CHAPTER 4

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT (POCSO ACT) 2012: A CRITICAL ANALYSIS

“Let’s raise children who won’t have to recover from their childhoods.” - Pam Leo

India, with the world’s second largest child population, has a complex framework of rights and guarantees that have been made in favour of children across a vast array of legal enactments ranging from the Constitution on the one hand to the Indian Penal Code and other statutory provisions on the other. The Constitution of India makes an exception to the overarching principle of equality by enabling the State to make special provisions in favour of children. A recent amendment to the Constitution further gives children between the ages of six and fourteen the fundamental right to free and compulsory education. A number of provisions in the Chapter on Fundamental Rights have also been devoted to preventing the trafficking of children and their employment in hazardous occupations. The constitutional framework for the protection of the child is, however, not limited in form to negative guarantees enforceable against the State alone. Besides the national framework, India is a signatory to the United Nations Convention on the Rights of the Child, 1989. This strong international and constitutional mandate for protecting the rights of a child has surprisingly, however, not been borne out by other enactments of the Indian legislature. A case in point is the country’s prime criminal statute—the Indian Penal Code conspicuous reticence on child sexual abuse.

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1 Pam Leo is an independent scholar in human development, a parent educator, a certified childbirth educator
2 Article 15(3) of the Indian Constitution
3 Article 21-A inserted via Constitution (Eighty-Sixth Amendment) Act 2002
4 Article 23 of the Indian Constitution
5 Article 24 of the Indian Constitution
Owing to the failure of the Code to explicitly recognize child sexual abuse as a distinct criminal offence, prosecutors and courts are often forced to rely on other generalized provisions which are often far too ill-equipped to deal with several instances of abuse. It is only girl-children who have been subjected to peno-vaginal penetration that can be covered under the ambit of rape as defined under the statute. Other forms of sexual abuse including exhibitionism, touching, penile-anal penetration, penile-oral penetration and object-vaginal penetration are left unpunished by the provision. Such other forms of penetration are covered by another provision of ‘outraging the modesty of women’ which comes with its own baggage.

Given that the modesty of women has been the subject of great judicial interpretation by the Hon’ble Supreme Court, children may often find themselves incapable of possessing such modesty. It may further be noticed that in the event that a case of child abuse is sought to be prosecuted under Section 354, the maximum quantum of punishment is reduced to two years as opposed to a minimum of seven years in cases of rape. What is perhaps even worse is that neither of these provisions could be resorted to if the victim of child abuse happens to be a boy. The only relevant gender-neutral provision in the Code is perhaps its most controversial one ‘unnatural offences’. While it recognizes the possibility of sexual abuse of boys, its high benchmark of the definition of the word “penetration” leaves molestation of boys unaddressed. Such glaring lacunae in India’s criminal law have led to an outburst of outrage by child rights activists who believe that a separate law designed exclusively to combat child sexual abuse is the need of the hour. In order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children

6 Section 375 of IPC after Criminal Amendment Act 2013 has broadened the definition of ‘rape’ to include object insertion, manipulation of body among other things.

7 Section 354 in The Indian Penal Code Assault or criminal force to woman with intent to outrage her modesty. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

8 Section 377 of IPC 1860
through less ambiguous and more stringent legal provisions, the Ministry of Women and Child Development championed the introduction of the Protection of Children from Sexual Offences Act, 2012. The Act is a welcome piece of legislation, in that it recognises almost every known form of sexual abuse against children as punishable offences, leaving little room for ambiguity in its interpretation.\footnote{Available at https://www.linkedin.com/.../child-protection-india-now-under-aegis-law-pocso-act, accessed on 11/07/2017} Further, by providing for a child-friendly judicial process, the Act encourages children who have been victims of sexual abuse to bring their offender to book and seek redress for their suffering, as well as to obtain assistance in overcoming their trauma. It makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child.

**4.1 NATIONAL CRIME RECORDS BUREAU (NCRB) FOR 2015: DATA ANALYSIS**

According to data compiled by the National Crime Records Bureau (NCRB) for 2015, 8,800 cases of rape on children were registered across the country under the Protection of Children against Sexual Offences Act (POCSO). In 2,227 cases, or 25.3 per cent, the offenders were found to be employers or co-workers.\footnote{NCRB data available at indianexpress.com, accessed on 11/07/2017} This is the first time that NCRB has tabulated data in terms of the relationship of the victim and the accused in cases involving rape.
RAPE OF CHILDREN

Neighbours the biggest predators

<table>
<thead>
<tr>
<th>Relationship</th>
<th>Cases under POCSO Act Sec 4&amp; 6 (Rape)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Neighbour</td>
<td>3.149</td>
<td>35.78</td>
</tr>
<tr>
<td>Employer/co-worker</td>
<td>2.227</td>
<td>25.30</td>
</tr>
<tr>
<td>Employer/father/brother etc.</td>
<td>138</td>
<td>1.56</td>
</tr>
<tr>
<td>Other close family member</td>
<td>210</td>
<td>2.38</td>
</tr>
<tr>
<td>Relatives other than close family</td>
<td>581</td>
<td>6.60</td>
</tr>
<tr>
<td>Other known person</td>
<td>2.036</td>
<td>23.13</td>
</tr>
</tbody>
</table>

| Total number of rape cases   | 8,880                                 |

HIGHEST PERCENTAGE OR CHILD RAPE AT WORKPLACE

<table>
<thead>
<tr>
<th>State</th>
<th>Number</th>
<th>% of all child rapes in state</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tamil Nadu</td>
<td>589</td>
<td>55</td>
</tr>
<tr>
<td>Gujrat</td>
<td>542</td>
<td>49</td>
</tr>
<tr>
<td>Madhya Pradesh</td>
<td>166</td>
<td>24</td>
</tr>
<tr>
<td>Karnataka</td>
<td>233</td>
<td>22</td>
</tr>
<tr>
<td>Uttar Pradesh</td>
<td>312</td>
<td>22</td>
</tr>
</tbody>
</table>

Only states with more than 500 case of child rape considered

WORST RATE AND CRIME NUMBERS UNDER POCSO

<table>
<thead>
<tr>
<th>State</th>
<th>Per 1 Lack Child population</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Madhya Pradesh</td>
<td>11.9</td>
<td>1.480</td>
</tr>
<tr>
<td>Karnataka</td>
<td>7.6</td>
<td>1.560</td>
</tr>
<tr>
<td>Odisha</td>
<td>6.8</td>
<td>1.416</td>
</tr>
<tr>
<td>Assam</td>
<td>6.1</td>
<td>731</td>
</tr>
<tr>
<td>Maharashtra</td>
<td>5.6</td>
<td>1.687</td>
</tr>
</tbody>
</table>

CHILD TRAFFICKING DOMINATES ALL HUMAN TRAFFICKING

<table>
<thead>
<tr>
<th>State</th>
<th>Human trafficking cases</th>
<th>Child trafficking cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>West Bengal</td>
<td>1.255</td>
<td>1.119</td>
<td>80</td>
</tr>
<tr>
<td>Assam</td>
<td>1.494</td>
<td>1.317</td>
<td>88</td>
</tr>
<tr>
<td>Bihar</td>
<td>381</td>
<td>332</td>
<td>87</td>
</tr>
<tr>
<td>Haryana</td>
<td>272</td>
<td>200</td>
<td>73</td>
</tr>
<tr>
<td>All India</td>
<td>6.877</td>
<td>3.490</td>
<td>51</td>
</tr>
</tbody>
</table>
In the case of children, the data reveals:\(^\text{11}\):

- Neighbours were the biggest abusers in such cases in 2015-3,149 (35.8%).
- In over 10 per cent of cases last year, children were subjected to rape by their own family members or relatives.
- In 94.8 per cent of cases, children were subjected to rape by someone known to them.
- 14,913 cases were registered under POCSO in 2015.

