sexual offences against children were registered under the IPC provisions (20,406), which includes offences under Sections 376 (rape), 354 (assault on a woman to outrage her modesty), 509 (insult to a woman’s modesty) and 377 (unnatural offences). A total of 35,319 cases of child sexual abuse were registered in 2015, constituting 37.5% of all crimes against children.

It is important to note that more than one child may be a victim in an FIR. To that extent, even the figure of 35,319 cases mentioned above does not reflect the actual magnitude and extent of the problem. For example, *Crime in India 2015* shows that regarding ‘child rape’, the total (all-India) cases reported were 10,854 and the victims were 10,934; regarding ‘unnatural offences’, the total cases reported were 814 and victims were 820. Under the POCSO Act, the total cases reported under Section 4 and the number of victims were 6,723 and 6,745 respectively, and under Section 6, the figures were 2,077 and 2,088.

In 2015, per Table 5.3 under the chapter ‘Crimes against Women’, the number of child victims of ‘incest rape’ were 306 – “54.5% of total incest rape victims were children (below 18 years).”¹ A new table (Table 6.7)² inserted under the chapter ‘Crimes against Children’ recorded the total number of child victims of ‘incest’ at the all-India level as only 138 - this shortfall is because certain states did not furnish data on child rape reported under the POCSO Act.³ No such information on ‘incest’ has been computed in *Crime in India 2016*.

There is a need to streamline data collection and analysis, which calls for better coordination between the NCRB and the States / Union Territories, further improvement in data collection and analysis templates, and capacity enhancement of human, infrastructural and material resources.

Since 2013, NCRB has been publishing a disclaimer, which says, “The Bureau follows ‘Principal Offence Rule’ for counting of crime. Hence among many offences

registered in a single case, only most heinous crime is considered as counting unit, thereby representing one case.” There is, however, nothing to explain which offence is to be treated as more heinous when the punishment for both the offences mentioned in the FIR is the same, such as when a case is registered under Section 376 of IPC as well as Section 4 of the POCSO Act. An attempt is made to rectify the same - *Crime in India 2016* states, “The Principle Offence Rule is not applicable for chapters of...Crimes Against Children...”

Delhi-Maharashtra Comparison

Since this study looks at the implementation of the POCSO Act in Delhi and Mumbai, it may be worth analysing the data for the two states.

In 2015, 22% of all crimes against children in Delhi were sexual offences (2,048 out of 9,489). The corresponding figure for Maharashtra stood at 35% (4,932 out of 13,921).

Interestingly, the city-level crime statistics presented in Table 2.4 of *Crime in India 2015* shows 70 cases under the POCSO Act in Delhi city and 1 in all of Mumbai city.

Table 4.1 Sexual Offences against Children under IPC and the POCSO Act – Delhi & Maharashtra (2015)

Types of Sexual Offences against Children	Delhi	Maharashtra
Child Rape [Section 376 IPC]	927	2,231
Sexual harassment Section 354A IPC]	270	1,043
Assault or Use of Criminal Force to Women (Girl Children) Intent to Disrobe [Section 354B IPC]	82	77
Voyeurism [Section 354C IPC]	6	12
Stalking [Section 354D IPC]	169	422
Insult to the modesty of girl child [Section 509 IPC]	52	91
Other offences under Assault on Women (Girl Child) With Intent to Outrage Her Modesty [Section 354 IPC]	344	914
Unnatural Offences [Section 377 IPC]	112	116
Penetrative Sexual Assault [Section 4 POCSO Act]	4	3
Aggravated Penetrative Sexual Assault [Section 6 POCSO Act]	8	0
Sexual Assault [Section 8 POCSO Act]	27	15
Aggravated Sexual Assault [Section 10 POCSO Act]	19	1
Child Pornography [Section 14/15 POCSO Act]	0	0
Other Offences under the POCSO Act	28	7
Total	2,048	4,932

Source: *Crime in India 2015*, Table 6.2

In 2015, city-level data is only available for the POCSO Act, without an offence-wise break-up, and that too reflecting an incredibly low number of cases - 70 cases under the POCSO Act in Delhi city and 1 in Mumbai city. The city-level data of 2015 clearly does not reflect the correct picture, and has not been

used for the purpose of analysis. However, *Crime in India 2016* has been recently published, wherein Chapter 4B, 'Crime Against Children in Metropolitan Cities (19 Cities with more than 2 Million Population)', contains offence-wise data under the POCSO Act for Delhi and Mumbai.

In 2016, 20% of all crimes against children in Delhi were sexual offences (1,485 out of 7,392), and for Mumbai, 30% (1,021 out of 3,400).

Crime in India 2015 shows that 95.6% of total sexual offences against children (1,962 out of 2,048) registered in Delhi were under the IPC, while in Maharashtra, 99% of total sexual offences against children (4,906 out of 4,932) were under the IPC. The 2016 data for Delhi and Mumbai shows that a higher number of sexual offences against children were registered under the POCSO Act. *Crime in India 2016* reflects that 92.5% of total sexual offences against children registered in Delhi (1,374 out of 1,485), and 95.9% of those registered in Mumbai (979 out of 1,021), were under the POCSO Act.

In 2015, of all cases under the POCSO Act in Delhi, the share of 'Other Offences under the POCSO Act', including sexual harassment, was the highest at 32.6%, followed by sexual assault (31.4%). In Maharashtra, it was the other way around, with sexual assault comprising the highest share of 57.7% under the POCSO Act, followed by other offences, including sexual harassment (26.9%). While no case of aggravated penetrative sexual assault was found in the data computed for Maharashtra, in the state of Delhi, 9.3% of all POCSO cases were cases of aggravated penetrative sexual assault. In 2016, of total cases under the POCSO Act in Delhi, the share of 'Child Rape (Sections 4 & 6 of POCSO Act / Section 376 IPC)' was the highest at 52.7%, whereas in Mumbai, the highest was that of 'Sexual Assault of Children (Sections 8 & 10 of POCSO Act / Section 354 IPC)' at 47.4%.

Though 94 cases were registered in 2015 at the all-India level under Section 14/15 of the POCSO Act dealing with child pornography, no such case was shown to be registered in Delhi and Maharashtra. In 2016, there was a fall in the number of cases registered under the pornography provisions of the POCSO Act (47 cases). Regarding Delhi and Mumbai, the situation remained the same as in 2015, with not a single case being registered under the heading 'Use of Child for Pornography / Storing Child Pornography Material (Sections 14 & 15 of POCSO Act)'. Under Section 67B of the Information Technology Act, 2000 (IT Act),⁴ one case was registered in Mumbai, and none in Delhi. Some of the police officers interviewed in Mumbai had never received complaints of online abuse and child pornography, while others stated that such incidences were very frequent and on the rise. One of them remarked, "I would say this is the side effect of advanced technology." They were of the view that these cases are handled by the cyber cell and hence none could give the details of investigation or challenges faced. Interestingly, data on cyber crimes in Chapter 18 of *Crime in India 2015* shows that across the country only 5 cases under Section 67B of IT Act went to trial.

A Police Officer, a Special Public Prosecutor and 5 Judicial Officers interviewed in Delhi during the course of this study said that they had not come across any case of child pornography so far. Police and court records, however, present a different picture. Out of 7 police stations (PS) that provided offence-wise break up of cases registered under the POCSO Act in response to the RTI applications filed by HAQ, 1 police station mentioned registration of 1 FIR under Section 14 of the POCSO Act in the year 2014. Of the 5 Special Courts, in 2 courts a total of 7 cases were found where the police had filed a chargesheet under Section 14/15 of the POCSO Act, though the trial did not proceed under these charges. Section 12, however, has been used where elements of pornography or obscene material and depiction as

mentioned in Sections 11 (ii), (v) and (vi) of the POCSO Act, are present in a case. In Mumbai, 2 of the cases under the study were registered under the IT Act along with the provisions of the POCSO Act.

This raises questions as to whether the police prefer to apply provisions of the IPC, the law that is familiar to them, instead of the POCSO Act, or whether the police are registering a case under the provisions of the IPC and the POCSO Act, and the NCRB is treating the offence under the IPC as the 'principal offence'.

Irrespective of whether a sexual offence against a child is registered under the POCSO Act or the IPC / IT Act, the case should be dealt with by the Special Court⁵ designated under the POCSO Act, so that the child can benefit from the special procedures and protection.

Data Discrepancies and Unreliability are a Huge Impediment

Discrepancies in the data available / obtained through NCRB and the RTI applications filed with the police and the courts—within and between the datasets—as well as in the information available on the courts' websites, including daily orders and judgments of cases under the POCSO Act, made this analysis really challenging.

Mumbai Data

Per RTI information, the 3 Special Courts dealing with cases under the POCSO Act in Greater Mumbai had seen 1,135 cases between January 2013 (when the Act came in force in Maharashtra), and 30 June 2015, while 256 cases were filed in the Special Court at Dindoshi during the same period. These Special Courts deal with diverse matters apart from those under the POCSO Act, and there is no break-up of cases available to separately ascertain the number of cases under the POCSO Act allocated to each of them.

As mentioned earlier, information generated through RTI applications filed in the Special Courts in Mumbai and the NCRB data cannot be compared, as the NCRB started providing data pertaining to POCSO cases only since 2014, which is when it had also stopped publishing city-level crime statistics.

Delhi Data

RTI responses received from all police districts (except the Railways and Metro) place the number of cases registered under the POCSO Act in 2014 at 1,195, while the NCRB data for the year shows only 107 such cases registered in Delhi under the POCSO Act and 2,263 under relevant IPC provisions. For 2015, police data received through RTI for January to July, 2015 (7 months) shows 643 cases registered under the POCSO Act, while the NCRB figure for the entire year is only 86 under the POCSO Act and 1,962 under the relevant provisions of IPC. The Delhi Police data received through RTI for the period 14 November 2012 to 31 July 2015 is given in Table 4.2.

Table 4.2 No. of FIRs registered under POCSO Act – RTI Data from Delhi Police (14 November 2012 to 31 July 2015)

Delhi Police Districts	2012	2013	2014	2015	Total
Outer District	3	113	152	78	346
East District	1	144	141	91	377
North West District	1	73	105	67	246
New Delhi District	1	28	17	4	50
North District	1	74	53	31	159
North East District	0	161	184	105	450
South West District	2	85	115	60	262
South East District	2	100	141	59	302
IGI Airport	0	0	0	0	0
Central District	4	74	93	42	213
South District	3	84	92	52	231
West District	3	110	102	54	269
Total	21	1,046	1,195	643	2,905

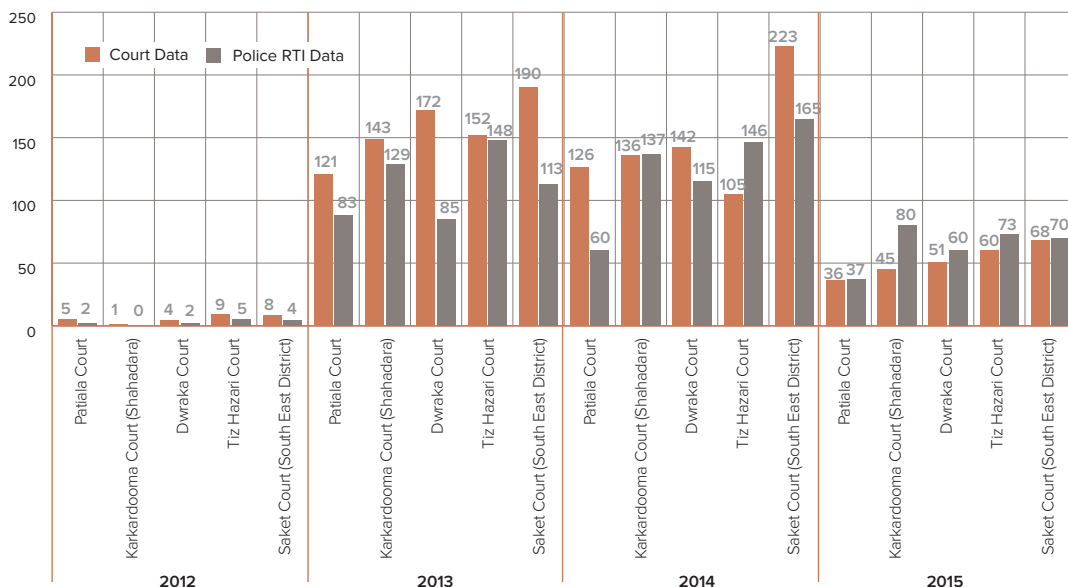
Table 4.3 Data for the following Police Stations was not provided by the SHOs to the DCP Office

1 Outer District	PS Prashant Vihar
2 East District	PS Farash Bazar, PS Madhuban
3 North	PS Maurice Nagar, PS Timarpur, PS Burari
4 South	PS Mehrauli, PS Neb Sarai, PS Fatehpur Beri
5 South East	PS Badarpur
6 South West	Though the total number of cases registered in each year (14 November 2012 – 31 July 2015) is available, police station level break-up is missing for the following 11 police stations: Sector 23 Dwarka, Dwarka (North), Dwarka South, Kapashera, Dabri, Binda Pur, Palam Village, Najafgarh, Jaffar Pur Kalan, Chhawala, and Baba Hari Dass Nagar
7 Railways/Metro	Data not available for Railways/Metro Police Stations in 9 locations

Police data generated through RTI is incomplete and often unrecorded. HAQ has provided services of support person to children in cases registered under some police stations, yet the very same stations show zero cases. The Govindpuri police station is one such example.

Discrepancies in the RTI data from Delhi Police came to light when we examined the data collected from the daily orders and judgments from the courts' websites. For instance, while the RTI data shows no case registered under the POCSO Act in the Khajoori Khas, Seelampur, Govindpuri and Kalkaji police stations between 14 November 2012 and 31 July 2015, court records show one case each from Seelampur and Khajoori Khas police stations, 79 cases from Govindpuri police station, and 10 cases from Kalkaji police station. Since this data is computed on the basis of the FIR number and year as mentioned in the police records and the court records, there is no reason why the two sets of data should not tally. Even accepted margins of error due to lack of information supplied by a few police stations do not justify the huge variance found in the two datasets, which is clear from Chart 4.3.

Chart 4.3 Court Data vs. Police Data – 14 November 2012 to 31 July 2015



A study published by the Delhi Commission for Protection of Child Rights (DCPCR) in 2015⁶ reveals that between December 2012 and March 2014, the Delhi Police had registered 1,492 cases under the POCSO Act. On the other hand, information collected from the police through RTI applications puts the number of cases at 1,067 between 14 November 2012 and 31 December 2013. Such data issues make it difficult for a researcher to rely on either set of statistics.

Table 4.4 Comparison of Data between a DCPCR Report and Police Response to RTI applications

Delhi Police Districts	DCPCR Data (Dec 2012 to Mar 2014)	RTI Data (14 Nov 2012 to Dec 2013)
Outer District	226	116
East District	121	145
North West District	164	74
New Delhi District	16	29
North District	84	75
North East District	157	161
South West District	119	87
South East District	176	102
IGI Airport	NA	0
Central District	99	78
South District	128	87
West District	200	113
Crime & Railways	2	NA
Total	1,492	1,067

Note: NA – Not Available

Delhi is divided into 11 police districts, which again are subdivided into 181 Police Stations (including 8 Metro Rail PS, 5 Railways PS, 2 Airport PS and 5 PS for specialised crime units). Even as the court system has expanded over the years and new courts have been set up to cater to different police districts and an increasing number of police stations, there is a mismatch in the jurisdiction of various courts and police districts in terms of the police stations covered by them. This too makes data access and reliability a huge challenge.

For some police stations, data received from the police is higher than that collated from court records, while for some others, data computed from court records is unexpectedly higher than the number of cases reported by the police. For example, police data relating to the number of FIRs under the POCSO Act for the Lajpat Nagar Police Station is far higher than what could be retrieved from the concerned court records—16 FIRs were reported by police, whereas the court records show only 9 cases for the period, 14 November 2012 to 31 July 2015. For the police stations of Ambedkar Nagar and Sangam Vihar in South East District of Delhi Police, records show registration of 27 and 36 cases, respectively, under the POCSO Act during the period of this study, while none of these could be traced on the records of the court catering to the South East District. Further investigations by the team, including online search for daily orders and judgments pertaining to cases under the POCSO Act, revealed that these two police stations fall under the jurisdiction of the Special Court for South District. It is the same story with the Lodhi Colony PS, which falls under Delhi Police South District but its cases are heard by the South East District Special Court.

Another example pertains to the Patiala House District Courts, meant to cover the New Delhi Police District as well as the South and South West Police Districts. These courts cover all police stations falling under the New Delhi Police District, but only a few police stations from South and South West Districts come under the jurisdiction of the Special Courts located in the Patiala House complex. Similarly, there are 3 District Courts functional in the Karkardooma Courts Complex, one for East Delhi, another for North-East Delhi and the third covers the Shahdara district-- the police stations covered by the Shahdara District Court, which form part of this study, included a few police stations that otherwise fall under the East and the North-East Police Districts.

Findings

1. Need to Streamline Data Collection and Publication by NCRB

Data collection and analysis by NCRB need to be urgently streamlined to include missing areas. For example, with a change in the juvenile justice law, it becomes imperative to maintain data on: how many cases dealt by the Special Courts involve children in conflict with the law; in how many such cases are the accused dealt with as children in conflict with the law under the JJ Act ; and in how many cases do the Special Courts treat them as adults.

This calls for better coordination between NCRB and the States / Union Territories, a significant improvement in data collection and analysis templates, as well as increased capacity of human, infrastructural and material resources.

In its 2015 report, the NCRB did not compute statistics for different cities in the Chapter 'Crimes against Children'. Although figures for offences under the POCSO Act can be found in the city-level data for SLL crimes⁷ contained in Table 2.4, city-level statistics for IPC crimes do not provide child-specific data. Nor are district-level crime statistics available. Hence, figures for different types of sexual crimes against children for Mumbai are not available. It is necessary to compute district-wise / city-wise data on different crimes against children to ensure comprehensive planning, programming and outreach, at the preventive and remedial level. This has been rectified in the 2016 report of NCRB where data for 19 cities, including Delhi and Mumbai, has been computed, and it is hoped this practice will continue.

In 2016, NCRB has not published data regarding offenders relation and proximity to victims, as had been computed in its 2015 report – “Offenders Relation and Proximity to victims reported under Section 4 & 6 of the POCSO Act During 2015”.

Finally, gender disaggregated data must include the third gender. Also, data providing disability status of the victims should be added to make crime statistics inclusive and facilitate further analysis.

2. Need for Standardised Terminology and Methods

Data received from the police through RTI with several unexplained abbreviations, and different terms used by different police stations and police districts for the same issue complicated matters. While some police stations provided case-wise information, some provided consolidated figures for the number of FIRs, number of cases where final report is filed, number of disposals, and number of convictions and acquittals. The data received from police on disposal was confusing, as some responses reflected disposal by police and some provided data on conviction or acquittal.

Even the court data was difficult to comprehend due to use of abbreviations that may not be commonly known or used. As the police and the courts gear up towards a digitised data management system, these details will have to be borne in mind to reduce discrepancies and ensure more accurate information is collected and disseminated.

3. Dealing with other Data Management Challenges

Data management systems should be developed to cater to the growing need for meaningful sociological, psychosocial and legal research that helps strengthen children's access to services and justice, as also measure the impact of the criminal justice system on a child. Crucial information on a case is not easily available on the courts' websites. Gathering of such information is dependent on its reflection, if at all, in orders/ judgments of the courts.

Data challenges also need to be addressed in the context of monitoring implementation of special laws pertaining to women and children, including the POCSO Act. Information management systems do not provide data on how many children have received the services of a support person, lawyer, translator, interpreter, special educator, counsellor, or how many have received interim and/or final compensation, etc. In the succeeding

There is a need for data management systems to cater to the growing need for meaningful sociological, psychological and legal research that helps strengthen children's access to services and justice.

chapters we will try and present the picture that we get through the courts' websites, the analysis based on the cases dealt with by HAQ and FACSE, interviews with survivors and stakeholders, and other similar research.

4. Publishing List of Specialised Services on Courts' Websites

Courts' websites should furnish details of specialised services available under the POCSO Act – District Child Protection Units; translators and interpreters for different languages and dialects; sign language interpreters; special educators; counsellors; social workers; supports persons, including governmental agencies and NGOs. This will enable access to such services by the Special Courts, investigating agencies and children / families.

Recommendations

- i. To ensure accurate data is published by NCRB, there should be better coordination between NCRB and State Governments / UTs. The State Governments / UTs should collate information from related stakeholders, such as police and other investigating agencies, Special Courts, and Juvenile Justice Boards.
- ii. NCRB should continue computing city-wise crime statistics regarding the POCSO Act and other crimes against children, as done in its 2016 report.
- iii. NCRB should compute and publish data regarding “Offenders Relation and Proximity to victims” of sexual offences under the POCSO Act, as done in its 2015 report.
- iv. There is a need to standardise terminology and the method of sharing of information sought under RTIs across different police stations in a particular State / UT.
- v. There is a need to include further details of a case on the court's websites in a systematic manner – date of FIR, date of arrest, date of cognizance, date of grant of bail, daily orders, date of granting of interim compensation, name of accused's lawyer, Special Public Prosecutor, and the child's lawyer.
- vi. Both micro and macro research should be promoted by all-India level institutions, such as the NCPCR, to generate critical information on implementation of the POCSO Act, and universities and colleges need to be encouraged to invest in sociological, psychological and legal research on child sexual abuse.
- vii. Particulars of DCPUs, translators and interpreters for different languages and dialects; sign language interpreters; special educators; counsellors; social workers; support persons, including governmental agencies / NGOs, should be available on the courts' websites. Such data should be prepared in consultation with DCPUs.

Endnotes

1. National Crime Records Bureau, Chapter 5, Crimes against Women, page 85.
2. National Crime Records Bureau, Crime in India 2015, Table 6.7, Age-Group-wise Cases & Victims reported under Section 4 & 6 of the POCSO Act (Incest Cases) during 2015.
3. National Crime Records Bureau, Chapter 5, Crimes against Women, page 85.
4. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.
5. Section 28 (2) and (3) of the POCSO Act.
6. Delhi Commission for Protection of Child Rights, Status of Implementation of POCSO Act, 2012 in Delhi, July 2015. Available at: http://delhi.gov.in/wps/wcm/connect/DOIT_DCPCR/dcpcr/publication/status+of+implementation+of+pocso+act,+21012+in+delhi. Accessed on December 2, 2016.
7. Crimes registered under Special and Local Laws (SLL).



About the Child and the Abuser

Child sexual abuse cuts across all caste, class and gender. Yet, an analysis of the police and court records as well as the cases covered by media and dealt by various organisations suggests that child sexual abuse is a problem of the poor. This conclusion is limited in that

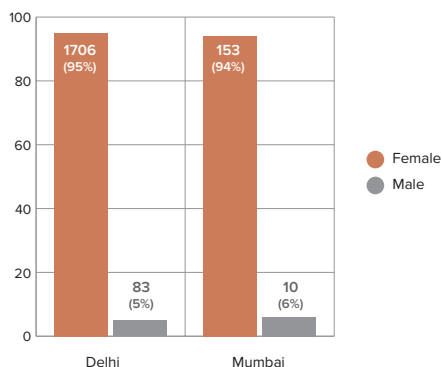
it is founded only on the cases that get reported and not what remains unshared and hidden, often within the walls of a home. The POCSO Act deals with cases of sexual abuse against all children below the age of 18 years, irrespective of gender.

Gender and Age Distribution of Children

For analysis of gender, age, education and economic status of victims and the accused, information was gathered from detailed reading of daily orders and judgments available on the courts' websites.

There were 163 victims in the 154 cases under the POCSO Act filed before the Special Courts in Mumbai, and information on gender was available for all, though information on age was available for only 143 victims. Similarly, in Delhi there were 1,860 victims in the total 1,803 cases analysed from the 5 selected Special Courts, while information on gender was available for 1,789 victims, and age data was considered only for 718 victims as 38 children were above the age of 18 years.

Chart 5.1 Gender Distribution of Children



Gender break-up of Children

- In terms of the gender break-up of children, Delhi and Mumbai showed similar trends.
- Out of a total of 1,952 child victims across the two cities, 95% were females and 5% were males.
- While 95% of the children in Delhi were females, in Mumbai they were 94% of all.
- Only 5% children in Delhi and 6% in Mumbai were males.

Two of the five judicial officers interviewed in Delhi in the course of this study had not come across any case of sexual abuse of a male child. The three who had varied in their perceptions on the proportion of females to males, as presented below:

Views of Judicial Officers on Proportion of Female and Male Children

Judicial Officer 1	“Cases of sexual abuse of boys would not be more than 5%”
Judicial Officer 2	“4 out of 10 cases involve boys as the victims; you can say about 25% of the cases are of male child sexual abuse”
Judicial Officer 3 (a former Special Court Judge dealing with POCSO cases for three years)	“Cases of male children are not much, about 10%”

One of these judges also remarked, “earlier the police was reluctant to register such cases, but with the new laws, that has changed. The problem is that in such cases the investigation is poor and the police do not turn up with evidence in time. There is no scientific evidence.” A Special Public Prosecutor in Delhi said that only 10% of the cases were related to male children.

None of the stakeholders interviewed in Delhi and Mumbai have ever received a case of sexual abuse of a third gender child. Neither the judicial officers nor the Special Public Prosecutor nor the woman police officer interviewed in Delhi had dealt with any such case. The Special Public Prosecutor and a Special Court Judge mentioned a single case involving a transgender child as the accused.

“Earlier the police was reluctant to register such cases, but with the new laws, that has changed. The problem is that in such cases the investigation is poor and the police do not turn up with the evidence in time. There is no scientific evidence.”

Former Special Court Judge from Delhi

According to the respondents in Mumbai, the law is appropriate to handle cases of sexual abuse of male and third gender children since it treats all gender equally. It is the society's rigid view that needs to change. Social awareness is required so that sexual abuse of male and third gender children is taken seriously and increasingly reported.

