

**A HANDBOOK ON THE LEGAL PROCESSES FOR THE POLICE IN RESPECT OF CRIMES AGAINST CHILDREN**

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**CRIMES AGAINST CHILDREN**

*Published by*  
The Centre for Police Studies and Public Security,  
Tata Institute of Social Sciences, Mumbai  
*and*  
Bureau of Police Reserach & Development  
Ministry of Home Affairs, Govt. of India, New Delhi

by  
**Dr. P.M. Nair**  
alongwith  
**Dr. Geeta Sekhon, Ms. Swagata Raha,  
Ms. Shruthi Ramakrishnan & Ms. Sumati Thusoo**

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## TABLE OF CONTENTS

### HANDBOOK on the LEGAL PROCESSES for the POLICE in respect of CRIMES AGAINST CHILDREN

Description	Page
<i>Foreword</i>	<i>ix</i>
<i>The Team &amp; Acknowledgments</i>	<i>xi</i>
<i>Preface</i>	<i>xii</i>
<b>SECTION I</b>	<b>1</b>
<b>INTRODUCTION AND COMMON ASPECTS</b>	<b>1</b>
1. THE CONTEXT	1
2. CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL OBLIGATIONS TO PROTECT CHILDREN	3
A. Constitutional Framework	3
B. Statutory Framework	4
C. International Obligations	8
D. Domestic Authorities and Structures Relevant to Children	8
3. CHILD VICTIMS AND THE CRIMINAL JUSTICE SYSTEM	13
4. WHO IS THE HANDBOOK MEANT FOR	14
5. HOW TO USE THE HANDBOOK	14
6. USE OF TERMINOLOGY	15
<i>Section 1.1 - Child-friendly process of investigation and care:</i>	<i>16</i>
<i>General norms</i>	
1.1.1. CWPO and SJPU	16
1.1.2. Facilitation of Care & Protection	17
1.1.3. Child-Friendly Investigation	24
1.1.4. Territorial Jurisdiction	28
1.1.5. Documentation	29
1.1.6. Forensic	29
<i>Section 1.2 - How to Assess Age of a Child Victim?</i>	<i>30</i>
<i>Section 1.3 - Communication with a Child</i>	<i>34</i>
1.3.1. Suggested Dos and Don'ts	34
1.3.2. How to Ascertain if a Child Witness Understands the Difference between Truth and Lie	42

<b>Description</b>	<b>Page</b>
<i>Section 1.4 - Behaviour of a Child Victim of a Sexual Offence</i>	<b>43</b>
<i>Section 1.5 - Children with different gender identities and sexualities</i>	<b>47</b>
<i>Section 1.6 - General Norms of a Child Friendly Trial</i>	<b>49</b>
<i>Section 1.7 - Convergence and Networking by Police with Multiple Stakeholders</i>	<b>50</b>
1.7.1. Role of the Police/SJPU vis-à-vis other authorities	51
1.7.2. Areas of intervention of the concerned stakeholders vis-à-vis child victims of offences: -	54
1.7.3. Specific Duties of Governments and Actors within Criminal Justice System	56
<b>SECTION II - THE SPECIFICS:DIFFERENT CONTEXTS</b>	<b>56</b>
<b>CHAPTER 1 - Sexual Offences against Children</b>	<b>56</b>
1.1. The Context	56
1.2. Overview of Legal Framework	58
1.2.1. Applicable Laws	58
1.2.2. Offences under the POCSO Act	59
1.2.3. Sexual Offences under the Indian Penal Code (IPC)	65
1.2.4. Sexual Offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Atrocities Act)	67
1.2.5. Sexual Offences under the Rights of Persons with Disabilities Act, 2016 (RPD Act)	70
1.2.6. Sexual Offences under the Information Technology Act, 2000 (IT Act)	70
1.2.7. Sexual Offences under the Indecent Representation of Women Act, 1986	71
1.2.8. Sexual Offences under the Goa Children's Act, 2003	71
1.3. Processes	72
1.3.1. Procedures to be followed by the police/ Special Juvenile Police Unit (SJPU)	72
1.4. Procedure for medical examination and emergency medical care	83

	<b>Description</b>	<b>Page</b>
1.5.	Facilitation of Recording of Statement under Section 164, Cr.P.C., by the Magistrate	86
1.6.	Procedures of the Special Court	87
1.7.	FAQs	90
	Chapter 1, Annexure 1: Sexual Offences and Penalties	92
	Chapter 1, Annexure 2: Significant Court Rulings	95
	<b>CHAPTER 2 - TRAFFICKING OF CHILDREN</b>	<b>102</b>
2.1.	The Context	102
2.2.	Applicable Laws	105
2.2.1.	What constitutes trafficking?	105
2.2.2.	The Victim of Trafficking	107
2.2.3.	The Traffickers / Perpetrators in Trafficking for Commercial Sexual Exploitation	107
2.2.4.	The process of trafficking	108
2.2.5.	Indicators of Human Trafficking	109
2.2.6.	Trafficking vs. other crimes	109
2.2.7.	Definition of "child" in laws relevant to trafficking	110
2.2.8.	Trafficked child victim is a "child in need of care and protection"	111
2.2.9.	Offences relevant to trafficking of children	111
2.2.10.	Presumptions in Law	112
2.2.11.	Relevant authorities	113
2.2.12.	Investigating authorities and their powers	113
2.3.	Processes for each Stakeholder	114
2.3.1.	Role of Special Police Officers	114
2.3.2.	Steps and Procedures for Police Officers	115
2.3.3.	Investigation from the organized crime perspective	115
2.3.4.	Preventing misuse of public place	116
2.3.5.	Suspending/cancelling hotel licence	116
2.3.6.	Closure and eviction of brothels with and without notice	116

	<b>Description</b>	<b>Page</b>
2.3.7.	Rescue dos and don'ts	118
2.3.8.	Post rescue dos and don'ts	118
2.4.	Anti-Human Trafficking Unit (AHTU)	120
2.5.	Arrest Procedures	120
2.6.	Role of Police in Prosecution	123
2.7.	Role of NGOs in Anti-human trafficking	124
2.8.	Prevention of Human Trafficking	125
2.9.	Rehabilitation of Trafficked Victims	126
2.10.	FAQs	128
	Chapter 2, Annexure 1: List of Offences Relevant to Trafficking and Penalties	130
	Chapter 2, Annexure 2: Significant Court Rulings	133
	<b>CHAPTER 3 - CHILD LABOUR</b>	<b>137</b>
3.1.	Context	137
3.2.	Overview of Legal Framework	138
3.2.1.	Applicable Laws	138
3.2.2.	Definition of Child under laws relevant to Child Labour	138
3.2.3.	Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 [CALPRA]	139
3.2.4.	Offences under the CALPRA	142
3.2.5.	Juvenile Justice (Care and Protection of Children) Act, 2015 and Model Rules	143
3.2.6.	The Bonded Labour System (Abolition) Act, 1976	144
3.3.	Processes	145
3.3.1.	Role of Statutory and Non-Statutory Actors	145
3.3.2.	Planning rescue of child labourers	149
3.3.3.	Production of a child involved in labour before CWC	149
3.4.	FAQs	151

<sup>1</sup> Chapter 3, Annexure 2: Excerpt from SOP on Investigation of Crimes of Trafficking for Forced Labour, UNODC, 2008, pp.15-16

<b>Description</b>	<b>Page</b>
Chapter 3, Annexure 1: Penalties for Offences Relevant to Child Labour	153
4.1. Steps to be taken for rescue procedure <sup>1</sup>	155
Chapter 3, Annexure 3: Significant Court Rulings	157
<b>CHAPTER 4 - OTHER OFFENCES AGAINST CHILDREN</b>	<b>160</b>
4.1. Introduction to other kinds of offences	160
4.2. Applicable Laws	161
4.2.1. Begging	161
4.2.2. Cruelty to Children	163
4.2.3. Offences involving liquor, narcotic drugs, tobacco products and psychotropic substances	165 168
4.2.4. Exploitation of a child employee	
4.2.5. Illegal Adoption and other adoption-related offences	168
4.2.6. Sale and Procurement of Children	169
4.2.7. Corporal Punishment	170
4.2.8. Use of child by militant groups or other adults	171
4.2.9. Kidnapping and abduction of a child	173
4.2.10. Offences committed on children with disabilities	176
4.2.11. Disclosure of Identity of the Child	177
4.2.12. Mandatory Reporting	178
4.2.13. False complaint and False information under POCSO Act	179
4.2.14. Abetment of suicide of a child	179
4.2.15. Sale of Obscene Objects to Young Persons	179
4.2.16. Abetment of Offences	179
4.3. Procedure in case of Offences committed against Children	180
4.3.1. Complaint	180
4.4. FAQs	181
Chapter 4, Annexure 1: List of Other Offences and Penalties	183
Chapter 4, Annexure 2: Significant Court Rulings	194

<b>Description</b>	<b>Page</b>
<b>CHAPTER 5 -CYBER OFFENCES AGAINST CHILDREN</b>	<b>195</b>
5.1. The Context	195
5.2. Legal Framework on cyber offences against children	197
5.2.1. Cyber offences under the Information Technology Act, 2000	197
5.2.2. Cyber offences under the Protection of Children from Sexual Offences Act, 2012	199
5.2.3. Cyber offences under The Indian Penal Code, 1860	203
5.3. Institutional and Process Framework	205
5.3.1. Functionaries:	205
5.3.2. Protection from Child Pornography (Blocking public access of information)	211
5.4. FAQs	213
Chapter 5, Annexure 1: Legal Framework of cyber offences against children	215
Chapter 5, Annexure 2: Significant Court Rulings	218
<b>CHAPTER 6 - PROHIBITION OF CHILD MARRIAGE</b>	<b>220</b>
6.1. The Context	220
6.2. Legal Framework on prohibition of child marriage	220
6.2.1. Offences under the PCM Act	221
6.2.2. Effect of a Child Marriage	221
6.2.3. Prevention of Child Marriage	223
Chapter 6, Annexure 1 - Table of Offences under the PCM Act	226
<b>SECTION III - REHABILITATION AND REINTEGRATION OF THE CHILD VICTIM</b>	<b>226</b>
Chapter 7 - Introduction to Rehabilitation of Children	226
7.1 Legal Framework for Rehabilitation in India	227
7.1.1. Restoration	229
7.1.2. Institutional Care	230
7.1.3. Foster Care	231

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	<b>Description</b>	<b>Page</b>
7.1.4.	Adoption	232
7.1.5.	Fit Facility/ Fit Person	234
7.1.6.	Sponsorship	235
7.1.7.	Aftercare	236
7.1.8.	Compensation	237
	Chapter 7, Annexure 1: Significant Judicial Rulings	239

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## Foreword

Child rights have tremendous significance in every aspect of the development of nations. Ensuring child rights constitute the core of good governance, and therefore is the essence of policing and the criminal justice process in our country. The Bureau of Police Research and Development (BPR&D), being dedicated to improving the quality of policing in India, has been in the fore front in espousing the best methods and enhancing professionalism in Indian Police. In this regard, I am immensely pleased to recommend this book on the law and practice with respect to child victims as a great and timely tool to the millions of investigators, supervisors and caregivers in the law enforcement and justice delivery process. It is a tool, a reference book, as well as a ready reckoner for the practitioners. It is a book that links the text to the context.

Unevenness and distortions in the justice delivery process on child rights has been a concern of all involved for quite some time now. Even a well-articulated law like POSCO (Protection of Children from Sexual Offences) Act of 2012, launched with fervour and zeal, has seen less than 10 per cent cases getting convictions (refer Crime in India of the previous years), meaning thereby that 90 per cent of the victims are not getting justice. This is a serious matter that should make all of us sit up and take notice. In this context, one of the issues that came up across the country was uneven levels of knowledge, skills and attitudinal orientation among the responders. We cannot afford to fail our children and this cannot wait anymore. Hence, I see this book, *A Handbook on the Legal Processes for the Police in respect of Crimes against Children* as a great instrument for a tremendous and positive impact.

The idea of the book was conceived, developed and put into process by Dr. P.M. Nair, a renowned international expert on child rights, with vast experience and expertise in law enforcement, justice delivery, professional investigation, research, legal drafting, capacity building and convergence of stakeholders. It has been drafted by him and an eminent team, working at the Tata Institute of Social Sciences, with full support from Child Investment Fund Foundation (CIFF). The draft of this book, revised several times by the authors, has been duly vetted by the expert academics of the National Law School of India University, Bengaluru, and the experienced officials of BPRD and has seen further improvements and value additions. The churning process has certainly enriched this book and made it more user-friendly.

I have no doubt that this book, translations of which are being planned in several Indian languages, will be a great support to the officials at the Police Stations and members of the Child Welfare Committee (CWC) across India as well as all associated bodies involved in the mission of supporting child rights. Considering the tremendous value, potential and utility of this book as a tool for positive action and impact, we in BPR&D are happy to publish this book. It is a matter of great pleasure for me to dedicate this book to the children of India, with the fervent hope and belief that it will help millions of children who are subjected or vulnerable to exploitation.

*A. P. Maheshwari*

(Dr. A.P. Maheshwari)

Director General

New Delhi  
April 10, 2018

**The Team** that conceived, planned, prepared, drafted, reviewed, revised and finalized this book are as follows:

**Dr. P.M. Nair, Dr. Geeta Sekhon, Ms. Swagata Raha, Ms. Shruthi Ramakrishnan, and Ms. Sumati Thusoo.**

[The Handbook was conceptualised by Dr. P.M. Nair. He guided the team working on the content and also co-authored parts of Section I, Chapter 2. Dr. Geeta Sekhon, edited the Handbook and authored Section I, Introduction, 1.4 and 1.7. Ms. Swagata Raha authored Sections 1.2–1.3 of Section I, Chapters 1, 2, and 3 of Section II. Ms. Shruthi Ramakrishnan authored Sections 1.1 and 1.2 of Section I, Chapters 4, 5, 6 of Section II, and Section III.]

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We are grateful to Ms. Rakhee Suryaprakash who donated her services as copy editor for this book, treating it as a noble cause in the process of justice delivery to children.



# TATA INSTITUTE OF SOCIAL SCIENCES

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**Prof. PM Nair**

Chairperson, Centre for Police Studies and Public Security

## PREFACE

As the type, spread, speed and intensity of crimes against children in India are on the rise, new special legislations, along with amendments to the general and subordinate criminal laws, have come up in the recent past to effectively address the specific offences against children, with a view to ensure good governance and proper law enforcement. However, the multiplicity of laws, their uneven knowledge and, above all, lack of skilled application by the police, as well as the other stakeholders involved in the process of justice delivery and prevention, has created an alarming scenario in respect of preventing and combating crimes against children. A need was felt to collectively bring all laws dealing with crimes against children into one reference book, in a user-friendly format, along with the different child-friendly processes prescribed under each of these laws. Accordingly, the Centre for Police Studies and Public Security, a nascent unit in the Tata Institute of Social Sciences, decided to take up this project. The idea was appreciated by stakeholders from different walks of life including police, prosecutors, judiciary, academics, guardians, children, care givers, civil society partners, social workers, etc. Prompt support from Child Investment Fund Foundation (CIFF) came in very handy to move ahead.

This handbook, originally titled 'Children's Charter', and later changed to the present one, is focused on the rights of child victims of crime. It is essentially meant for police officials who are called upon to address the issues of child rights. It is a ready reckoner which hopes to serve as a guide book to help the user decide which law(s) are to be used, when and how to implement the provisions effectively and the skills required in its utilization and implementation. It is a process document, explaining the best methods of ensuring that the rights of child victims are protected. While this is not a compilation of laws, it is a tool which will help one gain a complete picture of the laws and the latest rulings of the superior courts in India, as well as the best practices, and help in deciding how to

invoke them in the best possible manner while dealing with offences against children.

It is a book linking the text to the context. And that is the intended purpose too, by bringing in the laws and rulings into context and helping the stakeholders ensure rule of law.

The book has been written keeping in view the requirements of the officer in charge of a police station, the investigating officers, the prosecutors, the Child Welfare Police Officer, and other stakeholders who support and facilitate investigation and related aspects as well as prevention of violence and exploitation of children. It is a tool to enhance and fine-tune the skills of the end user in the application of the laws, rules, rulings, and related provisions. It is drafted in a user-friendly manner. This book can also be of immense help to all those who work on child rights, all those who are concerned with child rights and even children who need support or help, being subjected to or vulnerable to exploitation.

It is a novel venture, hence there can be shortcomings. We also welcome suggestions for improvement.

**Dr PM Nair**

April 2018, Mumbai

## Section I – INTRODUCTION AND COMMON ASPECTS

### 1. THE CONTEXT

The children of India have constitutional and legal rights for their care, protection, treatment, development, protection, rehabilitation, and re-integration. These rights are violated when children are subjected to abuse, exploitation, and violence. The police is the first responder to such a child, and plays the most crucial role in setting in motion the justice delivery system after a crime is reported or detected or when such a crime is likely to happen. The response and attitude of the police towards the child can encourage the child to participate without fear in the investigation process and later during trial, which also impacts the proper rehabilitation and reintegration of the child back into the family, and/ or society. It can also encourage more child victims and/ or their families to come forward with reports of crimes and significantly, ensure that the “process does not become the punishment” for victims.

Knowledge of child protection laws in letter and spirit is one part of the investigation work, but appropriate skills such as, those of interviewing children in a developmentally appropriate and age-sensitive manner, being alert to basic needs of children, recognizing trauma and basing decisions on where and when to interview child victims, etc., whilst dealing with child victims are equally important, and need to be actively acquired and harnessed by all Investigation Officials.

Thousands of children are being trafficked for labour or forced into various forms of commercial sexual exploitation, or are otherwise subjected to abuse, criminal neglect, and exploitation. According to the Census of 2011, about 8.2 million child labourers in the age group of 5-14 years were engaged in various occupations. NGOs however, estimate the number to be 90 million.<sup>2</sup>

A study by the Ministry of Women and Child Development<sup>3</sup> estimates that there are about three million women in prostitution in the country, of which an estimated 40% are children, as there is a growing demand for very young girls to be inducted into prostitution. UNICEF also estimates that 1.2 million children are victims of sex trafficking in India.<sup>4</sup> According to an ILO estimate, 15% of the country’s estimated 2.3 million persons in prostitution are children.

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<sup>2</sup> International Labour Office. 2013.  
*Domestic Workers across the World:*

*Global and Regional Statistics and the Extent of Legal Protection* (Geneva). p. 14.

<sup>3</sup> *India Country Report-To Prevent and Combat Trafficking and Commercial Sexual Exploitation of Children and Women*, presented at World Congress III – Against Sexual Exploitation of Children and Adolescents (Rio de Janeiro, Brazil, November 2008).

<sup>4</sup> US Department of State, Country Reports on Human Rights Practices for 2012. Both pictures are from UNICEF India website.



Source: UNICEF India<sup>6</sup>

With respect to child labour, child prostitution, child sexual abuse, and other crimes against children, the reported numbers are estimates, and not actual figures. The numbers of cases filed as can be gleaned from the Crime in India annual reports of the National Crime Record Bureau, also do not reflect the full extent of violence against children, as a significant number of cases are never reported and do not make it to the criminal justice system.

Data on Crimes Against Children based on Crime in India, 2016					
Laws	Cases Reported in 2016	Number of Victims	Charge-sheeting rate	Investigation Pendency Rate	Conviction Rate
Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 (CALPRA)	204	384	94.6%	63.4%	47.1%
Immoral Traffic (Prevention) Act, 1956	56	69	100%	58.5%	10.5%
Human Trafficking (Section 370 & 370A of Indian Penal Code)	340	763	85.2%	44.8%	18.2%
Prohibition of Child Marriage Act, 2006	326	327	84.6%	42.1%	14.7%
Protection of Children from Sexual Offences Act, 2012	36022	36321	94.2%	31.8%	29.6%

□

Source: Crime in India, 2016; National Crime Records Bureau

<sup>6</sup> <http://www.unicef.in/Whatwedo/21/Child-Labour>

## 2. CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL OBLIGATIONS TO PROTECT CHILDREN

In the context of India's commitments under its Constitution and under the United Nations Convention on the Rights of the Child (UNCRC) and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), India is duty bound to take measures to address violation of child rights and provide holistic support to child victims including child victims with disabilities.

### A. Constitutional Framework

The Constitution of India contains some specific and exceptional provisions referring to children (and women) and also "prohibits traffic in human beings and forced labour".

Article 15	The State can make any special provision for women and children.	Part of Fundamental Rights; providing discretion to the government to make special laws/policies and schemes for women and children.
Article 21 A - Right to Education	The State shall provide free and compulsory education to all children of the age of six to fourteen years.	Part of Fundamental Rights; added to the Constitution in 2002.  The Right of Children to Free and Compulsory Education Act, 2009 was enacted in pursuance of Article 21 A of the Constitution.
Article 23	Prohibition of traffic in human beings and forced labour.	Part of Fundamental Rights; only two Articles in the Constitution in 1950, listed as 'offences' and which, provided for 'punishment' were - trafficking and untouchability.
Article 24	Prohibition of employment of children below the age of fourteen years in factories, etc. or any other hazardous employment.	Part of Fundamental Rights; protecting children from performing hazardous labour.
Article 39	The State shall, direct its policy towards securing- that the health and strength of workers, men and women,	Article 39 is not a Fundamental Right, but is a part of the Directive Principles of State Policy - directing the State towards

	and the tender age of <i>children</i> are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.	formulating its policies protecting children from labour.
Article 39	State should ensure that <i>children</i> are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.	This provision is relevant to protecting children from all forms of exploitation.

## B. Statutory Framework

The *Indian Penal Code, 1860* (IPC) contains the definition of “trafficking of persons”, which was added in 2013. There are other provisions dealing with buying and selling of girls for prostitution, employing of a trafficked person, dealing in slaves, and sexual offences, etc. The *Protection of Children from Sexual Offences Act, 2012* (POCSO Act) is a special law that criminalizes penetrative, touch, and non-touch based sexual offences against children and also mandates the establishment of Special Courts and procedures for trial of offences involving children.

The *Juvenile Justice (Care and Protection of Children) Act, 2015* (JJ Act, 2015) is the core law relating to ‘children in need of care and protection’ and children in conflict with the law, providing for care, protection, development, treatment, social re-integration, and rehabilitation through a child-friendly approach. It defines the term “child-friendly” to mean “any behaviour, conduct, practice, process, attitude, environment or treatment that is humane, considerate and in the best interest of the child.”<sup>7</sup> This Act provides for setting up of institutional mechanisms to adjudicate and provide services to children in a comprehensive and holistic manner. It also specifies certain offences against children.

The Preamble of JJ Act, 2015 highlights the objectives of a ‘child-friendly’ approach and ‘best interest of the child’ principle in their care, protection, development, treatment, and social re-integration. The Principles underlined in Section 3, JJ Act, 2015, for guiding the juvenile justice system are as follows –

- Principle of presumption of innocence – Any child, who is a ‘child in conflict

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<sup>7</sup> JJ Act, 2015, Section 2(15).

with law' shall be presumed to be innocent of any mala fide or criminal intent up to the age of eighteen years.

- Principle of dignity and worth – All children, whether a child victim or a child in conflict with law shall be treated with equal dignity by the police, without showing any bias or prejudice, towards the situation that the child is facing. For example, a child seen begging on the road junction cannot be treated as a 'beggar' at par with an adult. The child shall be treated as a person who was made to beg by somebody.
- Principle of participation – The police shall hear the child and pay due respect to the wishes of the child – such as, when the child wants the police interview to discontinue, or the child expresses a desire to go home instead of to a Child Care Institution. Having heard the child's views, the police should take them consideration in the totality of the situation and take decisions accordingly, with due regard to the age and maturity of the child. For example, a trafficked child or a child subjected to sexual abuse may change his statement a few times, depending on its capacity to recall the events. This is natural and cannot be construed as concoction or 'padding' as one would attribute to an adult victim.
- Principle of best interest – “All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.” The child, and the child alone should be the focal point of all decision making, vis-à-vis the other adults who might be affected by those decisions. For example, the police cannot insist on the institutionalization of a child victim of a sexual offence only because her family members may pressurize her to turn hostile. This is because separating her from her family when she has undergone abuse and needs their support may not be in her best interest. Separation, may however, be considered by the Child Welfare Committee (CWC) where the perpetrator is a family member.
- Principle of family responsibility – The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be. For instance, if a child begging on the street is living with the parents/ relatives who also work on the street, it may probably not be prudent to separate and immediately produce the child before the CWC. Action in this case could also involve an NGO who could counsel the family and take the child off the street from begging and into a school, whilst continuing to live with the family.
- Principle of safety – “All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.” Children are sometimes

re-victimised in the child care institutions by the staff, or by other senior children. The police should ensure the child's safety, within this care and protection system. It would also entail ensuring their safety and protection from the accused during an on-going investigation or trial.

- Positive measures – “All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.” Through community policing, by mapping the vulnerable populations and communities within cities, towns and villages, the police can prevent the occurrences of crimes against children and also of children committing offences.
- Principle of non-stigmatizing semantics – “Adversarial or accusatory words are not to be used in the processes pertaining to a child.” During interviewing a child victim, especially in cases of sexual offences, the police should not use language that attributes blame to the child for the crime. Similarly, when a child is alleged to have committed an offence, the police should not use language which, labels the child as a criminal. For example, a child rescued from a brothel can never be called a “child prostitute” as she was never one, whereas the fact is that she has been prostituted and victimized.
- Principle of non-waiver of rights – The child should get the benefit of all provisions of the JJ Act, and other fundamental rights as laid down in the Constitution. No authority, which is statutorily bound to take a decision for the child, can claim that these procedures need not be undertaken or be deemed to have been waived either by the child/ or the family/ guardians.
- Principle of equality and non-discrimination – There shall be no discrimination by the police against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child. For instance, the police should not automatically assume that a child from a rich family would be more intelligent and can participate in the justice process, but a child who lives with the parents on the street, need not be asked for his/ her opinion with respect to decisions affecting the child.
- Principle of right to privacy and confidentiality – The police should for instance, ensure that the child's identity is never disclosed to the media, by the media or by anyone so as to identify the child – either as a victim or as a child in conflict with the law. The police should also maintain the confidentiality of their records with respect to processes under the JJ Act, for every child.
- Principle of institutionalization as a measure of last resort – Although it is for the CWC or the Juvenile Justice Board (JJB) to order for

institutionalization of the child brought before them, the police may also remember that taking the child away from the family and placing it in an institution may not always be the best course of action.

- Principle of repatriation and restoration – Again, this is a point to be decided by the CWC or the JJB respectively, and is the ultimate responsibility of the Child Care Institution where the child is staying, but the police should be aware of this principle that the child has a right to be re-united with his/ her family at the earliest, if it is in the best interest of the child.
- Principle of fresh start – All past records of any child under the Juvenile Justice system should be erased except in special circumstances, as is provided for under the law. The police should not disclose records of children for character certificates in cases that are closed or disposed of.<sup>8</sup>
- Principle of diversion – Measures for dealing with children in conflict with law without resorting to judicial proceedings are to be promoted by the JJB, unless it is in the best interest of the child or the society as a whole.
- Principles of natural justice – Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act. The Juvenile Justice Model Rules of 2016 provides that non-compliance with the Act and the Rules by any officer/institution, statutory body, etc., can invite action by the State Government against such officer/institution, statutory body etc., after due inquiry and simultaneously make alternative arrangements for discharge of functions for effective implementation of the Act (Rule 93).

On child labour, the two most significant laws are the *Bonded Labour System (Abolition) Act, 1976* and the *Child and Adolescent Labour (Prohibition and Regulation) Act, 1986* (CALPRA), as amended in 2016. The Bonded Labour Act provides for the abolition of bonded labour system, which was historically practiced in India in several forms and continues to be practiced. The CALPRA prohibits the engagement of children in certain employments and regulates the conditions of work of adolescents in certain other employments. The CALPRA prohibits completely the employment of children below 14 years in any occupation or process (two exceptions) and prohibits the employment of adolescents (14-18 years) in any hazardous occupations or processes.

Dealing with trafficking and the organized crime of commercial sexual exploitation and prostitution of women and children is the *Immoral Traffic (Prevention) Act, 1956*, along with POCSO Act, IPC, and the Prohibition of Child Marriage Act, 2006.

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<sup>8</sup> JJ Act, 2015, Section 74(2).

## C. International Obligations

In addition to the constitutional and statutory framework, the police must also be aware of the international legal framework relating to child rights. The primary international instrument with respect to children is the United Nations Convention on the Rights of the Child [UNCRC] adopted by the UN General Assembly in 1989. The UNCRC was acceded by India in 1992 thereby effectively agreeing to give effect to all the norms and standards contained in the provisions of the Convention. India has also ratified two additional protocols to the UNCRC dealing with the sale of children, child prostitution and child pornography;<sup>9</sup> and on children involved in armed conflict.<sup>10</sup> Article 1, UNCRC defines child to mean “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

The JJ Act, 2015 and the POCSO Act, 2012 were both enacted in pursuance of India’s obligations to the UNCRC and a specific reference to this is stated in the preamble of these legislations.

The UNCRC contains four core guiding principles integral to the rights of the child, which are also reflected in Section 3, JJ Act, 2015. They are:

- Article 2: Principle of Non-Discrimination which entitles children to exercise their rights and obligates the States to respect and ensure their rights without discrimination of any kind.
- Article 3: Principle of Best Interests of the Child which requires the child’s best interest to be a primary consideration in all actions concerning children by public, private institutions, courts, administrative authorities, or legislative bodies.
- Article 6: Right to Life, Survival and Development which requires States to recognise every child’s inherent right to life and ensure the survival and development of the child to the maximum extent possible.

Article 12: Respect for the views of the child which requires States to ensure that a child capable of forming views has the right to express those views freely in all matters affecting the child and further that the views are given due weight in keeping with the child’s age and maturity.

## D. Domestic Authorities and Structures Relevant to Children

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<sup>9</sup> *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002*

<sup>10</sup> *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2002*

## Key Statutory Bodies for the protection of child rights

	JJB	CWC	Special Court/ Children's Court	Sessions Court	Magistrate	Family Court/ District Court
<b>Child alleged to be in conflict with the law</b>	<ul style="list-style-type: none"> <li>Inquiry under section 14 of the JJ Act, 2015.</li> <li>Preliminary assessment under section 15 of the JJ Act, 2015 in case of children between the age of 16-18 years alleged to have committed a heinous offence.</li> </ul>	<ul style="list-style-type: none"> <li>Dealing with cases that may be transferred by the JJB.</li> </ul>	<ul style="list-style-type: none"> <li>Trial in cases where a matter against child alleged to be in conflict with the law has been transferred to the Children's Court pursuant to the order of the JJB under section 18(3) of the JJ Act, 2015.</li> <li>Hearing appeals against decisions of the JJB under Section 101(1), JJ Act, 2015.</li> </ul>	<ul style="list-style-type: none"> <li>Hearing appeals against the decision of the JJB after a preliminary assessment under Section 101(2), JJ Act, 2015.</li> </ul>		
<b>Child in need of care and protection</b>	<ul style="list-style-type: none"> <li>Transfer cases of children found innocent and in need of care and protection to the CWC under Section 17(2), JJ Act, 2015.</li> </ul>	<ul style="list-style-type: none"> <li>Inquiry under section 36 of the JJ Act, 2015.</li> <li>Decide on matters related to placement, care, protection, rehabilitation, etc.</li> </ul>	<ul style="list-style-type: none"> <li>Hearing appeals against decisions of CWC except decisions pertaining to aftercare, sponsorship, and foster care under</li> </ul>			

	<b>JJB</b>	<b>CWC</b>	<b>Special Court/ Children's Court</b>	<b>Sessions Court</b>	<b>Magistrate</b>	<b>Family Court/ District Court</b>
<b>Child victim of sexual offences</b>	<ul style="list-style-type: none"> <li>Inquiry in cases where the accused is a child.</li> </ul>	<p>in relation to such child.</p> <ul style="list-style-type: none"> <li>Receive a report regarding the incident from the police under Section 19(6), POCSO Act.</li> <li>May appoint a support person to aid the child and family during pre-trial and trial processes under Rule 4(7).</li> <li>Decide whether child should be separated from family in cases where the offence has been committed or is likely to be committed by a person living in the same or shared household as the child, or the child is living in a child care institution and is without parental support or is without home</li> </ul>	<p>Section 101(1), JJ Act, 2015</p> <ul style="list-style-type: none"> <li>Trial in a child-friendly manner</li> <li>Ordering of compensation for the child victim.</li> </ul>		<ul style="list-style-type: none"> <li>Recording statement of child under section 164 of the CrPC.</li> </ul>	

	<b>JJB</b>	<b>CWC</b>	<b>Special Court/ Children's Court</b>	<b>Sessions Court</b>	<b>Magistrate</b>	<b>Family Court/ District Court</b>
		and parental support under Rule 4(3), POCSO Rules.				
<b>Child victim of trafficking</b>	<ul style="list-style-type: none"> <li>Inquiry in cases where the accused is a child.</li> </ul>	<ul style="list-style-type: none"> <li>Where the victim is also a child in need of care and protection, the CWC may ask the child to be produced before it for inquiry and placement.</li> <li>Pass orders related to rehabilitation and re-integration.</li> </ul>	<ul style="list-style-type: none"> <li>Where the trafficking involved sexual abuse of the child, the Special Court shall conduct the trial in a child-friendly manner as per the POCSO Act, 2012 and POCSO Rules, 2012.</li> </ul>	<ul style="list-style-type: none"> <li>Trial against the offender</li> </ul>	<ul style="list-style-type: none"> <li>A Magistrate upon receiving information regarding prostitution being carried out in a brothel, may order the police to conduct a search and rescue.</li> <li>A victim of trafficking rescued under the ITPA must first be produced before a Magistrate who shall conduct an inquiry as per section 17(2) of the ITPA and immediately make an order for her immediate safe custody.</li> </ul>	
<b>Victim of child labour</b>		<ul style="list-style-type: none"> <li>Where the victim of child labour is also a child in need of care and protection, the</li> </ul>			<ul style="list-style-type: none"> <li>A Magistrate may upon application compound a first time</li> </ul>	

	JJB	CWC	Special Court/ Children's Court	Sessions Court	Magistrate	Family Court/ District Court
<b>Victim of child marriage</b>		<p>CWC may ask the child to be produced before it for inquiry and placement.</p> <ul style="list-style-type: none"> <li>Where the victim is also a child in need of care and protection, the CWC may ask the child to be produced before it for inquiry and placement.</li> </ul>			<p>offence committed by the parent or guardian of the child under section 14D of the CALPRA.</p> <ul style="list-style-type: none"> <li>Upon receipt of information regarding a child marriage being arranged or about to be solemnised, a Magistrate shall issue an injunction against any person including a member of an organisation or an association of persons prohibiting such marriage.</li> <li>The above injunction may also be issued <i>suo motu</i> upon any reliable information received by the Magistrate.</li> <li>The Magistrate may stop or prevent a child marriage from being solemnized through any appropriate means including the use of minimum force.</li> </ul>	<ul style="list-style-type: none"> <li>A Family Court (or in the absence any civil court) may annul a child marriage as per section 3 of the PCMA, 2006</li> <li>The Court shall make appropriate orders regarding maintenance, custody of children, etc.</li> </ul>

## **Human Rights Institutions for Children**

The National Commission for Protection of Child Rights (NCPCR), with its counterparts in the States, is a statutory human rights institution set up under the *Commissions for Protection of Child Rights Act, 2005*. The NCPCR and the State Commission for Protection of Child Rights (SCPCRs) mandate is to ensure that all laws, policies, programmes, and administrative mechanisms are in consonance with the child rights perspective as enshrined in the Constitution of India and international Conventions ratified by India. The CPCRs are also specifically mandated to monitor the implementation of the JJ Act, 2015 and the POCSO Act, 2012, among other laws related to children.

In addition to the legal framework, the Ministry of Women and Child Development along with State Governments and Union Territories, implements the Central Government Scheme on child protection called the Integrated Child Protection Scheme (ICPS), which provides financial and administrative support for implementation of the JJ Act, 2015.

### **3. CHILD VICTIMS AND THE CRIMINAL JUSTICE SYSTEM**

Crimes Against Children:<sup>11</sup> In 2016, total of 1,06,958 cases of crimes against children were reported compared to 94,172 cases during 2015, showing an increase of 13.6%. A total of 1,11,231 child victims entered the criminal justice system in 2016. The overall conviction rate for crimes against children in 2016 was 30.7% and the pendency rate was a staggering 89.6%.

In percentage terms, major crime heads under ‘Crime Against Children’ during 2016 were kidnapping & abduction (52.3%) and cases under the Protection of Children from Sexual Offences Act, 2012 (34.4%) including child rape.

In 2016, a total of 36,321 children were victims of sexual offences of which 19,920 children i.e., 54.84% were victims of child rape under Section 376 IPC/ Section 4 & 6 of the POCSO Act and 12,329 children i.e., 33.94% were victims of sexual assaults under Sections 8 and 10, POCSO Act/Section 354 IPC.

In child labour cases, only 8 out of 385 cases were convicted. The conviction rate for cases of child trafficking under the ITPA stood at 10.5%, while the pendency rate was a staggering 95.3%.<sup>12</sup>

Under the Prohibition of Child Marriage Act 2006, 236 cases were tried with total number of 10 convictions only.

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<sup>11</sup>National Crime Record Bureau, Crime in India, 2015

<sup>12</sup> National Crime Record Bureau, Crime in India, 2016.

The conviction rate and pendency of cases for crimes against children from the Crime in India Report of 2016, is indicative of the challenges in the existing response to crimes against children.

#### **4. WHO IS THE HANDBOOK MEANT FOR?**

This Handbook has been specifically drafted for law the police, particularly for investigating officers, Child Welfare Police Officers, and other police officers who interact with child victims in different capacities, keeping in view their roles and responsibilities on child protection in general and particularly under the special laws on children. The Handbook deals with ‘child in need of care and protection’ and ‘child victim’ of crime/ violence, and is not oriented towards information on ‘child in conflict with law’, which involves a different legal procedure under the JJ Act, 2015. However, it must be borne in mind that the JJ Act, 2015 recognises that child in conflict with the law can also be a child in need of care and protection and empowers the Juvenile Justice Board (JJB) to transfer them to the Child Welfare Committee (CWC) so that they can be treated as children in need of care and protection. For instance, a child accused of trafficking other children could be a victim of trafficking herself. Instead of being treated as child in conflict with the law, she could be transferred by the JJB to the CWC.

The ‘USP’ of this Handbook is that it is not purely academic, and that it covers “Theory to Practice”, providing a process driven approach for implementing laws. Wherever essential, it provides step-by-step processes in flow charts, is practical to use, drafted in a user-friendly manner, and is oriented to child rights and victim-centric approach. It is a book that links the text to the context.

Although the Handbook is primarily meant for use by the police, other stakeholders, namely, prosecutors, judges, Child Welfare Committees (CWC), District Child Protection Units (DCPU) and all other child welfare institutions (governmental and non-governmental), academics, media, etc. will find it useful to understand the role and responsibilities of the police in implementing various laws that are applicable to different types of crimes against children. The stakeholder mapping and convergence presented in this Handbook, in fact will also provide guidelines to the other stakeholders on the areas of co-ordination and co-operation with the police in providing comprehensive services to child victims towards their welfare, rehabilitation and reintegration. Undoubtedly, this process-oriented book will be of immense value to all concerned with child rights including parents and guardians. Although the text is not child-friendly, it can be referred to by children under the guidance of adults to understand the role of the police vis-à-vis them.

#### **5. HOW TO USE THE HANDBOOK?**

The Handbook has three distinct sections. The first section is the introductory

part which lays out details with respect to its content, the intended beneficiaries, and the layout of the various Chapters within each Section. The first Section also contains some standalone segments of information, which are common to all types of crimes against children and relevant to child victims (such as, ‘age determination’, ‘communication with child victim-witness’, etc.). These have been collated and distinctly presented for ease of reference to avoid repetition of the same content in multiple chapters under Section II.

The second Section has several chapters based on the different types of crimes and violence against children. Although each chapter is self-sufficient in its content, relevant cross-references have been provided only to avoid too much repetition of content throughout the Handbook. Each chapter provides the context, the legal framework for that crime, the offences and the punishments, the step-by-step roles and responsibilities of the police officials at various stages, and the administrative and institutional framework such as, those provided under the JJ Act, 2015 and the Integrated Child Protection Scheme (ICPS). Each chapter has answer to FAQs on common queries relevant to duty bearers and/ or anyone else referring the Handbook. Every chapter has annexures, containing detailed tables of the offences and punishments, and relevant court judgments for reference by police officials. The electronic version will have bookmarks in respect of themes, concepts, legal provisions, practical aspects of law enforcement etc. so that the user can have better and easy access.

## 6. USE OF TERMINOLOGY

**Trafficking in Persons** – The terms ‘Trafficking in Persons’ and ‘Human Trafficking’/‘Child Trafficking’ have been used interchangeably in this Handbook. The definition provided in Section 370, IPC<sup>13</sup> is the reference point.

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<sup>13</sup>Section 370(1), IPC states: Trafficking of persons

Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by —

- using threats, or
- using force, or any other form of coercion, or
- by abduction, or
- by practising fraud, or deception, or
- by abuse of power, or
- by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received,
- commits the offence of trafficking.

Explanations-

1. The expression “exploitation” shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs.
2. The consent of the victim is immaterial in determination of the offence of trafficking

**Child Victim** – The term ‘child victim’ is used in the Handbook to refer to a child against whom an offence/ violence has been committed. The term ‘*victim*’ has generated much debate in the context of sexual exploitation and violence against children; many argue that it implies powerlessness, rather than the resilience of the victim and therefore, prefer to use the term ‘*survivor*’ since it is more positive and draws attention to resistance, coping and survival. However, in the area of human rights and protection, the term ‘*victim*’ is used to refer to someone experiencing injustice for which the perpetrator is responsible. It indicates that the person or persons experiencing human rights violations have the right to protection, assistance and reparation. Therefore, this Handbook, which focuses on the duties of the police and responses uses the term ‘*victim*’ to highlight the wide-ranging rights of the child victim to an efficacious justice delivery mechanism, punishment of the offender and comprehensive protection and rehabilitation of the victim.

## **Section 1.1 – Child-friendly process of investigation and care: General norms**

### **1.1.1. CWPO and SJPU**

#### **Child Welfare Police Officer**

Recognizing the need for a dedicated police officer to deal with offences and matters concerning children, the JJ Act, 2015 requires at least one officer in every police station, not below the rank of an assistant sub-inspector, “with aptitude, appropriate training and orientation” to be designated as the Child Welfare Police Officer (CWPO).<sup>14</sup> The mandate of the CWPO under Section 107(1), JJ Act, 2015 is to “exclusively deal with children either as victims or perpetrators, in coordination with the police, voluntary and non-governmental organisations.”

#### **Special Juvenile Police Unit (SJPU)**

With a view to coordinate police functions related to children, the JJ Act, 2015 requires State Governments to constitute SJPUs in each district and city, headed by a police officer not below the rank of a Deputy Superintendent of Police or above.<sup>15</sup> The SJPU should consist of all designated Child Welfare Police Officers and two social workers with experience of working in the field of child welfare.<sup>16</sup> At least one social worker should be a woman.<sup>17</sup> The SJPU also includes Railway Police dealing with children.<sup>18</sup> The initiative to constitute a SJPU can be taken by the Director General of Police in the State.

In border areas, it would be advisable to include representation of border security forces like the BSF, ITBP etc. as the case may be.

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<sup>14</sup> JJ Act, 2015, Section 107(1).

<sup>15</sup> JJ Act, 2015, Section 107(2).

<sup>16</sup> JJ Act, 2015, Section 107(2).

<sup>17</sup> JJ Act, 2015, Section 107(2).

<sup>18</sup> JJ Act, 2015, Section 107(4).

In districts where SJPU are not constituted and Child Welfare Officers have not been specifically designated, it becomes incumbent on the regular police force to carry out the duties of the SJPU and CWPO to the fullest extent. The realisation of the rights of children must not be compromised in any manner for the want of specific designation of these posts. It is thus important for all police officers to be aware of their specific duties and functions in respect of children coming in contact with the legal system.

**Supreme Court’s direction in *Sampurna Behura v. Union of India*,  
(2018) 2 SCALE 209**

“It is important for the police to appreciate their role as the first responder on issues pertaining to offences allegedly committed by children as well as offences committed against children. There is therefore a need to set up meaningful Special Juvenile Police Units and appoint Child Welfare Police Officers in terms of the JJ Act at the earliest and not only on paper. In this context, it is necessary to clearly identify the duties and responsibilities of such Units and Officers and wherever necessary, guidance from the available expertise, either the National Police Academy or the Bureau of Police Research and Development or NGOs must be taken for the benefit of children.”

### **1.1.2. Facilitation of Care & Protection**

The JJ Act, 2015, entrusts the care and protection of children in need of care and protection (CNCP) primarily with the CWC. Nevertheless, other stakeholders in the system are also entrusted with certain duties towards ensuring that the child receives timely and appropriate care and protection. The police, being one of the key actors coming in contact with children, are mandated to follow certain protocols with regard to children in need of care and protection.

#### **Who is a child in need of care and protection?**

The term “child” is defined under Section 2(12), JJ Act, 2015, to mean “a person who has not completed eighteen years of age.” A police official coming in contact with a child must prima facie ensure that the child is in fact a ‘child in need of care and protection’ as that will require them to produce such a child before the CWC. It is pertinent to take note that the duty to provide care and protection to children is an integral function of the police commensurate with other official duties. The below table lists the categories of children who are considered to be ‘children in need of care and protection’ as per the JJ Act, 2015.<sup>19</sup>

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<sup>19</sup> JJ Act, 2015 , Section 2(14).

## Children in need of care and protection

<b>Children living in abusive conditions</b>	<b>Children in danger of abuse</b>	<b>Children without support</b>
<ul style="list-style-type: none"> <li>• children found working in contravention of labour laws</li> <li>• child found begging</li> <li>• child victim of or affected by any armed conflict, civil unrest or natural calamity</li> <li>• child living with a person who has injured, exploited or abused or neglected the child or violated any law passed for protection of children.</li> </ul>	<ul style="list-style-type: none"> <li>• child living with a person who has threatened to kill, injure, exploit or abuse the child with reasonable likelihood of the threat being carried out.</li> <li>• child living with a person who has killed, abused, neglected or exploited some other child and there is likelihood that that the child in question may be killed, abused, exploited or neglected</li> <li>• child who is likely to be abused, tortured or exploited for sexual abuse or any illegal acts</li> <li>• child who is found to be vulnerable and likely to be inducted into drug abuse or trafficking</li> <li>• child who is likely to be abused for unconscionable gains</li> <li>• child who is at imminent risk of marriage before attaining the age of marriage and the child's parents, guardians, family members, etc. are likely to be responsible for solemnisation of such marriage.</li> </ul>	<ul style="list-style-type: none"> <li>• child without parents or anyone to take care of her/him</li> <li>• Abandoned or surrendered child</li> <li>• Missing or runaway child whose parents cannot be found after reasonable enquiry</li> <li>• child found living in the street</li> <li>• child found without any home or any residence</li> <li>• child found without any means of sustenance</li> <li>• child with unfit or incapacitated parents or guardians</li> <li>• child who is mentally ill, mentally or physically challenged, suffering from terminal or incurable disease without fit parents or guardians or anyone to support or look after them.</li> </ul>

As stated earlier, while the JJ Act, 2015 categorises children in to 'child in conflict with the law' and 'child in need of care and protection', it is pertinent to realise that this is not a strict differentiation. On many occasions, a 'child in conflict with the law' is also a 'child in need of care and protection' and requires assistance for rehabilitation and healing. For instance, children accused in drug-related offences are also victims of drug abuse. In several cases, children are used by adults to aid in commission of crimes. The police must ensure to extend care and protection to all children without discrimination irrespective of the circumstances of the case during the course of their duties.

### **Procedure**

The brief process in ensuring care and protection of children is provided below. Where a police officer is of the belief that a child is in need of care and protection

***In re: Exploitation of Children in the State of Tamil Nadu***<sup>20</sup>

In this case, the Supreme Court took *suo motu* cognizance of a newspaper article that exposed the poor state of orphanages in Mahabalipuram (Tamil Nadu) with several incidences of child sexual abuse within the institutions as well as incidences of children being used to provide sexual services to tourists. The article also exposed sexual abuse against children in educational institutions including government schools.

While assessing who a ‘child in need of care and protection’ included, the court observed that the definition in the JJ Act, 2015 excluded certain categories of children. The court in this regard opined that the definition must not be treated as an exhaustive list and be the basis of excluding certain children. In this regard the court stated:

“[W]e are of the view that since the JJ Act is intended for the benefit of children and is intended to protect and foster their rights, the definition of a child in need of care and protection must be given a broad interpretation. It would be unfortunate if certain categories of children are left out of the definition, even though they need as much care and protection as categories of children specifically enlisted in the definition. Beneficial legislations of the kind that we are dealing with demand an expansive view to be taken by the Courts and all concerned.”

Observing the above the court concluded that:

“[T]he definition of a child in need of care and protection given in Section 2(14) of the JJ Act should be given a broad and purposeful interpretation – it ought not to be treated as exhaustive but illustrative and furthering the requirements of social justice...[I]t must also include victims of sexual abuse or sexual assault or sexual harassment under the POCSO Act as also victims of child trafficking. Such children must also be given protection under the provisions of the JJ Act being victims of crime under the POCSO Act and the Immoral Traffic (Prevention) Act, 1956.”

as per section 2(14) of the JJ Act, the officer has three primary obligations with regard to care and protection of children:

a. Produce the Child before a Child Welfare Committee

Any police officer or the special juvenile police unit or a designated Child Welfare Police Officer coming in contact with a child in need of care and protection

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<sup>20</sup> WP 102/2007 [Supreme Court], Decided on 5 May 2017.

must produce the child before the Child Welfare Committee within 24 hours.<sup>21</sup>  
The child victim may be recovered from:

- a. the scene of crime;
- b. home of the child;
- c. under the care of an NGO;
- d. in a child care institution;
- e. on the street;
- f. left abandoned at a place;
- g. any other place;
- h. appearing before the police by himself/herself.

### **Production before the CWC**

#### ***Who can produce a child before the CWC under Section 31, JJ Act, 2015***

- a. any police officer or SJPU or a Child Welfare Police Officer
- b. any officer of the DCPU
- c. any public servant
- d. Childline services or any NGO or agency recognized by the state government
- e. any social worker or public spirited citizen
- f. by a child himself
- g. any Child Welfare Officer or probation officer
- h. any nurse, doctor or management of a nursing home, hospital or maternity home.

#### b. Mandatory Reporting Obligations

Where any individual, police officer or functionary of any organization, nursing home, or maternity home finds and takes charge of a child who appears to be abandoned or lost, an orphan, or without family support, they must within 24 hours give information to the Childline Services, the nearest police station, the Child Welfare Committee, or the District Child Protection Unit, or hand over the child to a registered child care institution.<sup>22</sup> This information is to be uploaded on a portal as specified by the Central Government or the CWC or the DCPU.<sup>23</sup>

<sup>21</sup> JJ Act, 2015, Section 31.

<sup>22</sup> JJ Act, 2015, Section 32(2).

<sup>23</sup> JJ Act, 2015, Section 33.

<sup>24</sup> JJ Act, 2015, Section 34.

Non-reporting is an offence under the Act<sup>24</sup> and the offender is liable to be imprisoned for a period of up to six months or fine of Rs. 10,000 or both.<sup>25</sup>

c. Interim Care and Protection

Apart from the above obligations, the police are required to provide interim care and protection while having custody of the child. The JJ Act and Rules does not expressly provide for the obligations of a police officer in this regard, however, the obligations with regard to child in conflict with the law, may also be applied in case of children in need of care and protection. The relevant obligations in this regard are extracted below:<sup>26</sup>

- In no case must a child be kept in a lock-up or jail or along with an adult accused person.
- The transfer of the child to a CWPO from the nearest police station should not be delayed.
- In no case must a child be handcuffed or fettered in any manner.
- The child should be promptly informed regarding the circumstances in which he is being taken under care of the government.
- Appropriate medical assistance where necessary should be provided by the police.
- Assistance of an interpreter where required should be provided.
- Food should be provided to the child.
- No child victim should be interviewed in the police station pursuant to the proviso to Section 160(1), Cr.P.C.
- The child should not be made to sign any statement.
- The child must not be coerced or treated in a cruel and degrading manner.
- The police should ensure that there is no contact between the accused person and the child.<sup>27</sup>

Note must also be taken of Rule 93 of the Juvenile Justice (Care and Protection of Children), Model Rules, 2016 (Model Rules) which states that the State Government can take action against any officer/institution/statutory body who fails to comply with the provisions of the JJ Act, 2015 and the Rules framed thereunder.

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<sup>25</sup> JJ Model Rules, 2016, Rule 8(3).

<sup>26</sup> JJ Model Rules, 2016, Rule 86(8).

<sup>27</sup> JJ Model Rules, 2016, Rule 8(3).

### **Child-friendly Police Stations**

In addition to the above mandates, the NCPCR has also issued Guidelines in respect of Child Friendly Police Stations.<sup>28</sup> These Guidelines offer guidance in respect of setting up child-friendly police stations, procedure to be followed in respect of children in conflict with the law, and the procedure to be followed in respect of children in need of care and protection (CNCP).

In respect of CNCP, the guidelines provide the following protocols to be observed:<sup>29</sup>

#### **Behaviour and Conduct**

- The police officers interacting with the child should take care of their body language, gestures, eye movements, expressions and tone of speaking should be aimed at making the child feel comfortable and secure and not intimidate the child in any way.
- The police officer interacting with the child should behave at all times as a well wisher of the child and keep the best interest of the child uppermost as the basis of all their actions.
- In no circumstances should bad, abusive or negative language be used with the child.
- The police officer interacting with the child should not violate the personal space of the child and should not have physical contact with the child, as far as possible.
- The police officer should not cause any physical or mental suffering to the child.
- The police officer interacting with the child should not consume any form of tobacco or any other addictive substance while interacting with the child.
- The police officer should not talk on the mobile phone or check it for other communication during interaction with the child.
- The police officer should not act in aggressive manner in the presence of child.
- The police officer interacting with the child should have requisite knowledge of child related legislations.

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<sup>28</sup> Guidelines for Establishment of Child Friendly Police Stations: Laws Prescribing ‘Child Friendly’ Procedures, Processes, Conduct and Establishments, National Commission for the Protection of Child Rights [NCPCR], available at <http://ncpcr.gov.in/showfile.php?lang=1&level=1&&sublinkid=1307&lid=1526>

<sup>29</sup> Id. at pg 15.

## **Practice and Processes**

- All procedures should be followed keeping in mind the child's self-respect and dignity.
- The Child Welfare Police Officer (CWPO) should be in civil dress during interactions with the child.
- It should be ensured that the child is not kept at the police station overnight under any circumstances.
- The child's privacy and confidentiality of personal details should be maintained at all times.
- An F.I.R should be filed within 24 hours in case of a child found missing. In cases of children missing for more than 15 days, a case of trafficking should be registered.
- Timely and dedicated inquiry should be made to trace the parents or families of children found lost.
- The police officer interacting with the child should listen carefully and respectfully to everything the child says and should consider it carefully.
- A regular case diary for every child should be maintained.
- It should be ensured that the identity of the child - name; address, parent's name, name of the school etc., are not disclosed to or published by the media.
- The statement of the child should be recorded in a polite manner, keeping in mind the mental state of the child.
- When a child is asked to sign any document, it should be explained to him/her in detail what is written in the document and what will be the impact of the child signing it. The child should be informed that if he/she does not agree with what is written, he/she can say what modification needs to be made. Assistance of translator or expert should be obtained whenever necessary.
- Availability of a woman police officer/female social worker while interacting with a girl child should be ensured.
- Protection to the child victim and her family should be provided.
- It should be ensured that there is no contact between the accused and the child victim during the police inquiry and identification of the accused.
- Conducive atmosphere should be created before interacting with the child.
- The child and his or her family should be informed about the availability of paralegal volunteers and support persons.

- It should be ensured that the child's statement is recorded exactly as said by the child in the presence of the child's parents or any other person in whom the child reposes trust or confidence. It should be ensured that the statement of child is recorded by audio-video or electronic means.
- It should be ensured that the child is not hungry or thirsty and adequate provisions of food and water should be made if they are.
- It should be ensured that there are no instances of mistreatment or misconduct with the child and any complaints in this regard should be acted on promptly.
- The child and her family should be made aware of availability of free legal aid services.
- It should be ensured that child victims of sexual assault undergo a medical examination as promptly as possible within 24 hours, and medical treatment as required, should be provided to the child as also counselling and psychological support.
- Girl child rescued from prostitution or immoral activities should be treated as child in need of care and protection and be produced before the CWC.
- The child and her family should be informed about the government schemes available to provide assistance or relief to them, especially the victim compensation scheme.
- It should be ensured that child victims of abuse or violence and their families are kept updated about processes and developments in the case.
- The child victims and their families should also be informed if a bail application is filed on behalf of the accused and when it is listed.
- If a child in need of care and protection cannot be produced before CWC promptly, the child should be kept in a children's home for overnight protective stay and thereafter be produced before CWC.
- Victims in POCSO cases who fall in category of CNCP should be mandatorily produced before CWC, in other cases a report should be made to CWC regarding such cases.

### **1.1.3. Child-Friendly Investigation**

In addition to the Cr.P.C., the procedure to be followed by the police/SJPU while handling cases relating to offences against children are dealt with in the JJ Act and Model Rules as well as the POCSO Act and Rules.

