



## The Protection of Children From Sexual Offences Act 2012 (A Critical Review for the Busy Clinician)

**Avinash De Sousa**

Research Associate, Department of Psychiatry LokmanyaTilak Municipal Medical College, Mumbai.

**Sushma Sonavane**

Professor, Department of Psychiatry LokmanyaTilak Municipal Medical College, Mumbai.

### ABSTRACT

*The Protection of Child Sexual Offences Act, 2012 is said to be a landmark law passed against child sexual abuse in India. The present paper looks at the law and its benefits to victims of child sexual assault. It also looks at various offences and definitions under the Act. The paper also critically reviews the Act and looks at notable features and lacunae while presenting the salient points in a manner concise and precise for busy clinician to grasp all nuances of the Act.*

**KEYWORDS :** Sexual assault, child sexual offences, child sexual abuse.

### INTRODUCTION

India is home to the largest child population in the world with 42% of its population in the child age group. The Protection of Children from Sexual Offences Bill, 2011 which was passed in the RajyaSabha on 10 May 2012 and in the LokSabha on 22 May 2012 received the assent of the President of India on 20 June 2012. It is now known as the Protection of Children from Sexual Offences Act, 2012 and is the law of the land. It has 9 chapters and 46 sections. This is a landmark legislation. For the first time a special law has been passed to address the issue of sexual violence against children. It seeks to protect all children below the age of 18 from sexual assault, sexual harassment and pornography. These offences are clearly defined for the first time in Indian penal law. The Act provides for stringent punishment to the offenders. Aggravated Penetrative Sexual Assault, for example, carries an imprisonment of no less than 10 years, which can be extended to imprisonment for life. It provides for protection of children from the offences of sexual assault, sexual harassment, pornography and well being of the child in every stage of the judicial process. It is the first act that has child friendly procedures of reporting and recording evidence, investigation of offences and the establishment of a speedy court for fast resolution of trials and ensuring punishment to the guilty [1].

### THE ACT AND STATUS OF CHILDREN IN INDIA

Till the above act came into force, the IPC used to identify and define sexual offences. There was never a law that distinguished adult and child sexual offences upto now. The POCSO Act defines a child as any one who is below 18 years of age and provides protection to all children below the age of 18 years from sexual assault, sexual harassment and pornography. Until the Act was passed there was no law in India specifically addressing the protection of children from sexual exploitation, even though such a law was mandated by the United Nations Convention on the Rights of Children, 1989 which was ratified by India on 11th December, 1992. The Convention required the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity. It took India 20 years to fulfil that mandate. The approach to the Bill by our lawmakers has also been rather lackadaisical. It had been drawn up in 2005. But it was introduced in the RajyaSabha only on March 23, 2011. The same Bill was introduced in the LokSabha and passed hastily in the Lower House at the last minute without much of a discussion (the only point raised was that it could be misused) on the last day of the budget session of Parliament.

### SPECIAL FEATURES & CHILD FRIENDLY MEASURES IN THE ACT

The Act has some remarkable special and child friendly features. Some are listed below –

- It provides for the setting up of Special Juvenile Courts and appointment of Special Public Prosecutors for the speedy trial of the accused.
- The evidence of the child is to be recorded within 30 days and

the trial to be completed, as far as possible, within a year.

- The statement of child has to be recorded at the residence of the child or any place where the child is comfortable.
- The statement of the child is to be recorded as far as practicable by a woman police officer not below the rank of sub-inspector.
- No child would be detained overnight at the police station. The inspector is preferably not to be in uniform while recording the statement in order to minimize intimidation to the child.
- Assistance of an interpreter or translator or an expert may be taken to record the statement of the child as per the need of the child.
- Assistance of a special educator or an expert has to be taken while recording the statement from a child who is 'special' or disabled intellectually.
- The medical examination of the victim is to be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. In case the victim is a girl child, the medical examination is to be conducted by a woman doctor.
- The Act also stipulates that immediate arrangements have to be made, as needed, for the care and protection of the child who has been victimized.
- Frequent breaks to be provided to the child during the trial.
- The child shall not be called repeatedly to testify during the trial.
- In camera trial of all cases must be done.
- No aggressive questioning or character assassination of the child allowed during the trial.
- The media has been barred from disclosing the identity of the victim without the permission of the Special Court.
- The burden of proof in cases of heinous crimes like penetrative sexual assaults is placed on the accused. This is made keeping in view the greater vulnerability and innocence of children.
- The attempt to commit a crime, even if not successful, is made liable to punishment.
- The Act also provides punishment for abetment of the offence. Failure to report a known offence is also considered abetment.
- In the case of an allegation, the Act places the burden of proof on the accused. At the same time it also provides punishment for false accusation. The Act considers offences as aggravated when committed by a person in a position of trust or authority over the child in any way.
- The Act has mandated that Central and State governments give wide publicity to it.
- An especially appreciative measure mandated is that training be provided periodically to officers of Central and State governments on matters related to the implementation of the Act.
- The National Commission for Protection of Child Rights (NCPCR) and State Commission for Protection of Child Rights (SCPCR) has been made the designated authority to monitor the implementation of the Act.