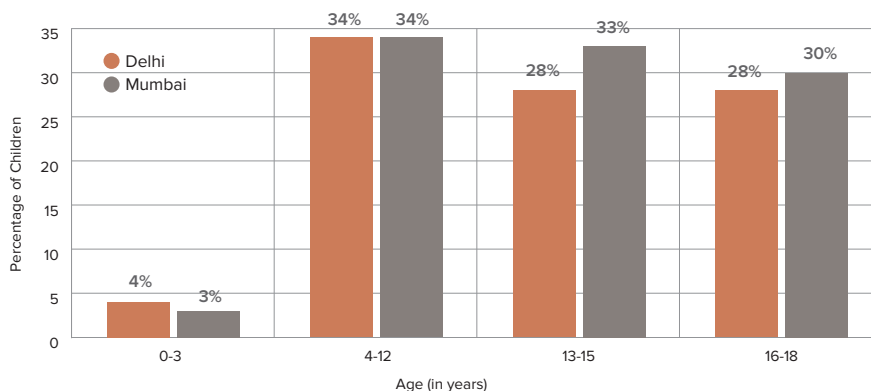
FIRs regarding male children are registered mostly under penetrative sexual offences. In Delhi, the victim was a boy in 24 of the disposed cases, out of which 67% dealt with penetrative sexual offences (3 cases of penetrative sexual assault and 13 cases of aggravated penetrative sexual assault). In Mumbai, the victim was a boy in two of the disposed cases, both of which dealt with penetrative sexual offences (a case each of penetrative sexual assault and aggravated penetrative sexual assault). Perhaps sexual offences of non-penetrative nature against a boy are not perceived and treated with the seriousness they deserve. Is it that boys believe that complaining about non-penetrative sexual offences makes them 'sissy' and question their own sexual orientation? A male survivor interviewed by HAQ said, "I never went to a counsellor or anybody but I have this feeling that maybe sometimes I appear as someone who is homosexual." They appear to come to terms with the abuse, and believe that they are able to handle the same. The same male survivor had also said that when his mother, unaware of the sexual abuse, had attempted to talk to him when he was in the 11th standard about 'good and bad touch', he had responded with "I can handle things on my own, so need for the 'talk'."

Sexual offences of non-penetrative nature against a boy are not perceived and treated with the seriousness they deserve.

Table 5.1 Age Distribution of Children

Age (in years)	Delhi		Mumbai	
	No. of Children	Percentage	No. of Children	Percentage
0 to 3	31	4	5	3
4 to 12	259	34	48	34
13 to 15	214	28	47	33
16 to 18	214	28	43	30
Total	718	100	143	100

Chart 5.2 Age Distribution of Children



Age break-up of Children

Age distribution of 861 children (718 from Delhi and 43 from Mumbai) for whom information was available, indicates the following:

- Delhi and Mumbai data reflect similar trends in the reporting of child sexual abuse across different age groups.
- There is very little variation in the reporting of child sexual abuse across the 4 to 18-year age group; the maximum number of children are in the 4 to 12-year age group.
- Of all children in Delhi and Mumbai, 60.2% (518 out of 861) were teenagers, 13 years and above.

Table 5.2 Age Distribution of Children by Gender – Delhi & Mumbai Combined

Age groups (in years)	Females	Females as % of all children	Males	Males as % of all children
0 to 3	33	3.8	3	0.3
4 to 12	273	31.7	34	3.9
13 to 15	241	28.0	20	2.3
16 to 18	247	28.7	10	1.2
Total	794	92.2	67	7.8

- As many as 36 children aged 0-3 years were reported to have faced sexual abuse; the youngest female being 6 months' old and the male, a year old.
- Highest reportage for both females and males is in the 4-to-12-year category, indicating this age group as the most vulnerable.
- The number decreases marginally in the next age group of 13 to 15 years for both females and males.
- Analysis of the 40 cases HAQ has engaged with shows that most children, irrespective of gender, were in the 4-to-12-year category (17 females and 5 males), followed by 13 to 15 years (9 females and 2 males). Altogether, 82.5% of these cases fell within the 4-to-15-year age group.
- There is a significant and steady decrease in the reportage for boys with increase in age, which becomes a mere 1% in the 16-to-18-year category. This implies that as boys grow up they internalise societal stereotypes, perceptions and expectations, and fear the consequences of reporting.
- While girls also face the same societal pressure, their numbers are significantly higher in the 16-to-18-year category. The reasons for this will be examined in later chapters.

Other Socio-economic Characteristics of Children and Their Families

Education

During the period of study, 21 cases were disposed of in Mumbai. A sample of 21 disposed cases was randomly selected from Delhi also to examine the education status of the victims. This information has been gathered from our study of judgments and orders on the courts' websites.

In Mumbai, 19 out of the 21 children (90%) were studying at the time of the offence or had attended a school in the past. The level is known in 13 out of the 19 cases, and ranges from 3rd standard to 12th standard. Three of them were in primary, two in elementary, five in secondary and three in higher secondary. Out of the 4 cases of romantic relationship, two girls were studying in secondary and one in higher secondary level.

In Delhi, from the 22 children in the randomly selected 21 cases, 11 were in school when the offence occurred, between 5th and 10th standard for seven of them, and unknown for the remaining four. One child had discontinued her schooling, whereas one had never been to a school. No information was available for 7 children, and two were aged 3 years, hence not in school.

Cases where HAQ has provided psychosocial and/or legal support show that most children had been educated up to primary and upper primary levels at the time of the incident.

Table 5.3 Education Level of Children in 40 Cases Supported by HAQ

Education	Females	Males	Total No. of Children
Under age for schooling	4	0	4
Pre-primary	4	1	5
Primary (Class 1 to 5)	10	2	12
Upper primary (Class 6 to 8)	5	2	7
Secondary (Class 9 to 10)	2	1	3
No Schooling	8	1	9
Total	33	7	40

Of the 9 children who have never been to a school, one is a girl with a visual impairment and the other a boy with mental retardation, both 12 years of age.

Disability

Three out of the 133 pending cases in Mumbai involved female children with cognitive disability. Three out of 365 disposed cases in Delhi were female children with disability – two being deaf and mute, and one whose nature of disability is not known. The Special Public Prosecutor interviewed in one of the courts in Delhi had received 4 cases in the past four years, where the children were physically or mentally challenged.

Economic status

Information regarding the economic status of children and their families was extracted from our study of the judgments in the 21 disposed cases from Mumbai and the 21 randomly selected cases from Delhi. Eight cases in Mumbai and nine in Delhi came from low-income groups. The economic background of the child is ascertained on the basis of several factors – place of residence (staying in unorganised settlements, *gurudwara*,¹ school premises), occupation of the father, and lack of basic amenities (accessing public toilets, visiting neighbour’s house to watch television). A study of the remaining judgments indicates that the children probably came from low-income background, but it was not definitely recorded. The occupational status of the parents of 40 children in HAQ cases is presented in Table 5.4.

Table 5.4 Economic Status of Child’s Family in 40 cases supported by HAQ

Father’s Occupational Status	Number of Cases	Mother’s Occupational Status	Number of Cases
Daily wage labourer	7	Homemaker	23
Driver	3	Piece rate/daily wage labour	5
Security guard	1	Cook / domestic help/ caretaker	3
Vendor	4	Peon	1
Rickshaw puller	2	Helper (in a shop)	1
Tailor	3	Security Guard	1
Photographer	1	Teacher	1
Small business	4	Beautician	1
Unemployed	2	Mother not alive	3
Beggar	1	Information not ascertained	1
Helper at a chemist shop	1	-	-
Father not alive or separated	6	-	-
Information not ascertained	5	-	-
Total	40	Total	40

When children come from a low-income background, it makes them more vulnerable and susceptible to abuse. In one case, poverty resulted in a girl from Assam being placed as a full-time domestic worker with an affluent family in Delhi, where sexual assault was repeatedly committed upon her by her employer, which she ultimately reported when she was 16 years old.

While the lives of the poor are exposed, children from middle class and upper class families are seldom able to report for various reasons, hence, we know little of what they endure. The *Study on Child Abuse: INDIA 2007*, published by the Ministry of Women and Child Development, says, “The prevalence of sexual abuse in upper and middle class was found to be proportionately higher than in lower or in lower middle class families.”

Economic hardships take a toll on families, and fighting a case of sexual abuse is not easy. In five of the cases, the father is the accused / offender. In such cases, the father may be the asole bread-earner, hence, it is imperative that the adult members of the family are provided with livelihood opportunities or with aid through existing government programmes. Some cannot continue to live in the same location,

but don't always have enough resources to shift to a new location and find new jobs for sustenance. And, of course, taking the child for therapy is beyond the comprehension of these families.

Gender and Age Distribution of the Accused/Offenders

A total of 2,542 accused went to trial in the 1,957 cases from Delhi and Mumbai – 214 accused/offenders from Mumbai and 2,336 from Delhi. While gender data was available for all the 214 accused/offenders from Mumbai, information on age was only available for 167 of them. In Delhi, out of 2,336 accused/offenders, information on gender was available for 2,328 and age data was available for only 259, as provided in Table 5.6.

Table 5.6 Gender Distribution of the Accused/Offenders

Accused/Offenders	Delhi		Mumbai	
	No. of Accused/ Offenders	Percentage	No. of Accused/ Offenders	Percentage
Male	2,230	96	200	93
Female	98	4	14	7
Total	2,328	100	214	100

Gender break-up of Accused/Offenders

An overwhelming majority of the abusers were males. The few female accused were charged for abetment or for brothel keeping under the ITP Act. In Mumbai, out of the 25 accused that were named in 21 disposed cases, there is only one female aged 60 years arraigned for abetment. The above cases indicate that females are rarely directly involved in sexual offences against children.

Crime in India 2015 shows a similar trend. Under Section 4 of the POCSO Act, out of the 1,097 accused in disposed cases, 1,083 (close to 99%) were males and 14 were females. Under Section 6 of the POCSO Act, out of the 268 accused in the disposed cases, 255 (95%) were males and 13 were females. Under Section 8 of the POCSO Act, out of the 621 accused in disposed cases, 620 (99%) were males and 1 was female, and under Section 10, out of the 41 accused in disposed cases, 40 (99%) were males and 1 was female.

Table 5.7 Age Distribution of the Accused/Offenders

Age of Accused/Offenders (in years)	Delhi		Mumbai	
	No. of Accused/ Offenders	Percentage	No. of Accused/ Offenders	Percentage
Below 18	38	14.7	2	1.2
18-25	144	55.6	80	47.9
26-35	24	9.3	45	26.9
36-45	12	4.6	23	13.8
46-55	21	8.1	10	6.0
Above 55	20	7.7	7	4.2
Total	259	100	167	100

The situation has not changed in *Crime in India 2016*. Under ‘Child Rape (Sections 4 & 6 of the POCSO Act / Section 376 IPC)’, out of the 7,967 accused in disposed cases, 7,875 were males (close to 99%) and 92 were females. Under ‘Sexual Assault of Children (Sections 8 & 10 of the POCSO Act / Section 354 IPC)’, out of 4,364 accused in disposed cases, 4,307 (98%) were males and 57 were females. Under ‘Sexual Harassment (Section 12 of the POCSO Act / Section 509 IPC)’, out of 165 accused in disposed cases, 163 (98%) were males and 2 were females. Under ‘Use of Child for Pornography / Storing Child Pornography Material (Sections 14 & 15 of the POCSO Act)’, all the 9 accused in disposed cases were males (100%). Under ‘Other Sections of the POCSO Act’, out of 542 accused in disposed cases, 531 (98%) were males and 11 were females.²

Age break-up of Accused/Offenders

- The accused/offenders ranged from below 18 years of age to 55 years and above, the youngest being 17 and the oldest, 82.
- In both cities most of them were in the 18 -25 years’ age group.
- In Delhi, 15 cases involving 15 accused/offenders below the age of 18 years were transferred to the Juvenile Justice Board. Additionally, in one case of trafficking, two of the six accused turned out to be minors and were transferred to the Juvenile Justice Board after conviction. No such information was available for Mumbai.

Economic Status of the Accused/Offenders

Though the economic background of the accused was not recorded, a study of the judgment in a few cases indicates that the accused too belonged to low socio-economic classes. For example, going by occupation of the accused/offenders in 10 out of the 21 disposed cases in Mumbai, we find that two of the accused/offenders were security guards, two ran flour mills, and one each was a paper vendor/ barber/ coolie/ flower seller/ leather craftsperson/ tea vendor. The address of one of the accused/offender was “foot path”. Two of the accused/offenders were provided with State Appointed Lawyers.

In Delhi, in many cases, the accused/offenders required a legal aid counsel or amicus curiae. Of the 21 randomly selected disposed cases, the occupation of only five accused/offenders could be ascertained from the judgments – one each being a welder / construction labourer / mason / shop owner / landlord. In one case the accused was unemployed.

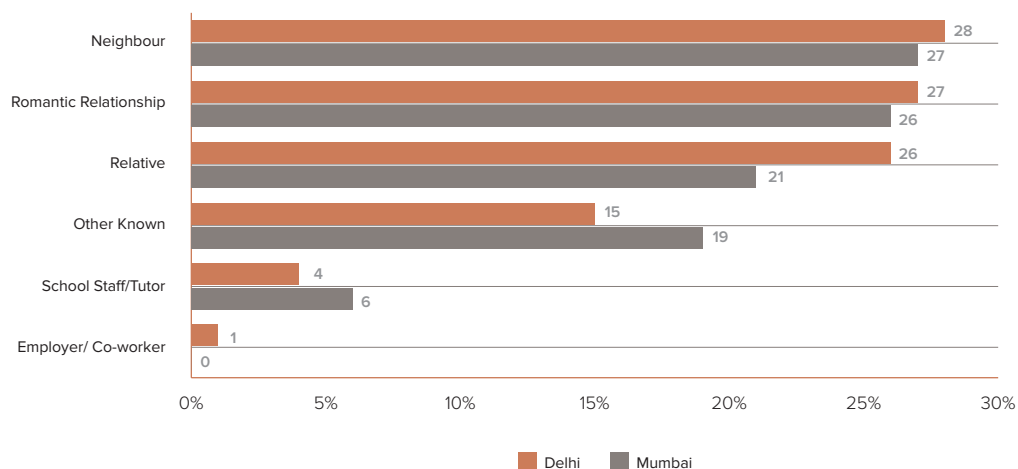
Proximity and Relation between Child and Accused/Offender

Information on offender’s proximity and relation to the child was available in 665 cases for both cities.

Table 5.8 Proximity between the Child and the Accused/Offender

Relation/Proximity between the Child and Accused/Offender	Delhi		Mumbai	
	No. of Cases	Percentage	No. Of Cases	Percentage
Known	441	81	84	71
Stranger	73	13	20	17
Both known and stranger	14	3	8	7
Any other (Proximity is not clearly established)	19	3	6	5
Total	547	100	118	100

Chart 5.3 Proximity between Child and 'Known' Accused/Offender (in per cent)



- In 547 cases (82.5%) the accused/offender was known to the child. This includes 22 cases (4%) where at least one of the accused/offender was known to the child.
- In cases of gang penetrative sexual assault or penetrative sexual assault and trafficking, one of the accused/offender was known to the child while the others could be friends or acquaintances of that accused. In the case of sexual abuse of male children, the accused/ offender were peers or senior boys or neighbours, but with whom the child had not interacted, hence have been categorised as 'strangers' in Table 5.8.
- Many of these cases are cases of romantic relationship.
- For the purpose of this analysis, various persons have been grouped together in the categories shown in Chart 5.3. For example, the category of 'other known' includes family friend, doctor, staff of a childcare institution, shopkeeper, father's customer, elder sister's fiancé, stalker, neighbour's servant and a peer. Similarly, school staff includes teacher as well as school bus driver and helper.
- Among accused/offenders known to the child, neighbours comprised the largest segment.
- In a quarter of the cases (25%), the accused/offenders were relatives such as father, stepfather, grandfather, brother, uncle, cousin, brother-in-law. These are persons trusted by the child.
- Another quarter of the cases (26%) were cases of romantic relationship.

Analysis of the 40 cases of HAQ corroborates the above – in 30 out of 40 cases (75%) accused/ offenders were known to the victims, 15 of them (50%) being neighbours, and 5 (17%) being fathers (two were biological fathers and three stepfathers).

Crime in India 2015 finds that the accused/offender was known to the child in 8,341 of 8,800 cases (95%) under Sections 4 and 6 of the POCSO Act. Neighbours comprised the largest category with 3,149 cases (38%), followed by employer or co-worker (27%). Almost 138 out of 8,341 (1.7%) were cases of incest where the accused was the child's grandfather/ father/ brother etc. Another 210 cases (2.5%) were by other close family members, and 581 cases (7%) by a relative. *Crime in India 2016* has not computed such data.

Some of the other reports and studies also suggest a similar trend. Findings from *Pursuing This Thing Called 'Justice': A Survivor Centric Approach Towards Victims of Sexual Violence*, a 2015 report by RAHAT and Majlis Legal Centre for Women, on cases they had handled in Mumbai, show that –

- Only in 9% of cases the accused were strangers; in the remaining 91%, the accused were known persons.
- Within the 'known persons' category 43% of the accused were acquaintances i.e. neighbours, boys from the locality, boyfriends, etc. Rapes by close family members comprised 18% cases, and rape under a promise of marriage, 20%.
- Rapes by fathers/stepfathers constituted 46% of family rapes. They form 7.2% of total rape cases, almost as high as rapes by strangers (9%).
- 20% of cases fall in the category of rapes under the pretext of 'promise of marriage'.

Judicial Officers interviewed in Delhi on Incest

"...In most of the cases the accused is known to the victim. But incest cases are too many these days."

"...One or two cases out of ten are incest cases. Mostly in incest cases the reporting is done late, when the accused has crossed his limits and the child cannot take it anymore. The challenges in dealing with such cases are more at a social level."

"... Incest cases are least reported."

"... Incest is reported after a very long time, sometimes after 5-6 years. But the victims often turn hostile because of family pressure. At times, even in incest cases, the case is filed because of some other issue in the family, such as a family dispute."

Proximity and Nature of Offence

Data computed for 428 cases of Mumbai and Delhi where information on both nature of offence and proximity was available shows that most sexual offences by a 'known' accused/offender were of a serious nature involving penetration or physical contact.

Table 5.9 Nature of Offence and Proximity / Relationship between the Child and the Accused/Offender

Offence	Known	Stranger	Both Known and Stranger	Any Other (Proximity Not Clear)	Total
Penetrative sexual assault	95	3	3	0	101
Aggravated penetrative sexual assault	105	10	3	2	120
Sexual assault	53	13	0	3	69
Aggravated sexual assault	32	14	1	2	42
Sexual harassment	37	11	1	2	51
Other multiple offences	28	5	5	0	38
Total	350	56	13	9	428

- Out of 221 cases of penetrative sexual offence, 120 cases (54%) were of an aggravated form. Out of 111 cases of sexual offences (touch), 42 cases (38%) were of an aggravated form.
- The accused/offenders were 'known' persons in 200 out of 221 (90.5%) cases of penetrative sexual offences and 85 out of 111 (77%) cases of sexual offences (touch).
- In 105 out of 120 (86%) cases of aggravated penetrative sexual assault and 32 out of 42 (76%) cases of aggravated sexual assault, the accused/offenders were 'known' persons.
- Out of 83 disposed cases of romantic relationship from Delhi and Mumbai, 56 (67%) were booked for penetrative sexual assault, 20 (24%) for aggravated penetrative sexual assault, 2 (around 2%) for sexual assault, 1 (1%) for aggravated sexual assault and 4 (5%) for sexual harassment.

Judicial Officers interviewed in Delhi on Elopement and Love Affair cases getting reported as cases of sexual abuse

"... About 70% of the cases under the POCSO Act would be cases of love affair or elopement or love marriage. Although there is no data that states this, it is more or less my experience or presumption you can say."

"... Most cases are those of elopement/love affair involving kids ranging from the age of 16 to 18 years particularly."

"... There are many cases of elopement, which are falsely framed under POCSO Act. The elopement cases mainly consist of children who fall in the age bracket of 15-18 years. In such cases, both the victim and the accused don't want to frame each other, but the families force them to do so."

"... 80% cases are mainly love affair and elopement."

"... False cases could be 1 or 2 out of 10, but cases of consensual sex could be 5 out of 10."

Findings

Gender

- The study of the court cases indicates that girls are predominantly the victims in these offences, yet social stigma and apprehension of the legal process prevents reporting of abuse. In the case of boys, it is the fear of his sexual orientation, sexuality and masculinity being questioned, and his mistaken belief that he has lost his manhood. This is reflected by the data which shows a decline in reportage as boys approach adulthood.
- *Study on Child Abuse: INDIA 2007*, states, "Some deep-seated fear has always moved Indian families to keep their girls and their 'virginity' safe, and many kinds of social and cultural practices have been built around ensuring this. This shows that there is knowledge of the fact that a girl child is unsafe though nobody talks about it. However, this fear is only around girls and the safety net is generally not extended to boys. There is evidence from this as well as other studies that boys are equally at risk... Among respondents 49% of boys and 39% of the girls faced sexual abuse."
- Although sufficient anecdotal evidence is available on sexual violence against the third gender, there is no recorded data. This means either such incidents do not get reported or the reports are not converted into a formal complaint. Stigma and marginalisation of the third gender has left these

children voiceless and invisible, highly vulnerable to abuse. Regrettably, the child rights and child protection initiatives too fail to reach them.

- A Centre for Child and the Law, NLSIU, study that analysed 667 judgments in POCSO cases in Delhi, shows 95% of cases involved a female child and 5% involved a male child.³
- In Mumbai, while all the 10 police personnel interviewed were aware of male children facing sexual abuse, they had not dealt with many such cases. Recalling a case of a one-and-a-half-year-old boy who was sodomised by an adult and hospitalised for two months because of his injuries, they were of the view that, “even now it is not accepted in the society that boys are also sexually abused. There may be many cases but the reporting is very poor. Such cases mostly happen in hostels and Ashram schools.”
- This raises a question as to whether a prejudicial and patriarchal system fails to acknowledge a boy child as being equally vulnerable to sexual abuse. The prejudice increases manifold when it comes to the third gender.
- Out of 2,542 accused/offenders, only 112 were females (4%). The female accused were mainly abettors or booked under the ITP Act. The RAHI study also showed a similar trend: “Women constituted 3% of all abusers.”⁴ Does inclusion of females as offenders open doors for falsely implicating them on charges of sexual offences, or will it ensure that every offender is aptly punished?

Age

- Highest reportage for both females and males is in the 4 to 12 years’ age category and the lowest reportage in the 0-3 years’ category. This could be due to greater parental/ family supervision when the child is younger. Data shows that only 12 children in Delhi and 5 children in Mumbai suffered sexual offences at less than 3 years of age. In this age group, then, the likelihood of the accused/ offender being a known person is higher; this is evident from the Delhi cases – in 10 out of 12 cases in this age group (83%), the accused/offender is a ‘known’ person. As they move into the next age group (4-12 years), the parental/ family supervision relaxes and such child may be left in the care of friends, neighbours, schools, etc., thereby increasing their vulnerability to sexual abuse.
- The diversity in reportage between the 0-3 years’ age group and 4-12 years’ age group could also be because a small child may not be able to fully understand the offence and/or express it to the parent/family. If physical injury has not been caused, the sexual abuse may go undetected in case of younger children. A child in the older age group is better able to express herself/himself.
- A 12% decline in the reportage between age groups of 4-12 years and 13-15 years may be attributed to the onset of puberty and the tendency of self-blame on the part of the child, and the likely impact on marriage prospects, especially for girls.

Education

- In the 21 disposed cases from Mumbai, four were cases of romantic relationship; three girls (75%) were in secondary/higher secondary school and one girl aged 17 years has been to school sometime. In the 21 randomly selected cases from Delhi, three were cases of romantic relationship; two girls were studying in secondary level and no information is available about the third. This indicates that the girls in romantic relationship were not “uneducated” or “unsophisticated village girls” and were capable of thinking for themselves.⁵

Economic Background

- Most of the 82 disposed cases (Delhi, Mumbai and HAQ) indicate that the children from the low-income group are vulnerable to sexual abuse. Factors that contribute to the vulnerability of such children include parents' struggle for survival and to eke out a living, children's separation from parents for various compelling reasons, inadequate housing and living conditions, absence of supervised care.
- HAQ's experience is that working mothers blame themselves that they failed to take care of their children and protect them from abuse. Even those who are homemakers blame themselves, and more so in cases of incest. It is mostly the mothers who accompany their children in matters connected to the case – to the police station, for counselling and to the courts. Fathers tend to stay away and seldom interact with the authorities and the NGOs involved. Only in four out of the 40 cases of HAQ that fathers showed an active involvement in their child's case, i.e., greater than that of the mothers.
- In 278 out of 525 cases (53%) in Mumbai and Delhi (Chart 5.3), the accused is a relative/neighbour of the child, so it may be assumed that the child and the accused could come from the same socio-economic background.

Proximity

- The perpetrators are mainly persons 'known' to the child. Other studies too have reached the same conclusion. The RAHI study shows that the most common abusers are 'known person' and 'family' members: "The most frequently marked abusers are 'Known Person', who form 46% of the total number of abusers. 'Family' members at 36%, follow. 'Strangers' form 16% of the total number of abusers and 'Other' 2%."⁶ A major finding of the *Study on Child Abuse: India 2007* is: "50% abusers are persons known to the child or in a position of trust and responsibility."⁷
- The gravest forms of sexual offences against children take place in supposedly secure environment by people who form the child's 'support' structure. Some of these people, who have the ability and responsibility of reporting, could be in close proximity to or be financially dependent upon the abuser. As a result, the child may continue to remain in such setting and undergo repeated sexual abuse. Hence, it is imperative that the support structures envisaged under the POCSO Act are established taking into account the bitter truth that many of these children may not be able to find such help within their families. It is essential for the state and civil society to focus at least as much on prevention of sexual abuse, if not more, as on the remedy.
- A large number of cases of 'romantic relationship' are entering the criminal justice system, and in all such cases the male is shown as the abuser, as it is the parent of the female child, who has vested interest, who informs the police. In some cases, not only is the male partner's bail rejected but he is also convicted. The judges interviewed in Delhi have also stated that many such elopement cases are coming before them, and one judge has called such cases as "falsely framed under the POCSO Act". This raises a question as to whether it was appropriate to increase the age of consensual sexual activity from 16 to 18 years under the POCSO Act.

Endnotes

1. A place of worship for Sikhs.
2. Table 4A.7.
3. Centre for Child and the Law, National Law School of India, University, Bangalore, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi. p. 50. 29 January 2016.
4. RAHI Foundation, Voices from the Silent Zone, Section 3: Abusers and Abuse; pg.17
5. AIR 1965 SC 942: S. Varadarajan vs. State of Madras
6. RAHI Foundation, Voices from the Silent Zone, 1998; pg.17.
7. Ibid; pg. vii.



Disclosure of Offence and Provision of Mandatory Reporting

This chapter is divided into 2 parts – Part A examines who is the person to whom the child discloses the commission of a sexual offence and who is the person that informs the police of such commission. Data on this aspect has been gathered from the 42 cases in Mumbai and

Delhi. Part B deals with the issue of mandatory reporting. For this analysis, in addition to the 42 cases, the study has looked at the data collated by the NCRB and the interviews conducted by HAQ of 8 adult survivors who were sexually abused as children.