## RECORDING OF INFORMATION

### **Cognizable Cases**

- Any information received related to a cognizable offence must be recorded.
- When it is given orally, it must be reduced to writing, be read over to the informant and signed by him.
- If the police officer refuses to record the information, the informant can approach the Superintendent of Police who can proceed to investigate into the matter himself or direct his subordinate officers to investigate.<sup>30</sup>
- FIR could also be registered by the police itself on any information received or other than by way of an informant and this has to be duly recorded and the copy should be sent to the Magistrate forthwith.<sup>31</sup>
- All information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the General Diary/Station Diary/Daily Diary and the decision to conduct a preliminary inquiry must also be reflected.<sup>32</sup>

### **Non-Cognizable Cases**

- When information related to the commission of a non-cognizable offence is received, the police officer must enter it into the Daily Diary. This must be transmitted to the Magistrate for further orders.<sup>33</sup>

### **Consequence of failure of the police to record a complaint**

- Failure of the police to record the alleged commission of an offence under the POCSO Act is an offence punishable with imprisonment which can extend to six months or fine or both under Section 21(1), POCSO Act.
- Failure of the police to record information in relation to cognizable offences under Sections 326-A, 326-B, 354, 354-B, 370 370-A, 376, 376-A, 376-B, 376-C, 376-D, 376-E, or 509, IPC is an offence under Section 166-A(c), IPC punishable with rigorous imprisonment for a minimum term of six months which can extend to two years and also attracts fine.

<sup>30</sup> Cr.P.C., Section 154.

<sup>31</sup> Cr.P.C., Section 157(1) and *Lalita Kumari v. Govt. of U.P. and Ors.*, AIR 2014 SC 187.

<sup>32</sup> *Lalita Kumari v. Govt. of U.P. and Ors.*, AIR 2014 SC 187.

<sup>33</sup> JJ Model Rules, 2016, Rule 54(3).

## **LODGING OF FIR**

- On receipt of information in respect of a cognizable offence against a child, the police should register a FIR immediately.<sup>34</sup> The JJB can direct the police to register a FIR for offences committed against a child in need of care and protection under the JJ Act, 2015 or any other law in force pursuant to a complaint registered by a CWC.<sup>35</sup> The JJB can direct the police to register a FIR for offences committed against a child in conflict with the law under the JJ Act, 2015 or any other law in force pursuant to a complaint.<sup>36</sup> The CWC can direct the police to register a FIR in case of complaint of abuse of a child in any child care institution.<sup>37</sup>

## **INVESTIGATION**

- In all cases concerning offences against children, the investigation shall be conducted by the CWPO.<sup>38</sup>
- The investigations should be carried out in accordance with Cr.P.C.
- No boy below 15 years or a girl child under 18 years should be summoned to the police station for the purpose of investigation.<sup>39</sup>
- The statement of a victim of a sexual offence under the POCSO Act, which includes boys below 18 years, should be recorded at the place the child resides or the place of the child's choice.<sup>40</sup>

## **Consequences of Summoning a Child to a Police Station**

Under Section 166-A(a), IPC, if a public servant “knowingly disobeys any direction of the law which prohibits him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter”, he can be punished with rigorous imprisonment for a minimum term of six months which can extend to two years and also be liable to fine.

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<sup>34</sup> JJ Model Rules, 2016, Rule 54(2)

<sup>35</sup> JJ Act, 2015, Section 8(3)(l)

<sup>36</sup> JJ Act, 2015, Section 8(3)(k)

<sup>37</sup> JJ Act, 2015, Section 30(xvi).

<sup>38</sup> JJ Model Rules, 2016, Rule 54(4).

<sup>39</sup> Cr.P.C., Section 160(1) proviso.

<sup>40</sup> POCSO Act, 2012, Section 24(1).

## **Significant Court Ruling**

*Lalita Kumari v. Govt. of U.P. and Ors.*, AIR 2014 SC 187

The following directions were laid down by a Constitutional Bench of the Supreme Court:

- i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
- ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
- iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
- iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
- v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
- vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:
  - (a) Matrimonial disputes/family disputes
  - (b) Commercial offences
  - (c) Medical negligence cases
  - (d) Corruption cases
  - (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

- vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should

not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

#### **1.1.4. Territorial Jurisdiction**

Territorial jurisdiction is an important factor that the police must take note of in the course of their duties particularly in respect of filing of FIR and preparing the charge-sheet.

While central laws are in general applicable throughout the territory of India, it is essential to keep in mind that several states have amendments to these laws. For instance, the state of Karnataka recently passed an amendment to the Prohibition of Child Marriage Act, 2006 which renders all child marriages *void an initio* although the central statute only makes them voidable.<sup>41</sup> Similarly, several states have also enacted amendments to various provisions of the Indian Penal Code. The police must ensure that they are aware of these changes within the state while applying them.

In addition to State amendments to central laws, some States have also enacted separate legislations in respect of child rights. A prominent legislation in this regard is the Goa Children's Act, 2003 [GCA] which deals with a variety of aspects in relation to child rights such as provision for education, health and nutrition; prevention of child abuse, trafficking in children, and child labour; establishment of homes for children; special protection of girl children and differently abled children; etc. The GCA is applicable only in the state of Goa.

Although in general, State laws only have applicability within the particular state, it may be made applicable to even other states through extending statutes. For instance, the Maharashtra Control of Organised Crime Act, 1999 [MCOCA] dealing with organized crime and terrorism was initially enacted for the state of Maharashtra but has been extended to states such as Delhi by the Delhi government. In some states that have not extended the MCOCA to their territory, they have passed legislation modelled after the MCOCA such as the Karnataka Control of Organized Crimes Act, 2000 and the Gujarat Control of Terrorism and Organised Crime Act, 2015.

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<sup>41</sup> Prohibition of Child Marriage (Karnataka Amendment) Act, 2016, s.2.

Further, Instead of the IPC, the state of Jammu and Kashmir has the Ranbir Penal Code, 1989 which is similar in most respects to the provisions of the IPC excepting a few differences. Similarly, the procedural aspects of criminal law has been dealt with in the Jammu and Kashmir Code of Criminal Procedure, 1989 and the Jammu and Kashmir Evidence Act, 1920. The state of Jammu and Kashmir does not have a dedicated legislation to combat child sexual abuse like the POCSO Act. The laws applicable in Jammu and Kashmir in respect of child protection have been listed below:

- Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act, 2013
- Jammu and Kashmir Child Labour (Prohibition) Act, 2015
- The Infant Marriages Prevention Act, 1985

Territorial jurisdiction of laws is a critical aspect of a criminal case and the police must be up to date with regard to laws related to offences against children in that state and should ensure that all laws applicable to an incident are included in the charge-sheet.

#### **1.1.5. Documentation**

Documentation and submission of relevant forms are an integral and essential function of the police. Proper and timely documentation is critical to ensure that all key authorities are intimated adequately and preventing loss of information amongst the different authorities fulfilling their role.

The different statutes prescribe a variety of forms and reports to filled and submitted by the police. They key documents required to be prepared by the police are described below:

Sl. No.	Document
1.	First Information Report
2.	Home Verification Report under ITPA
3.	Record book of information received under Section 19, POCSO Act.
4.	Report of incidence of sexual offences to the CWC and Special Court under section 19(6) of the POCSO Act.
5.	Care and Protection Report to the CWC under Section 19(6)

#### **1.1.6. Forensic**

The role of forensics can never be under estimated. The entire spectrum of forensic chemistry, physics, biology, serology, psychology, anthropology, sociology, all come alive in the investigation and prosecution of crimes against children.

Further, the role of child psychology, to be precise forensic psychology, assumes importance in many ways. The traumatized child will not be able to communicate properly or even recall the events. The child may be confused, especially with the adult oriented questions put to the child. The child victim may be shocked so much that she/he may not be wanting to recall the events. There may be complex fear psychosis operating in the mind of the child. In an instance, where the rapist was wearing a black shirt, the child became mortally afraid of anything black, including the court room with so many black gowns. There can be several anomalies in the behaviour of the child. Post-traumatic stress and disorder will prevent the child from even communicating the problems to the care givers including doctors. Hence the police officers investigating such crimes need to acquaint oneself on the essentials of child psychology, associate professionals and experts in the entire process of investigation and prosecution. At times, it may be essential that the interview is carried out through the psycho-social expert, as if he/she is a translator coming in to translate when the victim speaks a different language. The Police officers may maintain an updated list of such professionals and request their services as and when required. Schemes like ICPS have funds to meet such expenses too. Care should be taken that the job or professionals be done by them only and cannot be accomplished by an ill-trained person or even a half-baked or self-styled counsellor.

### **Section 1. 2 – How to Assess Age of a Child Victim?**

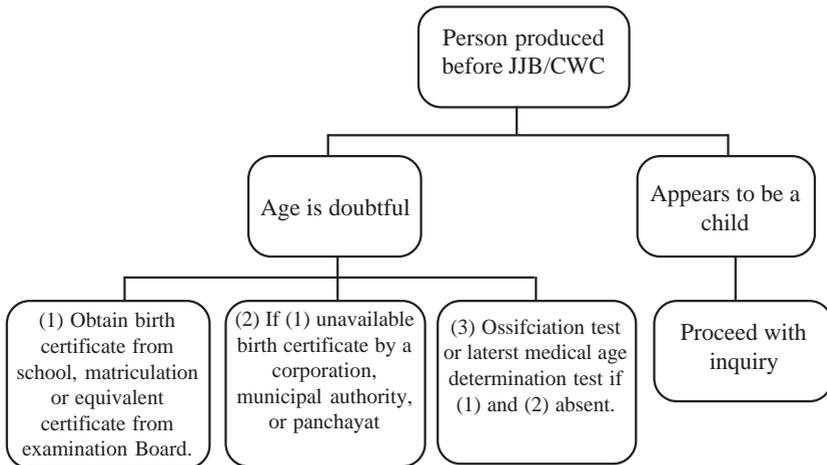
A child may have been rescued from labour or trafficking and brought before the police. A parent may walk in with a child to lodge a FIR alleging sexual abuse. A child victim of a brutal sexual assault may be found abandoned on the roadside by a patrolling police vehicle. After providing immediate comfort to the child and the person accompanying the child, the police may have to prima facie determine the age of the person, particularly to determine whether the victim is indeed a child under the JJ Act, 2015, POCSO Act, 2012, or other relevant laws.

This is crucial because certain child-friendly procedures need to be followed and legal provisions applied if the victim is a child. For instance, if the child rescued from labour appears to be above 14 years, relevant provisions pertaining to exploitation of a child employee under the JJ Act, 2015 and the CALPRA will have to be applied. If a victim of penetrative sexual assault or sexual assault is below 12 years, the offence will be aggravated under the POCSO Act and the relevant provisions will have to be mentioned in the FIR. Further, investigations should be conducted by a CWPO if the victim is a child.

It may be difficult to assess the age when the child appears to be on the borderline. Erring on the side of caution, the police may treat such a person as a child and produce him/her before the CWC or the Special Court under the POCSO

Act, as the case may be. This is because these bodies have the authority under the JJ Act, 2015<sup>42</sup> and the POCSO Act<sup>43</sup>, respectively, to determine age.

### Process for Age-Determination under Section 94, Juvenile Justice Act, 2015



The above process can be followed by any court before which the age of a person – the victim or the accused – is in question.

### Dos and Don'ts for the police

- When the victim/offender appears to be a child, treat the person as a child.
- If there is a doubt as to the victim or offender's age, there is no documentary proof available, or there is a dilemma as to whether the person is a child, take the decision in favour of juvenility and produce the person before the CWC, JJB, or the Special Court, as the case may be, for age determination.
- Collect documentary proof of age of the victim and the accused promptly.
- If the child is studying in a school, collect the birth certificate or matriculation certificate from school. If this is unavailable, birth certificate issued by a Municipal authority or Panchayat should be obtained from the parents.
- If no documentary proof is available, inform the CWC or the prosecutor or Special Court so that they can order an ossification test or latest medical age determination test.
- Do not ask doctors to conduct an ossification test or latest medical age determination test without seeking an order from the CWC/ Juvenile Justice

<sup>42</sup> JJ Act, 2015, Section 94.

<sup>43</sup> POCSO Act, 2012, Section 34(2).

Board(JJB)/ Court in accordance with Section 94, JJ Act.

- Charges under all relevant laws and provisions related to children should be applied if the victim is below 18 years.
- Aggravated charges under Sections 6 or 10, POCSO Act should be filed if the victim of penetrative sexual assault or sexual assault is below 12 years.
- If the victim of rape is below 16 years, charge should be filed under Section 376(2)(i), IPC, apart from the relevant provisions under the POCSO Act.

### **Significant Court Rulings**

#### **1. *Jarnail Singh v. State of Haryana*, AIR 2013 SC 3467**

The Supreme Court held that Rule 12 of the erstwhile Juvenile Justice (Care and Protection of Children) Rules, 2007, which detailed the age determination process for children in conflict with the law should be applied to determine the age of a child victim. It stated:

Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime.

**Note:** By extension, courts should apply Section 94, JJ Act, 2015 while determining the age of child victims.

#### **2. *Ashwani Kumar Saxena v. State of Madhya Pradesh*, AIR 2013 SC 553**

The Supreme Court held:

“Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, JJ Board or a Committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the JJ Board or the Committee need to go for medical report for age determination.”

#### **3. *Shah Nawaz v. State of Uttar Pradesh*, (2011) 13 SCC 751**

The Supreme Court observed that in accordance with the erstwhile JJ Model

Rules, 2007 “...the medical opinion from the medical board should be sought only when the matriculation certificate or school certificate or any birth certificate issued by a corporation or by any Panchayat or municipality is not available.”

#### **4. *Birad Mal Singhvi v. Anand Purohit*, AIR 1988 SC 1796**

In this case, the Supreme Court held that the basis on which the entry pertaining to date of birth in a school register was recorded needs to be established for it to have evidentiary value. It held:

“To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.”

#### **5. *State of Madhya Pradesh v. Anoop Singh*, 2015 (7) SCALE 445**

The High Court had set aside the respondent’s conviction under Section 363, 366, and 376, IPC on the ground that the prosecution had to establish the victim’s age as being below 16 years. There was a discrepancy of two days between the birth certificate and the middle school certificate produced by the prosecution and the victim was more than 15 years and less than 18 years based on the ossification test. The Supreme Court held that the discrepancy was immaterial and applied Rule 12(3)(b) of the JJ Model Rules, 2007. It was of the view that the High Court should have relied on the documents as only in their absence can a medical opinion be sought. The acquittal was set aside.

#### **5. *Eera through Manjula Krippendorf v. State (Govt. of NCT of Delhi) and Ors*, Criminal Appeal Nos. 1217-1219 of 2017 (Arising out of S.L.P. (Crl.) Nos. 2640-2642 of 2016)<sup>44</sup>**

The issue before the apex court in this case was whether Section 2(d) of the POCSO Act which defines the term “child” should be interpreted to include the mental age of a person so that a mentally retarded person or extremely intellectually challenged person above the biological age of 18 years would come within its ambit. A two-judge bench of the Supreme Court held that such an interpretation would not be tenable because of the purpose of the legislation and the intention of Parliament. The court held “we would be doing violence both to the intent and

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<sup>44</sup> Decided on 21.07.2017 by the Supreme Court

the language of Parliament if we were to read the word “mental” into Section 2(1)(d) of the 2012 Act. Given the fact that it is a beneficial/ penal legislation, as Judges can extend it only as far as Parliament intended and no further.”

**6. K. Muthu Mariappan v. The State Represented by the Inspector of Police, Criminal Appeal (MD) No. 98 of 2015<sup>45</sup>**

The Madras High Court held that the date of birth could be proved in the absence of a birth certificate and the school certificate would be sufficient proof of date of birth.

**Section 1.3 – Communication with a Child**

Developing effective communication with child victims, particularly those who have suffered sexual abuse or have been trafficked, is a special skill, which needs focused attention by the police. Recognition of trauma to the child and the duty to be child-friendly along with the need to investigate should go hand in hand, to be able to get all possible information from the child in a child-friendly manner.

Careful collection of information is necessary for the care and protection of children, for identifying their families, for arresting and prosecuting offenders, and for administrating the overall process of recovery, repatriation, social-reintegration and rehabilitation.

Numerous factors make interviewing child victims-witnesses challenging. Often, information must be collected rapidly, and at a time when the child finds it difficult to provide information. The child’s ability to provide sufficient and truthful information is affected by his/her psychological and physical well-being, and issues which create mistrust, fear or silence. Consequently, the information collected is sometimes incomplete or erroneous, and sometimes, improper interviewing techniques have a negative effect on the well-being and rights of the child. ‘Interviewing’ is a learned skill and those carrying out interviews with this particularly vulnerable group of children need to acquire basic techniques of the craft to ensure that their interviewing style is child-friendly, ethical and protective.<sup>46</sup>

**1.3.1. Suggested Dos and Don’ts**

The below-mentioned dos and don’ts have been authored by Dr. Preeti Jacob, NIMHANS.<sup>47</sup>

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<sup>45</sup> Decided on 12.06.2015 by the Madras High Court

<sup>46</sup> Caring for Children, Case Management and Child Friendly Interviewing, A Resource Pack; UNICEF, Regional Office for South Asia, 2008

<sup>47</sup> Dr. Preeti Jacob, M.D. (Psychiatry), Post-Doctoral Fellowship (PDF) and D.M. (Child and Adolescent Psychiatry) and Assistant Professor, Department of Child and Adolescent Psychiatry, NIMHANS. Select Extracts from: Centre for Child and the Law, Law on Child Sexual Abuse in India - Ready Reckoner for Police, Medical Personnel, Magistrates, Judges and Child Welfare Committees (November 2015) pp. 196-216.

The questioning of children for forensic purposes needs to follow a format so that the children can give accurate information to the best of their ability. Given below are some dos and don'ts for the interview procedure as well as questions that can be posed to child victims or witnesses. These have been adapted from several interview protocols.<sup>48</sup>

These would apply to interviews by the police in the course of investigation as well as examination and cross-examination during trial.

## **Dos and Don'ts**

### **Atmosphere**

- The atmosphere must be child friendly and relaxed. This can be done by having a specific room specially designed to interview children. The room should [ideally] be away from traffic, noise and other potential distractions like phones, fax machines, computers, typewriters, etc. The room should be bright and well lit. It should have a toilet facility. It should have tables and chairs and a cupboard to keep materials out of view. The cupboard can have a few toys and drawing material (such as papers, crayons, colour pencils), which can be used, if necessary. It should preferably have a one-way mirror and a video recording facility so that the interview can be recorded. The environment should be relaxed but not too distracting.
- Avoid having police personnel in uniform, the accused or any other person in the room when the interview is being conducted

### **Scheduling Interviews**

- Interviews must be scheduled after the child has used the toilet and has had something to eat. It should not be scheduled during the child's nap-time. It should be scheduled preferably in the morning. If the child is on medication, (for example, anti-seizure medication which can cause drowsiness), the interview should be scheduled for a time when the child is most alert.

### **Interview Guidelines<sup>49</sup>**

- The judge/police personnel conducting the interview must introduce

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<sup>48</sup> Including The Cornerhouse Forensic Interview Protocol (Anderson et al, 2010) , Forensic Interviewing Protocol (Governor's Task Force on Children's Justice and Department of Human Services, State of Michigan, 2003), National Institute of Child Health and Human Development Investigative Interview Protocol (Lamb et al, 2007) and the Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act (POCSO), 2012 Ministry of Women and Child Development, Government of India, 2013.

<sup>49</sup> Also see, P.M.Nair, "Rights Based Investigation: The New Mantra", Tata Institute of Social Sciences, 2017.

themselves. Their tone must be relaxed and easy-going. Sometimes children think that they have done something wrong and are in trouble and therefore are being interviewed by the judge/police personnel. It is important to allay their fears. The following is a brief example of how one can introduce one's self at the beginning of the interview. "Namaste, my name is XYZ. I am a police/ judge in this court. Part of my work here is to talk to children about events that have happened to them." Or, – "Hello, my name is ..... and I am a police officer here. I talk to a lot of children in ... (example of name of place where police station is located) about things that have happened to them. We will talk for a while and then I will take you back to the other room where your mother is waiting for you. Okay?"

- If the interview is video-recorded, verbal consent of the child must be taken prior to the interview. A statement such as the following can be made. "I have a video recorder in this room. It will record what we say. It is there so that I can listen to you without having to write everything down. Is that okay?"
- The child's personal space must be respected. By this it is meant that there must be adequate space between the interviewer and the child. More often than not, these children are talking about difficult issues which they may or may not have confided in others, events that are painful, shameful, embarrassing and guilt inducing and thus it can be quite disconcerting to have someone, especially a person in authority staring/looking at them directly at all times. Sitting at an angle of 45 degrees is helpful, as the child can look in front and talk if they don't wish to look at the interviewer, but the interviewer can see the child at all times.
- As these children have been abused in some form or the other (physical, sexual) they often misinterpret touch. It is important therefore, not to touch the child. Even if it is a small child, it is important not to tousle their hair, pinch their cheeks or demonstrate affection using touch.
- If the interviewer is unable to hear the child, he/she should not guess what the child might have said. This is important, because if the interviewer has misunderstood the child, in most cases the child is unlikely to correct the interviewer. It is therefore always better to ask the child again as to what he/she had said. For example, "Could you repeat what you just said?" or "I did not hear what you just said, so could you repeat it again please"
- If the child is talking very softly and the interviewer is unable to hear the child clearly, this should be communicated to the child. The interviewer could give the child an explanation such as -"I am unable to hear you, so it would help me if you can look at me and talk a little louder. Thanks" or, – "I have some difficulty hearing, so could you look at me and talk a little louder. Thank you"

- Do not volunteer information that the child has not yet revealed in the interview. For example, if the child has not told you that the father lay down on top of the child it is important not to introduce this information before the child has revealed it himself/herself. For example, “Did he have his pants off or on when he laid down on top of you?” If leading questions have to be asked then it is suggested that the following style be adopted – “Did he have his pants on or off?” Based on the child’s answer, the follow up question can be – “Tell me what happened after he took off his pants?”, or “Tell me what happened then?”

### **Additional Don’ts**

If the child is not comfortable for any reason, try to understand the reasons and reduce/avoid them before resuming interview. If the child is not ready or willing to speak, do not force the interview. Do it at a later date when the child is willing. Avoid repeated questioning/interview on the same topic or issue unless it is essential to clarify contradiction or follow-up on important gaps.

### **Language and Communication**

- It is important to talk to the child in a language well understood by the child. If the interviewer does not speak the child’s preferred language or dialect a translator must be present.
- Do not use baby or childish language while talking to children. Use a normal adult tone and pronunciation. The words that the child uses to describe certain body parts or names of alleged perpetrators or others, need to be used when referring to these body parts or persons.
- Actively listen to the child using minimal encouragers, such as “Go on, I am listening”, or “Hmmm”, or “Then what happened?”, or “Tell me more about what happened.”
- If the child uses a kinship term like “uncle” or “Grandpa” it is useful to clarify their name. For example, “Can you tell me this uncle’s name?” Or, the interviewer can ask – “Do you have one grandpa or more than one grandpa? Which grandpa was this?” Thereafter during the interview the alleged perpetrator’s name must be used. For example, if the child says “XYZ Mama” or “Dada” then subsequent questions must contain his/her name.
- It is also important not to use the pronouns ‘he’ or ‘she’ as they can be quite ambiguous. For example, “What were you doing when he came home?” Instead the question can be framed as “What were you doing when XYZ Mama came home?”
- Do not propose feelings by saying things such as – “I know that you probably hate your father.” Feelings that children have for the perpetrators can be

rather ambivalent. Sometimes it can be quite confusing for the child. The perpetrator may otherwise be pretty affectionate and caring and the child may have difficulty reconciling the different experiences shared with the perpetrator, both positive and negative experiences including the sexual abuse itself. The above statement regarding whether the child hates her/his father need not be made at all, as it is irrelevant legally to whether sexual abuse has indeed occurred or not.

- Do not make promises such as – “I will lock him up in prison and you will never have to see him again.” This is not ethical, as one cannot predict what is likely to occur during the trial. Making false promises can therefore even result in secondary victimization.
- Do not ask questions which convey judgments such as -”Why didn’t you tell your mother about it that very night?” It is essential to be non-judgmental, as in all probability, the child is feeling guilty about the same fact and this can make the child more guarded which may impede further evidence gathering by the interviewer.
- Do not use the words such as “abuse”, “rape” or “bad” etc., when asking about the experiences as these are adult interpretations.
- Do not display affection and bonhomie such as “I am like your father, you can tell me anything”, or “We are friends, aren’t we?” This might be quite confusing for the child whose trust in adults and perhaps in close friends/relatives has been destroyed – which may therefore make him/her more wary and guarded.
- If the interviewer does not understand a particular word or phrase, she/he can ask the child to elaborate by showing it on an anatomical drawing and explaining the same. For example, if the child says “pee pee” for the male/female genitalia, then the interviewer must ask – “Can you tell me what a pee pee is?” or “On this diagram can you show me where the pee pee is? As explained earlier, it is also important that the child’s words be used subsequently in the interview, when referring to the genitalia.
- If there is inconsistency, then the interviewer must ask the child for clarifications in a non-confrontational and non-accusatory manner. At no point should the questioning style suggest dis-belief in the story of the child. For example conversations questions with statements such as the following should be avoided – “You said that your XYZ uncle, kissed you on your mouth yesterday and then you said that you had stayed at your ABC uncle’s place yesterday. I am confused. Can you tell me again what happened.”

### **Questioning Children**

- Children are quite concrete in their thinking, and thus open-ended questions

must be asked. Questions such as “Did he touch you?” are not very good questions as they are unclear and misleading. Some children may answer negatively as in their experience, they were kissed not touched. Children are often literal beings and may be extra careful while answering in an interview of such nature and thus may not equate touch and kiss.

- Questions, which are ambiguous must not be asked, such as -”How were your clothes?” Instead, concrete questions such as – “What were you wearing when this happened?” must be asked.
- In the hierarchy of questions that can be asked during an interview of a child victim, open-ended questions and prompts are most often preferred. Specific but non-leading questions can be asked for soliciting further details. Closed questions are used to confirm specific details through the use of a multiple-choice question or a yes/no question. Leading questions can be asked after certain facts have already been established/revealed by the child.
- Examples for the above mentioned question types are given below.
- Open-ended questions are as follows. “Tell me everything you can about it”, or “Tell me what you know about what happened.” Open-ended prompts are used in the following manner: If the child stated that the uncle hit her, an open-ended prompt would be – “You said your uncle hit you. Tell me what happened”, or “You said your uncle hit you. Tell me everything about that.”
- Specific, non-leading questions are as follows. It focuses on details the child has already mentioned. Questions of this kind are as follows – “You said you were at home alone. Tell me what happened then?” or “You called this person XYZ. Who is XYZ?”, or “You said you were sleeping. Then what happened?”
- An example of a closed question would be as follows “Where did this happen? In your room, the bathroom or another place?”, or “Were you wearing your pyjamas, orwearing something else?”
  - o Leading questions must not be asked or, if at all, should be used sparingly, as they assume facts or suggest an answer, which the child has not yet given. Questions such as – “He touched you, didn’t he?”, should not be asked. If a leading question is required to be asked, the question should be framed as follows, “Did Uncle XYZ touch you?”, then follow it up with an open-ended prompt such as – “Tell me everything about that.”
  - o Do not ask the child to “pretend or imagine”. For example, “Imagine what happened and tell me.” This is not a good practice, as it removes the child from the direct experience and can lead to incorrect or/and inaccurate answers.
  - o Most children do not understand the concept of time until they are 8-10

years of age. Even if they do understand the concept of reading time, they may or may not be able to relate it to events that have occurred. Children less than 4 years have difficulty with times of the day. Children less than 7 years also do not understand prepositions such as “before” and “after” clearly. It is essential to keep these facts about the developmental stages of children in mind while questioning children. Words such as ‘yesterday’, ‘day after tomorrow,’ etc., should also not be used. Clock times should not be included in questions. Instead, events should be tied to meal times and other activities in the child’s day, (for example, to the time that he/she goes to school or comes back from school, attends singing class, etc.), which can be used as reference points. For example, – “You came back from school and then what happened?”, or “You said you ate lunch. Then what happened?”

- Young children also often have difficulty with numbers. Children should not be asked, “Tell me how many times it happened?” Instead the question should be framed as “Did it happen once or more than once?”, followed by questions such as “Can you tell me about the first/last time that this happened?”
- Multiple questions should not be asked at the same time. For example, “Where were you and what were you doing?” Instead, if the child stated previously that the event occurred after the uncle came home, then the questions must be framed as follows – “Where were you when XYZ uncle came home?” After the child has answered the first question, the next question can be - “What were you doing when XYZ uncle came home?” If for instance, the child said he/she was doing his/her homework, then the follow up question thereafter can be - “Tell me what happened after XYZ uncle came home and found you doing your homework?”

### **Making the Child Comfortable**

- Do not correct the child’s behaviour. For example, if the child rocks in his/her seat, or shakes his/her legs, as long as the interviewer can hear the child and it is not interfering with the interview procedure, it should be allowed, as these are often nervous or soothing behaviours. The child should, in no circumstance, be told to stop acting in these ways or any other such manner, as the range of such self-soothing behaviours may not always be all known. For example, some children may tap on the desk, hum, make noises with their mouth; rub their hands, sing, etc. An effort should be made to understand such behaviours, (however disturbing they may be to the interviewer), as possibly self-soothing behaviours, which in itself may actually contribute to a conducive and enabling environment for the child in making a clear testimony.
- It is also important to convey a non-judgmental attitude. Do not display shock,

disbelief or disgust when the child says something. If a translator is present, try and confine your communication with the translator to understanding the child. Do not engage in conversation beyond this as it could distract and prevent the free flow of thought and recall of painful memories.

- Do not promise rewards or gifts by making statements such as – “I will give you a chocolate, if you tell me what happened?”
- Do not withhold basic needs as a form of reinforcement, by making statements such as –”I will allow you to go the bathroom/drink water if you tell me what happened?” Children are then not only compelled to concentrate more on holding in their bowel/bladder, rather than answering the interviewer’s questions, which is counterproductive, but also feel disrespected and unimportant.
- Uses of reinforcements as stated in the above two examples are viewed as improper interview techniques, as they tend to coerce and compel the child into stating events and making disclosures in an incorrect manner. This will undermine the quality of the interview and the accuracy of the facts collected which can have negative consequences for the case in court.
- Acknowledge the child’s feelings. For example, if the child is demonstrating a feeling of being upset, sad, embarrassed or scared, acknowledge these feelings. For example, “I talk to many children about these kinds of things, it’s okay to feel that way, don’t worry. Now, would you like to tell me what happened?”

#### **Additional Points for police officers:**

1. (For details, refer ‘RBI: Rights Based Investigation: A Change mantra in Investigation’, by Dr P.M. Nair, TISS, 2017) Understand the difference between interviewing and interrogation. Interrogation techniques cannot be used in interviewing
2. Avoid repeated interviews by several investigators and supervisory officers, one after another, each one asking almost the same set of questions
3. Better to avoid too much crowding while interviewing. Let the team have maximum three persons and the best is to keep it two.
4. Do not associate female persons for interview of children, both male and female.
5. Know the legal requirements and ensure that. For example, under the ITPA, a rescued woman (means girl child also) shall be interviewed by a female police officer and if a female police official is not available, by a male police officer in presence of a female social worker (meaning a lady NGO).
6. When translators are being used for interview, train and orient the translators

too on the various aspects of child rights so that there is no violation from their side too.

7. It is essential that the trauma of the child victim is caught in the case diary. The sequence of events being written in the CD, under S. 172 Cr.P.C., be made elaborate and self-contained so that the Court gets a comprehensive picture of the trials and tribulations that the child victims had undergone.
8. Avoid touching the child victim, unless he/she needs physical support.
9. While interviewing, do observe the child carefully and capture all the nuances in the conversation, including the unspoken part, which comes out through the demeanour, body movements and all aspects of non-verbal communication. If required associate experts in neuro-linguistic programming.
10. Do not pressurise the child to speak. Give her/him time. Let them speak at their convenience.
11. Avoid group interviewing. Interview is not Focus Group Discussion. It has to be centred on the interviewed as much as the interviewer.
12. When the child victim starts speaking, do not interrupt or postpone the interview, even if the investigator may be busy elsewhere.
13. Ice breaking is an art. It has to be practiced. There cannot be a hard and fast rule on the method, as it depends on the facts and circumstances of the case.
14. Every child is different. Hence be not under the impression that there can be a standardised SOP for interview. Adopt according to the needs and situation.
15. Associate persons whom the child has trust, before and during interview, if the situation demands so. For example, in recent case where the girl child was being abused by the father, the brother of the girl noticed this and he started teasing her. When it came to the notice of the mother, she went into a shock and would only say that the daughter and son shall not speak out anything. Now the mother is in deep trauma. Such a mother cannot be attending the interview of the child, even though the mother loves the child and cares her. However, another trusted person should be present when the child is interviewed.

### **1.3.2. How to Ascertain if a Child Witness Understands the Difference between Truth and Lie**

In *State v. Sujeet Kumar*,<sup>50</sup> the Delhi High Court was critical of the

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<sup>50</sup> CRL.A. 1190/2014 decided on 13.10.2015 by the Delhi High Court.

developmentally inappropriate questions posed by a Magistrate to assess the competence of a two-and-a-half year old child victim of a brutal rape before recording her statement under Section 164, Cr. P.C. It found the questions to the child about the school she went to and the class she studied in highly inappropriate as the child lived in a slum and did not attend any school. The Magistrate then asked her if she understood the term “truth” and the difference between truth and lie. The High Court observed: “How could a two and half year old child explain the meaning of word “truth” and state difference between truth and lie. It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between truth and lie. What to talk of a two and half year old child.”

The Delhi High Court cited an article “Child Witness Competency: When Should the Issue be Raised” and highlighted the key points as follows–

- Asking, “What does it mean to tell the truth?” and “What does it mean to tell a lie?” are more developmentally appropriate for young children than asking, “What is the difference between the truth and a lie?”
- Very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. Situationally relevant multiple-choice questions can be posed to assess the child’s competency.
- Examples of such questions are:
  - \* If I told your mom that you just yelled at me, would that be the truth or a lie?
  - \* If you told your mom that I hit you, would that be the truth or a lie?
  - \* If you told your teacher that something bad happened to you, but it really didn’t happen-you were making it up-would you be telling the truth or a lie?
- Competent children should be able to consistently provide correct answers to these multiple-choice questions.

This ruling should be borne in mind by police officers who interact with children and record their statement.

#### **Section 1.4 – Behaviour of a Child Victim of a Sexual Offence**

## Features of Child Sexual Abuse

Extracted from: World Health Organisation, *Guidelines for medico-legal care for victims of sexual violence*, 2003<sup>51</sup> –

Features that characterize child sexual abuse include:

- Physical force/violence is very rarely used; rather the perpetrator tries to manipulate the child's trust and hide the abuse.
- The perpetrator is typically a known and trusted caregiver.
- Child sexual abuse often occurs over many weeks or even years.
- The sexual abuse of children frequently occurs as repeated episodes that become more invasive with time. Perpetrators usually engage the child in a gradual process of sexualizing the relationship over time (i.e. grooming).
- Incest/intra-familial abuse accounts for about one third of all child sexual abuse cases.

## Physical and Behavioural Indicators of Child Sexual Abuse

### Physical Indicators

Unexplained genital injury  
Recurrent vulvo-vaginitis  
Vaginal or penile discharge  
Bedwetting and faecal soiling beyond the usual age  
Anal complaints (e.g. fissures, pain, bleeding)  
Pain on urination  
Urinary tract infection  
STI (a)  
Pregnancy (b)  
Presence of sperm (b)

### Behavioural Indicators

Regression in behaviour, school performance or attaining developmental milestones  
Acute traumatic response such as clingy behaviour and irritability in young children  
Sleep disturbances  
Eating disorders  
Problems at school  
Social problems  
Depression  
Poor self-esteem  
Inappropriate sexualized behaviours (c)

- (a) Considered diagnostic if perinatal and iatrogenic transmission can be ruled out.
- (b) Diagnostic in a child below the age of consent.
- (c) No one behaviour can be considered as evidence of sexual abuse; however, a pattern of behaviours is of concern. Children can display a broad range of sexual behaviours even in the absence of any reason to believe they have been sexually abused.

<sup>51</sup> Pg. 76 [http://www.who.int/violence\\_injury\\_prevention/resources/publications/en/guidelines\\_chap7.pdf](http://www.who.int/violence_injury_prevention/resources/publications/en/guidelines_chap7.pdf)

**Grooming of Child** – Grooming is when someone builds an emotional connection with a child to gain their trust for the purposes of sexual abuse, sexual exploitation or trafficking. Children and young people can be groomed online or face-to-face, by a stranger or by someone they know – for example a family member, friend or professional. Many children and young people don't understand that they have been groomed or that what has happened is abuse. The signs of grooming aren't always obvious and the groomers will often go to great lengths not to be identified. If a child is groomed, the child may exhibit the following behaviours<sup>52</sup> –

- Be very secretive, including about what they are doing online
- Have older boyfriends
- Go to unusual places to meet friends
- Have new things such as clothes, or mobile phones that they can't or won't explain
- Have access to drugs and alcohol.

Grooming can affect any child, however some children may be more at risk than others such as children, who are disabled or in care, and those who are abused by known family members, such as fathers, uncles, etc. The groomers will exploit any vulnerability to increase the child or young persons dependence on them, and reduce the likelihood of the child speaking out. Police investigating cases of incest/ sexual abuse by known family member, need to understand that it is due to grooming that the child continues to say that she “loves” the father or the “grandfather”, without understanding the child was actually harmed by the abuser. It should also be noted that there is no ideal behaviour of a child victim of a sexual offences. The police should avoid arriving at conclusions about the veracity of the allegation based on the child's emotion and physical behaviour. For instance, if the child is not distraught or upset, it cannot be interpreted to mean that the child has not been sexually abused.

### **Section 1.5 – Children with different gender identities and sexualities**

Gender and sexuality are an integral component of a person's identity including a child's identity. While childhood by itself denotes vulnerability, identities of gender and sexuality intensify this depending on the social landscape the child is brought up in. Development of gender and sexuality identities is also a part of the physical, cognitive, social and emotional development of a child.<sup>53</sup> It is therefore crucial to understand these aspects and their impact while dealing with children

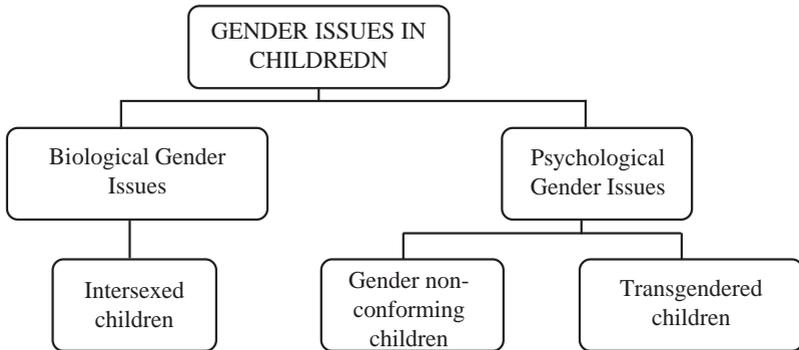
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<sup>52</sup> NSPCC, “Grooming: What it is, signs and how to protect children”, <https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/grooming/>

<sup>53</sup> Angela Oswalt, Early Childhood Gender Identity and Sexuality, Gracepoint, available at <http://www.gracepointwellness.org/462-child-development-parenting-early-3-7/article/12771-early-childhood-gender-identity-and-sexuality>

## Sex and Gender

‘Sex’ and ‘gender’ are the commonly used terms to differentiate between male and female persons. As technical terms, ‘sex’ refers to biological difference while ‘gender’ is social difference commonly referring to ‘masculinity’ and ‘femininity’. Gender issues in children may arise biologically as well as psychologically.



Typically after the birth of a baby, the child is assigned a gender after inspection of the child’s genitals. This is both a social as well as legal process. For a majority of children, the determination of sex and gender gets resolved at birth, i.e., children assigned the male gender identify themselves as boys and later as men, and children assigned the female gender identify themselves as girls and later as women. However, some children, may begin to display gender issues as they develop. These children typically begin to non-conform with the gender they were assigned. For some of these children, it is only a temporary phase. However, a few children will persistently insist on identifying as the opposite of the gender they were assigned in addition to being gender non-conforming.<sup>54</sup> While this group of children may grow up to become transgendered adults, they may begin the process of transitioning during their childhood itself.<sup>55</sup> Being transgendered refers to persons who have transitioned to a different gender than the one they were assigned at birth. Transitioning can occur in several ways from just changing names and clothing, to undergoing surgery and hormone therapy.

Some gender issues are biological in nature, i.e., occur as result of chromosomal deformities. This occurs in roughly 1.7% of all children.<sup>56</sup> These children are referred

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<sup>54</sup> Gender Non-Conforming & Transgender Children, Healthy Children, available at <https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Non-Conforming-Transgender-Children.aspx>

<sup>55</sup> Ibid.

<sup>56</sup> Jenny Kleeman, ‘We don’t know if your baby’s a boy or a girl’: growing up intersex, The Guardian [2 July 2016], available at <https://www.theguardian.com/world/2016/jul/02/male-and-female-what-is-it-like-to-be-intersex>

to as 'inter-sexed' children. Inter-sex persons are completely different from trans-sexual persons although the two groups are mistaken as the same. While intersex is a biological condition, trans-sexual is a psychological one.

Inter-sexed children are generally assigned a gender at birth even though they display both male and female traits. These traits can be visible externally (i.e., children born with both male and female genitalia) or be only internal (i.e., chromosomal anomalies). Several parents pick a gender and opt to corrective surgery and 'fix' this issue. Although surgery is a popular method chosen by parents to correct this issue, many times the issue remains unresolved and children experience gender unease and dissatisfaction i.e. distress with the gender assigned to them. This occurs when the gender assigned to them does not conform with their own sense of gender identity. With children whose anomalies are not visible at birth, they become evident during the development of the child. For e.g., a child assigned the female gender, may begin to show external male traits as she grows older such as facial hair, the growth of male genitalia, etc.<sup>57</sup>

## **Sexual Orientation**

Sexual Orientation refers to the gender of the person to whom one is attracted to or wishes to be in a sexual relationship with. Sexual orientation, although commonly categorized into homosexuality (attracted to a person of the same gender) and heterosexuality (attracted to a person of a different gender), can be identified across a spectrum of orientations. Although sexuality as an identity is generally perceived to develop only post puberty, children actually develop these identities from as early as the infancy period.<sup>58</sup>

## **Impact of gender and sexuality issues on children**

Children who display gender and sexuality issues face enormous discrimination, social stigma and humiliation in society. This directly impacts the exercise of their fundamental rights. At present, India has not legislated any special laws protecting persons who have gender and sexuality issues. Homosexuality is prohibited and is an offence under the criminal law of India.<sup>59</sup>

The Supreme Court has highlighted the rights of inter-sexed and trans-sexual persons in 2012 in the case of *National Legal Services Authority v. Union of*

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<sup>57</sup> Intersex states, Encyclopedia of Children's health, available at <http://www.healthofchildren.com/I-K/Intersex-States.html>

<sup>58</sup> Infancy Sexuality and Body Awareness Development, Gracepoint, available at <https://www.gracepointwellness.org/461-child-development-parenting-infants-0-2/article/10119-infancy-sexuality-and-body-awareness-development>

<sup>59</sup> IPC, Section 377.

*India*.<sup>60</sup> In this case, the transgendered community petitioned the Supreme Court praying to recognize their right to gender identity stating that non-recognition of their gender identity is violative of the right to life and right to equality enshrined in the Constitution. The Supreme Court in its landmark decision upheld the right to have a third gender and a self-identified gender. The Court further clarified that these persons would be guaranteed all the fundamental rights available in the Constitution. The Court also asked the Centre and State governments to take steps to address the problems faced by this community.

Based on the above and the principles under Section 3, JJ Act, 2015, the police should treat inter-sex and transgender children with dignity and not discriminate against them based on their gender identity. Stigmatizing language and terms should be avoided. For instance, such children should not be referred to as “chakka”, or any other demeaning or derogatory terms.

**Role of Police in ensuring the care and protection of inter-sex children, transgender children or children with different sexualities**

While there is no law that guides the police in their interaction with transgendered, intersexed children, and children with different sexualities, the guidelines issued by the Ministry of Health and Family Welfare (MOHFW) is instructive.<sup>61</sup> Although the guidelines are issued primarily for medico-legal care of survivors and victims of sexual assault, they provide useful guidance for all persons dealing with such children entering the Juvenile Justice system or the criminal justice system. The guidelines which are relevant even for law enforcement officials to observe have been extracted below: Relevant Guidelines for transgender and intersex children from the MOHFW Guidelines :<sup>62</sup>

- Gender identity is not constituted by anatomy, especially appearance of genitals. Primacy should be given in the record to the survivor’s stated gender identity and appropriate names and pronouns used.
- Intake forms and other documents that ask about gender or sex should have options as male/female/others.
- Information on the intersex variations or transgender status of the survivor must be treated as confidential and not to be revealed without the survivor’s consent.

<sup>60</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438

<sup>61</sup> Guidelines & Protocols, Medico-legal care for survivors/victims of sexual violence, Ministry of Health and Family Welfare [2014] available at <https://mohfw.gov.in/sites/default/files/953522324.pdf>

<sup>62</sup> Id. at p.12

- The inadvertent discovery during examination or history taking that a person is transgender or intersex must not be treated with ridicule, hostility, surprise, shock, or dismay. Such reactions convey that the person is being judged and is likely to make them uncomfortable in the health care setting.
- Information about referral agencies that provide services to transgender or intersex survivors of sexual violence must be provided where available.

Guidelines for dealing with children with alternate sexualities:<sup>63</sup>

- There should be no judgment on the person's sexual orientation in general or as a cause of the assault.
- Confidentiality of their sexual orientation should be maintained. One should not discuss or mention it to the other staff members unless needed for treatment reasons.
- The professional should not express shock, wonder, or any other negative emotions when a person reveals their sexual orientation. The speech and behaviour of the professional should remain inclusive.
- The professional should not give any advice or 'offer solutions' to 'cure' them of their sexual orientation.
- Lesbian, gay, bisexual and transgender persons are likely to be targets of hate crimes and may want to talk about the role their sexual orientation played in making them vulnerable to sexual violence. Their experience should be given a sincere hearing and validated. The survivors should be assured that it was not their fault that they were sexually assaulted.

## Section 1.6 – General Norms of a Child Friendly Trial

### Norms of a Child-friendly Trial<sup>64</sup>

- A parent or guardian should accompany the child at all times. In case they are accused of the offence against the child, another suitable person chosen by the child, or a representative of a fit institution as defined in the JJ Act, 2015, or a Support Person appointed by a CWC or a court should accompany the child.
- Where the parents or guardians are involved in the commission of an offence or the child is living at a place where there is a risk of further trauma, the child should be produced before the CWC and the CWC may direct the child to be taken out of their custody or care, or out of such situation. In the context of a sexual offence against a

<sup>63</sup> Id. at p.13

<sup>64</sup> JJ Rules, 2016, Rule 54(18),

child, the decision to take the child out of the custody of a parent, guardian, or childcare institution can be taken only by the Child Welfare Committee.<sup>65</sup> Courts before whom such children are produced should direct the police to present the child before the jurisdictional CWC.

- Age determination must be conducted as per the procedures laid out in Section 94, JJ Act, 2015.
- The language used in the court must be familiar to the child and where needed translators, interpreters, and special educators must be made available.
- The court must ensure beforehand that the child is capable of giving a voluntary statement.
- No statement of the child should be disregarded as evidence in the trial solely on the basis of the age of the child.
- Images or statements admissible in the interview of the child should not be detrimental to the mental or physical well-being of the child.
- Length and questions admissible at the interview should not be taxing and must be suitable to the attention span of the child.
- In case of young children, or otherwise incapacitated child, alternative methods of interaction and evidence collection that is less intimidating to be adopted.
- The Court should ensure that at no stage during trial, the child comes face to face with the accused.
- Special permission from school and arrangement for remedial classes for days lost to be ensured by the school authorities.
- Identity of the child should be protected from the media.

## **Section 1.7 – Convergence and Networking by Police with Multiple Stakeholders**

During the entire process, from the filing of the complaint, during investigation, prosecution and trial and the care, protection, rehabilitation and reintegration of the child victim, various functionaries are involved at different stages. Some of these stakeholders, such as, the police, the nodal government departments and the non-governmental stakeholders – have corresponding roles and responsibilities, which are all geared towards providing a victim-friendly and child-friendly treatment to the child victim at all stages of the justice delivery and beyond.

While it is important that each of the stakeholders perform their role well, effective delivery of child protection services requires coordination and convergence amongst them.

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<sup>65</sup> POCSO Rules, Rule 4(3) (4)

### 1.7.1. Role of the Police/SJPU vis-à-vis other authorities

Sr. No.	Police/SJPU	Convergence and Networking Relation
1	Role of the Police/SJPU vis-à-vis Child Welfare Committee (CWC)	<ul style="list-style-type: none"> <li>• Any child, who on reasonable grounds is thought to be a child in need of care and protection by the State may be produced before the CWC by any of the following persons – any police officer or Special Juvenile Police Unit or a designated Child Welfare Police Officer or any officer of District Child Protection Unit<sup>66</sup> or Inspector appointed under any labour law for the time being in force</li> <li>• For a child that is produced directly before CWC by anyone, CWC and police/ SJPU to coordinate in filing of FIR or a preliminary complaint, as relevant</li> <li>• Rescue/ recovery of child and/ or recovery of child’s property (from brothel, home, or place of work)</li> <li>• Tracing of family in cases of missing/rescued/ found children</li> <li>• Verification of documents for identity, age determination, etc.</li> <li>• Escorting child (to hospital or for tracing of family or for intra-state or interstate restoration with family, etc.)</li> <li>• Co-ordination in court during trial</li> <li>• Information regarding a case under the POCSO Act should be reported by the police with the CWC within 24 hours.</li> </ul>
2	Role of the Police/SJPU vis-a-vis NGOs	<ul style="list-style-type: none"> <li>• Receiving complaints/ reports through Childline or NGOs.</li> <li>• Filing FIR or a complaint</li> <li>• Assistance with tracing of family (for children rescued from exploitative situations and living without families), rescue operations, recovery of child’s property, etc.</li> <li>• Home verification report (under ITPA, 1956)</li> <li>• Placement of the child for short term or long term care based on an order from the CWC.</li> <li>• Counselling child victim for recording statements under S. 161 Cr. PC.</li> <li>• Psycho-social counselling and services, education, age appropriate vocational training, legal counselling and legal aid.</li> </ul>

<sup>66</sup> JJ Act, 2015, Section 106.

Sr. No.	Police/SJPU	Convergence and Networking Relation
		<ul style="list-style-type: none"> <li>• Assist police with inter-state or intra state transfer of child, and repatriation if child is foreign national.</li> <li>• Procuring identification documents for the child.</li> <li>• After care and monitoring of child restored with family.</li> </ul>
3	Role of Police/SJPU vis-à-vis Department of Health (hospital)	<ul style="list-style-type: none"> <li>• Reporting of sexual offences.</li> <li>• Medical examination.</li> <li>• Age verification.</li> <li>• Hospitalization and special or emergency medical treatment (where required).</li> <li>• Providing psychologists/ counsellors for professional counselling services (when required by the police).</li> </ul>
4	Police/SJPU – Department of Labour Coordination	<ul style="list-style-type: none"> <li>• Rescuing of child in coordination with Labour Inspector (appointed under any labour law); authorities under the Child and Adolescent Labour (Regulation and Prohibition) Act, 1986; and authorities under the Bonded Labour Act, 1976; and production before the CWC.</li> <li>• Coordination with District Child Labour Task Force.</li> <li>• Rescuing of child labourers in coordination with Inspector under the Shops and Establishments Acts, and production before the CWC, if necessary.</li> </ul>
5	Role of the Police/SJPU vis-a-vis State/District Legal Services Authority (DLSA) [Details of SLSAs is available at <a href="https://nalsa.gov.in/state-lsas-websites">https://nalsa.gov.in/state-lsas-websites</a> ]	<ul style="list-style-type: none"> <li>• Aid and assistance to the child victim for legal aid, where offences have been committed against the child.</li> <li>• Provision of legal services.</li> <li>• Assisting the child to receive compensation under the State Victim Compensation Scheme (Section 357A, Cr.P.C.) or any other scheme or to make an application to the Special Court for compensation (Section 33(8), POCSO Act and Rule 7, POCSO Rules), where ever applicable (even where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or dependents may make an application to the State or the District Legal Services Authority for award of compensation.</li> </ul>
6	Role of Police/SJPU vis-à-vis Special Public Prosecutors and Prosecutors	<ul style="list-style-type: none"> <li>• The charge-sheet should be scrutinized collectively to ensure all relevant provisions are included and aggravating factors are taken into account.</li> </ul>

Sr. No.	Police/SJPU	Convergence and Networking Relation
		<ul style="list-style-type: none"> <li>• The international mobility of offenders with respect to trafficking and sexual offences make it more necessary than ever that police and prosecutorial agencies collaborate and provide legal assistance to the country that has assumed jurisdiction over the offence committed by foreigner(s).</li> <li>• In cases of child trafficking, if the traffickers are foreign nationals, police should coordinate with the public prosecutor in matters related to extradition of the offender(s).</li> <li>• Referrals by the police in collaboration with prosecutors, to the appropriate government departments and NGOs, ensure that victims are offered comprehensive assistance through referrals to specialized services.</li> <li>• Assist the NGO supporting the child victim to coordinate with the prosecutor for preparing the child towards testimony in court.</li> </ul>
7.	Role of the Police/SJPU vis-à-vis DCPU.	<ul style="list-style-type: none"> <li>• Coordinate for escort, restoration and repatriation of children living in Child Care Institutions.</li> <li>• Cooperate in cases of deaths, suicides, children running away from institutions. Cooperate in cases of offences within child care institutions.</li> <li>• Close co-ordination between SJPU and DCPU for welfare of children within their jurisdiction.<sup>67</sup></li> <li>• Assist victims access compensation and rehabilitative services and schemes.</li> </ul>
8.	Role of the Police/SJPU vis-à-vis Media	<ul style="list-style-type: none"> <li>• Sensitizing the media to inform the general public about issues related to crimes against children in their area of jurisdiction</li> <li>• Dissemination and telecasting of photographs of missing/ lost/ found children for tracing their families</li> <li>• Sharing good practices, success stories, and the committed work done by police towards successful investigation and prosecution of crimes against children.</li> <li>• Ensuring that identity of child victims is protected from the media.</li> </ul>

<sup>67</sup> JJ Model Rules, 2016, Rule 86(12).

### 1.7.2. Areas of intervention of the concerned stakeholders vis-à-vis child victims of offences

Stages of Intervention	Relevant Stakeholders
Identifying victims	Police, Department of Labour, Department of Immigration, Border Security Forces, NGOs/ Childline, complaints by victim/ parents/ public spirited citizen / doctor, nurse, DCPU.
Rescue of victims	Police, Department of Labour, Department of Immigration, Childline, NGOs (aiding and assisting the rescue team).
Post-rescue interview	Police, CWC, Department of Labour, Department of Immigration, NGOs/SJPU social worker/DCPU Social Worker/Case Worker, counsellor.
Referral Services	Police/SJPU, Prosecutor's office, CWC, Department of Labour, Department of Immigration, NGOs/social worker / counsellor, Department of Health, District Legal Services Authority, Support Person, DCPU.
Investigation of cases	Police/SJPU, Police with Department of Labour (for forced/ bonded/ child labour)
Prosecution of cases	Directorate of Prosecution, public prosecutors along with the Investigating officer from Police, Department of Labour, victim's lawyer.
Rehabilitation and Social Re-integration	Police, prosecutors, courts, JJB, CWC, DCPU, NGOs, Support Person, DLSA/SLSA, Department of Labour, Department of Health, Department of Education, Skill India Initiative, Ministry of External Affairs (for repatriation of foreign child victims).
Repatriation	Ministry of Home Affairs, Ministry of External Affairs, police, prosecutors, courts, authorities under the JJ Act, 2015, NGOs.

### 1.7.3 Specific Duties of Governments and Actors within Criminal Justice System

#### Duties of the State Government and other governmental agencies with respect to trying offences against children:

Duties of the State Government	
<b>Infrastructural</b>	<ul style="list-style-type: none"> <li>• Constitution of SJPU and designating CWPOs in every police station.<sup>68</sup></li> <li>• Designation of Special Courts in every district under the POCSO Act.<sup>69</sup></li> </ul>

<sup>68</sup> JJ Act, 2015, Section 106.

<sup>69</sup> POCSO Act, Section 28(1).



<p>P.C in the children's room, or if possible at the residence of the child. The residence can include the home or an institution where the child resides.<sup>75</sup></p> <ul style="list-style-type: none"> <li>• It must be recorded verbatim, i.e., in the exact words used by the child.<sup>76</sup></li> <li>• The child may be allowed to be accompanied by his/her parent, guardian or social worker.<sup>77</sup></li> <li>• Recording of the child's statement must be done by following a child friendly procedure.<sup>78</sup></li> </ul>	
<p><b>Duties of the Judge</b></p>	
<p><b>Trial</b></p>	<ul style="list-style-type: none"> <li>• Provision for separate entrances for children (wherever possible)</li> <li>• Video-conferencing facilities for interacting with children (where possible)</li> <li>• Provision for entertainment for children such as books, games, etc. (where possible)<sup>79</sup></li> </ul>
<p><b>Testimony of the Child</b></p>	<ul style="list-style-type: none"> <li>• If the child victim or witness does not belong to the district or State or country, the statement or interview or deposition of the child may also be recorded through video conferencing.<sup>80</sup></li> <li>• Where the child is very disturbed by the court, upon an application, the judge may pass orders for conduction of video conferencing.<sup>81</sup></li> </ul>
<p><b>Compensation</b></p>	<ul style="list-style-type: none"> <li>• The trial judge should proactively consider whether compensation under Section 357-A, Cr.P.C. or Section 33(8), POCSO Act read with Rule 7, POCSO Rules should be awarded.</li> </ul>

## SECTION II –THE SPECIFICS:DIFFERENT CONTEXTS

### CHAPTER 1 – Sexual Offences against Children

**1.1. The Context:** According to a Study on Child Abuse: India, in 2007 by the Ministry of Women and Child Development, Government of India (MWCD Study), 53.2% children interviewed for the study from 13 States across India reported having faced one or more forms of sexual abuse.<sup>82</sup> Of these, 52.94% were boys and 47.06% were girls.<sup>83</sup>

<sup>75</sup> JJ Model Rules, 2016, Rule 54(13)(i).