### 4.2 SURVEY OF MINISTRY OF WOMEN AND CHILD DEVELOPMENT

In year 2007, a government commissioned survey has found that more than 53% of children in India are subjected to sexual abuse, but most don't report the assaults to anyone.\(^\text{12}\) The survey covered different forms of child abuse: physical, sexual and emotional as well as female child neglect, found that two out of every three children have been physically abused.

Parents and relatives, persons known to the child or in a position of trust and responsibility were mostly found to be the perpetrators of child sexual abuse in the country. According to the women and child development ministry sponsored report, which assumes greater significance in the backdrop of the Nithari killings that brought into focus the issue of children's safety, those in the age group of 5-12 years reported higher levels of abuse.\(^\text{13}\)

While releasing the survey, then women and child development minister Renuka Chowdhary said, "Child abuse is shrouded in secrecy and there is a conspiracy of silence around the entire subject. The ministry is

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\(^{11}\) Table has been taken from http://indianexpress.com/article/india/india-news-india/ncrb-data-rape-child-minor-workplace-by-employee-crime-3005142

\(^{12}\)Available at timesofindia.indiatimes.com/india/...53-children...sexual-abuse-Survey, accessed on 15/08/2017

\(^{13}\)ibid
working on a new law for protection of children's rights by clearly specifying offences against children and stiffening punishments.”¹⁴

The survey, carried out across 13 states and with a sample size of 12,447, revealed that 53.22% of children reported having faced one or more forms of sexual abuse, with Andhra Pradesh, Bihar, Assam and Delhi reporting the highest percentage of such incidents. In 50% of child abuse cases, the abusers were known to the child or were in a position of trust and responsibility and most children did not report the matter to anyone.¹⁵

The survey, sponsored by WCD ministry and carried out by the NGO Prayás in association with UNICEF and Save the Children, found that over 50% children were subjected to one or the other form of physical abuse and more boys than girls were abused physically. The first-ever survey on child abuse in the country disclosed that nearly 65% of schoolchildren reported facing corporal punishment ‘beatings by teachers’ mostly in government school. Of children physically abused in families, in 88.6% of the cases, it was the parents who were the perpetrators. More than 50% had been sexually abused in ways that ranged from severe such as rape or fondling to milder forms of molestation that included forcible kissing.¹⁶

The study also interviewed 2,324 young adults between the ages of 18 and 24, almost half of whom reported being physically or sexually abused as children. When it comes to emotional abuse, every second child was subjected to emotional assault and in 83% of the cases, parents were the abusers. The aim of the study was to develop a comprehensive understanding of the phenomenon of child abuse, with a view to facilitate the formulation of appropriate policies and programmes meant to effectively curb and control the problem of child abuse in India.¹⁷

¹⁴ibid
¹⁵ibid
¹⁶ibid
4.3 OBJECTIVE OF POCSO ACT

The POCSO Act was enacted on 14 November 2012 throughout India, except the state of Jammu and Kashmir. The Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography and to provide a child friendly system for the trial of these offences. It also intends to protect the child through all stages of judicial process and gives paramount importance to the principle of ‘best interest of the child’.

Before POSCO

In State Vs Pankaj Chaudhary 18

In this case the question for consideration is, as to what was the exact nature of the act committed by the Appellant. Whether it was an offence of rape and carnal intercourse against the order of nature or it was an attempt to rape/or attempt to have a sexual intercourse against the order of nature or it was merely an indecent assault within the meaning of Section 354 IPC.

The court held that the Appellant's conviction under Section 376/511 and 377/511 IPC is set aside, instead, he is convicted for the offence punishable under Section 354 IPC. He is sentenced to undergo Rigorous Imprisonment for two years and to pay fine of Rs. 2,000/- or in default of payment of fine to undergo further RI for three months. The conviction and sentence under Section 506 IPC needs no interference, the same is accordingly maintained. It goes without saying that the Appellant shall be given benefit under Section 428 Code of Criminal Procedure. The case clearly reveals the trauma that child victims faced, where the accused had inserted his fingers inside the vagina and anus of a five-year-old girl, and he was accused of ‘outraging the modesty of a

18 MANU/DE/3194/2011
woman’ as there was no concept of penetration with fingers in Indian law. The defence had won in this case.

**After POSCO**

*Nishu Vs Commissioner of Police, Delhi and Ors.*

Petitioner is a minor who was kidnapped on 25.10.2013 by a group of nine persons who had kept her confined up to 8.11.2013. The accused persons, in different combinations, had repeatedly raped her and that one of the accused, named, Pradeep is a constable in Haryana Police. After being recovered, medical examination of the girl was done, but neither the copy of the report was not furnished nor any FIR under Section 376 D of the Indian Penal Code or the provisions of the POCSO Act registered against the accused persons.

Petition under Article 32 has been filed seeking directions from the Court for registration of FIR under above mentioned sections; for the arrest of the accused. Appropriate action against the officers of the Delhi and Haryana police by way of departmental proceedings for their refusal/failure to register the FIR under the aforesaid sections of the Indian Penal Code as well as the provisions of POCSO.

In view of the arguments asserted by the counsels of both the respondents, court held that no order or direction to the first Respondent would be justified in view of the fact that the case has been registered by the Haryana Police and has been investigated by the authorities of the State of Haryana. The Hon’ble Court also find out that as the charge sheet has been filed against all the nine accused and the trial has commenced in the meantime it will be wholly inappropriate to exercise our jurisdiction under Article 32 of the Constitution. Thus the case is an example to show the changed scenario of child victim after legislation of POCSO Act.

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19(2014) 12 SCC 546
4.4 SALIENT FEATURES OF POCSO ACT

1. Gender neutral: Meaning thereby crimes of such nature done to male or female child will be dealt with, by this act only.

2. Burden of proof: The rule under this act is “guilty until proved innocent” instead of the general rule “innocent until proved guilty” and to prevent misuse of law, punishment has been provided for false complaints or false information with malicious intent.