PART A

Disclosure and First Informant

The first informant is the person who first informs the police about the commission of an offence. The first informant may or may not be the person to whom the child first discloses the commission of the offence. A child mostly discloses commission of the offence to a person she / he is comfortable with, or is available for the child at the relevant time.

Mumbai Cases

Scrutiny of the 21 disposed cases in Mumbai shows that in 8 cases, the child is the first informant (38%). In 10 cases, a parent of the child is the first informant (47%), in 7 cases, the mother, in 3 cases, the father, and in one case each, it is an elder brother, a maternal aunt, and a neighbour. Children who are the first informant are aged between 13 years to 17 years.

Out of the 10 cases in which the parent was the first informant, 3 cases were of romantic relationship - in two of which an FIR was registered for kidnapping, and in another, a Missing Report was filed. In the case of the romantic relationship where the child is the first informant; the relationship was not revealed till the birth of an offspring.

Disclosure of the offence is highest to the mother, 6 out of the 21 cases (28%). In 2 cases, the child disclosed the offence to staff at school, i.e., watchman and teacher. In one case each, disclosure was made to the father, elder brother, neighbour and friend. In one case, the mother witnessed the offence, and in another, the parents heard the child shout.

In 4 cases, i.e., **Case G**, **Case O**, **Case Q** and **Case R**, members of the public came to the child's rescue. In **Case G**, the child, a resident of Indore, ran away from an educational institution in Nashik, where she was beaten, and landed at CST Railway Station at Mumbai, where the accused befriended her, and thereafter committed penetrative sexual assault. About three days later, two women attached with an NGO found her crying at CST Railway Station, and on inquiry, the 16-year-old disclosed the offence to them.

In **Case H**, the child had first disclosed the offence to the school watchman, as it occurred while she was standing in queue to enter the school. The school watchman in turn informed the teacher. The school watchman and teacher took the child to the police station, and thereafter, informed her father about the incident. The father is shown as the first informant. In **Case S**, the child disclosed to her teacher about the offence on her way to school. The child and the teacher visited the spot, but the accused was not found. The accused repeated the offence on the very same day when the child was returning from school, hence, the second disclosure was made to her maternal aunt with whom she was residing.

In **Case F**, the child first disclosed the commission of the offence to accused No. 2 who had brought the child from Bihar to Mumbai and whom the child called "*mausi*",¹ but "when the victim narrated the incident to Accused No.2 she threatened and directed that she had to listen and obey Accused No.1... The victim was requesting Accused No.2 to send her back to her native place, but she was threatening, beating and keeping the victim starved". The child then informed a neighbour (female), who is the first informant.

In **Case K**, the first informant is the mother of the child, who then got the FIR registered against her brother, i.e., the maternal uncle of the child.

Perusal of the judgments indicate that a child finds it difficult to disclose the commission of sexual offence against them. In two of the cases, disclosure was made only upon repeated commission of the offence. In **Case Q**, she disclosed the offence only when it was repeated for the fourth time - "She did not disclose the incident to anybody, as she was feeling disgraceful." In **Case D**, it is observed, "She has alleged that both the accused frequently harassed her." In **Case I**, the mother of a 12-year-old deposed, "On that day, the victim came to her mother at night and told her that she wanted to tell her something. She looked very frightened and could not speak. When complainant asked her what had happened, the victim told..." In this case, the sexual offence is alleged to have been committed a few days before the disclosure. In **Case C**, the child was 9 years old. The accused had "pressed her breasts with his hand and took kiss of her cheek... the said man restrained the girl from to get out of the lift... he bit her nose and lips with his teeth. Therefore, she sustained injury on her lips and the blood started oozing." The trauma of the incident put the child "in a scared condition". She was unable to respond to her mother's queries as "the victim girl was very much scared. Thereafter, the informant tried to persuade her and thereafter, cleaned

her lips and the blood, took her in confidence and again made her inquiry”; it was only then that the child narrated what had occurred.

In 10 out of the 21 disposed cases (48%) in Mumbai, the FIR was registered on the date of commission of the offence. In **Case C**, there was a gap of seven days between the date of offence /disclosure and registration of FIR as the child’s mother had “also informed the incident to her husband on phone. Her husband told her that when he returned from Haryana, then only they would lodge report at police station.” In **Case F**, the penetrative sexual assault is repeatedly perpetrated for about a month prior to registering the offence with the support of a neighbour—the child had recently been brought to Mumbai by accused No.2. The child “did not go to anyone’s house as their doors were shut.” The disclosure happened due to inquiry by the neighbour on witnessing the child in tears.

Delhi Cases

Scrutiny of the 21 cases in Delhi shows that in 11 cases, the child is the first informant (52%); in 6 cases, the mother is the first informant (28%), in 2 cases the grandmother; in one case it is a stranger who witnessed the offence (**Case 5**), and in another, the CWC. Children who are the first informant are aged between 10 years to 18 years.

Two of these cases were of romantic relationship—**Case 1** and **Case 13**. In **Case 1**, the mother had filed a Missing Report, whereas in **Case 13**, the child was the first informant. The judgment in **Case 13** indicates that an FIR was registered as the accused refused to marry her - “It was further alleged that at the last moment, accused refused to marry with the complainant and his parents asked for house and gold in marriage and stated that if the mother of complainant would give a house and gold, they would marry the accused with the victim.”

Like in Mumbai, disclosure of the offence was the highest to the mother— 6 out of the 21 cases (28%). In 2 cases, the child disclosed commission of offence to the father, and in another 2 cases, to parents. In 2 cases, the offence was disclosed to grandmother— in **Case 16**, the grandmother heard the child scream and raised an alarm.

In 2 cases (**Case 3** and **Case 8**), the offence was disclosed to a stranger. The judgment in **Case 3** states that “one person came there and asked the prosecutrix as to what has happened. The prosecutrix told the whole incident to that person who accordingly called the police.” In **Case 5**, the stranger who witnessed the offence took the child and the accused to the police station.

In **Case 4**, the disclosure was made to a friend in her class, who informed her mother, who in turn informed the teacher but requested “that she should herself find out as to who was that student being sexually harassed.” Upon inquiry with the girl who had informed her mother, the teacher was told that another girl had told her about it. Hence, the teacher made inquiries with the other girl, who revealed the name of the child. When asked, the child “started crying and told her that one uncle residing in her neighbourhood has been doing ‘galat harkat’² with her.”

In **Case 21**, the sexual assault perpetrated upon a 17 year old girl by her father was disclosed to a trainee teacher who was conducting a psychological assessment. The child sought the trainee teacher’s support, and HAQ was contacted. The child also revealed the commission of the offence to HAQ’s representative, and thereafter, the matter ultimately reached the CWC, who ordered registration of FIR.

In 9 out of the 21 disposed cases (43%) in Delhi, the FIR was registered on the date of commission of the offence. In **Case 11**, the child did not disclose the commission of the sexual offence for two years due to blackmail by the accused; "...but due to fear, he did not disclose this fact at his house. Child victim had stated that accused used to blackmail him again and again by saying that he will disclose this fact to his friends in school..." In **Case 21**, her father sexually abused the child for several years prior to registration of FIR, and the child had disclosed it to the family, including the mother. "...her school had no clue about anything but her entire family including her mother knows about the sexual molestation." "Prosecutrix 'D' also confirmed that her mother, her dadi, all members in family and neighbourhood knew about her sexual abuse by her father."

In **Case 7**, a 9-year-old boy disclosed the commission of penetrative sexual assault one day later as he was unable to bear the pain; the accused had threatened "that in case he disclosed about this incident to anybody, he would kill the victim. The victim was suffering pain in his anus, but because of fear he went back to his home and slept. The pain continued on the next day and when he was unable to bear the pain, he informed his parents on their return back to home, at about 07:00 p.m." In **Case 19**, the disclosure was made two days later as the accused "had told her that if she disclose this thing to anyone he will hand over her parents to the police."

Findings

1. In each of the above cases, the child required support of a parent, family member or some other person to register an FIR. In **Case G**, a 16-year-old victim of penetrative sexual assault, roamed the railway station for three days, before two women asked the reason for her crying and facilitated the registration of the offence.
2. One silver lining of these cases is that strangers came forward to help child victims. In **Case O**, people on the street came to the rescue of a boy of 17 years. In **Case 5**, a stranger registered the FIR.
3. The period before a disclosure is finally made varies from child to child. In **Case H**, a 9-year-old immediately informed the school watchman, while a 12-year-old, in **Case I**, revealed to her mother only after a few days of the penetrative sexual assault.
4. Children are hesitant to disclose a sexual offence, even to parents, as they feel shame (**Case Q**) or fear. In **Case D**, while rejecting bail, the Special Court observed: "...it appears that the applicant not only harassed the victim but he also gave threat of throwing acid on her face." In **Case I**, the judgment says, "when she resisted, he threatened her by saying '*gap bus marun takin*'" (shut up otherwise I will kill you).
5. Children are often threatened by the accused at the time of the sexual offence. In **Case D**, **Case F**, **Case I**, **Case N**, **Case 7** and **Case 19**, the accused did threaten the child.
6. Children feel humiliated to reveal the sexual offence, and /or blame themselves for the same. In **Case 11**, the child was blackmailed with revelation of the offence: "The said threat given by accused of disclosing the sexual act committed by him with PW1 Child victim to his school friends would have had impact on the mind of child victim and out of fear of being disgraced amongst his school friends, child victim would have continued to suffer at the hands of accused."
7. Children do not disclose commission of sexual offence for diverse reasons. "Reasons for Not Disclosing" are mentioned in the RAHI Study – "I want to forget it happened" (23%); "What will people

think of me” (14%); “I feel it was my fault” (11%); “I don’t trust anyone” (11%); “It is not that important” (9%); “I feel guilty as it gave me pleasure” (7%); “I would not have been believed” (7%); “I was a willing participant so it wasn’t an issue” (3%); “I was threatened” (3%); “I was bribed” (1%); “Other” (35%).³

8. Children, given an opportunity, disclose the commission of a sexual offence. In **Case F**, **Case G** and **Case 3**, the child disclosed the commission of the offence upon inquiry being made regarding their distressed state.
9. In most cases examined in this study, the FIR is registered immediately or soon after disclosure, though in cases of sexual violence, it is not unusual to find the victim and the family thinking hard over it before registering an FIR, partly due to hesitation in disclosing /registering such offence. The Supreme Court has held that such “delay in the lodging of the FIR can be due to variety of reasons, particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.”⁴
10. The FIR is mostly registered in the name of the child or family member. In **Case H** though the child disclosed the commission of the offence to the school watchman and the teacher and they went to the police station, the FIR was registered in the name of the father. In **Case C**, the FIR was registered by the mother, though the police was informed about commission of the offence by a resident of the building in which the child resided. In the Mumbai cases, it is only in **Case F** that the neighbour registered the FIR as the 14-year-old had no parental support in Mumbai, and the ‘aunt’ with whom she resided was an abettor to penetrative sexual assault. In **Case 5**, a stranger who witnessed the offence, registered the FIR.
11. In Delhi, the CWC has facilitated the registration of FIR. In **Case 8**, the CWC registered the sexual offence against a father, as also deposed before the Special Court. In **Case 21**, the child was produced before the CWC, who directed registration of FIR.
12. The defence attempts to portray foisting of a false case on the ground of enmity or displeasure between the accused and the child’s family or the first informant. In **Case 5**, the accused claimed that the first informant “had called him to clean his car and as accused did not obey his directions he has been falsely implicated in this case.” The Special Court when convicting the accused observed, “There is nothing to indicate that he had any ill will or malice to depose falsely against the accused.” In **Case F**, the defence cast aspersions on the child’s character; “...Accused No.2 went to Lucknow for 8 days. When returned she found the victim with makeup like lipstick, powder, visiting (first informant’s) house where there was 20 years old boy” and “...Accused No.2 scolded the victim for having love affair with (first informant’s) son.”
13. Where an FIR is registered against a family member, the first informant and the child subsequently turn hostile. In **Case K**, the mother of the child registered an FIR against her brother (child’s maternal uncle) that “he caught hold her hand. He pulled her, took victim girl near him and touched her body.” The police also recorded the statement of the child. During trial, both the informant and the child were declared hostile as they only admitted to the accused having verbally abused and slapped the child under influence of liquor. In **Case 21**, despite support to the child, she turned hostile after registering an FIR against her father for repeated penetrative sexual assault.

PART B

Mandatory Reporting

The POCSO Act incorporates provisions regarding mandatory reporting for the first time in child-related legislation. Mandatory reporting punishes a person who has knowledge of commission of the offence, but does not report the same to the police. Under the POCSO Act, “Any person who fails to report the commission of an offence...shall be punished with imprisonment of either description which may extend to six months or with fine or with both.”⁵ The punishment is more stringent if such non-reporting is by “Any person, being in-charge of any company or an institution...in respect of a subordinate under his control”.⁶ This provision applies to schools and child-care institutions. The POCSO Act obligates “personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities” to inform the police of “coming across any material or object which is sexually exploitative of the child (including photographic, sexually-related or making obscene representation of a child or children) through the use of any medium”, and the failure to do so is an offence.⁷

Mandatory reporting is a contentious issue, and groups in favour as well as against the provision have strong views, discussed briefly in Chapter 3.

In 95% of the 21 disposed cases in Mumbai and 90% of the 21 randomly selected disposed cases in Delhi, it was the child, parent, family member or relative who registered the FIR.

In **Case F**, the neighbour registered the FIR upon disclosure by the child. In **Case G**, the two women to whom the disclosure was made took the child to Dadar railway station, and contacted the NGO “YUVA Childline”, whose social workers facilitated the registration of an FIR, and also testified before the Special Court. In **Case H**, the child informed the school watchman, who informed the teacher, who informed the father, who registered the FIR. Though the FIR was registered by the father, the school’s staff showed their willingness to engage in the legal process by taking the child to the police station. In **Case S**, upon disclosure the teacher took the child to the spot where the child claimed the offence occurred. In **Case O**, strangers who heard the boy shout, took him and the accused to the police station. It is hard to presume that such reporting /facilitation is due to fear of punishment, and not out of concern for the child.

The only case in Mumbai where reporting to the police could be due to compulsion is **Case U**, where a 15-year-old girl sought treatment from a hospital due to bleeding injury on her lower lip as a result of being slapped by the accused. The police “received message from the hospital that one girl child suffered sexual assault and admitted in the hospital. He rushed to the hospital, recorded her statement and treated it as an FIR.” The girl did not come to court at the time of trial; “At the outset it be noted that the prosecution could not bring before the Court the victim who was allegedly sexually assaulted by the accused. Thus, primary evidence as to occurrence of evidence is missing.” The evidence of the Prosecution witnesses were found to be “totally contradictory to each other”, and the accused was acquitted.

Case 21 from Delhi is most thought-provoking. A child disclosed to a trainee teacher, the commission of sexual offence at the hands of the father over a period of time. The child was provided with the support of an NGO (HAQ), who counselled the child and her mother. Sometime thereafter, the child sought support to

register an FIR, but her mother was reluctant. At the police station, the NGO representatives spoke to the mother “in a separate room to understand her level of information about the sexual abuse by her father. She did admit about the inappropriate behaviour of her husband and said that she had reminded (her husband)⁸ to keep away from her daughter. She insisted that she will take the girl to home. (The mother)⁹ was still not ready to lodge the complaint besides the financial support they provided for continuation of education and other needs of her four children. Ultimately, the mother approached the CWC, who placed the child in a Children’s Home and directed the registration of an FIR. In spite of the counselling and support provided to the child and mother, the time spent ruminating prior to registration of the FIR, the involvement of the CWC, and the child’s placement in a safe place, the child turned hostile, and the father was acquitted. It is important to note that the child had been released to the care of her mother prior to her testimony. “Perusal of the file reveals that PW3 prosecutrix ‘D’ is the only star witness of this case but she has turned hostile and has not supported the prosecution case. She has stated that she was having male friends in her class and her father was not liking her talking to them and for this reason he used to beat her. On 10.04.2013, the accused had beaten her up due to which she left the house in anger whereupon her father had lodged a complaint of missing in PS Kailash Colony. In retaliation, she has lodged this false complaint against her father and that her father has not done any wrong act with her.” The hesitation of the child to initiate action against her father is reflected in the deposition of the trainee teacher (PW2) - “Prosecutrix ‘D’ was too reluctant to take any legal action against her father at that time as she was worried about the family and thought that such an action would bring a bad name to the family.” PW2’s evidence was not considered as she was not brought to court for cross-examination.

Dilemma of Reporting Child Sexual Abuse

FACSE and HAQ have handled cases of child sexual abuse where they have observed that registering an FIR may not always be in the best interest of a particular child, and other alternatives may work better, such as, empowering a child through counselling to identify, negotiate and claim safe spaces; facilitating engagement of support structures within the family and community; trauma healing and therapeutic sessions. A Judicial Officer interviewed in Delhi, when referring to incest cases, observed, “The challenges in dealing with such cases are more at a social level.”

Eight adult survivors were interviewed in Delhi by HAQ in the course of this study. All of them had been subjected to sexual abuse as children multiple times, and none reported it to the police or sought legal action against the perpetrator(s) at any point of time. The common thread in all these cases is that the fear of not being believed, social stigma, protecting family from dishonour or pain, confusion and self-blaming held them back from disclosure for many years.

Voices of Adult Survivors

Male survivor, abused twice, once at the age of 11 years during a cricket camp and the second time at the age of 16 years while hitchhiking: “In both the cases there wasn’t any disclosure. Neither to my family nor the police. I was confused, more than being scared... For a very long time I thought maybe I was at fault, maybe I had given some signals... I have been visiting a counsellor for quite some time now. The counselling helped... The reason that I decided to speak about it now is because, I don’t consider it a personal tragedy any longer. However, I am still not very open to the idea about telling my parents. It’s in the past now.”

Female survivor abused thrice at different ages by different people - a peer at school when she was in third grade, 21 year old son of manager of day boarding facility she attended when she was in fourth grade, and by her own grandfather when she was 18 years old: "I didn't disclose this incident to anyone as I was scared of my parent's reaction... After about 12 years of the second incident, I got the courage to disclose it to my mother... The third time it was my own grandfather who had also been raping my mother since her childhood... I didn't know whom to talk to about this, since my mother avoided this conversation... Due to my family's non-supportive behaviour, I was made to feel as if I am at fault... I maintain a distance from both friends and family. I am slowly trying to come out of it but it haunts me... I am presently seeing a counsellor as I am extremely agitated within, suffering from depression, and have trust issues."

Female survivor who faced repeated sexual abuse from her cousin, who was 21 years old when he first raped her at the age of 7 and continued the abuse till she mustered courage to put her foot down at the age of 13: "One day, when I was 19, I found out that he died in a car crash. I was glad that he died. We all know sexual abuse isn't uncommon. What then stops us from speaking about it, from sharing our pain even with our friends and family? Is it society that tells you it is YOUR job to make sure that this doesn't happen to you and if it does, you must have invited it, even if you were a child? Or is it the fear of being attacked by the so-called protectors in our home and our world? Or perhaps the fact that we are told from a very young age, that the family's 'izzat' (honour) or reputation is something we women are meant to carry on our shoulders. I don't know which of these is the culprit or if it is all of these things... It isn't my shame! It sounds very simple when I say that, however, it was a long, hard road to the understanding of this simple fact... Anyone who has faced sexual assault would probably understand the pain of the loneliness that this unreal 'shame' traps us survivors in... I had ended up internalising the guilt and the shame, and for a couple of years believed that it happened and lasted that long because I didn't do anything to stop it and somehow, it was all my fault."

Female survivor, sexually abused by an uncle for three years starting in second grade and then by a neighbour when she was in seventh grade: "... as kids when the incidents take place inside the family, it becomes difficult to distinguish between abuse and affection... I did not complain. Since that had happened with me before, I thought it was the way elders express their affection... When I grew up a little I realised that I was being abused all throughout... I felt guilty for enjoying the abuse and how could I be so stupid to not understand it wasn't affection... I wanted to talk about this issue but I could not speak to my mom about this since I was scared that she would beat me and not believe me... Since I come from a very conservative background and my parents aren't very educated I didn't know whom to talk to... The counsellor helped me a lot and that is why I am able to talk about my problem today."

Female survivor who was repeatedly abused by a house help for months when she was five years old: "I was being abused right under my parent's nose by the house help and they couldn't figure out... For a long time I felt really sorry for myself and extremely guilty that I had let him do this to me. I couldn't have disclosed the matter. What would I have told my parents? That 'bhaiya'¹⁰ did this to me? Would they have believed me? They might have....I don't know, I can't say."

Male survivor sexually abused when he was in fourth grade by the driver hired by the family and then by the liftman in the building where he used to go for tuitions in ninth grade: "I was so embarrassed... This became a regular affair and I started feeling awkward and somewhat like a loser... I never really

directly disclosed these episodes to anyone. I did drop hints though and my teacher and the watchman picked them up pretty well. However, I never spoke to my parents about this... I have this feeling that may be sometimes I appear as someone who is homosexual. I don't know why, but it's awkward. To be honest, I can't explain what I feel."

Increase in Reportage of Sexual Offences against children

Data from *Crime in India* shows how reporting of cases of child sexual abuse has been rising even before the POCSO Act and the provision of mandatory reporting – 2,113 FIRs of child rape were registered in 2001; 2,532 were registered in 2002; 2,949 in 2003; 3,542 in 2003; 4,026 in 2005; 4,721 in 2006; 5,045 in 2007; 5,446 in 2008; 5,368 in 2009; 5,484 in 2010; 7,112 in 2011; and 8,541 in 2012. This was a jump of 400% over 12 years.

There was another sharp increase after the POCSO Act – in 2013, 12,363 FIRs of child rape were registered; in 2014, 13,766 FIRs of child rape were registered and 4,895 under Sections 4 and 6 of the POCSO Act; in 2015, 10,854 FIRs of child rape were registered and 8,800 under Sections 4 and 6 of the POCSO Act; in 2016, 19,765 FIRs were registered under Sections 4 and 6 of the POCSO Act / Section 376 IPC. What is the reason for increase in reporting to the police after the POCSO Act? Is such increase due to the provision of mandatory reporting? A study conducted by the *The Hindu* newspaper in Delhi attributes such increase to the raising of the age of consensual sexual activity. The study showed that in 2013 out of the 460 cases that were fully tried, 189 cases (40%) related to consensual sexual activity. Out of these 189 cases, 174 cases (92%) were those of elopement, and in 107 of such cases (64%), the female 'complainant' deposed that she was in love with the accused. Out of 583 cases examined, in 123 cases (21%) the female 'complainant' could not be found or did not testify or turned hostile. The findings of the study were published in *The Hindu* edition of 31 July 2014 and 1 August 2014, under *Young love often reported as rape in our 'cruel society'* and *Rape cases: Scripted FIRs fail court test*, respectively.

Findings

1. Persons other than family members / relatives too have acted in a most responsible manner when a child has disclosed the commission of a sexual offence. It is not the fear of punishment for non-reporting that has made them do so.
2. Registration of FIRs regarding sexual offences committed against children was rising even before the POCSO Act. This could be due to increasing awareness of the issue among the public and enforcement agencies.
3. The sharp increase in registration of crimes of sexual offences against children may be attributed to factors other than mandatory reporting, such as sexual activity that was earlier not criminalised under law; support provided to the child and family when journeying through the criminal justice system; and acknowledgement of significance of child protection.
4. Judgments of the Special Courts have been disparate in cases where children have registered FIRs or deposed against their father. In **Case 17**, the father was convicted despite the child turning hostile, whereas in **Case 21**, the father was acquitted on the child turning hostile. In **Case 8**, where the FIR was registered by the CWC, the father was convicted on the child's evidence.

5. Cases in which registration of FIR may be attributed to mandatory reporting have not resulted in successful prosecution due to the child's absence or turning hostile.
6. Further, in the light of the narratives of the eight survivors above, does the provision of mandatory reporting require a rethinking? These survivors neither then nor today saw legal action as an option. Their dilemmas and apprehensions on sharing and reporting the abuse clearly point to the need for engaging with parents as much as children. Psychosocial support to enable children's emotional healing is crucial, which in turn may overcome their apprehensions of 'reporting'. Their voices also suggest that the legal obligation of 'reporting' can best be met when 'reporting' becomes a 'social norm', and their fears, especially of social stigma, are addressed.
7. The inability of the justice delivery system to respond to this dilemma and apprehension is one side of the coin. The other side is the subjecting of the child to further trauma during the different stages of a legal proceeding, particularly when the support infrastructure is not established nor human resources appointed. Should every child compulsorily be subjected to such treatment even if it is not in her /his interest?
8. Instead of incorporating provisions that compel registration of FIR under the threat of punishment, should not there be greater focus on encouraging voluntary help seeking, to ensure that the injury and trauma caused to the child are suitably treated, that the child is in a safe place, that the child is assured of support through the family/ community? Should not the focus be on creating an environment whereby the child/ child's family recognise the significance of registering an FIR?

Recommendations

- i. The Ministry of Women and Child Development, Government of India, should urgently facilitate a debate about the effectiveness of mandatory reporting.
- ii. Victims should have access to voluntary help-seeking, without the support structure or service provider(s) fearing punishment due to the mandatory reporting provision.
- iii. The state and its machinery should be pro-active in creating an environment where the child/ child's family is encouraged to register an FIR– establish the infrastructure, appoint human resources, and follow the child-friendly procedures as envisaged under the POCSO Act; assure the child of relief and rehabilitation by providing timely compensation; and other such measures.
- iv. The state must make "a concerted allround effort to raise public awareness, point out the ill effects and gradually bring about social transformation."¹¹ Setting up monitoring mechanism stipulated under the Integrated Child Protection Scheme (District Level Child Protection Committees, Block Level Child Protection Committees and Village Level Child Protection Committees in rural areas and Ward Level Committees in urban areas) could ensure transformation of societal attitudes and form a protective environment for children. It is only when the experiences of social stigma and re-victimisation are successfully addressed that a child and child's family may unhesitatingly register an FIR. Towards this end, the NCPCR and its State counterparts also have an important role to play.

Endnotes

1. Maternal aunt.
2. Wrong acts.
3. RAHI Foundation, *Voices from the Silent Zone*, Section 4: Disclosure, 1998; pg. 23.
4. *State of Punjab vs. Gurmit Singh*: (1996) 2 SCC 384.
5. Section 21 (1) of the POCSO Act.
6. Section 21 (2) of the POCSO Act.
7. Section 20 of the POCSO Act.
8. The judgment mentions the name of the child's father, it is not revealed to protect the child's identity.
9. The judgment mentions the name of the child's mother, it is not revealed to protect the child's identity.
10. A common term used in Hindi to refer to or address a male meant to be in a position of respect by virtue of age / relationship / capacity to assist or help in any way.
11. Revised Integrated Child Protection Scheme of the Ministry of Women and Child Development, Government of India.