<sup>76</sup> JJ Model Rules, 2016, Rule 54(13)(ii).

<sup>77</sup> JJ Model Rules, 2016, Rule 54(13)(iii).

<sup>78</sup> JJ Model Rules, 2016, Rule 54(12).

<sup>79</sup> JJ Model Rules, 2016, Rule 54(12).

<sup>80</sup> JJ Model Rules, 2016, Rule 54(15).

<sup>81</sup> JJ Model Rules, 2016, Rule 54(14) .

<sup>82</sup> Ministry of Women and Child Development, Study on Child Abuse: India 2007, p.74

<http://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf>

<sup>83</sup> Ibid.

Sexual offences against children, however, remain largely underreported and hidden. Data based on the National Crime Records Bureau's *Crime in India, 2016* reveals:<sup>84</sup>

Total number of cases registered under POCSO Act	36022
Total number of cases under Section 376, IPC and Section 4 & 6, POCSO Act	19765
Total number of cases of sexual assault under Section 8 & 10, POCSO Act and Section 354, IPC	12,226
Total number of cases of sexual harassment	934
Total number of cases in which charge-sheet was submitted	30,891
Cases Pending Investigation	15,283 (31.8%)

Reporting of cases under the POCSO Act has significantly increased from the previous years. It was 14,913 cases in 2015 and 8904 cases in 2014. The increase could be attributed to greater awareness among the public as well as the police about the POCSO Act.

Studies have shown that contrary to the popular belief that the threat of sexual abuse is posed mostly by strangers, most perpetrators of sexual offences against children are known to the children.<sup>85</sup> This is also borne out by the data collected by the National Crime Records Bureau, which revealed that in 94.6% cases of rape and rape read with penetrative and aggravated penetrative sexual assault against children in 2016, the offender was known to the victim.<sup>86</sup> Neighbours, followed by persons who promised to marry the victim were two distinct categories of known persons, apart from relatives, and close family members signifying

<sup>84</sup> Table 4A.3, Police Disposal of Crime Against Children Cases (Crime Head-wise) – 2016, Crime in India, 2016; Table 6.2, Cases Reported (I), No. of Victims (V) and Rate(R) of Crimes Committed Against Children During 2015, National Crime Records Bureau, Crime in India 2015; Table 6.2, Incidence (I), No. of Victims (V) and Rate(R) of Crimes Committed Against Children During 2014, National Crime Records Bureau, Crime in India 2014.

<sup>85</sup> Centre for Child and the Law, National Law School of India University, Bangalore (CCL-NLSIU), Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi, 29 January 2016, pp. 62-64, <https://www.nls.ac.in/ccl/jjdocuments/specialcourtPOSCOAct2012.pdf> – Of the 667 cases decided by Special Courts in Delhi, 80% of the accused were known to the victim, 17% were strangers, and the profile of the remaining 3% was not specified. CCL-NLSIU, “Study on the Working of Special Courts under the POCSO Act, 2012 in Assam”, 13 February 2017, pp. 56-57, <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourttassamPOSCOAct2012.pdf> – Of the 172 cases decided by Special Courts in Assam, 78% of the accused were known to the victim, 10% were strangers, and the profile was unspecified in 12% cases.

<sup>86</sup> Table 3A.4, Offenders Relation to Victims of Rape – 2016., National Crime Records Bureau, Crime in India 2016.

children’s vulnerability within the community and at home.<sup>87</sup> 12.09% of offenders known to the victim were close family members and relatives, including grandfathers, fathers, brothers, live-in-partners etc., thus indicating that sexual abuse of children takes place within the family setting as well.

The police should bear in mind that children with disabilities are more susceptible to sexual abuse. A 2012 review on the prevalence and risk of violence against children with disabilities published in *Lancet*, a renowned medical journal, and endorsed by the World Health Organisation revealed that children with disabilities are “2.9 times more likely to be victims of sexual violence”. Further, children with mental or intellectual disabilities are more vulnerable as they face “4.6 times the risk of sexual violence than their non-disabled peers.”<sup>88</sup>

## **1.2. Overview of Legal Framework**

### **1.2.1. Applicable Laws**

Sexual offences against children are recognized under the following statutes:

1. Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and Rules
2. Indian Penal Code, 1860 (IPC)
3. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Atrocities Act)
4. Rights of Persons with Disabilities Act, 2016 (RPD Act)
5. Information Technology Act, 2000
6. Immoral Traffic (Prevention) Act, 1986 [Please refer to Chapter II]
7. Indecent Representation of Women (Prohibition) Act, 1986
8. Goa Children’s Act, 2003

Additionally, provisions of the Code of Criminal Procedure, 1973 (Cr.P.C) and Indian Evidence Act, 1872 (IEA) are relevant to the procedures and evidentiary rules to be followed by Special Courts while trying sexual offences against children.

The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015) will apply when the accused is a person below the age of 18 years, and/or when the child victim is also found to be in need of the State’s care and protection. A child who has been, is being, or is likely to be abused, tortured or exploited for

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<sup>87</sup> Table 3A.4, Offenders Relation to Victims of Rape – 2016, National Crime Records Bureau, Crime in India 2016.

<sup>88</sup> Jones, Bellis, et al., “Prevalence and risk of violence against children with disabilities: a systematic review and meta-analysis of observational studies”, *The Lancet*, Volume 380, No. 9845, p 899-907, 12 July 2012, referred to in [http://www.who.int/disabilities/publications/violence\\_children\\_lancet.pdf?ua=1](http://www.who.int/disabilities/publications/violence_children_lancet.pdf?ua=1)

sexual abuse or illegal acts comes under the ambit of a child in need of care and protection under the JJ Act, 2015.<sup>89</sup> Further, a child who has been or is likely to be subjected to a sexual offence under the POCSO Act by a person living in the same or shared household with the child, or if the child is living in a child care institution and is without parental support, or if the child does not have a home or parental support, such a child has to mandatorily be produced before the Child Welfare Committee by the police or SJPU.<sup>90</sup>

The provisions of the Prohibition of Child Marriage Act, 2006 will have to be applied if the child victim under the POCSO Act is married. If the child victim is pregnant and wishes to terminate the pregnancy, the procedures under the Medical Termination of Pregnancy Act, 1971 will have to be followed to facilitate such termination.

### 1.2.2. Offences under the POCSO Act

The POCSO Act, a special legislation enacted to protect children from sexual assault, sexual harassment and pornography, recognizes penetrative, touch and non-touch based sexual offences. Provisions of the POCSO Act are gender-neutral vis-à-vis both the perpetrator and the victim.

<b>Penetrative Sexual Offences under the POCSO Act</b>
<ul style="list-style-type: none"> <li>• Penetrative Sexual Assault (Sections 3 &amp; 4)</li> <li>• Aggravated Penetrative Sexual Assault (Sections 5 &amp; 6)</li> <li>• Using a child for pornography and committing penetrative sexual assault (Section 13 and 14(2))</li> <li>• Using a child for pornography and committing aggravated penetrative sexual assault (Section 13 and 14(3))</li> </ul>
<b>Touch-based Sexual Offences under the POCSO Act</b>
<ul style="list-style-type: none"> <li>• Sexual Assault (Section 7 &amp; 8)</li> <li>• Aggravated Sexual Assault (Section 9 &amp; 10)</li> <li>• Using a child for pornographic purposes (Sections 13 and 14(1))</li> <li>• Using a child for pornography and committing sexual assault (Section 13 and 14(4))</li> <li>• Using a child for pornography and committing aggravated sexual assault (Section 13 and 14(5))</li> </ul>

<sup>89</sup> JJ Act, 2015, Section 2(14)(viii).

<sup>90</sup> POCSO Rules, Rule 4(3).

<b>Non-touch based Sexual Offences under the POCSO Act</b>
<ul style="list-style-type: none"> <li>• Sexual harassment (Sections 11 &amp; 12)</li> <li>• Storage of pornographic material involving a child for commercial purposes (Section 15)</li> </ul>
<b>Other Offences under the POCSO Act</b>
<ul style="list-style-type: none"> <li>• Failure to report the commission of a sexual offence (Section 21(1))</li> <li>• Failure to record the commission of a sexual offence (Section 21(1))</li> <li>• Failure of a person-in-charge of any company or an institution who fail to report the commission of an offence by a subordinate under his control (Section 21(2))</li> <li>• Punishment for false complaint or false information (Section 22)</li> <li>• Disclosure of identity of a child without permission of the Special Court (Section 23(2)(4))</li> <li>• Making of report or comments on any child from any form of media without complete and authentic information which may have the effect of lowering reputation or infringing the privacy of the child (Section 23(1) (4))</li> <li>• Abetment of offence (Sections 16 and 17)</li> <li>• Attempt to commit an offence (Section 18)</li> </ul>

### Expanded Notion of “Penetration”

The POCSO Act has expanded the concept of penetration to include penetration to any extent, of not just the vagina, but also the penetration of the anus, urethra, and mouth by the penis of a person.<sup>91</sup> Insertion of objects or body parts, other than the penis, into the vagina, urethra, or anus of the child or making the child do so with the perpetrator or any other person also constitutes penetrative sexual assault under Section 3(b). Manipulation of the child’s body parts to cause penetration into the vagina, urethra, anus or any other body part of the child is also an offence.<sup>92</sup> Penetrative sexual assault also includes within its ambit the application of mouth to the penis, vagina, and urethra of the child.<sup>93</sup> Making the child penetrate any person or the perpetrator in any of the above-mentioned ways is also an offence.

**Note:** Use of force or coercion, presence or absence of resistance, and consent are not relevant or necessary ingredients of the offences under the POCSO Act.

<sup>91</sup> POCSO Act, 2012, Section 3(a).

<sup>92</sup> POCSO Act, 2012, Section 3(c).

<sup>93</sup> POCSO Act, 2012, Section 3(d).

## Aggravating Factors

The POCSO Act recognizes aggravating factors that warrant the imposition of a higher penalty under Section 5. They are as follows:

- If the child is below 12 years of age;
- If the child's mental or physical disability is taken advantage of to commit penetrative sexual assault;
- If the penetrative sexual assault is committed more than once or repeatedly;
- If the child becomes pregnant because of the assault or physically incapacitated or mentally ill or becomes impaired such that the child is unable to perform regular tasks, temporarily or permanently, or the child is inflicted with HIV or any other life threatening disease or infection which can have a temporary or permanent effect on the child's performance of regular tasks;
- If the penetrative sexual assault is committed by a person related to the child by blood, adoption, marriage, guardianship or foster care or if the person is in a domestic relationship with the child's parent or is living in the same shared household;
- If the penetrative sexual assault is by a person on the management or staff of a jail, remand home, protection home, child care institution (CCI), place of custody or care and protection, hospital, educational or religious institution, or an institution providing services to the child, on a child in that institution;
- If the penetrative sexual assault is by a person in a position of trust or authority vis-à-vis the child. For instance, a tuition teacher who commits penetrative sexual assault can be charged with having committed aggravated sexual assault because of the position of authority he/she exercises over the child;
- Gang penetrative sexual assault on a child;
- If the perpetrator is a police officer, public servant, or member of the armed forces or security forces;
- If the penetrative sexual assault is committed on a pregnant child knowing that she is pregnant;
- If the penetrative sexual assault is carried out using deadly weapons, fire, heated substance or corrosive substance or grievous hurt or bodily harm and injury or injury to the sexual organs is caused;

**Note:** POCSO Act has introduced mandatory reporting i.e., any person who has knowledge about the commission of a sexual offence should report to the police/Special Juvenile Police Unit. Failure to report the commission of a sexual offence is a punishable offence.<sup>94</sup>

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<sup>94</sup> POCSO Act, 2012, Section 21.

- If the penetrative sexual assault is accompanied by an attempt to murder;
- If the penetrative sexual assault is committed during communal or sectarian violence;
- If the perpetrator commits penetrative sexual assault and makes the child strip or parade in naked;
- If the penetrative sexual assault is committed by a repeat sex offender.

### **Sexual Offences within the Family Setting**

The POCSO Act, 2012 recognizes that sexual offences can be perpetrated by relatives and family members too and considers it to be an aggravated ground for penetrative sexual assault as well as sexual assault. Penetrative sexual assault or sexual assault by a person related to the child by marriage is an aggravating factor. Rape by a relative or a person in a position of trust or authority constitutes aggravated rape under the IPC. Besides, in *Independent Thought v. Union of India*<sup>95</sup>, to ensure harmony between the POCSO Act and the IPC and to social justice to the married girl child, the Supreme Court read down Exception 2 under Section 375, IPC as “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” It is also important to note that a child may experience confusion and guilt along with trauma when the perpetrator is a family member. Allegations of sexual abuse should not be dismissed as frivolous or false merely because the child says she loves or is fond of the alleged perpetrator. Care should be taken during questioning a child to also assess whether the child has been groomed by the perpetrator.

### **Sexual Intent Necessary in Touch and Non-Touch Based Sexual Offences**

The presence of sexual intent is a necessary ingredient of the offences of sexual assault (Section 7), aggravated sexual assault (Section 9) and sexual harassment (Section 11). Sexual assault includes touching of the vagina, penis, anus or breast of the child or doing any other act with sexual content which involves non-penetrative physical contact. For instance, kissing a child or touching a child’s genitals during bathing or medical examination with a sexual intent would constitute sexual assault. Making the child touch any of the above-mentioned body parts of any person or the perpetrator is also a sexual assault. The grounds for aggravated sexual assault are the same as those for aggravated sexual assault, except the ground related to pregnancy, as that is not applicable in case of sexual assault, a non-penetrative offence.

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<sup>95</sup> Writ Petition (Civil) No. 382 of 2013 decided on 11.10.17.

Sexual harassment entails utterance of any word or making of any sound or gestures or exhibition of any body part or object with a sexual intent and intention that this is seen or heard by the child.<sup>96</sup> Showing the child media or objects for pornographic purposes, stalking a child physically, electronically or digitally, or threatening to use in any form of media body parts of the child or the child's involvement in a sexual act, real or fabricated, constitute sexual harassment.<sup>97</sup> Enticement of a child for pornographic purposes also falls within the ambit of sexual harassment.<sup>98</sup>

### **Using a child for pornography**

Using a child through any media for preparing, producing, offering, transmitting, publishing, facilitating and distributing pornographic material for sexual gratification is a punishable offence. This includes representation of child's sexual organs, using children engaged in real or simulated sexual acts, with or without penetration, and indecent or obscene representation of children.<sup>99</sup> It is immaterial whether the media is for personal use or distribution.<sup>100</sup> The POCSO Act also criminalizes the use of a child for pornographic purposes and commission of penetrative/aggravated penetrative sexual assault and sexual/aggravated sexual assault by directly participating in pornographic acts. Storage for commercial purposes of pornographic materials involving a child is a punishable offence.<sup>101</sup>

### **Presumptions under the POCSO Act**

The POCSO Act provides for two presumptions – presumption as to certain offences (Section 29) and presumption of culpable mental state (Section 30). A person prosecuted for committing, abetting or attempting to commit penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, or aggravated sexual assault will be presumed to have committed the offence unless the contrary is proved. If an offence requires presence of a culpable mental state, the Special Court should presume its existence and the burden is on the defence to establish that the accused did not have the mental state. The phrase “culpable mental state” includes “intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”<sup>102</sup> The offences of sexual assault, aggravated sexual assault, and sexual harassment require the presence of sexual intent. The presumption of culpable mental state can be applied to these offences.

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<sup>96</sup> POCSO Act, Section 11(i)(ii).

<sup>97</sup> POCSO Act, Section 11(iii)(iv)(v).

<sup>98</sup> POCSO Act, Section 11(vi).

<sup>99</sup> POCSO Act, Section 13.

<sup>100</sup> POCSO Act, Section 13.

<sup>101</sup> POCSO Act, Section 15.

<sup>102</sup> POCSO Act, Section 30 Explanation.

### **Delhi Witness Protection Scheme, 2015<sup>103</sup>**

The Delhi government has notified a Witness Protection Scheme, which empowers the Delhi State Legal Services Authority (DSLISA) to pass directions for protection of witnesses, protection of identity, change of identity, or relocation of a witness. An application for protection can be moved by the witness, a family member, a lawyer, or the concerned IO/SHO and preferably forwarded through the Prosecutor.<sup>104</sup> The Scheme provides a wide range of protections such as ensuring that the witness is not exposed to the accused during investigation or trial, changing the telephone number of the witness, installation of security devices in the home of the witness, concealment of identity of the witness, patrolling, escort to and from the court, *in-camera trials*, allowing a support person to be present during deposition and statements, use of specially designed vulnerable witness courtrooms, expeditious recording of depositions, and financial grants for relocation, sustenance, etc.<sup>105</sup>

### **Karnataka State Child Protection Policy, 2016 (KSCPP)**

The KSCPP applies to all educational institutions (EI) that have been defined to mean and include “an institution by whatever name called, including pre-primary, primary, middle, secondary, higher secondary schools, apprenticeship training centres, corporate skill training centres, and includes all premises attached thereto which is carrying on either, exclusively or among other activities the activity of imparting education for children between the ages of 2.5 to 18 years.”<sup>106</sup> It also applies to tutorials, government schools, private schools, partly or wholly aided schools, aided and unaided minority schools. Every EI is required to have a written Child Protection Policy that should recognize protection of children and their commitment to provide a protective environment.<sup>107</sup> Among several obligations, the KSCPP requires EIs to constitute a Child Protection Committee to focus on complaints and violations.<sup>108</sup> The internal response reporting and redressal process is detailed in the KSCPP that includes informing appropriate authorities, ensuring the safety of the child victim, undertaking immediate risk assessment of the child, ensuring medical intervention, informing parents/guardians, preserving evidence, reporting to the police and cooperating with investigation, convening internal meeting, ensuring confidentiality, completing inquiry and taking action and following up on it.<sup>109</sup>

<sup>103</sup> Available at <http://dlsia.org/wp-content/uploads/2016/02/273286063-Delhi-Witness-Protection-Scheme-2015.pdf>

<sup>104</sup> Delhi Witness Protection Scheme, 2015, Clause 2(n).

<sup>105</sup> Id at Clause 7.

<sup>106</sup> Operational Guidelines and Procedures for Educational Institutions under Karnataka State Child Protection Policy, 2016, Para 2.1, p.21.

<sup>107</sup> Id at Para 3.1, p.23.

<sup>108</sup> Id at Para 4.2.1, p.31.

<sup>109</sup> Id at Para 4.3, pp.35-39.

### 1.2.3. Sexual Offences under the Indian Penal Code (IPC)

Pursuant to the Criminal Law (Amendment) Act, 2013 some sexual offences in the IPC were redefined, while several others were introduced. It is important to note that unlike the POCSO Act, most sexual offences under the IPC are not gender neutral. Rape, for instance, can be perpetrated only by a man against a woman.

Pursuant to the Supreme Court's judgment in *Independent Thought v. Union of India*, sexual intercourse or sexual acts of a man with his wife who is not below the age of 18 years, will not constitute rape.<sup>110</sup> In other words, sexual intercourse of a husband with his wife below the age of 18 years will constitute statutory rape under the IPC.

**Note:** No sanction for prosecution is required to prosecute a public servant charged with sexual offences under the IPC.

Sexual offences relevant to children under the IPC are<sup>111</sup>:

- **Outraging the modesty of a woman**, which entails the assault or use of criminal force with the intention to outrage or knowing it to be likely that her modesty will be outraged. (Section 354)
- **Sexual harassment**, which includes unwelcome physical contact and advances and explicit sexual overtures, demand or request for sexual favours, showing pornography against will of a woman, or making sexually coloured remarks by a man. (Section 354-A)
- **Using criminal force with intent to disrobe** a woman or compel her to be naked and the abetment of such an act. (Section 354-B)
- **Voyeurism** which criminalizes the following acts by a man – watching, capturing, or disseminating the image of a woman engaging in a private act where her genitals, posterior or breasts are exposed or covered only in underwear or where the victim is using a lavatory or doing a sexual act that is not ordinarily done in public, and where she would usually expect not being observed. (Section 354-C)
- **Stalking** which entails following, contacting, or attempting to contact a woman by a man to foster personal interaction repeatedly despite a clear indication of disinterest by the woman or monitoring the use of internet, email or any other form of electronic communication. (Section 354-D)

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<sup>110</sup> IPC, Section 375, Exception 2.

<sup>111</sup> Source: Raha, Giliyal, Sajjanashetty & Ramakrishnan,

*Frequently Asked Questions on the Protection of Children from Sexual Offences Act, 2012 and The Criminal Law (Amendment) Act, 2013*, Centre for Child and the Law, National Law School of India University, Bangalore, (revised 2<sup>nd</sup> ed. 2016) pp. 33-34.

- **Kidnapping, abducting or inducing woman to compel her marriage** against her will, or so that she may be forced or seduced to illicit intercourse, or knowing it is likely that she will be forced or seduced to illicit intercourse. (Section 366)
- **Procuration of a minor girl** which entails inducing a girl below 18 years to go from any place or do any act with the intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. (Section 366-A)
- **Importation of a girl below 21 years from a foreign country or from Jammu & Kashmir** with the intent that she may be or knowing it to be likely that she will be forced or seduced to illicit intercourse with another person. (Section 366-B)
- **Trafficking** which entails recruitment, transportation, harbouring, transferring, or receiving a person for the purpose of exploitation by using threats, force or any form of coercion, abduction, practicing fraud or deception, abuse of power, or inducement including the giving or receiving of payments or benefits to achieve consent of the person having control over the person trafficked. (Section 370) This provision is gender neutral vis-à-vis the offender and the victim. For details, please refer to Chapter 2.
- **Rape** by a man of woman below 18 years, with or without her consent. (Section 375) The Criminal Law (Amendment) Act, 2013 has expanded the concept of penetration and rape now includes penetration of the penis, to any extent, into the vagina, mouth, urethra or anus of woman; inserting, to any extent, any object or body part other than the penis, into the vagina, urethra or anus of a woman; manipulating any body part of woman so as to cause penetration into the vagina, urethra, anus, or any part of the body of a woman; application of the mouth to the vagina, anus or urethra of the woman. Making the woman do any of the above acts with the man or any other person will fall under the ambit of rape if any of the seven descriptions under Section 375, IPC are met. In the context of the girl child, the sixth description which states “With or without her consent, when she is under eighteen years of age” will apply.
- **Causing death or resulting in persistent vegetative state** of a woman during rape or aggravated rape. (Section 376-A)
- **Sexual intercourse by husband upon his wife during separation** without her consent. (Section 376-B)
- **Sexual intercourse by a person in authority or fiduciary relationship**, public servant, or superintendent of a custodial institution, or management or staff of a hospital who abuses the authority to induce or seduce any woman under his custody or charge or present in the premises to have sexual intercourse with him. (Section 376-C)

- **Gang rape** i.e., rape by one or more persons constituting a group or acting in furtherance of a common intention. (Section 376-D).

The following grounds constitute aggravated rape under the IPC:

- Rape on a woman below the age of 16 years;<sup>112</sup>
- Rape on a woman suffering from mental or physical disability;<sup>113</sup>
- Rape by a relative, guardian, teacher, or person in a position of trust or authority;<sup>114</sup>
- Rape by a person on the management or staff of a jail, remand home, place of custody, women's or children's institution on any inmate within that institution;<sup>115</sup>
- Rape by a person on the management or staff of hospital on a woman in the hospital;<sup>116</sup>
- Rape by a person in a position of control or dominance over the woman;<sup>117</sup>
- Rape by a police officer within the limits of the police station, premises of any station house, or on a woman in his or his subordinate officer's custody;<sup>118</sup> by a public servant on a woman in his or his subordinate officer's custody;<sup>119</sup> by a member of the armed forces in the area in which he is deployed;<sup>120</sup>
- Rape committed during communal or sectarian violence;<sup>121</sup>
- Rape committed on a woman knowing her to be pregnant;<sup>122</sup>
- Causing grievous bodily harm, maiming, disfiguring or endangering the life of a woman;<sup>123</sup>
- Repeatedly raping the same woman;<sup>124</sup>

#### **1.2.4. Sexual Offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Atrocities Act)**

Under the Atrocities Act, the intentional touching of a woman belonging to SC or ST by a person having knowledge about her identity is an offence when the touch

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<sup>112</sup> IPC, Section 376(2)(i).

<sup>113</sup> IPC, Section 376(2)(l).

<sup>114</sup> IPC, Section 376(2)(f).

<sup>115</sup> IPC, Section 376(2)(d).

<sup>116</sup> IPC, Section 376(2)(e).

<sup>117</sup> IPC, Section 376(2)(k).

<sup>118</sup> IPC, Section 376(2)(a).

<sup>119</sup> IPC, Section 376(2)(b).

<sup>120</sup> IPC, Section 376(2)(c).

<sup>121</sup> IPC, Section 376(2)(g).

<sup>122</sup> IPC, Section 376(2)(h).

<sup>123</sup> IPC, Section 376(2)(m).

<sup>124</sup> IPC, Section 376(2)(n).

is of a sexual nature and without the woman's consent.<sup>125</sup> The term "woman" signifies a "female human being of any age" and would therefore include girls below the age of 18 years.<sup>126</sup> Using words, acts, or gestures of a sexual nature towards a woman belonging to SC or ST having knowledge about her identity is also an offence.<sup>127</sup> These sexual offences under the Atrocities Act are not gender neutral in nature and are only applicable as against female victims. Both these offences are punishable with a minimum term of six months imprisonment that can extend to five years and fine.<sup>128</sup> In cases under these provisions, the prosecution will have to establish that the accused was not a member of SC or ST, the accused had knowledge that the victim belonged to a SC or a ST, and that the nature of the touch was sexual in nature.

**Note:** An act constitutes an offence under the Atrocities Act only when perpetrated by a person does not belong to SC or ST category against a woman who belongs to such category. The police should collect the caste certificate of the victim and ensure that the accused does not belong to SC or ST before filing charges under the Atrocities Act.

The term "consent" has been defined to mean "an unequivocal agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act".<sup>129</sup> It has been clarified that the absence of physical resistance to an act of a sexual nature cannot by itself be construed as consent for the sexual activity.<sup>131</sup> Further, the woman's sexual history, including with the offence will not imply consent or mitigate the offence.<sup>131</sup>

- The police should collect the relevant certificates to establish the identity of the victim.
- The provisions of the SC and ST (Prevention of Atrocities) Rules, 1995 and the Amendment to the Rules in 2016, along with other advisories and guidelines, will have to be adhered to while investigating cases involving offences under the Atrocities Act as well as the POCSO Act.
- The investigation should therefore be done by a police officer not below the rank of a Deputy Superintendent of Police assigned by the State Government, DGP, or SP.<sup>132</sup>

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<sup>125</sup> Atrocities Act, Section 3(1)(w)(i).

<sup>126</sup> IPC, Section 10 read with Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1988 as amended in 2015, Section 2(1)(f).

<sup>127</sup> Atrocities Act, Section 3(1).

<sup>128</sup> Atrocities Act, Section 92.

<sup>129</sup> Atrocities Act, Explanation to Section 3(1)(w).

<sup>130</sup> Atrocities Act, first proviso to Section 3(1)(w).

<sup>131</sup> Atrocities Act, second proviso to Section 3(1)(w).

<sup>132</sup> SC and ST (Prevention of Atrocities) Rules, 1995, Rule 7(1).

- The appointed IO should complete the investigation on top priority and submit the report to the SP, who should forward it to the DGP or Commissioner of Police of the State Government.<sup>133</sup>
- The OIC of the concerned police station should file the charge-sheet and conduct the investigation within 60 days.<sup>134</sup>
- Reasons for the delay in investigation or filing of charge-sheet should be explained in writing by the IO.<sup>135</sup>
- Failure to read out to the informant the information orally given and reduced to writing before taking signature, failure to register a complaint or FIR under the POA Act and under appropriate sections, failure to furnish copy of the information recorded to the informant, failure to record statement of the victims or witnesses, failure to conduct the investigation and file charge before the Special Court within 60 days and to explain delay if any, in writing, failure to correctly prepare, frame and translate any document or electronic record, or perform any duty under the Act or Rules will constitute willful neglect of duties. It is punishable with imprisonment for a minimum term of six months and can extend to one year.<sup>136</sup> Charges against the public servant can be booked only on the recommendation of an administrative inquiry and the cognizance can be taken by a Special Court which can direct penal proceedings against such public servant.<sup>137</sup>
- In *Dr. Subhash Kashinath Mahajan v. State of Maharashtra*,<sup>138</sup> in its decision dated 20 March 2018, the Supreme Court has issued the following directions with respect to arrest of persons under the Atrocities Act:
  - o A public servant can be arrested only after approval is received from the appointing authority. In case of a non-public servant, approval of the S.S.P, which can be granted in appropriate cases after recording reasons. The reasons have to be further scrutinized by a Magistrate for permitting further detention.
  - o “To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.”

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<sup>133</sup> SC and ST (Prevention of Atrocities) Amendment Rules, 2016, Rule 4 which has substituted Rule 7(2) with the above-described provision.

<sup>134</sup> *Ibid.*

<sup>135</sup> SC and ST (Prevention of Atrocities) Amendment Rules, 2016, Rule 4 which has introduced Rule 7(2A).

<sup>136</sup> Atrocities Act, Section 4 as amended by the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015.

<sup>137</sup> *Ibid.*, Sections 4(2) proviso and 4(3).

<sup>138</sup> Criminal Appeal No. 416 of 2018 decision of Supreme Court dated 20 March 2018.

- o Violations of the above two directions will be actionable by way of disciplinary action as well as contempt.

### **1.2.5. Sexual Offences under the Rights of Persons with Disabilities Act, 2016 (RPD Act)**

Under the RPD Act, assaulting or using force with the intention of outraging the modesty of a woman with disability is an offence.<sup>139</sup> Sexual exploitation of a child with disability by a person in a position to dominate the will of the child is also an offence.<sup>140</sup> Both these offences are punishable with a minimum term of six months imprisonment that can extend to five years and fine.<sup>141</sup>

The RPD Act also requires the government to enable persons with disabilities to “access any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigation powers without discrimination on the basis of disability.”<sup>142</sup> This would imply that the physical environment and communications within Special Courts under the POCSO Act, court complexes, police stations, as well as Commissions for Protection of Child Rights, CWCs, JJBs, etc., are accessible to all children with disabilities.

Section 7(4), RPD Act obligates a police officer who receives a complaint or comes to know about abuse, violence or exploitation toward a person with disability to inform such a person about the right to apply to an Executive Magistrate for protection, details of the jurisdictional Executive Magistrate, details of the nearest organization or institution working for persons with disabilities, right to free legal aid, and the right to file a complaint under the RPD Act or any other law dealing with such an offence. These duties are in addition to the duty of the police officer to follow the procedures if the information relates to the commission of a cognizable offence.<sup>143</sup>

### **1.2.6. Sexual Offences under the Information Technology Act, 2000 (IT Act)**

Section 67B, IT Act criminalizes the publication or transmission of material depicting children i.e., persons who have not completed 18 years of age, in a sexually explicit act in an electronic form.<sup>144</sup> The provision also criminalizes:

- Creation of text or digital images, collection, seeking, browsing, downloading, advertising, promoting, exchanging or distributing material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or

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<sup>139</sup> RPD Act, Section 92(b).

<sup>140</sup> RPD Act, Section 92(d).

<sup>141</sup> RPD Act, Section 92.

<sup>142</sup> RPD Act, Section 12(1).

<sup>143</sup> RPD Act, Section 7(4) proviso.

<sup>144</sup> IT Act, Section 67B(a).

- Cultivating, enticing or inducing children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or
- Facilitating abusing children online; or
- Recording in any electronic form own abuse or that of others pertaining to sexually explicit act with children

For more information on cyber offences against children refer to Chapter 5.

### **1.2.7. Sexual Offences under the Indecent Representation of Women Act, 1986**

The publication of advertisements, production, sale, distribution, circulation or sending by post anything depicting a woman – her figure, form, body, or any part – in way that has the “effect of being indecent, or derogatory to, or denigrating, women, or is likely to deprave, corrupt or injure the public morality or morals” are offences under the Indecent Representation of Women Act, 1986. Both these offences are bailable and cognizable.

Publications proven to be for the public good on the ground that they are in the interest of science, literature, art or learning or objects of general concern or publications kept or used for bona fide for religious purposes are exempted. Representations in ancient monuments, temples, cars used for conveyance of idols or used for religious purposes, and films to which Part II of the Cinematography Act, 1952 applies are also exempt.

### **1.2.8. Sexual Offences under the Goa Children’s Act, 2003**

The Goa Children’s Act, 2003 defines sexual offences to include grave sexual assault, sexual assault, and incest.<sup>145</sup> It is gender neutral qua the victim and the accused, The term sexual assault includes touch and non-touch based sexual acts such as<sup>146</sup>:

- Sexual touching with any body part or object;
- Voyeurism;
- Exhibitionism;
- Showing pornographic pictures or films to minors;
- Making children watch others engaged in sexual activity;

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<sup>145</sup> Goa Children’s Act, 2003, Section 2(y).

<sup>146</sup> Goa Children’s Act, 2003, Section 2(y)(ii).

- Issuing threats to sexually abuse a minor;
- Verbally abusing a minor using vulgar and obscene language
- Non-touch and touch based sexual acts, while grave sexual assault includes penetrative sexual acts as well as making children pose for pornographic photos or films.

Grave sexual assault includes penetrative as well as non-penetrative sexual acts such as<sup>147</sup>:

- Vaginal, oral, or anal intercourse;
- Use of objects with children;
- Forcing minors to have sex with each other;
- Deliberately causing injury to the sexual organs of children;
- Making children pose for pornographic photos or films;
- Rape

Incest has been defined to mean “commission of a sexual offence by an adult on a child who is a relative or is related by ties of adoption.”<sup>148</sup> Note that the term incest does not appear in any of the legislations mentioned above.

### **1.3. Processes**

#### **1.3.1. Procedures to be followed by the police/ Special Juvenile Police Unit (SJPU)**

The POCSO Act and Rules stipulate the procedures that should be followed by the police and SJPU in a case of sexual offence against a child. Procedures have also been prescribed under the Cr. P.C in respect of sexual offences against women. Failure to record the commission of a sexual offence under the POCSO Act is an offence punishable with imprisonment of either description that can extend to six months or fine or both.<sup>149</sup> Failure to record sexual offences under the IPC is punishable with a fine and rigorous imprisonment for a minimum of six months, which can extend to two years.<sup>150</sup> If a police officer knowingly disobeys the direction of law, which prohibits her or him from requiring the attendance at any place of any person for investigation, she or he can be punished with fine and rigorous imprisonment for a minimum of six months which can extend to two years.<sup>151</sup> For instance, if a police officer summons a child to the police station for recording a statement in the night time, he can be held liable for doing so in contravention of Sections 24(1) and 24(4) of the POCSO Act.

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<sup>147</sup> Goa Children’s Act, 2003, Section 2(y)(i).

<sup>148</sup> Goa Children’s Act, 2003, Section 2(y)(iii).

<sup>149</sup> POCSO Act, Section 21(1).

<sup>150</sup> IPC, Section 166-A(c).

<sup>151</sup> IPC, Section 166-A(a).

The chart below depicts the steps that should be taken by the police/SJPU under the POCSO Act and Rules as well as the Cr. P.C. They are not necessarily sequential as in some cases the police may have to facilitate emergency medical care or care and protection before recording the FIR.

<p><b>Recording of Information</b></p> <ul style="list-style-type: none"> <li>• <b>Entry:</b> Record entry in a book about every report received about commission or apprehension of commission of a sexual offence in writing, ascribe an entry number, and read over to the informant. (Section 19(2), POCSO Act)</li> <li>• <b>FIR:</b> Where information relates to commission, attempt or abetment of a cognizable offence, register a FIR as per Section 154, Cr. P.C and give a free copy to the informant. (Rule 4(2)(a), POCSO Rules)</li> <li>• <b>Recording of information given by child:</b> If the child is the informant, the report should be recorded in simple language to ensure child can understand contents being recorded. (Section 19(3), POCSO Act)</li> <li>• <b>Person recording the information:</b> In cases of sexual offences under the IPC, the information should be recorded by a woman police officer or any woman officer. (Section 154(1), first proviso, Cr.P.C.)</li> <li>• <b>Recording information given by a child with disability:</b> Information by a girl temporarily or permanently disabled, mentally or physically, should be recorded by a police officer at her residence or at a convenient place of her choice in the presence of an interpreter or special educator and it should be videographed. (Section 154(1), second proviso, Cr. P.C.)</li> <li>• <b>Assistance of Experts:</b> Take assistance of a qualified interpreter, translator, special educator, or person familiar with the manner of communication of the child, or experts, if necessary. (Section 19(4), POCSO Act)</li> <li>• <b>Information:</b> Give details to the informant about the name, designation, contact information of the officer making the report and the details of the supervisor. (Rule 4(1), POCSO Rules)</li> </ul>
<p><b>Dos &amp; Don'ts</b></p>
<p><b>Dos</b></p> <ul style="list-style-type: none"> <li>• Information received under Section 19(1) should be recorded by the police without exception.<sup>152</sup></li> <li>• The child-informant should be made comfortable by ensuring the presence of a parent, guardian, or person whom the child trusts.</li> <li>• SHO should ensure that a lady police official/officer not below the rank of the Sub-Inspector should be available around the clock.<sup>153</sup> While this is applicable to Delhi, other State Police may consider adopting this measure as well.</li> </ul>

<sup>152</sup> NCPCR, Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders: Police, Special Courts and Special Prosecutors, prepared by Lawyers Collective (LCWRI) and UNICEF, p.24.

<sup>153</sup> Delhi Police, Standing Order No. 303 of 2009 – Guidelines to be followed by the police while investigating cases of rape, p.4.

- If the child victim has come to the PS, a quiet place within the police-station should be identified where children can be seated and the information recorded. FIR should be recorded immediately if the offence is cognizable.
- Information received on telephone or cellphone pertaining to cognizable offences, if reliable, should be recorded as FIR.<sup>154</sup>
- A list of interpreters, translators, and special educators should be obtained from the District Child Protection Unit (DCPU) in advance.
- Interactions with the child should be in an age appropriate, and developmentally appropriate manner. [Refer to Section I.2, on Communication with a child].
- All applicable provisions under the POCSO Act, IPC, RPD Act, IT Act, Atrocities Act, and other relevant laws should be identified and included in the FIR.
- Documents relating to the age of the victim such as birth certificate from the school, matriculation or equivalent certificate from the concerned examination Board, or a birth certificate given by a corporation or municipal authority or Panchayat should be collected.
- In the absence of above-mentioned documents, an ossification test or any other latest medical age determination test should be requested.

#### **Don'ts**

- Local police should not direct the informant/child to approach the SJPU instead and vice-versa.<sup>155</sup>
- The informant/child should not be kept waiting or asked to return later to lodge the report or FIR.
- The police should not avoid recording the report to verify or confirm the information.<sup>156</sup>
- The informant/child should not be directed to a different police station citing want of jurisdiction. An FIR should be lodged, all the steps that are urgently called for should be undertaken (for example, medical care if the person requires it; apprehension of the accused if the victim is in danger from that person, etc) and thereafter transferred to the police station having jurisdiction.
- If the informant is a child, the words used by the child should be recorded verbatim to ensure that no discrepancies arise when the child is examined or cross-examined in court.
- The informant/child should not be humiliated and no aspersions should be cast on their character.
- The police should not refuse to record a report or lodge FIR or ask the informant to compromise the matter with the accused.

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<sup>154</sup> NCPCR, Monitoring Guidelines for NCPCR/SCPCR for Roles and Functions of Various Stakeholders: Police, Special Courts and Special Prosecutors, prepared by Lawyers Collective (LCWRI) and UNICEF, p.29.

<sup>155</sup> Id at p.24.

<sup>156</sup> Id at p.25.

- No disbelief or doubt should be expressed at the time of recording the report or FIR, especially in cases of alleged sexual abuse by a family member or relative.
- The accused should not be asked to come to the police station in the presence of the victim for verification or confrontation.

### **Sending Report to the CWC and Special Court**

- **Reporting receipt of case:** Report to the Special Court and CWC within 24 hours of the recording of the information including steps taken to ensure care and protection. (Section 19(6), POCSO Act).
- **Reporting about Support Person:** Report to the Special Court about the assignment of a support person to the child within 24 hours of such assignment. (Rule 4(9), POCSO Rules).

### **Dos and Don'ts**

#### **Dos**

- Obtain the roster indicating the CWC member available during holidays, Sundays, and after hours every month.
- Transmit information to the Special Court and CWC about cases recorded, electronically or through other means.
- If the CWC does not have an official email id, consider seeking the assistance of the DCPU to transmit information to the CWC.
- Upon completion of investigation, file the charge sheet before the Special Court under the POCSO Act.

#### **Don'ts**

- The charge-sheet should not be filed before the Magistrate, as is done in other crimes, but before a Special Court as it can take direct cognizance under Section 33(1), POCSO Act.

### **Ensure Immediate Care and Protection**

- **Immediate arrangements:** Make arrangement for shelter, medical treatment, including admitting the child to a Shelter Home or hospital etc., within 24 hours if child needs care and protection, after recording reasons in writing. (Section 19(5), POCSO Act)
- **Production before the CWC:** Produce the child before the CWC within 24 hours if the offence has been committed, attempted, or is likely to be committed by a person residing in the same or shared household as the child, or in a CCI and the child doesn't have parental support, or the child is without a home and parental support. (Rule 4(3), POCSO Rules) Submit a report in Form 17, JJ Model Rules containing the details of the child as well as the circumstances in which the child was received or found. (Rule 18(2), JJ Model Rules)
- If the child cannot be produced, the CWC should be informed so that they can reach out to the child where the child is located. (Proviso to Rule 18(1), JJ Model Rules)

- Child victim of sexual abuse who is below two years of age or who is medically unfit need not be produced physically before the CWC and a written report along with the child's photograph can be sent to the CWC within 24 hours. The child can be produced before the CWC when the child is medically fit along with a medical certificate. (Rule 18(3), JJ Model Rules)

### **Dos & Don'ts**

#### **Dos**

- Obtain a list of Shelter Homes, Children's Homes, and Fit Facilities, from the DCPU where a child can be placed for immediate care and protection.
- If the victim is a child with disability, inform the child and the child's parent or guardian of the option to approach an Executive Magistrate for protection orders and maintenance.
- If the child victim and her parent or guardian has also been subjected to domestic violence, inform them of the reliefs available under the Protection of Women from Domestic Violence Act, 2005 such as residence orders, protection orders, and maintenance.

#### **Don'ts**

- Child victims should not be produced before the CWC for counselling or any other purpose if they do not fall under Rule 4(3), POCSO Rules.
- The police should not insist that the child be institutionalized only to prevent the child from turning hostile.

### **Facilitate Medical Examination and Emergency Medical Care**

- **Emergency medical care:** Facilitate emergency medical care in the nearest hospital or medical care facility in cases requiring urgent medical care and in cases under Sections 3,5, 7, and 9. (Rule 5(1), POCSO Rules)
- **Medical examination:** Facilitate medical examination of the victim within 24 hours of the report. (Section 27, POCSO Act & Section 164A, Cr. P.C)
- **Collection of samples:** Ensure that samples collected are sent to the State Forensic Science Laboratory (FSL) at the earliest. (Rule 4(2)(d), POCSO Rules)
- **Free First-aid:** Ensure that victim receives first-aid or medical treatment free of cost at any hospital (public or private). (Section 357C, Cr. P.C)
- **Hand over medical examination report to Magistrate:** Copy of the victim's medical examination report should be immediately handed over to the Magistrate who records the victim's statement under Section 164, Cr. P.C. [*State of Karnataka v. Shivanna*, (2014) 8 SCC 913]

### **Dos & Don'ts**

#### **Dos**

- For medical examination, child should be taken to a hospital run by the Government or local authority within 24 hours.
- For emergency medical care child should be taken to the nearest hospital.

- A database of CMO's and doctors within the jurisdiction where the child can be taken for medical examination should be maintained<sup>157</sup> in the Central Control Room and by the Duty Officer of the Police Station, or procured from the Health department.
- A fund (e.g., Juvenile Justice Fund or Nirbhaya Fund) should be identified for escorting the victim to the hospital and back. Funds available under ICPS can be used for such activities.
- The IO must communicate with the medical personnel to collect key information regarding the commission of the offence which may have been relayed by the victim to the doctor.
- Where a registered medical practitioner declines to provide free first aid or medical treatment to a victim of rape, the IO must inform the practitioner that such refusal constitutes a criminal offence under section 166B of the IPC read with section 357C of the Cr.P.C.

#### **Don'ts**

- The CWC should not be approached to compel the child to undergo medical examination against her/his wishes. Such a request would violate the child's right to bodily integrity.
- Medical practitioners providing treatment should not be asked to conduct interviews of children to ascertain whether he/she is stating the truth.
- If the victim needs urgent medical treatment, registration of FIR should not be insisted upon before facilitating medical treatment.
- The victim and the accused should not be escorted in the same vehicle for medical examination. The victim and the victim's family should not be discouraged from or scared about undergoing medical examination.
- No money should be charged from the victim/family for travel expenses or medical examination.

#### **Record Child's Statement**

- **Place and Presence of parent/trusted person:** The child's statement should be recorded at the child's residence or a place of the child's choice and in the presence of the child's parent (non-offending), guardian, near relatives, local social worker, or person whom the child trusts. (Section 24(1), POCSO Act and proviso to Section 157(1)(b), Cr. P.C)
- **Person recording the statement:** As far as practical, a woman Sub-Inspector should record the statement for offences under the POCSO Act. (Section 24(1), POCSO Act) A woman police officer or woman officer should record the statement of a girl against whom sexual offences under the IPC have been committed or attempted. (Section 161, second proviso, Cr. P.C)
- **Police officer should not be in uniform:** The officer should be in plain clothes and not in uniform when the statement is being recorded. (Section 24(2), POCSO Act)

<sup>157</sup> Id at p.32.

- **Protections:** It should be ensured that the child does not come in contact with the accused during investigation or while examining the child. (Section 24(3), POCSO Act) The child should not be detained in the police station during night time for any reason. (Section 24(4), POCSO Act)
- **Confidentiality:** The identity of the child should be protected and no identifying information should be given to the media unless the Special Court authorizes it. (Section 23(1)(2), POCSO Act)
- **Recording of statement:** The child's statement should be recorded as spoken by the child. (Section 26(1), POCSO Act)
- **Audio-visual recording:** The statement should be recorded through audio-visual means as far as possible. (Section 26(4), POCSO Act)
- **Assistance of Experts:** Assistance of a qualified interpreter, translator, special educator, or person familiar with the manner of communication of the child, or experts, can be taken if necessary. (Section 26(3), POCSO Act)

### **Dos & Don'ts**

#### **Dos**

- Child's statement should be recorded only when the child is fit.<sup>158</sup>
- The section of the Model Guidelines under Section 39, POCSO Act for conducting a forensic interview, i.e., an interview by police or investigative agencies to obtain a statement from the child that will facilitate the investigation and justice process, should be adhered to.
- The child's statement should be recorded while in plain clothes and not in police uniform.
- The child should be informed that the statement will be recorded.
- Officers responsible for recording statements of child victim should be trained on using audio-visual equipment to record statements.
- The equipment for audio-visual recording should be checked before the time scheduled to record the statement, to ensure that it is working properly.
- The list of translators, interpreters, special educators, counsellors and other experts should be obtained from the DCPU or such a list should be maintained at the police station if the DCPU has not prepared it.
- The child's parent, guardian, or any person whom the child requests for should be present with the child when the statement is recorded.

#### **Don'ts**

- The child should not be compelled to give a statement until the child is fit to do so.
- Avoid repeated interviews and interviews by multiple officers, as it can be intimidating. The words or language used by the child to explain the abuse should not be altered or modified.

<sup>158</sup> UNODC, Standard Operating Procedures (SOP) On Investigating Crimes of Trafficking for Commercial Sexual Exploitation, (2007), p.31

- No third person should be present in the room for recording the child’s statement through audio-visual means, besides the person whose presence the child requests for. The audio-visual recording of the child’s statement should not be given to the media or any third party.
- Information such as the name of the school, parents’ names or workplace, etc., that could lead to the child being identified should not be shared with the media or any person, or uploaded on any portal without suppressing the child’s identity. The child’s name and the names of family members can be substituted with pseudonyms.
- The child should not be made to confront the accused in person for identification or any other purpose.
- It should not be assumed that if the victim speaks about her love for the accused that a sexual offence has not been committed.

#### **Facilitate Recording of 164 Statement by Magistrate**

- **Facilitation for recording statement under Section 164 :** Facilitate recording of the statement u/s 164 Cr.P.C. immediately in case of sexual offences under the IPC. [Section 164(5-A)(a), Cr. P.C]
- **Magistrate to whom child should be taken:** Take the child within 24 hours preferably before any Metropolitan/preferably Judicial Magistrate for recording the 164 statement in cases of rape. [*State of Karnataka v. Shivanna*, (2014) 8 SCC 913]
- The IO should take the child victim of rape to the nearest lady Metropolitan Magistrate, preferably lady Judicial Magistrate, as far as possible. [*State of Karnataka v. Shivanna*, (2014) 8 SCC 913]
- **Details and reasons for delay:** The IO should record the date and time at which he learnt about the commission of rape and the date and time at which the child was taken to the Magistrate. Reasons for delay exceeding 24 hours should be recorded in the case diary and handed over to the Magistrate. [*State of Karnataka v. Shivanna*, (2014) 8 SCC 913]

#### **Dos & Don’ts**

##### **Dos**

- The child should be explained the purpose of the statement u/s 164, Cr. P.C.
- If a Support Person has not been made available, the Social Worker attached to the SJPU should provide the child with an orientation of the courtroom, court complex, and the procedure that is likely to be followed by the Magistrate.
- If the child is traumatized or is in discomfort, the Magistrate could be informed about it so that the 164 statement could be scheduled accordingly.

##### **Don’ts**

- The recording of the statement under Section 164, Cr. P.C should not be delayed for want of escort or availability of a lady Magistrate.

- The child should not be intimidated, convinced, coerced, or threatened to say or suppress any information or be misled into believing that doing so will help the case or allow the child to get done with the case quickly.
- The police should not be present to operate the audio-visual equipment when the statement is being recorded by the Magistrate.

### **Keep Victim and Family Informed and Provide Information about Legal Aid**

- **Information about support services:** Inform the child and parent/ guardian/ person whom the child trusts about availability of support person, counselling services, and assist in contacting them. [Rule 4(2)(e), POCSO Rules] Information regarding available relief like compensation, public and private emergency and crisis services and procedural steps should be shared.
- **Information about legal aid:** Inform about the right to legal advice and counsel and right to be represented. [Section 40, POCSO Act and Rule 4(2)(f), POCSO Rules]
- **Information about the case and relief available:** The child, family members, and support person should be kept informed about the procedural steps, status of investigation, arrest of the suspected offender, filing of charge-sheet, court schedule, bail, release or detention status, final verdict and sentence imposed. [Rule 4(12), POCSO Rules]

### **Dos & Don'ts**

#### **Dos**

- A list of Legal Aid Lawyers who can support child victims in accessing compensation or other reliefs should be maintained and made available to the victim and/or parent/guardian/ trusted person.
- Legal assistance for the victim should be facilitated at the police station as the guidance and support to a traumatized victim at that stage would be of great assistance.<sup>159</sup>
- A list of service providers, counsellors, and NGOs who can support victims of sexual offences should be maintained and made available to the victim and/or parent/guardian/ trusted person.
- A list of Central and State Schemes for compensation and rehabilitation and the contact information of the authority responsible for sharing with victims should be maintained and made available to the victim and/or parent/guardian/ trusted person. [Refer to the list of Central and State Schemes relevant for victims of sexual offences below.]
- The process of applying for State Victim Compensation should be initiated, where applicable and the victim/parent/guardian should be apprised about its status. The child and the child's family/guardian/trusted person should be informed if the accused is released on bail.

<sup>159</sup> *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14.

- Complaints from the child and the child’s family/guardian/trusted person about threats or attempts to foster a compromise by the accused should be promptly responded to.
- The victim and parent/guardian/ trusted person should be informed about their right to appeal an acquittal under Section 372 Cr. P.C.

**Don’ts**

- The child and the child’s family, guardian or trusted person should not be discouraged from approaching NGOs, lawyers, counsellors or support persons.
- The victim and the victim’s family should not be kept in the dark about the progress or developments in the case.

**Conduct Investigation and File Charge-sheet**

- **Forensic samples:** Samples collected for forensic tests should be sent to the forensic laboratory at the earliest.<sup>160</sup>
- **Diary entries:** The IO should enter proceedings in the investigation in the diary day by day and record information about the time at which information reached him, time at which investigation began and closed, places visited, and statement of the circumstances ascertained, and statement of witnesses.<sup>161</sup> It should also be paginated.
- **Timeline:** The investigation in a case of rape of a child may be completed within three months from the date on which information was recorded by the officer-in-charge of the police station.<sup>162</sup>

**Dos & Don’ts**

**Dos**

- Continuity should be ensured and care should be taken to ensure that multiple officers are not interacting with the child.
- Investigation in cases involving offences under the Atrocities Act should be investigated by an officer not below the rank of DSP and specially appointed by the State Government, DGP, and SP.
- Investigation in cases involving offences under the IT Act should be handled by an officer not below the rank of an Inspector<sup>163</sup> and by an officer conversant with the Act and having the requisite expertise and skills.
- Statements of public witnesses, if available, should be recorded.
- Statements of relevant witnesses should be recorded. All relevant materials such as clothes of the victim and accused, mobile phones, laptops, etc., should be seized and sent for analysis by the Forensic Science Laboratory and Cyber Cell.

<sup>160</sup> POCSO Rules, Rule 4(2)(d).

<sup>161</sup> Cr.P.C., Section 172(1), (1-A), (2).

<sup>162</sup> Cr.P.C., Section 173(1-A).

<sup>163</sup> IT Act, Section 78

- Whenever necessary, assistance of technical experts should be taken in sexual offences involving IT Act as well.
- Entries in the case diary, especially the time at which information is received should be recorded accurately.
- If the victim is pregnant, steps should be taken to make an application to the Special Court for a DNA test.
- The chain of custody for forensic samples should be maintained.
- Prompt action should be taken if the victim/family/guardian report threats or intimidation by the accused and a FIR should be registered under Section 506, IPC.
- Care should be taken to ensure that all relevant provisions are mentioned under the charge-sheet, especially the aggravated provisions under the POCSO Act and IPC.
- Charges under the IT Act, 2000 should be framed in cases where the abuse has been filmed or the accused has cultivated, enticed, or induced the child into an online relationship.
- Reports of a psychiatrist, medical prescriptions, and bill should be submitted along with the charge-sheet as they can corroborate the prosecution's case, especially when physical signs of abuse are not found due to delay in reporting or any other reasons.
- The child should not be made to repeat the statements to multiple officers and the statement should be recorded by the same officer.
- The spot panchnama should be prepared with a lot of care and seriousness and only after actually visiting the spot.
- The handing of forensic samples after collection to the FSL should not be delayed to avoid degeneration in the quality of samples.
- The child should not be exposed to the accused at any stage of the investigation. Where identification is necessary, the photograph of the accused can be shown to the victim or the guidelines for test identification parade laid down by the Delhi High Court in *Rakesh Kumar v. State*,<sup>164</sup> may be adhered to.
- Charges under the IT Act should not be excluded or not investigated owing to the belief that it may delay the filing of the charge-sheet. Avoid delays in filing charge-sheets. Charges can be filed even if reports from FSL are pending.
- Delays in receiving reports from FSL have to be escalated to the Director or Deputy Director of FSL through letter from the unit head of the Police, (Commissioner of Police or Superintendent of Police).

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<sup>164</sup> CrI. A. 513/1998, decided on – 30.05.2014.

#### 1.4. Procedure for medical examination and emergency medical care

Based on the POCSO Act, IPC, Cr. P.C, and the Guidelines and Protocols for Medico-legal care for Victims and Survivors of sexual violence issued Ministry of Health and Family Welfare Guidelines:

**Note:** Person in-charge of a public or private hospital can be held criminally responsible for failure to provide immediate first-aid or medical treatment free of cost to victims of acid attack and rape related offences and to inform the police about the incident under Section 166B, IPC.

- All hospitals, government run or private, should provide first-aid or medical treatment immediately and free of cost to victims of acid attack, rape, rape resulting in permanent vegetative state, sexual intercourse by husband upon his wife during separation, sexual intercourse by a person in authority, gang rape, or rape by a repeat offender.<sup>165</sup> Further, they should inform the police immediately about the incident.<sup>166</sup>
- Medical examination should be conducted by a registered medical practitioner in a government hospital or a hospital run by a local authority.<sup>167</sup>
- Consent of the child should be obtained when the child is above 12 years and in a position to give consent i.e., the child is physically, mentally, and psychologically fit. For children below 12 years, consent should be obtained from the parent or guardian, unless he/she is possibly the perpetrator.<sup>168</sup> In such situations, the Medical Superintendent or Resident Medical Officer can give consent on behalf of the child.<sup>169</sup> The medical report should clearly record, in writing, that consent of the child or of a competent person on the child's behalf was taken.<sup>170</sup> Refusal for medical examination should also be recorded by the medical officer, in writing.
- A girl child victim should be medically examined by a woman doctor.<sup>171</sup> In the absence of a woman doctor, a male doctor can examine the child in the presence of a female attendant.<sup>172</sup> The treatment or examination should not be delayed because of the non-availability of a woman doctor.

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<sup>165</sup> Cr.P.C., Section 357-C.

<sup>166</sup> Ibid

<sup>167</sup> Cr.P.C., Section 164-A(1).

<sup>168</sup> MOHFW Guidelines, p.24.

<sup>169</sup> Id at p.39.

<sup>170</sup> Cr.P.C., Section 164-A(4).

<sup>171</sup> POCSO Act, Section 27(2).

<sup>171</sup> MOHFW Guidelines, p.20.