3. It makes the recording of abuse mandatory: This act also states that it is mandatory for the police to register an FIR in all cases of child abuse. A child’s statement can be recorded even at the child’s residence or a place of his choice and should be preferably done by a female police officer not below the rank of sub-inspector.\(^{20}\)

4. It lists all known types of sexual offences towards a minor: It punishes penetrative sexual assault, aggravated penetrative sexual assault, non-penetrative sexual assault, aggravated non-penetrative sexual assault, sexual harassment, use of minor for pornographic purposes, attempt or abetment of offence and even failure to report an offence, i.e., if there is an apprehension of such offence to be committed, then the same should be immediately reported. Failure to report will attract imprisonment of 6 months or fine or both.

5. It provides for the protection of minors during the judicial process.
   i) For speedy trial, the evidence of the child is to be recorded within a period of 30 days.\(^{21}\)
   ii) Special courts have been set up to conduct trials, which should be completed within one year.\(^{22}\)

\(^{20}\) Section 24(1) of the POCSO Act 2012
\(^{21}\) Section 35 of the POCSO Act 2012
\(^{22}\) Supra note 9
These courts must ensure that, the minor is not exposed in any way to the accused during the recording of evidence and his identity is not disclosed at any time during the investigation or trial.\textsuperscript{23}\textsuperscript{2} The minor is not made to repeat his/her testimony in court, and that he/she can give the testimony using a video link. The defence routes all questions through the judge and is not allowed to ask them in an aggressive manner. An interpreter, translator, special educator or any other expert is present in court for the minor’s assistance. There is a defined criteria for awarding compensation by the Special Court that includes, loss of educational and employment opportunities along with disability, disease or pregnancy as the consequence of the abuse.

6. It has raised the age of consensual sex from 16 years as per Indian Penal Code, 1860 to 18 years.\textsuperscript{24}\textsuperscript{2} This means that –

- Any person (including a child) can be prosecuted for engaging in a sexual act with a child irrespective of whether the latter consented.
- A husband or wife can be prosecuted for engaging in a sexual act with his or her spouse under the age of eighteen years.

7. People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the Act.

8. In keeping with the best international child protection standards, the Act also casts a legal duty upon a person who has knowledge that a child has been sexually abused to report the offence; if he fails to do so, he may be punished with six months’ imprisonment and/ or a fine.\textsuperscript{25}

9. The Act stipulates that a case of child sexual abuse must be disposed of within one year from the date the offence is reported.

\textsuperscript{23} Section 24(3) of the POCSO Act 2012
\textsuperscript{24} The age has been increased with the Criminal (Amendment) Act 2013
\textsuperscript{25} Section 21 of the POCSO Act 2012
10. At night no child to be detained in the police station.\textsuperscript{26} The statement of the child to be recorded as spoken by the child. Frequent breaks for the child during trial. Child not to be called repeatedly to testify. For offences under this Act the burden of proof is shifted on the accused, keeping in view the vulnerability and innocence of children. To prevent misuse of the law, punishment has been provided for false complaints or false information with malicious intent. The media has been barred from disclosing the identity of the child without the permission of the special court. The punishment for breaching this provision by media may be from six months to one year.\textsuperscript{27}

4.5 TYPES OF SEXUAL OFFENCES AND PUNISHMENTS

List of sexual offences under the Act and the punishment for the offences:

<table>
<thead>
<tr>
<th>S.No</th>
<th>Offence and Description</th>
<th>Punishment</th>
</tr>
</thead>
</table>
| 1    | **Section 3** Penetrative Sexual Assault
Inserting body part or object in a child, or making a child does this with another. | **Section 4** Not less than seven years of imprisonment which may extend to imprisonment for life, and fine |
| 2    | **Section 5** Aggravated Penetrative Sexual Assault
Penetrative sexual assault by a police officer, member of armed forces, public servant, staff of remand home, jail, hospital or school. It includes penetrative sexual assault committed by any other person through gang penetrative assault, penetrative sexual assault using deadly weapons, fire, heated substance or corrosive substance, penetrative sexual assault which physically incapacitates the child or causes child to become mentally ill, causing grievous hurt or bodily harm and injury to the sexual organs of the child, making girl child pregnant, inflicting child with HIV or any other life threatening illness | **Section 6** Not less than ten years of imprisonment which may extend to imprisonment for life, and fine |

\textsuperscript{26} Section 24(4) of the POCSO Act 2012

\textsuperscript{27} Section 23 of the POCSO Act
<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td><strong>Section 7</strong>&lt;br&gt;Sexual Assault&lt;br&gt;With sexual intent touching the private parts of a child</td>
</tr>
<tr>
<td>4</td>
<td><strong>Section 9</strong>&lt;br&gt;Aggravated Sexual Assault&lt;br&gt;Sexual assault by a police officer, member of armed forces, public servant, staff of remand home/jail/hospital/school, etc, and other acts of sexual assault by any person as mentioned in the second part of section 5, except making a girl child pregnant.</td>
</tr>
<tr>
<td>5</td>
<td><strong>Section 11</strong>&lt;br&gt;Sexual Harassment of the Child&lt;br&gt;With sexual intent:&lt;br&gt;• showing any object/body part, or&lt;br&gt;• making any gesture aimed at a child&lt;br&gt;• making a child exhibit her body enticing or threatening to use a child for pornography</td>
</tr>
<tr>
<td>6</td>
<td><strong>Section 13</strong>&lt;br&gt;Use of Child for Pornographic Purposes</td>
</tr>
<tr>
<td>7</td>
<td><strong>Section 14 (2)</strong>&lt;br&gt;Penetrative sexual assault by directly participating in pornographic acts</td>
</tr>
<tr>
<td>#</td>
<td>Section 14 (3)</td>
</tr>
<tr>
<td>---</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Aggravated penetrative sexual assault by directly participating in pornographic acts</td>
</tr>
<tr>
<td>9</td>
<td>Section 14 (4)</td>
</tr>
<tr>
<td></td>
<td>Sexual assault by directly participating in pornographic acts</td>
</tr>
<tr>
<td>10</td>
<td>Section 14 (5)</td>
</tr>
<tr>
<td></td>
<td>Aggravated sexual assault by directly participating in pornographic acts</td>
</tr>
<tr>
<td>11</td>
<td>Section 15</td>
</tr>
<tr>
<td></td>
<td>Storage of pornographic material involving a child for commercial purposes</td>
</tr>
<tr>
<td>12</td>
<td>Section 21</td>
</tr>
<tr>
<td></td>
<td>Punishment for failure to report or record a case by (i) Any person; (ii) Any person, being in charge of any company or an institution. (This offence does not apply to a child)</td>
</tr>
<tr>
<td>13</td>
<td>Section 22</td>
</tr>
<tr>
<td></td>
<td>(1) Punishment for false complaint or false information in respect of an offence committed under sections 3, 5, 7 and section 9 solely with the intention to humiliate, extort or threaten or defame him. (2) False complaint or providing false information against a child knowing it to be false, thereby victimising such child in any of the offences under this Act. (This offence does not apply to a child)</td>
</tr>
</tbody>
</table>
4.6 DETAILED ANALYSIS OF POCSO: MENACE THAT ACT SEEKS TO CURE

The Act defines a child as any person below eighteen years of age, and regards the best interests and wellbeing of the child as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child. It defines different forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography, and deems a sexual assault to be “aggravated” under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority vis-à-vis the child, like a family member, police officer, teacher, or doctor. People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the Act. The Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life and fine.