Bail

This chapter examines the manner in which the Special Court deals with bail applications filed by those arrested for offences under the POCSO Act. The questions important here are – (i) Are Special Courts and/or investigating agencies considering the nuances of a child’s case and dealing with bail applications under the POCSO

Act differently from those filed in other matters? (ii) Are Special Courts seeking the assistance of support person and/ or a child’s lawyer when considering a bail application? (iii) Are the peculiarities of the situation of a child kept in view when stipulating the conditions of bail?

The POCSO Act acknowledges that any sexual offence committed against a child is a serious offence, and therefore treats such offences as non-bailable. Whether a sexual offence committed against a child is bailable or non-bailable is not laid down under the POCSO Act, hence, the First Schedule (Classification of Offences) – Part II (Classification of Offences Against Other Laws) is applicable, namely, an offence is non-bailable if punishable with imprisonment for three years and upwards. All sexual offences under the POCSO Act are non-bailable – the punishment for most such offences extends to imprisonment beyond three years (Sections 4, 6, 8, 10 and 14), and under Sections 12 and 15, with imprisonment “which may extend to three years”.

The POCSO Act acknowledges that any sexual offence committed against a child is a serious offence, and therefore treats such offences as non-bailable.

Bail Status in All Cases

Table 7.1 Bail Status in All Cases

Bail status	Delhi		Mumbai	
	Total cases	Percentage	Total cases	Percentage
Granted	820	76	85	62
Rejected	192	18	51	37
Dismissed as withdrawn /in default	67	6	1	1
Total	1,079	100	137	100

- Information on bail was available for 1,216 cases —1,079 in Delhi and 137 in Mumbai.
- More bails were granted than rejected in both Delhi and Mumbai.
- Bail was granted in 820 cases (76%) in Delhi and 85 cases (62%) in Mumbai.
- In Mumbai, in 37% cases the bail applications were rejected, whereas in Delhi, only 18% were rejected.
- In 67 cases (6%) in Delhi and one case (1%) in Mumbai, bail applications were dismissed as withdrawn or dismissed for default. A bail application is generally withdrawn when the accused fears rejection and hopes for another opportunity to file a fresh bail application before the same court. In appropriate cases, courts may permit an accused to withdraw a bail application, with liberty to file a fresh one if the trial does not begin or is not concluded within a period mentioned in the order. Where the accused's lawyer is not present in court to argue the bail application, it may be dismissed for default.
- In Mumbai, out of the 21 cases that were disposed of, bail had been rejected in 7 cases, granted in 7 cases and no information regarding filing of bail was available in 7 cases. In 2 cases out of the 7 cases where bail had been granted, the accused were not able to avail of the same. The seven accused regarding whom no information about bail is available were in custody on the date of judgment. Out of the 7 cases in which bail was rejected, five accused were convicted, and two were acquitted. Out of the 5 cases in which bail was granted, three accused were convicted, and two were acquitted. Both the accused unable to avail of the bail granted were subsequently acquitted.
- Generally, courts expedite trials of those in custody, but no such trend is noticed in the cases examined. In Mumbai, the trial completed in the shortest time (5 months) was where the accused was on bail, and the trial that took the longest (1 year 7 months), was where the bail had been rejected. From the 21 disposed cases in Mumbai, trial in respect of 8 cases were completed within the stipulated period of 1 year – ranging from 5 months to one year. In 4 out of these 8 cases (50%), the accused were on bail; in one case (12.5%), bail had been granted, but the accused was unable to avail of the same; in 3 cases (37.5%), bail was rejected. In 13 cases, trial was completed between 1 year to 2 years – ranging from 1 year 1 month to 1 year 7 months. In 2 cases out of these 13 cases (15%), the accused were on bail; in one case (7.5%), bail had been granted, but the accused were not able to avail of the same; in 5 cases (38.5%) bail was rejected.

Analysis of Status of Bail by Nature of Offence

To analyse the status of bail for different types of sexual offences, information was available for 492 cases in Delhi and 133 cases in Mumbai, and unavailable for the remaining.

Table 7.2 Bail Status by Nature of Offence – Delhi (Information available for 492 cases)

Nature of Offence	Bail			Total
	Granted	Rejected	Dismissed as withdrawn / in default	
Penetrative sexual assault (PSA)	48	29	20	97
Aggravated penetrative sexual assault (APSA)	62	65	14	141
Sexual assault (SA)	90	13	4	107
Aggravated sexual assault (ASA)	54	13	3	70

Nature of Offence	Bail			Total
	Granted	Rejected	Dismissed as withdrawn / in default	
Sexual harassment (SH)	62	8	2	72
Attempt to PSA	2	0	1	3
Attempt to SA	1	0	0	1
Attempt to ASA	1	0	0	1
Total	320	128	44	492

Table 7.3 Bail Status by Nature of Offence – Mumbai (Information available for 133 cases)

Nature of Offence	Bail			Total
	Granted	Rejected	Dismissed as withdrawn / in default	
Penetrative sexual assault (PSA)	19	12	1	32
Aggravated penetrative sexual assault (APSA)	9	3	0	12
Sexual assault (SA)	22	4	0	26
Aggravated sexual assault (ASA)	1	0	0	1
Sexual harassment (SH)	5	4	0	9
Multiple offences	27	26	0	53
Total	83	49	1	133

- Though granting and rejecting of bail depends on the facts and circumstances of each case, the figures are worrisome.
- In Delhi, bail was granted in 48 out of 97 (49.5%) cases of penetrative sexual assault, while in Mumbai the corresponding figure was much higher, with bail being granted in 19 out of 32 (59%) cases of penetrative sexual assault. Even in cases of aggravated penetrative sexual assault, the proportion of granting bail was significantly high – 62 out of 141 (44%) cases in Delhi and 9 out of 12 (75%) cases in Mumbai. This means, even in grave cases of sexual offences the Special Courts have released the accused on bail.
- The POCSO Act has acknowledged that cases of sexual offences without penetration are a social crime and traumatic to the child, hence the creation of a distinct offence of ‘sexual assault’. It was a pleasant surprise to notice that the legislature’s intent has been respected by the investigating agencies. In Delhi, out of 824 cases, 226 (27%) were those of sexual assault and aggravated sexual assault, and, in Mumbai, out of 152 cases, 33 (22%) were of sexual assault and aggravated sexual assault. However, bail data shows that the Special Court is not treating cases of sexual assault with the seriousness they deserve. Out of 107 sexual assault cases in Delhi, in 90 cases (84%) bail was granted, while in Mumbai, bail was granted in 22 out of 26 (85%) cases of sexual assault. Bail was also granted in 54 out of 70 (77%) cases of aggravated sexual assault in Delhi and in the lone case of aggravated sexual assault in Mumbai.
- Out of 133 cases in Mumbai, only 9 (6.8%) were of sexual harassment. In Delhi, the numbers were higher - 72 out of 492 (14.6%). It is noticed that in Mumbai, bail was granted in 5 out of 9 (56%) cases of sexual harassment, whereas in Delhi it was granted in as many as 62 out of 72 (86%), indicating

a differential approach on the part of the Special Courts in Delhi and Mumbai. The number of cases of sexual harassment before the Special Courts was higher in Delhi, and the rate of granting bail in such cases was also higher. This makes one feel that Special Courts tend to normalise inappropriate sexual behaviour when a sizeable number of cases, which they believe are not of a serious nature, come before them.

- In every case in Mumbai where the father was the accused, bail was rejected on account of the accused being in a position of dominance, whereas in Delhi the situation has been very different. Out of 80 cases where father was the accused and information on bail was available, bail was granted in 38 (47.5%) cases.
- In Mumbai, from the 21 disposed cases, 4 (19%) cases (**Case A**, **Case B**, **Case E** and **Case J**) related to romantic relationship, out of which bail was rejected in one case (**Case B**) that ended in conviction. Out of the 3 cases that ended in acquittal, bail was granted in one case (**Case E**), and in 2 cases (**Case A** and **Case J**) the accused were in jail on the date of judgment – one of them remained in custody for a period of 1 year 10 months (**Case A**) prior to acquittal. In **Case J**, the accused was granted bail, but was unable to benefit from it.
- In Delhi, from the 21 disposed randomly selected cases, 2 (10%) were of romantic relationship (**Case 2** and **Case 13**). In both the cases bail was granted.
- The Special Court in Mumbai rejected bail in a romantic relationship where a child had been born, and the DNA Report, “prima facie, shows that the applicant / accused is a father of baby girl delivered by the victim” (**Case B**). Further, what also seems to have affected the court is that the child was half the age of the accused.

Reasons for Granting or Rejecting Bail and Conditions Imposed

Common Reasons Cited by the Special Courts while Granting Bail

- Statement of the child under Section 164 CrPC has been recorded.
- On the basis of the child’s statement recorded under Section 164 CrPC.
- Nature of allegations of offence is not grave.
- Testimony of the child has been recorded.
- On the basis of the child’s testimony.
- Quashing petition moved in the High Court on behalf of the child and the accused.
- Interim bail converted into bail.
- Young age of the accused.
- Prolonged period of detention of the accused.
- Child turned hostile.
- Child/complainant has no objection to bail being granted.
- Chargesheet filed.
- Accused and prosecutrix have gotten married / intend to get married.
- Absence of criminal antecedents of the accused.
- In view of the MLC report.
- On the facts and circumstances of the case.

There have been instances where these grounds seem inappropriate and inexplicable. For example, when a 14-year-old boy complains of the accused having “taken the victim in a lift and there he had touched his penis and started feeling his body also”, the Special Court has considered the custody of the accused for mere 4 days as an important factor at the time of granting bail.

Different Approaches of the Special Courts to Bail for Romantic Relationship

- A Special Court in Delhi granted interim bail for a period of seven days subject to the condition that during the period of interim bail the accused shall perform *nikah* (marriage) with the prosecutrix and then surrender with evidence of the marriage.
- In another case, the Special Court imposed multiple conditions -- along with furnishing a personal bond and surety of a particular amount, the court laid down the following conditions:
 - The accused shall not leave Delhi without the prior permission of the Court.
 - Accused shall appear before the SHO of the concerned police station on every Saturday between 4 PM and 5 PM.
 - Accused shall not change his address without intimating the SHO in advance in writing.
 - Accused shall furnish his contact number and address to the SHO within seven days from the date of release.

Common Reasons Cited by the Special Courts while Rejecting Bail:

- On the basis of the child’s statement recorded under Section 164 CrPC.
- On the basis of the child’s testimony.
- Chargesheet not yet filed.
- Charges not framed.
- Gravity of allegation of offence.
- Accused is a repeat offender.
- Child / material witnesses yet to be examined.
- Young age of the child.
- Relationship between the prosecutrix and the accused.

Conditions of Bail Imposed by the Special Courts

While the specific circumstances of each case vary, the general conditions on which bail was granted to the accused were found to be as follows:

- On furnishing a personal bond ranging from INR 10,000 to INR 40,000, with one or more surety of the like amount.
- On furnishing a personal bond ranging from INR 10,000 to INR 30,000, without surety.
- Accused should not threaten or pressure the child, or misbehave with the child in any manner whatsoever.
- Accused should stay away from the locality where the child resides until trial is completed.
- Accused shall not try to contact the prosecutrix and her family members.
- Accused shall not leave the jurisdiction of the court without prior permission of the court.
- Accused “shall not change his residence”.

- Accused should “attend the court on each date of hearing”.
- Accused “shall join the investigation”.
- Accused should “not tamper with the evidence”, or should not “intimidate the witnesses”, or should not “overawe the witness and try to tamper the evidence”.
- Accused should not “directly or indirectly make any attempt to threaten any prosecution witness and shall not tamper with the prosecution witnesses”.
- Accused should not “commit any attempt to delay the trial”.
- Accused should “cooperate with the Court” in expeditious disposal of the trial.
- Accused should “report at the concerned police station on the two stipulated days every week”.
- Accused should “not commit the same offence again”.

Anticipatory Bail

Section 438 CrPC (Direction of grant of bail to person apprehending arrest) deals with anticipatory bail. Bail prior to arrest may be granted in certain situations.

The Special Court in Delhi granted anticipatory bail to the mother of a child in conflict with the law, alleged to have committed penetrative sexual assault on a 12 year old: “...considering the facts and circumstances of the case, the fact that the applicant is a widow, aged 52 years, and has no role in commission of alleged offence”, on the condition that she will not tamper with the evidence or try to intimidate the witness, shall not leave the jurisdiction of the court and shall join the investigation. The minor accused was treated as an adult and placed in judicial custody for more than a month before being granted bail. Such placement of a child in conflict with the law by a Special Court is contrary to the JJ Act and the POCSO Act [Section 34 (1)]. Later, the accused’s case was transferred to the JJB.

Bail Granted Prior to Filing of Charge Sheet

In several cases, Special Courts in Delhi granted bail in serious sexual offences even before the chargesheet was submitted, without assessing the implications of this on the child.

Bail was granted prior to chargesheet having been filed in 136 out of 492 cases (28%) in Delhi. Twenty-six out of these 136 are cases of penetrative sexual assault or aggravated penetrative sexual assault (10 cases registered under Section 4 and 16 cases under Section 6 of the POCSO Act). Four out of the 10 cases of penetrative sexual assault, were cases of romantic relationship – in two of such cases the girls were aged 16 years, and in the other two cases, they were held to be above 18 years. In cases of romantic relationship, bail was mostly granted on the ground that the “prosecutrix intends to marry the accused” or “having regard to marriage between the prosecutrix and the accused”. An additional ground for those held to be above 18 years is: “Having regard to ... the documents of age proof”. In one case, bail was granted because the petition for quashing of FIR was pending before the High Court.

An Example of Anticipatory Bail in POCSO cases

Anticipatory bail granted to the mother of a minor accused alleged to have committed penetrative sexual assault on a 12 year old, “considering the facts and circumstances of the case, the fact that the applicant is a widow, aged 52 years, and has no role in commission of alleged offence.”

Forty-four cases where bail was granted prior to the filing of chargesheet related to sexual assault and aggravated sexual assault (32 cases registered under Section 8 and 12 cases under Section 10 of the POCSO Act).

An example of a case where bail was granted prior to submission of chargesheet: The matter related to the commission of aggravated penetrative sexual assault on a male child of 14 years – “per the allegations made in the FIR by the child victim that he was taken by the accused in his godown for the purpose of employment and there when the child was asleep, accused had committed sexual intercourse with the child victim”. Bail was granted “in the facts and circumstances, having regard to the nature of allegations and period of custody undergone by accused”. At the time of granting bail, the Special Court observed that the investigation was almost complete and that the child’s statement under Section 164 CrPC denoted that he had falsely implicated the accused. It is important to note that the FIR was registered on 21 July 2013 and bail was granted less than a month thereafter, i.e., on 17 August 2013. Also, the investigation was not near completion at the time of granting bail - chargesheet was filed on 13 February 2014, i.e., 6 months and 12 days after grant of bail. In view of the employer-employee relationship, should not further scrutiny have been made to ascertain whether the child was under pressure when making his Section 164 CrPC statement?

The suggestion is not that Special Courts should not grant bail in any case prior to the chargesheet being filed, but bail should be granted considering the facts and circumstances of each case. For example, in cases of ‘romantic relationship’, incarceration is unwarranted –prior to filing of chargesheet, the Special Court in Delhi has granted bail in 3 cases of penetrative sexual assault (out of 4 such cases) and in 6 cases of aggravated penetrative sexual assault (out of 12 such cases) in which ‘romantic relationship’ is clearly made out. In another 2 cases of aggravated penetrative sexual assault, bail was granted as the prosecutrix and her mother had no objection to it – these cases too probably fall within the category of ‘romantic relationship’.

Most surprisingly, the Special Public Prosecutor, prior to submission of chargesheet, places on record ‘No Objection’ to grant of bail. Out of 16 cases of aggravated penetrative sexual assault in which bail was granted, bail orders in 8 cases show that the Special Public Prosecutor had ‘No Objection’.

Below are a few examples of cases of aggravated sexual assault and sexual assault in which bail was granted prior to filing of chargesheet by the Special Courts in Delhi:

1. In a case of sexual assault, the bail order has noted that “the Addl. P.P. concedes that... there is no allegations of penetrative sexual assault”.
2. In another case of sexual assault committed against an 8-year-old girl by her father, bail was granted because “the mother of the prosecutrix provided no objection”. Bail was granted on the condition of furnishing a personal bond of INR 15,000 and that the accused shall not leave the jurisdiction of the court without prior permission of the court. So, the daughter may have continued to live in the same household with the alleged offender.
3. In yet another case of sexual assault committed against a 9 year old, the bail order has stated that the “complainant/mother of the prosecutrix submits that she has no objection”.
4. In a case of aggravated sexual assault (gang sexual assault), when two accused persons had kidnapped the child victim in a car and thereafter touched her with sexual intent, both the accused

got bail on the ground that in her Section 164 CrPC statement the “child victim has stated that she had herself taken the lift from the accused persons in a car”. The fact that a 14-year-old girl sought a lift may not amount to kidnapping, but it does make out a case of gang sexual assault.

5. An FIR was registered under Section 12 of the POCSO Act, but in her Section 164 CrPC statement, the 11 year old child had stated that “accused used to misbehave with her whenever she used to go to his shop by putting his hands into her clothes, by making her sit on his lap and by embracing her”. Despite the age of the child and her Section 164 CrPC statement, bail was granted prior to the submission of chargesheet.

The above five examples show that (i) the Special Public Prosecutors have not opposed bail in cases of sexual assault; (ii) the Special Courts have neglected to consider that a mother (wife of the accused) may be under the accused’s pressure; (iii) there have been instances where facts and/or law have been misapplied.

Findings

1. Absence of Legal Representation

Under Section 40 of the POCSO Act, “the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice”, and if they “are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.” Under Rule 4 (2) (f) of the POCSO Rules, the police at the time of registration of FIR should “inform the child and his parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer”.

In the 42 cases examined, study of bail orders and other court records reveal that children are not represented by a lawyer before the Special Court. Neither are children provided a lawyer at the police station. A child is entitled to legal representation at pre-trial and trial stage. In *Delhi Domestic Working Women’s Forum vs. Union of India* [(1995) 1 SCC 14], the Supreme Court has held, “The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim’s advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance.” The Supreme Court has also dealt with the significance of a lawyer at the police station level: “Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.” Further, the police have been obligated “to inform the victim of her right to representation”.

Prior to the POCSO Act, lawyers were engaged on behalf of children against whom sexual offences were committed. They were called, in common parlance, ‘watching advocates’, who were to act “under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments, after the evidence is closed in the case” [Section 301 (2) of CrPC].

Under CrPC, every accused has a right to be defended by a lawyer of his choice [Section 303], or “the Court shall assign a pleader for his defense at the expense of the State” [Section 304]. Criminal courts routinely provide State Appointed Lawyers to the accused; the same practice is noted in the Special Courts. In two of the 21 disposed cases in Mumbai (**Case H** and **Case S**), the judgment records that the accused were provided with State Appointed Lawyers, but in none of the cases, such lawyer was appointed for the child.

It is imperative for a child to be represented by a lawyer at the bail stage and the Special Court should ensure the same. Appointment of such lawyer ensures that the child’s interests are safeguarded, and her / his concerns are brought to the notice of the Special Court. A child’s lawyer should be provided an opportunity to put forth his / her views at the bail hearing, as also at the stage of imposing of conditions of bail. The Special Public Prosecutor may not be aware of the nuances relating to a particular case, hence the role of a child’s lawyer is crucial.

To ensure that a child has legal representation at the bail stage, it is suggested that notice should be given to the child, so that her / his interest is safeguarded. In fact, the Special Court should guarantee legal representation to the child, soon after the case is brought to its notice, through the District Legal Services Authority, if necessary.

2. Imposition of Conditions of Bail

The Special Courts may impose conditions while granting bail, but sometimes it is done routinely, without considering the peculiarities or nuances of a particular case. For example, the Special Court in Delhi granted bail to a father on certain conditions, which did not include ‘not to try to have any contact with the daughter’. It is necessary that the conditions imposed are appropriate to the circumstances of that case. For such purpose, the child’s lawyer or support person must be heard prior to imposing conditions of bail.

Further, if the accused flouts or misuses the conditions of bail by threatening or attempting to influence the child, the child is entitled to approach the court for cancellation of bail [Section 439 (2) of CrPC]. Often, a child may not have the resources to do so, especially when she/he is without family support, support person or legal representation.

It is imperative for a child to be represented by a lawyer at the bail stage, and the Special Court should ensure the same.

3. Failure to Appoint a Support Person

Under Rule 4 (7) of the POCSO Rules, the Child Welfare Committee “may provide a support person to render assistance to the child through the process of investigation and trial. Such support person may be a person or organization working in the field of child rights or child protection, or an official of a children’s home or shelter home having custody of the child, or a person employed by the DCPU.” The POCSO Rules permit the child to seek “the assistance of any person or organization” [proviso to Rule 4 (7)]. Upon appointment of a support person the police is required to inform the Special Court of the same [Rule 4 (9)].

It is the responsibility of the police to keep the support persons “informed about the developments, including the arrest of accused, applications filed and other Court proceedings.” [Rule 4 (11)].

Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act 2012 refer to a ‘support person’ as “a useful intermediary between the authorities and the child.”

None of the bail orders of the Special Court reflected the appointment of a support person. This could indicate any of the following: (i) the police do not inform CWC about the registration of an FIR under the POCSO Act nor produce the child before the Committee in appropriate cases [Rule 4 (3)]; (ii) the CWC is not deploying the provisions relating to support person or does not think it fit to appoint a support person; (iii) the child and parents or guardian or other person in whom the child has trust and confidence have not sought the assistance of any person or organization; (iv) the police are not informing the Special Court about appointment of support person [Section 19 (3)]; or (v) the Special Court is not engaging with the support person at different stages of the judicial process.

A support person portrays the circumstances of a child (family situation; vulnerabilities; relationship with alleged offender; etc.) to enable the Special Court to make a decision that is not detrimental to the interests or safety of the child. For example, a Special Court in Delhi, granted bail in a case of aggravated penetrative sexual assault of a three year old on the mother’s ‘no objection’. The court could have inquired to ascertain the reasons for ‘no objection’ as the child’s safety is the court’s main concern. Should there be a blanket acceptance of the ‘no objection’, even if given by a parent? A 3 year old may or may not be in a position to express her wishes, thus the support person plays a crucial role in assisting the court to discern the actual reason for ‘no objection’. Anyways, a child can only but benefit from the services of a support person.

The Special Court in Delhi granted bail before the chargesheet being filed in 2 cases of sexual assault, where the children were eight and nine years old, on the ‘no objection’ of the mother. In one of these cases, the accused was the father. The Special Court and the Special Public Prosecutor did little to ascertain the wishes or situation of the child. A support person would have enabled the Special Court to find out the views or situation of the child.

A child or a child’s family are fearful of the accused being granted bail as they wonder what ‘he’ will do when he comes out of jail. In one of the HAQ cases, the mother of a 7-year-old girl reflected her anxiety by repeatedly asking, “If he gets bail will he come out of jail? Does that mean he can go home?” They perceive release of the accused on bail as acquittal. It is necessary that a support person also explains the legal process to them, and assures them of legal recourse in the event of misuse of bail.

4. Investigating Agencies’ and Special Courts’ Inappropriate Application of the Provisions of the POCSO Act

Though the law regarding bail under the POCSO Act is same as that contained under the CrPC, the principles that govern its application are diverse. The *Statement of Objects and Reasons* of the POCSO Act states, “proposed to enact a self-contained comprehensive legislation *inter alia* to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process”. Hence, at all stages, including bail, the Special Court should make efforts to ascertain and ensure that

the “interest and well being of the child” is protected and enhanced.

Investigating agencies and Special Courts do not seem to be very familiar with the provisions of the POCSO Act, and/or are inappropriately applying the same. For example, aggravating factors against the accused have been perceived as mitigating factors when entertaining a bail application. Under the POCSO Act, sexual offences

committed by a “public servant” (Government employee) falls within the ambit of ‘aggravated’ form of such offence. Despite this, the relevant provision [Section 9 (c)] was not included in the chargesheet, which reflected sexual assault of a 10-year-old boy by a Government employee. Moreover, a Special Court in Delhi, while granting bail in that case, considered the argument of the accused of being a Government employee – such status was treated as a mitigating circumstance instead of an aggravating factor. The significance of a ‘public servant’ accused of committing sexual assault has been heeded by neither the investigating agency nor the Special Court.

Investigating agencies and Special Courts do not seem to be very familiar with the provisions of the POCSO Act, and/or are inappropriately applying the same.

In another example, in a matter relating to romantic relationship, where an offence of aggravated penetrative sexual assault was included in the chargesheet, bail was rejected on the ground that it is an aggravated form of penetrative sexual assault under Section 5 (l) - “whoever commits penetrative sexual assault on the child more than once or repeatedly”.

Recommendations

- i. A ‘child-friendly’ approach implies that the Special Court should innovate practices that provide insights regarding the situation of a particular child at the bail stage.
- ii. There should be minute scrutiny by the Special Court prior to granting bail so that the child’s interests are identified and safeguarded, and for such purpose it is essential that a child is represented by a lawyer and / or aided by a support person.
- iii. When a bail application is filed by the accused, the Special Court should inform the same to the child’s lawyer or support person or child’s family / guardian / person in whom the child has trust or confidence.
- iv. To guarantee legal representation to a child at all stages: (a) the police at the time of registration of FIR should inform the child and / or parent / guardian of the right to seek legal assistance through a private or a legal aid lawyer; (b) the Special Court should inform the child and / or parent / guardian of the child’s right to be represented by a lawyer; (c) if a child is unable to engage the services of a private lawyer, the Special Court should make available the services of a free legal aid lawyer –every Sessions Court must have a panel of lawyers attached to the Special Court to assign a lawyer as needed.
- v. The child should be heard, through a lawyer or support person, by the Special Court entertaining a bail application, with regards to the merits and the imposition of conditions of bail, if being considered.
- vi. The Special Court, on granting bail, should inform the child of the conditions of bail imposed, and her/his rights if the conditions of bail are flouted by the accused. In fact, the Special Court should include in the order that if any of the conditions are flouted, the bail may be cancelled.