<sup>172</sup> Ibid

- A transgender/intersex child should be given the choice as to whether the child wants to be examined by a male or female doctor.<sup>173</sup>
- Medical examination and emergency medical care should be conducted in the presence of a parent or a person whom the child trusts or has confidence in.<sup>174</sup> If such a person cannot be present, the medical examination should be conducted in the presence of a woman nominated by the head of the medical institution.<sup>175</sup>
- Report of medical examination should contain name and address of the child and the person who brought the child, age of the child, materials collected from the person of the child for DNA profile, injury marks, general mental condition, reasons for each conclusion arrived at, and the exact time of commencement and completion of the examination.<sup>176</sup>
- Privacy of the child should be ensured during emergency medical care and examination.<sup>177</sup>
- Legal or magisterial requisitions cannot be demanded before conducting medical examination or providing emergency medical care.<sup>178</sup> In case the victim has approached the medical facility prior to registering a case, then the medical officer has a responsibility to enter the case into the Medico-Legal Register and inform the jurisdictional police regarding the same.
- During emergency medical care:<sup>179</sup>
  - o cuts, bruises, injuries including genital injuries should be attended to;
  - o child should be provided treatment for exposure to STDs and HIV and necessary prophylaxis;
  - o in case of a possible pregnancy, the option of emergency contraceptives should be discussed with a child who has attained menarche, in the presence of a parent or person whom the child trusts;
  - o referrals for mental or psychological health or counselling should be made, if necessary;
  - o follow-up visits should be scheduled and the relevance and importance of such visits to be informed to child and care-giver.

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<sup>173</sup> POCSO Act, Section 27(3) and POCSO Rules, Rule 5(2)

<sup>174</sup> POCSO Act, Section 27(4).

<sup>175</sup> Cr.P.C., Section 164-A(2)(3)(5).

<sup>176</sup> POCSO Rules, Rule 5(2).

<sup>177</sup> POCSO Act, Section 27(1) and POCSO Rules, Rule 5(3).

<sup>178</sup> POCSO Rule, Rule 5(4).

<sup>179</sup> Ministry of Health and Family Welfare Guidelines, p.34.

- The child's and guardian's consent and medical opinion is sufficient for termination of pregnancy below 20 weeks. No approval is required from the CWC or any other authority for such termination. If the pregnancy exceeds 20 weeks, the High Court or Supreme Court may have to be approached.

The Product of Conception (PoC) should be collected, packed, labelled, sealed in the presence of police officer and handed over to police to send to FSL for DNA matching with accused. It should be transported by the police in an ice-box with temperature around 4 degree Celsius (2-8 degree Celsius) at all times.<sup>180</sup>

### **Dos**

- Medical report should indicate whether there is evidence of recent sexual activity.<sup>181</sup>
- A victim of sexual assault should be spoken to in a non-threatening environment and with sensitivity.<sup>182</sup>
- The child and the parent, guardian, or trusted person should be explained the purpose and process of medical examination and fears and doubts should be answered sensitively.
- A detailed history should be taken from child which includes time of incident, place, person/s involved with description, frequency of assault / abuse and description of acts
- The medical examination of the child should be conducted in a room that is away from intimidating and inappropriate spaces like the labour ward, emergency, morgue etc.

### **Don'ts**

- Medical report should not indicate whether rape has or has not been committed. This is because "rape is a crime and not a medical condition".<sup>183</sup>
- Police officers should not be allowed in the room during medical examination or noting of history.<sup>184</sup>
- The two-finger test should not be used and nor should any stigmatizing language or remarks about the victim being "habituated to sexual intercourse" or prior sexual experience be made.<sup>185</sup> These offend the guarantee of dignity,

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<sup>180</sup> *Madan Gopal Kakkad v. Naval Dubey*, (1992) 3 SCC 204 endorsed *Modi's Medical Jurisprudence and Toxicology* (21<sup>st</sup> ed).

<sup>181</sup> CEHAT Manual, p.15

<sup>182</sup> *Madan Gopal Kakkad v. Naval Dubey*, (1992) 3 SCC 204.

<sup>183</sup> CEHAT Manual, p.15.

<sup>184</sup> *Lillu v. State of Haryana*, AIR 2013 SC 1784; MOHFW Guidelines, p.60.

<sup>185</sup> *Ibid*

privacy, physical and mental integrity available under Article 21, Constitution of India and have no bearing on a case of sexual violence.<sup>186</sup>

- A victim cannot be forced to be subjected to a medical examination, against his/her will, through use of force, threat or coercion.

### **1.5. Facilitation of Recording of Statement under Section 164, Cr.P.C., by the Magistrate**

The POCSO Act does not mandate that a statement under Section 164, Cr.P.C. be recorded in every case. However, pursuant to the Criminal Law (Amendment) Act, 2013, Section 164(5-A)(a), the statement of victim against whom offences has been committed under Sections 354, 354-A, 354-B, 354-C, 354-D, 376(1), 376(2), 376-A, 376-B, 376-C, 376-D, 376-E or 509 of the IPC has to be recorded by a Judicial Magistrate. The statement should be recorded as soon as the commission is brought to the notice of the police.<sup>187</sup> In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/preferably Judicial Magistrate for recording the 164 statement and preferably to a Lady Magistrate.<sup>188</sup>

- **Child victim to be brought immediately:** In case of sexual offences under the IPC, the IO should bring the child victim to the Magistrate immediately. [Section 164(5-A)(a)] In cases of rape, the IO should take the victim within 24 hours to any Metropolitan/preferably Judicial Magistrate for recording the 164 statement.<sup>189</sup>
- **Reasons for delay:** The reasons for delay in bringing the victim of rape within 24 hours should be recorded in the case diary and the copy of the same should be handed to the Magistrate.<sup>190</sup> For instance, if the child is traumatized or in no state to be physically taken for the 164 statement, this reason should be cited to the Magistrate to explain the delay.
- **Medical examination report:** The IO should also hand over to the Magistrate a copy of the medical examination report.<sup>191</sup>
- **Unavailability of lady Magistrate:** The POCSO Act does not mandate that the child should be taken to a lady Magistrate. The Supreme Court has also indicated that this is a preference and not a mandatory requirement. The priority should be on ensuring that the statement is recorded at the earliest. If a lady Magistrate is unavailable, the IO should not delay matters and take the child to any Metropolitan or preferably Judicial Magistrate.

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<sup>186</sup> Cr.P.C., Section 164(5-A)(a).

<sup>187</sup> *State of Karnataka v. Shivanna*, (2014) 8 SCC 913.

<sup>188</sup> *Ibid*

<sup>189</sup> *Ibid*.

<sup>190</sup> *Ibid*.

<sup>191</sup> POCSO Act, Section 28(1).

## 1.6. Procedures of the Special Court

Under the POCSO Act, the State Government in consultation with the Chief Justice of the High Court, should designate a Sessions Court to be a Special Court in every district to try offences under the Act.<sup>192</sup> The Special Court can try offences under the POCSO Act and offences with which the accused is charged under the Cr.P.C. at the same trial.<sup>193</sup>

### Jurisdiction of Special Courts

The Special Court designated under the POCSO Act will have the jurisdiction to try offences in addition to those under the POCSO Act with which the accused has been charged under the Cr. P.C at the same trial.<sup>194</sup> Where the accused has been charged under the Atrocities Act along with the POCSO Act, the matter will be tried by the Special Court under the POCSO Act and not the Special Court under the Atrocities Act.<sup>195</sup>

It will also have the jurisdiction to try offences relating to publication or transmission of sexually explicit material depicting children in any act or conduct or manner that facilitates abuse of children online under Section 67B, Information Technology Act, 2000.<sup>196</sup>

The police should thus submit the charge-sheet to the Special Court under the POCSO Act.

### Cognizance and Disposal

- Special Courts can take cognizance directly without committal.(Section 33(1), POCSO Act)
- They must record the evidence of the child within 30 days of taking cognizance and record reasons for the delay.(Section 35(1), POCSO Act)
- They must complete the trial within one year of taking cognizance, as far as possible.(Section 35(2), POCSO Act)

### Questioning Children

- Special Courts should ensure that the Special Public Prosecutor and defence lawyer do not question the child directly. The questions to be put to the child

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<sup>192</sup> POCSO Act, Section 28(2).

<sup>193</sup> Ibid.

<sup>194</sup> *In Re: A Ref u/s 395(2) Cr.P.C by S.J. v. Unknown*, S.B. Criminal Reference Petition No. 1/ 2013, Rajasthan High Court-Jodhpur Bench; Reference Case No.1 of 2017, In the matter of reference under Section 395 of Cr.P.C. made by the learned Sessions Judge, Mahilar Court, Tiruchirappalli, in his letter in D.No.238/2016 dated 17.03.2017 decided on 28.04.2017 by the Madras High Court.

<sup>195</sup> POCSO Act, Section 28(3).

<sup>196</sup> POCSO Rules, Rule 7(2)

have to be communicated to the Special Court, who should put the questions to the child.(Section 33(2), POCSO Act)

- They should permit frequent breaks to the child during trial, if necessary.(Section 33(3), POCSO Act)
- They should not allow aggressive questioning or character assassination of the child and ensure that dignity is maintained (Section 33(6), POCSO Act)
- Special Courts should take the assistance, if necessary, of a qualified and experienced translator or interpreter on payment of prescribed fees when recording the statement of a child. (Section 38(1), POCSO Act).
- They should take the assistance, if necessary, of a qualified and experienced special educator or person familiar with the manner of communication of the child or an expert, when recording the statement of a child with mental or physical disability.(Section 38(2), POCSO Act)

### **Child-friendly atmosphere**

- Special Courts should create a child-friendly atmosphere by allowing a family member, guardian, friend, or relative whom the child trusts or has confidence in to be present. (Section 33(4), POCSO Act).
- They should ensure that the child is not repeatedly called to testify in court.(Section 33(5), POCSO Act)
- They should ensure that identity of the child is not disclosed at any time during investigation or trial unless the disclosure is in the interest of the child. Reasons should be recorded in writing if disclosure is allowed. (Section 33(7), POCSO Act)
- Special Courts should determine the age of the child when the question arises before the court and adhere to the provisions of the JJ Act, 2015 on age-determination.(Section 34(2), POCSO Act)
- They should ensure that the child is not exposed to the accused at the time of recording the evidence and that the accused is able to hear the statement of the child and communicate with his advocate. Video conferencing, single visibility mirrors, curtains, or any other device should be used to facilitate this.(Section 36, POCSO Act)
- They should conduct the trial *in camera* and in the presence of parents of the child or any other person in whom the child has trust or confidence. (Section 37, POCSO Act)
- Special Courts should examine the child in a place other than the courtroom if the situation requires it.(Section 37, POCSO Act)

## Compensation

- Special Courts should direct payment of compensation (interim and final) for physical or mental trauma caused to the child or for the child's immediate rehabilitation. They should determine quantum and direct the State Government to pay the compensation within 30 days. (Section 33(8), POCSO Act read with Rule 7, POCSO Rules)
- In order for the Special Court to order for interim or final compensation, it is not pre-requisite for the child to file an application. The Special Court may order on his/her own accord where it is found to be appropriate.
- A record of conviction is not mandatory for the provision of compensation. Where the Special Court is satisfied that a child has been a victim of sexual abuse, the judge may direct compensation to be paid in cases where the accused has been acquitted or even in cases where the accused has not identified or traced.<sup>197</sup> Interim compensation can be paid at any stage and is not linked to the child's testimony.
- The compensation ordered must be disbursed by the State Government within 30 days from the order.<sup>198</sup> The State Government may pay the sum from the *Victims Compensation Fund* or any other scheme or fund which has been established under section 357A of the Code of Criminal Procedure.
- The quantum of compensation is not specified in the POCSO Act and it is based on the discretion of the judge deciding the matter. The POCSO Rules provides that while deciding the quantum of compensation, the judge must take into consideration the type, nature and severity of abuse, the extent of physical and mental harm caused to the child, expenditure incurred for medical treatment for physical and/or mental health, financial condition of the child, etc.<sup>199</sup>

## Support Persons

- They should recognize the support persons appointed by the CWC or the family directly and allow them to be present during the child's evidence. They should also allow them to also convey the child's questions and fears about the evidence recording process. (Rule 4(8), POCSO Rules)

## Legal Counsel on Behalf of Victim

- Special Courts should recognize the right of the child to take assistance of a legal practitioner. (Section 40, POCSO Act)

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<sup>197</sup> POCSO Rules, Rule 7(4) and 7(5)

<sup>198</sup> POCSO Rules, Rule 7(3)

<sup>199</sup> POCSO Act, Section 34(1); JJ Act, 2015, Section 1(4)(i).

## **Dos and Don'ts for the Police**

- Information regarding appointment of support persons by the CWC, or the family directly, should be communicated to the Special Court by the IO.
- The IO should inform the child and the child's family about the child-friendly procedures under the Act and facilitate a prior interaction with the Special Public Prosecutor so that the child can be familiarized with the courtroom atmosphere and procedures.
- The IO should provide timely information to the child and the family/guardian about the dates for the hearings and inform them about the outcome.
- Requisite cooperation should be extended to the Support Person appointed by the CWC or the family.
- Information about the child's exams, school events, etc., should be provided to the Special Public Prosecutor (SPP) in advance so that the child's examination and cross-examination can be scheduled accordingly.
- Children and their families should not be prompted to compromise or turn hostile in court for any reason.
- Police should play an active role in opposing bail for accused by providing SPP with necessary information, evidence and documentation. Any violations of the bail conditions should be brought to the notice of the SPP, so bail can be revoked.

### **1.7. FAQs**

- **Is it sufficient to file charges only under the POCSO Act or should all relevant provisions be included in the charge-sheet?**

All relevant provisions should be mentioned in the charge-sheet. This is because the ingredients and penalties may be different under different laws. For instance, rape of a 15-year-old girl would constitute aggravated rape under the IPC and penetrative sexual assault under the POCSO Act. Aggravated rape under the IPC would attract higher penalty than that of penetrative sexual assault under the POCSO Act. Further, an alleged act may constitute distinct offences under different laws. For instance, the accused may have filmed the abuse or shown the child pornography and then abused the child. In such cases, relevant provisions under the POCSO Act, IPC, and the IT Act should be applied as the act constitutes distinct offences under each of these laws.

- **If a sexual offence against a child is allegedly committed by a person below 18 years, will the person be dealt with by the Special Court under the POCSO Act?**

No, a person below 18 years who allegedly commits a sexual offence against a child will be dealt with by the Juvenile Justice Board (JJB) under the Juvenile Justice (Care and Protection of Children) Act, 2015.<sup>200</sup> Such a person should be produced before the JJB after apprehension by the police or the SJPU.

- **Can children above 16 years alleged to have committed a sexual offence be tried as adults?**

A person above 16 years and below 18 years alleged to have committed penetrative or aggravated penetrative sexual offences can be treated as an adult if they are transferred to the Children's Court by the Juvenile Justice Board and the Children's Court decides to try the child as an adult. However, the child must first be produced before the JJB who will make the above assessment in accordance with the JJ Act.

- **If the offence is allegedly committed by a child below 7 years, what is the process to be followed by the police?**

According to Section 82, IPC "nothing is an offence which is done by a child under seven years of age." Although an FIR will have to be lodged if the offence alleged is cognizable, no penal action can be taken against a child below 7 years. Such a child can, however, be produced before the CWC if the circumstances warrant it.

- **Will the translator be a witness in the court?**

A translator can be appointed by the Special Court to assist it in recording the testimony of a child. In such a situation, the translator is not a witness. However, if a translator has been used by the police to record the statement of the child, then she/he will be a witness. Summons can be issued to secure their appearance before the court.

- **If the person alleged to have committed a sexual offence looks clearly above 18, but the defence produces document to show he is under 18, what should be done?**

Under Section 94(1), JJ Act, 2015, appearance of a person can be relied upon only to conclude that the person is a child. It cannot be the basis to conclude that the person was an adult. According to Section 94(2), JJ Act, 2015, the birth certificate from school, matriculation or evaluation certificates will be considered to determine if the person is a child. If these documents are not available, the birth certificate by a corporation, municipal authority, or a Panchayat will be considered. If these are also unavailable, the JJB or CWC can order an ossification test or latest medical age determination test. The Special Court under the POCSO

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<sup>200</sup> (2013) 7 SCC 263.

Act could also adhere to the procedure prescribed under the JJ Act, 2015 for age-determination as in *Jarnail Singh v. State of Haryana*,<sup>201</sup> the Supreme Court has held that the procedure to determine age of a child in conflict with the law can be used to determine age of a child victim.

- **If a child victim of rape escapes the clutches of the offender and manages to get into a train, and the offender follows her, will the Railway police ask her to go to the Police Station where she was raped or will they arrest the offender, rescue the girl and register the crime in the Railway PS?**

The crime is continuing as the offender was chasing the victim. Therefore, the Railway Police has duty to nab the offender and rescue the child and take all actions according to law, including FIR registration. Even if the offender was not chasing her, the rescue of the victim and post-rescue care as well as registration of a crime at the Railway PS is mandatory. After the FIR is registered, the SHO of the Railway PS can transfer the case to the PS having original jurisdiction and till such time they take over, all urgent steps required have to be undertaken. It is reiterated that want of jurisdiction is not sufficient cause to delay lodging of FIR and taking protective measures.

### Chapter 1, Annexure 1: Sexual Offences and Penalties

List of sexual offences and penalties under the POCSO Act			
Offence	Minimum	Maximum	Fine
Penetrative Sexual Assault	7 years	Life imprisonment	✓
Aggravated Penetrative Sexual Assault	10 years (rigorous imprisonment)	Life imprisonment	✓
Sexual Assault	3 years	5 years	✓
Aggravated Sexual Assault	5 years	7 years	✓
Sexual Harassment	–	3 years	✓
Use of a child for pornographic purposes	–	5 years	✓

Source: Raha, Giliyal, Sajjanashetty & Ramakrishnan, *Frequently Asked Questions on the Protection of Children from Sexual Offences Act, 2012 and The Criminal Law (Amendment) Act, 2013*, Centre for Child and the Law, National Law School of India University, Bangalore, (revised 2<sup>nd</sup> ed 2016) pp. 31-32.

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<sup>201</sup> (2013) 7 SCC 263.

<b>List of sexual offences and penalties under the IPC</b>			
<b>Offence</b>	<b>Minimum</b>	<b>Maximum</b>	<b>Fine</b>
<b>Section 354: Assault or criminal force to a woman with intent to outrage her modesty</b>	–	Two years	And/ Or
<b>Section 354A(2): Sexual Harassment (physical contact and advance, sexual overtures, demand for sexual favours, showing pornography against will)</b>	–	RI for 3 years	And/ Or
<b>Section 354A(3): Sexual Harassment (making sexually coloured remarks)</b>	–	1 year	And/ Or
<b>Section 354B: Assault or use of criminal force to woman with intent to disrobe (abetment included)</b>	3 years	7 years	✓
<b>Section 354C: Voyeurism (watching or capturing image of a woman engaging in a private act or disseminating such images)</b>	1st CV: 1yr 2nd CV: 3 years	1 <sup>st</sup> CV: 3 years 2nd CV: 7 years	✓ ✓
<b>Section 354D: Stalking (physical/electronic)</b>	–	1 <sup>st</sup> CV: 3 years 2 <sup>nd</sup> CV: 5 years	✓ ✓
<b>Section 370(4): Trafficking of minor</b>	RI 10 years	Life imprisonment	✓
<b>Section 370(5): Trafficking of more than one minor</b>	RI 14 years	Life imprisonment	✓
<b>Section 370(6): Repeat trafficker of minors</b>	Imprisonment for remainder of natural life		✓
<b>Section 370A(1): Sexual exploitation of a trafficked manner</b>	RI for 5 years	RI for 7 years	✓
<b>Section 376(1): Rape</b>	RI 7 years	Life imprisonment	✓
<b>Section 376(2): Aggravated Rape (includes rape of a girl below 16 years of age)</b>	RI 10 years	Life imprisonment for remainder of life	✓
<b>Section 376A: Rape causing death or resulting in vegetative state of victim</b>	RI 20 years	Life imprisonment for remainder of life or death	
<b>Section 376B: Sexual intercourse by husband upon his wife during separation</b>	2 years	7 years	✓

<b>Section 376C: Sexual intercourse by a person in authority (includes superintendent or manager of children's institutions)</b>	RI 5 years	RI 10 years	✓
<b>Section 376D: Gang rape</b>	RI 20 years	Life imprisonment for remainder of life	✓
<b>Section 376E: Repeat offenders under sections 376, 376A, 376D</b>	Imprisonment for remainder of life or death		
<b>Section 377: Unnatural Offences</b>	Life imprisonment or imprisonment upto 10 years		✓
<b>Section 509: Word, gesture or act intended to insult the modesty of a woman</b>	–	SI 3 years	✓

<b>List of sexual offences and penalties under the Goa Children's Act, 2003</b>			
<b>Offence</b>	<b>Minimum</b>	<b>Maximum</b>	<b>Fine</b>
<b>Section 6(19): Failure to ensure child under care and custody of Children's Home is not exposed to sexual offences, child trafficking or child prostitution.</b>	–	3 years	Upto Rs. 1 lakh
<b>Section 8(2): Punishment for sexual assault</b>	–	3 years	Upto Rs. 1 lakh
<b>Section 8(2): Punishment for grave sexual assault</b>	10 years	Life imprisonment	Rs. 2 lakhs
<b>Section 8(2): Punishment for incest</b>	10 years	Life imprisonment	Upto Rs. 2 lakhs
<b>Section 8(14): Punishment for failure of a developer of photographs or films to report discovery of sexual/ obscene depictions of children</b>	1 year	3 years	And/or Minimum of Rs. 50,000
<b>Section 9(4): Exploitation of a child for commercial sexual exploitation</b>		7 years	Upto Rs. 1 lakh
<b>Section 9(7): Abetment of performance of ceremony or act for dedicating minor girl child as devadasi</b>		3 years	Upto Rs. 2000
<b>Section 9(7) proviso: Abetment of above offence by parents</b>	2 years	5 years	Rs. 2000–Rs. 5000

## Chapter 1, Annexure 2: Significant Court Rulings

### 1. Role of the Police in facilitating statement under Section 164, Cr.P.C

*State of Karnataka v. Shivanna (Supreme Court)*<sup>202</sup>: In cases of rape, IO should take the victim immediately, as far as possible, to the nearest lady Metropolitan/ preferably lady Judicial Magistrate for recording the statement under Section 164, Cr.P.C. The IO should record the date and time at which he learn about the commission of rape and the date and time at which the victim was taken to the Magistrate. Reasons for delay exceeding 24 hours should be recorded in the case diary and a copy should be handed to the Magistrate along with a copy of the medical examination report.

### 2. Jurisdiction of Special Courts

*Kum. Shraddha Meghshyam Velhal v. State of Maharashtra, Criminal Application 354 of 201. Decided by the Bombay High Court on 03.07.14*: In cases under the POCSO Act, police officers should produce the accused for remand before the Children’s Court and not before the Magistrates Court.

*Prasad v. State of Kerala, (2013) 2 KLT 942*: The POCSO Act does not prevent Magistrates from ordering first remand of an accused under the Act, since Section 167, Cr.P.C. allows it. However, subsequent remand orders or bail applications should be made only before the Special Court under the POCSO Act.

### 3. Nature of Offences under the POCSO Act

*Santosh Kumar Mandal v.State, Bail Appln No. 1763/2016, Delhi High Court (28 September 2016)*: “Considering the gravity of the offences and the special mechanism provided under POCSO Act to hold that the offences are bailable though cognizable and would fall in category 3 would be rendering an interpretation to the classification provided in second part of First Schedule of Cr.P.C contrary to the object of the special enactment. Thus offences punishable under POCSO Act including Section 12 are cognizable and non-bailable offences.”

**Note:** The above interpretation is applicable only in the State of Bombay. In the absence of specifications of the nature of offences under the PCOSO Act, the Cr.P.C will apply.

### 4. Rape is non-compoundable

*Shimbhu v.State of Haryana, (2013) 10 SCALE 595*: “Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle.”

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<sup>202</sup> Available at <https://indiankanoon.org/doc/2622362/>

## 5. Use of Two-finger test unconstitutional

*Lillu v. State of Haryana*, AIR 2013 SC 1784: In this case, the Supreme Court held that the “two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity.”

## 6. Credibility of testimony of rape victims and child witnesses

*State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384: “Corroborative evidence is not an imperative component of judicial credence in every case of rape... It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons’ lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice.”

*Dattu Ramrao Sakhare v. State of Maharashtra*, (1997) 5 SCC 341: “A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

*Ranjit Hazarika v. State of Assam*, (1998) 8 SCC 635: “The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused.”

***Balaji Sarjerao Kamble v. State of Maharashtra*, Criminal Appeal No. 28 of 2016 decided by the Bombay High Court on 29.08.17.**

Bearing in mind the age of the child victim who was about 6 to 8 years at the time of the alleged rape, the Bombay High Court held that “merely because date of the

incident is not stated by the victim, her evidence cannot be doubted. The [victim] is not expected to have such chronometric sense at the tender age.”

## **7. Delay in lodging FIR**

*State of Himachal Pradesh v. Shree Kant Shekari, AIR 2004 SC 4404*

Setting aside the acquittal in a case under Sections 376 and 506 of the IPC on grounds of delay in lodging the FIR, the Supreme Court held: “Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case.”

## **8. Test-identification**

In *Rakesh Kumar v. State*,<sup>203</sup> the Delhi High Court laid down the following guidelines for test identification parade (TIP) where children below 12 years of age had to identify an accused:

- a) In every case where witness is a child below the age of 12 years TIP proceedings shall be held in one of the court rooms attached with the main Tihar Jail so that the child does not enter the main Jail Complex to reach the Test Identification Parade room.
- b) Installation of semi reflective screen or any other screen or mechanism in a room where TIP proceedings will be conducted so that the child witness is not confronted face to face with the criminals participating in the TIP proceedings.
- c) A person accused of the offence and the others who may be participating in the TIP will be explained the procedure and the manner of TIP proceedings to be held in a case of child witness.
- d) No officer below the rank of Deputy Superintendent of Jail shall accompany the child witness at the time of TIP proceedings and endeavour shall also be made by the Jail Superintendent that, so far as possible only female officer is deployed wherever witness happens to be a girl child for the purposes of identifying the accused person.

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<sup>203</sup> CrI. A. 513/1998, decided on – 30.05.2014.

- e) No police official shall be seen in a uniform right from the stage when the child enters the TIP Room and till he/she leaves the premises after the completion of TIP proceedings. The child witness shall be entitled to accompany his parents/guardians or any of his close relatives so as to make the child comfortable before participating for identifying the accused in the Test Identification Parade.
- f) Endeavour shall be made by Director General (Prisons)/Jail Superintendent that a lady officer who is more humane, sensitive and compassionate is given duty to accompany the child witness.
- g) The child friendly atmosphere will be created in a room where the child is brought first and the stay of the child will be made most comfortable so that the child finds the place to be attractive and conducive to his/her requirements.
- h) Necessary arrangements for light refreshment to the general liking of children below the age of 12 years shall also remain in place to keep the mood of the child upbeat.

**9. Duty of police to facilitate compliance with Section 35(1), POCSO Act**

***Vinay v. State of Karnataka, Criminal Petition No. 1105/2017 decided on 13.07.2017 by the Karnataka High Court.***

The Karnataka High Court laid emphasis on the role of the Special Court in ensuring that the testimony of the child is recorded within 30 days from cognizance in this case. Additionally, it noted that the Investigating Officer should also adhere to this mandate. It held “if the Presiding Officer notices callous attitude on the part of the Investigating Officer in producing the properties, the same shall be brought on bench in the ‘crimes’ meeting held with the Police Officers of the District and the matter shall be brought to the notice of the superior Police officers. Even if the Investigating officer fails to produce the property on the date called for, that shall not stop the Court from recording the statement of the victim child ...”

**10. Procedures to be followed in sexual offences against children**

***Sakshi v. Union of India, AIR 2004 SC 3566:*** Guidelines were issued by the Supreme Court to be followed during the trial of child sexual abuse or rape in this case. These guidelines are particularly significant for the on-going trials of rape cases before the enactment of the POCSO Act. The guidelines are:

- (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
- (ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident should be given in writing to the Presiding

Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

- (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

***Virender v. State of NCT of Delhi, 2010 III AD (Delhi) 342***

The Delhi High Court laid down guidelines to be followed by the police, Magistrate, and court in sexual offences against children based on decisions of the Supreme Court and the High Court. The guidelines relevant to the police and not expressly mentioned in the POCSO Act are as follows:

- On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately. (Ref: Court On Its Own Motion v. State and Anr.)
- Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by him also under his guidance and advice. (Ref : Mahender Singh Chhabra v. State of N.C.T. of Delhi and Ors.)
- The statement should be recorded promptly without any loss of time. (Ref: Court On Its Own Motion v. State and Anr.)
- The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case. (Ref: Court On Its Own Motion v. State and Anr.)
- In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist. (Ref: Court On Its Own Motion v. State and Anr.)
- The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available. (Ref: Court On Its Own Motion v. State and Anr.)
- The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date. (Ref: Court On Its Own Motion v. State and Anr.)
- The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officer/s. (Ref: Court On Its Own Motion v. State and Anr.)

- To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O., for investigations on any particular aspect of the matter, the same shall be adverted to by the I.O. Proper entries shall be made by I.O. in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.(Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)
- Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration.(Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)
- The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)
- The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref : Mahender Singh Chhabra v. State of N.C.T. Of Delhi and Ors.)

Other general guidelines laid down in this case were:

- Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.
- The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness. This would create and inspire a feeling of confidence and trust in the child.

### **Jhakhu Case**

The multi-disciplinary team of CBI that investigated the Jhakhu case<sup>204</sup> (which led to Sakshi Vs UOI) had the following: The investigating Officer (a lady officer); The supervisory officer (a male); The counsellor from NGO (a lady) who facilitated the ice breaking of the victim with the investigators; The prosecutor (male); The forensic expert (male); The psycho social expert ( a Lady). The interview was done at a pace the child was comfortable, and was a child friendly ambience; There were no intimidating questions; the child victim was facilitated to speak out and she spoke in the language of the child, which was recorded verbatim, which the Court eventually appreciated too.

It may not be possible to have such an expert team elsewhere' but all those who have some expertise and need to be involved in the interviewing process, may be brought together and in a non-intimidating ambience so that the victim can be facilitated to speak.

- The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of “Ascertaining voluntary nature of statement” unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref : Court On Its Own Motion v. State of N.C.T. Of Delhi)
- No court shall detain a child in an institution meant for adults.(Ref : Court On Its Own Motion v. State of N.C.T. Of Delhi). This would apply to investigating agencies as well.

### **11. Cross-examination of a child with disability**

***Chander Singh v. State*, Crl. A. 751/2014 decided by the Delhi High Court on 03.06.2016**

In this case, a 12-year-old deaf girl had been sexually assaulted by the accused. Her statement had been recorded through gestures and drawings, which were interpreted with the assistance of a teacher working in a primary school for deaf children run by the Delhi Government. The defence argued that her testimony could not be read as evidence because she could not be cross-examined. The Delhi High Court held, “A party cross-examining a deaf and dumb witness like any other witness is required to act within the bounds of law and cannot be permitted to cross-examine the witness all and sundry on irrelevant questions.” It further held that, “When a deaf and dumb witness is under cross-examination, the Court is required to take due care of the fact that vocabulary of such a person is limited as he or she speaks through sign language and it may not be possible for

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<sup>204</sup> Smt Sudesh Jhaku v. K.C.J, <https://indiankanoon.org/doc/1525708/>

that witness to answer, or in detail explain every answer by sign language. **This disability of a limited vocabulary of sign language does not affect either the competence or the credibility of such witness.** The Court is required to exercise control over the cross-examination keeping in view the ability of the witness to answer the questions.” The Delhi High Court concluded that the drawing of the right to cross-examination of the accused and upheld the appellant’s conviction.

## CHAPTER 2 – TRAFFICKING OF CHILDREN

### 2.1. The Context

Child trafficking – within countries, and across national borders – is closely interlinked with the demand for cheap labour in sectors and among employers where the working conditions and the treatment grossly violates the rights of the children. These forms range from bonded or forced labour, child domestic labour, commercial sexual exploitation and prostitution, drug couriering, and child soldiering to exploitative or slavery-like practices in the informal industrial sector.

According to *Crime in India, 2016*, 2992 cases of child trafficking (under Sections 370/370A, 366-B, 366-A of Indian Penal Code (IPC) and the Immoral Traffic Prevention Act, 1956 (ITPA) were reported in 2015, a drop from 3490 cases in 2015.<sup>205</sup> 9034 children were reportedly victims of trafficking in 2016 constituting 58.74% of all trafficked victims<sup>206</sup> 14183 children were rescued from trafficking of which boys constituted approximately 61%.<sup>207</sup> Of the total, cases under the ITPA constituted only 1.66%, cases under Sections 370 and 370A comprised 6%, while 89% of the cases were lodged for procurement of minor girls under Section 366-A, IPC.<sup>208</sup> The conviction rate for cases of child trafficking stood at 14.3% in 2015, while the pendency rate was 92%.<sup>209</sup>

These figures are however only a fraction of the children who are missing or go missing in India, and many cases go unreported.

Children are trafficked for various purposes – commercial sexual exploitation (prostitution, child pornography, child sex-tourism, online commercial sexual exploitation), labour, transplantation of human organs, child marriage, illicit adoptions, and begging.

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<sup>205</sup> Table 4A.2(i) and (ii), IPC and SLL Crimes Against Children-2016 in *Crime in India, 2016*; Table 6A.7, Cases Reported & Rate of Crime Relating to Child Trafficking During 2015, <http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Table%206A.7.pdf>

<sup>206</sup> Table 14.2 Victims Trafficked, *Crime in India, 2016*.

<sup>207</sup> Table 14.3 Victim Rescued, *Crime in India, 2016*.

<sup>208</sup> TABLE 6A.8 Incidence (I), Victims and Rate (R) of Total Crimes Relating to Child Trafficking During 2015, <http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Table%206A.8.pdf>

<sup>209</sup> Table 6A.10, Disposal of Cases by Courts for Crimes Relating to Child Trafficking during 2015, <http://ncrb.nic.in/StatPublications/CII/CII2015/FILES/Table%206A.10.pdf>

*This Chapter addresses only trafficking for commercial sexual exploitation of children. Trafficking for labour is explained in the chapter pertaining to child labour.*

### **Linkage with Missing Children/ Persons**

A Delhi High Court judgment<sup>210</sup> highlighted that of the 44,000 children that are reported missing annually, only 11,000 get traced. The NHRC Action Research (2002-04) had brought out evidence to show linkages – that many missing children, though reported as missing, had indeed been trafficked. Taking into consideration these issues, the Supreme Court directed in 2013<sup>211</sup> that all missing cases be registered as FIR with a presumption that a missing child has been trafficked/ abducted. If the child is not traced in four months, the investigation should be handed over to the Anti Human Trafficking Unit (AHTU). The order further directed that the AHTU should report progress of such cases to the District Legal Services Authority (DLSA).

#### **Protocol for the Police in case of a missing child<sup>212</sup>**

A missing child refers to a child whose whereabouts are not known to the parents, legal guardian or any other person/institution which is legally entrusted with the custody of the child. Irrespective of the circumstances in which the child has disappeared, the child should be considered a ‘missing child’ and a ‘child in need of care and protection’ until the location, safety and well-being of the child has been established.<sup>213</sup>

#### ***Dos and Don'ts for the Police***

- When a complaint is received regarding a missing child, an FIR must be registered immediately.
- Information regarding the missing child must be conveyed to a Child Welfare Police Officer.
- The FIR must be forwarded to the SJPU for immediate action and tracing of the child.
- The police must collect a recent photograph of the missing child and make copies for the DCPU, Missing Persons Squad, National Crime Records Bureau, Media, etc.
- Fill the form on the designated portal for missing children
- Fill the specific designed ‘Missing Persons Information Form’ and immediately send to Missing Persons Squad, District Missing Persons Unit, National Crime Record Bureau, State Crime Records Bureau, Central Bureau of Investigation, and other related institutions.

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<sup>210</sup> Bachpan Bachao Andolan vs. Union of India, Writ Petition (C) No. 51 of 2006, decided on 18.04.2011

<sup>211</sup> Bachpan Bachao Andolan vs. Union of India, Writ Petition (Civil) no. 75 of 2012, decided on 10.05.2013

<sup>212</sup> JJ Model Rules, 2016, Rule 92.

<sup>213</sup> JJ Model Rules, 2016, Rule 92(1).

- Send a copy of the FIR by post or email to the office of the nearest Legal Services Authority along with addresses and contact phone numbers of parents or guardian of the missing child or the Child Care Institution.
- Prepare sufficient number of Hue and Cry notices containing photograph and physical description of the missing child to be sent for publication.
- Give wide publicity by publishing or telecasting the photographs and the description of the missing child, as feasible in (a) leading newspapers (b) Television/electronic media (c) local cable television network and social media and thereafter submit for ratification by the CWC/JJB or the Children’s Court, as the case may be.
- Give wide publicity in the surrounding area through the use of loud speakers and the distribution and affixture of Hue and Cry notice at prominent places. Social networking portals, Short Message Service alerts and slides in cinema halls can be used to reach out to the masses.
- Distribute Hue and Cry notice at all the outlets of the city or town, that is, railway stations, bus stands, airports, regional passport offices and other prominent places.
- Search areas and spots of interest such as movie theatres, shopping malls, parks, amusement parks, games parlours and areas where missing or run away children frequent should be identified and watched.
- Scan the recordings of the Closed Circuit Television Cameras installed in the vicinity of the area from where the child was reported missing and on all possible routes and transit destination points like bus stands, railway stations, and other places.
- Inquire from under construction sites, unused buildings, hospitals, and clinics, Childline services, and other local outreach workers, railway police, and other places.
- Details of missing children should be sent to the District Crime Record Bureaus of the neighbouring States and Station House Officers (SHOs) of the bordering police stations including in-charge of all police posts in their jurisdiction.
- Where a missing child cannot be traced within four months, the case investigation must be transferred to the Anti Human Trafficking Unit in the District.
- In the event that the missing child is traced:
  - o the child must be produced before the relevant CWC/JJB/Children’s Court for appropriate directions.
  - o the police must send a report to the District Legal Services Authority which should provide counselling and other support services to the child and family
  - o the police must conduct an inquiry as to whether the child had been subject to any offence under the JJ Act, 2015 or any other law in force.

The Ministry of Women and Child Development has prepared a comprehensive Standard Operating Procedure in cases of Missing Children<sup>214</sup> which must be referred by police officers in such cases.

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<sup>214</sup> Standard Operating Procedure for Cases of Missing Children, Ministry for Women and Child Development, available at <http://www.wcd.nic.in/sites/default/files/FINAL%20E-office%20SOP.pdf>

## 2.2. Applicable Laws

Article 23(1) of the Indian Constitution prohibits traffic in human beings, *beggar*, and other similar forms of forced labour and states that contravention of this fundamental right against exploitation is a punishable offence. Additionally, the following legislations are relevant to child trafficking:

- Indian Penal Code, 1860
- Immoral Traffic Prevention Act, 1956
- Protection of Children from Sexual Offences Act, 2012 (POCSO Act)
- Juvenile Justice (Care and Protection of Children) Act, 2015 (JJ Act, 2015)
- The Bonded Labour System (Abolition) Act, 1976

Besides, legislations such as the Prohibition of Child Marriage Act, 2006; Child and Adolescent Labour (Prohibition & Regulation) Act, 1986; and Transplantation of Human Organs Act, 1994 will also apply to cases involving trafficking for marriage, labour, or sale of organs, respectively. The provisions of the Information Technology Act, 2000 and the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 as amended in 2015 may also be relevant.

There are also the state legislations dealing with *devdasi*, which is another façade for trafficking girls/ women for prostitution – such as, The Bombay Devdasi (Protection) Act, 1934; The Madras Devdasi (Prevention of Dedication) Act, 1947; The Andhra Pradesh (Prohibition of Dedication) Act, 1988; The Karnataka Devdasi (Prohibition of Dedication) Act, 1982; and the Goa Children’s Act, 2003.

### 2.2.1. What constitutes trafficking?

#### Note

- Consent of the victim is immaterial as has been expressly stated under Section 370, IPC.<sup>215</sup>
- The concept of trafficking is broad under the IPC and narrow under ITPA. Trafficking of persons for physical or sexual exploitation, slavery, and forced removal of organs fall within the ambit of trafficking under Section 370, IPC. The ITPA recognises only trafficking for commercial sexual exploitation.
- ITPA is a special legislation with several provisions for rescue, rehabilitation, deterrent action, and prevention, etc. Hence, both the IPC and the ITPA should be simultaneously utilized in all offences of sex trafficking of children.

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<sup>215</sup> IPC, Section 370(1), Explanation 2.

<b>Relevant Provision</b>	<b>Activities</b>	<b>Means/Methods</b>	<b>Purpose/Intention</b>
Section 370, IPC (amended in 2013) – Trafficking of persons	Recruitment, transportation, harbouring, transferring or receiving <u>person/ persons</u>	Threats, force or any other form of coercion, abduction, practicing fraud or deception, abuse of power, inducement including giving or receiving payments or benefits to achieve consent of person having control over the person	Exploitation – including physical exploitation, any form of sexual exploitation, slavery or practices similar to slavery, servitude, or forced removal of organs.
Section 16, Explanation III, POCSO Act, 2012 – Abetment of an offence Note: The term “trafficking” is not used in the POCSO Act.	<u>Employment</u> , harbouring, receiving or transportation of a <u>child</u>	Threat, use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving of payments of benefits to achieve the consent of a person having control over another person	Commission of sexual offences under POCSO Act
Section 5A, ITPA – Procuring, inducing or taking person for the sake of prostitution	Recruitment, transportation, harbouring, transferring or receiving a <u>person/persons</u>	This provision of the ITPA does not explicitly provide any means; however, activities under this Section could be deemed to include the following: Threats, force, coercion, abduction, fraud or deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of person having control over another person	Commercial sexual exploitation
Section 2(z), Goa Children’s Act, 2003 – “child trafficking”	<u>Procurement</u> , recruitment, transportation, transfer; <u>harbouring or receipt of children</u>	Threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve the consent of a person having control overanother person	Monetary gain or otherwise

### **2.2.2. The Victim of Trafficking**

Any person who is affected by, or subjected to, any act in the trafficking process is a victim. This includes the following: -

- Any trafficked person, irrespective of their age or nationality or the time of trafficking or the place of trafficking or the purpose for which the person has been trafficked.
- Persons above the age of 18 who through force or threat of force, coercion, abuse of power etc. were/are required to perform sexual acts without their consent, by any person(s).
- ‘Children’ who have not completed the age of 16 years and ‘minors’ who have completed the age of 16 years, but have not complete the age of 18 years, who are found in places of commercial sexual exploitation (CSE) (under Section 2(aa) and (cb) ITPA).
- Any person below 18 years who is found vulnerable and is likely to be trafficked, as this person is a ‘child in need of care and protection’ under section 2 (14) of the JJ Act, 2015 and, therefore, a person who should be rescued.
- Anybody who has been recruited, harboured, transported, detained, obtained, or procured for CSE.
- Any person who has been detained in a brothel, with or without consent (Section 6 (1) (a) ITPA).

### **2.2.3. The Traffickers / Perpetrators in Trafficking for Commercial Sexual Exploitation**

Trafficking is an organized crime. The list of offenders in a trafficking crime include one or more of the following<sup>216</sup>:

- Recruiter
- Agents of recruiter
- Seller of trafficked person
- Buyer of trafficked person
- Transporter
- Conspirator
- Abettor
- Financier

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<sup>216</sup> P.M. Nair, "Handbook for Law Enforcement Agencies on Trafficking for Sexual Exploitation", UNODC, 2007.

- Parent(s)/Guardian(s) who knowingly sell/cause to sell/traffic their children/ward
- ‘Customer’/clientele
- Pimp
- Brothel madam
- Brothel managers
- Any other person who is knowingly involved in any act of commission and/or wilful omission in the process of human trafficking.

The list is only illustrative and not exhaustive; and the onus is on the Investigating Officer (IO) to fathom the entire process of trafficking and identify who else is involved.

#### **2.2.4. The process of trafficking**

Human trafficking is an organized crime. It is a crime with several components and therefore has been referred to as a ‘basket of crimes’.<sup>217</sup> From the victim’s perspective, a typical case of human trafficking for sexual exploitation may have the following components: -

- displaced from her community, which is tantamount to kidnapping/abduction;
- procured illegally;
- sold by somebody;
- bought by somebody
- imported from a foreign country;
- wrongfully restrained;
- wrongfully confined;
- physically tortured/injured;
- subjected to criminal force;
- mentally tortured/harassed/assaulted;
- criminally intimidated;
- outraged of her modesty;
- raped/gang raped/repeatedly raped; filmed while performing sexual acts;
- subjected to perverse sexual exploitation (unnatural offences);
- defamed;
- enslaved, bonded;

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<sup>217</sup> Nair PM, Human Trafficking: Dimension, Challenges & Responses, Konark Publishers, 2010.

- subjected to sexual slavery;
- victim of criminal conspiracy.

This list is only illustrative and not exhaustive. It must be noted that not all elements may be present, but the act may still amount to trafficking. For instance, in case of children belonging to devadasi families, the child may not be displaced, yet other elements may be present.

### **2.2.5. Indicators of Human Trafficking**

The crime can be gauged only with reference to the context, and therefore alertness in observation is the key aspect in detection. The indicators will vary from context to context. However, some of the generic indicators are as follows: -

- a. Lack of freedom of the victim;
- b. Clientele ‘calling themselves as customers’ visit more often and surreptitiously;
- c. Association of drugs, alcohol, smoke etc.;
- d. Purchase and usage of contraceptives;
- e. Medical issues of the victims especially sex related and reproductive and sexual health;
- f. Visible injuries on the trafficked victim like cigarette burns etc.;
- g. Traumatized and distraught victims;
- h. An ambience of make-believe world where the victims are made to show up or made to indulge in exhibitionism;
- i. Nexus among the officials or other duty bearers, which generally gets discussed;
- j. Huge asset creation by the traffickers and conspirators.

This list is only illustrative and not exhaustive.

### **2.2.6. Trafficking vs. other crimes**

Sex trafficking and labour trafficking can be intertwined, for example, a woman trafficked for domestic labour can be a victim of sex slavery also. Trafficking differs from ‘smuggling of migrants’ as in the case of latter there is an element of consent from the victim. However, the investigating officers should be circumspect in ascertaining consent because if the consent has been obtained by lure, deception, coercion or force, it is not an informed consent and therefore, even such persons are also victims of trafficking. The trafficking process essentially has a chain starting from source, transit and then to destination. It is a continuing crime, and may entail moving from one destination to another or the exploitation by several persons continuing over a period of time.

The cause of trafficking can be classified into two: -

- a. vulnerability factors, sometimes called push factors;
- b. demand factors, usually called pull factors.

The NHRC research<sup>218</sup> had brought out that the vulnerability factors are essentially ignorance of rights, illiteracy, lack of care of children in family and community, gender discrimination, discrimination on the basis of caste, community, disability, sexual orientation etc., economic disparity, lack of law enforcement, lack of priority among respondents and nexus, lack of political will and/or nexus, etc. Recent empirical research revealed that economic conditions, lack of family support, and force were key causes, among others that pushed women into prostitution.<sup>219</sup> The demand factors, which constitute the major causes of human trafficking is essentially violence of human beings against others. This violence can be manifested into different acts that constitute brutality. Sex slavery is an aggravated form of violence. The abuser/exploiter indulges in several types of violence on the victim causing different types and intensity of harm including physical, emotional, mental, financial, health hazards, etc.

The word ‘customer’ does not appear in the ITPA. With respect to sexual exploitation of children, the ‘customers/ clients’ can be charged directly under POCSO also.

Trafficking can be within the country or trans-border also. It can even take place under one roof. It is essentially a crime, which makes huge profits with lower risks.

### **2.2.7. Definition of “child” in laws relevant to trafficking**

Section 2(aa), ITPA	“child” means a person who has not completed 16 years
Section 2(cb), ITPA	“minor” means a person who has completed 16 years but not 18 years.
Section 2(d), Goa Children’s Act, 2003	“child” means any person who has not completed 18 years of age; in an offence of rape, “child” means any person who has not completed 16 years of age.
Section 2(d), POCSO Act	“child” means any person below 18 years
Section 2(12), JJ Act, 2015	“child” means a person who has not completed 18 years.

<sup>218</sup> Nair, P.M & Sen. S, Trafficking in Women and Children in India, Orient Longman, 2005

<sup>219</sup> Wilson, B & Nochajski, T.H., "On the Continuum of Exit: Understanding the Stages of Change Among Women in Commercial Sexual Exploitation", Gender Issues, September 2017, [https://www.researchgate.net/publication/319720514\\_On\\_the\\_Continuum\\_of\\_Exit\\_Understanding\\_the\\_Stages\\_of\\_Change\\_Among\\_Women\\_in\\_Commercial\\_Sexual\\_Exploitation](https://www.researchgate.net/publication/319720514_On_the_Continuum_of_Exit_Understanding_the_Stages_of_Change_Among_Women_in_Commercial_Sexual_Exploitation)

The term “child” or “minor” is not defined under the IPC and does not appear in the Bonded Labour System (Abolition) Act, 1976.

### **2.2.8. Trafficked child victim is a “child in need of care and protection”**

Any child found vulnerable or likely to be inducted into trafficking is a child in need of care and protection (CINCP) under Section 2(14)(ix) of the JJ Act, 2015. Such a child can be produced before the Child Welfare Committee (CWC) by any police officer or Special Juvenile Police Unit (SJPU) or officer of the District Child Protection Unit (DCPU), labour inspector, Childline, public servant, probation officer, Child Welfare Officer, social worker, public spirited citizen, nurse, doctor, or management of a hospital or nursing home, or by the child herself/himself.<sup>220</sup> Rehabilitation and restoration/repatriation of a trafficked child will have to be in accordance with the JJ Act, 2015.

### **2.2.9. Offences relevant to trafficking of children**

Under the IPC, the following provisions would apply to a case of trafficking for commercial sexual exploitation of a person below 18 years:

- Procurement of minor girl under 18 years – Section 366-A
- Importation of girl under 21 years from foreign country– Section 366-B
- Trafficking of minor– Section 370 (4)
- Trafficking of more than one minor – Section 370 (5)
- Punishment for repeat trafficker of minors – Section 370 (6)
- Exploitation of a trafficked minor – Section 370-A(1)
- Habitual dealing in slaves – Section 371
- Selling minor girl for purposes of prostitution – Section 372
- Buying minor girl for purposes of prostitution – Section 373

Under ITPA, the following provisions are relevant:

- Punishment for keeping a brothel or allowing premises to be used as a brothel – Section 3
- Punishment for living on the earnings of prostitution of a child – Section 4
- Procuring, inducing or taking child for the sake of prostitution – Section 5
- Trafficking/abetment of trafficking – Section 5B
- Person visiting brothel for sexual exploitation of trafficked victim – Section 5C
- Detaining a person in premises where prostitution is carried on – Section 6
- Prostitution in or the vicinity of public place in respect of a child – Section 7

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<sup>220</sup> JJ Act, 2015, Section 31(1).

While the POCSO Act, 2012 does not expressly use the term “trafficking”, according to Explanation III to Section 16, employing, harbouring, receiving or transporting a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any sexual offence under the Act would constitute aiding the offence and amount to abetment.

The following offences will be relevant to trafficking for commercial sexual exploitation under the JJ Act, 2015:

- Penalty for non-reporting a child found separated from guardian – Section 33
- Punishment for cruelty to child – Section 75. Under this provision, assault, abandonment, abuse, exposure or wilful neglect of a child or causing or procuring a child through such acts in a manner likely to cause the child unnecessary mental or physical suffering is an offence.
- Cruelty by person employed or managing an organization responsible for care and protection of child – Section 75, second proviso
- Disability caused due to cruelty – Section 75, third proviso
- Exploitation of child employee – Section 79
- Sale and procurement of children for any purpose – Section 81

Under the Goa Children’s Act, 2003, exploitation of child for commercial sexual exploitation is an offence under Section 9(4).

### **2.2.10. Presumptions in Law**

Under the ITPA, the ‘doctrine of presumption’ is a good weapon for preventing and combating trafficking by virtue of the fact that the specific provisions of presumption casts onus of proof on the accused. The relevant provisions are<sup>221</sup>:

- Section 3 provides punishment for keeping a brothel or allowing premises to be used as a brothel. It shall be presumed, u/s 3(2A), that the concerned person (owner, tenant, lessee, occupier, in-charge of any such premises) has knowledge of the same if:
  - a report is published in a newspaper with local circulation that the premises concerned are being used for prostitution, as revealed during a search;
  - a copy of the search list is made available to the person concerned.

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<sup>221</sup> P.M. Nair, "Handbook for Law Enforcement Agencies on Trafficking for Sexual Exploitation", UNODC, 2007.

- If any person, over 18 years of age, is proved to have exercised control, direction or influence over the movements of another person who is below 18 years of age, in such a manner as to show that he/she is aiding, abetting or compelling the other person to for prostitution, it shall be presumed that he/she is living on the earnings of prostitution of another person and is liable under Section 4 of ITPA.
- If a person is found with a child in a brothel, it will be presumed unless the contrary is proven that the person has detained the child in a premise where prostitution is carried on.<sup>222</sup>
- If medical examination of a child or minor found in a brothel reveals sexual abuse, it will be presumed unless the contrary is proven that the child or minor had been detained in the brothel for the purpose of prostitution or was sexually exploited for commercial purposes.<sup>223</sup>
- According to Section 6 (3) of ITPA, a person shall be presumed to have detained a woman or a girl in a brothel or upon any premises for CSE, if the person withholds from her any of her property (like jewellery, dress, money etc.), with intent to compel/induce her to remain there. He is also liable if he threatens her with action if she takes away any such property lent/supplied to her by, or on the direction of, such a person.

### 2.2.11. Relevant authorities

Act	Investigation	Departments	Adjudication	Care & Protection, Rehabilitation
IPC	Police and special units like AHTU	Home	Sessions Court	CWC
ITPA	Special Police Officer/AHTU		Metropolitan Magistrate/Judicial Magistrate of First Class	CWC
POCSO Act, 2012	Police/SJPU	Department dealing with Children	Special Court	CWC Special Court

### 2.2.12. Investigating authorities and their powers

- Under Section 370, IPC and other offences related to child trafficking, there is no legal prescription or restriction on the minimum rank of the investigator.

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<sup>222</sup> ITPA, Section 6(2).

<sup>223</sup> ITPA, Section 6(2A).

- Under ITPA, State Governments are required to appoint a special police officer not below the rank of an Inspector of Police in specified areas to deal with offences under the Act.<sup>224</sup>
- Special Police Officers must be assisted by subordinate police officers including women police officers wherever practicable.<sup>225</sup> Five leading social welfare workers including women workers can be associated with the Special Police Officer and advise them about questions of general importance about the implementation of the ITPA.<sup>226</sup>
- Powers available to the Special Police Officer can be conferred by the District Magistrate upon any retired police officer not below the rank of Inspector before or retired military officer not below the rank of a commissioned officer, for specific cases or classes of cases or to cases generally.<sup>227</sup>
- The Central Government can appoint police officers as Anti-trafficking police officers for investigating offences under the ITPA or under any other law for dealing with sexual exploitation of persons and committed in more than one State.<sup>228</sup> These officers can exercise powers and discharge functions all over India. The Government of India has notified officers of the rank of Inspectors and above in CBI under this provision of law.

## **2.3. Processes for each Stakeholder**

### **2.3.1. Role of Special Police Officers**

- I. Police Officers who are authorized to investigate crimes under ITPA, 1956 such as notified police officer under Section 13(1) of ITPA, or subordinate police officers authorized by the State Government under Section 13(3)(a) of ITPA or Central (Anti) Trafficking Police Officers under Section 13(4) of ITPA;
- II. Police officers authorized to arrest offenders such as under Section 14(i) arrest without warrant can be done by a special police officer or anybody acting under his direction or guidance, or under Section 14(ii) arrest without warrant can be done by any subordinate officer, when authorized in writing by the special police officer, or under Section 14(iii) arrest even without a written order by the SPO can be done by any police official, provided he/she is of the rank of SI or above and believes delay will lead to destruction/ concealment of evidence, or the offender is likely to escape, or suspects that the person is stating a false name/address etc.

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<sup>224</sup> ITPA, Section 13(1) and (2).

<sup>225</sup> ITPA, Section 13(3)(a).

<sup>226</sup> ITPA, Section 13(3)(b).

<sup>227</sup> ITPA, Section 13(2A).

<sup>228</sup> ITPA, Section 13(4).

III. Police officers who can undertake rescue are any notified police officer as stated at I. above. Any police officer authorized to arrest an offender as stated in II. above can rescue any victim while undertaking arrest of suspect. Any police officer of the rank of SI, and above, specially authorized by any competent Magistrate (Metropolitan Magistrate or First Class Judicial Magistrate or DM or SDM) under Section 16 of ITPA.

### **2.3.2. Steps and Procedures for Police Officers**

1. Since the crime of trafficking has linkages from source to transit to destination, the FIR can be registered at any of these places.
2. The FIR can be registered on the statement of any person who is aware of the facts including NGO. If nobody comes up, the police officer can be the complainant.
3. The investigation has to be taken up by a notified special police officer like an SPO. If SPO is not available, and the situation demands investigation, the officer in-charge of the police station can make an entry in the station diary accordingly and take over investigation. However, the telephonic concurrence of the SPO or a senior officer should be obtained and noted in the case diary. As and when the SPO returns, the investigation should be handed over to him. The absence of SPO is never a detriment in conducting rescue or starting investigation of a crime of human trafficking.