**OFFENCES AS PER THE POCSO ACT**

Offence	Punishment
Penetrative Sexual Assault	Not less than 7 years May extend to life imprisonment and Fine
Aggravated Penetrative Sexual Assault	Not less than 10 years May extend to life imprisonment and Fine
Sexual Assault	Not less than 3 years May extend to 5 years and Fine
Aggravated Sexual Assault	Not less than 5 years May extend to 7 years and Fine
Sexual Harassment of a Child	3 years imprisonment and Fine
Using a Child for Pornographic purposes	5 years imprisonment and Fine
All subsequent convictions	7 years imprisonment and Fine
False complaint made or providing false information with malicious intent (adults)	6 months imprisonment and Fine
False complaint made against a Child	1 year imprisonment and Fine

**Note : Aggravated assault as per the act is any form of sexual assault when committed by a person in a position of trust and authority of a child as a member of the security forces, public servant, government employee, police officer etc.**

**CHAPTERS OF THE POCSO ACT 2012**

Chapter I – Preliminaries and Definitions

Chapter II – Sexual Offences Against Children

Chapter III – Use of Child for Pornographic Purposes and Punishment Thereof

Chapter IV – Abetment or Attempt to Commit An Offence

Chapter V – Procedure for Reporting of Cases

Chapter VI – Procedures for Recording the Statement of the Child

Chapter VII – Special Courts

Chapter VIII – Procedures and Powers of Special Courts and Recording of Evidence

Chapter IX – Miscellaneous

**CERTAIN CLINICAL RELEVANT AND DEBATABLE FEATURES OF THE POCSO ACT 2012**

- Penetrative Sexual Assault as defined by the Act uses the masculine pronoun "he" to refer to the offender; this excludes women as offenders. The act does not mention about women who engage in rape of boys or insert objects into the anus or vagina of children. The Act thus refers to penetrative sex applicable only to use of the male genital organ or penetrative objects by men. There is an assumption among many people that sexual abuse is perpetrated only by men; this is not true. Even though most abusers are men, women also sexually abuse both male and female children [2].
- Before the Act came into force, the police used sections like IPC Section 354 (assault or criminal force to a woman with an intent to outrage her modesty) which was a bailable offence when women complained against men. The POCSO Act has a stringent section for this offence [3].
- Presently the child is presented before the Child Welfare Committee (CWC), which will then offer support to the victim. The recording of the victim's statement now happens after 2-3 days under section 164 of Criminal Procedure Code. This is a crucial period where family members of the child or the child may be threatened to withdraw the complaint. The statement however is better recorded immediately for better administration of justice

however this depends on the psychological condition of the child [4].