- vii. In the absence of a support person, the Special Court should appoint one to ensure that the nuances of a particular case and the interests of a particular child are identified and considered when bail orders are passed.
- viii. The Special Court should, once a matter under Section 19 (6) of the POCSO Act is brought to its notice by the investigating agency, seek a report from the DCPU as to the present situation of the child - whether a child has the services of a support person, the particulars of such support person. If no support person has been appointed, the Special Court should call upon the DCPU to furnish the Special Court with the list of support persons and nominate an appropriate support person. As per the *Model Guidelines under Section 39 of the Protection of Children from Sexual Offences Act 2012* [clause 3.1], "The DCPU and the CWC shall maintain a list of persons / NGOs who may be appointed as support person to assist the child." The Special Court should fix a date for the support person to be present before the court, and on such date inform such support person of the child's right to legal representation, the child's right to make an application for compensation, etc. This appointment of support person should be completed before the Special Court takes any decision in the matter, including interim compensation, bail application, etc. Needless to say, the Special Court should ensure that the support person is acting in the interest of the child.
- ix. The police should include the appropriate substantive Sections of the POCSO Act in the FIR and chargesheet so that the gravity of the offence is revealed.
- x. The Special Court should not merely consider the bail application on the basis of the Sections contained in the FIR or charge sheet, but should inquire from the Special Public Prosecutor and IO as to what the investigation reflects or should ascertain the nature of offence from the charge sheet, respectively.
- xi. The Special Public Prosecutor / IO should, at the time of bail arguments, bring to the notice of the Special Court, the sexual offence alleged to have been committed as reflected through police investigation - applying an incorrect Section may result in inappropriate granting or denial of bail.



Child’s Evidence, Disposal, Acquittal / Conviction and Sentencing

A. Child’s Evidence

A child against whom a sexual offence has been committed is a crucial prosecution witness (PW), and the success or failure of the prosecution’s case depends on her/his evidence. Under Section 118 of the IEA, “All persons shall be competent to testify

unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or other cause of the same kind.”

The law does not stipulate any minimum age for deposition—the court is required to ascertain whether a particular child is competent to depose, and such competence may differ from child to child. For example, in **Case 6**, a Special Court in Delhi gives credence to the deposition of a three year old when convicting the accused— “The star witness of the prosecution is the prosecutrix herself who appeared as PW-4. Despite her tender age of about 3 years, she had been cogent and coherent in deposing that the accused, whom she addressed as ‘*Budhe*’ uncle’ and who lived in their lane, had taken off her underwear while she was playing”. Yet, in **Case 5**, the examination of a three year old was dispensed with “since the child on examination by the court in the presence of her mother barely told her name and could not tell even the name of her parents.” The accused was convicted in **Case 5** as the first informant had caught him red-handed in the act, and testified before the court about it.

The POCSO Act does not stipulate any minimum age for purpose of deposition—the court is required to ascertain whether a particular child is competent to depose, and such competence may differ from child to child.

In relation to age, the evidence of children as young as five years old (**Case P**), nine years (**Case C**), and 10 years (**Case H**) have been recorded by the Special Courts in Mumbai. The evidence of children of three years of age (**Case 6**), five years (**Case 15** and **Case 19**), six years (**Case 10** and **Case 16**), nine years (**Case 7**) and 10 years (**Case 4**) have been recorded by the Special Courts in Delhi.

In cases where the child had not deposed, the Special Courts in Mumbai dealt with such cases in a dissimilar manner. In **Case S** and **Case U**, the child's evidence was not recorded due to their unavailability at the time of trial. In **Case S**, the judgment reflects that PW1, the maternal aunt of the 12-year-old child, deposed "that the victim girl is missing. Her missing report was filed at police station. Police has searched her but she was not found." The Special Court observed, "the victim girl is missing and her whereabouts are not known. She was searched by the police officer, however, she was not found." In **Case U**, the judgment reflects, "At the outset it be noted that the prosecution could not bring before the Court, the victim who was allegedly sexually assaulted by the accused." In **Case S**, the accused was convicted, whereas in **Case U**, he was acquitted.

To ensure that all children are able to depose, the POCSO Act has provisions to facilitate the communication of a physically and/ or mentally challenged child with the police officer, the Magistrate [Section 26 (3)] and the Special Court [Section 38] – to provide the assistance of "a special educator or any person familiar with the manner of communication of the child or an expert in that field". The Act also provides for engagement of translator / interpreter to help the child.

Three of the cases in Delhi deal with a physically disabled child, where the Magistrate/ Special Court sought the assistance of an interpreter to enable the child to communicate. In *State vs. Dinesh Kumar*, the judgment discloses that "the prosecutrix 'M' was deaf and dumb" and that "statement under Section 164 Cr.P.C. of prosecutrix 'M' was got recorded by the help of translator." While examining 'M' as PW1, the Special Court observed, "The witness is deaf and dumb and the IO has arranged an interpreter Ms. Isha from National Institute of Ministry Hearing Handicap (NIHM) to assist in the recording of the statement of the witness. The interpreter states that the witness does not understand the entire sign language and is also illiterate but she can try to interpret the signs whichever she can gather. The mother of the prosecutrix / XXX² is also present and since she is well conversant with the sign language of the witness, who is her daughter, the statement of the witness is recorded with the assistance of mother of the prosecutrix as well as Ms. Isha, Interpreter." The prosecutrix with the help of such assistance was able to communicate that she was above 18 years of age and had willingly gone with the accused, whom she had since married.

In the other case, *State vs. Shaheed Ali*, the allegations against the accused were "of taking away physically challenged girl, who could not hear or speak, in a public park for committing sexual assault upon her." The child was eight years old. In this case, the Special Court provided assistance to the child to put her at ease for her deposition: "the victim child is deaf and dumb and is not able to depose anything. I have tried to talk to the girl child also with the help of her mother by way of signs but it appears that not only the help of an interpreter is required for recording her deposition but it will be appropriate that the child may be provided some counselling services as she appears to be overawed by the atmosphere of the court... in the meantime IO and SHO PS Vasant Vihar are directed to provide necessary counseling services to the girl child and to also arrange for an interpreter from some government institute so that with the help of interpreter the deposition of the girl child may be recorded." The judgment observed

that the child deposed with the help of her mother and support person. Further, “Prosecutrix as PW-5 by nodding her head and gestures confirmed that she was taken by the accused and was apprehended by the security guard.” The accused was convicted under Section 10 of the POCSO Act.

In the third case, *State vs. Anil Kumar*, the child’s disability is not known, but the same is reflected through the doctor (PW 5), who “has proved the disability certificate of the child”. The accused was the 16-year-old’s maternal uncle, later acquitted under Sections 6 and 8 of the POCSO Act after the child turned hostile.

None of the cases examined in this study deal with a mentally challenged child. The **Kalyani Sanstha case** reflects the role the courts can play to facilitate the deposition of a mentally challenged person. Though the trial in this case took place prior to the POCSO Act, it helps us understand the manner of recording a mentally challenged child’s police statement and testimony, and of weighing such child’s evidence, resulting in successful prosecution. Kalyani Mahila Balkalyan Seva Sanstha, a home for mentally challenged girls at New Panvel, district Raigad (near Mumbai), had 19 mentally challenged girls, whose medical examination revealed “that the girls were subjected to severe physical and sexual abuse.”³ The Bombay High Court had taken suo moto cognizance (Suo Motu - Public Interest Litigation No. 182 of 2010) of a news report in Mumbai Mirror in September 2010, which exposed “pitiable condition of the children in children homes in the State”⁴ of Maharashtra. Regional Committees were formed “to inspect the homes for mentally challenged children”.⁵ Inspection of Kalyani Mahila Balkalyan Seva Sanstha by such a committee, the Child Welfare Committee and others gave rise to suspicion of sexual abuse of the girls, which was confirmed on medical examination, and resulted in registration of FIR and investigation into the affairs.

The Investigating Officer was directed by the Bombay High Court (order dated 7 April 2011) to “ensure that victims are given assistance of support persons from out of members of CWC, Raigad and also Psychologist and Psychiatrist.” The assistance of experts was taken to enable the children to communicate. “The evidence on record indicates that since the children were mentally challenged and some were deaf and dumb services of PW6 – Dr. Archana Singh, Psychiatrist attached to the Government Hospital, Alibag, and PW7 Sunanda Tarte, who is a teacher having done her B.A. B.Ed. and special course for hearing impaired, were availed to record the statements of the said victim girls under section 161 and 164 of the Cr.P.C.⁶..... The testimony of PW6 and PW7 indicates that they had interacted with the girls including the victim girls PW17, 18 and 19 from the 12th April, 2011 to 18th April, 2011. They had tried to understand the sign language developed by the girls. They established a rapport with the victim girls and questioned them about the incident, they assisted the Investigating agency in recording their statements under section 161 and 164 of Cr.P.C.”⁷ The evidence of PW18, a deaf girl, was “recorded in sign language and with the help of the Interpreter and both these witnesses were administered oath.”⁸

The following was the response of the Bombay High Court to “the contention of the learned Counsel for the accused that the learned Judge had interjected and had asked questions to negate the pivotal answers elicited in the cross-examination of the witness”:⁹ “Suffice it to say that the Court has ample powers under Section 165 of the Indian Evidence Act to put any question to the witness to elicit the truth.¹⁰” Further, “Having regard to the physical, sexual and emotional trauma the victim underwent, the learned Judge had an onerous task of ensuring that the victim was able to understand the import of the questions asked by the defence counsel and that she was able to give correct answers. It has to be

borne in mind that the criminal trial is not a duel between the prosecution and the defence but as held by the Apex Court in **Ritesh Tiwari v. State of U.P. (2010) 10 SCC 677** 'every trial is a voyage of discovery in which truth is the quest'. The learned Judge therefore cannot be faulted for interjecting and asking or explaining the questions, the judge would have failed in her duty had she chosen to remain a passive or silent spectator."¹¹

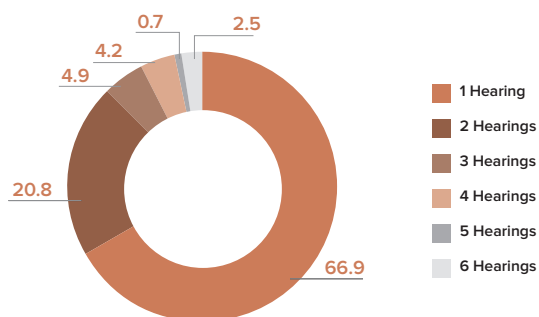
While weighing the evidence of mentally challenged children, the court observed, "Nonetheless, it has to be borne in mind that this witness, though a competent witness, was a mentally challenged girl with IQ level below the average. She was subjected to long drawn and strenuous cross-examination spilled over several days by battery of lawyers. It was virtually a battle between a mentally challenged girl and skilled lawyers...A plain reading of evidence of PW17 also indicates that this witness was subjected to repetitive questioning as to the details of the occurrence. It is evident that the witness was either utterly confused, nervous or anxious due to her mental disability coupled with dexterous cross examination or that she was frustrated because of repeated and long drawn strenuous cross examination by skillful defence lawyers, in unfamiliar and unfriendly courtroom environment. Under the circumstances we are not inclined to discard the evidence of this witness altogether but our endeavor is to scrutinize the evidence carefully and find out whether substratum of her evidence is consistent and credible and accept the part of the evidence which is found to be dependable."¹² Further, "In appreciating evidence of these witnesses, one cannot lose sight that they are mentally/ physically disabled. They were frightened and were under psychological pressure due to trauma and agony suffered at the hands of the accused. Under these circumstances, these witnesses could not be expected to give an accurate resume of the events. The minor discrepancies or inconsistencies in her evidence are but natural and the same does not vitiate the trial."¹³

Most importantly, the Bombay High Court called upon the State government to consider the State Level Coordinating Committee's *Guidelines for cases of sexual abuse/ assault/ sexual offences against mentally deficient children*, some of which are similar to the procedural provisions under the POCSO Act- the presence of a support person permitted while recording the statement of the MDC (Mentally Deficient Children); assistance must be made available of sign language experts, counselors, psychiatrists and a support person must be allowed to be present with the child, at the police station and Court; an endeavour must be made to commit such cases to the Court of Sessions expeditiously; the Legal Services Authority to provide such victims with a counsel; the Additional Sessions Judge/ District Judge shall maintain a panel of psychiatrists/psychologists and experts in sign language who could assist in recording the statement of witnesses as and when requested by the Sessions Court; the learned trial Judge may also consider the feasibility of examining the child through video conferencing or in the chamber so that the MDC victim is not intimidated.¹⁴

Time Taken for Recording Child's Evidence

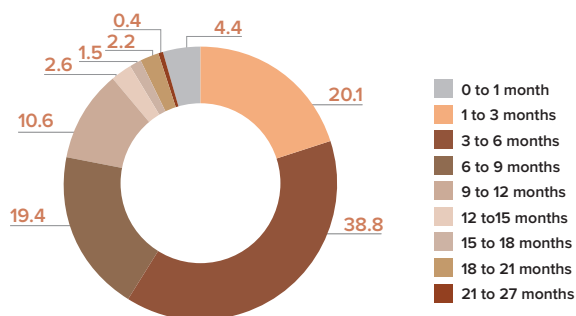
The reason behind setting up Special Courts is to provide speedy trial to the victims of child sexual abuse [Section 28 (1)]. To operationalise this provision, the "evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence" [Section 35 (1)]. For this study, information about the time in which the child's evidence was recorded was collated from the daily orders on the websites of the courts in Delhi alone, not in Mumbai as such information was not available from the courts' website.

Chart 8.1 No. of Hearings for recording victim’s testimony (in per cent)



There were 284 cases for which such information was available. Chart 8.1 shows that in Delhi, the children came to the Special Court for recording of evidence once to 6 times. Of these, in 66.9% of the cases children came to court only once, and in 12.3% of the cases, the child had to come to the court 3 to 6 times.

Chart 8.2 Time taken for recording the testimony of the victim (in per cent)



89.4% of children’s testimony was recorded beyond the period of 30 days, extending as far as 27 months.

In Mumbai, though the court’s website did not show the date on which the child’s testimony was recorded, it did show the date on which the Special Court took cognizance of the matter (First Hearing Date) and the date from which evidence was recorded (EVIDENCE). In 3 disposed cases, the website did not show the date on which ‘evidence’ was recorded. In not a single of the remaining 18 disposed cases was the evidence recorded within a period of 30 days of cognizance being taken-- the date on which the recording of evidence started ranged between 2 months 15 days to 18 months. Moreover, perusal of the judgments reveals that it is not always the child whose evidence is recorded on the first date when the matter is listed under the caption ‘EVIDENCE’ - only in 8 cases has the child been examined as PW1 (**Case D, Case F, Case G, Case H, Case N, Case O, Case Q and Case R**); in 7 cases, the child has been examined as PW2 (**Case C, Case I, Case J, Case K, Case M, Case P and Case T**); in two cases, the child has been examined as PW3 (**Case A and Case B**); in two cases, the same cannot be ascertained (**Case E and Case L**) and in 2 cases, the child has not been examined (**Case S and Case U**).

Findings

1. Assistance of Translator, Interpreter and Special Educator

The POCSO Act has provisions to enable a physically or mentally challenged child to communicate at the police station, Magistrate and Special Court levels through the assistance of translator, interpreter or special educator. The aforementioned data denotes that the Special Courts in Delhi have provided the assistance of interpreters to physically disabled children. The Sessions Court in Mumbai too, though prior to enactment of the POCSO Act, has provided mentally disabled children with assistance of interpreters, as also mental health professionals, experts and support persons.

2. Child's Evidence Not Recorded within the Stipulated Time

A study of the Special Court orders in Delhi shows that in only about 11% of the cases is the child's evidence recorded within the period of 30 days from the date of cognizance. Speedy recording of the child's evidence plays a crucial role towards restoring the child to her/ his normal life, effective healing, uniting with family from a different region, continuation of education, etc, hence the courts should attempt to honour the time stipulation. The courts also do not record the reason for delay in recording the child's testimony as mandated under Section 35 (1) of the POCSO Act.

Child victims of sexual abuse need to overcome the trauma and heal quickly, and it helps if they can return to their normal life as soon as possible. Minimising the delay in a child's testimony becomes important from this perspective.

Recommendations

i. Child's Interest Paramount

A child should not be compelled to undergo unnecessary hardship, only to ensure successful prosecution, especially when it can be curtailed through linkages with the juvenile justice system. Concerns about the child's testimony in a case pending trial may hold back the child's restoration to the city/state where the family resides. After the CWC gets the home study report or the social investigation report, and finds the child's family fit to receive her/his charge, the child can be restored and measures taken to ensure the child's presence as required; linkages with the relevant CWC and District Child Protection Officer can be one such measure.

B. Disposal

Five Special Courts in Delhi took cognizance of 1,803 cases, whereas during the same period, 3 Special Courts in Mumbai took cognizance of only 154 cases. The rate of disposal and pendency in these courts is shown in Table 8.1.

Table 8.1 Pendency and Disposal Status

Case Status	Delhi		Mumbai	
	No. of Cases	Percentage	No. of Cases	Percentage
Disposed				
Acquittal	286	16	8	5
Conviction	79	4	13	9
Transferred to JJB	15	1	0	0
Other Disposal	52	3	0	0
Information Not Available	27	1	0	0
Pending				
Pending	1,344	75	133	86
Total				
Total Cases	1,803	100	154	100

A look at the status of the 1,957 cases in the Special Courts in Delhi and Mumbai indicates the following:

- Out of these, as on 31 July 2015, number of cases pending disposal was 133 (86%) in Mumbai and 1,344 (75%) in Delhi.
- Of the cases examined in Delhi, information of acquittal/ conviction was available for 365 cases— 286 out of 365 (78%) cases ended in acquittal. Of the cases examined in Mumbai, information of acquittal/ conviction was available for 21 cases— 8 out of 21 (38%) cases ended in acquittal.
- Convictions were higher in Mumbai (about 9%) than Delhi (4%).
- In Delhi, 15 cases (1%) were transferred to JJBs. No such information could be gathered from available court records in Mumbai.
- In 52 cases (3%), in Delhi, there was 'other disposal' in the form of closure because of 'death of the accused' or 'accused cannot be traced', 'cancellation of case' or 'FIR quashed by High Court', 'cognizance not taken under POCSO Act', and 'transfer to appropriate court' where the victim was found to be an adult. No such cases were noticed in Mumbai.

Table 8.2 Burden of Courts – Delhi

Year	Fresh Cases (As Per Date of FIR)	Pending from Previous Year	Total Cases (Fresh & Carried Forward from Previous Year)	Disposal During the Year	Caseload at the End of the Year
2012	28	0	28	0	28
2013	783	28	811	70	741
2014	732	741	1473	227	1246
2015 (as on 31 July 2015)	260	1246	1506	162	1344

Table 8.3 Burden of Courts – Mumbai

Year	Fresh Cases (As Per Date of FIR)	Pending from Previous Year	Total Cases (Fresh & Carried Forward from Previous Year)	Disposal During the Year	Caseload at the End Of the Year
2012	0	0	0	0	0
2013	12	0	12	0	12
2014	103	12	115	0	115
2015 (as on 31 July 2015)	39	115	154	21	133

Another enabling provision in the POCSO Act on speedy disposal of cases says, “The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence” [Section 35 (2)].

Out of a total of 1,957 cases, data for calculating delay in completion of trial was computed for 946 cases (870 from Delhi and 76 from Mumbai).

- Delay in completion of trial was observed in 682 cases from Delhi and Mumbai (72%).
- Only 28% of all cases completed trial within the stipulated timeframe.
- Mumbai recorded delay in 67 cases (88%) and Delhi in 615 cases (71%).

To get further insights on delay in trial, time taken for trial was calculated for all cases (acquittals, convictions and pending cases) in Table 8.4, and separately for the cases ending in acquittal or conviction in Table 8.5.

Chart 8.3 Delay in Completion of Trial

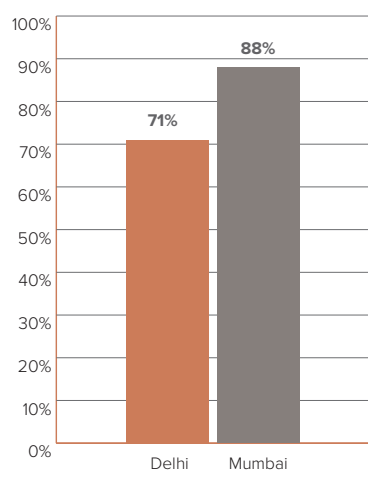


Table 8.4 Time Taken in Pending and Disposed Cases (as on 31 July 2015)

Time Taken in Relation to Stipulated Period of One Year From Date of Cognizance	DELHI				MUMBAI			
	Pending Cases	Disposed Cases	Total No. of Cases	Percentage	Pending Cases	Disposed Cases	Total No. of Cases	Percentage
Trial did not cross the One Year Period	835	255	1090	64	78	9	87	56.5
Trial Extended beyond One Year Period	509	106	615	36	55	12	67	43.5
Total Cases	1344	361	1705	100	133	21	154	100

Table 8.5 Time Taken in Disposed Cases

Time Taken from Date of Cognizance	DELHI		MUMBAI	
	No. of Disposed Cases	Percentage	No. of Disposed Cases	Percentage
Within 1 Year	255	71	9	43
Within 1 to 2 Years	97	26	12	57
More than 2 Years	9	3	0	0
Total Cases	361	100	21	100

- In 509 cases from Delhi and 55 cases from Mumbai, trial was pending beyond the stipulated period of one year from the date of cognizance.
- For calculation of time taken for completion of trial in disposed cases, only cases that ended in acquittal or conviction were taken into consideration. In 4 cases from Delhi, either the date of cognizance or the date of judgment could not be ascertained. Hence, information on time taken for completion of trial was calculated for 361 out of the 365 disposed cases from Delhi and 21 disposed cases from Mumbai.
- 12 out of 21 (57%) cases and 106 out of 361 (29%) cases disposed by Special Courts in Mumbai and Delhi, respectively, took more than a year for completion of trial.
- 9 out of 106 cases (8.5%) from Delhi took more than two years. No case in Mumbai took more than two years for disposal.

In **Case B**, involving a romantic relationship, FIR was registered on 2 December 2013 and cognizance was taken on 30 January 2014 and the accused was convicted under Section 6 of the POCSO Act on 27 August 2015. The time taken between cognizance and disposal was 1 year 7 months. There were 44 hearings from the date of cognizance till disposal – it is important to note that this matter was *High Court expedited time-bound*.

In **State vs. Dilip**, also a case of romantic relationship in Delhi, FIR was registered on 11 January 2013 and cognizance was taken on 18 September 2013, and the accused was acquitted of the charge of sexual harassment under Section 12 of the POCSO Act on 24 September 2015. The time taken between cognizance and disposal was 2 years and that from arrest was 2 years 9 months. It is important to note that during the period of two years the matter came up only on 13 dates.

Reasons for Delay in Completion of Trial

Factors contributing to delay in completion of trial as reflected in the cases can be attributed to the investigating agency, the judicial machinery and the parties before the court and include: complete chargesheet not supplied; documents not submitted by IO; FSL (Forensic Science Laboratory) report submitted improperly/ not submitted; prosecution witnesses not present; witnesses not summoned/ served due to change of address; victim not present; IO absent; verification of documents of accused/ victim not done (usually documents for age verification); adjournment sought by PP; documents of prosecution not available in the judicial file; statement of accused not ready; order / judgment not ready; judge on leave/ had to attend workshop/ busy elsewhere; court cause list heavy/ court's time out; accused absent; accused not produced from judicial custody; counsel of accused sought adjournment; quashing petition filed before the High Court; lawyers on strike.

Findings

1. Delay in conclusion of trial

Special Courts are designated for “providing a speedy trial”.¹⁵ The POCSO Act, hence, also stipulates the period within which the trial may be concluded. There are several factors that result in delay, some of which are legitimate, and others, avoidable. The caseload in Special Courts increases every year as trials are not being completed within the stipulated period of one year. While timely completion is important, it should not deny justice to the child or the accused – both should be allowed sufficient time to put forth their case.

Is the delay a consequence of the Special Court’s limited infrastructure and/ or human resources? Is the pendency a consequence of the Special Court’s heavy caseload?

Recommendations

i. Set up more Special Courts with suitable infrastructure and human resources

Given that 86% cases in Mumbai and 75% cases in Delhi were pending as on 31 July 2015, only if more Special Courts are set up in Mumbai and Delhi, the trial may be completed within one year from the date of cognizance.

Focus should also be on providing the Special Courts with appropriate infrastructure and human resources to meet the objectives of the POCSO Act.

C. Acquittal and Conviction

Table 8.6 Status of Disposed Cases

Status	Delhi		Mumbai	
	No. of cases	Percentage	No. of cases	Percentage
Convicted	79	22	13	62
Acquitted	286	78	8	38
Total	365	100	21	100

- Out of 386 cases disposed of in Delhi and Mumbai during the period of study, 365 [95%] were Delhi cases, whereas 21 (5%) were Mumbai cases. Since the numbers are low for Mumbai, the trends are more noticeable through the Delhi cases.
- The above data does not include two cases from Delhi where the accused were acquitted of charges under the POCSO Act but convicted under the IPC provisions for kidnapping a minor, whereas the Mumbai data includes one case where the accused was acquitted on charges under the POCSO Act, but convicted under Section 509 of the IPC (“Words, gesture or act intended to insult the modesty of a woman”).

- Out of 386 cases disposed in Delhi and Mumbai, 92 cases (24%) ended in a conviction. A much higher rate of conviction was observed in Mumbai, i.e., 62% as against 22% in Delhi.
- More than three-fourths of the disposed cases in Delhi, i.e., 286 cases (78%), were acquittals.

Table 8.7 Age Distribution of Children in cases that ended in Acquittal or Conviction

Age of Children (in years)	Delhi		Mumbai		Total No. of Children
	No. of Children in Acquittal Cases	No. of Children in Conviction Cases	No. of Children in Acquittal Cases	No. of Children in Conviction Cases	
0 - 3	6	5	0	0	11
4 - 12	63	27	2	4	96
13 - 15	60	18	4	5	87
16 - 18	72	7	2	4	85
Above 18	30	0	0	0	30
Total Children	231	57	8	13	309

Age Distribution of Children by Cases that Ended in Acquittal or Conviction

- In Mumbai, there were a total of 21 children, one in each of the 21 disposed cases. In Delhi, there were 378 children in 365 disposed cases. Analysis of age of children in disposed cases was however, possible for only 288 children from Delhi cases and all 21 children from Mumbai cases.
- Such analysis suggests that most acquittals in Delhi were in cases relating to children aged 16 to 18 years (72 out of 231), whereas in Mumbai, it was in cases of children aged 13 to 15 years (4 out of 8).