See also BPRD's Human Trafficking Handbook for Investigators (March 2007).<sup>229</sup>

### **2.3.3. Investigation from the organized crime perspective**

Human trafficking is a crime of crimes. It is a basket of crimes. In this basket one can dig out the elements of abduction, kidnapping, illegal detainment, illegal confinement, criminal intimidation, hurt, grievous hurt, sexual assault, outraging modesty, rape, unnatural offences, selling and buying of human beings, servitude, criminal conspiracy, abetment etc. Therefore, multiple abuse and abusers located at different points of time and place together constitute the organized crime of trafficking. A host of human rights violations like denial of privacy, denial of justice, denial of access to justice, deprivation of basic rights and dignity, etc. constitute other part of the exploitation. Therefore, there is no doubt that trafficking is an organized crime.<sup>230</sup>

Since human trafficking is an organized crime, the entire linkage from source to transit to destination and all the offenders in all these places need to be

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<sup>229</sup> Available at <http://nlrd.org/wp-content/uploads/2012/02/BPRD-Trafficking.pdf>

<sup>230</sup> Nair, PM, Trafficking Women and Children for Exploitation - Handbook for Law Enforcement Agencies in India, UNIFEM, UNODC, 2007.

investigated into.<sup>231</sup> It would be appropriate to develop a crime map with all the linkages and kept as part of the case diary, so that a comprehensive picture is available. The financial trail needs to be investigated and established to break the chain and the nexus of multiple offenders and perpetrators.

#### **2.3.4. Preventing misuse of public place**

Under Section 7 of ITPA, the role of law enforcement agencies is in not only taking action against the offenders who misuse public places, but also in preventing such misuse. Public place, includes the following:

- Any premises within an area notified by the Government;
- Any premises within a distance of 200 meters of any place of public worship, educational institution, hotel, hospital, nursing home or other official/public domain;
- Any hotel defined under Section 2(6) of the Hotel Receipts Tax Act, 1980, any place where residential accommodation is provided by way of business, for a monetary consideration, is a hotel;
- Any transport or vehicle to which public has access;
- ‘Public place’ has, however an overarching definition, as per the Supreme Court’s decision in *Gaurav Jain v. Union of India*.<sup>232</sup> “Any place intended for use by, or accessible to the public” is a public place. “It is not necessary that it must be public property”, “Even if it is a private property, it is sufficient that the place is accessible to public.”<sup>233</sup>

#### **2.3.5. Suspending/cancelling hotel licence**

Under Section 7(2)(c) of ITPA, if the public place which, is misused happens to be a hotel, the hotel license may be suspended for a period not less than three months and may be extended to one year. Therefore, in such circumstances, the police officer should move the concerned court (District Magistrate is the competent court) for the suspension of the hotel license. Additionally, if it can be proved that the victim of prostitution or CSE in the hotel happens to be a child or minor (i.e. any person, male or female, who is under 18 years of age), then the hotel license is liable to be cancelled. The police officer has to move the court of the District Magistrate for the same.

#### **2.3.6. Closure and eviction of brothels with and without notice**

- Under Section 18(1) of ITPA, the District Magistrate can act on information

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<sup>231</sup> MHA Advisory on Human Trafficking as an Organized Crime, 30 April, 2012 [http://mha.nic.in/sites/upload\\_files/mha/files/advisory%20HT%20as%20organised%20crime%20on%2030.4.2012.pdf](http://mha.nic.in/sites/upload_files/mha/files/advisory%20HT%20as%20organised%20crime%20on%2030.4.2012.pdf)

<sup>232</sup> AIR 1997 SC 3021.

<sup>233</sup> *Gaurav Jain v. UOI*, AIR 1997 SC 3021.

from police or NGO or anybody else. The Commissioner of Police or any other official who has been vested with the powers of DM is also empowered to take action under this provision.

- The information should be that any house, room, place or portion thereof, located within a distance of 200 meters of any public place (as explained by the Supreme Court) is being used as a brothel by any person, or is being used for commercial sexual exploitation of anybody.
- DM can issue notice to the owner, lesser, landlord (of the house, room, place or portion thereof) or their agent, as well as the tenant, lessee, occupier of, or any other person in charge of such house, room, place or portion thereof.
- The notice sent to them by the DM directs that show cause be filed within 7 days of the receipt of the notice stating why the property should not be attached for misuse.
- The DM should hear the party before taking a decision.
- After hearing, if the DM is satisfied about the misuse, he can (a) direct eviction of the occupier within 7 days of the order and (b) direct that prior approval of the DM be obtained before letting out the place again during the following one year (and during the following 3 years if a child or minor has been found during the search of the premises).
- Under Section 18(3) of ITPA, the order of the DM is non-appealable and cannot be stayed or set aside.
- Since closure of brothel would entail loss of 'income' for the exploiters, and no relief is available by way of appeal, this is a stringent section of law which the administrators, police, prosecutors and NGOs can effectively utilize to combat and prevent trafficking.
- The Sub Divisional Magistrate (SDM) also can exercise all these powers.

According to Section 18(2) of ITPA, the court convicting a person of any offence under Section 3 of ITPA (keeping a brothel, etc.) or Section 7 of ITPA (misuse of public places for CSE) may pass orders of closure and eviction without any notice to any such person. Therefore in the event of a conviction under Section 3 or Section 7 of ITPA, the police/ prosecutor should immediately move the court for closure/eviction under Section 18 of ITPA. However, the eviction order of the judicial magistrate is a sequel to the conviction of the person to be evicted, and cannot precede conviction.<sup>234</sup> According to Section 18 of ITPA, orders passed by

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<sup>234</sup> A.C. Aggarwal and another Vs. Mst. Ram Kali, 1968 Cri L.J.82

the DM under Section 18(1) of ITPA and orders by the convicting court under Section 18(2) of ITPA shall not be subject to appeal and shall not be stayed or set aside by any court, civil or criminal. Therefore, the finality of order by a competent court is a very powerful tool to combat CSE.

### **2.3.7. Rescue dos and don'ts**

- Children are to be dealt with under the provisions of the JJ Act, 2015 also. Therefore, while rescue is going on, do segregate the children from the adult victims and proceed with them under JJ Act. They are children in need of care and protection and should therefore be produced before the Child Welfare Committee (CWC) set up under the JJ Act, 2015.
- The police officers need to know beforehand as to where the Rescue Home is available. If there is a need for such Homes, it should be taken up with the concerned authorities. Of late many NGO's have set up such Homes. Keep a ready list of their address, telephone, contact person, etc.
- As and when the rescue is done, notify the authorities of the concerned Home regarding the number of persons going to be lodged so that they could be prepared to receive them and organize themselves; along with the authorities under the JJ Act of 2015.
- Rescue party should have adequate number of vehicles so that the rescued persons could be transported without publicity and glare. Accused and suspected persons should never be allowed to mix up with the rescued persons.
- Search and seizure of all material evidence, including documents in the brothel, is an important job. This should be done at the first available opportunity so that evidence is not destroyed or made to disappear by anybody, especially the exploiters.
- Training of police officials on victim protocols is a pre-requirement to see that they are aware and sensitized to the issues concerned. A copy of this handbook, translated in the local language, would be an appropriate tool kit.
- Ensure accountability of all the officials taking part in the rescue. Brief them well in advance on all the points mentioned above and ensure compliance. Accountability demands appreciation of good work as well as condemnation of all wrong-doings, including acts of omission and commission. Utilize the services of reputed NGOs, as independent agency, to understand and assess how things are and were during the search so that appropriate steps could be taken accordingly.

### **2.3.8. Post rescue dos and don'ts**

- Interview the rescued persons to know about their personal details like age, nativity, health status, family history, etc., and also to identify their best

interests so that actions can be oriented accordingly. Interview is essential in the investigative process to identify the traffickers and other exploiters so that they can be brought to book. NGOs and trained counsellors are useful in de-traumatizing the person and helping in ice breaking so that the police officials can carry on with the interview. Interview must be carried out by a female police officer or in the presence of a female NGO worker as mandated u/ Section 15(6A) ITPA.

- There can be one or more statements u/ Section 161 and 164 Cr.P.C. Hence do record statements as the story unfolds and when the victim is comfortable to speak, especially after counselling.
- Do not delay production of the rescued persons before the Magistrate (Section 17 ITPA).
- SPO can produce the rescued person before any Magistrate (Section 7 ITPA).
- Intermediate custody can be obtained for a period not exceeding 10 days by which time the person has to be produced before the appropriate Magistrate (Section 17 ITPA).
- Rescued children should be produced before the Child Welfare Committee (CWC) constituted under the JJ Act, 2015.
- During the pendency of verification, the child can be kept in a child care institution after obtaining orders from the CWC concerned.
- Home verification is to be done by Probationary Officer, who can utilize services of NGOs.
- Suitability of the rehabilitation home should be verified before the person is lodged. Magistrate may utilize the services of five NGOs (including 3 female NGO workers) for home verification and also consult with them in the process of decision making u/ Section 17(5) ITPA; including following of the procedure under the JJ Act of 2015.
- For trauma counselling of victims, it is ideal to utilize the services of NGOs. A list of such volunteers/NGOs, who have specialization in this field, be maintained at the police station. The Family Counselling Centres (FCC) available at certain police stations in certain states have trained counsellors whose services can be utilized.
- For legal counselling, networking with lawyers/NGOs is advisable. A list of willing lawyers should be maintained at the police station. Contact Bar Council and District Legal Services Authority for the same.
- Medical care and attention (including mental health) should be provided immediately after rescue. Also make arrangements for expert care, if required. Besides specialist doctors in hospitals, Medical Associations can be contacted for such services.

- Network with appropriate agencies (government, NGO and corporate offices) for rehabilitative steps.

## **2.4. Anti-Human Trafficking Unit (AHTU)**

AHTUs have been setup by the government to prevent and combat human trafficking by the Police with the support of all concerned especially prosecutors, relevant govt. agencies and NGOs.<sup>235</sup> AHTU is a task force with powers to collect intelligence, take up investigation of cases and file prosecution reports, as well as undertake other deterrent actions like eviction of places, etc. In certain states, AHTUs have been notified as a police station and therefore, they can register FIR as *suo motu* and proceed with investigation. In other states where they are not notified as police station, the superintendent police should get the case registered with the jurisdictional police station and thereafter get the case investigated by the AHTU. As per the configuration envisaged, every AHTU should have at least one NGO as its component. The SP of the district needs to ensure this.

## **2.5. Arrest Procedures**

Special Police Officers (SPO) under ITPA have the power to:

- Arrest without warrant;<sup>236</sup>
- Authorise or direct arrest without warrant. For this purpose, the subordinate officer should be given a written order specifying the person to be arrested and the offence for which the arrest is being made. The subordinate officer before arresting the person should inform him the substance of the order and show the order, if required by such person.<sup>237</sup>

### **Arrest without written authorization from Special Police Officer**

If a police officer not below the rank of Sub-Inspector (SI) specially authorized by the SPO believes that the delay in obtaining an order for arrest could result in destruction or concealment of valuable evidence or escape of the suspect, or if the name and address of such a person is unknown or there is reason to suspect that a false name or address has been given, the officer can arrest the person concerned without such order.<sup>238</sup> He should, however, report the arrest and the

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<sup>235</sup> The AHTU was originally set up under the UNODC project of 2006-2008, with the first AHTU in India being setup at Hyderabad during January 2007. For rules relating to AHTUs, refer to “Synergy in Action: Protocol on the Structure and Function of the Integrated Anti Human Trafficking Unit (IAHTU) in India” (2007) at [https://www.unodc.org/documents/human-trafficking/India\\_Training\\_material/Protocol\\_on\\_AHTU.pdf](https://www.unodc.org/documents/human-trafficking/India_Training_material/Protocol_on_AHTU.pdf)

<sup>236</sup> ITPA, Section 14(i).

<sup>237</sup> ITPA, Section 14(ii).

<sup>238</sup> ITPA, Section 14(iii).

circumstances in which the arrest was made to the Special Police Officer as soon as may be. However, arrest should be in accordance with evidence and necessity.<sup>239</sup>

### 2.5.1. Search procedures

- If a SPO or Trafficking Police Officer has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a child living in any premises, and that a search warrant would cause undue delay, he can after recording the grounds of his belief, enter and search such premises without a warrant.<sup>240</sup>
- Before carrying out the search, two or more respectable inhabitants of whom at least one should be a woman of the locality should be called to attend and witness the search, and a written order can be issued to them to do so.<sup>241</sup> The woman witness does not necessarily have to be from the same locality in which the place to be searched is situated.<sup>242</sup> Refusal or neglect to attend and witness a search when called upon to do so by a written order delivered and tendered would be an offence under Section 187, IPC.<sup>243</sup>
- The SPO or Trafficking Police Officer (TPO) should be accompanied by at least two women police officers, and where any woman or girl removed needs to be interrogated, it should be done by a woman police officer.<sup>244</sup> If no woman police officer is available, the interrogation should be done only in the presence of a lady member of a recognised welfare institution or organization recognised by the State Government.<sup>245</sup>

**Step-by-step rescue procedure** Extracted from: **UNODC, Standard Operating Procedures (SOP) on Investigating Crimes of Trafficking for Commercial Sexual Exploitation, 2007, pp.18-20.**

1. Enter source information in the General Diary (GD) of the Police Station (PS) in such a way that anonymity of the source/ victim/ location is not compromised.
2. Carry out a recce of the place to be searched. An official conversant with the local language should be sent incognito, to the place. Take the help of local officers/ NGOs and empowered survivors who are willing to co-operate.
3. Draw a sketch map of the area, which can be used for briefing and assigning specific duties to both officials and witnesses involved in the rescue. This includes duties like cordoning, guarding entry and exit points, locating hide-outs, identifying

<sup>239</sup> Nair PM, *Rights Based Investigation: A Changed Mantra*, Tata Institute of Social Sciences, 2017

<sup>240</sup> ITPA, Section 15(1).

<sup>241</sup> ITPA, Section 15(2).

<sup>242</sup> ITPA, Section 15(2), proviso.

<sup>243</sup> ITPA, Section 15(3).

<sup>244</sup> ITPA, Section 15(6A).

<sup>245</sup> ITPA, Section 15(6A).

- a safe place to keep rescued persons till the rescue operation is completed, etc.
4. Wherever possible, obtain a search warrant from the jurisdictional Magistrate u/ Section 166 Cr.P.C. and/ or u/ Section 15/ 16 ITPA.
  5. Ensure adequate composition of the rescue team:
    - The team should have two women officials of any rank (Section 15(6A) ITPA).
    - If rescued persons are to be interviewed, it shall be done by a woman police officer, if no woman police officer is available the interview should be done only in the presence of a lady member of a recognized welfare institution/ organization (NGO) (Section 15 (6A) ITPA). Hence, do co-opt a lady police official or a female representative of an NGO.
    - Secure the help of NGOs to act as panchas/ mediators/ witnesses. Rescue activities require two witnesses; one of them shall be a woman (Section 15 (2) ITPA).
    - The team should have at least one police officer who is legally empowered to conduct a rescue [(i.e. a SPO notified u/ Section 13 (1) ITPA, or CTPO notified u/ s Section 13 (4) ITPA or any police officer above the rank of SI duly authorized by the Magistrate u/ Section 16 (1) ITPA].
  6. Arrange an adequate number of vehicles and escort for rescued persons so that victims are always kept segregated from the offenders.
  7. Arrange materials and equipment required for documentation and evidence collection such as a writing pad, white paper, pen, pencil, box for transporting the exhibits, box for safe-keep of the belongings of the rescued persons, camera, video and audio recording equipment, first aid kit, torch, hammers, cutters, rope for cordoning etc.
  8. Inform appropriate authorities (including the Police Nodal Officer) regarding the proposed activities including the places to be visited and time of operation, keeping in mind the need for confidentiality.
  9. Alert the authorities of the government or recognized Homes run by NGOs in the vicinity, regarding the approximate number of persons likely to be rescued and the time when they are likely to be brought there.
  10. Conduct the rescue promptly. If the situation demands that more places need to be searched without delay, go ahead and do it. The grounds for taking this step should be clearly recorded in the report.
  11. Inform rescued persons about the authority and purpose of the search and rescue. Assure them of the care and attention they will get.
  12. Identify children (those below 18) among the rescued, as they have to be produced before Child Welfare Committee (CWC).
  13. Ensure safety of all rescued persons.
  14. Do arrest the offenders if they are present. Keep them segregated from the victims.
  15. Collect documents and exhibits from the place of rescue. Do not postpone this task.
  16. Allow rescued persons to take their belongings with them.
  17. If the rescued persons have children with them, ensure they are also rescued.
  18. If the rescued persons belong to another state(s), inform the Police Nodal Officer of the concerned states.
  19. If the rescued person belongs to a foreign country, inform the Police Nodal Officer of the state and network with appropriate NGOs for necessary follow up.

## **Removal of persons and production before Magistrate**

- The SPO or TPO has the power to remove all persons found in the premises in which the search is being carried out and should produce them before the appropriate Magistrate.<sup>246</sup>

## **Facilitate Medical Examination**

A person removed from a premise and produced before a Magistrate should be examined by a registered medical practitioner for age-determination or for detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases.<sup>247</sup>

## **Production after rescue**

- A person below 18 years rescued from a brothel or any other site who has allegedly been trafficked should be produced by the police before the Child Welfare Committee within 24 hours.<sup>248</sup>
- If the person's age is unclear, the police should request the Magistrate to determine the person's age. For this purpose, the Magistrate should follow the procedure prescribed under Section 94(2), JJ Act.

## **Facilitating age-determination**

- The police should collect the rescued person's birth certificate from the school, matriculation certificate or equivalent certificate from the concerned examination Board, if available, or birth certificate from a corporation or municipal authority or Panchayat.
- If these documents are not available, the police should seek a direction from the CWC or Magistrate for an ossification or latest medical age determination test. Refer to Section I.2 above for more details.

## **2.6. Role of Police in Prosecution**

Besides the normal duties envisaged for the Police in the prosecution of any crime, certain additional responsibilities emerge in a trafficking crime, as listed below:

- If the victim has been restored or repatriated to the original home, within India or abroad, and the victim is not willing to come back to the place of rescue for appearing as a witness in the court of law, the police officers shall link up with all agencies concerned and arrange for video-conferencing. Within the country, the facilities of NIC be utilized.<sup>249</sup>

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<sup>246</sup> ITPA, Section 15(5).

<sup>247</sup> ITPA, Section 15(5A).

<sup>248</sup> JJ Act, 2015, Section 31(1).

<sup>249</sup> See Tata Institute of Social Sciences, "Standard Operating Procedures on Inter Jurisdictional Transfer of Evidence in Trafficking Crimes Through: Video Conferencing" (2017).

- Assistance of special educators or persons familiar with the manner of communication of the child should be taken to communicate with children with disabilities. The list maintained by the DCPU for this purpose can be relied upon.
- If the victim speaks a different language, the translator need to be arranged for which the police officer needs to link up with the DCPU.
- Confiscation of illegal assets is an important aspect that should be undertaken with respect of a trafficking crime. This requires assimilation of all data, physical and electronic (e.g bank transactions, if any) and an in-depth analysis. The services of experts from banking sector or from the department of income tax or enforcement directorate may be utilized if and when required.

## **2.7.Role of NGOs in Anti-human trafficking**

ITPA of 1956 envisages a large role of NGOs/ CBOs and social workers. Following are the some of the responsibilities that NGOs can perform: -

- ***Advisory Body:*** Under Section 13(3)(b) of ITPA, the State Govt. may notify a non-official advisory body of leading social workers to advise the SPO on questions regarding the working of ITPA. Therefore, this body can advise and facilitate the police to (a) carry out rescue, (b) ensure that the rights of rescued persons are protected (c) initiate steps for victims' best care and attention, keeping in view victims' best interests, (d) take steps for empowerment and rehabilitation of victims. (e) take steps for stringent action against traffickers and other exploiters and (f) initiate and implement steps for prevention of trafficking and (g) network with all concerned government and non-government agencies.
- ***Accompanying Police during search:*** Under Section 15 (2) of ITPA, the SPO should arrange two or more respectable persons of the locality to attend and witness the searches. NGOs are the appropriate agencies to be contacted by police in such situations. Out of the male and female accomplice, the male witness should be from the locality, whereas the female witness could be from anywhere, preferably a lady social activist. There should be a list of women activists and NGOs (ready reckoner) whose services can be called upon in such situations. NGOs have been given a legal right to be part of the rescue process.
- ***Interviewing rescued/removed persons:*** Under Section 16 (6a) of ITPA, any female rescued or removed during a search (this includes victims, suspect and accused) can be interviewed by the police officer only in the presence of a female police officer or a female member of NGO. This gives a legal right to NGOs to be part of the investigation process.
- ***Home verification of rescued persons:*** Under Section 17(2) of ITPA, it is

mandatory for the Magistrate to cause home verification of the rescued person before taking a final decision regarding her rehabilitation and to direct the Probation Officer (under the Probation of Offenders Act, 1958). The Magistrate can call upon NGOs to carry out the task. Even the Probation Officer who has been tasked for the same can, in turn, entrust the job to NGOs. This gives a legal right to NGOs to be part of the rehabilitation process; as also under the JJ Act of 2015. In the case of child victims of trafficking, the CWC should call for a Social Investigation Report (SIR) based on which it can conduct inquiry and pass rehabilitation orders. The CWC can direct a NGO, Probation Officers, DCPU or Child Welfare Officers to conduct the SIR and submit a report.<sup>250</sup>

- ***NGOs to advise Magistrate on rehabilitation:*** Under Section 17(5) of ITPA, the Magistrate may summon a panel of five respectable persons, three of whom shall be women, to assist him/her in taking decision in home verification and rehabilitation of the rescued person. In the case of children, all decisions related to rehabilitation will be taken by the CWC. It would be better that the CWC is provided with a list of NGOs who are working in the field so that their services can be utilized at the appropriate time. This provision also gives a legal right to NGOs to be part of the justice delivery process and an opportunity to ensure that the processes conform to the principles of human rights and the decisions are in the best interest of the rescued person.
- Private lawyers are allowed to assist prosecution and take up the cause of victim.<sup>251</sup>

## **2.8.Prevention of Human Trafficking**

Human trafficking can be prevented by concerted action. The following are some of the steps, which need to be considered:

- Law enforcement should be undertaken in an integrated manner with focus on prosecution (investigation and charge sheet, arrest etc. of all offenders), protection of the victim (restoration, repatriation, rehabilitation etc.) and undertaking preventive steps at source, transit and destination areas.
- Punishing the clientele and confiscating the illegal assets are important deterrents, leading to prevention.
- Vulnerability factors need to be identified and concerned development agencies notified to undertake timely action. Coordination with the DCPU is necessary as it has been vested with the responsibility of identifying families at risk and children in need of care and protection and assessing number of children in difficult circumstances.<sup>252</sup>

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<sup>250</sup> JJ Act, 2015, Section 30(iii).

<sup>251</sup> Sathyavani Ponrani v. Samuel Raj, CrI. O.P. (MD) No. 5474 of 2010, Decided On: 07.07.2010 by the Madurai Bench of the Madras High Court.

<sup>252</sup> JJ Model Rules, 2016, Rule 85(1)(vii-viii).

- Empowering the youth to fight against human trafficking and to undertake steps in prevention can be an effective step in prevention. In order to associate the youth, anti-human trafficking clubs can be set up in the educational institutions as well as in the youth organizations like Nehru Yuwak Kendra, self-help groups and so on.

## 2.9 Rehabilitation of Trafficked Victims

Child Victims of trafficking may be rehabilitated both under the JJ Act as well as the ITPA although the JJ Act is the overriding law in respect of all matters relating to children in conflict with the law and children in need of care and protection.<sup>253</sup> Under the ITPA Act, following a child’s rescue, s(he) is to be mandatorily produced before a Magistrate who is required to conduct an inquiry with the help of a Probation Officer. The inquiry will assess the age, character and history of the victim as well as the suitability of her parents, guardian or husband for taking charge of her. The inquiry will additionally also look into the prospect of rehabilitation of the child.<sup>254</sup>

During the period of inquiry, the Magistrate may place the child in safe custody, including in a Children’s Home for a maximum period of three weeks.<sup>255</sup> Post the enquiry, if satisfied that the child is in need of care and protection, the Magistrate may pass orders requiring the child to be placed in a Protective Home or in any other custody for a minimum period of one year and maximum period of three years.<sup>256</sup> A Protective home refers to an institution set up by the Government under the ITPA for the purpose of care and protection of victims of trafficking.<sup>257</sup>

**Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women<sup>258</sup>**

In addition to other aspects of trafficking, the Plan also dealt with Rehabilitation and stated as follows:

“Rehabilitation, Reintegration and Repatriation of Trafficked Victims with Special Focus on Child Victims:<sup>259</sup>

The rehabilitation, reintegration and repatriation of victims of trafficking being a long process must be planned, taking into account the specific short and long-term needs of individual victims. Efforts must be non-punitive and aimed at protecting the rights of the victims. All stakeholders should therefore consider:

<sup>253</sup> JJ Act, 2015, Sec.1(4)

<sup>254</sup> ITPA, 1956, Sec.17(2)

<sup>255</sup> ITPA, 1956, Sec.17(3)

<sup>256</sup> ITPA, 1956, Sec. 17(4)

<sup>257</sup> ITPA, 1956, Sec. 21

<sup>258</sup> Integrated Plan of Action to Prevent and Combat Human Trafficking with Special Focus on Children and Women

<sup>259</sup> Id at Para 7

1. Taking into account the specific short and long-term needs of each individual victim based on their age, education, skills, etc., the rehabilitation, reintegration and repatriation package for victims of trafficking should be worked out.
2. Keeping in view the paucity of government run institutions as well as the deteriorating conditions of these institutions, there is need to identify names of fit persons and fit institutions for providing safe custody to victims of trafficking. This list should be made available to the police, courts, non-governmental organizations and civil society at large for information.
3. Providing access to legal, medical and counselling services to all trafficked victims in order to restore their self-confidence and self-esteem. Special provision should be provided to those who have contracted HIV/AIDS.
4. Enabling victims of trafficking to access both formal and non-formal education structures. Formal education should be made available to those victims who are still within the school going age, while non-formal education should be made accessible to adults.
5. Providing gender sensitive market driven vocational training in partnership with non-governmental organizations to all rescued victims who are not interested in education. Government and non-governmental organizations should also work together to develop partnership with public and private sector employers in order to provide training/facilitate work placement as part of the reintegration process. Due care should be taken to give ample choice to victims so that rehabilitation and reintegration becomes a holistic process, which respects their human rights.
6. Involving the community in the rehabilitation, reintegration and repatriation process of trafficked victims. This means involving the families of victims and the community by enhancing their awareness about trafficking in general and the impact of trafficking on the individual.
7. Monitoring the rehabilitation, reintegration and repatriation of rescued victims with the help of non-governmental organizations.
8. Making available to rescued victims various developmental and anti-poverty schemes meant for the general population, both in the rehabilitation and reintegration phase.
9. Upgrading the conditions and capacities of institutions/homes run by the Government and an increase in the number of such institutions/homes not only in the cities, but also at the district and taluka levels, are of utmost necessity.
10. Recruiting adequate number of trained counsellors and social workers in institutions/homes run by the government independently or in collaboration with non-governmental organizations.
11. Appointing trained social workers and counsellors at police stations, courts and homes/institutions of different kinds meant for accommodating victims of trafficking.
12. Anti-trafficking cells/units should be set up at the Centre, State, Block District and Village levels to facilitate and monitor the process of rescue, rehabilitation, reintegration and repatriation."

In addition to ITPA's provisions of rehabilitation, the Ministry of Women and Development also introduced the Ujjawala Scheme in order to provide for "A Comprehensive Scheme for Prevention of Trafficking and Rescue, Rehabilitation and Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation".<sup>260</sup>

In addition to prevention, facilitating rescue, repatriation and reintegration of victims, the scheme also made provisions for various rehabilitative services for victims of trafficking.<sup>261</sup> The Scheme also dealt comprehensively with Rehabilitative Services by providing for:

“3.1 Setting up of Protective and Rehabilitative (P&R) Homes – The P&R Homes would be set-up by the agency.

3.2 Basic amenities – to provide basic amenities such food, clothing and other items of personal use.

3.3 Medical Care – This Scheme would provide Doctor's fee, cost of medicines, hospitalization, appropriate linkages to de-addiction centres. Since the victims of trafficking undergo immense psychological trauma, professional counselling services would be provided through a qualified clinical psychologist and psychiatrist.

3.4 Legal Aid– As victims are the main witnesses against the trafficker/pimp/perpetrator, or to claim their right to property, marital rights, divorce, maintenance and custody of children, they will need to be provided with legal aid which would include court work and documentation relating to the victims court case.

3.5 Administrative Costs – To support small contingencies arising out of the project.

3.6 Education – As a large proportion of the rescued victims are children, they will need to be inducted in to the formal or open school system, for which some expenditure on text-books, notebooks, stationary, school uniform and other incidental expenses may have to be incurred.

3.7 Vocational Training and Income generation activities – in order to completely rehabilitate the victim it is necessary to provide alternate livelihood options. Therefore, support for vocational training is provided.”<sup>262</sup>

## 2.10FAQs

- **Should a male child found in a brothel be treated as child in need of care and protection or child in conflict with the law?**

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<sup>260</sup> Ujjawala: A Comprehensive Scheme for Prevention of Trafficking and Rescue, Rehabilitation and Re-Integration of Victims of Trafficking for Commercial Sexual Exploitation, Ministry of Women and Child Development, Government of India [2016], available at <http://www.wcd.nic.in/sites/default/files/Ujjawala%20New%20Scheme.pdf>

<sup>261</sup> Id.

<sup>262</sup> Id. at Pg 6 and 7

While the manner of treatment would depend on the facts and circumstances of the case, a male child living in a brothel could be treated as a child in need of care and protection if they are being or are likely to be used for unconscionable gains, or are vulnerable and are likely to be inducted into drug abuse or trafficking or are likely to be abused, tortured, or exploited for sexual abuse or illegal acts. The Delhi High Court's decision in *Delhi High Court Legal Services Committee v. Union of India* (Crl. Rev. No. 443/2009 & Crl. M.A. No.3071/2010, Delhi High Court decision dated 12.08.14) is instructive. It was held that a child involved in trafficking should be treated as a child in need of care and protection.

- **Can a child be treated as child alleged to be in conflict with the law for allegedly trafficking a person for sexual exploitation?**

Section 8(3)(g), JJ Act, 2015, recognizes that a child in conflict with the law can also be a child in need of care and protection and enables the JJB to transfer the matter to the CWC and there is a need for both authorities to be involved. For instance, if the child alleged to have trafficked a girl for sexual exploitation is herself a victim of trafficking, such child could be treated a child in need of care and protection.

- **Can a child victim of commercial sexual exploitation be directly taken to the CWC if the police feel she is below 18 years, or does she have to be produced before the Magistrate first?**

A child victim of commercial sexual exploitation should be produced before the CWC in accordance with the JJ Act, 2015 as such a child falls within the ambit of a child in need of care and protection.

- **The rescued person says that she is 19 years, whereas, the police feel that she is below 18 years. Age verification may take some time. Can the police make the presumption that she is a 'child'/'minor' and take action accordingly?**

Yes, such a presumption can be drawn and the child can be produced before the CWC. The CWC and then undertake the age determination process.

- **If a child victim is rescued by an NGO and is directly produced before the CWC, will the CWC direct the NGO to take the child victim to the police for registering FIR or will the CWC attend to the child? If so, what steps will be taken?**

The child victim could be placed in a Children's Home or a fit institution and the NGO could be asked to lodge a FIR. It is not necessary for the child victim to be taken to the police station. Upon the registration of the FIR, the police could visit the Child Care Institution in which the child is placed to record the child's statement.

## Chapter 2, Annexure 1: List of Offences Relevant to Trafficking and Penalties

Act	Offence	Minimum	Maximum	Fine	Nature
Indian Penal Code	Section 366-A - Procuration of minor girl under 18 years	-	10 years imprisonment	✓	Cognizable, non-bailable, non-compoundable
	Section 366-B - Importation of girl under 21 years from foreign country or from Jammu and Kashmir	-	10 years imprisonment	✓	Cognizable, non-bailable, non-compoundable
	Section 370(4) - Trafficking of minor	10 years rigorous imprisonment (RI)	Life imprisonment	✓	Cognizable, non-bailable
	Section 370(5) - Trafficking of more than one minor	14 years RI	Life imprisonment	✓	Cognizable, non-bailable
	Section 370(6) - Repeat trafficker of minors	Life imprisonment i.e., for remainder of person's natural life		✓	Cognizable, non-bailable
	Section 370-A(1) - Exploitation of a trafficked minor	5 years RI	7 years RI	✓	Cognizable, non-bailable
	Section 371- Habitual dealing in slaves	-	Life imprisonment or imprisonment upto 10 years	✓	Cognizable, non-bailable non-compoundable
	Section 372- Selling minor girl for purposes of prostitution	-	10 years imprisonment	✓	Cognizable, non-bailable non-compoundable
	Section 373- Buying minor girl for purposes of prostitution	-	10 years imprisonment	✓	Cognizable, non-bailable non-compoundable

<b>Act</b>	<b>Offence</b>	<b>Minimum</b>	<b>Maximum</b>	<b>Fine</b>	<b>Nature</b>
Immoral Traffic Prevention Act, 1956	Section 3 - Punishment for keeping a brothel or allowing premises to be used as a brothel	First conviction: 2 years RI Second/subsequent conviction: 3 years RI	First conviction: 3 years RI Second/subsequent conviction: 7 years RI	✓	Cognizable
	Section 4 - Punishment for living on the earnings of prostitution of a child	7 years imprisonment	10 years imprisonment		
	Section 5 - Procuring, inducing or taking child for the sake of prostitution	7 years RI	Life imprisonment		Cognizable
	Section 5B - Trafficking/abetment of trafficking	First conviction: 7 years RI			Cognizable
		Second/subsequent conviction: Life imprisonment			
	Section 5C - Person visiting brothel for sexual exploitation of trafficked victim	-	First conviction: 3 months imprisonment Second/subsequent conviction: 6 months imprisonment	And/Or ✓	Cognizable
	Section 6 - Detaining a person in premises where prostitution is carried on	7 years imprisonment	Life imprisonment or 10 years imprisonment	✓	Cognizable
Section 7 - Prostitution in or the vicinity of public place in respect of a child	7 years imprisonment	Life imprisonment or 10 years imprisonment	✓	Cognizable	

Act	Offence	Minimum	Maximum	Fine	Nature
POCSO Act	Section 16, Explanation III read with Section 17 - Punishment for abetment	Punishment for the abetted offence			
JJ Act, 2015	Section 33 - Penalty for non-reporting a child found separated from guardian	-	6 months imprisonment	And/Or	Non-Cognizable & bailable
	Section 75 - Punishment for cruelty to child	-	3 years imprisonment	And/Or	Non-Cognizable & bailable
	Section 75, second proviso - Cruelty by person employed or managing an organization responsible for care and protection of child	-	5 years imprisonment	✓ Upto Rs. 5 lakhs	Cognizable & non-bailable
Goa Children's Act, 2003	Section 75, third proviso - Disability caused due to cruelty	3 years RI	10 years RI	✓ Upto Rs. 5 lakhs	Cognizable & non-bailable
	Section 79 - Exploitation of child employee	-	5 years RI	✓ Upto Rs. 1 lakh	Cognizable & non-bailable
	Section 81 - Sale and procurement of children for any purpose	-	5 years RI	✓ Upto Rs. 1 lakh	Cognizable & non-bailable
	Section 9(4) - Exploitation of child for commercial sexual exploitation	-	7 years	✓ Rs. 1 lakh	Cognizable & non-bailable

## **Chapter 2, Annexure 2: Significant Court Rulings**

### **Delhi High Court Legal Services Committee v. Union of India, Crl. Rev. No. 443/2009 & Crl. M.A. No.3071/2010, Delhi High Court decision dated 12.08.14.**

In this case, a petition was filed under Section 17 of Immoral Traffic (Prevention) Act (ITPA), 1956, challenging the order passed by the Magistrate whereby, custody of two minors recovered in police actions in violation of provisions of the Act, was handed over to the minor's father. The issue was whether custody of the minor could be handed over to minor's father. It was held that if a minor was rescued by police under the Act and produced before Magistrate, then the minor must be transferred to the CWC, which under the JJ Act, 2000 had the final authority in respect of custody and restoration of child victim. It was also held that the children involved in trafficking could not be treated as juveniles in conflict with law but as children in need of care and protection:

“A person under the age of eighteen years, if found involved in any aspect of trafficking or prostitution, within the meaning of the expression in the IT Act, 1956, or is rescued in police action under Section 15/16 of the IT Act cannot be treated as a juvenile in conflict with law” as defined Section 2(1) and has to be treated as a “child in need of care and protection” as defined under section 2(d) of the JJ Act, 2000.

### ***Apne Aap Women Worldwide Trust India v. State of Bihar, 2015(1) PLJR 268***

Some of the directions passed by the Patna High Court relevant to raid/search and rescue under the ITPA were as follows:

- Raid/search and rescue should be conducted regularly by duly trained Special Police Officers.
- Search should be conducted in the presence of two or more respectable inhabitants of the area one of whom should be a woman who need not be a resident of the same area.
- A woman or girl removed from the searched premise should be interviewed by a woman police officer or in the presence of a lady member of a recognised welfare institution/organisation if a woman police officer is unavailable.

### ***Guria, Swayam Sevi Sansthan v. State of U.P., 2010 (2) Cri.L.J.1433. (Supreme Court)***

A complaint was filed by the appellant organization in respect of some children detained in the “red light area” and it approached the police for their rescue. More than 30 young girls and children were rescued. The Supreme Court lamented that investigating officers and courts fail to make a distinction between rescued girls and the perpetrators, who organize immoral trafficking. The Supreme Court

observed that when the victims are released and not given rehabilitation they are at the risk of being re-trafficked and forced into prostitution. It also observed that where the accused are let out on bail, their role should be ascertained clearly to discern if they are eligible for bail or not depending on the nature of the offence. The Supreme Court held that bail should be denied in ITPA offences involving minors as these are grave offences.

***Prerana v. State of Maharashtra, 2003 (2) MhLJ 105. (Bombay High Court)***

The petitioner NGO filed a public interest litigation under Article 32 to ensure implementation of existing laws that protect the rights of trafficked victims. The ITPA allowed the authorities to raid red light districts and arrest the offenders and rescue the women working there. After paying a fine, these women were released back into the same conditions, where they were susceptible to the same people who had exploited them previously. No provision was made for their rehabilitation and protection. The Government did not offer any meaningful support and protection to victims who have been rescued from sexual exploitation.

It was held by the High Court that minor girls will more aptly fall under Section 2(b)(v) of the Juvenile Justice Act (JJA), 2000 as children in need of care and protection i.e., children who are being or who are likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts and they will have to be produced before the CWC. In the case of minors there is no provision whereby it can release the minor girls because they desired to be released without giving a thought to their rehabilitation and the frightening possibility of their re-entry into brothels. The High Court also issued the following directions:

- No Magistrate can exercise jurisdiction over any person under 18 years of age. The Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law or to the CWC if such a person is a child in need of care and protection.
- The said juvenile should be released only to the care and custody of a parent/guardian after such parent/guardian has been found fit by the CWC to have the care and custody of the rescued juvenile.
- If the parent/guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the JJ Act, 2000 should be followed for the rehabilitation of the rescued child.
- An advocate appearing for a pimp or brothel keeper is barred from appearing in the same case for the victims rescued under the ITPA.

***Prerana v. Maharashtra, Criminal Writ Petition No. 1694 of 2003. (Bombay High Court)***

**Decided on 18.4.2007**

In this case, the Bombay High Court directed the establishment of an “Anti-

Trafficking Cell” at the different levels in the police force, with appropriate staff. In every district at the level of the Local Crime Branch, a Senior Police Inspector shall be designated as head of the “Anti-Trafficking Cell” having jurisdiction all over the district. At the Commissionerate level, a police officer of the rank of DCP should be designated as head of the “Anti-Trafficking Cell” having jurisdiction all over the area falling under such Commissionerate.

The High Court also issued detailed directions for Special Police Officers, State Government, Superintendents of institutions for housing child victims, Magistrates and Sessions Judges, and different Departments.

Special Police Officers under the ITPA were directed:

- (a) to seek the association of suitable persons in every district who may be associated with the Officers to advise them in carrying out their functions under ITPA from the stage of raid till completion of trial;
- (b) to produce before the Magistrate within 24 hours all those persons found on the brothel premises, including the rescued victims;
- (c) to produce upon rescue operations an apparent child victim before the Child Welfare Committee;
- (d) to immediately upon rescue operations contact a lawyer nominated by the Maharashtra State Legal Services Authority on the panel constituted to provide free legal-aid to the rescued victims for protecting the interests of the rescued victim;
- (e) to record the detailed statements of the rescued victim at the place of safety in the presence of the persons mentioned in the said list and / or the Superintendent / Probation Officer / responsible staff of the institution;
- (f) to seize / recover the personal belongings and documents of the rescued victims at the time of rescue operation or soon thereafter, and to hand the same to the concerned rescued victim;
- (g) (i) to recover the child or children of the rescued victim at the time of raid or soon thereafter, and to reunite the child or children with their mother; (ii) to separate the child or children from their mother only on a reasoned order being passed on inquiry by the Child Welfare Committee under the Juvenile Justice Act;
- (h) to separate the rescued victims from the offenders immediately upon the rescue operation; (i) to convey the rescued victims and the offenders in separate vehicles from the brothel to the place of safety / police lock-up or from the place of safety / police lock-up to the court;
- (j) to place the rescued victims in a place of safety immediately upon the rescue operation, and in no event should the rescued victim be kept in the police station;

- (k) upon raid of a brothel, to immediately inform the District Magistrate or Sub-Divisional Magistrate of the same, with a request to initiate action under section 18(1) of ITPA for closure of the brothel;

***Vishal Jeet v. India, 1990 Cri. L.J. 1469 (S.C.)***

The following directions were passed by the Supreme Court:

1. All the State Governments and the Governments of Union Territories should direct their concerned law enforcing authorities to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference.
2. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women's organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well the members of various voluntary social organisations and associations etc., the main objects of the Advisory Committee being to make suggestions of:
  - (a) the measures to be taken in eradicating the child prostitution, and
  - (b) the social welfare programmes to be implemented for the care, protection, treatment, development and rehabilitation of the young fallen victims namely the children and girls rescued either from the brothel houses or from the vices of prostitution.
3. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.
4. The Union Government should set up a committee of its own in the line, ... suggested under direction No. (2) the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation etc. etc. of the young fallen victims namely the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children.
5. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.
6. The Advisory Committee can also go deep into devadasi system and Jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.

***Geeta Kancha Tamang v. State of Maharashtra, 2010 Cr.L.J. 2755.***

In this case under Section 6, ITPA, the Bombay High Court rejected the appellant's plea for suspension of sentence on the grounds that 1) trafficking, which is prohibited by the Constitution is the "grossest violation of the rights of the victim child" and 2) the offence is prone to repetition as the brothel was still operating and the same offence was likely to be repeated on other persons.

**Chapter 3 – CHILD LABOUR**

**3.1. Context**

The Census of 2011 estimated the number of child labourers in India between 5-14 years as 4.35 million (main workers) and 3.87 million (marginal workers), which comes to a total of 8.22 million. Furthermore, the total number of child labourers in India (5-19 years) is 35.38 million. The 2001 Census figures for the same age group was 12.26 million as compared to 11.3 million in 1991. In the decade between 2001-2011, the number of working children has shown a downward trend.<sup>263</sup>

The data from the National Sample Survey Organization for 2009-2010 puts the number of working children at 4.9 million, a 60% reduction since 2001. However, NGO estimates in various studies and field reports have pegged the numbers to be around 90 million. The Ministry of Labour and Employment also concedes that there is no correct estimation of the extent of bondage, including children in bonded labour, which has also transformed its form under the compulsions of transitional economy.<sup>264</sup>

The term child labour is an umbrella term used for a myriad of circumstances under which children perform labour such as children who live on and off the street, bonded children, working children, migrant children, children used for sexual exploitation etc. While there are many reasons pertaining to the unorganized labour laws in India that have a huge role to play in contributing towards the high percentage of prevalence of child labour in India, many studies<sup>265</sup> have also shown a significant correlation between poverty, lack of resources and child labour.

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<sup>263</sup> As per the census data, the trend on the magnitude of child labour is not uniform across the country. There is across the board decline in the incidence of child labour in the Southern and Western Indian States and UTs between 2001 and 2011. However, there has been an increasing trend in the Eastern and North Indian States and UTs. There is an increase in the absolute magnitude of child labour between 2001 and 2011 in the states of UP, Bihar, Rajasthan, Punjab, Haryana, Himachal Pradesh and Madhya Pradesh. Over 53% of the child labour in India was accounted for by the five states namely UP, AP, Rajasthan, MP and Bihar during 2011.

<sup>264</sup> <http://pib.nic.in/newsite/PrintRelease.aspx?relid=145414> (17-May-2016)

<sup>264</sup> [http://planningcommission.gov.in/reports/sereport/ser/ser\\_nclp1709.pdf](http://planningcommission.gov.in/reports/sereport/ser/ser_nclp1709.pdf)

### 3.2. Overview of Legal Framework

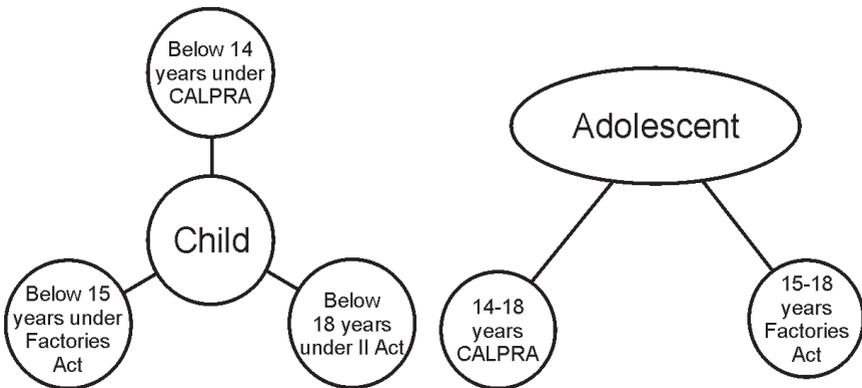
#### 3.2.1. Applicable Laws

The main legislations relevant to child labour are:

- Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 [CALPRA] as amended in 2016
- Bonded Labour System (Abolition) Act, 1976 – While this Act does not specifically refer to children, its provisions will apply if children are kept as bonded labour.
- Factories Act, 1948
- Indian Penal Code, 1860
- Juvenile Justice (Care and Protection of Children) Act, 2015

Apart from the above, other legislations such as the Mines Act, 1952, Merchant Shipping Act, 1951, Plantation Labour Act, 1951, Apprentices Act, 1861, Beedi & Cigar Workers (Conditions of Employment) Act, 1966, Motor Transport Workers Act, 1961, and State Shops and Establishments Act are also applicable to child labour.

#### 3.2.2. Definition of Child under laws relevant to Child Labour



Under the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, as amended in 2016, a child is defined to mean a person who has not completed 14 years of age and an adolescent is defined as a person who has completed 14 years of age, but not 18 years of age.<sup>266</sup> No such distinction is made under the JJ

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<sup>266</sup> CALPRA, Section 2(i) and (ii).

Act, 2015, which defines a child to mean a person who has not completed 18 years of age.<sup>267</sup> There is a slight variation in the definition of child and adolescent under the Factories Act, 1948. A child is a person who has not completed 15 years of age and an adolescent is one who has completed 15 years but not completed 18 years of age.<sup>268</sup>

### 3.2.3. Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 [CALPRA]

The Child Labour (Prohibition and Regulation) Act, 1986 was amended in 2016 and the title of the Act was changed to the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986. The key changes introduced by the CALPRA are as follows:

- Prohibition on the employment in any occupation or process of a person who has not completed 14 years of age or the age specified in the Right of Children to Free and Compulsory Education Act, 2009, whichever is more.
- Introduction of the category of “adolescent”, i.e., a person who has completed 14 years of age, but not 18 years and the prohibition of employment of adolescents in specified hazardous occupations or processes.
- Enhancement of penalties for contravention of the provisions of the Act.
- Establishment of a Child and Adolescent Labour Rehabilitation Fund.

The CALPRA prohibits the employment of children below 14 years in any occupation or process.<sup>269</sup> There are two situations exempt from this prohibition provided the child’s school education is unaffected<sup>270</sup>:

- **Helping Family or Family Enterprise:** A child below 14 years can help the family or family enterprise after school hours or during vacation. The following conditions should be adhered to:

The child’s family would mean mother, father, brother, sister – biological or adoptive, and biological siblings of the father and mother.<sup>271</sup> “Family enterprise” would mean any work, profession, manufacture or business performed by the family members with engagement of other persons.<sup>272</sup>

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<sup>267</sup> JJ Act, 2015, Section 2(12).

<sup>268</sup> Factories Act, 1948, Section 2(b) and (c).

<sup>269</sup> CALPRA, 1986, Section 3(1).

<sup>270</sup> CALPRA, 1986, Section 3(2).

<sup>271</sup> CALPRA, 1986, Explanation (a) to Section 3(2); CALPRA Rules, 1988 as amended in 2017, Explanation 1 to Rule 2B(1).

<sup>272</sup> CALPRA, 1986, Explanation (b) to Section 3(2).

- o **Bar on hazardous work:** The child cannot be involved in any hazardous occupation or process.<sup>273</sup>
- o **Bar on substitution:** The child cannot substitute an adult or adolescent while helping the family or family enterprise.<sup>274</sup>
- o **Family should be occupier:** The child should be allowed to help in the family or family enterprise only where the family is the occupier.<sup>275</sup>
- o **Ban on work that is remunerative:** It should not include work, occupation, or process “at any stage of the manufacturing, production, supply or retail chain that is remunerative for the child or his family or the family enterprise”.<sup>276</sup> The nature of the assistance should not be “incidental to any occupation, work, profession, manufacture or business, or for any payment or benefit to the child or any other person exercising control over the child, and which is not detrimental to the growth, education and overall development of the child.”<sup>277</sup>
- o **Timings:** The child should not be involved in any tasks during school hours and between 7pm and 8am or be involved in any task that hinders or interferes with the right to education, school attendance, or affect activities like completion of homework or any extra-curricular activities assigned by the school.<sup>278</sup>
- o **Rest period:** While helping the family or family enterprise, the child should not be engaged continuously without rest and for not more than three hours excluding the rest period.<sup>279</sup>
- o **Respect for other laws:** No other law should be violated while helping the family or family enterprise.<sup>280</sup>
- **Working as an artist:** A child below 14 years can work as an artist in audio-visual entertainment industry, including advertisement, films, television serials or any such other entertainment or sports activities except the circus. The following safety measures and conditions should be adhered to<sup>281</sup>
  - o **Duration:** Child should not work more than 5 hours, not more than 3 hours without rest, and not work consecutively for more than 27 days.

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<sup>273</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(a)(i).

<sup>274</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(a)(vii).

<sup>275</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(a)(iii).

<sup>276</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(a)(ii).

<sup>277</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(b)

<sup>278</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(a)(iv) and (v).

<sup>279</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(a)(vi).

<sup>280</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(a)(viii).

<sup>281</sup> CALPR Rules, 1988 as amended in 2017, Rule 2C.

- o **Child’s consent:** A child cannot be compelled to participate in any audio-visual, sports, or informal entertainment activity against the child’s will and consent.
- o **Prior permission:** District Magistrate’s permission should be obtained by the producer of any audio-visual medial production or commercial event before involving a child.
- o **Undertaking:** An undertaking should be given to the District Magistrate stating that the child’s physical and mental health will be ensured and all applicable laws related to child protection, right to education, care and protection, and sexual offences will be adhered to. The list of child participants, consent of their parent/guardian, and the person from the production or event who will be responsible for the child’s safety and security should be submitted to the District Magistrate.
- o **Education:** Education facilities should be arranged so that the child’s education is not disrupted.
- o **Care and Protection:** One responsible person each for a maximum of five children should be appointed to ensure the child’s care and protection and best interest.
- o **Financial Arrangement:** 20% of the child’s income should be deposited in a fixed deposit account in a nationalized bank on the child’s name to be credited to the child on attaining majority.

The CALPRA also stipulates conditions of work for adolescents, which are as follows:

- They cannot be made to work beyond the prescribed number of hours;<sup>282</sup>
- The period of work should be fixed each day and should not exceed three hours.<sup>283</sup>
- At least 1 hour interval for rest if they need to work for more than three hours.<sup>284</sup>
- The period of work should not be spread over more than 6 hours including the interval for rest and time spent waiting for work.<sup>285</sup>
- They cannot be allowed or required to work between 7p.m – 8 a.m.<sup>286</sup>

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<sup>282</sup> CALPRA, 1986, Section 7(1).

<sup>283</sup> CALPRA, 1986, Section 7(2).

<sup>284</sup> CALPRA, 1986, Section 7(2).

<sup>285</sup> CALPRA, 1986, Section 7(3).

<sup>286</sup> CALPRA, 1986, Section 7(4).

- No overtime.<sup>287</sup>
- They cannot work in two establishments on the same day.<sup>288</sup>
- One weekly holiday that should not be altered more than once in 3 months.<sup>289</sup>

**Who can file complaints under the CALPRA?** Any person can file a complaint including school-teachers and representatives from school management committee, child protection committee, Panchayat or Municipality.<sup>290</sup> If a child is absent from school for 30 days consecutively without intimation to the Principal or Head Master of the school, they should report the child's absence to the nodal officer specified by the District Magistrate.<sup>291</sup>

### 3.2.4. Offences under the CALPRA

Employment of a child/adolescent or permitting a child/adolescent to work in violation of Section 3/3A, CALPRA is a cognizable offence.<sup>292</sup> Failure to comply with or violation of other provisions such as those pertaining to the work condition of adolescents is an offence.<sup>293</sup>

Parents or guardian of a child cannot be punished unless they allow the child to be employed for commercial purposes in violation of the exception created in favour of helping the family or family enterprise.<sup>294</sup> Parents or guardians of adolescents will also not be punished unless they allow the adolescent to work in violation of Section 3A, CALPRA.<sup>295</sup> Parents or guardians, however will not be liable for punishment in case of the first offence.<sup>296</sup> However, commission of a like offence subsequently will attract a fine, which can extend to Rs. 10,000.<sup>297</sup>

An application to compound the offence can be filed by a first-time offender or the parent or guardian of a child or adolescent.<sup>298</sup> The application should be filed before the District Magistrate. After hearing the accused and the Inspector concerned, if the District Magistrate decides to allow the application, it can issue a certificate of compounding subject to the payment of 50% of the maximum fine prescribed for the offence within a specified period or 75% of the maximum fine

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<sup>287</sup> CALPRA, 1986, Section 7(5).

<sup>288</sup> CALPRA, 1986, Section 7(6).

<sup>289</sup> CALPRA, 1986, Section 8.

<sup>290</sup> CALPR Rules, 1988 as amended in 2017, Rule 17A.

<sup>291</sup> CALPR Rules, 1988 as amended in 2017, Rule 2B(2).

<sup>292</sup> CALPRA, 1986, Section 14(1) and (1A).

<sup>293</sup> CALPRA, 1986, Section 14(3)(d).

<sup>294</sup> CALPRA, 1986, proviso to Section 14(1).

<sup>295</sup> CALPRA, 1986, proviso to Section 14(1A).

<sup>296</sup> CALPRA, 1986, Section 14(1B).

<sup>297</sup> CALPRA, 1986, Section 14(2).

<sup>298</sup> CALPRA, 1986, Section 14D(1) & CALPR Rules, Rule 17B(1).

if the accused fails to meet the deadline.<sup>299</sup> The compounding amount should be paid to the Central Government. If the accused fails to pay up, the proceeding will continue.<sup>300</sup> If the offence is compounded before prosecution is initiated, the prosecution will not be instituted.<sup>301</sup> If it is compounded after the prosecution has been instituted, the Court before which the prosecution is pending should be informed in writing and if approval is given, the accused can be discharged.<sup>302</sup>

**Rehabilitation under the CALPRA** Apart from regulation of child labour, the CALPRA also provides for rehabilitation of rescued child labourers. Section 14C of the Act specifically provides that all children and adolescents rescued from employment in contravention of the provisions of the Act must be rehabilitated. To realize this goal, the Act also creates a Child and Adolescent Labour Rehabilitation Fund, which is required to be set up in every district or for a group of districts. All fines collected from offenders under the Act will be credited to the Fund in addition to Rs. 15,000 which, will be credited by the government for each child/adolescent. This money will thereafter be used for the rehabilitation of children.

### **3.2.5. Juvenile Justice (Care and Protection of Children) Act, 2015 and Model Rules**

The JJ Act, 2015, is the principal legislation governing care, protection, treatment, development, social-reintegration and rehabilitation of children in conflict with the law as well as children in need of care and protection.

Under the JJ Act, 2015, a child working in violation of labour laws would fall within the ambit of a ‘child in need of care and protection’.<sup>303</sup> Such a child could be produced before the Child Welfare Committee for ensuring the care, protection, treatment, development, and rehabilitation of the child. Further, under the JJ Act:

- Engaging a child **and** keeping the child in bondage for the purpose of employment, or
- Withholding a child’s earnings, or
- Using a child’s earning for own purpose

amounts to exploitation of a child employee and is a punishable offence.<sup>304</sup> Refer to Section 3.3.3. below for information on when child found working in violation of labour laws should be produced before the CWC.

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<sup>299</sup> CALPR Rules, Rule 17B(2).

<sup>300</sup> CALPRA, 1986, Section 14D(2); CALPR Rules, Rule 17B(4).

<sup>301</sup> CALPRA, 1986, Section 14D(3).

<sup>302</sup> CALPRA, 1986, Section 14D(4).

<sup>303</sup> JJ Act, 2015, Section 2(14)(ii).

<sup>304</sup> JJ Act, 2015, Section 79.