- Presently the Act recommends an imprisonment of 6 months to a police officer who fails to record a complaint of sexual offence by a child victim. Police sensitization and training in implementation of the Act is very essential.
- The Act has also a mention where there is mandatory reporting of socially sanctioned child marriages and male to male sexual victimization.
- There is also certain lacuna and better definitions are needed with regard to the definition and identification of 'culpable mental state' (i.e. sexual intent, motive and knowledge). We need better definitions in this regard.
- The Act clearly defines sexual assault, sexual harassment and pornography and gives very clear guidelines to be followed when incidence of abuse comes to be known. Abused children will have the consolation that their violators as well as those who abet their victimisation will face due course of the law. Those who care for children also can have the confidence now that they can avail of legal recourse in cases of sexual exploitation of children.
- All though the Bill is meant "to protect children from sexual assault, sexual harassment and pornography," there is nothing in the Act that refers to prevention of abuse. The Act only deals with actions to be taken after the child has suffered sexual violence. Hence, the Act is a misnomer. Our legislators seem to think that punishment is a valuable deterrent. This is not the case as various heinous crimes including murder and rape occur even in the presence of capital punishment by law [5].
- In the earlier version of the bill anyone under age 16 was considered a minor. The Act raised the cut off age to 18. In the course of it, the Act also made any sexual activity, even a consensual one, with children under 18 or between minors a serious criminal offence punishable with imprisonment.
- Not every sexual act between children below 18 is inappropriate. There is much sexual experimentation among children that is part of healthy psychosexual development. The American Psychological Association, the premier association of psychologists in the world, has stipulated in its definition of sexual abuse that there has to be a difference of five years between a child and a perpetrator for a sexual act to be considered abuse [6].
- The Act does not specify regarding adolescents who have been below 18 and caught in sexual experimentation consensually. This is a very important lacuna as many adolescents in schools and colleges engage in consensual sexual acts and the parents of a particular adolescent may be implicate another adolescent by filing a complaint under the provisions of the Act. The Act does mention that if adolescents are found guilty under act, then the Juvenile Justice Act (2000) would apply to them.
- Any person who has reason to believe that an offence under this Act is likely to be committed or knows that such an offence has been committed any time in the past is obliged to inform the Special Juvenile Police or the local police. Failure to report is considered a criminal offence punishable by imprisonment. This is a section that does not define whether how is one to ascertain whether a person knew of the offence or that it was committed. People who are family members of the child and not aware that sexual assault may get falsely accused in this section.
- Just as in Chapter II, B where various categories of persons whose action can be considered as aggravated sexual assault have been specifically mentioned, so also this section should have specifically listed the categories of persons mandated to report abuse, and who can be exempted in considering medical or therapist confidentiality and religious bindings. Some special considerations for mental health professionals reporting such cases when under confidentiality binding from their patient needs mention as well as guidelines for reporting when someone in sessions of psychotherapy reports the same during a therapy session to the psychotherapist.
- In keeping with the above, the Act should have had a section on 'privileged information' such as gained through lawyer-client exchange, therapist-patient and doctor-patient exchange or in the Sacrament of Confession in the case of Catholic Priests. In the case of Catholic Priests who are obliged by their vow to maintain secrecy about everything heard in the Sacrament of Confession, this requirement becomes aviolation of their sacred commitment

to protect the sanctity of the Sacrament. It would give rise to conflicts of conscience and religious as well as ethical dilemmas in these areas.

- There is also no punishment stipulated for children who make false accusations or provide false information. In a sense, this is child friendly. However, the Act does not mention about the case of a manipulative or malicious adolescent can make a false allegation and face no consequences for it, ruining in the process the reputation and even careers of innocent people or people in authority who he has spite against.
- One of the main lacunae and limitation of the Act is that it does not mention any statute of Limitation. Should an act committed 10, 15, 20 or 30 years ago be reported when it comes to light. This is very relevant as child sexual abuse has consequences that may need psychological or psychiatric intervention in adult life. The Act does not mention of the rules of reporting or exemption from reporting when a patient reports to a therapist or mental health professional / psychiatrist about abuse or sexual assaults that happened in their childhood, when they come for therapy many years later in life. Some differentiation should have been made between current or recent abuse and abuse which happened a long time ago.
- An important issue in regard to reporting of abuse that is missing from the Act is the protection of those reporting the abuse. When a teacher, for example, reports that a student is being abused by a family member (most abuse happens in the family), he or she may face negative consequences, including threat to life; the child too may suffer negative consequences including beatings and further assault etc. The same may be the case for a doctor, mental health professional or a psychiatrist. No protective measures are offered for the person who reports abuse. Obligation to report, without providing protection for the one who reports, including children other than the victim, can be dangerous. Very often the person who reports may be in grave danger and must be protected. The Act however does provide for protection of child who has been abused.

## REFERENCES

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