Proximity between the Child and the Accused/Offender in Disposed Cases

Table 8.8 Disposed Cases where the Accused/Offender was 'Known'

Proximity	Delhi		Mumbai		Total Cases
	No. of Acquittal Cases	No. of Conviction Cases	No. of Acquittal Cases	No. of Conviction Cases	
Relative	36	10	0	1	47
Neighbour	47	15	0	0	62
Employer/ Co-worker	1	0			1
Romantic Relationship	74	5	3	1	83
School Staff/Tutor	4	0			4
Other Known	28	4	1	1	34
Total Cases	190	34	4	3	231

- Maximum acquittals where the accused/offender was 'known' to the child are cases of romantic relationship (39%), followed by cases where the accused/offender is a neighbour (25%), and cases where the accused/offender is a relative (19%).

The large number of acquittals in cases involving 'known' accused/ offender has been closely examined to understand the possible reasons for acquittal.

1. Romantic relationship

- In Delhi, out of 79 disposed cases of romantic relationship, 74 cases (94%) ended in acquittal (Table 8.8). In Mumbai, out of 4 disposed cases of romantic relationship, 3 cases (75%) ended in acquittal. The category 'romantic relationship' comprises only those cases where a study of judgments indicates so. For example, where a 'romantic relationship' was claimed in the accused's Section 313 CrPC statement, it has not been included in this category or of 'known' accused / offender.
- The data reflects that 72 out of 74 cases (97%) of acquittal in the 16-18-year age group in Delhi were due to the child and accused being in a romantic relationship (Table 8.7 and Table 8.8 read together). In Mumbai, though, only one case of romantic relationship that ended in acquittal was in this age group (33%) – the remaining two cases were in the age group of 13 to 15 years.

2. 'Known' accused/ offender

- The category of 'known' accused/ offender includes romantic relationships and comprises only those cases where a study of judgments establish that the accused / offender was 'known' to the child.
- Out of 224 cases of 'known' accused from Delhi, 190 (85%) ended in acquittal (Table 8.8).
- In Mumbai, 7 out of 21 disposed cases (33%) were of 'known' accused/ offender. Out of the 7 disposed cases of 'known' accused/ offender, the accused was acquitted in 4 cases (57%).
- In Mumbai, the break-up of the disposed cases of 'known' accused/ offender is as follows romantic relationship (4 cases), residing in shared household (one case), maternal uncle (one case), acquaintance (one case).
- In Mumbai, in one case where the accused was the 'maternal uncle', the child and her mother turned hostile, and the accused was acquitted.
- In Delhi, out of 78 children in the age group of 13 to 15 years, 60 children's cases (76%) ended in acquittal. In Mumbai, out of 9 cases in the age group of 13 to 15 years, 4 cases (44%) ended in acquittal.
- In Delhi, out of the 60 children aged 13 to 15 years whose cases ended in acquittal, the accused were known in 34 cases (57%). In Mumbai, out of 4 cases of 13 to 15 year old children, which ended in acquittal, the accused were known in 2 cases (50%).
- In Delhi, 30 of 60 (50%) children in the 13 to 15 years age group turned hostile, resulting in acquittal of the 'known' accused.
- In Delhi, in none of the 18 cases of children in the 13 to 15 years age group that ended in conviction, was the offender known to the child. In Mumbai, in 2 out of the 5 cases (40%) in the age group of 13 to 15 years that ended in conviction, the offender was known to the child.

- On the basis of the above data, it may be inferred that the high number of acquittal cases in the 13 to 15 years age group is due to the proximity of relationship resulting in pressure on the child to turn hostile.
- In Delhi, a similar trend was noted in the 4 to 12 years age group with acquittal in the case of 63 children out of 90 (70%). 34 out of these 63 children (54%) turned hostile, and the accused was known to 28 out of these 34 children (82%). There was only one case where a known accused was convicted. The trend was different in Mumbai, where out of 6 cases in this age group, 4 cases (66%) ended in conviction. In one of the cases that ended in acquittal, the child turned hostile though the accused was not known to her.
- In Mumbai, there was one case in which the accused was convicted, though the 18-year-old turned hostile, under Section 509 of IPC.
- In Mumbai, there was no disposed case in the 0-3-year age group. In Delhi, out of 11 children in the 0-3-year age group, cases of six children ended in acquittal (54%). The accused was known to the children in 4 cases; in three of these, the witnesses turned hostile (75%) - the mother, the parents, and the neighbour of the child.

3. Police Not Being Familiar with the POCSO Act

Acquittals may also be attributed to the fact that the police are not familiar with the POCSO Act. The analysis that follows reflects the unfamiliarity of the investigating agency with the provisions of the POCSO Act.

Cases not booked under appropriate section of the POCSO Act

In 10 out of the 40 (25%) cases of HAQ, the police failed to book the accused under the appropriate Sections of the POCSO Act. The most common error was that of not deploying the provisions relating to the 'aggravated' form of the offence, even though the child evidently appeared to be below 12 years, or the assault was alleged to have been committed by a parent/ relative.

For example, an FIR was registered under Section 4 of the POCSO Act and Section 506 of IPC, whereas it should have been registered under Section 6 r/w (read with) Sections 5 (f) and (m) of the POCSO Act as the child was below 12 years of age and the accused was on the management of the child's pre-school. Another example is of an FIR registered under Sections 8 and 10 of the POCSO Act, whereas it should have been registered under Section 6 r/w Section 5 (m) of the Act, as the alleged offence was of finger penetration in a child below 12 years of age. In yet another case, an FIR was registered under Section 8 of the POCSO Act and Section 363 of IPC, whereas it should have been registered under Section 6 r/w Sections 5 (g) and (l) of the POCSO Act; the alleged offence was of repeated gang-penetrative sexual assault. Instead of registering an FIR under Section 6 (k) of the POCSO Act where the child is visually impaired, the police erroneously registered the case under Section 4 of the POCSO Act.

Similar examples abound among the cases from Mumbai. An FIR was registered under Sections 4, 8 and 12 of the POCSO Act and Sections 354 and 509 of IPC, whereas it should have been registered under Section 6 r/w Sections 5 (m) and (n), Section 10 r/w Sections 9 (m) and (n), and Section 12 of the POCSO Act because the accused was the father of the two girls, who were below 12 years of age. In another example, an FIR was registered under Sections 8 and 12 of the POCSO Act, whereas it should have been

registered under Sections 10 r/w Section 9 (f) and (m) of the POCSO Act, as the offence was alleged to have been committed by the cleaner of the school bus, which the 11-year-old girl took to school daily. In yet another case, an FIR was registered under Sections 4, 8 and 12 of the POCSO Act and Section 377 of IPC, whereas it should have been registered under Section 6 r/w Sections 5 (i) and (m), Section 10 r/w Sections 9 (i) and (m) and Section 12 of the POCSO Act, as anal penetration was alleged to have been committed on an 11-month-old boy, who had to be hospitalised for bleeding.

Though such errors may have reduced substantially with the police getting more familiar with the provisions of the Act, they have not gone away completely.

Manner of recording FIR or child's statement

Although FIRs are to be recorded “as spoken by the child” [Section 26 (1) of the POCSO Act], the tendency is to reduce to writing the facts shared by the child as understood/ interpreted by an adult. Such recording almost always leads to a discrepancy between the contents of the child's FIR and/ or statement under Section 161 CrPC / Section 164 CrPC, and the child's testimony before the Special Court. The child then faces stringent though avoidable cross-examination from the defence lawyer, which might adversely affect the outcome of that case.

Most children/ their families are not aware of their right to get a copy of the FIR free of cost, and that it is the duty of the police officer registering the FIR, to read it out to them, to ensure accuracy. Further, the children/ their families are under great trauma and may not be very coherent when narrating the facts to the police. Hence, there is every chance of there being a disparity in the facts narrated by the child/ family and those written down.

Sometimes, the FIR and/ or the child's statement under Section 161 CrPC / Section 164 CrPC, may not contain certain information that is critical to the child's case due to the distressful situation of the child/ family, or due to police/ Magistrate not having put such question to the child. When the child gives information to the Special Court that has not been included in the FIR/ statement before the police/ Magistrate, the defence attempts to argue that such additions should be treated as ‘embellishment’ or ‘omission’ or ‘material improvement’. Hence, it is important that a child-friendly environment is created at the police station/ court to put the child at ease to communicate the events in detail – “in the presence of the parents of the child or any other person in whom the child has trust or confidence”.¹⁶ The child should be given the “assistance of a translator or interpreter”,¹⁷ or “the assistance of a special educator, or any person familiar with the manner of communication of the child, or an expert in that field”,¹⁸ and a support person. It is also important to record the FIR/ statements as spoken by the child so that there is no misinterpretation or misrepresentation of the narration.

For example, a Special Court in Delhi, in its judgment, noted, “The second point highlighted by defence counsel regarding the material improvement made by child victim is the fact that no such comments i.e. *‘Aaj isko uthalangey aur pass kay naaley par lekar jayengay’*¹⁹ were not stated by the child victim in the police complaint Ex. PW 1/A or in the statement before the Ld. Magistrate under section 164 Cr.P.C. Ex. PW 1/B. 35. Although it is true that in the police complaint Ex. PW 1/A, the nature of comment is not specifically mentioned by child victim but she has stated that accused had passed lewd comments and was misbehaving with her”. In this case, this judge recognised that an FIR and statement under

Section 164 CrPC may not contain minute details of an offence, but another judge may have perceived it otherwise, causing great detriment to the success of the case.

Police stations not appropriately staffed as mandated under the POCSO Act

Under Section 24 (1) of the POCSO Act, “The statement of the child shall be recorded...as far as possible by a woman police officer not below the rank of sub-inspector.” This provision implies that a woman police officer should interact with the child, especially a girl, because a girl may not feel comfortable to share details of the sexual offence with a male police officer. Presence of a woman police officer is also necessary when the victim girl is taken for medical examination, recording of her Section 164 CrPC statement, etc.

All the police officers interviewed in Mumbai agreed that women police officers must be there to handle complaints under the POCSO Act considering the sensitive nature of these cases. Majority of them said that the child’s statement is recorded by a woman police officer, while registration of FIR can be done by anyone. Police officers take pains to ensure that the provisions as they understood them were complied with; “sometimes if a woman police officer is not available in the police station and a case under the POCSO Act is brought, then we have to call her from any nearest police station to record the child’s statement.” A similar remark was made by a woman police officer from Delhi, who said, “there is no female police of this rank here and when there is a need, we call such police officers from nearby police stations.” Workload and scarcity of policewomen were quoted as the key challenges to ensuring the attendance of one in each case. One of the police officers interviewed in Mumbai added that, “apart from these cases, we have lots of workload and the staff is limited. For medical check-ups, Section 164 CrPC statements, it becomes difficult to send a woman constable with victims every time”.

Most officers in a police station are not aware of the provisions of the POCSO Act, unless they have been part of an investigation in a previous case. In the initial years of the POCSO Act, often, women police officers waited for their male colleagues to return from the courts to seek their assistance on how to proceed with a complaint under the POCSO Act. Today there are few women officers requiring such basic support.

Lapses in investigation

Some cases also fail due to procedural lapses on the part of the investigating agency, which the defense attempts to place on record as an ‘incurable irregularity’.

Following is an excerpt from a judgment of a Special Court in Delhi, which shows that the IO did not produce the best evidence before the court, resulting in acquittal. “Evidence of child victim could have been corroborated by independent witnesses, who had witnessed her captivity in the house of accused. Since it has come in the evidence of child victim that she used to play with the children in the neighbourhood of accused’s house and used to talk to neighbours and one aunt as per her statement u/s 164 Cr.P.C. Ex. PW1/A, therefore it was incumbent upon the IO to have examined the neighbours of accused and children residing in the vicinity of accused’s house to lend credence to the version of child victim. However, despite availability of witnesses, they were not examined by the IO for the reasons best known to him which also creates a doubt in the prosecution story. No efforts were made by IO during the course of investigation to have taken the child victim to the house of accused and to identify

neighbours and children, who had seen child victim in the company of accused. Even child victim was not taken to the hotel where it is alleged that she had been taken by accused for the purpose of meal. When evidence is available and is not collected then it creates a doubt regarding the prosecution case, benefit of which has to go to accused”.

Investigation skills of police officers constantly fall short of expected standards. In *State of Gujarat vs. Kishanbhai Etc.*,²⁰ a case relating to rape and murder of a six-year-old girl in 2003, the Supreme Court enumerated the lapses of the investigating agency and stated, “The investigating officials and the prosecutors failed in discharging their duties. They have been instrumental in denying to serve the cause of justice.” The court continued, “We are required to adjudicate on the basis of well drawn parameters. We have done all that. Despite thereof, we feel crestfallen, heartbroken and sorrowful. We could not serve the cause of justice, to an innocent child. We could not even serve the cause of justice, to her immediate family.” Further, “We accordingly direct, that on the completion of the investigation in a criminal case, the prosecuting agency should apply its independent mind, and require all shortcomings to be rectified, if necessary by requiring further investigation. It should also be ensured that the evidence gathered during investigation is truly and faithfully utilized, by confirming that all relevant witnesses and materials for proving the charges are conscientiously presented during the trial of a case. This would achieve two purposes. Only persons against whom there is sufficient evidence, will have to suffer the rigors of criminal prosecution. By following the above procedure, in most criminal prosecutions, the concerned agencies will be able to successfully establish the guilt of the accused.” In conclusion, while upholding the acquittal, the court directed “the Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments, should be vested with aforesaid responsibility”, and those found responsible for such lapses should suffer departmental action.

Findings

1. Low Conviction Rate for Crimes against Children and under the POCSO Act

The all-India conviction rate for crimes against children (35.6%)²¹ is lower than the all-India conviction rate (47%)²² recorded in *Crime in India 2015*, both for IPC and SLL crimes. The all-India conviction rate under the POCSO Act is 42% -- 41% for offences under Section 4 of the POCSO Act; 32% for offences under Section 6 of the POCSO Act; 48% for offences under Section 8 of the POCSO Act; 33% under Section 10 of the POCSO Act; 91% under Sections 14 and 15 of the POCSO Act; and 40% under the caption ‘Other Sections of POCSO’.²³ The NCRB for 2015 data indicates that the conviction rate under the POCSO Act is inflated due to high conviction under Sections 14 and 15 - 20 out of 22 cases ending in conviction. It is important to note that offences under Sections 14 and 15 were a mere 1% of cases disposed of under the POCSO Act in 2015.

Crime in India 2016 reflects a similar picture - the all-India conviction rate for crimes against children (30.7%)²⁴ is half of the all-India conviction rate (64.7%) for IPC and SLL crimes.²⁵ The all-India conviction rate under the POCSO Act is even lower (29.6%) - 28.2% for offences under Sections 4 and 6 of the POCSO Act; 30.7% for offences under Sections 8 and 10 of the POCSO Act; 17.4% under Section 12 of the POCSO

Act; 25% under Sections 14 and 15 of the POCSO Act; and 44.6% under 'Other Sections of POCSO'. The conviction rate for crimes against children is higher in Mumbai (56.2%) than in Delhi (42.6%).²⁶

The conviction rate for the cases examined in Delhi has been very low – 22%, but far higher in Mumbai – 62%. The Mumbai figures are not reflective of the correct picture as the number of cases disposed are a mere 5% of the total cases of acquittal/conviction examined in this study. While the high number of acquittals in the 16-18 years age group can be attributed to romantic relationships, and in the 0-15 years' age group to 'known' accused, we need a more detailed review of the acquittal in the remaining cases.

An analysis of 667 cases from Delhi done by the Centre for Child and the Law, NLSIU, Bangalore too shows a low rate of conviction. According to this study, "conviction was awarded in 112 cases under the POCSO Act and the large majority (i.e. 555 cases) ended in acquittal. This pegs the rate of conviction at a measly 16.8%. Thus, approximately only one in every six cases results in a conviction."²⁷ A similar analysis for Maharashtra done by the same Centre found low rates of conviction; "conviction was awarded in 257 cases out of 1330 cases, i.e. 19% with the acquittal rate being 81%... The rate of conviction in romantic cases is 9.15%, whereas the rate of acquittal is 90.85%."²⁸

What is behind the low rate of conviction? Are scientific and modern techniques not used when conducting forensic investigation? Is the environment in Special Courts not conducive for the child to communicate? Are the Special Courts not ensuring compliance with child-friendly procedures laid down in the POCSO Act? Are the Special Public Prosecutors unable to conduct examination-in-chief in an age-appropriate manner? Are these Prosecutors not able to safeguard the child's interest as mandated under the POCSO Act?

2. Absence of Infrastructure and Human Resources

The purpose of the Special Courts is to assure child-friendly treatment and atmosphere for the victim. The question is, whether such treatment and atmosphere existed during the relevant period?

The Special Courts in Mumbai, if at all, had a very rudimentary arrangement to "ensure that the child is not exposed in any way to the accused at the time of recording of the evidence"²⁹ - curtain fitted around the witness box; cupboards segregating the child and the accused. Today, due to the increased number of cases under the POCSO Act, the same are being distributed among different courtrooms in the Sessions Court for trial, most of which do not have the appropriate infrastructure as envisaged under the legislation.

The judgments examined did not reveal whether the Special Courts were taking recourse to the special procedures stipulated under Section 33 of the POCSO Act. HAQ's personal experience indicates that in the initial years, the advocate for the defense directly used to put the questions in cross-examination to the child. In most of the cases, the judgments did not reveal the appointment of 'support person' and/or lawyer to safeguard the interest of the child.

3. Court's Time Taken up in Romantic Relationship

Out of 224 cases in Delhi, 79 cases (35%) related to 'romantic relationship', and out of these 79 cases, 74 cases (94%) ended in acquittal, which formed 39% of the total acquittal cases (190). This shows that a large amount of court time is being spent on cases involving a romantic relationship--especially since

the age of sexual consent went up from 16 years to 18 years--resulting in the child turning hostile and/ or the prosecution being otherwise unable to prove the offence of 'penetrative sexual assault' or 'sexual assault'.

4. Absence of Victim Protection

A high rate of children/ family turning hostile has been found in cases of 'known' accused. Though an FIR is registered, the child is then pressured into denying the occurrence of the offence before the court, and most such cases have ended in acquittal. A judge interviewed in Delhi said, "Incest is reported after a very long time, sometimes after 5-6 years. But the victims often turn hostile because of family pressure. At times, even in incest cases, the case is filed because of some other issue in the family such as a family dispute."

The analysis by the Centre for Child and the Law in relation to the cases tried by the Special Courts in Delhi is similar; "The prosecutrix/ victim turned hostile in a staggering 67.5% of the cases".³⁰ Further, "The highest percentage of cases in which the victim turned hostile were those in which she was married to the accused (99%), followed by cases in which she was in a romantic relationship with the accused (96.07%), his step-daughter (76.47%), and daughter (76.34%). In 73.58% cases in which the victim was related to the accused, the child turned hostile."³¹ Examination of cases in Maharashtra by the Centre shows that in 47% of cases "the victims turned hostile,"³² resulting in acquittal in about 98% of such cases. "Out of the 629 cases in which the victim was declared hostile, acquittals were recorded in 618 cases (97.93%) and convictions in 11 (1.74 %). Of these, 159 cases (25.27%) were romantic in nature, and 31 (5.06%) were cases in which the accused was a father, brother or step-father. According to a Public Prosecutor, the pressure from the community to compromise is very high in these types of cases and that explains why victims turn hostile. It is important to note that, these categories aside, victims turned hostile in most cases in which the accused was known to them in some way."³³

The Special Courts must delve into the reasons for the child turning 'hostile'. Such inquiry may be made with the aid of the 'support person', who could also help the child in handling the family pressure, and ultimately reduce this reversal.

Recommendations

i. Training of Police Personnel

Though some things have improved over the years, the investigating agencies require to constantly hone their skills in relation to crimes against children, including cybercrime. The curriculum of police academies and training programmes, including refresher training programmes, should include a module on 'offences against children', so that they get familiar with child-related legislations, including the POCSO Act, their objectives and procedures, and investigative and forensic skills. Such curriculum/ programme content should be regularly reviewed to update with the progress in forensic science and investigative techniques.

ii. Training of Judges of the Special Courts, Special Public Prosecutors and Legal Aid Lawyers

The Special Courts use the same yardstick and competencies as used for adults, when dealing with and weighing the evidence of a child, thus defeating the objectives of the POCSO Act.

It is necessary for the Special Courts to probe into the situation of the child with the aid of the child's lawyer and / or support person, and not accept the child's deposition at face value. The Special Courts should also utilise their powers under Section 165 of IEA [Judge's power to put questions or order production] and Section 311 of CrPC [Power to summon material witness or examine person present] to ensure that the best evidence is produced before the court. It is the interest of the child, including her/his safety, which is paramount.

Further, the Special Public Prosecutors too should deal with the child in an age-appropriate manner, and should assure the child of the special protection under the POCSO Act.

Similarly, the curriculum of judicial academies, including initiation and refresher training programmes, should contain a module on 'child rights' that does not merely include different legislations, but also understanding childhood, adolescence and related vulnerabilities, child psychology, and tools and techniques for communicating with children. Such curriculum content should be regularly reviewed and upgraded in consultation with professionals from relevant fields. Such trainings should also be periodically conducted for Special Public Prosecutors and legal aid lawyers.

iii. Need to Improve Special Courts' Infrastructure, Appoint Resources and Follow Special Procedures per the POCSO Act

As conviction mainly depends on the child's deposition before the Special Court, the Special Court should guarantee a child with the necessary support to curtail her/his challenges within the criminal justice system. A child's need for a support person should be assessed not only by the CWCs, but also by the Special Courts and/ or Special Public Prosecutors. To enable children to withstand pressure, support person/ organisation should be appointed in cases where the accused is a family member, relative or otherwise known to the child's family.

The primary role of the support person is to safeguard the interest of the child, as also to inform the Special Court about the child's situation at home or otherwise. Absence of a support person denies the Special Court such crucial information, which would prompt suitable measures to protect the child from extraneous influence and pressure. This is the essence of witness protection. Also, every child should be provided an opportunity to legal representation – an over-burdened Special Public Prosecutor is unable to deal with the nuances of every case.

D. Sentencing

According to Section 53 of IPC, *Punishments*, stipulates "The punishments to which offenders are liable under the provisions of this Code" – death, imprisonment for life, imprisonment (rigorous and simple),

forfeiture of property, and fine. Section 28 of CrPC, *Sentences which High Courts and Sessions Judges may pass*, states that the High Court and Sessions Judge/ Additional Sessions Judge “may pass any sentence authorised by law”.

A Court of Sessions is designated as a Special Court under the POCSO Act [Section 28], and is empowered to pass sentences as stipulated thereunder. It is important to note that the POCSO Act does not mention whether the imprisonment is ‘rigorous’ or ‘simple’, leaving the same to the discretion of the courts.

Sexual offences under the POCSO Act are punishable with a term of imprisonment and fine, except for storage of pornographic material involving a child [Section 15], which is punishable with a term of imprisonment “or with fine or with both”. Further, punishment for most offences contain the minimum and maximum term of imprisonment. For example, for the offence of penetrative sexual assault, the Special Court is to impose a sentence of imprisonment “which shall not be less than seven years but which may extend to imprisonment for life”, whereas for a few sexual offences, only the maximum term of imprisonment is stipulated. For example, for the offence of sexual harassment, the the imprisonment may be “for a term which may extend to three years”.

The Special Court is to impose a sentence of imprisonment within the range stipulated under the law, and has no powers to reduce the sentence to less than the minimum prescribed. Removal of discretion prompted a Special Court in Delhi to state, in *State vs. Mohd. Zahid*, “In the light of above discussion, I am of the view that to award appropriate sentence after considering all aggravating and mitigating factors, some discretion should be given to the Courts while determining the quantum of sentence. But Courts are bound to perform their duty and to award sentence in accordance with existing provisions of law unless and until the provisions are amended suitably either by the legislature or clarified by the Higher Courts. Under Section 8 of POCSO Act, Court has no option except to award minimum sentence of imprisonment of three years, thus, this Court has no other option except to award the minimum sentence.”

Under Section 235 (2) of CrPC, the courts should, after conviction, “hear the accused on the question of sentence, and then pass sentence on him according to law.”

Quantum of Punishment

Delhi

Table 8.9 Quantum of Punishment – Delhi

	No. of Cases	Percentage
Minimum Imprisonment	32	74.4
Between Minimum and Maximum Imprisonment	4	9.3
Less than Minimum Imprisonment + Probation + Fine	2	4.7
Probation and Fine	4	9.3
Probation only	1	2.3
Total Cases	43	100

Table 8.10 Quantum of Punishment vis-à-vis Nature of Offence – Delhi

Nature of Offence	Minimum Imprisonment	Between Minimum and Maximum Imprisonment	Less than Minimum Imprisonment + Probation + Fine	Probation and Fine	Probation only	Total Cases
Aggravated penetrative sexual assault	6	0	0	0	0	6
Sexual assault	8	0	0	0	1	9
Aggravated sexual assault	18	1	2	0	0	21
Sexual harassment	0	3	0	4	0	7
Total Cases	32	4	2	4	1	43

- Out of 79 cases that ended in conviction in Delhi, information on sentences under the POCSO Act was available only for 43 cases.
- In 74% of the cases, the offender was sentenced to undergo the minimum term of imprisonment; in 9% cases the offender was sentenced to undergo a term of imprisonment ranging between the minimum and maximum. None of the offenders were sentenced to the maximum term of imprisonment.
- In another 9% of the cases, the Special Court thought there were adequate grounds to release the offender on probation along with fine, and in nearly 5% cases the offender was held guilty for aggravated sexual assault but awarded a combination of rigorous imprisonment of one year followed by release on probation and fine.
- In Delhi, fine was imposed in 40 out of the 43 cases for which information on sentencing was available. The amount of fine ranged from INR 200 to INR 25,000, and in default of such payment, imprisonment ranging between 2 days to 8 months. In a few cases, no period of imprisonment in default was mentioned.

Probation

In 7 cases, the Special Court in Delhi released the offender on probation. In 4 of these cases, the offender was convicted for sexual harassment; in two for aggravated sexual assault and in one case for sexual assault. In those cases where the offender was convicted for sexual harassment, fine ranged from INR 2,000 to INR 10,000. In 2 cases, of aggravated sexual assault, the offender was sentenced to imprisonment for a specified period and then directed to be released on probation. In one case of sexual assault, the offender was solely released on probation. The grounds for release on probation are mainly the offender being the only bread earner (“is only the bread earner of his family having five minor children”) and/or being of young age.