### 3.2.6. The Bonded Labour System (Abolition) Act, 1976

Pursuant to the constitutional prohibition under Article 23(1) on *beggar* and other forms of forced labour, the Bonded Labour System (Abolition) Act, 1976 was enacted. The Act abolishes the bonded labour system and declares customs, contracts, or agreements, which require any person or family member or dependent to work or serve as a bonded labour to be void.<sup>305</sup> Enforcement of bonded labour, advancement of bonded debt, and extraction of bonded labour, failure to restore properties to bonded labourers, and abetment of these are offences under the Act. Enforcement of any custom, tradition, contract, agreement or other instrument requiring a person to provide services under the bonded labour system is a punishable offence.<sup>306</sup>

While the Act does not expressly refer to children, it will inevitably apply to cases in which a child is compelled to work without wages or for unreasonable wages for repayment of ancestral debts, or where the child is working along with the family, which is in bondage.

**Rehabilitation of bonded labourers**The Bonded Labour System (Abolition) Act, 1976 does not contain provisions for rehabilitation of rescued bonded labourers. In order to address this gap, the Central Government through the Ministry of Labour and Employment introduced the *Centrally Sponsored Plan Scheme for Rehabilitation of Bonded Labour* in the year 1978. This scheme has undergone changes and is currently operated through the ‘Central Sector Scheme for Rehabilitation of Bonded Labourers, 2016’. The Scheme is wholly sponsored by the Centre and does not require any contribution from the State Government. All bonded labourers including child bonded labourers are covered under the scheme for services such as financial assistance, short stay homes, education for children, skill development, assistance in marriage, etc. The Scheme provides for the following framework for financial assistance: Male beneficiary – Rs. 20,000 to One Lakh Women and Children – Rs. Two Lakh Victims of extreme deprivation and marginalization such as trans-gendered individuals, persons with disability, or women and children rescued from sexual exploitation – Rs. Three Lakh\* The release of financial assistance is not conditional upon the conviction of the accused persons. Where the Administration finds preliminary proof of bondage, cash assistance must be released even where the trial has not been concluded. Full payment may be made after receiving full proof of bondage.

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<sup>305</sup> The Bonded Labour System (Abolition) Act, 1976, Sections 4 and 5.

<sup>306</sup> The Bonded Labour System (Abolition) Act, 1976, Section 18.

### 3.3. Processes

#### 3.3.1. Role of Statutory and Non-Statutory Actors

1. DM/SDM<sup>307</sup>
  - a. Implement provisions of the CALPRA and the Bonded Labour System (Abolition) Act, 1976. The DM has wider powers and responsibilities under the latter including identification, release and rehabilitation.
  - b. Inquire whether bonded labour system or any form of forced labour is being enforced within the DM's jurisdiction, cause inquiry into the prevalence of bonded labour and take necessary action to eradicate forced labour.
  - c. Specify subordinate officers to be called nodal officers who will exercise powers and perform all or any duties of DM conferred and imposed by the Central Government.
  - d. Assign powers and duties, as deemed appropriate, to a nodal officer to be exercised or performed within the local limits of jurisdiction.
  - e. Preside as Chairperson of the District Task Force comprising Superintendent of Police, ADM, nodal officer, Assistant Labour Commissioner (Central), two representatives each from a voluntary organization involved in rescue and rehabilitation of employed children, representative of DLSA nominated by District Judge, member AHTU, Chairperson, CWC, DCPO, DEO, and any other person nominated by the DM.
  - f. Preside over the Vigilance Committee under the Bonded Labour System (Abolition) Act, 1976 and nominate other members of the Committee.
  - g. Ensure rehabilitation of rescued children and adolescents as per JJ Act, 2015, Bonded Labour System (Abolition) Act, 1976, Central Sector Scheme for Rehabilitation of Bonded Labourers, 2016, National Child Labour Project, other laws or schemes, direction of court, and Central Government guidelines for rescue and rehabilitation.
2. Metropolitan Magistrates/Magistrate of First Class
  - a. Try offences under the CALPRA.
3. Executive Magistrate
  - a. Try offences under Bonded Labour System (Abolition) Act, 1976, if

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<sup>307</sup> CALPRA, Section 17A; Bonded Labour System (Abolition) Act, 1976, Sections 10, 11, 12, 13, and 14.

powers of a Judicial Magistrate of the First Class or Second Class are conferred by the State Government.

- b. Hear applications for restoration of possession of property under the Bonded Labour System (Abolition) Act, 1976, if powers of a Judicial Magistrate of the First Class or Second Class are conferred by the State Government.
  - c. Restore bonded labourer to the possession of homestead or residential premise that he/she was occupying before eviction by the creditor.
4. CWC
- a. Authority to dispose cases for the care, protection, treatment, development and rehabilitation of persons below 18 years who are working in contravention of labour laws and are in need of State care and protection.
  - b. Pass orders for care, protection, treatment, development, rehabilitation and social reintegration.
5. Police Station and SJPU
- a. Rescue and production of persons below 18 years working in contravention of labour laws before the CWC; In case of complaint, police can rescue even without waiting to have the FIR registered.
  - b. Register a FIR immediately if the information relates to a cognizable offence;
  - c. Comprehensively identify all relevant offences in the FIR and the charge-sheet; In case of trafficking for child labour, do add provisions of labour laws along with S370 IPC.
  - d. Make an entry in the Daily Diary if the information pertains to a non-cognizable offence;
  - e. Ensure that investigation is carried out by the Child Welfare Police Officer. The investigation needs to be conducted from an organised crime perspective, bringing in the role of all offenders from source to transit to place of demand (rescue);
  - f. Ensure that child is not placed in a lock-up or lodged in a jail;
  - g. Provide access to paralegal volunteers under the DLSA to the child and the family;
  - h. Undertake immediate assessment of the needs of the child and extend necessary support such as food, clothing, shelter, medical care, counselling, psychological support, etc.

- i. Facilitate medical examination of the child or adolescent;
  - j. Collect documentary proof of age of the child such as school certificate, birth certificate, municipality/Panchayat issued certificate, ration card. Request for a medical examination can be made to the Magistrate or Child Welfare Committee, as the case may be, if no documentary records are available;
  - k. Record the statement of the child when the child is fit and comfortable and in the presence of a person the child is comfortable with;
  - l. Take the assistance of qualified translators, interpreters, special educators or experts, if necessary, to record the child's statement;
  - m. Child's statement can be recorded in a place in which the child is comfortable (u/s 160(1), Cr.P.C.);
  - n. Treat the child with dignity and do not threaten the child or give false assurances;
  - o. Record the statement of relevant witnesses;
  - p. Ensure that charge sheet is filed within 90 days;
  - q. Ensure protection of the child from further abuse or exploitation or from the accused during the investigation and trial;
  - r. Undertake all steps in preventing child labour by involving all stakeholders from governing and non-government sector;
  - s. Extend all support to the Executive Magistrate/SDM/DM/Labour Officer for rescue, post-rescue care of the rescued children as well as in prevention.
6. DCPU
- a. Identify families at risk and children in need of care and protection;
  - b. Monitor trends of children in difficult circumstances;
  - c. Periodically map services available for children and adolescents involved in labour at the district level and make the directory available to CWCs;
  - d. Facilitate sponsorship, foster care, and after care based on orders of the CWC for children and adolescents involved in labour;
  - e. Facilitate transfer of children for their restoration to families;
  - f. Ensure inter-departmental coordination and liaise with relevant State departments, SCPS, and other DCPUs on child labour;
  - g. Network and coordinate with civil society organisations working on child labour;

- h. Generate awareness and conduct training programmes for stakeholders under the JJ Act on child labour;
  - i. Serve as member of the District Task Force on Child Labour
7. Inspector
- a. Take steps to secure compliance with the provisions of the CALPRA.
  - b. File a complaint about the commission of an offence under the CALPRA in any court of competent jurisdiction.
  - c. Send quarterly reports to the Central Government about inspections made to secure compliance with the CALPRA and action taken.
  - d. Facilitate the opening of an account in a nationalized bank for the deposit of the amounts from the Child and Adolescent Labour Rehabilitation Fund.
8. Labour Commissioner and department officials in the Labour department
- a. Take steps to secure compliance with the provisions of the CALPRA
  - b. Ensure periodic inspections for detecting and identifying child labour
9. Prosecutors
- a. Interact with the child or adolescent ahead of the trial and orient them about the procedures;
  - b. Address the fears and questions of the child or adolescent about the legal process.
10. Parents and Care givers'
- a. Do not permit the child or adolescent to work in violation of the CALPRA and other labour laws.
  - b. Seek the assistance of the DCPU, CWC, Childline, police or SJPU to access schemes, sponsorship, or support.
  - c. Ensure that the child is sent to a school.
11. Media
- a. Protect the privacy and identity of children involved in labour and adolescents working in contravention of labour laws.
  - b. Do not publish pictures or identifying information without the permission of the court or CWC as that would amount to a breach of privacy and an offence under Section 74, JJ Act, 2015.

## 12. NGOs and civil Society members

- a. Serve as members of the District Task Force on Child Labour;
- b. Assist the police in rescuing children involved in labour and adolescents working in contravention of labour laws;
- c. Produce a child/adolescent who is thought to be a child in need of care and protection before the CWC;
- d. Assist the CWC in preparation of the Social Investigation Report, if directed;
- e. Assist the SJPU or police in escorting children to their families;
- f. Generate awareness and organize programmes on child labour;
- g. Provide psycho-social, or legal services to children and adolescents.

### **3.3.2. Planning rescue of child labourers**

#### **Who can be rescued?**

- Child below 14 years working involved in any process or occupation other than helping family or a family enterprise or working as an artist.
- Child/adolescent above 14 years and below 18 years working in conditions that contravene labour laws.

### **3.3.3. Production of a child involved in labour before CWC**

The Child Welfare Police Officer, Special Juvenile Police Unit, or any police officer may encounter a person below 18 years involved in labour. While children above 14 years can work under regulated conditions in non-hazardous processes, they can come under the ambit of a “child in need of care and protection” under the JJ Act, 2015 if they are found or reported to be working in contravention of any labour laws.

**When can a child involved in labour be a child in need of care and protection?**

Is the child below 14 years?

<b>Yes</b>		<b>No</b>	
Is the child helping her/his family or family enterprise	Is the child working as an artist?	Is the child/adolescent working in contravention of any labour laws? <b>OR</b> Is the adolescent working in mines, or with inflammable substances or explosives or in any hazardous process?	
Yes	No	Yes	No
Have the conditions specified in the CALPRA Rules been complied with?	Have the conditions specified in the CALPRA Rules been complied with?	Does the child require "State" care and protection?	Is the child being kept in bondage? <b>OR</b> Is the child's earning being withheld? <b>OR</b> Is the child's earnings being used by the employer for his own purpose? <b>OR</b> Does the child fall under any of the categories mentioned in S.2(14), JJ Act, 2015
Yes	No	Yes	No

Child should be produced before the CWC

Under the JJ Act, 2015, a child found working **in violation of the labour laws** in force falls within the ambit of a “child in need of care and protection” and should be produced before a Child Welfare Committee (CWC) within 24 hours excluding the journey time.<sup>308</sup>

It is important to note that not all children involved in labour will be considered in need of care and protection, but only those children who are found working in contravention of a labour statute will. For instance, while a 15-year-old working in a road-side hotel as a waiter may not be engaged in hazardous labour. However, if he is found working between 7pm and 8am or working for more than three hours at a stretch and without a one hour period for rest, it is to be acted upon and such an adolescent can be produced before the CWC as these work conditions are a violation of Section 7, Child and Adolescent Labour (Prohibition and Regulation) Act, 1986.

<b>Who can produce a child before the CWC?<sup>309</sup></b>		
<ul style="list-style-type: none"> <li>• Police officer</li> <li>• SJPU</li> <li>• Child Welfare Police Officer</li> <li>• Officer of the District Child Protection Unit</li> </ul>	<ul style="list-style-type: none"> <li>• Labour Inspector</li> <li>• Public Servant</li> <li>• Childline Services</li> <li>• NGOs</li> <li>• Social Worker</li> </ul>	<ul style="list-style-type: none"> <li>• Public spirited citizen</li> <li>• Probation Officer or Child Welfare Officer</li> <li>• Nurse, doctor or management of a nursing home, hospital or maternity home</li> <li>• Child</li> <li>• Any person</li> </ul>

### 3.4 FAQs

- **If I see a child working on a road side establishment, or shop, what can I do as a common citizen?**

You can call 1098 – Childline and inform them about the location of the child and the circumstances in which you observed the child. You can inform the local police station or senior police officials having jurisdiction. Note that no child, i.e., a person below 14 years under the Child and Adolescent (Prohibition and

<sup>308</sup> JJ Act, 2015, Sections 2(14)(ii) and 31(1) proviso.

<sup>309</sup> JJ Act, 2015, Section 31(1).

Regulation) Act, 1986 can be employed in any process or occupation. However, a child can help the family or family enterprise after school hours or during vacation and can work as an artist under specified conditions. No adolescent, i.e., a person who has completed 14 years but not 18 years, can work in any hazardous occupation or process. Adolescents can work in non-hazardous processes provided certain conditions are complied with.

- **If my neighbour, or someone from my building employs a child as domestic worker, can I inform someone or complaint somewhere?**

You can call 1098 – Childline and inform them about the location of the child and the circumstances in which you observed the child. You can also reach out to the District Child Protection Officer or the local police or any NGO working on child rights in your city.

- **If my domestic helper, brings her 13 years old daughter occasionally to work in my house, will I be held guilty of employing child labour?**

Yes, you can be charged with an offence under the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 as no person below 14 years can be employed or permitted to work in any occupation or process. This is also to ensure that all children below 14 years are in school in accordance with the Right of Children to Free and Compulsory Education Act, 2009.

### Chapter 3, Annexure 1: Penalties for Offences Relevant to Child Labour

Act	Offence	Minimum imprisonment	Maximum imprisonment	Fine	Nature of Offence	Court
<b>CALPRA, 1986</b>	Employment of child or allowing child to work in any occupation or process (S. 14(1))	6 months	Two years	(And/Or) Rs. 20,000- Rs 50,000	Cognizable, compoundable	Metropolitan Magistrate or Magistrate of First Class
	Employment of adolescents in hazardous occupations and processed listed in the Schedule (S.14(1A))	6 months	Two years	(And/Or) Rs. 20,000- Rs 50,000	Cognizable, compoundable	
	Repeat violation of Sections 3 or 3A (S. 14(2))	1 year	3 years		Cognizable, compoundable	
	Repeat violation of Sections 3 or 3A by parents or guardian (S.14(2A))	-	-	Upto Rs. 10000	Non-cognizable, compoundable	
<b>JJ Act, 2015</b>	Failure to comply or contravention of any provision of the Act or Rule (S.14(3))	-	SI upto 1 month	(And/or) Rs. 10,000	Cognizable, compoundable	Magistrate of First Class
	Exploitation of a child employee (Section 79)	-	RI upto five years	(And) Rs. 1 lakh fine	Cognizable, non-bailable	
<b>IPC</b>	Unlawful compulsory labour (S.374)	-		(And/Or) fine	Cognizable, bailable	Any Magistrate
<b>Bonded Labour System (Abolition) Act, 1976</b>	Compelling a person to render bonded labour (Section 16)	-		(And) Upto Rs. 2000	Cognizable, bailable	Executive Magistrate
	Advancement of bonded debt (Section 17)	-	Upto three years	(And) Upto Rs. 2000		

Act	Offence	Minimum imprisonment	Maximum imprisonment	Fine	Nature of Offence	Court
	<p>Extracting bonded labour under the bonded labour system (Section 18)</p> <p>Omission or failure to restore possession of property to bonded labourers (Section 19)</p>	<p>–</p> <p>–</p>	<p>Upto three years</p> <p>Upto one year</p>	<p>(And) Upto Rs. 2000</p> <p>(And/Or) Upto Rs. 1000</p>		
<p><b>Factories Act, 1948</b></p>	<p>General penalty for contraventions of the provisions of the Act (Section 92)</p>		<p>Upto two years</p>	<p>(And/Or) Upto Rs 2 lakhs</p> <p>Continued contravention: Rs 1000 per day for each day of contravention.</p> <p>Upto Rs 1000</p>		<p>Magistrate First Class</p>
	<p>Penalty for double employment of a child (Section 99)</p>					

## 4. RESCUE

### 4.1 Steps to be taken for rescue procedure:<sup>310</sup>

#### RESPONSE HAS TO BE QUICK AND EFFECTIVE

**Remember** – Not all rescue operations should be treated the same, as each context has different risks, different legal procedures, and different stakeholders involved. Unplanned rescue operations can have serious consequences for those rescued, and for those who have to provide services of care and protection, in terms of resources and infrastructure. Each rescue operation should take into account all such factors, including a risk assessment to the victims, and to the police themselves. Even when the rescue is to be undertaken at short notice or in a hurry, planning the operation before execution is advisable, especially in involving the different stakeholders like witnesses, clarifying the role of different persons participating in the rescue, in arranging logistics, etc.

Step 1: Enter source information in the General Diary (GD) of the Police Station (PS) in such a way that anonymity of the source/ victim/ location is not compromised.

Step 2: Any rescue operation should be so designed as to include details of location, entry and exit points, ways and means of removing victims securely and preventing the disappearance of traffickers. All entry and exit points must be secured. Carry out a recce of the place to be searched. An official conversant with the local language be sent to the place incognito. The help of local officers/ NGOs be taken, provided the information remains confidential.

Empowered survivors, who are willing to co-operate, could be useful in recce. After recce, draw a sketch map of the area which could be used for briefing and for assigning specific duties to the officials who will participate in the rescue. This includes duties such as cordoning, guarding entry and exit points, locating the hide-outs, identifying safe place to keep the rescued persons till completion of the rescue operation, etc.

Step 3: Rescue team should, where ever possible, be accompanied by a Sub Divisional Magistrate (SDM), who is the implementing authority under the Bonded Labour System (Abolition) Act, 1976 and officers of the labour department, so that the Child Labour (Prohibition and Regulation) Act, 1986 may also be utilized wherever applicable.

Step 4: Rescue team should, where ever possible, obtain a search warrant from the jurisdictional Magistrate u/s. 166 Cr. PC if SDM is not accompanying. Since

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<sup>310</sup> Chapter 3, Annexure 2: Excerpt from SOP on Investigation of Crimes of Trafficking for Forced Labour, UNODC, 2008, pp.15-16

the SDM is the implementing authority under the Bonded Labour Act, any complainant including an NGO can approach the SDM for rescue/ identification.

Step 5: Ensure adequate number of officials for rescue. If rescued persons are to be interviewed, it shall be done by a police officer and not in the presence of the employer or any of his agents. If possible, the interview should be done by a member of a recognized welfare institution or organization (NGO) or a qualified social worker.

- Secure help of NGOs to act as witnesses.
- Team should have at least one officer who is legally empowered to conduct rescue i.e., a labour department officer authorized by the court or duly authorized by the Magistrate.
- Maintain a list of officials of labour department and NGOs working on Anti Human Trafficking in the area. If no NGO is available, the services of any Government employee/ Panchayat representatives, etc. may be utilized.

Step 6: Arrange materials and equipment required for documentation and evidence collection (such as writing pad, white paper, pen, pencil, box for transporting the exhibits, box for belongings of the rescued persons, camera, videography, audio recording equipment, first aid kit, torch lights, hammers, cutters, etc.) Drinking water, snacks, etc. may also be arranged well in advance before a rescue.

Step 7: Inform the appropriate authorities regarding the proposed activities, including the places to be visited/ searched and the proposed time.

Step 8: Alert the authorities of the Government run Homes or recognized homes run by NGOs at the place of rescue regarding the approximate number of persons likely to be rescued and the time when they are likely to be brought to the Home.

Step 9: Arrange adequate number of vehicles and escort for the rescued persons so that the victims are always kept segregated from the offenders.

Step 10: Identifying the victims during rescue; age is immaterial. No victim should be left behind.

Step 11: Talk to the victim. Try and make the victim comfortable as soon as possible.

Step 12: Immediate efforts should be made to win the confidence of the victim. Remember, most victims, especially children are scared of the police and many victims are often threatened by the employers that if they don't work harder, police will arrest them.

Step 13: If the rescued persons belong to another state(s), inform the Nodal Police Officer of the concerned state(s).

### Chapter 3, Annexure 3: Significant Court Rulings

#### 1) *M.C. Mehta v. State of Tamil Nadu*, AIR 1991 SC 417

In this case, a petition under Article 32 of the Constitution was brought before the Supreme Court by way of public interest litigation about the problem of employment of children in match factories of Sivakasi in Tamil Nadu. The Court held that the working conditions in the match factories involved health hazards in normal course. **The Supreme Court held that employing children in hazardous work is gross violation of sections 3 and 4 of the Minimum Wages Act, 1948; sections 67, 71 and 75 of the Factories Act, 1948 and Articles 24(1) and 45 of the Constitution of India.** It was further held that the minimum wage for child labour should be fixed and children can be employed in the process of packing only and not at the place of manufacture to avoid exposure to accident.

#### 2) *M.C. Mehta v. State of Tamil Nadu and others*, AIR 1997 SC 283

In this case, popularly known as the 'Child Labour Abolition case', a writ was filed under Article 32 of the Constitution of India, as the fundamental right of children against exploitation (Article 24) was being grossly violated in the match and fireworks industries in Sivakasi where children were employed. The Supreme Court opined that "the provisions of Article 45 of Constitution in the Directive Principles of State policy still remained a far cry and though according to this provision", all children up to the age of fourteen years are supposed to be in the school, economic necessity forces grown-up children to seek employment. In view the provisions contained in Article 39(f) and 45 of the Constitution, it gave directions as to how the quality of life of children employed in the factories could be improved.

It recommended that the offending employer pay compensation of Rs. 20,000 for every child employed in contravention of the Child Labour (Prohibition and Regulation) Act, 1986. This should be deposited in a Child Labour Rehabilitation-cum-Welfare Fund. Income from the corpus formed by such fund should be used for the concerned child. It also urged the government to provide employment to adults family members of children employed in factories, mines, or hazardous work, and where this was not possible, to contribute Rs. 5000 to the Fund.

#### 3) *Peoples Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473: (1982) 3.SCC 235; 1982 SCC ( L & S ) 275.

In this case, commonly known as 'Asiad workers case', it was brought to the notice of the Supreme Court that children below 14 years of age were employed in construction work. It was held that construction work is clearly a hazardous occupation and it is absolutely essential that the employment of children under the age of 14 years must be prohibited in every type of construction work. Referring to Article 24, Justice P.N. Bhagavathi and Justice Bahrul have held that "apart

from the requirement of International Labour Organization Convention No.59, we have Article 24 of the Constitution which even if not followed up by the appropriate legislation, must operate “proprio vigore” (independently) and construction work plainly and indubitably a hazardous employment, it is clear that by a reason of constitutional prohibition no child below 14 years can be allowed to be engaged in construction work”. The Supreme Court observed that “there can be no doubt that notwithstanding the absence of specification of construction industry in the schedule to the Employment of Children Act, 1938, no child below the age of 14 years can be employed in construction work and the Union as also every State Government must ensure that the constitutional mandate is not violated in any part of the country”.

**Note:** In accordance with this judgment, construction work was added to the list of prohibited occupations in part ‘A’ of Schedule to the Child Labour (Prohibition and Regulation) Act, 1986. It does not, however, feature in the Schedule to the CALPRA.

**4) *Labourers, Salal Hydro Project v. State of Jammu and Kashmir, (1983)2 SCC 181; AIR 1984 SC.177.***

In this case, the Supreme Court delivered protected the interest of large number of child labourers working in the construction of Salal Hydro Project, a hazardous work. The court was constrained to remark that the problem of child labour is a difficult problem and it is purely on account of economic reasons that parents often want their children to be employed in order to be able to make both ends meet. Article 24 limits the prohibition against employment of child labour only to factories, mines or other hazardous employments. The Central Government was directed to persuade the workmen to send their children to a nearby school and arrange not only for the school fees to be paid but also provide free of charge, books and other facilities such as transportation etc. The Supreme Court also suggested to the Central Government that “whenever it undertakes a construction project which is likely to last for some time it should provide that children of construction workers who are living at or near the project site should be given facilities for schooling and this may be done either by the Central Government itself or if the Central Government entrusts the project work or any part thereof to a contractor, necessary provision to this effect may be made in the contract with the contractor”.

**5) *Bandhua Mukti Morcha v. Union of India and others, AIR 1984 SC 802.***

In this case, a petition was filed under Article 32 of the Constitution by a bonded labour organisation invoking the Employment of Children Act, 1938 and Article 24 of the Constitution. The Supreme Court took into cognizance the employment of children in the carpet manufacturing industry in Mirzapur, Uttar Pradesh. It instructed the District Magistrate to conduct raids, and subsequently got 144

children, who were under the forced custody of the owners, released. The Supreme Court held that a child should be developed to be responsible and productive and children should be assured social and physical health.

**6) *PUCL v. State of Tamil Nadu, Writ Petition (Civil) No. 3922 of 1985 decided on 15-10-2012***

In this case, a PIL was filed before the Supreme Court in 2012 regarding the issue of bonded labour and child labour that follows the same. It elaborated several facts of bonded labour and discrimination of children who are employed for the same. Large numbers of children are working as domestic help in the urban, town and rural areas with no chance to go to schools even though the education from standard I to VIII is compulsory under the Right of Children to Free and Compulsory Education Act, 2009. Local Panchayats and local bodies should identify such children and ensure that they get proper education.

**7) *Rajangam, Secretary, Dist. Beedi Workers Union v. State of Tamil Nadu and others with K.C. Chandra Segaram v. State of Tamil Nadu and others, AIR 1993 SC 404.***

With regard to child labour in Beedi Industry, various allegations were made regarding failure to implement the provisions of the labour laws, manipulation of records regarding employees, non-payment of appropriate dues for work taken etc. including the child labour and specifically the non-implementation of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966. To protect children, the apex Court suggested that “tobacco manufacturing has indeed health hazards. Child labour in this trade should therefore be prohibited as far as possible and employment of child labour should be stopped either immediately or in a phased manner to be decided by the State Government...” The Court further admitted that the exploitation of labour is rampant in the beedi trade and suggested that “in view of the health hazard involved in the manufacturing process, every worker including children, if employed, should be insured for a minimum amount of Rs. 50,000 and the premium should be paid by the employer.”

**8) *Sheela Barse & Others v. Union of India, AIR 1986 SC 1773.***

In this case, under the direction of the Supreme Court, children who were being exposed to chemical fumes and coal dust from working near furnaces in the glass industry were released from their employment. The Supreme Court held that Article 39 (f) of the Constitution provides that the state shall direct its policy towards securing the goal that children are given opportunities and facilities to develop in a healthy manner and in condition of freedom and dignity and the childhood and youth are protected against exploitation and against moral and material abandonment. The apex court further held that though various states have enacted children Act for fulfilment of constitutional obligation for welfare of children

under Article 39 (f), yet it is not enforced in some states and the Court directed that such beneficial statutes should be brought into force and administered without delay.

**9) *Neeraja Chaudhary v. State of M.P.* (1984) 3 SCC 243.**

The Supreme Court emphasized on the rehabilitation of bonded labours and observed that mere release from bondage without suitable rehabilitation measures will not be useful and will instead present livelihood challenges. It held:

It is the plainest requirement of Articles 21 and 23 of the Constitution that bonded laborers must be identified and released and on release, they must be suitably rehabilitated. The Bonded Labour System (Abolition Act, 1976 has been enacted pursuant to the Directive principles of State Policy with a view to ensuring basic human dignity to the bonded labourers and any failure of action on the part of the State Government in implementing the provisions of this legislation would be the clearest violation of Article 21 apart from Article 23 of the Constitution.

**10) *Roscann Rajan v. Taluk Supply Officer*, W.P. No. 992 of 2015 decided on 12 March 2015 by the Madras High Court.**

Addressing the issue of ration cards for rescued bonded labour victims, the Madras High Court took note of the absence of identity proofs and held that the bonded labourer's release certificate can be considered as the identity proof to issues them the entitled benefits.

## **Chapter 4 – Other Offences against Children**

### **4.1 Introduction to other kinds of offences**

Apart from the offences discussed in the previous Chapters which have been dealt with exhaustively in separate legislations, certain other offences against children have also been covered under the Juvenile Justice (Care and Protection of Children) Act, 2015, the Indian Penal Code, and the POCSO Act, 2012. These include:

- a. Begging
- b. Cruelty to Child
- c. Offences involving liquor, narcotic drugs, tobacco products and psychotropic substances
- d. Exploitation of a child employee
- e. Illegal Adoption and other Adoption-related Offences
- f. Sale and Procurement of Children
- g. Corporal Punishment
- h. Use of child by militant groups or other adults

- i. Kidnapping and abduction of a child
- j. Offences committed on children with disabilities
- k. Disclosure of identity of the child
- l. Making a false complaint or providing false information against a child under the POCSO Act
- m. Mandatory Reporting
- n. Abetment of suicide of a child
- o. Sale of obscene objects to young persons

## 4.2 Applicable Laws

Other offences against children have been primarily dealt with under Chapter IX of the Juvenile Justice (Care and Protection of Children) Act, 2015, the POCSO Act and the IPC. The procedure to be followed in cases of offences under the JJ Act is provided for in the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 [hereinafter “JJ Model Rules”].

The framework of offences and the laws covering them are covered in detail below. A table stipulating the offences and the applicable punishment is covered in the Annexure to this Chapter.

It is important to note that there may be overlaps between offences under the JJ Act and other legislations. In such cases, the offender found guilty of the offence will be liable to be sentenced under the law providing the higher degree of punishment.<sup>311</sup>

The offences against children have been briefly described below.

### 4.2.1. Begging

As per Census 2011, India has 55,258 child beggars between the ages of 0 to 19.<sup>312</sup> Out of these 6549 children are aged under 4 years, 34,736 children are aged between 5 and 14 years, and 13973 persons are aged between 15 to 19 years.<sup>313</sup>

'Begging' refers to:

- a. soliciting or receiving alms in a public place
- b. entering into a private place for the purpose of soliciting or receiving alms

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<sup>311</sup> JJ Act, 2015, Section 88.

<sup>312</sup> Census 2011, Office of the Registrar General & Census Commissioner, India, Ministry of Home Affairs, See B-13 on *Non-Workers by Main Activity, Age And Sex (Total, SC/ST)*, available at [http://www.censusindia.gov.in/2011census/population\\_enumeration.html](http://www.censusindia.gov.in/2011census/population_enumeration.html)

<sup>313</sup> *Id.*

- c. exposing or exhibiting any sore, injury, wound, deformity or disease (of oneself or another person or an animal) in order to obtain or extort alms<sup>314</sup>

Section 76, JJ Act, 2015 provides that whoever employs, uses or causes any child to beg commits an offence. If a person having charge or control over the child aids to make a child beg, that person is liable to be tried for the offence of begging. The child victim can be considered a 'child in need of care and protection' on account of having

been "found begging" and having a parent or guardian who "is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child."<sup>315</sup>

The offence carries a higher punishment in cases where the perpetrator amputates or maims a child for the purpose of begging.<sup>316</sup>

The Bombay Prevention of Begging Act, 1959 (Bombay Act) in section 11 also prohibits the employing, conniving, encouraging or causing a child to beg. Similarly several other states such as Tamil Nadu,<sup>317</sup> Karnataka,<sup>318</sup> Uttar Pradesh,<sup>319</sup> etc also have legal provisions prohibiting begging. It is also an offence under the Railways Act, 1989.<sup>320</sup> However, the JJ Act provides immunity to children from being prosecuted for the offence of begging under section 76(2).

## Dos and Don'ts

- A person below the age of 18 years involved in begging should not be arrested or prosecuted for begging. Instead, the persons who made him/her beg should be identified and be prosecuted. Incidences of child begging are often part of organized rackets and traffickers, who commercialize this, and make profits. The perpetrators and gangs involved in such offences must be identified and charged.<sup>321</sup>

A child who has been used for begging will not be considered as a child in conflict with the law even where 'begging' is considered an offence. [s.76(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015].

Such children must be treated as children in need of care and protection while necessary action must be taken against the perpetrators engaging children in begging.

<sup>314</sup> JJ Act, 2015, Section 2(8).

<sup>315</sup> JJ Act, 2015, Section 2(14)(ii) and (v).

<sup>316</sup> JJ Act, 2015, Section.76(1)

<sup>317</sup> Tamil Nadu Prevention of Begging Act, 1945.

<sup>318</sup> Karnataka Prohibition of Beggary Act, 1975.

<sup>319</sup> Uttar Pradesh Prohibition of Beggary Act, 1975.

<sup>320</sup> Railways Act, 1989, Section 144.

<sup>321</sup> JJ Act, 2015, Section 76(2) proviso.

- The child must be removed from the charge or control of the guardian exploiting the child and must be produced before the CWC for rehabilitation.<sup>322</sup>
- Before taking charge of a child involved in begging, the child must be informed that the child is not being apprehended or arrested for any offence.
- Where the alleged offender is arrested at the same time as taking charge of the child, care should be taken to keep the offender away from the child at all times through use of separate transport facilities and separate waiting areas.
- A child involved in begging may be produced before the CWC as soon as possible and within 24 hours.
- A child may refuse to accompany the police, in which case care should be taken to arrange for a social worker or an NGO to be present to persuade the child and assuage his/her fears. Forcefully taking charge of a child will only aggravate the situation causing the child to distrust the system and may aggravate any psychological trauma the child may already be experiencing.
- Where the incident also involves kidnapping a child or maiming a child for the purpose of begging, charges under section 363A(1) or 363A(2) of the IPC must be added as applicable.

#### **4.2.2 Cruelty to Children**

Section 75, JJ Act provides for punishment for committing acts of cruelty towards a child. The provision punishes:

- assault, abandonment, and abuse of child by persons in charge of the child
- neglect of child by person resulting in unnecessary physical or mental suffering

Persons employed by or managing an organization, eg., schools, Child Care Institutions, which are entrusted with the care and protection of children, are under special obligation to not commit cruelty towards children and attract higher punishment for offences under this provision. Further, higher degree of punishment is imposed where the child becomes physically incapacitated, or develops a mental illness, or is rendered mentally unfit to perform regular tasks, or has risk to life or limb due to the cruelty.<sup>323</sup>

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<sup>322</sup> Id.

<sup>323</sup> JJ Act, 2015, Section 75, third proviso.

The JJ Model Rules has now interpreted cruelty to children in this section to include the act of giving a child in marriage.<sup>324</sup> Further, failure to provide immediate medical care resulting in serious injury, damage or threat to life, or death is considered an offence under section 75 of the JJ Act and amounts to wilful neglect of the child as per the JJ Model Rules.<sup>325</sup> It is not clear as to whether these provisions amount to creation of an offence and whether that is possible under a delegated legislation.

Although Section 317 of the IPC criminalises parents of a child under the age of 12 years who expose or leave such child in any place with the intention of wholly abandoning the child, the JJ Act specifically excludes biological parents who have abandoned their child due to circumstances beyond their control.<sup>326</sup> The JJ Act being the overriding Act, in respect of children in conflict with the law as well as children in need of care and protection, will apply in such cases.<sup>327</sup>

#### **Prevention of Abuse and Exploitation of a child in a Childcare Institution**

Where an act of cruelty takes place in a child care institution, a school or any other place of care and protection of a child, the JJB or the CWC or the Children's Court can provide alternative rehabilitative care for the child. This must be done in consultation with the child and/or parents and guardians.<sup>328</sup>

In order to prevent cruelty against children within a childcare institution, Rule 76 of the JJ Model Rules mandate the setting up of a system to ensure that there is no abuse, neglect or maltreatment of a child. The Rule provides the following procedure to be followed in cases of any physical, sexual or emotional abuse against a child:<sup>329</sup>

- Incident must immediately be reported by a staff member to the Person-in-charge on receiving such information;
- When knowledge of such incident comes to the knowledge of the Person-in-charge, a report must be placed before the JJB or CWC having authority who shall in-turn order for a special investigation.
- The JJB/CWC shall direct the local police station or an SJPU to register a case and take due cognizance of the incident and conduct necessary investigation.
- The JJB/CWC must take necessary steps to ensure completion of inquiry and provide legal aid as well as counselling to the child victims.

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<sup>324</sup> JJ Model Rules, 2016, Rule 55(1).

<sup>325</sup> JJ Model Rules, 2016, Rule 55(3).

<sup>326</sup> JJ Act, 2015, s. 75, first proviso.

<sup>327</sup> JJ Act, 2015, Section 1(4).

<sup>328</sup> JJ Model Rules, 2016, Rule 55(2).

<sup>329</sup> JJ Model Rules, 2016, Rule 76(2)

- Upon completion of the inquiry, the CWC may give appropriate directions to the police, DCPU, the labour department, or the Childline services.<sup>330</sup>
- The JJB/CWC shall transfer such child victim to another institution or place of safety or fit person.
- The Person-in-charge of the institution shall also inform the Chairperson of the Management Committee and place a copy of the report of the incident and subsequent action taken in its next meeting.
- Where there is a suspicion that any other crime has taken place in respect of children in institutions, the JJB/CWC must take cognizance and arrange for necessary investigation to be carried out by the local police or the SJPU.
- The JJB/CWC may consult Children's Committee to enquire into the fact of abuse and exploitation as well as seek assistance from voluntary organisations, child rights experts, mental health experts or crisis intervention centres in dealing with matters of abuse and exploitation of children in an institution.

### **Dos and Don'ts**

- A child who has been abandoned requires to be produced before the CWC as soon as possible and within 24 hours to ensure speedy placement of a child.
- While taking charge of an abandoned child, care must be taken to inform the child that he/she is not being arrested for any offence. Where possible, help must be sought from a social worker or NGO to accompany the child and assuage their fears.
- A child who has suffered physical cruelty may require immediate first aid and must be taken to the nearest medical facility. The CWC can provide a direction to ensure free treatment of the child.
- Information about an abandoned child must be uploaded on the portal maintained by the Central Government in accordance with the rules laid down in that regard.
- Where information is received regarding the risk of a child of being given in marriage, the police (or any officer under the JJ Act or the Prohibition of Child Marriage Act, 2006) must produce the child before a CWC for appropriate directions.

### **4.2.3 Offences involving liquor, narcotic drugs, tobacco products and psychotropic substances**

The JJ Act prohibits:

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<sup>330</sup> JJ Act, 2015. Section 30(xvi)

*a. Giving intoxicating liquor or narcotic drug or psychotropic substance to a child.*

Section 77, JJ Act, 2015 prohibits any person from giving intoxicating liquor or any narcotic drug or tobacco products or psychotropic substance to a child. Where such substance is given to a child under the order of a qualified medical practitioner, the act will not amount to an offence.

Recognising the growing concern of substance abuse and addiction amongst children, a Juvenile Justice Board in Delhi banned the sale of whiteners and thinners to children unless accompanied by a parent and a letter of prescription from school.<sup>331</sup>

Through the course of an enquiry into the sale of these substances by a minor child, the Board looked into the findings of the Draft Report commissioned by the Department of Women and Child Development, Govt. of NCT of Delhi titled 'Mapping And Size Estimation Of Street Children Who Use Drugs In Delhi'.<sup>332</sup> The report estimated that about 11.7% of children (totalling 7910 children) were using inhalants with a vast majority of them (90.5%) having difficulty in giving up the habit. The report further noted the high incidence of school drop outs among these children coupled with them facing several other issues such as experiencing anxiety, getting into fights, encountering legal problems, indulging in sexual behaviour, and encountering falls, injuries and accidents due to intoxication. Noting the above points, the JJB opined that "the vicious cycle of addiction continues, and can be broken only with State intervention" and proceeded to impose a ban on whiteners and thinners. The order is applicable throughout the Delhi NCR area.

To ensure the proper implementation of the above section, the JJ Model Rules mandates the following:

- i. All shops selling intoxicating liquor, and tobacco products, must display a message at a prominent place on their shop stating that giving or selling intoxicating liquor or tobacco products to a child is a punishable crime with up to seven years of rigorous imprisonment and a fine of up to one lakh rupees.<sup>333</sup>
- ii. All tobacco products and intoxicating liquor must display a message that giving or selling intoxicating liquor or tobacco products to a child is a

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<sup>331</sup> Juvenile Justice Board ban sale of whiteners, thinners in NCR to curb drug menace amongst youngsters

<http://www.india.com/news/india/juvenile-justice-board-ban-sale-of-whiteners-thinners-in-ncr-to-curb-drug-menace-amongst-youngsters-2032563/>

<sup>332</sup> Mapping And Size Estimation Of Street Children Who Use Drugs In Delhi, September 2016 Draft Report, Dept. of Women and Child Development, Delhi.

<sup>333</sup> JJ Model Rules, 2016, Rule 56(8).

punishable crime with up to seven years of rigorous imprisonment and a fine of up to one lakh rupees.<sup>334</sup>

- iii. Whoever sells intoxicating liquor, narcotic drugs or psychotropic substances or tobacco products within 200 meters of a Child Care Institution or any other home registered or recognized under the JJ Act, or the office of a Committee or a Board shall be punished as per section 77 of the Act.<sup>335</sup>

When a child is found to be under the influence of or addicted to intoxicating liquor, tobacco, psychotropic substances or narcotic drugs, the concerned JJB or CWC must pass appropriate orders concerning the rehabilitation and de-addiction of the child.<sup>336</sup>

*b. Using a child for vending, peddling, carrying, supplying or smuggling any intoxicating liquor, narcotic drug or psychotropic substance.*

Section 78 of the Act criminalizes persons who use a child for vending, peddling, carrying, supplying or smuggling any intoxicating liquor, narcotic drug or psychotropic substance. A child who has committed an offence under section 78 of the Act will be first produced before a JJB who may then determine the child to be a child in need of care and protection upon which the case will be transferred to the CWC.

In addition to the JJ Act, the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 [COTPA] also prohibits the sale, offering for sale or permitting a sale of cigarettes and other tobacco products to a person under the age of 18 years.<sup>337</sup> The Act also prohibits the sale of cigarettes and other tobacco products within 100 yards of any educational institution.<sup>338</sup>

## **Dos and Don'ts**

- Where an offence is committed under section 77 and 78 of the JJ Act the police shall enquire as to how the child came under the influence of, or possession of such intoxicating liquor or narcotic drugs or psychotropic substances or tobacco products and shall register an FIR forthwith.<sup>339</sup>
- Where a child is found under the influence of an intoxicating liquor, a narcotic drug or a psychotropic substance or has been administered any of the above substances, the child must immediately be produced before a JJB or CWC as

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<sup>334</sup> JJ Model Rules, 2016, Rule 56(9).

<sup>335</sup> JJ Model Rules, 2016, Rule 56(10).

<sup>336</sup> JJ Model Rules, 2016, Rule 56.

<sup>337</sup> COTPA, Section 6(a).

<sup>338</sup> COTPA, Section 6(b).

<sup>339</sup> JJ Model Rules, 2016, Rule 56(1) and 57(1).

relevant in the case. Where a child is not in position to be produced, immediate medical attention must be given.

- Where a child is found to be addicted to a substance, the child must immediately be brought before a CWC for rehabilitative and de-addiction.
- Reference to section 6 of the Cigarettes and Other Tobacco Products Act (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution), 2003 must be made in the charge-sheet where relevant.

#### **4.2.4 Exploitation of a child employee**

Section 79 criminalizes acts of exploitation of a child employee. Exploitation included acts of ostensible engagement of a child and keeping the child in bondage for the purpose of employment or withholding the child's earnings or using the child's earning for one's own purpose (also refer Chapter 3 on Child Labour). It should be noted here that the JJ Act, 2015 uses the term "child" which is defined to mean a person who has not completed 18 years of age.<sup>340</sup>

#### **Dos and Don'ts**

- Reference to Section 79, JJ Act, 2015, should be added to the charge-sheet in all cases involving a violation of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986.

#### **4.2.5 Illegal Adoption and other adoption-related offences**

Apart from the Hindu Adoption and Maintenance Act, 1956, adoptions in India can only take place as per the procedures prescribed under the JJ Act, 2015, JJ Model Rules, 2016, and the Adoption Regulations, 2017. Any person or organization offering, giving or receiving any child (who is orphaned, surrendered or abandoned) for the purpose of adoption without following the procedure under the JJ Act is said to commit an offence under section 80 of the Act. Where such an offence is committed by a recognized adoption agency, apart from criminal sanctions, the registration and recognition of the agency under the Act will also be withdrawn for a minimum period of one year.<sup>341</sup>

Where an orphan, abandoned or surrendered child is found to be offered or given or received for adoption purpose without following the procedures under the JJ Act, the police may on its own or on receipt of information register an FIR.<sup>342</sup>

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<sup>340</sup> JJ Act, 2015, Section 2(12).

<sup>341</sup> JJ Act, 2015, Section 80.

<sup>342</sup> JJ Model Rules, 2016, Rule 58(1).

Apart from illegal adoption, it is also an offence for the relevant stakeholders in the system to omit taking necessary steps towards ensuring the adoption of orphaned and abandoned children. Section 65(4) of the JJ Act makes it an offence for Specialised Adoption Agencies for failure to take steps towards getting an abandoned or orphaned child legally free for adoption, or failure to conduct a home study, or failure to obtain an adoption order in accordance with the Act, Model Rules and Adoption Regulations.

Similarly, under Section 66 of the JJ Act, failure on the part of registered institutions not recognized as Specialised Adoption Agencies in ensuring that all orphaned, abandoned or surrendered children under their care are reported, produced and declared legally free for adoption would attract a fine and can also result in de-recognition if the provisions are persistent flouted.

### **Dos and Don'ts**

- Where information has been received regarding an illegal adoption, the police must file an FIR immediately.
- A child given in illegal adoption must be produced before the CWC as soon as possible.
- Care must be taken to assure the child that he/she is not being arrested for any offence.
- The child may express reluctance to separate from the adoptive parents. All care should be taken to deal with the child in a sensitive manner. Assistance can be taken from social workers or NGOs in this matter.
- Where the illegal adoption has taken place in lieu for any kind of payment or consideration, it will also be an offence under section 81 of the JJ Act, 2015 criminalising the sale and procurement of children.
- Where the illegal adoption took place before the JJ Act, 2015, came into force, the child may be produced before the Child Welfare Committee. As no retrospective effect can be given to penal provisions, the parents cannot be charged under the JJ Act, 2015, but other relevant provisions under the IPC may be invoked against them.

### **4.2.6 Sale and Procurement of Children**

Section 81 of the Act criminalizes the buying and selling of children for any purpose. Where such an offence is committed by a person having charge of the child or by employees of a hospital or nursing home or maternity home, the punishment is more severe.

### **Dos and Don'ts**

- Where information has been received regarding buying and selling of children, the police must file an FIR immediately

- Where payment or any consideration has been exchanged in lieu of adoption, it shall be considered to be an offence under section 81 of the Act and an FIR must be filed immediately.
- A child being subjected to sale must be produced before the CWC immediately.
- The perpetrators of the offence must be apprehended based on the statement of the child. The perpetrators may be the child’s biological parents.

#### **4.2.7 Corporal Punishment**

The JJ Act addresses corporal punishment within child care institutions as defined in the Act to include Observation Homes, Special Homes, Children Homes, Open Shelter, Place of Safety, Specialised Adoption Agencies, and Fit Institutions as recognized by the JJB and CWC. Section 82 of the JJ Act prohibits persons-in-charge or those employed at a child care institution from subjecting a child to corporal punishment in order to discipline a child. The term ‘corporal punishment’<sup>343</sup> refers to “subjecting a child to any physical punishment that deliberately causes pain to a child as retaliation for something the child has done or as a way of disciplining or reforming the child.”<sup>344</sup> While the offence attracts only a fine when committed the first time, subsequent offences can attract imprisonment. The CWC can give directions to the police after an inquiry into a complaint of abuse of a child in a CCI.<sup>345</sup>

Apart from criminal sanctions, a person convicted under this section can be dismissed from service and debarred from working directly with children.<sup>346</sup> Managements of child-care-institutions are mandated to cooperate with inquiries under the law. Failure to do so can result in persons-in-charge of the institution facing criminal prosecution.<sup>347</sup>

#### **Note:**

- The police may receive a complaint regarding an offence under section 82 from a child in addition to other persons.
- A Child Welfare Police Officer can be directed by a Judicial Magistrate receiving the complaint to investigate the offence.
- Where the institution does not cooperate with the investigation and inquiry, the Judicial Magistrate of the First Class may take cognizance of the matter or direct the filing of an FIR against the person in-charge of the management of the institution.<sup>348</sup>

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<sup>343</sup> JJ Act, 2015, Section 2(24).

<sup>344</sup> Id.

<sup>345</sup> JJ Act, 2015, Section 30(xvi).

<sup>346</sup> JJ Act, 2015, s.82(2).

<sup>347</sup> JJ Act, 2015, s.82(3).

<sup>348</sup> JJ Model Rules, 2016, Rule 60(7).

- Where an institution does not cooperate with the inquiry or comply with the orders of the Board or Committee or a court or the state government may make regarding a complaint of a corporal punishment, the person-in-charge of the institution may be charged under section 82(3) of the JJ Act, 2015.

#### **Protection of Children in Institutions from Corporal Punishments**

- A complaint box is mandatorily required to be placed in every institution.<sup>349</sup>
- The complaint box must be opened in the presence of a representative of the DCPU once a month.<sup>350</sup>
- All the complaints received must be forwarded to the Judicial Magistrate of First Class nearest to the Child Care Institution.
- Copies of the complaint must also be forwarded to the JJB/CWC. The JJB/CWC receiving the complaint will require to make orders to ensure the safety, well-being and medical treatment (where required) of the child victim. The Board or the Committee may also consider transferring the child to another Child Care Institution in the best interest of the child victim.

#### **4.2.8 Use of child by militant groups or other adults**

Section 83 criminalizes the recruiting or using of any child by a militant group or outfit for any purpose. It further prohibits adults and groups of adults from using a child for illegal activities.

A ‘child soldier’ may be a child in conflict with the law or a child in need of care and protection depending on several factors including the circumstances of the case. Section 2(14)(xi) of the JJ Act classifies all children who are a victim of or have been affected by any armed conflict, civil unrest or natural calamity as children in need of care and protection. Where such a child has been produced before the JJB, the JJB after an inquiry may decide that the child is a ‘child in need of care and protection’ and transfer him/her to the a CWC instead.<sup>351</sup> In addition, or in the alternative, the JJB may pass directions for rehabilitation, safe custody and protection of the child and transfer the child to a fit facility which has the capacity to provide appropriate protection to the child. The JJB may also consider transferring the child to another District or State to ensure the protection and safety of the child.<sup>352</sup>

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<sup>349</sup> JJ Model Rules, 2016, Rule 60(2).

<sup>350</sup> JJ Model Rules, 2016, Rule 60(3).

<sup>351</sup> JJ Model Rules, 2016, Rule 9(3).

<sup>352</sup> Id.

### **Child Soldiers in India**

- The recruitment of child soldiers and the involvement of children in armed conflict remain rampant and largely unchecked in India especially in conflict-prone areas with even governments complicit in such recruitment.
- Figures estimate that at least 5,000 child soldiers are involved in several conflict zones in India with both governmental and rebellion groups recruiting them.<sup>353</sup>
- Children are often recruited in conflict-zones under obsolete legal provisions permitting appointment of persons under the age of 18 years such as section 17 of the Police Act, 1861 which permits Magistrates to appoint residents as ‘Special Police Officers’ during difficult law and order situations.<sup>354</sup> Similarly, provisions of the Madhya Pradesh Police Regulation allegedly permitted the appointment of hundreds of ‘boy orderlies’ under the age of 18 years.<sup>355</sup> Reports also indicate that the Government of Chhattisgarh in 2011 recruited more than 300 children as ‘Balrakshaks’ into the state police force on ‘compassionate grounds’ in cases where the children had lost their parents to illness or Maoist attacks.<sup>356</sup>
- Involvement of children in armed forced is a leading factor in the high dropout rates in children in the region with 46% of boys and 45% of girls dropping out of school between the ages of 6 to 11 years. In comparison the national average stands at 31% for boys and 25% for girls.<sup>357</sup>

### **Dos and Don’ts**

- On apprehending a child, ascertain if the child committed the crime alone or in a group.
- If the crime was committed along with a group of adults, ensure that it is highlighted in the Social Background Report to be submitted to the Juvenile Justice Board.<sup>358</sup>
- Lodge a FIR and arrest persons who may have used the child to commit illegal activities based on the child’s statement.

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<sup>353</sup> *India’s Child Soldiers: Government defends officially designated terror groups’ record on the recruitment of child soldiers before the UN Committee on the Rights of the Child*, Asian Centre for Human Rights [2013], p.3, available at [http://tbinternet.ohchr.org/Treaties/CRC-OP-AC/Shared%20Documents/Ind/INT\\_CRC-OP-AC\\_ICO\\_Ind\\_15714\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC-OP-AC/Shared%20Documents/Ind/INT_CRC-OP-AC_ICO_Ind_15714_E.pdf)

<sup>354</sup> *Id.* at p.8.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at p.9.

<sup>357</sup> *INDIA: Between the rock and a hard place – children in armed conflict*, [2013] available at <http://alrc.asia/india-between-the-rock-and-a-hard-place-children-in-armed-conflict/> 011) 7 SCC 547

<sup>358</sup> JJ Model Rules, 2016, Rules 8(1) and 8(5) and Form 1.

- Arrange for the child to be screened for alcohol and substance abuse with the aid of the Social Worker attached to the SJPU or the Social Worker attached to the DCPU.
- In case of injuries, the child may require immediate medical care and attention, which must be taken care of by the police without any delay.

#### **4.2.9 Kidnapping and abduction of a child**

Section 84 deals with kidnapping and abduction of children and provides that all the offences provided for between Sections 359 to 369 of the IPC would be an offence under the JJ Act when committed against a child. Accordingly, the following acts are prohibited:

- Kidnapping from India: Conveying a child beyond the limits of India without the consent of the child or a person authorized to consent on behalf of the child.<sup>359</sup>
- Kidnapping from lawful Guardianship: Taking of enticing a child out of the lawful guardianship without the consent of the guardian.<sup>360</sup>
- Abduction: Compelling or inducing a child by deceitful means to go from any place.<sup>361</sup>
- Kidnapping or maiming a minor for the purposes of begging: Kidnapping a minor by a person who is not the lawful guardian or obtaining custody of the child in order to have the child employed or used for the purpose of begging.<sup>362</sup> The provision also criminalizes maiming of a child so that the child may be employed or used for begging.<sup>363</sup> Where a person who is not the lawful guardian uses the child for begging, it will be presumed that he has kidnapped or obtained custody of the child for begging.<sup>364</sup>
- Kidnapping or abducting in order to murder: Kidnapping or abducting a child for the purpose of murdering the child or disposing a child in a manner where the child is in danger of being murdered.<sup>365</sup>
- Kidnapping for ransom: Kidnapping or abducting any person or keeping a person in detention after such kidnapping or abducting and threatens or causes or gives reasonable apprehension of causing death or hurt to such person in order to compel the Government or any foreign state or international inter-

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<sup>359</sup> IPC, Section 360.

<sup>360</sup> IPC, Section 361.

<sup>361</sup> IPC, Section 362.

<sup>362</sup> IPC, Section 363A(1).

<sup>363</sup> IPC, Section 363A(2).

<sup>364</sup> IPC, Section 363A(3).

<sup>365</sup> IPC, Section 364.

governmental organisation or any other person to do or abstain from doing anything or to pay a ransom.<sup>366</sup>

- Kidnapping or abducting with intent secretly and wrongfully to confine person: Kidnapping or abducting a child with intent to cause the child to be secretly and wrongfully confined.<sup>367</sup>
- Kidnapping, abducting or inducing child to compel her marriage, etc.: Kidnapping or abducting a child with the intention or knowledge that she is likely to be compelled to marry a person against the child's will, or so that the child may be forced or seduced to illicit intercourse.<sup>368</sup>
- Procuration of minor child: Inducing a child through any means to from any place or to do any act with the intention that or knowing that it is likely that such child will be forced or seduced to illicit intercourse with another person.<sup>369</sup>
- Importation of girl from foreign country: Importing into India from any country or from the state of Jammu and Kashmir any child with the intent of or knowing that child is likely to be forced or seduced to illicit intercourse with another person.<sup>370</sup>
- Kidnapping or abducting in order to cause grievous hurt, slavery, etc.: Kidnapping or abducting a child with the intention of subjecting the child to grievous hurt, slavery, unnatural lust of a person. It is also an offence to kidnap or abduct with the intention of disposing off such a child in a manner where it is likely that a child will be subjected to the above acts.<sup>371</sup>
- Wrongfully concealing or keeping in confinement, kidnapped or abducted child: Concealing or confining a child who the person knows to having been kidnapped or abducted.<sup>372</sup>
- Kidnapping or abducting child with intent to steal from the child: Kidnapping or abducting a child with the intention of taking dishonestly any movable property from the child.<sup>373</sup>

Several complaints of kidnapping arise in elopement cases where a child may have left home with a boyfriend/girlfriend. Aggrieved parents (of the girl in most cases) file kidnapping charges against the boy and/or his family in addition to

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<sup>366</sup> IPC, Section 364A.

<sup>367</sup> IPC, Section 365.

<sup>368</sup> IPC, Section 366.

<sup>369</sup> IPC, Section 366A.

<sup>370</sup> IPC, Section 366B.

<sup>371</sup> IPC, Section 367.

<sup>372</sup> IPC, Section 368.

<sup>373</sup> IPC, Section 369.

charges under the POCSO Act. The Supreme Court in several cases such as *Varadarajan v. State of Madras*<sup>374</sup> have recognized that such cases where the child leaves his/her parent or guardian willingly, no offence of kidnapping is attracted.

### Parental Child Abduction

A prevalent global trend posing an emerging concern in India is the incidence of 'parental child abduction' or 'inter-parental abduction' which refers to the taking of custody of a child and moving the child to a place away from the child's habitual residence by a parent and thereby effectively restricting the other parent from exercising lawful custody or visitation.

This phenomenon also presents a crisis at an international level leading to the adoption of the Convention on the Civil Aspects of International Child Abduction at the Hague Convention on Private International Law in 1980. The Convention requires the return of the abducted child to the member country where the child was a habitual resident prior to the wrongful abduction.