1. Under Section 44 of the Protection of Children from Sexual Offences (POCSO) Act and Rule 6 of POCSO Rules, 2012, the National Commission for Protection of Child Rights, in addition to its assigned function, also mandated.

2. To monitor the designation of Special Courts by State Governments.

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28 Section 17 of POCSO Act 2012- Punishment for abetment: Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence. Explanation. — An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment.

29 Section 44 of POCSO Act - Monitoring of implementation Act: (1) The National Commission for Protection of Children Rights constituted under section 3, or as the case may be, the State Commission for Protection of Child Rights constituted under section 17, of the Commissions for Protection of Child Rights Act, 2005 shall, in addition to the functions assigned to them under that Act, also monitor the implementation of the provisions of this Act in such manner as may be prescribed. (2) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, while inquiring into any matter relating to any offence under this Act, have the same powers as are vested in it under the Commissions for Protection of Child Rights Act, 2005. (3) The National Commission or, as the case may be, the State Commission, referred to in sub-section (1), shall, also include, its activities under this section, in the annual report referred to in section 16 of the Commissions for Protection of Child Rights Act, 2005.
3. To monitor the appointment of Public Prosecutors by State Governments.

4. To monitor the formulation of the guidelines described in the Act by the State Governments, for the 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, and to monitor the application of these guidelines.\(^{30}\)

5. To monitor the designing and implementation of modules for training police personnel and other concerned persons, including officers of the Central and State Governments, for the effective discharge of their functions under the Act.

6. To monitor and support the Central Government and State Governments for the dissemination of information relating to the provisions of the Act through media including the television, radio and print media at regular intervals, so as to make the general public, children as well as their parents and guardians aware of the provisions of the Act.

7. To call for a report on any specific case of child sexual abuse falling within the jurisdiction of a CWC.

8. To collect information and data on its own or from the relevant agencies regarding reported cases of sexual abuse and their disposal under the processes established under the Act, including information on the following:-

   a. Number and details of offences reported under the Act;

   b. Whether the procedures prescribed under the Act and rules were followed, including those regarding timeframes;

\(^{30}\)Section 39 of POCSO Act 2012
c. Details of arrangements for care and protection of victims of offences under this Act, including arrangements for emergency medical care and medical examination; and

d. Details regarding assessment of the need for care and protection of a child by the concerned CWC in any specific case.

9. To assess the implementation of the provisions of the Act and to include a report in a separate chapter in its Annual Report to the Parliament.  

4.7 ROLE OF CHILD WELFARE COMMITTEES (CWC)

This Act need to be reported to the CWC within 24 hours of recording the complaint. The Child Welfare Committees (CWC) play a vital role under the POCSO Act, cases registered under CWC should take into account the opinion of the child to decide on the case within three days and conclude whether the child should remain in an institution or be with the family. The CWC should nominate with the consent of the child parent / guardian / other person who the child trusts, a support person to assist the child during the investigation and trial of the case.

4.8 ROLE OF STATE COMMISSIONS FOR PROTECTION OF CHILD RIGHTS

The State Commissions for Protection of Child Rights (SCPCR) has been empowered and with the responsibility of monitoring the implementation of the provisions of the POCSO Act 2012, to conduct inquiries and to report the activities undertaken under the POCSO Act 2012, in its annual report. The commission is also empowered to call for a report on any specific case of child sexual abuse falling within the jurisdiction of a CWC. The commission can also recommend interim relief, or make recommendations to the state government to effectively redress the matter.

32Section 19(6) of the POCSO Act
33Section 44 of the POCSO Act
4.8.1 Duty on State to Spread Awareness

The Act casts duty on state to spread awareness to the general public, of the provisions of this act through media i.e. television, radio and print at regular intervals. The POCSO Act of 2012 looks into a support system for children through a friendly atmosphere in the criminal justice system with the existing machinery i.e. the CWC and the commission. The positive aspect is the appointment of the support person\(^{34}\) for the child who would assist during investigation, pretrial, trial and post-trial. The major challenge also would be convergence between different entities under different legislations. The act makes it mandatory to report to the police about any offence defined under POCSO Act 2012. The recent decision of the cabinet in a bill to reduce the age of consent for sex to 16 years will mean that the protection given under this law to protect children from sexual crimes will be restricted to the children who are 16 years of age. There is a fear that this would end up taking away safeguards available to victims under the POCSO Act, especially girls in the 16-18 age bracket. The benefits of POCSO Act would trickle down to the child only if this Act is implemented in its true sense and spirit by all the agencies.\(^{35}\)

The Act defines a child as any person below eighteen years of age, and regards the best interests and well-being of the child as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child. It defines different forms of sexual abuse, including penetrative and non-penetrative assault, as well as sexual harassment and pornography, and deems a sexual assault to be “aggravated” under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a

\(^{34}\)“A person assigned by a Child Welfare Committee, in accordance with sub-rule (8) of rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in pre-trial or trial process in respect of an offence under the Act” – Support Person as defined under definition clause of ‘The Protection of Children from Sexual Offences Rules, 2012’

position of trust or authority vis-a-vis the child, like a family member, police officer, teacher, or doctor. People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the Act.

4.8.2 Criteria of Compensation

The rules laid down in this act also had defined a criteria of awarding the compensations by the special court that includes loss of educational and employment opportunities along with disability, disease or pregnancy as the consequence of the abuse. This compensation would be awarded at the interim stage as well as after the trial ends.

4.8.3 Trafficking of Children

People who traffic children for sexual purposes are also punishable under the provisions relating to abetment in the said Act. The said Act prescribes stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life, and fine. The said Act recognizes almost every known form of sexual abuse against children as punishable offences, and makes the different agencies of the State, such as the police, judiciary and child protection machinery, collaborators in securing justice for a sexually abused child. Further, by providing for a child-friendly judicial process, the said Act encourages children who have been victims of sexual abuse to report the offence and seek redress for their suffering, as well as to obtain assistance in overcoming their trauma. In time, the said Act will provide a means not only to report and punish those who abuse and exploit the innocence of children, but also prove an effective deterrent in curbing the occurrence of these offences.

4.8.4 Mandatory Reporting of Sexual Offences

In keeping with the best international child protection standards, the Act also provides for mandatory reporting of sexual offences. This casts a legal duty upon a person who has knowledge that a child has been sexually abused to report the offence; if he fails to do so, he may be punished with
six months’ imprisonment and/ or a fine.\textsuperscript{36} Thus, a teacher who is aware that one of her students has been sexually abused by a colleague is legally obliged to bring the matter to the attention of the authorities. The Act, on the other hand, also prescribes punishment for a person, if he provides false information with the intention to defame any person, including the child.

\textbf{4.9 ROLE OF POLICE}

The Act also casts the police in the role of child protectors during the investigative process.\textsuperscript{37} Thus, the police personnel receiving a report of sexual abuse of a child are given the responsibility of making urgent arrangements for the care and protection of the child, such as obtaining emergency medical treatment for the child and placing the child in a shelter home, should the need arise. The police are also required to bring the matter to the attention of the Child Welfare Committee (CWC) within 24 hours of receiving the report, so the CWC may then proceed where required to make further arrangements for the safety and security of the child.