Mumbai

Table 8.11 Quantum of Punishment – Mumbai

	No. of Cases	Percentage
Minimum Imprisonment	9	69.2
Between Minimum and Maximum Imprisonment	4	30.8
Total Cases	13	100

Table 8.12 Quantum of Punishment vis-à-vis Nature of Offence – Mumbai

Nature of Offence	Minimum Imprisonment	Between Minimum and Maximum Imprisonment	Maximum Imprisonment	Total Cases
Penetrative sexual assault	3	0	0	3
Aggravated penetrative sexual assault	1	0	0	1
Sexual assault	2	0	2	4
Sexual harassment	0	4	0	4
Total Cases	6	4	2	12

- Out of 13 cases that ended in conviction in Mumbai, information on sentence is not included for one case as the accused was acquitted of offence under the POCSO Act, and convicted under Section 509 of IPC - “sentenced to suffer Simple imprisonment for the period he has already under gone i.e. 1 year 3 month and 10 days”.
- In 50% of the cases the offender was sentenced to undergo the minimum term of imprisonment; in 33% cases the offender was sentenced to undergo a term of imprisonment ranging between the minimum and maximum prescribed; and in 16.7% cases the offender was sentenced to undergo the maximum term of imprisonment.
- In none of the cases were the offenders released on probation.
- In 3 cases, the offender was sentenced “for the period he has already undergone”, and in all these cases the accused were convicted for the offence of sexual harassment.
- In one case, the accused was convicted for attempt to commit penetrative sexual assault.
- In one case, the co-accused, a woman, was convicted for abetment to commit penetrative sexual assault.
- In all the offences, the Special Court levied fine ranging from INR 400 to INR 25,000, and in default of such payment, imprisonment for terms ranging from 2 days to 6 months.

Findings

1. Minimum Sentence Imposed by the Special Court

In most cases that ended in conviction, the Special Courts chose to impose the minimum sentence, even in the more serious offences. This shows that the Special Courts, after considering the aggravating and mitigating circumstances, felt that the minimum term of imprisonment was sufficient. Out of 55 cases for which sentencing information was available (43 in Delhi and 12 in Mumbai), the maximum punishment was imposed in only 2 cases (4%).

Clearly, to curb sexual offences against children, seeking increase in punishment term would serve no purpose. In fact, that may even bring about a drop in the rate of conviction, as Special Courts may prefer to acquit the accused. What is of concern is not the quantum of sentence, but the high rate of acquittal (78% in Delhi). Instead, the focus should be on increasing the rate of conviction.

2. Sentencing under wrong provision of the POCSO Act

It is noticed that a Special Court in Delhi did not convict an accused under the appropriate provision of the POCSO Act-- the accused was charged under Section 10 of the Act (aggravated sexual assault) as the child was found to be below the age of 12 years, yet the offender was convicted and sentenced under Section 8 of the said Act (sexual assault).

Endnotes

1. Hindi term used to refer to an old person.
2. Though the judgment mentions the name of the child's mother, it is not revealed to protect the child's identity.
3. Judgment dated 11-3-2016 passed by the Bombay High Court in Confirmation Case No. 3 of 2013 [State of Maharashtra vs. Ramchandra Sambhaji Karanjule], with Criminal Appeal No. 426 of 2013 [Ramchandra Sambhaji Karanjule vs. State of Maharashtra], and 6 other appeals confirming death sentence or challenging the trial court judgment dated 21-3-2013.
4. Ibid.
5. Ibid.
6. Ibid (para 70).
7. Ibid (para 71).
8. Ibid (91).
9. Ibid (para 83).
10. Ibid.
11. Ibid (84).
12. Ibid (90).
13. Ibid (115).
14. Order dated 29-7-2011 passed in Suo Moto Public Interest Litigation No. 182 of 2010 [Civil Appellate Side].
15. Section 28 (1) of the POCSO Act.
16. Section 26 (1) of the POCSO Act.
17. Section 26 (2) of the POCSO Act.
18. Section 26 (3) of the POCSO Act.
19. 'Today we will grab her and take her to the drain nearby.'
20. (2014) 5 SCC 108.
21. Table 6.4.
22. Table 4.5 - IPC crimes.
23. Ibid.
24. Table 4A.7 - IPC & SLL crimes.
25. Table 19A.5 and Table 19A.7.
26. Table 4B.6.
27. Centre for Child and the Law, National Law School of India University, Bangalore, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi. p. 16. 29 January 2016.
28. Centre for Child and the Law, National Law School of India University, Bangalore, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra. pp. 44 and 75. 7 September 2017.
29. Section 36 (1) of the POCSO Act.
30. Centre for Child and the Law, National Law School of India, University, Bangalore, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi. p. 16. 29 January 2016.
31. Ibid; pg.18
32. Centre for Child and the Law, National Law School of India, University, Bangalore, Report of Study on the working of Special Courts under the POCSO Act, 2012 in Maharashtra, p. 47, 7 September 2017.
33. Ibid; pg. 53.



Victim Compensation

Compensation is payable under the POCSO Act by the State Government from schemes or funds established for such purpose “to the child for any physical or mental trauma caused to him”.¹

Provisions for payment of compensation to the victim are also contained under the Code of Criminal Procedure. Sub-section (3) of Section 357 CrPC:²

“When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.”

Compensation is payable by the accused, and the criminal court, while calculating it, considers the financial capacity of the accused. Hence, the compensation awarded may not always be commensurate with the loss or injury suffered. Further, compensation under Section 357 CrPC³ is awarded only after the accused is convicted, hence it does not provide the victim with the immediate necessary relief.

An order of compensation under Section 357 (3) CrPC is an alternative to a sentence of fine. Fine is a form of punishment.⁴ On being found to have committed an offence, a convict may be sentenced to a term of imprisonment and fine. For example, under Section 4 of the POCSO Act,⁵ the offender is “punished with 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.” For certain offences, a convict may be sentenced to a term of imprisonment or with fine or with both. For example, under Section 15 of the POCSO Act,⁶ the offender is “punished with imprisonment of either description which may extend to three years or with fine or with both.” A court imposing fine as sentence is empowered to direct that “in default of payment of the fine, the offenders shall suffer imprisonment for a certain term”,⁷ which “shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence”.⁸ For example, in **Case 6**, the convict was “sentenced to undergo RI for 5 years and further to pay fine of Rs 10,000/- in default 5 months SI, under Section 10 of the POCSO Act, 2012.”

While awarding a sentence of fine, the criminal court has the option to direct that the fine, wholly or in part, be given to the victim.⁹ Such provision has been contained in the CrPC, since 1898,¹⁰ namely, that “the whole or any part of the fine” levied as part of a sentence to be applied “in the payment to any person of compensation for any loss or injury caused by the offence”. The compensation will become due only after “the period allowed for presenting the appeal has elapsed” or if appeal is preferred by the accused, after the appeal is rejected.¹¹ Further, the amount of compensation may not reach the victim as the convict may choose to undergo imprisonment in default of fine.¹² Moreover, the amount of fine that may be imposed is restricted by statute.

Acknowledging the importance of restitution, reparation and rehabilitation in the *Delhi Domestic Working Women’s Forum vs. Union of India*,¹³ the Supreme Court laid down “broad parameters in assisting the victims of rape”, inter alia, “It is necessary, having regard to the Directive Principles contained under Article 38 (1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.” Further, “Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place...” This judgment delinked compensation from the accused, rightly, as the victim’s rehabilitation should not be dependent on the accused’s ability or inclination.

Keeping in view the rehabilitation needs of a victim and the limitations of Section 357 of CrPC, Section 357A, *Victim Compensation Scheme*, has been inserted in the CrPC.¹⁴ It is for the State Government to make funds available for payment of compensation upon recommendation of the court to a victim of crime. Under Section 357A of CrPC, every State Government shall “prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.”¹⁵ Compensation may be awarded when, in the trial court’s opinion, “compensation awarded under Section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated”,¹⁶ or “Where the offender is not traced or identified”.¹⁷ The quantum of compensation is to be determined by the State (SLSA) or District Legal Services Authority [DLSA],¹⁸ who in certain circumstances may also grant interim relief.¹⁹

The provisions regarding compensation under the POCSO Act and Rules are based on Section 357A of CrPC, with suitable changes, to ensure immediate and speedy relief to the child. Under the POCSO Act and Rules, compensation is payable by the State Government through schemes or funds established for such purpose.

Compensation under the POCSO Act

Section 33 of the POCSO Act read with Rule 7 of the POCSO Rules provides that the Special Courts may on their own or on receiving an application, “recommend the award of compensation”, determine the quantum of compensation and “make a direction for the award of compensation”.

As per Rule 7 (1) and 7 (2), a victim is entitled to both interim compensation for meeting the immediate relief and rehabilitation needs of the child, and final compensation, irrespective of the outcome of the case in terms of conviction, acquittal or discharge, and also if the accused remains untraced or

Keeping in view the rehabilitative needs of a victim and the limitations of Section 357 of CrPC, Section 357A, *Victim Compensation Scheme*, has been inserted in the Code of Criminal Procedure.

Section 33 of the POCSO Act, read with Rule 7 of the POCSO Rules, provides that Special Courts may on their own or on receiving an application, “recommend the award of compensation”, determine the quantum of compensation and “make a direction for the award of compensation”.

The POCSO Act acknowledges that a child may require immediate financial assistance due to physical injury and/or mental trauma, and that a child is entitled to interim compensation.

unidentified. “The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purpose of compensating and rehabilitating victims”.²⁰ The Victim Compensation Fund is the vehicle through which the compensation may be paid by the State Government, and in no way limits the powers of the Special Court in determining the amount of compensation. The obligation of the State Government to make such payment is absolute; if no Victim Compensation Fund or other scheme exists, such compensation is payable by the State Government.

The amount of compensation is to be determined by the Special Court—“it shall take into account all relevant factors relating to the loss or injury caused to the victim, and including the following:- (i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child; (ii) the expenditure incurred or likely to be incurred on child’s medical treatment for physical and/or mental health; (iii) lack of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason”; etc.²¹

Rule 7 (6) further states that compensation under the POCSO Rules shall not prevent a child from seeking relief under any other rules or scheme of the Central Government or State Government. Payment of compensation under the POCSO Act should not deny the child from claiming her/ his entitlement under any other scheme.

On 12 March 2015, while responding to Rajya Sabha Unstarred Question No. 175, Maneka Gandhi, the Union Minister for Women and Child Development, reiterated the provision for victim compensation under the POCSO Act, as well as the responsibility of the State Governments to set up a Victim Compensation Fund or Scheme under Section 357A of CrPC, to pay the compensation awarded by the Special Court. She also quoted the figures presented by the NCPDR to elaborate that, “for the period from 14-11-2012 to 30-06-2013 a total of 6816 FIRs were registered and in 166 cases accused were convicted” and “up to March 2014, in 27 cases interim compensation was awarded by the Special Courts whereas, in 86 cases final compensation was awarded by these courts”.

Delhi

Data for 1803 cases was collected in Delhi. Out of these, 365 cases were disposed of by way of acquittal or conviction. For information on victim compensation, judgments in 79 cases that ended in conviction were studied. While no compensation was awarded in cases that ended in acquittal, information on compensation was only available in 7 disposed cases (9%). Details of these cases are in Table 9.1.

Table 9.1 Victim Compensation – Delhi

Nature of Offence	Section 33 (8) of POCSO Act	Section 357 (1) (b) of CrPC	Section 357 (3) of CrPC	Section 357A of CrPC	Section 33 (8) of the POCSO Act & Section 357 (1) (b) of CrPC	Total
Aggravated penetrative sexual assault	0	0	0	1	1	2
Aggravated sexual assault	0	2	0	1	0	3
Sexual harassment	0	0	2	0	0	2
Total	0	2	2	2	1	7

- **Case 11**, in which the accused was convicted for aggravated penetrative sexual assault, was the only case where the Special Court granted compensation under Section 33 (8) of the POCSO Act - compensation of INR 1,50,000 was directed to be paid by the DLSA. The court further directed that since the child had crossed the age of 18 years, he was at liberty to utilise the compensation amount in the manner he liked. In **Case 11**, the Special Court also directed payment of compensation under Section 357 (1) (b) of CrPC - out of the fine of INR 25,000, INR 15,000 was to be paid to the child as compensation.
- In 2 cases [*State vs. Anil @ Neele* and *State vs. Vicky*] in which the accused were convicted for sexual harassment and released on probation of 6 months, the Special Court directed the offenders to pay compensation of INR 10,000 and INR 5,000, respectively, “to the child for the harassment caused to her by him”.
- In 2 cases of aggravated sexual assault, the Special Court “sentenced to minimum punishment of 5 years rigorous imprisonment and fine. Out of fine of Rs.10,000/-, Rs.7,000/- shall be given as compensation to the child victim for the sexual assault being committed upon her” [*State vs. Raman Kumar* and *State vs. Moti Lal*].
- In a case of incest, **Case 17**, while convicting the child’s father for aggravated sexual assault, the Special Court granted compensation under Section 357A of CrPC and directed the DLSA to assess the quantum of compensation to be given to the child. The court further directed that the amount of compensation shall not be released to the child in one go as the purpose of awarding compensation is to enable the victim to complete her studies. “As the victim is still minor, she is financially dependent upon her parents. To ensure that the conviction and sentence may not come on way in her study, a suitable compensation is recommended under Section 357A Code of Criminal Procedure to the victim to enable her to complete her study and to become financially independent.”
- In **Case 16**, while convicting the 25-year-old accused for aggravated penetrative sexual assault of a 6-year-old boy, the Special Court directed the DLSA to fix the compensation amount under Section 357A of CrPC. The concerned IO was asked to assist the Secretary, Legal Aid Services, in determining the compensation amount and identifying the victim before the compensation amount is disbursed.

Cases Supported by HAQ

Out of the 40 cases in which HAQ was involved with providing psychosocial services and/ or legal aid to the children, compensation was awarded in 4 cases upon conviction of the accused. In two of these cases, compensation was awarded under the POCSO Act, and in two others, under Section 357A of CrPC. In all four cases, the amount has been disbursed.

In Delhi, though no daily orders could be found regarding interim compensation on the courts' websites, insights on interim compensation, the procedure followed and the amount of interim compensation granted may be gathered from these 40 cases.

Table 9.2 Status of Interim Compensation in 40 Cases supported by HAQ

Status of Interim Compensation	No. of cases
Special Court exercised its powers under Section 33 (8) of the POCSO Act and determined the amount of interim compensation, leaving only disbursement to DLSA	3
Special Court exercised its powers under Section 33 (8) of the POCSO Act and granted interim compensation, but amount was determined and disbursed by DLSA	3
Special Court exercised its powers under Section 33 (8) of the POCSO Act and granted interim compensation, but determination of amount was left to DLSA and is still pending with DLSA	1
Interim compensation under Delhi Victim Compensation Scheme - granted, determined and processed by DLSA	13
Application under Section 33 (8) of the POCSO Act is pending before Special Court	1
No application made as Special Court is waiting for child to testify	7
No application made for other reasons, e.g., no clarity regarding the process for interim compensation by JJB, case came to HAQ at a later stage, case marked by court only for counselling	3
Interim compensation not required as child is in Shelter Home	4
Family not interested in compensation	4
Withdrawal of support services at behest of family	1
Total	40

In 3 cases the Special Court exercised its powers under Section 33 (8) of the POCSO Act fully by not only granting the interim compensation but also determining the amount, leaving only the disbursement to the DLSA. In 3 cases, the Special Court exercised its powers only partially, leaving the assessment of amount and disbursement to the concerned DLSA. In 13 cases where interim compensation was granted, the application was processed under the Delhi Victim Compensation Scheme by the DLSA. Most of these cases were registered before 2015, when the Special Courts in Delhi were not clear about their role and powers in respect of compensation under the POCSO Act and Rules.

The amount of interim compensation ranged from INR 20,000 to INR 1,50,000. On the one hand, the quantum of interim compensation has gradually increased as the Special Courts became more familiar with the POCSO Act and Rules, and on the other, certain Special Courts awarded interim compensation only after the child testified. In 7 cases, the reason for not applying for interim compensation is because the court grants interim compensation only after the victim testifies.

Mumbai

Data was collected for 154 cases in Mumbai. Out of these, only 21 cases were disposed of by way of acquittal or conviction (8 acquittals and 13 convictions). In none of the cases of acquittal did the Special Court award compensation. In 8 cases of conviction (38%), the Special Court directed payment of compensation under the CrPC / POCSO Act to the child.

Table 9.3 Victim Compensation – Mumbai

Nature of Offence	Section 33 (8) of POCSO Act	Section 357 (1) (b) of CrPC	Section 357 (3) of CrPC	Section 357A of CrPC	Section 33 (8) of the POCSO Act & Section 357 (1) (b) of CrPC	Total
Penetrative sexual assault	0	1	0	0	1	2
Sexual assault	0	1	0	0	0	1
Aggravated sexual assault	0	1	0	0	0	1
Sexual harassment	0	2	1	0	0	3
Section 509 of IPC	0	1	0	0	0	1
Total	0	6	1	0	1	8

- In none of the cases did the Special Court award compensation under the POCSO Act, though in **Case F**, the Special Court directed, “In view of Rule 7 (2) of Protection of Children from Sexual Offences Rules, 2012 the State Government is directed to award compensation to the victim as per rules for survivor of penetrative sexual assault apart from compensation u/sec. 357 of Cr.P.C.” Such direction to award compensation under Rule 7 (2) of the POCSO Rules was in addition to payment of compensation under Section 357 (1) (b) of CrPC. In **Case F**, the Special Court did not determine the amount of compensation.
- In only one case (**Case T**), where the accused was convicted for sexual harassment, the judgment shows that the Special Court awarded compensation under Section 357 (3) of CrPC. “Accused is also directed to pay Rs.2000/- to the victim girl under Section 357 (3) of Criminal Procedure Code, i.e. victim compensation scheme.” The order regarding compensation passed by the Special Court is erroneous in as much as (i) Section 357A of CrPC, and not Section 357 (3), deals with Victim Compensation Scheme; (ii) under Section 357 (3) of CrPC both fine and compensation cannot be ordered – the Special Court has also imposed fine of INR 400.
- In 7 cases, the judgment directs the offender to pay a portion of the fine to the child as compensation. In only 2 of these 7 cases has such provision under Section 357 (1) (b) of CrPC been correctly applied (**Case F** and **Case M**). In **Case F**, accused No. 1 was sentenced by the Special Court “to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.7,000/- (Rupees Seven Thousand only), out of that Rs.5,000/- be given to the victim after appeal period is over”, and accused No. 2, a woman convicted for abetting the offence was sentenced “to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.10,000/- (Rupees Ten Thousand only), out of that Rs.8,000/- be given to the victim after appeal period is over.” In **Case M**, the accused “is sentenced to suffer rigorous imprisonment for three and half (3 and ½) years and to pay a fine of Rs.20,000/- (Rupees Twenty Thousand only)...

Out of fine amount Rs.18,500/- (Rupees Eighteen Thousand Five Hundred only) be given to the victim as compensation after appeal period is over.”

- In the remainder of the cases, a study of the judgments shows that there has been no proper understanding of the different provisions relating to compensation. In **Case C**, the Special Court passed a sentence of fine aggregating to INR 50,000, and directed, “Out of fine amount of Rs.30,000/- be given to the victim girl as of compensation under section 357(A) of Criminal Procedure Code.” On the one hand, the Special Court directed that the compensation be paid from the fine recovered, whereas on the other, it evoked Section 357A of CrPC, which entails payment of compensation from the Victim Compensation Scheme. Moreover, the convict is a security guard and may choose not to pay the fine, and undergo imprisonment in default of payment of fine. The situation is similar in **Case H** where the convict is a vegetable vendor, in **Case K** where the convict is a mechanic, **Case O** where the occupation of the convict is not known.
- In **Case N**, “Out of fine of amount of Rs.10,000/-, amount of Rs.5000/- be paid to the victim girl by way of compensation under section 357 (3) of Code of Criminal Procedure Code”. An incorrect provision of law has been invoked here, hence, in Table 9.3, **Case N** is included under the heading “Section 357 (1) (b) of CrPC”. In **Case N**, the convict is a flower seller.
- In 5 cases no compensation was awarded to the child – In **Case G**, the accused was convicted under Section 4, in **Case Q** and **Case R** under Section 8, and in **Case S** under Section 12. Non-awarding of compensation may on one hand be justified in **Case B** as it falls under the category of ‘romantic relationship’, but on the other hand, a child has been born of such relationship.

Findings

1. Special Courts are Neglecting to Award Compensation under the POCSO Act

Table 9.1 and Table 9.3 reflect that in Delhi, in only one case did the Special Court award compensation under the POCSO Act, whereas in Mumbai, in one case, the Special Court merely referred to Rule 7 of the POCSO Rules. The Special Court in Mumbai referred to Rule 7 (2) of the POCSO Rules, but did not determine the amount of compensation, and simply directed the same to be paid by the State Government per the relevant scheme. Why are the Special Courts shying away from awarding compensation under the POCSO Act? Is it that they are more comfortable with applying the compensation provisions under the CrPC? Is it that the children’s support structure finds it easier to apply for compensation under the State Government’s *Victim Compensation Scheme – Delhi Victim Compensation Scheme and Manodhairya Scheme*? It is important to note that compensation payable under the *Delhi Victim Compensation Scheme* or *Manodhairya Scheme* is governed by the contents of the said Scheme in application and amount, and the Scheme may be altered depending upon the vagaries of those in power, whereas, under the POCSO Act, the Special Court has the power to award compensation for any sexual offence and to determine the amount per Rule 7 (3) of the POCSO Rules, which the State Government is obligated to pay within 30 days of passing of the order.

2. Awarding of Interim Compensation Yet to Become a Normative Practice

The POCSO Act acknowledges that a child may require immediate financial assistance due to physical injury and/or mental trauma. That a child is entitled to interim compensation is clear from the words “for immediate rehabilitation of such child” and “pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation” under Section 33 (8) and Rule 7 (1), respectively. Despite such provisions for interim compensation, none of the cases examined in Mumbai or Delhi indicate that interim compensation was awarded to the child. A child may suffer irreparable damage due to non-payment of compensation when most needed. The question remains as to whether recourse for interim compensation is taken under the *Delhi Victim Compensation Scheme* or *Manodhairya Scheme*? According to HAQ, in Delhi it is easier to get interim compensation under the *Delhi Victim Compensation Scheme* as the procedure is laid down, and the same has been streamlined through directions of the Delhi High Court. In *Court on its Own Motion vs. Union of India through Secretary, Ministry of Home Affairs and Another* [WP (C) 7927 of 2012], the Delhi High Court by order dated 13 August 2014 directed that “with effect from 21-08-2014 the victims in whose favour the awards has been made by the District Legal Services Authorities shall receive the payments in their accounts within one day of the communication of the award to the Delhi State Legal Services Authority.”

Under the POCSO Act, payment of interim compensation is dependent upon the Special Courts. HAQ’s experience denotes that Special Courts have increasingly shown a tendency to keep matters of interim compensation on hold until the victim has testified in court and the court is assured that it is not a ‘false’ case or that it can proceed with the trial without the apprehension of the victim turning hostile and non-cooperative. While judicial application of mind is necessary in deciding applications for interim compensation, such apprehension and attitude defeats the very purpose of interim compensation. Moreover, there is no coordination between Special Courts and Child Welfare Committees or the support persons. Rule 4 (9) of the POCSO Rules require the police to inform the Special Courts in writing about the assigning of a support person within 24 hours of such assignment, but this seldom happens. It is important to note that the data gathered regarding the economic status of the child (Chapter 5) indicates that majority of the children who enter the criminal justice system as victims of sexual abuse belong to the low-income group, hence, the compensation is essential to meet the immediate needs for relief and rehabilitation of the child.

3. Invoking of Section 357 (1) (b) by the Special Court

Compensation under Section 357 (1) (b) of CrPC is awarded only on conviction. In 7 out of the 8 cases (87.5%) in Mumbai and in 2 out of the 7 cases (28%) in Delhi, the Special Court apportioned a part of the fine as compensation to be paid to the child. Such compensation may or may not have been paid by the offender.

It is important to note that the child is unable to recover such compensation, if the accused fails to pay the fine, and undergoes further sentence in lieu of it. For example, in **Case F**, out of the fine of INR 7,000 payable by accused No. 1 and INR 10,000 by accused No. 2, INR 5,000 and INR 8,500, respectively, was to be paid to the victim, and in default of payment of fine, the accused were “to suffer further simple imprisonment for One month.” In **Case M**, out of the fine of INR 20,000, INR 18,500 was to be paid to the

victim and in default of payment of fine, the accused was “to suffer further simple imprisonment for one month.” In Delhi, compensation under Section 357 (1) (b) of CrPC was awarded in two cases – “In case of default in payment of fine, convict shall further undergo three months simple imprisonment.”

Further, such compensation is payable only after the period for appeal has lapsed or after the order of the trial court has been upheld in appeal. For example, the Bombay High Court’s website shows that in **Case F**, both the accused have preferred appeals, which are admitted and pending. Hence, in **Case F**, the child has not received the compensation awarded for more than 3 years 6 months after the offence.

4. Improper Criteria Adopted by the Special Court for Not Recommending or Awarding Compensation to the Child

It appears that the recommending / awarding of compensation by the Special Court to the child is founded upon the situation of the accused. For example, in **Case 7**, the Special Court stated, “he is the sole bread earner of the family”. In **Case 8**, the Special Court observed, “Since the convict is a vagabond, I am not imposing any fine.” In **Case G** the grounds for not awarding compensation to a child victim of penetrative sexual assault were indirectly reflected in the judgment – “The accused is quite young. He is having burden of wife and daughter. He has repentance therefore crying a lot.” In **Case Q**, the Special Court observed, “However he is having responsibility of his family, education of his son and marriage of daughter.” In **Case R**, the accused “is very poor person. His parents are dependent upon him.” In **Case S**, the judgment reads, “I have heard accused on point of sentence in person, who submits that he is a poor person and leniency be shown to him. I have also heard his Advocate. He too submitted that accused being only earning member in the family and he is lingering in the jail since last one year”. The situation of the accused may be appropriate for imposing a minimum sentence (**Case 8**, **Case G**, **Case Q** and **Case R**) or sentence of period already undergone (**Case S**), but not recommending or awarding compensation for such reason amounts to improper application of the law.

Much grief is caused to children due to the confusion that prevails regarding the role of Special Courts in victim compensation under the POCSO Act

Questions that have troubled children and their families are –

- Whom should they approach for victim compensation- the District Legal Services Authority, the Special Court or the State Government?
- Why is it so difficult to get immediate relief? Aren’t they entitled to interim compensation?
- What if there is no conviction but the child has faced irreparable trauma?