This Convention has not been signed by India although a domestic law on similar lines – 'Civil Aspects of International Child Abduction Bill, 2016' is pending before the legislature.<sup>375</sup> At present, there is no uniform law on addressing this concern in India.<sup>376</sup>

### Dos and Don'ts

- In several cases, kidnapping is a part of other offences against the child such as POCSO Act, ITPA, etc. Such offences must be added in the charge-sheet although the complaint filed may only state kidnapping.
- Where a child is unwilling to accompany the police, care must be taken not to forcefully take the child. The help of a social worker or an NGO may be sought in this regard.
- A child unwilling to return to the parental home should be produced before the Child Welfare Committee who will then decide on the placement of such a child.

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<sup>374</sup> AIR 1965 SC 942

<sup>375</sup> Sofi Ahsan, *Behind India's unease with a global child abduction law*, THE INDIAN EXPRESS [Aug 4, 2017], available at <http://indianexpress.com/article/explained/behind-indias-unease-with-a-global-child-abduction-law-4781318/>

<sup>376</sup> Amit Anand Choudhry, *NRIs move SC for law to deal with 'parental abduction' cases; Court issues notice to Centre*, TIMES OF INDIA [Dec 1, 2017] <https://timesofindia.indiatimes.com/nri/other-news/nris-move-sc-for-law-to-deal-with-parental-abduction-cases-court-issues-notice-to-centre/articleshow/61884087.cms>

#### 4.2.10 Offences committed on children with disabilities

Section 85 penalizes offences committed against children with disabilities. Where any person commits any of the above offences against a disabled child, then the person shall be liable to twice the prescribed punishment. The Rights of Persons with Disabilities Act, 2016 [The RPD Act] defines a person with disability as a person with “long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others”.

The RPD Act in section 92 prohibits acts of atrocities against persons with disabilities. In this regard the provision prohibits:

- i. Intentional insulting or intimidation with the intent to humiliate a person with disability in any place with public view;<sup>377</sup>
- ii. Assaulting or using force to any person with disability with intent to dishonour him or outrage the modesty of a woman with disability;<sup>378</sup>
- iii. Voluntarily or knowingly denying food or fluids to a person with disability whom the offender has actual charge or control over;<sup>379</sup>
- iv. Sexual exploitation of a disabled woman or child by a person in a position to dominate the will of the woman or child.<sup>380</sup>
- v. Voluntarily injures, damages, or interferes with the use of any limb or sense or any supporting device of a person with disability;<sup>381</sup>
- vi. Performing, conducting or directing any medical procedure to be performed on a woman with disability which leads to or is likely to lead to termination of pregnancy without her express consent except in cases where medical procedure for termination of pregnancy is done in severe cases of disability and with the opinion of a registered medical practitioner and also with the consent of the guardian of the woman with disability.<sup>382</sup>

Committing any of the above offences against a child with disability will automatically also constitute an offence under section 85 of the JJ Act.

In addition to making provision for offences, the RPD Act also empowers the Executive Magistrate to provide for protective custody and maintenance of persons with disabilities who has been or likely to suffer abuse and exploitation.<sup>383</sup>

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<sup>377</sup> RPD Act, Section 92(a).

<sup>378</sup> RPD Act, Section 92(b).

<sup>379</sup> RPD Act, Section 92(c)

<sup>380</sup> RPD Act, Section 92(d)

<sup>381</sup> RPD Act, Section 92(e)

<sup>382</sup> RPD Act, Section 92(f)

<sup>383</sup> RPD Act, Section 7(3)

## **Dos and Don'ts**

- The police must inform the child and the family regarding available protection under the RPD Act through an application to an Executive Magistrate. Additionally, the police must inform of the nearest organisation or institution working for rehabilitation of persons with disabilities, the right to free legal aid, and the right to make a complaint under the RPD Act.
- A child with disability may require assistance for mobility (eg. Wheelchair) and arrangements must be made in this regard.
- Certain children with disability may require a special educator or interpreter to communicate and the police should procure a list of special educators and interpreters from the DCPU to avail assistance when necessary.

### **4.2.11. Disclosure of Identity of the Child**

Section 74 of the JJ Act penalizes the disclosure of the identity of the child. It prohibits the reporting in any newspaper, magazine, news-sheet or audio-visual media or any form of communication regarding any inquiry or judicial procedure disclosing the name, address, school or any particular which may lead to the identification of a child in conflict with the law or a child in need of care and protection. Such disclosure is permissible by the JJB or CWC for reasons recorded in writing where the best interest of the child warrant it.<sup>384</sup>

It is also an offence under the provision for the police to disclose about the record of a child for use as a character certificate or otherwise where the case has been disposed off or closed.<sup>385</sup>

A similar provision is provided for in the POCSO Act and the IPC. Section 23 of the POCSO Act specifically for victims of child sexual abuse wherein there is a prohibition on reporting by media which discloses the identity of the child (such as name, address, photography, school, neighbourhood, family details, etc.) unless special permission is received in this regard from the Special Court permitting the disclosure in the best interest of the child. Additionally, no person is permitted to make any reports or present comments on any child in any form of media without complete and authentic information that has the effect of lowering the reputation or infringing upon the privacy of the child.

Section 228-A of the IPC also prohibits the publishing or printing of the name or any information which will disclose the identity of any person against whom an

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<sup>384</sup> JJ Act, 2015, Section 74(1) of the JJ Act, 2015

<sup>385</sup> JJ Act, 2015, Section 74(2) of the JJ Act, 2015

offence of rape as provided for in section 376, 376A, 376B, 376C or 376D of the IPC has been committed or alleged to have been committed.

Where an offence has been committed under section 23 of the POCSO Act described above, the publisher or owner of the media, studio or photographic facility will be held jointly and severally liable for the act/omission of his employee.

### **Dos and Don'ts**

- The police must take great care to ensure that the victim is not re-victimised by sensitive handling of information and ensuring that private information of the child is not disclosed through the course of the investigation.
- The police should not disclose information about the case involving a child for the purpose of character certificate if the case has been closed or disposed.
- All relevant charges that may be applicable under section 228-A of the IPC or the POCSO Act must be added to the charge-sheet.

#### **4.2.12. Mandatory Reporting**

Section 32 of the JJ Act mandates that all individuals including the police, any organisation, and other authorities must upon finding and taking charge, or being handed over of a child found without a guardian, or child who claims to be abandoned or lost, or claims to be an orphan without family support, immediately report the matter to:

- a. the police
- b. a Child Welfare Committee
- c. a District Child Protection Unit

In the alternative, the person finding the child may handover the child to a registered child care institution. Such reporting must be done within 24 hours of finding a child. This information will then be uploaded upon a specially designed portal in accordance with specifications made in this regard by the Central Government.

A similar provision is provided for in section 19(1) of the POCSO Act wherein any person (including the child), who has apprehension that an offence under the POCSO Act is likely to be committed or has knowledge that such an offence has been committed must provide information to the police. Failure to report the commission of an offence is an offence under the Act. However, the POCSO Act prohibits the prosecution of children for failure to report the commission of an offence.<sup>386</sup>

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<sup>386</sup> POCSO Act, Section 21(3).

#### **4.2.13 False complaint and False information under POCSO Act**

The POCSO Act under section 22 prohibits any person from making a false complaint or providing false information against a person in respect of an offence committed under section 3, 5, 7, and 9 of the POCSO Act dealing with penetrative sexual assault and sexual assault solely with the intention to humiliate, extort or threaten or defame him. No liability is incurred in respect of information given in good faith.<sup>387</sup>

The POCSO Act prohibits the prosecution of a child for making a false complaint or providing false information regarding the commission of an offence under the POCSO Act.<sup>388</sup>

#### **4.2.14 Abetment of suicide of a child**

Section 305 of the IPC provides punishment for abetment of suicide of a child, insane person or intoxicated person.

#### **4.2.15 Sale of Obscene Objects to Young Persons**

Section 293 of the IPC prohibits the sale, letting for hire, distribution, exhibition or circulation of any obscene object to any person below the age of 20 years.

#### **Dos and Don'ts**

- In addition to section 293 of the IPC, other charges may also apply depending on the circumstances of the case. The police must ensure that all applicable charges are added.
- Where the said object was distributed or sold with a sexual intent to a child below 18 years, the act will also constitute the offence of sexual harassment under section 11 of the POCSO Act.
- Where the obscene object was distributed to the child through the use of electronic communication, charges under the Information Technology Act, 2000 will also apply. (See Chapter 5 on Cyber Offences Against Children)
- Where the object portrays a child in a sexually explicit manner, charges of child pornography charged under the POCSO Act and the Information Technology Act, 2000 will be applicable. (See Chapter 5 on Cyber Offences Against Children)

#### **4.2.16 Abetment of Offences**

Abetment of any of the offences under the JJ Act attracts the same punishment as

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<sup>387</sup> POCSO Act, Section 19(7)

<sup>388</sup> POCSO Act, Section 22(2)

committing the offence itself.<sup>389</sup> A similar provision is contained in the POCSO Act in section 17 and section 109 of the IPC which provide that any person who has abetted the commission of an offence will be punished with the punishment provided for that offence.

### 4.3 Procedure in case of Offences committed against Children

When an offence is committed against a child, the criminal justice system is set into motion and the procedures laid out in the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 and the Indian Penal Code, 1860 come into play.

<b>WHAT HAPPENS AFTER THE COMMISSION OF AN OFFENCE AGAINST A CHILD?</b>	
<b>CRIMINAL PROCEDURE</b>	<b>PROCEDURE FOR CARE AND PROTECTION</b>
<ul style="list-style-type: none"> <li>▪ Recording of Information</li> <li>▪ Investigation</li> <li>▪ Trial</li> <li>▪ Sentence</li> <li>▪ Compensation</li> </ul>	<ul style="list-style-type: none"> <li>▪ Production before CWC if the child requires State care and protection</li> <li>▪ Determination of Placement: Restoration with parent/guardian or Institutionalisation if it is in the child’s best interest and as a measure of last resort</li> <li>▪ Rehabilitation: Institutional and Non-Institutional Care, preparation of Individual Care Plan, etc.</li> <li>▪ Follow-up and After-care</li> </ul>

#### 4.3.1 Complaint

The first step usually involves the filing of a complaint. A complaint regarding an offence committed against a child can be made by:<sup>390</sup>

- a. Child
- b. Family
- c. Guardian
- d. Friend
- e. Teacher
- f. Childline services
- g. Any other individual or institutions or organizations, including CWC or JJB concerned

<sup>389</sup> IPC, Section 87.

<sup>390</sup> JJ Model Rules, 2016, Rule 54(1).

Please refer section 1.1 for the detailed criminal procedure to be followed in case of offences against children; and the various duties imposed upon the different stakeholders in the criminal justice system; and the general norms for facilitation of care and protection by the Police.

#### 4.4 FAQs

- **A registered orphanage informs the police regarding the arrival of a new infant at their institution after being abandoned by the mother who was a 14-year old girl? Should she be charged under Section 317, IPC for abandonment of child and section 75 of the JJ Act for cruelty to child?**

Although the IPC and JJ Act criminalise abandonment of a child, the JJ Act provides an exception for biological parents who have abandoned their child due to circumstances beyond their control.<sup>391</sup> Further, the 14 year old mother here would be a victim of aggravated penetrative sexual abuse under the POCSO Act. The mother should thus be assessed to see if she is a child in need of care and protection to take further steps. Information regarding the commission of a child sexual abuse must be informed to the CWC.

- **16- year old Savita eloped with 17-year old Vinay and got married without the consent of their parents. Savita's parents file charges of kidnapping. Can the police arrest Vinay?**

Where a child has left the custody of her guardians willingly, it would not amount to kidnapping. Vinay can be arrested for offences under the POCSO Act. The police may produce Savita before the CWC who will decide upon the further course of action if Savita refuses to return to her parental home.

- **Vinay is a 14 year old child with speech impairment residing at a Children's Home for Boys in Lucknow. Vinay's teacher who comes to the Home to teach the boys severely reprimands Vinay for failing in a test and hits him with a scale in front of the other students. A complaint regarding the incident is made through the use of the complaint box in the Home. During inquiry the superintendent states that the teacher was only disciplining the child and preparing him to pass his Board exams the following year. Can the teacher be charged with an offence? If yes, under what provisions?**

Corporal punishment by persons employed in a Child-Care Institution is prohibited under the JJ Act even where the punishment is administered for the purpose of disciplining. The act of the teacher would constitute an offence under section 82 of the JJ Act. Further charges will also be applicable under section 92(a) of the

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<sup>391</sup> JJ Act, 2015, Proviso to Section 75

Rights of Persons with Disabilities Act, 2016 and relevant portions of the IPC. In addition to these charges, depending on the extent of the role played by the Superintendent of the Home, he may be charged under section 75 of the JJ Act for exposing a child under his care to an act of cruelty.

- **A child has been rescued from the streets, however, the police find that none of the CWC members are sitting on that day. What must the police do in such cases?**

Where a child is rescued during late hours or at night, the child may be admitted to a Children's Home in the vicinity prior to being produced before the CWC. As per Rule 16(6) of the JJ Model Rules, 2016 at least one member of the CWC must be available at all times for any emergency and in order to issue appropriate directions to the SJPU or local police. For this purpose, the Chairperson of the CWC must create a monthly roster of the CWC members who shall be available at all days including Sundays and holidays. This roster is to be circulated to all police stations, Chief Judicial Magistrate/ Chief Metropolitan Magistrate the District Judge, the District Magistrate, the Board, the District Child Protection Unit and the SJPU.

- **A child victim of begging is rescued from a temple premise. Upon questioning, the child reveals that he was abducted by a group from the neighbouring state in order to beg. Before which CWC must the child be produced? Does he have to be taken to the CWC from the place of origin of the child?**

Irrespective of the place of origin of the child, the police must first promptly produce the child before the CWC which has jurisdiction in the area in which the child was rescued. During the inquiry before the CWC, if it is found that the child is from a place outside their jurisdiction, it may after a consultation with the CWC in the child's home district choose to order for a transfer to that CWC.<sup>392</sup> Such transfer must be made in consideration of the best interests of the child. Where the transfer involves an inter-state transfer, the CWC must be handed over to the CWC in the home district of the child where convenient or to the CWC of the capital city of the home State.<sup>393</sup>

Once a CWC has ordered for a transfer, the SJPU will be ordered to escort the child within 15 days of receiving the order.<sup>394</sup> Further, where the child to be transferred is a girl child, the child must be accompanied by a woman police officer.<sup>395</sup> Such transfer must accompany a transfer of all relevant documents.<sup>396</sup>

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<sup>392</sup> JJ Act, 2015, Section 95(1)

<sup>393</sup> Id., Proviso to Section 95(1)

<sup>394</sup> JJ Act, 2015, Section 95(2)

<sup>395</sup> Id.

<sup>396</sup> JJ Act, 2015, Section 95(1)

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
Employment of a child for Begging or Causing a child to beg	s.76 of the Juvenile Justice (Care and Protection of Children) Act, 2015	Employing, using or causing a child to beg	Cognizable and Non-Bailable <sup>397</sup>	Imprisonment for a term that may extend to five years and fine of Rs. 1 Lakh.
		Amputating or maiming a child for the purpose of begging		Imprisonment for a minimum term of seven years which may extend up to ten years, and fine of Rs. 5 lakh.
		Person having charge or control over the child aiding in making a child beg		Imprisonment for a term that may exceed to five years and fine of Rs. 1 Lakh.
Cruelty to Child and Abandonment of child	s.11 of the Bombay Prevention of Begging Act, 1959.	Employing or causing any person to beg Whoever having custody or charge of child, conniving or encouraging or causing a child to beg.	Non-Cognizable and Bailable	Imprisonment for a period of minimum one year and a maximum three years.
	s.144 of the Railways Act, 1989	Begging in any railway carriage or upon a railway station.	Non-Cognizable and Bailable	Imprisonment for a maximum term of up to one year, or with fine up to two thousand rupees, or both Removal from railway carriage or any part of the railway or railway station
	s. 75 of the JJ Act, 2015(Cruelty to Child)	Acts of assault, abandonment, and abuse or neglect of a child by person in charge or control of the child resulting in unnecessary physical or mental suffering. Acts of cruelty by persons employed by or managing institutions entrusted with care of a child Acts of cruelty that result in child	Non-Cognizable and Bailable  Cognizable and Non-Bailable  Cognizable and	Imprisonment for a term that may extend to three years and/or with a fine of Rs. 1 Lakh.  Rigorous Imprisonment that may extend to five years and a fine up to Rs. 5 Lakh.  Rigorous imprisonment for a minimum

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
		becoming physically incapacitated, or developing a mental illness, being rendered mentally unfit to perform regular tasks, or has risk to life or limb	Non-Bailable	term of three years which may extend to ten years and fine of Rs. 5 Lakh.
	Section 317 of the IPC (Abandonment of a child under 12 years)	Exposing or leaving a child under the age of 12 years in any place with the intention of wholly abandoning the child by a person who is the father or mother of the child or having care of the child.	Cognizable and Bailable	Imprisonment for a maximum term of seven years, or fine or both.
<b>Giving tobacco, drugs or liquor to a child.</b>	s. 77 of the JJ Act, 2015	Giving intoxicating liquor, or narcotic drug, or tobacco products, or psychotropic substance to a child unless its under the order of a duly qualified medical practitioner.	Cognizable and Non-Bailable	Rigorous imprisonment for a term of up to seven years and fine of up to Rs 1 lakh.
	Rule 56(10) of the Juvenile Justice Model Rules, 2016	Giving or selling of intoxicating liquor, narcotic drugs or psychotropic substances or tobacco products within 200 meters of a:Child Care Institution or any other home registered or recognised under the Act, or the office of a CWC or a JJB <sup>1</sup>		Rigorous imprisonment for a term of up to seven years and fine of up to Rs. 1 lakh.
	S.6 of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003	Prohibition on sale of cigarette or other tobacco products to a person below the age of eighteen years and in particular area: Selling, offering for sale or permitting of a sale of a cigarette or other tobacco product. to a person under the age of 18 years.ii. within hundred yards of an educational institution	Non-Cognizable and Bailable	Fine which may extend to Rs. 200.

<b>Offences</b>	<b>Applicable Law</b>	<b>Description of Offence</b>	<b>Nature of Offence</b>	<b>Punishment Prescribed</b>
<b>Using a child for committing offences related to drugs or liquor.</b>	s.78 of the JJ Act, 2015	Using a child for vending, peddling, carrying, supplying or smuggling any intoxicating liquor, narcotic drug or psychotropic substance.	Cognizable and Non-Bailable	Rigorous imprisonment for a term up to seven years and fine up to one lakh rupees.
<b>Exploitation of a child employee.</b>	s.79 of the JJ Act, 2015	Exploitation of a child employee by keeping a child in bondage for the purpose of employment or withholding their earnings or using the earnings for their own purpose.	Cognizable and Non-Bailable	Rigorous imprisonment for a term up to five years and fine of one lakh rupees.
<b>Adoption-related Offences</b>	Illegal Adoption [s.80 of the JJ Act, 2015]	Any person or organization offering, giving or receiving any child (who is orphaned, surrendered or abandoned) for the purpose of adoption without following the procedure under the JJ Act.	Non-Cognizable and Bailable	Imprisonment (of either description) for a term of up to three years or fine of Rs 1 lakh, or both. In addition, where the offence is committed by an adoption agency, their registration and recognition under the JJ Act will be withdrawn for a minimum period of one year.
	Failure of Specialised Adoption Agency [s.65(4) of the JJ Act]	Failure of a Specialised Adoption Agency to take steps to get an abandoned or orphaned child declared legally free for adoption, do a home-report or failure in taking steps to receiving a court order for adoption	Non-Cognizable and Bailable	Fine of up to Rs. 50,000. In case of repeated default, withdrawal of recognition
	Failure of child-care institutions [S.66 of the JJ Act]	Failure of a child-care institution in getting an abandoned or orphaned child declared legally free for adoption and setting up necessary linkages with Specialised Adoption Agency	Non-Cognizable and Bailable	Fine up to Rs. 50,000. In case of repeated default, withdrawal of recognition

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
<b>Sale and Procurement of Children</b>	Sale and Procurement of children (s.81 of the JJ Act, 2015)	<p>Buying and selling of children for any purpose.</p> <p>Where the above offence is committed by a person having charge of the child, including employees of a hospital or nursing home or maternity home.</p>	Cognizable and Non-Bailable	Rigorous imprisonment for a term of up to five years and fine of Rs. 1 lakh.
<b>Corporal Punishment</b>	s.82 of the JJ Act, 2015	Persons-in-charge or those employed at a child care institution subjecting a child to corporal punishment in order to discipline a child.	Non-Cognizable and Bailable	<p><u>First conviction:</u> Fine of Rs. 10,000.</p> <p><u>Subsequent conviction:</u> Imprisonment up to three months or fine or both.</p> <p>Where the accused is employed at a child care institution, he shall be liable to be dismissed from service and debarred from working directly with children. Where the management of the institution does not cooperate with the inquiry or comply with the orders of the JJB or CWC or court or State Government, the person-in-charge of the institution shall be liable to imprisonment of a minimum period of three years and fine up to Rs. 1 lakh.</p>
<b>Use of child by militant groups or other adults</b>	s.83 of the JJ Act, 2015	Recruiting or using of any child by a militant group or outfit for any purpose. Use of child for the commission of illegal activities by an adult or group of adults.	Cognizable and Non-Bailable	Rigorous imprisonment for a term up to seven years and fine of Rs. 5 lakh.

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
<b>Kidnapping and Abduction</b>	s.84 of the JJ Act, 2015	Offences under section 359 to 369 of the IPC against a child		
	Section 360 of the IPC	<u>Kidnapping from India</u> : Conveying a child beyond the limits of India without the consent of the child or a person authorized to consent on behalf of the child.	Cognizable and Non-Bailable	Imprisonment for a term of up to seven years and fine.
	Section 361 of the IPC	<u>Kidnapping from lawful Guardianship</u> : Taking of enticing a child out of the lawful guardianship without the consent of the guardian.	Cognizable and Non-Bailable	
	Section 362 of the IPC	<u>Abduction</u> : Compelling or inducing a child by deceitful means to go from any place.	Cognizable and Non-Bailable	
	Section 363A(3) of the IPC	<u>Kidnapping or maiming a minor for the purposes of begging</u> : Kidnapping a minor by a person who is not the lawful guardian or obtaining custody of the child in order to have the child employed or used for the purpose of begging. <sup>398</sup> The provision also criminalizes maiming of a child so that the child may be employed or used for begging. <sup>399</sup> Where a person who is not the lawful guardian uses the child for begging, it will be presumed that he has kidnapped or obtained custody of the child for begging.	Cognizable and Non-Bailable	Kidnapping for the purpose of begging: Imprisonment for a term of up to ten years and fine. Kidnapping and maiming a minor for the purpose of begging: Imprisonment for life, and fine.
	Section 364 of the IPC	<u>Kidnapping or abducting in order to murder</u> : Kidnapping or abducting a child	Cognizable and Non-Bailable	Imprisonment for life or rigorous imprisonment for a term of up to ten

<sup>398</sup> Section 363A(1) of the IPC

<sup>399</sup> Section 363A(2) of the IPC

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
		for the purpose of murdering the child or disposing a child in manner where the child is in danger of being murdered.		years and fine.
	Section 364A of the IPC	Kidnapping for ransom: Kidnapping or abducting any person or keeping a person in detention after such kidnapping or abducting and threatens or causes or gives reasonable apprehension of causing death or hurt to such person in order to compel the Government or any foreign state or international inter-governmental organisation or any other person to do or abstain from doing anything or to pay a ransom	Cognizable and Non-Bailable	Punishable with death, or imprisonment for life and fine
	Section 365 of the IPC	<u>Kidnapping or abducting with intent</u> secretly and wrongfully to confine person: Kidnapping or abducting a child with intent to cause the child to be secretly and wrongfully confined.	Cognizable and Non-Bailable	Imprisonment for a term of up to seven years and fine.
	Section 366 of the IPC	<u>Kidnapping, abducting or inducing child to compel her marriage, etc:</u> Kidnapping or abducting a child with the intention or knowledge that she is likely to be compelled to marry a person against the child's will, or so that the child may be forced or seduced to illicit intercourse through the use of any form of compulsion such as abuse of authority or criminal intimidation.	Cognizable and Non-Bailable	Imprisonment for a term of up to ten years and fine.

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
	Section 366A of the IPC	<u>Procurement of minor child</u> : Inducing a child through any means to from any place or to do any act with the intention that or knowing that it is likely that such child will be forced or seduced to illicit intercourse with another person.	Cognizable and Non-Bailable	Imprisonment for a term of up to ten years and fine.
	Section 366B of the IPC	<u>Importation of girl from foreign country</u> : Importing into India from any country or from the State of Jammu and Kashmir any child with the intent of or knowing that child is likely to be forced or seduced to illicit intercourse with another person.	Cognizable and Non-Bailable	Imprisonment for a term of up to ten years and fine.
	Section 367 of the IPC	<u>Kidnapping or abducting in order to cause grievous hurt, slavery, etc.</u> : Kidnapping or abducting a child with the intention of subjecting the child to grievous hurt, slavery, unnatural lust of a person. It is also an offence to kidnap or abduct with the intention of disposing off such a child in a manner where it is likely that a child will be subjected to the above acts.	Cognizable and Non-Bailable	Imprisonment for a term of up to ten years and fine.
	Section 368 of the IPC	<u>Wrongfully concealing or keeping in confinement, kidnapped or abducted child</u> : Concealing or confining a child who the person knows to having been kidnapped or abducted.	Cognizable and Non-Bailable	Same punishment as the person committing the kidnapping.

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
	Section 369 of the IPC	Kidnapping or abducting child with intent to steal from the child; Kidnapping or abducting a child with the intention of taking dishonestly any movable property from the child.	Cognizable and Non-Bailable	Imprisonment for a term of up to seven years and fine.
<b>Offences against Disabled children</b>	s.85 of the JJ Act, 2015 Section 92 of the Rights of Persons with Disabilities Act, 2016	Commission of any offence in the JJ Act against a disabled child Acts of Atrocities against a child including: <ul style="list-style-type: none"> <li>• Intentional insulting or intimidation with the intent to humiliate a person with disability in any place with public view;</li> <li>• Assaulting or using force to any person with disability with intent to dishonour him or outrage the modesty of a woman with disability;</li> <li>• Voluntarily or knowingly denying food or fluids to a person with disability whom the offender has actual charge or control over;</li> <li>• Sexual exploitation of a disabled woman or child by a person in a position to dominate the will of the woman or child.</li> <li>• Voluntarily injures, damages, or interferes with the use of any limb or sense or any supporting device of a person with disability;</li> </ul>		Twice the penalty as that of the offence.
			Cognizable and Bailable	Imprisonment for a minimum term of six months, which may extend to five years and fine.

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
<b>Disclosing the identity of a child</b>	Section 74 of the JJ Act, 2015	<ul style="list-style-type: none"> <li>Performing, conducting or directing any medical procedure to be performed on a woman with disability which leads to or is likely to lead to termination of pregnancy without her express consent except in cases where medical procedure for termination of pregnancy is done in severe cases of disability and with the opinion of a registered medical practitioner and also with the consent of the guardian of the woman with disability.</li> </ul>	Non-Cognizable and Bailable	Imprisonment for a term of up to six months or fine up to Rs. 2 lakh or both.
	Section 23 of the POCSO Act	Reporting by media which discloses the identity of the child victim (such as name, address, photograph, school, neighbourhood, family details, etc.)	Non-Cognizable and Bailable	Imprisonment for a minimum period of six months which may extend to one year or with fine or with both.

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
<b>Mandatory Reporting</b>	Section 228A of the Indian Penal Code, 1860	<p>Making any reports or present comments on any child in any form of media without complete and authentic information that has the effect of lowering the reputation or infringing upon the privacy of the child.</p> <p>Publishing or printing of the name or any information which will disclose the identity of any person against whom an offence of rape as provided for in section 376, 376A, 376B, 376C or 376D of the IPC has been committed or alleged to have been committed.</p>	Cognizable and Bailable	Imprisonment for a maximum term of two years and fine
	Section 32 of the JJ Act, 2015	<p>All individuals including the police, any organisation, and other authorities must upon finding and taking charge, or being handed over of a child found without a guardian, or claims to be abandoned or lost, or claims to be an orphan without family support, immediately report the matter to the policea Child Welfare Committee District Child Protection UnitIn the alternative, the person finding the child may handover the child to a registered child care institution. Such reporting must be done within 24 hours of finding a child.</p>	Non-cognizable and Bailable	Imprisonment for a term of up to six months or fine of Rs. 10,000 or both
	Section 19(1) of the POCSO Act	Any person who has (including the child), who has apprehension that an offence	Non-cognizable and Bailable	Imprisonment for a term of up to six months or with fine or with both.

Offences	Applicable Law	Description of Offence	Nature of Offence	Punishment Prescribed
		<p>under the POCSO Act is likely to be committed or has knowledge that such an offence has been committed must provide information to the police. *POCSO Act prohibits the prosecution of children for failure to report the commission of an offence.<sup>400</sup></p>		
<b>False Information &amp; False Complaint</b>	Section 22 of the POCSO Act	<p>Making a false complaint or providing false information against a person in respect of an offence committed under section 3,5,7, and 9 of the POCSO Act dealing with penetrative sexual assault and sexual assault with the sole intention of humiliating, extorting or threatening or defaming him. *A child may not be punished for an offence under this provision.</p>	Non-cognizable and Bailable	Imprisonment for a term of up to six months or with fine or with both.
<b>Abetment of suicide of a child</b>	Abetment of suicide of child or insane person (s.305 of the IPC)	Abetment of suicide of a child, insane person, delirious person or an intoxicated person.	Cognizable and Non-Bailable	Punishment by Death, or Imprisonment for life, or Imprisonment for a period not exceeding ten years, and Fine.
<b>Sale, etc. of Obscene Objects to young person:</b>	Section 293 of the Indian Penal Code, 1860	Any act of selling, distributing, exhibiting or circulating to a young person any obscene object. The provision protects all persons under the age of 20 years.	Cognizable and Bailable	<p>First Conviction: Imprisonment for a term of up to three years and fine of up to Rs. 20000. Second Conviction: Imprisonment for a term of up to seven years and fine of up to Rs. 5000.</p>

<sup>400</sup> Section 21(3) of the POCSO Act

## Chapter 4, Annexure 2: Significant Court Rulings

- ***Bachpan Bachao Andolan v. Union of India, WP No. 906 of 2014***

This case was instituted by way of a writ petition by the NGO, Bachpan Bachao Andolan in order to draw attention to the increasing use of drugs and alcohol amongst children in India. The Supreme Court was prayed to issue orders to the Government to formulate and implement a national action plan to address this concern, incorporate important information in this regard in school curriculums, establish de-addiction centres, etc.

Through the course of the hearings the Supreme Court observed that although various arms of the governments had taken initiative to deal with substance abuse and addiction amongst children, there was a lack of a comprehensive national plan.

The Supreme Court in its final order directed the Union government to:

- a. Complete a national survey to determine the extent and patterns of abuse
- b. Generate a national level database with reliable information on factors such as high-risk populations, vulnerable states, etc.
- c. Formulate and adopt a comprehensive national plan within a span of four months
- d. Adopt specific content in school curriculums under New Education Policy (NEP)

- ***Nandini Sundar v. Union of India, [2011] 7 SCC 547***

This case dealt with the role of the State of Chhattisgarh in the mass violation of human rights perpetuated in the context of the civil unrest and Maoist activities in the state. Part of these serious allegations included the recruitment of civilians including children under the age of 18 years as ‘Special Police Officers’ (also known as Koya Commandos).

Through the course of the case it emerged that these children were recruited under s.17 of the Police Act, 1861 as special police officers (SPOs) as the provision did not specify any age restriction. The provision empowers Magistrates to appoint residents of the neighbourhood as SPOs during difficult law and order situations. These youth are trained extensively in the use of firearms and deployed in conflict areas under the leadership of the local police.

The Supreme Court lamented the state of affairs in the state and observed that:

*“It is now clear to us, as alleged by the petitioners, that thousands of tribal youth are being appointed by the State of Chhattisgarh, with the consent of the Union of India, to engage in armed conflict with the Maoists/Naxalites...*

*It is also equally clear to us, as alleged by the petitioners, that the lives of thousands of tribal youth appointed as SPOs are placed in grave danger by virtue of the fact that they are employed in counter-insurgency activities against the Maoists/Naxalites in Chattisgarh. The fact that 173 of them have “sacrificed their lives” in this bloody battle, as cynically claimed by the State of Chhattisgarh in its affidavit, is absolute proof of the same.”<sup>401</sup>*

The Supreme Court called for the immediate disbanding of such SPOs and pronounced such appointments as unconstitutional.

- ***Parents Forum for Meaningful Education v. Union of India, AIR 2001 Delhi 212***

The petitioner organisation comprising of parents of school children petitioned the Delhi High Court challenging a provision of the Delhi School Education Rules, 1973 which prescribed detention breaks, corporal punishment, fine, expulsion, rustication, etc. methods for the purpose of disciplining students. In particular the impugned rule permitted corporal punishments through the use of cane up on the student’s hand with a limit of ten strikes in cases of persisting impertinence or rude behaviour towards the teachers, physical violence, intemperance and serious form of misbehaviour with other students.

The parents’ group alleged before the Court that such a rule was illegal and unconstitutional. The Court considered various constitutional law provisions, the guarantees under the United Nations Convention on the Rights of the Child. Further, considering various studies on the impact of physical force on children, the court observed that “[b]rutal treatment of children can never inculcate discipline in them. Obedience exacted by striking fear of punishment can make the child adopt the same tactics when he grows up for getting what he wants.”<sup>402</sup> Making the above observation, the court struck down the rule as unconstitutional and directed the state to ensure that “children are not subjected to corporal punishment in schools and they receive education in an environment of freedom and dignity, free from fear.”<sup>403</sup>

## **Chapter 5 – Cyber Offences Against Children**

### **5.1 The Context**

Around 400 million people in India (i.e., approximately one third of the population) are estimated to use the Internet.<sup>404</sup> Although the internet penetration rate in India is comparatively lower than other countries, it has still demonstrated one of the

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<sup>401</sup> Id. at para 43 and 444.

<sup>402</sup> Parents Forum for Meaningful Education v. Union of India, AIR 2001 Delhi 212 at para 19.

<sup>403</sup> Id. at para 28.

<sup>404</sup> *Internet in India 2016*, IAMAI & KANTAR IMRB Report, p.3, available at <http://bestmediainfo.com/wp-content/uploads/2017/03/Internet-in-India-2016.pdf>

highest rates of cyber offending, particularly in relation to online child pornography. It is estimated that in India every 40 minutes a pornographic video is created and 35-38% of such videos feature children.<sup>405</sup>

The anonymity and ease offered by the internet makes commission of crimes much easier and detection of these crimes that much more challenging. For instance, the media widely reported regarding an online game - ‘Blue Whale’ which purportedly targets children and induces them to commit suicide after performing a variety of ‘challenges’.<sup>406</sup> Despite more than 5 deaths of teenagers in India being allegedly linked to the game in 2017,<sup>407</sup> and several more deaths of children world over, governments have still been unable to even confirm the existence of the game<sup>408</sup> illustrating the difficulty of investigation in cases of cyber crimes.

The rate of offending with respect to other online crimes specifically against children such as bullying or online grooming, which refers to the cultivation of an online relationship with a child for sexual purpose, is less clear due to the absence of statistical data.

Cyber Offences under the Information Technology Act, 2000 in the year 2016 <sup>409</sup>	
Total Offences under the IT Act	8613
Offences relating to the publication or transmission of obscene or explicit content	934
Offences relating to obscene or sexual representation of children.	17
Offences under the IPC <sup>410</sup>	
Sexual Harassment of Children (under section 354A)	3350
Stalking of a child (under section 354C)	1020

<sup>405</sup> Shashank Shekhar, *India has one of world's worse rates of online child pornography despite crackdown*, cyber experts reveal [Daily Mail 5 Sep 2017], available at <http://www.dailymail.co.uk/indiahome/indianews/article-4855694/India-world-s-worse-rates-online-child-pornography.html#ixzz4tBJ3jkuk>

<sup>406</sup> *What is Blue Whale Challenge*, THE INDIAN EXPRESS [Oct 21, 2017], available at <http://indianexpress.com/article/what-is/what-is-the-blue-whale-challenge/>

<sup>407</sup> *Blue Whale Challenge: These are the 5 suspected cases in India*, THE INDIAN EXPRESS [Oct 21, 2017] available at <http://indianexpress.com/article/india/blue-whale-challenge-these-are-the-suspected-cases-india-4798745/>.

<sup>408</sup> Bhairavi Prakash, *Myth of the Blue Whale game*, THE HINDU [Oct 8, 2017] available at <http://www.thehindu.com/education/myth-of-the-blue-whale/article19818341.ece>.

<sup>409</sup> National Crime Records Bureau, *Crime in India – 2016*, Table 9A.2.

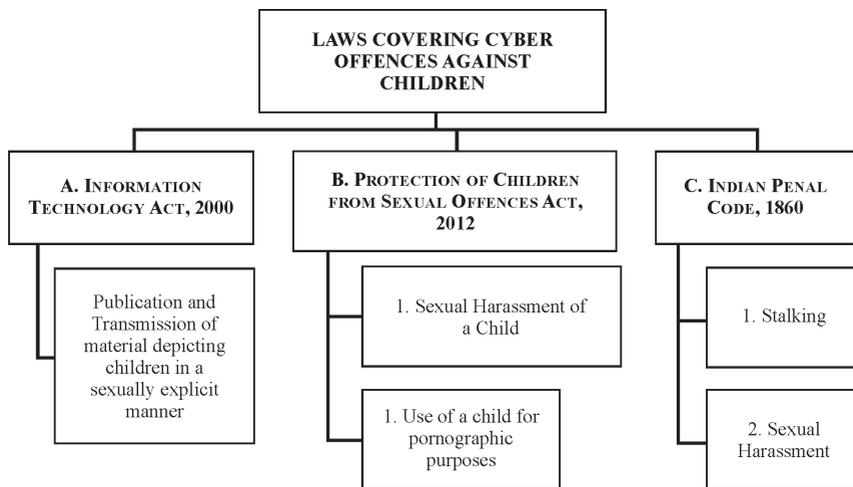
<sup>410</sup> National Crime Records Bureau, *Crime in India – 2015*, Chapter 6, pg 99,100.

Although it is not known how many of the above offences listed under the IPC were committed using internet technology, it is indisputable that the rise in internet and electronic communication has given rise to a new category of offences creating a new landscape of vulnerability in children.

## 5.2 Legal Framework on cyber offences against children

The provisions which may be applicable in cases of cyber offences against children find place in the following three significant legislations:

- i. The Information Technology Act, 2000 [the IT Act]
- ii. The Protection of Children from Sexual Offences Act, 2012 [the POCSO Act]
- iii. The Indian Penal Code, 1860 [the IPC].



As can be seen in the above framework, certain offences are covered by more than one legislation leading to overlapping laws. For e.g., the offence of child pornography is covered both under the IT Act, as well as the POCSO Act. Additionally, different laws may prescribe different punishments for the same offence. The police should, however, refer to all relevant provisions similarly named offences have different elements and an act may constitute distinct offences under different laws.

### 5.2.1 The Information Technology Act, 2000

The Information Technology Act was enacted in the year 2000 with the primary purpose of providing legal recognition and regulation of electronic commerce

and facilitating electronic transactions, and was amended in the year 2008 to deal with several offences related to the use of cyber technology. A significant addition was the introduction of the provision prohibiting the depiction of children in a sexually explicit manner through electronic form. The amended IT Act contains, in relation to objectionable material:

**Jurisdiction for Offences under the IT Act**

The IT Act is applicable to persons irrespective of their nationality and to offences committed outside the territory of India if the offence involves a computer, computer system or computer network located in India.<sup>411</sup>

- a. Section 67: Punishment for publishing or transmitting obscene material in electronic form
- b. Section 67A: Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form
- c. Section 67B: Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.

The IT Act, thus, includes general provisions prohibiting publishing and transmission of obscene material and sexually explicit material in electronic form, and a separate special provision criminalizing child pornography.

***Section 67B of the IT Act***

Section 67B, IT Act is the key provision tackling child pornography and covers several cyber offences besides child pornography itself. It criminalises the following acts:

- Electronic publication or transmission of material that depicts children in a sexually explicit act or conduct. This includes the act of even causing the publication or transmission of such material.
- Creation (of text or digital images), collection, seeking, browsing, downloading, advertising, promoting, exchanging, or distribution of material which depict children in an obscene, indecent or in a sexually explicit act or conduct in electronic form.
- Cultivation or enticement or inducing a child in order to have an online relationship with one or more children for a sexually explicit act or any other offensive purpose. This covers grooming.
- Facilitation of online child abuse.
- Electronically recording own abuse or abuse of others relating to sexually explicit acts with children.

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<sup>411</sup> IT Act, 2000, Section 75.

Exception: The above provision creates two exceptions in favour of material (books, pamphlets, paper, writing, drawing, painting, representation or figure in electronic form) which:

- a. is justified as being for public good in the interest of science, literature, art, or learning or other objects of general concern; or
- b. is kept or used for bona fide heritage or religious purposes.

The IT Act applies to all persons below the age of 18 years<sup>412</sup> and is gender neutral in nature.

### **5.2.2 Protection of Children from Sexual Offences Act, 2012**

The Protection of Children from Sexual Offences Act, 2012 was enacted to provide for a special law exclusively addressing sexual offences against children. The provision on ‘Sexual Harassment’ covered under the Act covers a broad range of non-touch based offences. In addition, the Act also contains detailed provisions on child pornography. A detailed overview of the offences covered under the POCSO Act has been dealt with in Chapter 1 of Section II.

The provisions relevant to cyber offences in the POCSO Act have been detailed below:

#### ***i. Prohibition of Sexual Harassment***

Section 11 of the POCSO Act includes a broad range of activities, which may constitute sexual harassment of a child. Any of the following acts committed with a sexual intent amounts to ‘sexual harassment’:

- a. Uttering a word or sound, making any gesture, exhibiting any object or part of the body with the intention that it be heard or seen by the child.
- b. Making a child exhibit his body or part of his body in order to be seen by the offender or any other person
- c. Showing any object to a child in any form or media for pornographic purposes
- d. Repeatedly or constantly following or watching or contacting a child directly or through electronic means.
- e. Threatening to use any form of media whether real or a fabricated depiction through electronic or any mode in order to show any part of the body of the child or involvement of a child in a sexual act.
- f. Entices a child for any pornographic purpose or gives gratification for this purpose.

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<sup>412</sup> IT Act, 2000, Explanation to section 67A.

For any of the above acts to constitute an offence, it is essential that it be shown that the acts were done with a ‘sexual intent’. However, ‘sexual intent’ has not been defined or elaborated by any of the provisions in the Act. Section 30<sup>415</sup> of the Act creates a **presumption** with regard to the mental state of the accused and provides that where an offence in the Act requires a certain mental state on the part of the accused, a court must presume that the accused possessed such mental state. The burden to prove the absence of such mental state is on the accused. Thus, while prosecuting an offence related to related

Note: All offences in the POCSO Act carry a mandatory reporting obligation requiring any person with the knowledge of the commission of an offence or an apprehension that an offence under the Act may be committed to report the offence.<sup>413</sup> Failure to report the commission of an offence may be punished with imprisonment for up to six months or fine or both.<sup>414</sup>

to online sexual harassment of a child, a court will presume that the acts of the accused were in fact committed with a ‘sexual intent’ unless the defence is able to prove the contrary.

As the IT Act does not cover acts of cyber stalking or online harassment, Section 11 of the POCSO Act is an important provision to be invoked along with section 354A of the IPC. Section 11 of the POCSO Act makes an expressed mention of the use of electronic means to commit stalking.

This provision along with section 67B of the IT Act can also be invoked to tackle cases of grooming of children. ‘Grooming’ refers to the process of “establishing/building a relationship with a child either in person or through the use of the Internet or other digital technologies to facilitate *either online or offline* sexual contact with that person.”<sup>416</sup>

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<sup>413</sup> POCSO Act, 2012, Section 19(1).

<sup>414</sup> POCSO Act, 2012, Section 21(1).

<sup>415</sup> POCSO Act, 2012, Section 30 states: “30. Presumption of culpable mental state:

(1) In any prosecution for any offence under this Act which requires a 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 defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.”

<sup>416</sup> *Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse*, Adopted by the Interagency Working Group in Luxembourg, 28 January 2016 [pg 51], available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—ipecc/documents/instructionalmaterial/wcms\\_490167.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—ipecc/documents/instructionalmaterial/wcms_490167.pdf)

*ii. Prohibition on using children for child pornography*

Section 13 of the POCSO Act prohibits the use of children for pornographic purposes and all actions connected and related to child pornography. The provision criminalises the use of children for sexual gratification in any form of media, which may include an advertisement, an internet medium, any electronic form or even in printed form. It is irrelevant whether the use is personal or for the purposes of distribution.

The provision includes the following acts:

- a. representation of the sexual organs of a child,
- b. usage of a child engaged in real or simulated sexual acts (with or without penetration),
- c. the indecent or obscene representation of a child.

For the purposes of Section 13, the expression “use a child” includes involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

In addition to the above offences, Section 15 of the Act provides punishment for storage of pornographic material involving children for commercial purposes.

Apart from the actual filming or representation of a child in a sexually explicit manner, the Explanation to Section 13 states that acts of involving a child for the above purpose in any stage such as preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material also constitutes an offence under the provision. Where a sexual offence under the Act has been committed upon the child while committing the offence of child pornography, the act attracts a higher degree of punishment. (See table at Chapter 1, Annexure 1, for the scale of punishments provided under this provision)

**Difference between S.67B of the IT Act, 2000 and S.13-15 of the POCSO Act**

While both provisions address the crime of child pornography, there are key differences between the scope of the two provisions as stated below.

	<b>IT Act, 2000 (S.67B)</b>	<b>POCSO Act, 2012 (Ss.13, 14 and 15)</b>
<b>Definition of ‘child pornography’</b>	Material depicting children engaged in a sexually explicit act or conduct <sup>417</sup> and material depicting children in obscene or indecent manner. <sup>418</sup>	Using of children in material in any medium for the purposes of sexual gratification. This includes: a. representation of the sexual organs of a child; b. usage of a child engaged in real or simulated sexual acts (with or without penetration); c. the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes. <sup>419</sup>
<b>Application to Virtual Pornography</b>	The interpretation is yet to emerge as to the applicability of these laws to virtual child pornography. Virtual Child Pornography refers to erotic images and videos created through use of graphics and other computer technologies without the use or involvement actual children.	
<b>Mediums covered</b>	The IT Act as evident from the title of the statute, covers depictions only in the electronic form.	The POCSO Act covers all forms and mediums including programme or advertisement telecast by television channels, the internet medium, any electronic form or even in the printed form.
<b>Acts covered under the provision</b>	The provision in the IT Act comprehensively covers all acts in relation to online child pornography and includes within its ambit even downloading, possession and browsing for pornography through the use of an electronic medium. The Act also prohibits other online offences against children such as enticement into an online relationship for sexual purpose and any form of facilitation of online child abuse.  The POCSO Act addresses any form of sexual, indecent or obscene representation of children in electronic form or otherwise. Storage of child pornography is an offence only when stored for commercial purposes. <sup>420</sup> It does not expressly cover grooming.	

<sup>417</sup> IT Act, 2000, Section 67B(a).

<sup>418</sup> IT Act, 2000, Section 67B(b).

<sup>419</sup> POCSO Act, 2012, Section 13.

<sup>420</sup> POCSO Act, 2012, Section 15.

	<b>IT Act, 2000 (S.67B)</b>	<b>POCSO Act, 2012 (Ss.13, 14 and 15)</b>
	<p>The IT Act criminalises the following acts under the provision prohibiting child pornography:</p> <ol style="list-style-type: none"> <li>publication and transmission (or causing the publication or transmission) of child pornography</li> <li>creation of texts or digital images, collection, seeking, browsing, downloading, advertising, promotion, exchange and distribution of child pornography or any material that</li> <li>cultivation or enticement or inducing children into an online relationship for a sexually explicit act or in an offensive manner.</li> <li>Facilitation of online abuse of children</li> <li>Recording of abuse pertaining to a sexually explicit act with children.</li> </ol>	<p>The POCSO Act criminalises the following acts with respect to child pornography:</p> <ol style="list-style-type: none"> <li>preparation</li> <li>production</li> <li>offering</li> <li>transmitting</li> <li>publishing</li> <li>facilitation</li> <li>distribution</li> <li>storage for commercial purposes.</li> </ol>
<b>Exceptions</b>	<p>An exception is created in favour of:</p> <ol style="list-style-type: none"> <li>publication in the interest of science, literature, art or learning or other objects of general concern, or</li> <li>material kept or used for bona fide heritage or religious purposes.</li> </ol>	No Exception provided under the Act.

### 5.2.3 The Indian Penal Code, 1860

In respect of cyber offences against children, the following IPC provisions are applicable:

- Sexual harassment (Section 354-A)
- Stalking (Section 354-D)

Each of these offences have been described below:

**a. Sexual Harassment**

Section 354-A criminalises the following acts committed by a man:

- i. any physical contact and advances involving unwelcome and explicit sexual overtures
- ii. a demand or request for sexual favours
- iii. showing pornography against the will of a woman
- iv. making sexually coloured remarks

**Note:** Unlike the IT Act and the POCSO Act, all sexual offences under the IPC are not gender neutral in nature and are mostly applicable when committed only against women or girl children by a man.

**Difference between Sexual Harassment in the IPC and Sexual Harassment in the POCSO Act**

It is pertinent to note here that the offence of sexual harassment has also been covered comprehensively under the POCSO Act but several important differences exist between them. The POCSO Act is far more specific and rigorous. Most importantly, while the IPC takes into account the will of the woman or girl child in question, the POCSO makes consent immaterial.

**Table: Difference between Sexual Harassment in the IPC and Sexual Harassment in the POCSO Act**

	Section 354-A IPC	Section 11 POCSO Act
<b>Acts covered</b>	The IPC covers both touch and non-touch based harassment.	S.11 of the POCSO Act covers only non-touch based sexual harassment. Touch based offences are covered under other provisions. In addition to the acts covered by the IPC, S.11 also additionally covers all acts of communicating with the child with a sexual intent, making a child expose his/her body parts, stalking a child, enticing a child for pornographic purpose, etc.
<b>Gender of Victim</b>	Applicable only to women and girl children	Gender neutral in nature, applicable to boys also.
<b>Consent of victim</b>	Consent of the victim is material here and the offence	Consent of a child to 'sexual harassment' is immaterial.

	<b>Section 354-A IPC</b>	<b>Section 11 POCSO Act</b>
<b>Mental state of accused person</b>	is punishable only when it is against the will of the woman.  No requirement of mental state of the part of the accused.	Requires acts to be committed with a 'sexual intent'

### ***b. Stalking***

While Section 11 of the POCSO Act specifically covers stalking of a child, the IPC contains a general provision punishing stalking in Section 354D. This provision criminalises any man who:

- i. follows a woman and contacts or attempts to contact her in order to foster an interaction despite clear indication of disinterest.
- ii. monitors the use by a woman of the internet, email or any other form of electronic communication.

Exceptions:

- acts pursued in order to prevent or detect crime by a person entrusted with the responsibility by the State
- acts pursued under any law or to comply with any requirement under law
- in regard to circumstances, the acts were reasonable and justified.

This provision, unlike the POCSO provisions is not gender neutral in nature and is applicable only in respect to female victims and only against male offenders. Consequently, male children who are victims of stalking are protected only under Section 11 of the POCSO Act.

## **5.3 Institutional and Process Framework**

### **5.3.1 Functionaries:**

The chief Ministries and functionaries who work in tackling cyber offences against children have been detailed below.

#### ***i. Ministry of Electronics and Information Technology***

The Ministry of Electronics and Information Technology [hereinafter “MeitY”] is the primary governmental body responsible for the implementation of the IT Act. The MeitY is responsible for issuing timely guidelines, rules and regulations on behalf of the Central Government for the functioning of the IT Act. The Ministry

is also responsible for the appointment and/or designation of authorities for the functioning of the IT Act.

The IT Act empowers the Central Government to:

- Order or give directions to any agency of the Government to interpret, monitor or decrypt any information received or stored through any computer source.<sup>421</sup>
- Provide for procedure and safeguards for interception or monitoring or decryption to be carried out
- Issue directions for blocking of access by public any information generated, transmitted, received, stored or hosted in any computer resource.<sup>422</sup>
- Prescribe procedure and safeguard for blocking access to any information.<sup>423</sup>

### ***ii. Indian Computer Emergency Response Team***

The IT Act empowers the Indian Computer Emergency Response Team (I-CERT) to function as the national agency for incident response.<sup>424</sup> The I-CERT performs the following functions:

- a. collection, analysis and dissemination of information on cyber incidents
- b. forecast and alerts of cyber security incidents
- c. emergency measures for handling cyber security incidents
- d. Coordination of cyber incidents response activities
- e. issue guidelines, advisories, vulnerability notes and white papers relating to information security practices, procedures, prevention, response and reporting of cyber incidents
- f. other prescribed functions

In the process of carrying out the above functions, the I-CERT may call for information or even give directions to intermediaries, service providers, etc. who are required to comply with such orders.<sup>425</sup>

### ***iii. Intermediaries:***

Intermediaries, particularly Internet Service Providers [hereinafter “ISPs”] often have a key role to play in the prevention and detection of cyber offences. An

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<sup>421</sup> IT Act, 2000, Section 69.

<sup>422</sup> IT Act, 2000, Section 69A(1).

<sup>423</sup> IT Act, 2000, Section 69A(2).

<sup>424</sup> IT Act, 2000, Section 70B.

<sup>425</sup> IT Act, 2000, Section 70B(6).

‘intermediary’ is defined under the IT Act as “with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.”<sup>426</sup>

Thus online shopping websites, social media platforms, messenger services, etc. all amount to ‘intermediaries’ under the IT Act.

### ***Duties and Functions of Intermediaries:***

- Preservation and retention of data as prescribed by the Central Government.
- Compliance with the directions of the I-CERT with regard to directions given.<sup>427</sup>
- Extend all facilities and technical assistance to the Central or State Government or agency in order to:<sup>428</sup>
  - a. provide access to or secure access to the computer resource containing such information;
  - b. generating, transmitting, receiving or storing such information;
  - c. intercept or monitor or decrypt the information, as the case may be;
  - d. provide information stored in computer resource.

Criminal liability is attracted for intermediaries failing to comply with the above.

### ***Liability of an intermediary***

An intermediary will not be held liable for any information, data or communication hosted by him/her provided that:<sup>429</sup>

- a. the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored;
- b. the intermediary does not-
  - (i) initiate the transmission,
  - (ii) select the receiver of the transmission, and
  - (iii) select or modify the information contained in the transmission

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<sup>426</sup> IT Act, 2000, Section 2(1)(w).

<sup>427</sup> IT Act, 2000, Section 70B(6).

<sup>428</sup> IT Act, 2000, Section 69.

<sup>429</sup> IT Act, 2000, Section 79(2) and (3).

- c. the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf (Inserted Vide ITAA 2008)
- d. the intermediary has not conspired or abetted or aided or induced whether by threats or promise or otherwise in the commission of the unlawful act
- e. upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary expeditiously removes or disables access to that material on that resource without vitiating the evidence in any manner.

**iv. Cyber-Cells**

For the purpose of tackling cyber offences, separate cyber investigation cells have been established within the different police units. These cells work within the organizational structure present within the relevant jurisdiction.

<b>Role of the Police in combating cyber offences against children</b>	
<p>The Police play a pivotal role in tackling cyber offences against children and are often the first port of call for victims and their families. A detailed and comprehensive guide for the police on handling electronic evidence, investigation in such cases, etc. are provided in the <i>Handbook on Cyber Crimes Against Children and Investigative Methodologies for Law Enforcement Agencies</i><sup>430</sup> prepared by the Cyber Peace Foundation as well as in the <i>Cyber Crime Investigation Manual</i><sup>2</sup> prepared by the Data Security Council of India. It is recommended that police in charge of handling cyber offences study these guides must be thoroughly.</p>	
<b>Powers and Duties of the Police in investigating cyber offences under the IT Act</b>	<ul style="list-style-type: none"> <li>• No police officer below the rank of an Inspector may investigate an offence under the IT Act.<sup>432</sup></li> <li>• During the course of investigation, the following objects may be subject to confiscation: any computer, computer system, floppies, compact disks, tape drives or any other related accessories.<sup>433</sup></li> </ul>

<sup>430</sup>*Handbook on Cyber Crimes Against Children and Investigative Methodologies for Law Enforcement Agencies*, Cyber Peace Foundation, available at <https://scpsassam.org/wp-content/uploads/2018/01/UNICEF-Handbook-for-Law-Enf-Agencies-Handbook-on-Cyber-Crimes-against-Children.pdf>

<sup>431</sup>*Cyber Crime Investigation Manual*, Data Security Council of India [2011], available at [https://uppolice.gov.in/writereaddata/uploaded-content/Web\\_Page/28\\_5\\_2014\\_17\\_4\\_36\\_Cyber\\_Crime\\_Investigation\\_Manual.pdf](https://uppolice.gov.in/writereaddata/uploaded-content/Web_Page/28_5_2014_17_4_36_Cyber_Crime_Investigation_Manual.pdf)

<sup>432</sup> IT Act, 2000, Section 78.

<sup>433</sup> IT Act, 2000, Section 76.