\textbf{4.9.1 Unmistakable Duties of Police During the First 24 Hours}

Most specifically, the paramount role and duties of police need to be appreciated and streamlined, since police shall record and register the sexual offences (Penetrative or non-Penetrative) committed against the children under Protection of Children from Sexual Offences (POCSO) Act 2012,\textsuperscript{38} any negligence or lapses on the part of police will crop up with serious implications. If the police fail to register a case under the Act timely, then the case will remain almost unreported and it will slowly but surely evaporate from

\textsuperscript{36} Section 21(1) of the POCSO Act 2012  
\textsuperscript{37} See Section 19 and 24 of POCSO Act 2012  
\textsuperscript{38} Section 24-Recording of statement of a child (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector. (2) The police officer while recording the statement of the child shall not be in uniform. (3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused. (4) No child shall be detained in the police station in the night for any reason. (5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.
public domain resulting in leaving the culprit scot-free while the survivor child is not provided with any kind of care and protection measures or justice.

A relevant question to be analyzed: Could the police deny from record or register a complaint about sexual assault cases under the Act?

Under the POCSO Act, the police as a bounded duty need to record the complaint and assign an entry number to the information, read it over to the complainant/informant, enter the complaint in a book kept by the Police Unit.\(^{39}\) So it is evident that Police cannot refuse to record or register of any such complaint. Because failure to record information relating to the commission of an offence or an apprehension that an offence is likely to be committed is punishable under the Act, with imprisonment which may extend up to 6 months or with fine or with both.\(^{40}\) As emergency duties of police which need to discharge within 24 hours of the report being registered i.e. registering an FIR, local police or Special Juvenile Police Unit (SJPU) shall, without unnecessary delay but within a period of 24 hours, report all the sexual assault cases to the concerned Child Welfare Committee and Special Court or where no Special Court has not been designated, to the Court of Sessions, including the need of the child for care and protection ad steps taken in this regards.\(^{41}\) It is the duty of the SJPU and Police to ensure that a victim child of sexual assault is taken to the nearest hospital (Government or Private which is the closer) or medical facility within 24 hours of the report being registered.\(^{42}\) The police should be aware the fact that the time frame for medical examination of a child is within 24 hours from the case is reported to the police. Therefore, the police should, either on one or another pretext, never try to delay in taking the child for a medical examination within 24 hours at any cost.

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\(^{39}\) Section 19(2) of the POCSO ACT 2012  
\(^{40}\) Section 21 of the POCSO ACT 2012  
\(^{41}\) Section 6 of the POCSO ACT 2012  
\(^{42}\) Section 19(5) of the POCSO ACT 2012
4.10 ROLE OF DOCTORS

The Act also makes provisions for the medical examination of the child in a manner that is least distressful. The Act also clearly vocalizes that doctors should not demand legal records or legal procedure or documentation to be completed before initiating the treatment or examination. Legal procedures can be done later after initiating the medical care. It is now mandatory for doctors to register a medico-legal case in all cases of child sexual abuse. Failure of reporting could result in six months imprisonment and/or a fine under Section 21 of the POCSO Act, 2012. The registered medical practitioner rendering medical care shall (i) collect evidence after a thorough medical examination, (ii) treat the physical and genital injuries, (iii) conduct age assessment of the victim (if required), (iv) offer prophylaxis for sexually transmitted diseases including HIV, (v) discuss emergency contraceptives with the pubertal child and her parent, (vi) do baseline evaluation for mental health issues, (vii) monthly follow up at least for six months to look for development of psychiatric disorders, (viii) do family counselling and (ix) assist the court in interviewing the child and testifying in the court. Another significant provision made in this law is that no hospital under the jurisdiction of the Indian constitution can refuse to admit the victim of child sexual abuse for examination and treatment.

This issue has been re-emphasized under Section 357C into the Code of Criminal Procedure, 1978. The amended act, Section 166B of Indian Penal

43 Section 27 of the POCSO ACT 2012
44 Section 357C of the Code of Criminal Procedure, 1978- Treatment of victims-All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under section 326A, 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident.
45 Under Section 166B of the Indian Penal Code -whoever, being in charge of a hospital, public or private, whether run by the central government, the state government, local bodies, or any other person, contravences the provisions of section 357C of the code of criminal procedure, 1973 (2 of 1974), shall be punished with imprisonment for a term which may extend to one year or with fine or with both.
Code specifies that no hospital whether the private or public can deny treatment to a rape victim. Challenges and controversies Child sexual abuse is a multidimensional problem having legal, social, medical and psychological implications.

4.10.1 Duties of Hospitals or Doctors during the First 24 hours

Hospitals and Doctors should know, it is now a crystal clear that Rule 5 (3) of the POCSO Rules categorically bars doctors or hospitals from demanding legal documents (FIR etc.) before rendering medical care, and Section 27 of POCSO Act stated that medical examinations must be carried out even if an FIR or Complaint has not been registered. In short, under the Act, any doctor or hospital now cannot insist on legal formalities to the victim's party such as FIR or formal complaint to police about the sexual offence prior to the medical examination or emergency medical care of child victim.

4.10.2 Doctors Seek Parents Cooperation To Report Child Sexual Abuse

Doctors should play a more responsible role in bringing child sexual abuses to light under the Prevention of Children from Sexual Offences (POCSO) Act. But, most of them feel that it can be done only if there is cooperation from the parents of such victims. Section 21 of the POCSO Act\textsuperscript{46} poses threat to doctors who deal with victims of child sexual abuse because the pressure mounts on them to report the matter to police for action against the perpetrators. Otherwise, they may have to face legal action which may extend to imprisonment of six months. Even though the Act ensures safety and justice to the victims of the child sexual abuse, lack of cooperation from the family remains a setback to implement the Act completely. There are instances which

\textsuperscript{46}Section 21-Punishment for failure to report or record a case : (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine. (3) The provisions of sub-section (1) shall not apply to a child under this Act
show that the parents of many children are not willing to report child sexual abuse cases to police though doctors are willing to bring it to the notice of the officials. Parents should be educated on this issue.

It is pointed here that if the child had been abused by their own family members, they will try to cover up the matter. In that case it is expected from doctors to do proper documentation of the case details of the suspected victims of child sexual abuse so that it can be submitted as strong evidence against the perpetrators in the court of law. The researcher here wants to bring in notice that doctors who are willing do to so put their submission that medical equipment like colonoscopy required for diagnosis can't be owned by some of them. But the tests to check sexual abuse cases can be done using such equipment. So, they have to depend on other doctors. In order to overcome such problem, a group of gynaecologists should decide to bring such victims personally to the nearby government hospitals where they can get the tests done.  

4.10.3 Medical Examination of the Child

The Act also makes provisions for the medical examination of the child designed to cause as little distress as possible.  