5. Confusion regarding Victim Compensation in Cases under the POCSO Act

Much confusion prevails regarding the role of Special Courts in victim compensation under the POCSO Act. The question that has caused much grief to children is whether the Special Court is to merely recommend the payment of compensation to the State Government or should it determine the amount of compensation? Under Section 33 (8) of the POCSO Act, the Special Court is to “direct payment of such compensation as may be prescribed to the child”. “Prescribed” means prescribed by rules made under

this Act.²² Hence, the answer is to be found in Rule 7 of the POCSO Rules, which operationalise Section 33 (8). Reading of Rule 7 in its entirety shows that the Special Court is required to ascertain whether compensation should be ordered in a particular case, as also to determine the amount of compensation in that case. Rule 7 (3) stipulates the factors that are to be considered by the court when awarding compensation; Rule 7 (4) expresses that the compensation determined by the Special Court is to be paid “by the State Government from the Victims Compensation Fund or other scheme or fund established by it for purpose of compensating and rehabilitating victims”. The Delhi High Court has settled this confusion; “the reading of Section 33 of the POCSO Act would show that the power has been given to the Special Court to grant compensation and there is no outer limit which has been fixed while granting the compensation”.²³ In the same case, the Delhi High Court held that compensation was also payable to a boy child.

In **Case 11**, the Special Court in Delhi correctly interpreted the provisions of the POCSO Act in relation to compensation. While awarding INR 1.5 lakh as compensation, the Special Court directed, “The Secretary, Delhi Legal Services Authority, Dwarka Courts crediting the compensation amount into the bank account of the child victim after verifying the bank account and the identity of the child victim from the IO. In case, child victim is not maintaining any bank account then IO will ensure that same is opened in any Nationalised bank in the name of child victim. The child victim will be at liberty to utilize the compensation amount in the manner he likes as he is more than 18 years of age as of today.”

HAQ’s interactions with judges of Special Courts and Special Public Prosecutors in different States shows that most Special Courts, as also Juvenile Justice Boards dealing with cases under the POCSO Act, tend to follow the State Government’s Victim Compensation Scheme established under Section 357A of CrPC when dealing with compensation of a child under the POCSO Act. From conversations with different stakeholders in Maharashtra and many other States/ UTs, it appears that the procedure laid down under the victim compensation scheme of respective States/ UTs is followed - the role of Special Courts remain confined to granting or rejecting victim compensation applications.

There is lack of clarity on procedures to be followed for disbursing the compensation, especially, in cases where the child has no family support, or resides in a child care institution without parental support, or there is apprehension that the compensation so awarded may be misused.

There is also lack of clarity on procedures for disbursing the compensation, especially in cases where the child has no family support, or resides in a childcare institution without parental support, or there is apprehension that the compensation so awarded may be misused. Needless to say, the child’s support person or lawyer may apply for the compensation, but neither the POCSO Rules, nor the Model Guidelines of the Ministry of Women and Child Development, nor any of the existing victim compensation schemes stipulate the procedure for monitoring the use of compensation to ensure that such child benefits from the same. Under their testamentary and guardianship jurisdiction, the courts direct that the share of the child is deposited with and invested by the court’s accounts office, and the interest on it is periodically paid to the guardian to meet the expenses of that child. On the child attaining majority, the principal amount with the interest is to be handed over to the child. Suitable adjustments could be made to such

procedure to ensure the amount of compensation is enjoyed by the child. In such event, the Special Court may appoint as guardian of the child, any fit person or the District Protection Officer or an officer of the court.

6. Support Person or Organisation plays a Pivotal Role in Ensuring Compensation to the Victim Child

The POCSO Act allows for the Special Court “on its own motion”²⁴ to pass orders for compensation, but the cases examined in the study denote that the courts have not deployed such powers.

Data of the 40 cases of HAQ indicates that Special Courts are willing to award / recommend compensation, including interim compensation, if the same is sought on behalf of the victim child. Compensation is awarded / recommended in 4 out of these 40 cases (10%) on conviction of the accused. Interim compensation is awarded / recommended by the Special Court in 20 out of the 40 cases (50%) – in 3 out of these 20 cases (15%), the Special Court invoked Section 33 (8) and determined the quantum; in another 3 cases (15%), the Special Court invoked Section 33 (8), but left the quantum to be determined by DLSA; in 13 cases (65%), compensation was paid under the Delhi Victim Compensation Scheme by the DLSA.

Cases examined from the websites of the Special Courts in Mumbai and Delhi for the relevant period show that the numbers regarding awarding of compensation under the POCSO Act are very low, but for the same period, these numbers increase when a support person /organisation is involved as reflected in HAQ’s cases.

Recommendations

- i. Every State Government should create a fund with sufficient credit for payment of compensation, including interim compensation, awarded by the Special Court.
- ii. To clear any confusion with Special Courts in respect of awarding compensation under the POCSO Act – (a) training programmes for judges of the Special Courts should contain a specific module on compensation; (b) Criminal Manuals issued by the High Courts for the Guidance of the Criminal Courts & their Subordinate Officers should include a Chapter on compensation, including compensation under the POCSO Act.
- iii. To ensure that a child requiring immediate relief or rehabilitation is not denied the same, it is imperative to establish robust coordination and linkage between the justice delivery mechanism under the POCSO Act, the JJ Act, DLSA and the Department of Women and Child Development. This will enable the Special Courts to assess the victim’s needs, instead of rejecting the application for interim compensation, and to guarantee disbursement of the amount awarded at the earliest.
- iv. In appropriate cases, the Special Court should award interim compensation “on its own”, without waiting for any application in this regard.
- v. The Special Court, when in doubt regarding awarding of compensation, including interim compensation, should clarify the same through inquiries with the support person / child’s lawyer / CWC.

Endnotes

1. Section 33 (8) of the POCSO Act.
2. Inserted for the first time in the Code of Criminal Procedure 1973.
3. Titled, Order to pay compensation.
4. Section 53 of I.P.C.
5. Punishment for penetrative sexual assault.
6. Punishment for storage of pornographic material involving child.
7. Section 64 of I.P.C.
8. Section 65 of I.P.C.
9. Section 357 (1) (b) of Cr.P.C.
10. Code of Criminal Procedure 1898.
11. Section 357 (2) Cr.P.C.
12. Section 30 Cr.P.C.
13. (1995) 1 SCC 14.
14. By the Code of Criminal Procedure (Amendment) Act 2008.
15. Section 357A (1) Cr.P.C.
16. Section 357A (3) Cr.P.C.
17. Section 357A (4) Cr.P.C.
18. Section 357A (2) of Cr.P.C.
19. Section 357A (6) of Cr.P.C.
20. Rule 7 (4) of POCSO Rules.
21. Rule 7 (3) of the POCSO Rules.
22. Section 2 (g) of POCSO Act.
23. Order dated 31-3-2016 in W.P. (CrI) No 798 of 2015 (The Minor, through Guardian Zareen vs. State (Government of NCT Delhi)).
24. Rule 7 (1) of the POCSO Rules.



Summing Up

The POCSO Act was one of the most awaited steps taken by India to address child sexual abuse, enabling children to access justice as well as psychosocial and rehabilitation support.

Government and civil society organisations have engaged with the POCSO Act in different ways to make it more effective. Trainings modules have been developed around the law and trainings are being regularly held by the judicial academies, national and state legal services authorities as well as the police. Some states such as Delhi set up vulnerable witness deposition rooms to help children testify at ease. Measures like one-stop crisis centres have been in existence in cities like Mumbai. In Delhi too, Standard Operating Procedures have been developed for a two-tier system of one-stop centres, one located in hospitals and the other in the courts. Alongside, many have engaged with studying the implementation of the legislation to build evidence that can inform law and policy change. The present study is one such step.

Key Findings

Understanding the Magnitude of the Problem and Data Challenges

- In the last decade (2005 to 2015), while total crimes against children saw an increase of 529%, cases of 'child rape' and 'penetrative sexual assault', including 'aggravated penetrative sexual assault', increased by 408%.
- A total of 35,319 cases of child sexual abuse were registered in the year 2015, constituting 37.5% of all crimes against children (14,193 cases under the POCSO Act and 20,406 cases under the IPC provisions – Sections 376 (rape), 354 (assault on a woman to outrage her modesty), 509 (insult to a woman's modesty) and 377 (unnatural sexual offences). In 2016, 37,269 cases of sexual offences against children (36,022 under the POCSO Act and 1,427 under Section 377 IPC) were registered, which constitutes 34.8% of total crimes against children.

- For the only time, data on incest cases is made available in Table 6.7 of *Crime in India 2015*. However, with data not coming in from many states, the figure for the country is at an abysmally low 136 cases—the study has shown that this cannot be true.
- There is no data on child victims with disability and a category of transgenders is yet to find place in gender disaggregated crime records. No such data on ‘incest’ has been computed in *Crime in India 2016*.
- NCRB has made continuous efforts to revise its methodology to capture the magnitude of sexual crimes against children, reduce the scope for duplication in data, and meet the requirements of changes in the laws relating to the subject. Despite a new legislation on juvenile justice, there is no data on the number of cases of children in conflict with the law being transferred to the Special Courts, and the number of cases where such children are tried as adults.
- Of the total sexual offences against children registered in Delhi and Maharashtra respectively in 2015, 96% in Delhi and 99% in Maharashtra were found to be under the relevant IPC provisions. This could be due to NCRB treating IPC offences as the ‘principal offence’ when a case is registered under the POCSO Act and the IPC provisions. Or it could be due to the fact that the investigating agency was not familiar with the provisions of the POCSO Act, and therefore, not using it. The third possibility for such categorisation of the sexual offence is that punishment for such sexual offence is greater under the IPC or that such sexual offence is not covered under the POCSO Act. This has been rectified in 2016. *Crime in India 2016* has clubbed sexual offences under the POCSO Act and IPC, except for Section 377 IPC which has been separately recorded – Child Rape (Sections 4 & 6 of the POCSO Act / Section 376 IPC), Sexual Assault of Children (Sections 8 & 10 of the POCSO Act / Section 354 IPC), Sexual Harassment (Section 12 of the POCSO Act / Section 509 IPC).
- Irrespective of discrepancy in data and of how a sexual offence committed against a child is registered—under the POCSO Act / IPC / IT Act—the case should be dealt with by the Special Court, and the child should be provided with special protection under the POCSO Act.
- Data discrepancies are everywhere; figures collected through RTI from the police and courts and that collected from courts’ websites do not match.
- There is no resource directory available in public domain on specialised services meant to be provided to the child victim under the POCSO Act, viz., translators and interpreters for different languages and dialects; sign language interpreters; special educators; counsellors; social workers; supports persons, including governmental agencies/ non-governmental organisations.

About the Child and the Abuser

- There were 1,860 victims in the total of 1,803 cases analysed from Delhi, and 163 victims in the 154 cases analysed from Mumbai. 95% of all child victims were females, the youngest female being 6 months old and the youngest male being a year old.
- The number of cases reported, of both girls and boys, was the highest in the 4 to 12 years’ age group. Reportage has been low in the 0 to 3 years’ age group.
- A significant number of children were teenagers with 30% aged 13 to 15 years and another 30% aged 16 to 18 years. The number of girls in the 16 to 18 years’ category was far greater than boys, which may be because of lowering of age of sexual consent and entry of a large number of cases of

'romantic relationship' into the criminal justice system. In Delhi, 97% cases of 16 to 18 year olds that ended in acquittal were cases of romantic relationship.

- Of all accused, 96% in Delhi and 93% in Mumbai were males. The 4% female accused were charged for abetment or for brothel keeping under ITP Act. Maximum number of accused/ offenders were in the 18 to 25 years age group, though the youngest was aged 17 years and the oldest was 82 years old.
- In 82.5% cases the accused/ offender was known to the child. Neighbours formed the largest category of 'known' accused / offenders (28%), followed by romantic relationships (26%), and relatives (25%).
- Most sexual offences by 'known' accused / offender were of a serious nature involving penetration or physical contact.
- In incest cases where fathers are involved, the mothers find it difficult to sustain the family and tend to compromise. In Delhi, 10% of the cases that ended in acquittal due to the child and witnesses turning hostile, were those where the accused was the father of the child. In such situations, the child may continue to remain in an abusive setting and could undergo repeated sexual abuse.
- Both children and the accused/ offenders come from similar socio-economic backgrounds as majority of the offences are committed by 'known' accused / offenders.
- Though the cases examined in Delhi and Mumbai reflect that the children and the accused / offenders belong to the lower income group, it does not suggest that there are no sexual crimes against children belonging to the higher income groups, or that offenders are not from such income group. It merely indicates that sexual offences against children from upper middle class or economically well-off families seldom get reported, more so when the offender is also from the same class. Also, children from the economically weaker sections are more vulnerable to sexual offences due to their difficult living conditions.

Disclosure and Mandatory Reporting

- Disclosure of the offence is highest to the mother. The period before which disclosure is made varies from child to child, depending on their supportive environment. Feeling of shame, guilt, fear of being humiliated and threat from the accused are some of the factors that hold them back from disclosing sexual abuse.
- More cases from Delhi (52%) had the child as the first informant, compared to Mumbai (38%), the youngest being a 10 year old in Delhi and a 13 year old in Mumbai.
- FIRs have generally been registered in the name of the child, parent, family member or relative, soon after disclosure. Strangers to whom children have disclosed the commission of offence have also helped children register a case. Children do require support of a parent, family member or some other person to register an FIR.
- Where an offence is registered against a family member, children and/ or their parents tend to turn hostile sooner or later. Judgments of the Special Courts have been disparate in such cases where the child turned hostile; the conviction/ acquittal of the accused depends upon the other evidence produced by the prosecution, and the rigour of the court to arrive at the truth.

- Cases in which registration of FIR may be attributed to Mandatory Reporting have not resulted in successful prosecution due to the child's absence or child turning hostile. None of the eight adult survivors interviewed had taken legal action against their perpetrators or sought any other intervention, due to fear of stigma and not being believed by their parents. This raises a question on the provision of Mandatory Reporting. Should not the law be flexible enough to enable disclosure that can assure healing and other support needed by the child even if they do not wish to pursue a legal case? Shouldn't the focus instead be on creating support structures, appointing qualified human resources, and strengthening services that could otherwise compliment and facilitate reporting of sexual crimes?

Bail

- Bail was granted in 76% cases in Delhi and in 62% cases in Mumbai.
- While Mumbai rejected bail in all cases of incest where the father was the accused/ offender, in Delhi bail was granted in 47.5% of such cases, making the child vulnerable to further and continued abuse.
- In 28% cases from Delhi, bail was granted before the police completed its investigation and filed a charge sheet. Leaving out the cases of romantic relationship where incarceration would have been unreasonable, misapplication of facts or law, tendency to arrive at a conclusion of the case while hearing bail and accepting 'no objection' of the mother of the child at face value are matters of concern.
- While bail matters would depend on the facts and circumstances of each case, and an accused's right against arbitrary detention must be respected, such matters when decided at the cost of a child's 'right to be heard' calls for a serious rethinking. Bail orders and other court records examined for this study have shown that children are not represented by a lawyer during bail hearings, neither are support persons appointed to safeguard their interest.

Child's Evidence

- Evidence of children as young as three years and five years has been recorded by the Special Courts in Delhi and Mumbai, respectively. Whether these children received the services of a support person is not known as daily orders and judgements do not include such information. The judgments also show that in most of the cases in Delhi (and none in Mumbai) a child was provided with legal representation during the recording of evidence.
- Of the three Delhi cases of children with special needs, special assistance was provided by the Special Courts in two cases. In the third case, despite ascertaining the child's disability, no assistance was provided.
- In Mumbai, no information was available on the courts' website on the time of recording of the child's evidence. That it was recorded in all the 21 disposed cases after the stipulated period of 30 days from the date of cognizance can be indicated from the date on which the matter was first shown on the court's website for recording of evidence. In Delhi, in 89.4% cases children's testimony was recorded beyond the stipulated period of 30 days, extending as far as 27 months.

Disposal

- As on 31 July 2015, pendency of POCSO cases before the Special Courts was 86% in Mumbai and 75% in Delhi. Only 28% of all cases completed trial within the stipulated timeframe of one year from the date of cognizance by court.
- Although in 69% of the cases disposed by way of conviction or acquittal, trial was completed within the stipulated time of one year from the date of cognizance by court, 57% of disposed cases from Mumbai and 29% from Delhi took more than a year for completion of trial. Another 8.5% of disposed cases from Delhi took more than two years.
- Factors contributing to delay in completion of trial can be attributed to different causes at the hands of the investigating agency, the judicial machinery and the parties before the court, many of which are avoidable.

Acquittal / Conviction

- Only 24% of the disposed of cases ended in a conviction. Rate of conviction in cases in Mumbai was 62%, much higher than that in Delhi (22%).
- Rate of acquittals is fairly high in cases involving a 'known' accused/ offender – 66% in Delhi and 50% in Mumbai. Maximum acquittals where the accused/ offender was 'known' to the child are cases of romantic relationship (39%), which is justifiable, followed by cases where the accused/ offender is a neighbour (25%), and cases where the accused/ offender is a relative (19%). Most common reason for acquittal in such cases was the child and other material witnesses turning hostile.
- Acquittals may be attributed to the fact that the police are not familiar with the provisions and are not applying the special procedures under the POCSO Act – cases are not being booked under appropriate provisions of law, the FIR or child's statement is not being recorded in the 'language of the child', absence of women police officers, and lapses in investigation that have been noted by the courts from time to time.
- In most cases, the judgments did not reveal appointment of a 'support person' and/ or providing of lawyer to safeguard the interest of the child before the Special Court.

Sentencing

- In most cases the Special Courts have chosen to impose the minimum sentence. In 7 cases, the Special Courts in Delhi have released the offender on probation.
- Though the evidence brought on record by the prosecution clearly shows the commission of a sexual offence under a particular Section, there have been cases where the offender has been erroneously sentenced under some other Section, sometimes to the detriment of the child, and sometime to that of the offender.
- It is not the quantum of sentence, but certainty of conviction that is material.

Victim Compensation

- Information regarding victim compensation was not a part of most judgements or sentencing orders or daily orders. Further, none of the daily orders mentioned award of interim compensation.

- Experience and study of judgements show that the Special Courts have been shying away from awarding victim compensation, both interim and final. Some courts tend to defer interim compensation till the child testifies and the possibility of the child turning hostile or the case turning out to be ‘false’ can be safely ruled out, thereby denying the child of immediate relief. Final compensation under the POCSO Act, if at all, has only been awarded in cases that have ended in conviction.
- Despite a clear provision for victim compensation under the POCSO Act, Special Courts have relied on the provisions under the CrPC for compensating the victims out of the fine imposed on the offender, which may or may not be paid by the offender.
- There is much confusion on the part of the Special Courts regarding victim compensation. Special Courts are taking recourse to Sections 357 (1) (b), 357 (3) and 357A of CrPC instead of the POCSO Act, whereas civil society organisations prefer to seek compensation under the State Victim Compensation Schemes. There also seems to be ambiguity regarding application of and interplay among the different provisions in the law relating to compensation. In the cases examined during the present study, it is noticed that the Special Courts are not utilising their powers under the POCSO Act and Rules to fix the quantum of compensation depending on the facts of each case, and the situation and needs of the child.
- A support person/ organisation can play a pivotal role in assisting the Special Courts with information pertaining to a child that can help the courts decide on victim compensation. However, there is no coordination between Special Courts and CWCs or the support persons. To ensure optimum narration and capture of the child’s situation before the court, a child should be provided with a lawyer.

Key Recommendations

1. There is a need to promote micro and macro research by all-India and state level institutions, such as the NCPDR and State Commissions as well as Universities/ Colleges, to generate critical information on implementation of the POCSO Act, as also sociological, psychological and legal analysis.
2. Given the significantly high number of cases of children aged 16 to 18 years in romantic relationship coming into the criminal justice system, there is an urgent need for the Ministry of Women and Child Development to facilitate discussions on the issue of age of sexual consent.
3. A large number of cases where the accused is known to the child have ended in acquittal due to the child turning hostile. It is imperative for a robust Victim Protection Programme to be initiated and implemented to enable the child to deal with the pressure to turn hostile. Providing such child with a support person will also be a step towards achieving this end.
4. The provision of Mandatory Reporting in the POCSO Act makes it compulsory for every child against whom a sexual offence is committed to enter the criminal justice system. It is essential to acknowledge that the criminal justice system may not be the best option for all children who have suffered sexual abuse. Further, due to fear of registration of an FIR, children are denied access to services. The Ministry of Women and Child Development should hold consultations to re-examine the provision of Mandatory Reporting, and its impact upon children.
5. The Ministry should also encourage voluntary help-seeking by ensuring that the injury and trauma caused to the child is suitably handled, that the child is in a safe place, and the child is assured of

support through the family / community. The focus should be on creating an environment where the child/ child's family recognise the significance of registering an FIR.

6. There should be minute scrutiny by the Special Court prior to granting bail and at all stages of the case so that the child's interests are identified and safeguarded. The Special Courts should ensure that a child is represented by a lawyer and / or aided by a support person.
7. It should be mandatory for police and the Special Courts to inform children and their families about their right to legal representation and provision of free legal aid, and record the same in their documents, such as, diary entries and daily orders.
8. While the police should inform the Special Courts about assignment of a support person to a child, the Special Courts should also inquire in this regard from the prosecution – Police or Special Public Prosecutor, and should record the same in the daily order, along with the particulars of such support person / organisation. If a support person / organisation is not appointed, the Special Court should facilitate such appointment.
9. It is imperative to establish a robust coordination and linkage between the justice delivery mechanism under the POCSO Act and the JJ Act to enable the Special Court assess the victim's needs. It is not only in relation to the offence, the CWC also has a pivotal role to play to ensure that the developmental needs of the child are fulfilled, such as education, trauma healing, safe living environment.
10. A list containing particulars of translators and interpreters for different languages and dialects; sign language interpreters; special educators; counsellors; social workers; support persons, including governmental agencies/ non-governmental organisations, should be prepared in consultation with the District Child Protection Units (DCPUs) and uploaded on the courts' websites.
11. Sexual offences against children cannot be curtailed by seeking increase in punishment; instead, the focus should be on increasing the rate of conviction. This requires serious investment in enhancing the investigation skills of the police and their sensitization as also building the capacity of Special Courts and Special Public Prosecutors to innovate and move away from the conventional methods of functioning so as to meet the objectives of a special legislation like the POCSO Act.
12. The minimum expectation from the police, the Special Courts and the Special Public Prosecutors is that the provisions of the POCSO Act are respected and followed. All trainings should, therefore, (a) insist upon the police and the courts to record children's statements as spoken by them; (b) ensure that they are well versed with the child-friendly techniques, tools and aids that may be used for interacting with children; (c) insist on no direct questioning of the child at the time of cross-examination; (d) help the Special Courts understand the victim compensation provisions under the POCSO Act and Rules, and its rationale; (e) encourage police and the Special Courts to share ideas and good practices for protecting the rights of children as witnesses; and, (f) send out a clear message that specialised services for children laid down in the law is their entitlement and not mere kind-heartedness.
13. Curriculum of judicial academies, including initiation and refresher training programmes, should contain a module on 'child rights', not merely stressing on different legislations, but also on understanding childhood, adolescence and related vulnerabilities; child psychology and tools and techniques for communicating with children. Such curriculum content should be developed, and regularly reviewed and upgraded in consultation with professionals from relevant fields.

14. The Special Courts should also utilise their powers under Section 165 of IEA (Judge's power to put questions or order production) and Section 311 of CrPC (Power to summon material witness or examine person present) to ensure that the best evidence is produced before the court.
15. Special Courts need to have exclusive charge of matters under the POCSO Act to ensure speedy disposal. The necessary infrastructure and human resources required to meet the objectives of the Act should also be set up/engaged. Where necessary, more Special Courts should be established with suitable infrastructure and human resources.
16. Every State Government should create a fund with sufficient credit for payment of compensation, including interim compensation, awarded by the Special Court to the child victim.
17. Criminal Manuals issued by the High Courts for the Guidance of the Criminal Courts & their Subordinate Officers should include a Chapter on COMPENSATION, including compensation under the POCSO Act.
18. Monitoring mechanism under the ICPS (District Level Child Protection Committee, Block Level Child Protection Committee and Village Level Child Protection Committee in rural areas and Ward Level Committee in urban areas) need to be set up to work towards transforming societal attitudes and building a protective environment for children.
19. NCRB should continue to compute city-wise statistics regarding the POCSO Act, and also provide disaggregate data on different parameters, some of which have been mentioned in the present study.
20. Standardised methods and tools and also terminology can go a long way in eliminating data discrepancies and improving data management systems.
21. Daily orders and details such as date of FIR, date of arrest, date of cognizance, date of grant of bail, date of granting of interim compensation, name of accused's lawyer, Special Public Prosecutor and child's lawyer must be available on courts' websites uniformly, in an organised and systematic manner.

Conclusion

The POCSO Act must be commended for expanding the scope of offences to be included under child sexual abuse to more comprehensively address the issue. It also encourages a child-enabling environment during the investigation and trial of such offences, which immensely helps the victim. However, what is lacking is the methodical operationalisation and implementation of the legislation to meet its objectives. As we cross the fifth year of the Act, we hope that these gaps will be addressed and bridged.

Of greater worry are certain provisions in the POCSO Act, which do not adhere to the legislation's goal and require re-appraisal. These include: raising the age of consent to sexual activity, and the concept of mandatory reporting, to name just two. It is important that debates among stakeholders are facilitated to draw out more such issues, as also to strengthen the legislation.

Successful prosecution is not the only test to measure whether a child has attained justice. The concept of justice extends to providing a child-friendly process through the special procedures, infrastructure and human resources envisioned under the POCSO Act. The rehabilitative component is also an essential

part of justice delivery, and is not limited only to victim compensation, but rests on effective coordination with the juvenile justice system. Justice is not onefold; the interest of a specific child requires to be identified, and her/ his needs fulfilled. The solution may not always lie within the criminal justice system; other avenues also require to be explored.

Precious little is being done towards preventing the entry of children into the criminal justice system. Under the Constitution,¹ it is the state's duty to take steps to prevent violence against children, including sexual violence. "Preventing violence in one generation reduces the likelihood in the next."² To be effective, preventive programmes should be integrated into the mainstream of community life. These should be initiated through professionals working in child-related fields, and should be implemented with community participation. This will also ensure a strong community support structure, more so for children at risk.

Endnotes

1. Article 39 (f).
2. General Comment No 13 (2011), titled, The right of the child to freedom from all forms of violence, issued by the Committee on the Rights of the Child.