4.10.4 Provision to avoid re-victimisation of the Child

The Act further makes provisions for avoiding the re-victimisation of the child at the hands of the judicial system. It provides for special courts that conduct the trial in-camera and without revealing the identity of the victim.

48 Section 27 of the POCSO act Medical examination of a child: (1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973. (2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor. (3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the children poses trust or confidence. (4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any woman nominated by the head of the medical institution.
49 Section 37 of the POCSO Act
child, in a manner that is as child friendly as possible. Hence, the child may have a parent or other trusted person present at the time of testifying and can call for assistance from an interpreter, special educator, or other professional while giving evidence; further, the child is not to be called repeatedly to testify in court and may testify through video-link rather than in the intimidating environs of a courtroom. Above all, the Act stipulates that a case of child sexual abuse must be disposed of within one year from the date the offence is reported.

4.11 ROLE OF STATE GOVERNEMENT UNDER SECTION 39 OF THE POCOSO

The said Act is to be implemented with the active participation of the State Governments. Under section 39 of the said Act, the State Government is required to frame guidelines for the use of persons including non-governmental organizations, professionals and experts or persons trained in and having knowledge of psychology, social work, physical health, mental health and child development to assist the child at the trial and pre-trial stage.

4.12 DESIGNATION BY STATE GOVERNMENT OF A SPECIAL COURT UNDER SECTION 28 OF POCOSO

Section 28 of the POCSO Act, 2012 specifies that the State Government shall designate for each district, a Court of Session to be a Special Court to try the offences under the Act. The Section also states that if a Court of Session is already notified as a children's court under the Commissions for Protection of Child Rights Act, 2005, then such court shall be deemed to be a Special Court to try offences under the POCSO Act,

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50 Section 38 of the POCSO Act
2012. As per information available, eighteen States/UTs have designated Special Courts/Children's Court to try offences under the Act.

**4.13 CRITICAL APPRAISAL AND BEST PRACTICES UNDER POCSO ACT**

The Protection of Children from Sexual Offences Act, 2012 is a criminal law, which protects children from the chilling reality of sexual abuse. All offences under the POCSO must be tried in camera by a Special Court and in the presence of the parents of the child or any other person that the child trusts. If the accused is a juvenile, then he/she will be tried under the Juvenile Justice (Care and Protection of Children) Act, 2015. If the child is differently abled or is mentally or physically ill, the Special Court should take the assistance of a translator, interpreter or special educator, to record the statement of the child and for any other purposes that it may so need. If the offence complained of is also an offence under any other law, and if the accused is found guilty of the offence, then such an accused can be sentenced with the greatest punishment that there may be under the different laws. The family or the guardian of the child is entitled to separate legal representation during any trial for an offence. This legal representation is distinct from the public prosecutor and must act in the best interest of the child.

In case the offence is of a physical nature, try to report it to the police and then have a medical examination conducted within twenty-four hours as it is the best chance to gather vital physical evidence such as injury marks, DNA material, etc. If the child is capable of stating the facts, then he/she should be encouraged to do so. The police must record the complaint in simple language so that child can understand it. After recording the statement of the child, the policeman must read it back to the child so that the child can state whether the statement is correct or not.\(^52\)

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4.14 LOOPHOLES IN THE LAW

There are certain drawbacks in the law around the following issues:

(A) Consent

If the child/adolescent refuses to undergo medical examination but the family member or investigating officer is insisting for the medical examination, the POCSO Act is silent and does not give clear direction. There is an urgent need to clarify the issue of consent in such cases. However, it would be prudent to take informed consent from parent when the survivor is a child (below 12 years) and consent from both parent and the victim, if the survivor is an adolescent (age group from 12 -18 years). However, emergency treatment needs to be initiated without getting into these consent issues or legality to protect the life of the child.

(B) Medical Examination

The POCSO ACT, Section 27(2) mandates that in case of a female child/adolescent victim, the medical examination should be done by a female doctor. However, the law mandates the available medical officer to provide emergency medical care. On the other hand, the Criminal Law amendment act, Section 166A of Indian Penal Code mandates the Government medical officer on duty to examine the rape victim without fail. This conflicting legal position arises when female doctor is not available.

(C) Treatment Cost

The law has casted legal obligation on the medical fraternity and establishment to provide free medical care to the survivors. If there are no proper facilities or costly procedure is required, the State should take responsibility of reimbursing the cost; otherwise hospital may provide substandard medical treatment procedure or may deprive the survivor from comprehensive treatment.
(D) Consented Sexual Intimacy

Sexual contact between two adolescents or between an adolescent and an adult are considered illegal under the POCSO Act 2012, because no exception has been granted in the Act under which an act of sexual encounter with a person under 18 is an offence irrespective of consent or the gender or marriage or age of the victim. However, it is proposed that any consensual sexual act that may constitute penetrative sexual assault should not be an offence when it is between two consenting adolescents, otherwise both the adolescents will be charged under the POCSO Act, 2012. On the other hand, the latest amendment of the Indian Penal Code concerning rape laws in 2013 clearly reports that the age of consent for sex has been fixed to 18 year, hence, anyone who has consensual sex with a child below 18 year can be charged with rape, which may increase the number of rape cases. One more serious repercussion is that obstetric and gynaecologists need to report all the MTP (medical termination of pregnancy) cases performed on children below 18 year.

(E) Need for Training

Training: there is an urgent need to train the medical, teachers, judicial, advocates and law enforcing agencies in the POCSO Act, 2012. Research, information, monitoring and sensitizing the public are the biggest challenges. Training all the stakeholders is one of the important variables in providing comprehensive care and justice. There is also an urgent need to train all the medical undergraduates and primary health care doctors in providing child friendly interview, structured assessment, collecting evidence, prophylaxis for sexually transmitted diseases and HIV, family counselling and regular follow up.

(F) Role of Mental Health Professional

Role of mental health professional: The definitive signs of genital trauma are seldom seen in cases of child sexual abuse. Hence, the evaluation of child sexual abuse victim requires special skills and techniques in history
taking, forensic interviewing and medical examination. The role of mental health professional is crucial in interviewing the child in the court of law. Child sexual abuse can result in both short-term and long-term harmful mental health impact mental health professionals need to be involved in follow up care of the victim with regard to emergence of psychiatric disorders, by providing individual counselling, family therapy and rehabilitation.

(G) Same Sentence for different degrees of assault under POCSO, not just.

Under Section 10 of POCSO Act, court has no option except to award minimum sentence of imprisonment of five years. However age of the convict and the fact that he is first-time offender are mitigating factors in favour of the convict, but in view of provisions of Section 10 of the Act, this court is unable to give due weightage to the said mitigating factors.53

(H) Problem of Reporting

Reporting: It is well known that the cases of child sexual abuse are usually not reported. Further, knowing and reporting child sexual offence is highly difficult and highly personal decision for many family members and also for survivors. Both survivors and family members feel embarrassed and ashamed bearing the guilt, anger, frustration and emotional turmoil of the act. The fear of re-victimization because of medical examination, criminal justice system and poorly informed society members keeps them silent and undergo torture for long duration.

(I) Child Marriage

Child marriage and consummation of child marriage are considered illegal under the POCSO Act, 2012. In India even though child marriage is prohibited under secular law, it enjoys sanction under certain Personal Law thus complicating matters. These issues need to be addressed when the law is open for amendment.

4.15 STRONG PROVISIONS, WEAK IMPLEMENTATION

Although the state is required to give wide publicity to the Protection of Children from Sexual Offences Act, the law is relatively unknown even to those who need to apply it. Amid the public outcry raging on the streets over instances of rape of children across the nation, the victimised and abused child suffers in silence. Traumatised, dejected and horrified family members of the unfortunate victims find themselves helpless, confused and unable to cope in the aftermath of the heinous crime. There are Constant demands for stiff penalties, expeditious new laws and fast-track courts although POCSO, as a wholesome law, already says it all. Until recently, various provisions of the Indian Penal Code (IPC) were used to deal with sexual offences against children as the law did not make a distinction between an adult and a child. POCSO deals with sexual offences against persons below 18, who are deemed as children. POCSO provides definitions of “penetrative sexual assault”, “sexual assault” and “sexual harassment” the offence is considered graver if it is committed by a police officer, public servant, any member of the staff at a remand home, protection or observation home, jail, hospital or educational institution, or by a member of the armed or security for POCSO provides for relief and rehabilitation as soon as the complaint is made to the Special Juvenile Police Unit or the local police, who are required to make immediate arrangements for care and protection.54

The intent to commit an offence, as defined under POCSO, is also punishable, besides abetment of sexual abuse against a child. Special emphasis has been placed on ensuring the speedy disposal of trials in special children’s courts as well as following of special procedures to keep the accused away from the child at the time of testifying. Despite POCSO enjoining the Central and State governments to take measures for giving wide publicity through the media television, radio and print and imparting periodic training to all

54http://www.thehindu.com/todays-paper/tp-opinion/strong-provisions-weak-implementation/, accessed on 12/10/2017
stakeholders on the matters relating to implementation of POCSO’s provisions, the Act is relatively unknown. The Supreme Court had, in a hard-hitting directive issued order to all States to ensure that the regulatory and monitoring bodies are constituted and made functional. However, till date, such Commissions are either only partially functional or effectively non-functional.55

Although the POCSO Act contains a mechanism, well equipped to handle cases of child sexual abuse, its implementation has been mired in malpractices and outdated legal proceedings. It is imperative to conduct a critical empirical assessment of the implementation mechanism envisaged under the POCSO Act.

It is important to assess the effectiveness of the Act, identify the implementation gaps, and suggest policy recommendations to plug these gaps.

We are trying to achieve the ambitious goals of the POCSO Act, through a police force that is overworked. Despite their best efforts, the police face a lot of barriers in conducting a proper investigation in POCSO cases. It begins with the registration of the FIR. The police must ensure that there is no delay in the registration of the FIR, and the conducting of the Medico Legal Case. The MLC of the victim is often times not conducted as the victim’s family is given inaccurate information on the long term ill effect of the MLC on the child’s health. When the child has to go for an MLC or an abortion, he or she often faces a hostile atmosphere in the hospital. Doctors need to be sensitized on how to communicate with the child about what he or she is going through. An abrupt bedside manner or violation of the child’s privacy ends up traumatizing the victim.

The FSL samples taken by the police often end up getting contaminated, or putrefied due to improper storage. The police need to be acquainted with the best methods of collecting forensic evidence, so that the appreciation of the

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evidence can take smoothly during the trial. The institutions such as the NCPCR and SCPCR are required to monitor and evaluate the implementation of the Act on a regular basis in addition to generating public awareness to the provisions of the Act.\textsuperscript{56} However, the functioning of such departments and their M&E procedures has not been open to public scrutiny. To this extent, it is imperative to study the procedures established by such bodies and evaluate the effectiveness of the same in generating impactful outcomes.

In conclusion, the progress report of the POCSO Act gives mixed results. While the mandate of the legislation is truly radical in that it aims to protect children against sexual abuse, and provides for a victim sensitive criminal justice process, there are several snags in its implementation.

There are several potent questions which are often being inquired out of curiosity not only by the legal professionals but also raised by the common man to understand certain tricky questions about the POSCO Act 2012. The researcher has tried to examine those questions after making the detailed analysis of the various Sections under the POSCO Act. Therefore, the researcher has formulated the following research questions after interviewing with the common man.

\textbf{4.16 RESEARCH QUESTIONS}

\textbf{Can a child be charged with an offence under the act?}

Yes, a child can be charged with a sexual offence under the Act. However, cases against a child will lie before the Juvenile Justice Board as per procedures laid down under the JJ Act 2015. The child cannot be tried by the Special Court and cannot be punished under the Act. If the child is found to have committed an offence under The Act, the Juvenile Justice Board could pass any of the following orders as per provisions listed under the JJ Act: Advice and admonish the child and send her/him home with parents or

\textsuperscript{56} Under Section 43-44 and Rule 6 of POCSO Act 2012
guardian after counseling. Direct the child to participate in group counseling and similar activities. Order the child to perform community service.\textsuperscript{57}

Order the parent or the child to pay a fine, if such child is working and is above 14 years of age. Release the child on probation of good conduct after executing a bond and place the child in the custody of parent or guardian or fit person. Release the child on probation of good conduct and place the child in the custody of a fit institution for good behaviour and

\textsuperscript{57} Section 18 of Juvenile Justice(Care and Protection of Children) Act, 2015 Orders regarding child found to be in conflict with law. 1.Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—

a. allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;
b. direct the child to participate in group counselling and similar activities;
c. order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;
d. order the child or parents or the guardian of the child to pay fine:
Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;
e. direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child’s well-being for any period not exceeding three years;
f. direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child’s well-being for any period not exceeding three years;
g. direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformatory services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:
Provided that if the conduct and behaviour of the child has been such that, it would not be in the child’s interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

2. If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to—
i. attend school; or
ii. attend a vocational training centre; or
iii. attend a therapeutic centre; or
iv. prohibit the child from visiting, frequenting or appearing at a specified place; or
v. undergo a de-addiction programme.

3. Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children’s Court having jurisdiction to try such offences.

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wellbeing of a child for not more than three years. Send the child to a special home for reformation for a maximum period of three years.

**Can POCSO Act be misused to frame any person?**

The Government says that it has brought this law on 20th June, 2012 as it has acceded on the 11th December, 1992 to the convention on the Rights of the child adopted by the General Assembly of the United Nations. Objections to the following provisions of the POCSO Act can be raised such that certain provisions of POCSO Act are not in conformity with natural justice and are biased towards the child or any other person who makes a complaint on behalf of child (accuser) but could be detrimental to the interest of an adult person against whom complaint has been filed (accused).

1. Under Section 22(1) of the POCSO Act, any person who make a false complaint or provides false information against any person in respect of an offence committed under section 3, 5,7 and section 9 solely with the intention to humiliate, extort or threaten or defame him shall be punished with imprisonment for a time which may extend to six months or with fine or with both. Now compare this with the punishment and fine on the person who has been implicated (accused) by the person mentioned in the above para (accuser).The person who is implicated under section 3/section 5 of this Act shall be punished with imprisonment which shall not be less than 7 years/10years and may extend to imprisonment for life and shall also be liable to fine.

   The person who is implicated under section 7/section 9 of this Act shall be punished with imprisonment which shall not be less than 3 years/5 years and may extend to5 years/7 years and shall also be liable to fine. If one compares the punishment being given to the person who has been implicated and to the person who is falsely implicating that person, it is very clear that the person who is implicating (accuser) is at an advantageous place than the person who is implicated (accused).If the person who make a false allegation is successful
due to miscarriage of justice than he is free and even if it is proved that he has committed an offence of falsely implicating the other person then he will be behind bars maximum of 6 months. The members of parliament and the courts should rethink over these provisions before it does more damage to the society.

2. Section 22 (2) provides that when a false complaint has been made or false information has been provided by a child no punishment shall be imposed on such a child. How is this justified that no punishment is provided for the child who can ruin the life of an adult by making a false complaint. It is a known fact that child can be manipulated by his parents, guardians and others for their nefarious designs. The child can be used as a pawn by someone to defame anyone without any implications for him/her. This Act provides that his/her identity will be protected at all stages of the court proceedings, but this is not for the person who has been implicated. We all have heard the phrases “please do not talk like a child” or “why are you behaving like a child”. Which shows or proves the point, that utterances of a child cannot be taken seriously and have to be taken with a pinch or handful of salt, depending upon his/her behavior or character of that child. 58

But in the case of POCSO law “The child is being made father of any adult and can threaten anyone with the help of this Act” and no one can do anything about it. The section 19(7) provides that no person shall incur any liability civil or criminal, for giving information in good faith for the purpose of sub section(1). What happens where intention of the accuser is to ruin the reputation of the accused? The Act appears to be in favor of the accuser. When a false complaint has been made or false information has been provided by a child or any complainant than proportionate punishment should be imposed on child or on such a complainant.

3. Section 29 provides where a person is prosecuted for committing or abetting or attempting to commit any offence under section 3, 5, 7 or 9 of this Act, the special court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. The court will presume you to be guilty of an offence you have not committed and onus is on you prove that you have not committed the offence. How justified is this situation? In most of other laws the onus is on the person who has alleged that something wrong has been committed on him/her to prove his/her case.

This makes it very difficult for the person who has been alleged accused to have committed any offence under the section 3, 5,7 or 9 that he or she is innocent. In these cases generally there is no eye witness. It is a claim of a child against an adult which is denied by the adult. If there is any medical evidence in support of the child then it is different, if there is no medical evidence in support of the child the case will be decided on circumstantial evidences. This is where the difficulty arises as the courts have been made to presume that an offence has been committed which may not be the case in case of false allegations.

4. Section 30 of the Act provides that for any offence under the Act which requires culpable mental state on the part of the accused the special court shall presume the existence of such mental state but it shall be a defense for the accused to prove beyond reasonable doubt the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. If a person has been falsely implicated by someone or if a person has committed an act of sexual assault for the first time, how can courts presume that such person is having culpable mind. How fair is this to the person accused?

5. Section 34(2) provides that the age of the child will be decided by the court and shall record its reasons for such determination. Section 34(3) provides that no

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59Ibid.
60Ibid.
order made by the special court shall be deemed to be invalid by any subsequent proof that the age of the person as determined by it under sub section (2) was not the correct age of the person. This clearly shows that the child who is alleging that something wrong has happened with him or her may or may not be minor. What is difficult to comprehend is the fact that if court has come to a wrong conclusion on the age of a minor and it is proved that he or she is major even then the decision of the court will not be changed. This is against the principle of natural justice. Is this fair in any way to the accused, again it is advantage to the accuser that he or she can manipulate the age and can get away with it as there is no punishment for the child and if child is proved to be major it is not more than 6 months of imprisonment or with fine or both.

6. The provisions of section 3 to 13 (both inclusive) shall not apply in case of medical examination or medical treatment when such medical examination or treatment is done with the consent of parent or guardian. Now let us assume day to day activity of a child, suppose he is injured while playing football or cricket in groin region, will the coach or elder person will have to wait for his parents to give consent before he/she does examination of the child private parts. How absurd is this law? Another example a girl child is hit in her breast area again the elder person cannot do anything to help her as he or she has wait for parental consent to do such examination, otherwise he will be implicated under this Act and may end up in jail for 3-5 years. If a girl child is dying and needs artificial respiration and revival, no male will touch her as she has fainted and the person has to touch her breast area to revive her, than that person will have to wait, if her parents are not around to give consent for the same. The law makers could have foreseen these situations of medical exigencies and could have entered the words “the provisions of section 3 to 13 of POCSO Act shall not apply in case of medical exigencies, in that case consent of parents is not required to save the life of any child”.

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The above analysis of the provisions of POCSO Act has been done only to make understand how absurd, difficult to implement and draconian this law is. Any child can implicate you if you spend some time of privacy with him or her and onus will be on you to prove your innocence. The court will take the accusation of the child at face value and if you are prosecuted by police the court will presume that you have committed the offence or abetted or attempted to commit the offence.

The changes in POCSO Act are important to bring the children back to the life of any individual, so that everyone gets justice and no one is placed at a disadvantageous position in comparison to the other.61

**Should the child victim be produced before child welfare committee (CWC) within 24 hours of report being registered?**

As per the Section 6 of the Act, it is clear that police has a mandatory duty to report all the sexual assault cases to CWC within 24 hours, but production of the child is not stated. However, under Section 5 of the Act, if the SJPU/Police is convinced that the child is without any parental support or living with the abuser or potential abuser, or is in an institution, or homeless, the child victim must be produced within 24 hour before CWC. The SJPU/Police has to record the reason in writing as to why the child needs to be shifted and make immediate arrangement for care and protection. This may include admitting the child to hospital or shelter home within 24 hours of the report.62

**Whether the publication of the details of child rape victim's entail severe penalty?**

Police issues notices to some media houses for violating the law; rules outlined. The city police have decided to prosecute media houses and internet forums in which the identity of the child rape victims is revealed. People are

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61Ibid.
62Pocso Act vis-a-vis Police and Doctors, Published byMeghalaya Times (India) December 18, 2013 Wednesday available at www.lexisnexis.com, accessed on 21/02/2016.
not supposed to reveal any information which leads to the establishment of the identity of the child rape victim under the POCSO Act. So, notices have been issued to news channels to answer why they telecast such programmes even after they know the law. Police will even be sending notices to newspapers which have published information about the victims.

Rules to be followed

Under POCSO Act, section 23, police outlined the procedure for media:

1. No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having completed and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

2. No reports in any media shall disclose the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

3. The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

4. Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

While interpreting the provisions of the Act, it is important to remember the purpose of the Act, as well as the conditions in which trials under the Act are conducted. The Act was brought into force to combat a widely prevalent
evil of child abuse. Thus in this chapter, the enactment by the parliament and its application in letter and spirit has been discussed thoroughly.

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