	<ul style="list-style-type: none"> <li>• Any police officer (not below the rank of an Inspector) may enter any public place and search and arrest without warrant any person found who is reasonably suspected of having committed, committing or about to commit an offence under the IT Act.<sup>434</sup> Public place here refers to any public conveyance, any hotel, any shop or any other place for use by or accessible to the public.<sup>435</sup></li> <li>• These powers are also vested with any other officer of the Central of State Government authorized by the Central Government for this purpose.</li> <li>• Where a person is arrested in connection with an offence under the IT Act by an officer other than a police officer, he should without any delay produce the person before a magistrate having jurisdiction or before the officer-in-charge of a police station.<sup>436</sup></li> <li>• All powers and functions specified in the Code of Criminal Procedure, 1973 in relation to entry, search or arrest are applicable with respect to offences under the IT Act as well.<sup>437</sup></li> </ul>
<p><b>Dos and Don'ts while dealing with parents of children who have been victims of cyber offences</b></p>	<p>The Cyber Peace Foundation have published an informative '<i>Handbook on Cyber Crimes Against Children and Investigative Methodologies for Law Enforcement Agencies</i>'<sup>438</sup> which provides the following guidelines on dealing with parents or families of child victims of cyber offences:"</p> <ul style="list-style-type: none"> <li>• To save screenshots/URLs/messages/multimedia files etc. that may act as evidence.</li> <li>• To talk to the child and ask not to disclose any personal information like home/ school address.</li> <li>• To ensure that the child does not deactivate/delete accounts or communication with the offender</li> <li>• To notice any changes in the child's behaviour and get expert help if needed."</li> </ul>

<sup>434</sup> IT Act, 2000, Section 80(1).

<sup>435</sup> Id.

<sup>436</sup> IT Act, 2000, Section 80(2).

<sup>437</sup> IT Act, 2000, Section 80(3).

<sup>438</sup> *Handbook on Cyber Crimes Against Children and Investigative Methodologies for Law Enforcement Agencies*, Cyber Peace Foundation, p.18, available at <https://scpsassam.org/wp-content/uploads/2018/01/UNICEF-Handbook-for-Law-Enf-Agencies-Handbook-on-Cyber-Crimes-against-Children.pdf>

<p><b>Dos and Don'ts while evaluating the scene of offence</b></p>	<p>The Cyber Crime Investigation Manual<sup>439</sup> prepared by the Data Security Council of India provides the following guidelines for Investigative Officers [IOs] while examining a scene of crime related to a cyber offences:”</p> <ul style="list-style-type: none"> <li>• After identifying the scene of offence, IO should secure it and, take note of every individual physically present at the scene of offence, and their role at the time of securing the scene of offence</li> <li>• From the information gathered and based on visual inspection of the scene of offence, IO should identify all potential evidences. These physical evidences may include conventional physical evidences like the manuals, user guides and, other items left behind like passwords on slips, bank account numbers etc. It is also important to note the position of the various equipment and items at the scene of offence. For e.g., a mouse on the left hand side of the desktop possibly indicates the person operating the computer is a left-handed user.</li> <li>• While identifying the digital evidence, IO should make sure that, the potentially perishable evidence is identified and, all the precautions are put in place for its preservation. At the time of review, distributing or altering the condition of electronic evidences should be avoided.</li> <li>• If the systems are OFF, they should not be turned ON for the inspection. If systems are on, it is advised to leave them ON.</li> <li>• If systems are ON at the scene of offence, IO should take appropriate steps to photograph it, plan for the seizure of evidences at the earliest and document it. IO should notify appropriate technical personnel to support during the seizure process, so that the perishable evidences (volatile data) are appropriately recovered without loss.</li> <li>• IO should make note of the attached network cables and power lines to the systems. With the help of the complainant or the technical person at the agency, make note of all the network connections, modems, telephone lines and, mark them both the equipment connection end and, from the source in the walls.”<sup>440</sup></li> </ul>
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<sup>439</sup> *Cyber Crime Investigation Manual*, Data Security Council of India [2011], available at [https://uppolic.e.g.o.v.in/writereaddata/uploaded-content/Web\\_Page/28\\_5\\_2014\\_17\\_4\\_36\\_Cyber\\_Crime\\_Investigation\\_Manual.pdf](https://uppolic.e.g.o.v.in/writereaddata/uploaded-content/Web_Page/28_5_2014_17_4_36_Cyber_Crime_Investigation_Manual.pdf)

<sup>440</sup> *Id.* at pp. 29-30.

### **5.3.2 Protection from Child Pornography (Blocking public access of information)**

Section 69A, IT Act empowers the Central Government or any of its authorized agencies to issue directions for blocking of public access of any information through any computer resource. Where the Central Government is satisfied that it is necessary, it may order (with written reasons) any agency of the government or intermediary to block access by the public any information generated, transmitted, received, stored or hosted in any computer resource.

In addition, the government is required to prescribe safeguards and procedure for such blocking of access. Intermediaries are required to comply with such directions failing which they may be punished with imprisonment for a term of up to seven years and fine. In this regard, the Central Government has enacted the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

These Rules provide for a designated officer to issue directions for blocking access by public to any information generated, transmitted, received, stored or hosted in any computer resource.<sup>441</sup> This officer is empowered to direct any agency of the government or an intermediary to block access upon receiving information from a nodal officer of an organization, or a competent court.<sup>442</sup>

Process for blocking of access<sup>443</sup> :

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<sup>441</sup> Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, Rule 3.

<sup>442</sup> Id. at Rule 5.

<sup>443</sup> Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009

### **COMPLAINT**

- Any person may forward a complaint to the Nodal Officer of the organisation for blocking access to any prohibited information. An organisation here refers to any agency, ministry, department of the government or a State Government or Union Territory.
- The organisation may examine the complaint and if satisfied may send the request for blocking to the Designated Officer.
- The Designated Officer shall not entertain any complaint or request for blocking of information directly from any person.



### **EXAMINATION OF REQUEST**

- The request along with the printed sample content of the alleged offending information or part of it will be examined by a committee.
- This committee shall consist of the Designated Officer as its chairperson and representatives, not below the rank of Joint Secretary in Ministries of Law and Justice, Home Affairs, Information and Broadcasting and the I-CERT
- The Designated Officer must try to identify the person/intermediary who is hosting the information and the computer resource on which such information or part thereof is being hosted. A notice must be sent to such intermediary and person in control of the computer resource to appear and submit their reply before the committee.
- The committee should examine the request and give specific recommendation.
- The designated Officer should submit the recommendation of the committee to the Secretary in the Department of Information Technology [“Secretary”] under the MeitY.



### **IMPLEMENTATION OF RECOMMENDATIONS**

- The Designated Officer, on approval of the request by the Secretary, Department of Information Technology, should direct any agency of the Government or the intermediary to block the offending information generated, transmitted, received, stored or hosted in their computer resource for public access within the time limit specified in the direction.
- Where the Secretary does not approve the request for blocking, the Nodal Officer must be intimated.
- In case of emergencies, where it expedient, necessary for justifiable reasons the Designated Officer can forward a request to the Secretary who can issue directions for blocking as an interim measure.
- Where a competent court has passed directions for blocking of access to any information, the Designated officer must forward a certified copy of this order to the Secretary who shall initiate action as ordered.

### **Removal of Online Child Sexual Abuse Material<sup>444</sup>**

Recognising the need to contain the spread of online child sexual abuse material [hereinafter “CSAM”], the MeitY constituted an Inter-Ministerial Committee to examine the matter. Another thrust came from the order of the Supreme Court in the matter of *Kamlesh Vaswani v Union of India*<sup>445</sup> requiring the government to take up positive steps to tackle this issue. The Committee noted that:

- a. Most of the online CSAM content was being hosted outside of India with URLs that were dynamic and frequently changing thereby making detection and action-taking challenging.
- b. Lack of a centralized mechanism in India to monitor online CSAM.
- c. Existence of a few global resources that identify dynamic websites and URLs hosting CSAM such as the Internet Watch Foundation.

Noting the above, the committee recommended that until India develops a centralized system to monitor CSAM content online, India must subscribe to the Internet Watch Foundation’s [hereinafter “IWF”] list and disable or remove URL’s and websites accordingly.

The Committee further reiterated that all ISPs have an obligation to observe due diligence requirements and remove or disable access to any material that is paedophilic or harmful to minors in any way as per the IT Act and IT (Intermediary Guidelines) Rules, 2011.

Following the recommendation of the Committee, the MeitY passed an executive order requiring all ISPs to subscribe to adopt the IWF resources by 31st July 2017, in order to prevent the distribution and transmission of online CSAM in India. Further, the order stressed on the need for ISPs to follow due diligence requirements and remove or disable access to any unlawful content.<sup>446</sup>

## **5.4. FAQs**

- **What should one do if one finds child sexual abuse imagery (i.e. child pornography) online?**

Any form of child sexual abuse imagery is illegal and a criminal offence under Section 67B of the Information Technology Act, 2000 as well as Section 13 of the Protection of Children from Sexual Offences Act, 2012.

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<sup>444</sup> Order No. 1(3)/2016-CLFE Ministry of Electronics and Information Technology [18 April 2017, Cyber Laws and E-Security Division]

<sup>445</sup> Order dated 12.07.2013 in Writ Petition(s)(Civil) No(s). 177/2013.

<sup>446</sup> Id.

A complaint may be filed through any of the following means by any person coming across child pornography on the internet:

a. A police complaint

A criminal complaint may be filed at the nearest police station regarding the offence along with any particulars such as the website details, etc.

b. Information to the nearest cyber investigation cell

In several cities, special investigation cells have been constituted for the purpose of tackling cyber offences. A complaint may be posted to the relevant cell with the particulars of the offence.

c. Online Reporting

In addition, to written complaints, it is also possible to report these offences online. India received its first national hotline to report child pornography in the year 2016 through the collaboration of the Internet Watch Foundation (a UK based organization) and Aarambh (an Indian NGO). Together, these organizations created an online portal (<https://report.iwf.org.uk/in>). In addition to the above initiative, several cyber cells in India (e.g., the Delhi cyber cell)<sup>447</sup> have launched online reporting features, which may be used for easy reporting.

- **The public chat board of an online game contain conversations amongst adult gamers and gamers under the age of 18 years. Some of the content is obscene and contains references to sexual acts. Is one required to report this?**

Sexual communication with children with the intention of establishing sexual contact with a child, amounts to grooming. Indian laws prohibit any form of communication with a child with a sexual intent.<sup>448</sup> Thus, the above acts may constitute sexual harassment of a child under the POCSO Act. Any person who has knowledge of an offence being committed under the POCSO Act is mandatorily required to report the offence.<sup>449</sup>

- **If one knows of a child who is facing online bullying and harassment due to his disability on social media platforms such as Facebook and Twitter, is there something that can be done?**

There are no laws at present to tackle bullying specifically. However, online

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<sup>447</sup> See Delhi Police Online Complaint Lodging System for Economic and Cyber Offences, available at <http://205.147.111.155:84/>

<sup>448</sup> POCSO Act, 2012, Section 11.

<sup>449</sup> POCSO Act, 2012, Section 19(1).

bullying and harassment on a public platform such as Facebook and Twitter may contravene defamation laws under the Indian Penal Code as well as constitute an offence under the Rights of Persons with Disabilities Act, 2016. A police complaint may be filed by the victim, or his/her parents.

- **The police receive a complaint from the Principal of a private school that students of a class were found to be distributing pornographic images to each other through their cellphones, but have now deleted them after viewing it. What must the police do in such cases?**

Electronic transmission of pornography is a crime under section 67A of the Information Technology Act, 2000. Thus, the acts of the students constitute an offence irrespective of the fact that the images were deleted subsequently. Further, section 11(iii) of the POCSO Act criminalises showing any pornographic content to a minor with a sexual intent under the provision prohibiting sexual harassment of a child.

Legal Provision	Description of Offence	Nature of Offence	Punishment
Section 67B of the Information Technology Act, 2000	<p><u>Publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form.</u></p> <p>i. publishing or transmission any material depicting children engaged in sexually explicit act or conduct<sup>450</sup></p> <p>ii. creating text or digital images, collecting, seeking, browsing, downloading, advertising, promoting, exchanging or distributing material in any electronic form which depicts children in obscene or indecent or in a 'sexually explicit manner'.<sup>451</sup></p> <p>iii. cultivates, entices or induces children to an online relationship with one or more children for the purpose of a sexually explicit act or in a manner that offends a reasonable adult<sup>452</sup></p> <p>iv. facilitation of online child abuse<sup>453</sup></p>	Cognizable <sup>455</sup> and Non-Bailable	<p><u>First conviction:</u> Imprisonment for a term of up to five years and fine of up to Rs.10,00,000/-</p> <p><u>Second or subsequent conviction:</u> Imprisonment of up to seven years and fine of up to Rs. 10,00,000/-</p>

<sup>450</sup> IT Act, 2000, Section 67B(a).

<sup>451</sup> Id. at section 67B(b).

<sup>452</sup> Id. at section 67B(c).

<sup>453</sup> Id. at section 67B(d).

<sup>455</sup> IT Act, 2000, Section 77B.

Legal Provision	Description of Offence	Nature of Offence	Punishment
	v. recording in any electronic form own abuse or any abuse relating to a sexually explicit act with children <sup>454</sup>		
Section 13 of the Protection of Children from Sexual Offences Act, 2012	<b>Use of child for pornographic purposes:</b> The use of child in any form of media including electronic form for the purpose of sexual gratification. ‘Use’ here includes the acts of preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.	Cognizable and Non-Bailable	<b>First Conviction:</b> Imprisonment of up to five years and fine. <sup>456</sup> <b>Second Conviction:</b> Imprisonment of up to five years and fine. <sup>457</sup>
Section 11 of the Protection of Children from Sexual Offences Act, 2012	<b>Sexual Harassment:</b> Prohibits the following acts when done with a sexual intent: i. uttering any word, sound or gesture, or exhibiting any object of part of the body with the intention that it is seen, or heard by the child ii. making a child exhibit their body or body part to be seen by the other person iii. shown any object or media form to a child for pornographic purposes iv. repeatedly or constantly following or watching a child either directly or through electronic means v. threatening to use any form of media depicting any part of the body of the child or the involvement of the child is a sexual act. The media may be real or fabricated through electronic or other means. vi. Enticing a child for pornographic purposes or giving gratification for this purpose.	Non-Cognizable and Bailable	Imprisonment for a term for a term of up to three years and fine of up to Rs. 2,00,000

<sup>454</sup> Id. at section 67B(e).

<sup>456</sup> POCSO Act, 2012, Section 14(1).

<sup>457</sup> Id.

Section 354-A of the Indian Penal Code, 1860	<p><u>Sexual Harassment:</u> Prohibition on a man from committing the following acts:</p> <ul style="list-style-type: none"> <li>i. physical act and advances involving unwelcome and explicit sexual overtures</li> <li>ii. a demand or request for sexual favours</li> <li>iii. showing pornography against the will of a woman</li> <li>iv. making sexually coloured remarks</li> </ul>	Cognizable and Bailable <sup>458</sup>	For offences described in i, ii, and iii, imprisonment of up to three years or fine or both. For offence described in iv, imprisonment for a term of up to one year or fine or both.
Section 354-D of the Indian Penal Code, 1860	<p><u>Stalking:</u> Prohibition on a man from:</p> <ul style="list-style-type: none"> <li>i. continuously following a woman and contacting or attempting to contact such woman to foster personal interaction repeatedly despite clear indication of disinterest,</li> <li>ii. monitoring woman's use of the internet, email or any form of electronic communication</li> </ul>	For the first offence: Cognizable and Bailable <sup>459</sup> For the second offence: Cognizable and Non-Bailable <sup>460</sup>	<p><u>First Offence:</u> Imprisonment for a term of three years and fine. <u>Second or subsequent offence:</u> Imprisonment for a term of five years and fine.</p>
Section 4 of the Indecent Representation of Women Act, 1986	<p><u>Prohibition of publication or sending by post of books, pamphlets, etc. containing indecent representation of women:</u></p> <p>Production, causing a production, sale, hiring, distributing, circulating or sending by post any book, pamphlet, paper, slide, film, writing, drawing, painting, photograph, representation or figure which contains indecent representation of women in any form.</p>	Non-cognizable and Bailable	<p><b>First Conviction:</b> Imprisonment for a term of up to two years and fine of up to Rs.2000.<sup>461</sup> <b>Second or subsequent conviction:</b> Imprisonment for a minimum term of six months which may extend up to five years and fine of not less than 10,000 which may extend to Rs. 1,00,000.<sup>462</sup></p>

<sup>458</sup> Code of Criminal Procedure, 1973, Schedule I.

<sup>459</sup> Id.

<sup>460</sup> Id.

<sup>461</sup> Indecent Representation of Women Act, 1986, Section 6.

<sup>462</sup> Id.

## Chapter 5, Annexure 2: Significant Court Rulings

### *a. Kamlesh Vaswani v. Union of India, WP 177/2013*

In 2013, an Indore based advocate petitioned the Supreme Court urging for various sections of the IT Act to be held unconstitutional in the context of the harmful effects of pornography on the health, wellness and human potential of the people.<sup>463</sup> The petition highlighted the injurious effects that free and easy access to pornography has on children. It stated that the IT Act and the relevant sections 67, 67A and 67B which criminalise the publication and transmission of obscene content, sexually explicit content and child pornography respectively, were ineffective in tackling virtual pornography and poser pornography.<sup>464</sup> The petition further stressed that the punishments meted out in the Act were insufficient given the serious nature of the offences. With particular reference to the cancerous spread of child pornography and the extensive number of child abuse clips available freely online,<sup>465</sup> the parties sought that various orders be passed with directions to the MeitY and the Ministry of Women and Child Development.

The Supreme Court, during the course of hearing this petition has passed several orders imposing obligations on various stakeholders. The Supreme Court stressed that “innocent children cannot be made prey to these kind of painful situations, and a nation, by no means, can afford to carry any kind of experiment with its children in the name of liberty and freedom of expression.”<sup>466</sup>

### *b. Avinash Bajaj v. State<sup>467</sup>*

In November of 2004, two school-going adolescents in New Delhi created a pornographic video on a cellphone, which quickly spread through the use of Multimedia Messaging Service (“MMS”). Within no time, the video was listed for sale on eBay.com, an online market platform by a user. The seller offered to provide the video through an email for an amount of Rs. 125.

The sale of the video online attracted furious media attention, raising several issues regarding liability and obligations of intermediaries such as eBay. A criminal complaint was filed against the Managing Director of Bazee.com (which operated the Indian subsidiary of eBay) for hosting child pornography in violation of the Section 67B, IT Act, 2000.

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<sup>463</sup> Kamlesh Vaswani v. Union of India, WP 177/2013 available at <https://docs.google.com/file/d/0B-e-IXh7NmVmbGNXT1BraHF5RUU/edit>

<sup>464</sup> Id. at pg 11

<sup>465</sup> Order dated 26.02.2016, available at [http://supremecourtindia.nic.in/pdf/cir/2016-02-26\\_1456490615.pdf](http://supremecourtindia.nic.in/pdf/cir/2016-02-26_1456490615.pdf)

<sup>466</sup> Id.

<sup>467</sup> CrI. M.C. 3066 of 2006, Decided by the High Court of Delhi on 29.05.2008

The High Court ultimately discharged the liability of the accused stating that no automatic criminal liability could be attached in this matter. Following the plethora of issues raised in this matter, the Central Government issued guidelines in respect of intermediaries and the due diligence to be followed by them.

*c. Jayesh Thakkar v. State of Maharashtra*<sup>468</sup>

In 2001, the petitioner in this case, Mr. Jayesh Thakkar wrote a letter to the Bombay High Court raising concerns regarding the proliferation of pornography and its harmful effects. On 28 September 2001, the Court passed an order appointing a Committee to suggest and recommend measures to protect minors from accessing pornographic and obscene material on the Internet. Accordingly, the committee constituted looked into several issues and passed the following recommendations:<sup>469</sup>

- (i) **Site-Blocking:** The Committee expressed doubts as to whether blocking of pornographic websites would help. The Committee further stated that such measures were not technically feasible and moreover not found to be effective. Further, due to the presence of dynamic IP addresses and several sites being linked to one IP address, it was possible that one of the legitimate sites could be blocked in an attempt to target illegitimate sites.<sup>470</sup> In addition to the above, site-blocking would throw up several legal and constitutional challenges in the light of the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution.<sup>471</sup> Thus, the Committee unanimously rejected proposals for site-blocking.<sup>472</sup>
- (ii) **Protection of Minors in Cyber-Cafes:** The Committee found that there were no regulations in place for the functioning of cyber-cafes. Due to the lack of any regulations, it was possible to track an offender only up to the cyber-café creating a ‘last-mile problem’. The Committee thus recommended that Cyber-Cafes must be required to maintain proper logs and registers of persons entering the café and using the facilities. Further, they should be required to keep physical records such as address checked against photo IDs.<sup>473</sup> In addition to logging requirements, cyber cafes must be required to

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<sup>468</sup> Jayesh Thakkar v. State of Maharashtra & Ors., W.P. 1611 of 2001, Decided by the High Court of Bombay on 13 Feb 2002. Available at <http://www.cyquator.com/Html/vol1.pdf>

<sup>469</sup> Protecting Minors from Unsuitable Internet Material, Report of the High Court Committee [Jan 30 2002] Submitted to the Hon’ble Bombay High Court In Suo Motu WP 1611 of 2001 Jayesh Thakkar & Another Versus State of Maharashtra & Others And Internet Users Association of India (Intervenors).

<sup>470</sup> Id. at para 1.7.

<sup>471</sup> Id. at para 1.9.

<sup>472</sup> Id. at para 1.18.

<sup>473</sup> Id. at para 2.7.1.

ensure that minors who visit the premises re seated in systems that are not behind cubicles or any partition. Further, all ‘open’ machines, to which minors are restricted, be equipped with suitable safety software.<sup>474</sup>

- (iii) **Regulatory Recommendations for ISPs:** The Committee recommended that all ISPs must maintain accurate time stamps<sup>475</sup> and all time clocks on the ISPs must be regularly checked and synchronized.<sup>476</sup>
- (iv) **Educational Measures:** The Committee recommended that that every ISP be required to offer its subscribers protective software.<sup>477</sup> Further, the Cyber Crime Investigation Cell of the Bombay Police must be required to establish a telephone hotline for parent whose minors are being victimized by cyber pornographers, stalkers, etc. The services must also include counselling and therapy.<sup>478</sup>

## **Chapter 6 - Prohibition of Child Marriage**

### **6.1 The Context**

The National Family Health Survey, 2015 estimates that 26.8% of women aged 20-24 years were married off before the legal age of 18 years.<sup>479</sup> Although the numbers have nearly halved over the last decade (from 47% in 2005), the figures still indicate that nearly one fourth of Indian women are married before they are deemed physically and psychologically ready. The corresponding number of incidences reported under the Prohibition of Child Marriage Act, 2006 are however as few as 326 during 2015-2016<sup>480</sup> signifying that the implementation of the Act is weak.

### **6.2 Legal Framework on prohibition of child marriage**

The Prohibition of Child Marriage Act [PCM Act] was enacted in the year 2006 replacing the Child Marriage Restraint Act, 1929. The PCM Act sets the legal age of marriage at 18 years for girls and 21 years for boys. The PCM Act is a comprehensive legislation providing the legal framework for criminalization of certain acts related to child marriage, prevention of child marriage and provisions relating to validity of child marriages and legitimacy of children born out of child marriages. Each of these aspects will be examined below.

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<sup>474</sup> Id. at para 2.5.1.

<sup>475</sup> Id. at para 3.1.

<sup>476</sup> Id. at para 3.3.1.

<sup>477</sup> Id. at para 4.3.1.

<sup>478</sup> Id. at para 4.3.3.

<sup>479</sup> National Family Health Survey – 4 (2015-2016), Ministry of Health and Family Welfare [2015], p.2, available at <http://rchiips.org/NFHS/pdf/NFHS4/India.pdf>

<sup>480</sup> National Crime Records Bureau, Crime in India 2016, Chapter 4A.

### 6.2.1 Offences under the PCM Act

The PCM Act criminalises the following acts:

- i. Male adult contracting a child marriage: It is an offence for any adult male (who is above the age of 18 years) to contract a child marriage.<sup>481</sup>
- ii. Solemnising a child marriage: It is an offence to perform, conduct, direct or abet any child marriage. It is a defence for the offender to show that he/she had reasons to believe that this was not a child marriage.<sup>482</sup>
- iii. Promoting or permitting of a child marriage: Where a child marriage has taken place, it is an offence for a parent or guardian or any other person (including an organisation or association of persons) to do any act promoting or permitting the child marriage including attending and participation in such marriage. It is also an offence for such persons to negligently fail to prevent the solemnization of such marriage.<sup>483</sup> Where a minor child has contracted a marriage, it shall be presumed that the person having charge of the child has negligently failed to prevent the marriage. However, a woman may not be punished under this section.

### 6.2.2 Effect of a Child Marriage

- Effect on the validity of the marriage

The PCM Act, although enacted to prohibit the solemnization of a child marriage, does not invalidate such marriages automatically. It provides the option of invalidating the marriage to the child in such a marriage<sup>484</sup> unless the marriage has been conducted under the following circumstances in which case the marriage shall be deemed to be void ab initio:<sup>485</sup>

- a. where the minor child has been taken or enticed out of the lawful guardianship
- b. where the minor child has been forced or compelled by deceitful means to go from any place
- c. where the minor child has been sold for the purpose of marriage
- d. where the minor has been sold or trafficked or used for an immoral purpose after the child marriage

Except under the above circumstances, where a child marriage is solemnized, the child may opt to annul such a marriage by filing a petition to a district court. Until such annulment is opted for, the marriage is deemed valid in every sense. This

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<sup>481</sup> PCM Act, 2006, Section 9.

<sup>482</sup> PCM Act, 2006, Section 10.

<sup>483</sup> PCM Act, 2006, Section 11.

<sup>484</sup> PCM Act, 2006, Section 3(1).

<sup>485</sup> PCM Act, 2006, Section 12.

option cannot be exercised by an adult who has contracted a marriage with a child.<sup>486</sup> If the child is still a minor at the time of filing the petition, the petition can be filed through a guardian or through the Child Marriage Prohibition Officer.<sup>487</sup> The child may avail this option of invalidating the marriage until two years after attaining majority.<sup>488</sup>

- Effect on the assets exchanged during the child marriage

A court passing a decree of nullity will also make orders as to the return of money, valuable, gifts, etc. that may have been exchanged between the families of the contracting parties at the time of the child marriage.<sup>489</sup>

- Provision for maintenance and residence

While passing an order of nullity, the court passing the final decree may also may pass an order directing the male contracting party to pay maintenance to the female contracting party either on a monthly or a lump sum basis. Where the male party is also a minor, the family of the minor may be asked to pay the maintenance instead.<sup>490</sup> The quantum of such maintenance will be determined by the court taking into consideration the needs and lifestyle of the child as well as the means and income of the party paying maintenance.<sup>491</sup>

Apart from maintenance, the court may also may an order for the residence of the female child until her remarriage.<sup>492</sup>

- Effect on the legitimacy and custody of children born out of child marriages

All children born to parties in a child marriage shall be deemed to be legitimate children irrespective of annulment of such a marriage at a later date.<sup>493</sup> The court, while making an annulment decree, may also make any appropriate order for the custody of children born out of the child marriage taking into consideration the welfare and best interests of the child.<sup>494</sup> Such an order may also include directions concerning visitation<sup>495</sup> of the child by the other party and maintenance for such child.<sup>496</sup>

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<sup>486</sup> Id.

<sup>487</sup> PCM Act, 2006, Section 3(2).

<sup>488</sup> PCM Act, 2006, Section 3(3).

<sup>489</sup> PCM Act, 2006, Section 3(4).

<sup>490</sup> PCM Act, 2006, Section 4(1).

<sup>491</sup> PCM Act, 2006, Section 4(2).

<sup>492</sup> PCM Act, 2006, Section 4(4).

<sup>493</sup> PCM Act, 2006, Section 6.

<sup>494</sup> PCM Act, 2006, Section 5(1) and 5(2).

<sup>495</sup> PCM Act, Section 5(3).

<sup>496</sup> PCM Act, Section 5(4).

### **Child Sexual Abuse and Child Marriage**

Despite the presence of the PCMA, child marriages are still vastly prevalent in India with a few personal laws still permitting child marriages. While on the one hand the PCMA does not automatically invalidate a child marriage, on the other hand child sexual abuse laws such as the POCSO Act, 2012 are drafted in strict terms and do not permit any sexual contact with a child below the age of 18 years. Consent of a child is deemed irrelevant by the POCSO Act and any sexual activity with a child, even consensual is an offence. Thus, a strict interpretation of the law would mean that husbands of child brides may be prosecuted under the POCSO Act if the husband and wife were to establish a sexual relationship. Further exacerbating the confusions, the Indian Penal Code contains an archaic provision in the Exception 2 to section 375 of the IPC which provides immunity for marital rapes where the woman is above the age of 15 years. Although the POCSO Act contains a non-obstante clause stating that in the event of any conflict, the provisions of the POCSO Act would override,<sup>497</sup> several confusions remain at the ground level.

In order to rectify the ambiguities and clarify the situation, the Supreme Court in *Independent Thought v. Union of India*<sup>498</sup> read down the Exception 2 to section 375 insofar as it provides immunity from marital rape against a woman under the age of 18 years and stated that the exception would be applicable only in respect of wives above the age of 18 years. The Supreme Court in the course of reading down the provision, held that the exclusion of wives aged between 15 – 18 years was discriminatory, arbitrary and violative of Article 14 of the Constitution.<sup>499</sup>

### **6.2.3 Prevention of Child Marriage**

The Act also provides for a child marriage to be prevented from taking place. A Child Marriage Prohibition Officer [CMPO] is designated under this Act for a state or part of a state in order to prevent child marriages from taking place.<sup>500</sup> Apart from prevention, the CMPO also aids in collection of evidence in prosecution of persons under the Act, creation of awareness against child marriages, etc.<sup>501</sup>

A CMPO may make an application to the Judicial Magistrate of the first class or a Metropolitan Magistrate in order to issue a prohibition against a child marriage, which has been arranged or about to take place.<sup>502</sup> Any person with knowledge of a child marriage about to take place may also make a complaint in this regard.

A Judicial Magistrate may issue an injunction upon receiving the application

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<sup>497</sup> PCM Act, Section 42A.

<sup>498</sup> W.P. (C) No. 382 of 2013, Judgment dated Oct 11, 2017.

<sup>499</sup> Id at para 78.

<sup>500</sup> PCM Act, Section 16(1).

<sup>501</sup> PCM Act, Section 16(3).

<sup>502</sup> PCM Act, Section 13.

from the CMPO, a complaint by any person or upon receiving information from any other reliable source. A District Magistrate is empowered to act as CMPO on days where mass child marriages are prone to be conducted and take measures for prevention of such marriages. In this regard, the Magistrate is permitted to take all appropriate measures including the use of minimum force required.<sup>503</sup>

Any child marriage, which is conducted in violation of an injunction issued will be deemed to be invalid.<sup>504</sup>

### **Role of Police**

Police are usually the first authority receiving complaint or information regarding a child marriage that is about to take place. It is thus imperative that the police act in an appropriate and timely manner to curb the occurrence of a child marriage.

The Ministry of Women and Child Development's Handbook on the Prohibition of Child Marriage Act, 2006 issues the following guidelines for the police to follow after receiving information or complaint on the occurrence of a child marriage:<sup>505</sup>

- Register an FIR and investigate. No police can refuse to accept the complaint, which may be made orally or in writing. All complaints must be converted into an FIR without delay.
- Report the matter to the Child Marriage Prohibition Officer (CMPO) for him/her to gather evidence about the instance of a child marriage.
- Report the matter to the District Magistrate for her/him to issue an injunction. Accompany the CMPO or the appointed person for investigation.
- Arrest the offender as offences under the law are cognizable and non-bailable.
- Do not arrest or handcuff the child.
- In case of non-availability of CMPO or the appointed persons, visit the scene of crime (i.e. where a child marriage is being conducted/or has been conducted) and take necessary action, including rescue of the minor(s) if necessary.
- Avoid being in uniform when dealing with children to make them more comfortable and less intimidated.
- Ensure presence of a lady police officer in dealing with a girl child along with a female social worker/teacher/anganwadi worker/ANM/ child's next friend (a person trusted by the child). Only in case there is NO LADY officer available immediately, should a male police person interact with the girl child, but in the presence of a female social worker/teacher/anganwadi worker/ANM/child's next friend.

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<sup>503</sup> PCM Act, Section 13(5).

<sup>504</sup> PCM Act, Section 14.

<sup>505</sup> Handbook on Prohibition of Child Marriage Act, 2006, Ministry of Women and Child Development, available at <https://childlineindia.org.in/pdf/Child-Marriage-handbook.pdf>

- Produce the child/minor before the nearest Child Welfare Committee within 24 hours or before a Judicial Magistrate of First Class where such Committee is not available. Victims of child marriage are also children in need of care and protection under the Juvenile Justice Act and the rules made for its implementation.<sup>506</sup>
- Removal of children from the custody of parents/legal guardians must be the last resort and taken only in the best interest of the child. No such child shall be placed in police lock-up or police custody. Such child can only be placed in a fit institution recognised and registered under the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006.
- In addition to using the PCMA, you can use every other relevant law to ensure protection of children and prosecution of offenders. Chapter XX of the Indian Penal Code (IPC) for instance contains legal provisions on offences relating to marriage, which can be brought into use for booking a case.”

### 6.2.3 FAQs

- **The police receive information regarding a child marriage being solemnised by a small community? The community justify their actions stating that child marriages are a cultural norm being practised over several years and their traditions permit such marriages. What can the police do in such cases?**

As per Section 11 of the PCM Act, any act done by an association of persons towards promoting, permitting or abetting a child marriage, including participating and attending, commits an offence. Thus, if the child marriage were to occur, the community would be committing an offence as a whole. The police must upon receiving information of a possible child marriage, inform the Child Marriage Prohibition Officer. In addition, the police may take steps to create awareness through the aid of NGOs to prevent such customs from continuing. Where there is a likelihood of such child marriage occurring despite the above steps, the police may approach the Judicial Magistrate of the first class or a Metropolitan Magistrate to issue an injunction under Section 13 of the PCM Act against the members of the community. It is further important to note that the PCM Act is a secular legislation recognising the harms of child marriage and does not create any exceptions in favour of any prevailing custom or practice.

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<sup>506</sup> JJ Act, 2015, Section 2(14)(xii).

## Chapter 6, Annexure 1 – Table of Offences under the PCM Act

Provision	Offence	Nature of Offence	Punishment
Sec. 9:	Punishment for male adult marrying a child: An adult male above the age of 18 years contracting a child marriage	Cognizable and Non-Bailable	Imprisonment of up to two years or fine up to Rs. 1,00,000 or both
Sec.10:	Punishment for solemnising a child marriage: Performing, directing, conducting any child marriage unless proven that the offender had reasons to believe that it was not a child marriage.	Cognizable and Non-Bailable	Imprisonment of up to two years or fine up to Rs. 1,00,000 or both
Sec. 11	Punishment for promoting or permitting solemnisation of child marriages: Where a child marriage has taken place, promoting, permitting, attending and participating in a child marriage by the parents, guardians or any other persons including organisations and association of persons. The negligent failure of such persons to prevent such marriage also constitutes an offence under this provision.	Cognizable and Non-Bailable	Imprisonment of up to two years and fine up to Rs. 1,00,000
Sec. 13(10)	Conduction of a child marriage in contravention of a prohibitory injunction	Cognizable and Non-Bailable	Imprisonment of up to two years or fine up to Rs. 1,00,000 or both

## SECTION III - REHABILITATION AND REINTEGRATION OF THE CHILD VICTIM

### Chapter 7 - Introduction to Rehabilitation of Children

The term ‘rehabilitation’ does not have a specific definition in any legislation concerning children. It is, however stated to be one of the primary objects of the Juvenile Justice (Care and Protection of Children) Act, 2015. Rehabilitation and social integration refers to a process of restoring normal health and life of a person following an incident of illness, exploitation, or any form of injury.

Rehabilitation of victims functions on the premise that it is not sufficient to secure rights merely through criminal prosecution and punishment of offenders. For instance, in cases of dealing with child labour, it is not sufficient that children are

rescued from exploitative situations and employers be prosecuted. For full realisation of child rights it becomes incumbent that the child is provided the education, life skills, financial assistance, counselling, etc. to prevent re-victimisation and effective social integration.

## **7.1 Legal Framework for Rehabilitation in India**

Rehabilitation of children in India operates through several legislations and schemes. Children who come under the juvenile justice system for various reasons are all eligible for rehabilitative services under the Juvenile Justice (Care and Protection of Children) Act, 2015. In addition to this law, rehabilitation of child victims is also provided under other specific laws relating to their special circumstances, e.g., The Immoral Traffic (Prevention) Act, 1956, The Protection of Children from Sexual Offences Act, 2012, etc. However, the legal framework under the JJ Act is the overriding law in respect of all laws, procedures, processes including rehabilitation of children in need of care and protection.<sup>507</sup>

In addition to the framework under the JJ Act and other legislations, the government has also formulated the Integrated Child Protection Scheme [ICPS] which has been functional from the year 2009 in order to strengthen the existing system and structures on child protection.<sup>508</sup> The ICPS contains various activities and programmes with a significant focus on Rehabilitation, thereby rendering support in respect of several of the rehabilitative services envisaged under the JJ Act.

Rehabilitation under each of these laws has been described below:

### **Rehabilitation under the Juvenile Justice (Care and Protection of Children) Act, 2015 [“JJ Act”]**

Under Chapter VII of the JJ Act, any child who comes under the juvenile justice system is entitled to receive rehabilitation services so as to foster social integration. Children in the juvenile justice system are categorized as ‘children in need of care and protection’ and ‘children in conflict with the law’. A wide category of children are covered as ‘children in need of care and protection’, including child victims.<sup>509</sup> These victims are provided with care, protection and rehabilitative services by the Child Welfare Committee, a statutory authority set up under the JJ Act.

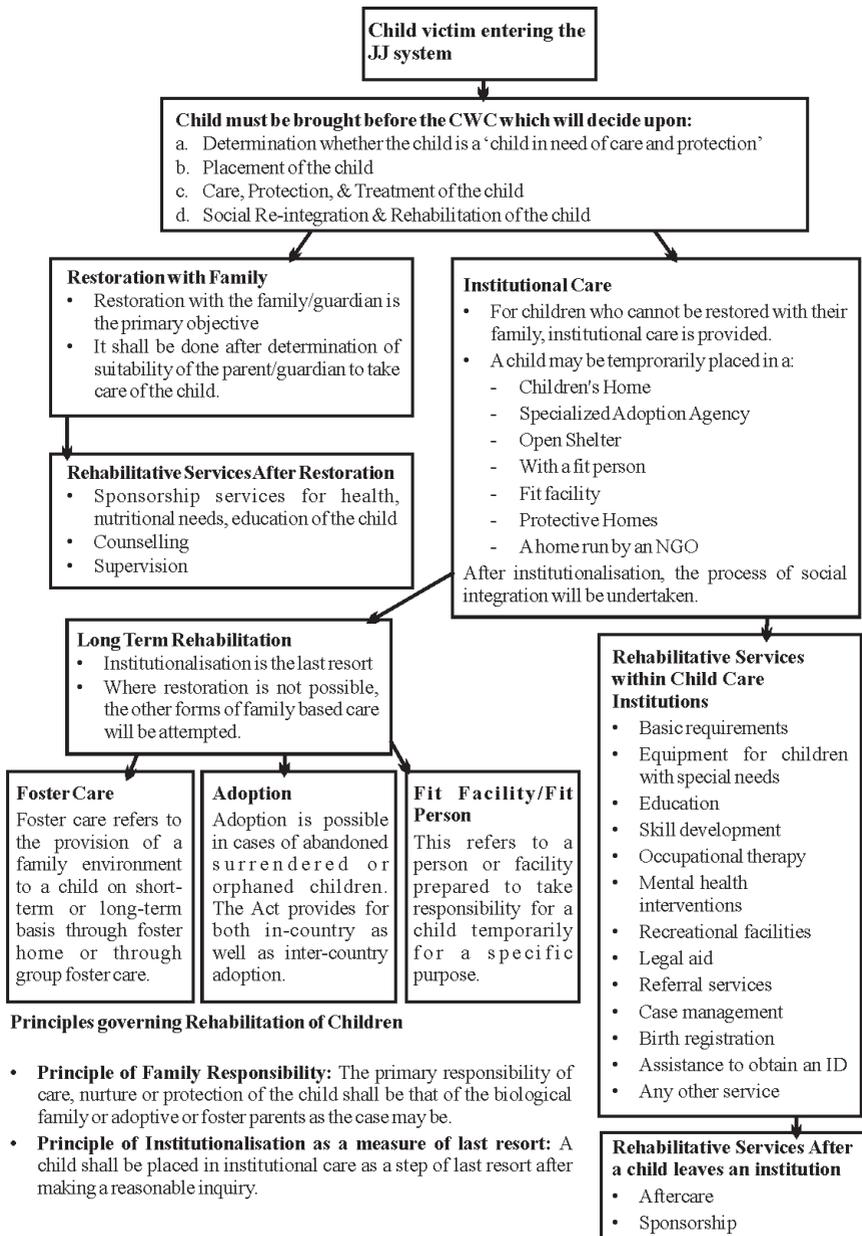
The JJ Act envisages a comprehensive framework of rehabilitation providing for a range of both institutional and non-institutional care of children. The chart below briefly provides the rehabilitative framework in the JJ system and the variety of services included in the framework:

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<sup>507</sup> JJ Act, 2015, Section 1(4).

<sup>508</sup> The Integrated Child Protection Scheme: A Centrally Sponsored Scheme of Government – Civil Society Partnership, available at <http://childlineindia.org.in/CP-CR-Downloads/ICPS.pdf>

<sup>509</sup> See JJ Act, 2015, Section 2(14)



**Principles governing Rehabilitation of Children**

- **Principle of Family Responsibility:** The primary responsibility of care, nurture or protection of the child shall be that of the biological family or adoptive or foster parents as the case may be.
- **Principle of Institutionalisation as a measure of last resort:** A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

## *Modes of Rehabilitation within the JJ System*

### **7.1.1 Restoration**

The restoration of the child is the primary objective of the Children's Home, Specialised Adoption Agency or open shelter<sup>510</sup> and it is built upon the principle of family responsibility, which states that the primary responsibility for care, protection of nurturing of a child belongs to the family of the child.<sup>511</sup> Further, the JJ Act also mandates that institutionalisation of a child must be done only as a last resort.<sup>512</sup>

Restoration of a child may include restoration to:<sup>513</sup>

- a. parents
- b. adoptive parents
- c. foster parents
- d. guardian; or
- e. fit person

Where a child is temporarily housed in a Children's Home Specialized Adoption Agency or at an Open Shelter, the institution must make an effort to restore the child.<sup>514</sup> Prior to restoration, the CWC must ascertain the suitability of the parents, guardians or fit person to take care of the child.<sup>515</sup> In addition, the CWC must also look into the following reports prior to making a restoration order: reports of the probation officer, social worker or child welfare officer or case worker or non-governmental organisation; report of a home study; and any other relevant document or report brought before the Committee.<sup>516</sup> The CWC, however, cannot force restoration where the child refuses to go back to his/her family, or in cases where the family refuses to accept the child.<sup>517</sup>

Restoration is usually accompanied with follow-up obligations which refer to checking in from time to time to assess the situation of the child and ensure that a child is not in danger of re-victimisation.<sup>518</sup>

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<sup>510</sup> JJ Act, 2015, Section 40.

<sup>511</sup> JJ Act, 2015, Section 3(v).

<sup>512</sup> JJ Act, 2015, Section 3(xii).

<sup>513</sup> JJ Act, 2015, Explanation to Section 40(3).

<sup>514</sup> JJ Act, 2015, Section 40(2).

<sup>515</sup> JJ Act, 2015, Section 40(3).

<sup>516</sup> JJ Model Rules, 2016, Rule 114(2).

<sup>517</sup> JJ Model Rules, 2016, Rule 114(8).

<sup>518</sup> JJ Model Rules, 2016, Rule 114(10).

## ***Role of the Police***

The police are a key functionary involved in tracing the child's family and escorting the child during the restoration process.<sup>519</sup> The Child Care Institutions are required to submit a copy of the report to the CWC indicating the circumstances in which the child was received to the local police station with 24 hours of receiving the child.<sup>520</sup> The DCPU is required to disburse the funds necessary for travel and incidental expenses related to restoration of the child.<sup>521</sup>

### **7.1.2 Institutional Care**

Where restoration is not possible, a child will be placed under institutional care. A 'child care institution' ["CCI"] refers to any institution such as the Children's Home, Specialized Adoption Agency, Open Shelter, etc., recognized by the Act to provide care and protection to children.<sup>522</sup>

The JJ Act mandatorily requires the registration of all Child Care Institutions including institutions run by voluntary or non-governmental organisations, which are wholly or partly meant for housing children in need of care and protection or children in conflict with the law. Registration is liable to be cancelled where an institution is found to have unsatisfactory standards of care, protection, reintegration or rehabilitation.<sup>523</sup> Non-compliance of registration requirements under the Act is a criminal offence and the in-charge of such an unregistered institution may be punished with an imprisonment for a term of up to one year or fine of up to one lakh rupees of both.<sup>524</sup>

A registered institution is liable to be inspected by the CWC and an Inspection Committee constituted under the Act.<sup>525</sup> The institution is also duty bound to admit children into its institution irrespective of whether it receives funds from the government subject only to the capacity of the institution.<sup>526</sup>

Institutional care may be temporary or until the child reaches the age of majority. Several rehabilitative services including education, inculcation of life skills, vocational training, etc. will be provided to the child from within the institution. For this purpose, a Rehabilitation-cum-Placement Officer is designated for every child care institution in order to ensure rehabilitation of children by identifying

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<sup>519</sup> JJ Model Rules, 2016, Rule 114(5).

<sup>520</sup> JJ Model Rules, 2016, Rule 19(25).

<sup>521</sup> JJ Model Rules, 2016, Rule 114(7).

<sup>522</sup> JJ Act, 2015, Section 2(21).

<sup>523</sup> JJ Model Rules, 2016, Rule 21(7).

<sup>524</sup> JJ Act, 2015, Section 42.

<sup>525</sup> JJ Act, 2015, Section 41(9).

<sup>526</sup> JJ Act, 2015, Section 41(8).

their skills, aptitude, etc.; developing linkages with NGOs for providing vocational training, etc.; mobilizing funds; making rehabilitation plans for children; and making all efforts towards facilitating complete and effective rehabilitation of children.

In addition to rehabilitation within the institution, provision of family-based care and long-term rehabilitation such as adoption, foster-care, fit-facility, etc will also be provided for suitable children.

### **7.1.3 Foster Care**

Foster care refers to a system of alternative care providing a family environment to a child by persons other than the biological family of the child.<sup>527</sup> Foster care provides a form of family care that is not possible in child care institutions. Unlike adoption, foster care is not permanent in nature and is only for a certain period of time. A short-term foster care cannot be for a period exceeding a year.<sup>528</sup> Long-term foster care can be for a period exceeding a year and can be extended until the child attains 18 years if the foster care is found to compatible.<sup>529</sup>

The following categories of children are eligible for being placed under foster care:<sup>530</sup>

- Adoptable children between 6 to 8 years old who do not get adopted within a period of two years after they were legally declared free for adoption.
- Children between the ages of 8 to 18 who are declared legally free for adoption but do not get selected by a Prospective Adoptive Parent within one year.
- Children with special needs, irrespective of age who do not get adopted within a period of one year after being legally declared free for adoption. It must be ensured that the foster family has facilities for such children.

Children between the ages of 0 to 6 years who are being considered by the CWC for being declared free for adoption as well as those children already legally declared free for adoption should not be placed in foster care as far as possible.

For the purposes of providing foster care where it is deemed appropriate, the CWC may place a child in a family which does not include the biological family of the child or the child's adoptive parents which the committee thinks is suitable.<sup>531</sup> A child who is adoptable cannot be placed in foster care for a long period.<sup>532</sup> A

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<sup>527</sup> JJ Act, 2015, Section 2(29).

<sup>528</sup> JJ Model Rules, 2016, Rule 23(6).

<sup>529</sup> JJ Model Rules, 2016, Rule 23(7).

<sup>530</sup> JJ Model Rules, 2016, Rule 44(1).

<sup>531</sup> JJ Act, 2015, Section 44(1).

<sup>532</sup> JJ Act, 2015, Section 44(9).

foster family will be decided based on their ability, intentions, capacity and prior experience.<sup>533</sup> The CWC must endeavour to keep siblings together by placing them in the same foster family.<sup>534</sup>

Where a child has been placed in a foster care because his/her parents were found to be unfit, the parents may be permitted to visit the child in the foster home unless the CWC deems it to be against the best interests of the child.<sup>535</sup>

In addition to the mandates under the JJ Act, the ICPS provides significant support towards ensuring foster care through the Sponsorship and Foster Care Fund created by the Scheme. This Fund is made available to the District Child Protection Society [DCPC] and where the CWC makes an order for placement of a child in foster care, a copy of such order should be made to the DCPS for release of funds.

Fundamental principles governing adoption of children in India:<sup>536</sup>

- the **child's best interests** shall be of paramount consideration, while processing any adoption placement;
- preference shall be given to place the child in adoption with **Indian citizens** and with due regard to the principle of placement of the child in his **own socio-cultural environment**, as far as possible;
- all adoptions shall be **registered** on Child Adoption Resource Information and Guidance System and the **confidentiality** of the same shall be maintained by the Authority.

#### 7.1.4 Adoption

Adoption is another key form of rehabilitation aimed at ensuring the right of a child to family and provision of non-institutional care. The JJ Act defines adoption as “the process through which the adopted child is permanently separated from his biological parents and becomes the lawful child of his adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.”<sup>537</sup> Adoption has the effect of the adopted child becoming the child of the adoptive parents for all purposes as if the child were born to them. After the adoption takes place, all ties of the child with his/her birth family will stand severed.<sup>538</sup> In addition to the above, the JJ system also provides for adoption of

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<sup>533</sup> JJ Act, 2015, Section 44(2).

<sup>534</sup> JJ Act, 2015, Section 44(3).

<sup>535</sup> JJ Act, 2015, Section 44(5).

<sup>536</sup> Adoption Regulations, 2017, Rule 3.

<sup>537</sup> JJ Act, 2015, Section 2(2).

<sup>538</sup> JJ Act, 2015, Section 63.

foster children as well as adoption for child of a relative by making an application to the court.<sup>539</sup>

Adoption under the juvenile justice system is governed under three principle texts: the JJ Act, the JJ Model Rules and the Adoption Regulations, 2017. This framework provides for both inter-country and well as in-country adoption. The Central Adoption Resource Agency [“CARA”] is the primary body constituted for regulation of both in-country and inter-country adoption in India.

For the purpose of housing children for adoption, the government has recognized certain institutions as a Specialised Adoption Agency [“SAA”].<sup>540</sup>

The ICPS supports the process of adoption in a significant manner and provides for setting up Adoption Coordinating Agencies, Specialised Adoption Agencies, Cradle Baby Reception Centres, etc.<sup>541</sup>

**Process:**

<b>Process for children to be adopted</b>		
<b>Eligibility of children to be adopted</b>		<p>The following categories of children are eligible to be adopted:<sup>542</sup></p> <ul style="list-style-type: none"> <li>• Any orphan or abandoned or surrendered child, declared legally free for adoption by the Child Welfare Committee;</li> <li>• Any child of a relative;<sup>543</sup></li> <li>• Any child or children of spouse from earlier marriage, surrendered by the biological parent(s) for adoption by the step-parent.</li> <li>• Any child of mentally retarded parents or child of a victim of sexual assault.<sup>544</sup></li> </ul>
<b>Declaration of a child as legally free for adoption</b>	<b>Surrendered Children</b>	<p>A surrendered child refers to a child who has been voluntarily produced before the committee by parents or guardians who are unable to care for this child due to physical, emotional and social factors.<sup>545</sup></p> <ul style="list-style-type: none"> <li>• If the CWC is satisfied, it may ask the parents to execute a surrender deed</li> <li>• The parents will be given two months to reconsider their decision.</li> </ul>

<sup>539</sup> JJ Act, 2015, Section 60 of the JJ Act & JJ Model Rules, 2016, Rule 44.

<sup>540</sup> JJ Act, 2015, Section 65(1).

<sup>541</sup> ICPS, p. 18

<sup>542</sup> Adoption Regulations, 2017, Rule 4.

<sup>543</sup> ‘relative’ is defined in section 2(52) of the JJ Act as “a paternal uncle or aunt, or a maternal uncle or aunt, or paternal grandparent, or maternal grandparent”

<sup>544</sup> JJ Act, 2015, Section 38(3).

		<ul style="list-style-type: none"> <li>• Where the child is below six years old, the CWC shall place the child in a Specialized Adoption Agency.</li> <li>• Thereafter the CWC may legally declare the surrendered child free for adoption.</li> </ul>
	<b>Abandoned and Orphaned children</b>	<ul style="list-style-type: none"> <li>• Orphaned and Abandoned children who are below the age of 6 years shall be placed in a SAA.</li> <li>• Efforts will be made by the CWC to trace the parents and guardians of children. If it is found that they do not have any support, the CWC may legally declare them free for adoption.<sup>546</sup></li> <li>• The police should trace the biological parents or legal guardian and submit the report if they are untraceable within two months if the child is below two years and within four months if the child is above two years.<sup>547</sup> If it is not received in the stipulated time, it will be deemed to have been given.<sup>548</sup></li> </ul>

### 7.1.5 Fit Facility/ Fit Person

Fit Facilities and fit persons refers to facilities or individuals who are entrusted with children on a temporary basis for a specific purpose.<sup>549</sup> The JJB and the CWC are empowered to recognize any facility as a ‘fit facility’ or a person as a ‘fit person’ for providing care, treatment and protection of a child after conducting due enquiry.<sup>550</sup>

A fit person or facility may be entrusted with a child for the purposes of providing the following services to the child:

- i. short term care
- ii. medical care and treatment and specialized treatment
- iii. psychiatric and mental health care
- iv. de-addiction and rehabilitation
- v. education
- vi. vocational training and skill development
- vii. witness protection
- viii. group foster care

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<sup>546</sup> JJ Act, 2015, Section 38(1).

<sup>547</sup> Adoption Regulations, 2017, Regulation 6(11).

<sup>548</sup> Adoption Regulations, 2017, Regulation 6(11).

### **Fit Facility & Fit Person**

A fit facility must:<sup>551</sup>

- a. meet the basic standards of care and protection of children
- b. provide basic services to children such as:
  - o food, clothing, sanitation, hygiene
  - o mental health interventions including counselling
  - o medical facilities
  - o formal age appropriate education
- c. prevent all forms of cruelty, neglect, abuse or exploitation of the child
- d. abide by orders of the CWC and JJB

A fit person must:<sup>552</sup>

- a. have the capacity and willingness to receive the child
- b. provide basic services of care and protection of the child

\* Where the JJB or CWC is dissatisfied with the standards of care at a fit facility or fit person, it may withdraw the recognition through an order.<sup>553</sup>

### **7.1.6 Sponsorship**

Section 45 of the JJ Act empowers State Government to make rules in order to provide sponsorship programmes for children. These sponsorship services can be provided to individuals, groups, communities, families or even to Children's Homes and Special Homes. They may be used for medical, educational, nutritional and other needs. A child may be placed under sponsorship for a maximum of three years.

The following children are eligible for sponsorship services:

- a. Child whose mother is widowed or divorced or abandoned by family
- b. Orphaned children living with extended family
- c. Child whose parents are victims of life-threatening disease
- d. Children whose parents are incapacitated due to accident and are unable to take care of children physically or financially.

The ICPS supports Sponsorship services through the setting up of a Sponsorship and Foster care Fund within the District Child Protection Society [DCPS]. This Fund aids in providing supplementary sponsorship support to families for

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<sup>549</sup> JJ Act, 2015, Section 2(27) and 2(28).

<sup>550</sup> JJ Act, 2015, Sections 51 and 52.

<sup>551</sup> JJ Model Rules, 2016, Rule 27.

<sup>552</sup> JJ Model Rules, 2016, Rule 28.

<sup>553</sup> JJ Model Rules, 2016, Rule 27(7) and 28(4).

educational, medical, nutritional and other needs. The fund is aimed at not only providing rehabilitative aid but also preventing children from becoming destitute or victims of offences such as child labour, child marriage, etc. The release of such funds will be based on the decision of CWC and as per the Individual Care Plan prepared for the child.<sup>554</sup>

### 7.1.7 Aftercare

The framework of the JJ Act also provides for aftercare of children who are exiting the system in order to ensure effective reintegration of the child.<sup>555</sup> A child who is leaving a child care institution upon completion of 18 years of age can be provided with support such as some financial support, provision of employable skills, placement in employment and aid in finding adequate residential facilities.<sup>556</sup>

The following are some of the aftercare services, which may be provided to children:

- community group housing on a temporary basis for groups of six to eight persons;
- provision of stipend during the course of vocational training or scholarships for higher education and support till the person gets employment;
- arrangements for skill training and placement in commercial establishments through coordination with National Skill Development Programme, Indian Institute for Skill Training and other such Central or State Government programmes and corporates, etc.;
- provision of a counsellor to stay in regular contact with such persons to discuss their rehabilitation plans ;
- provision of creative outlets for channelising their energy and to tide over the crisis periods in their lives;
- arrangement of loans and subsidies for persons in after-care, aspiring to set up entrepreneurial activities; and
- encouragement to sustain themselves without State or institutional support.<sup>557</sup>

Children are eligible for aftercare until they reach the age of 21 years or as per the order of the CWC, JJB or Children’s Court. In certain exceptional cases, a child may be provided with aftercare services until they reach the age of 23 years.<sup>558</sup>

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<sup>554</sup> ICPS, p. 16

<sup>555</sup> JJ Act, 2015, Section 46.

<sup>556</sup> JJ Model Rules, 2016, Rule 25(1).

<sup>557</sup> JJ Model Rules, 2016, Rule 25(7).

<sup>558</sup> JJ Model Rules, 2016, Rule 25(2).

## ***Roles & Responsibilities:***

<b>AUTHORITY</b>	<b>FUNCTION</b>
<b>State Government</b>	<ul style="list-style-type: none"> <li>• The State Government is required to make Rules for the purpose of providing aftercare services to children.</li> <li>• The State Government is required to make funds available for essential expenses of the child as a part of provision of aftercare services. These funds must be transferred directly to the bank account of the child.</li> </ul>
<b>District Child Protection Unit [DCPU]</b>	<ul style="list-style-type: none"> <li>• The District Child Protection Unit must prepare and maintain a list of organisations, institutions, individuals, etc. interested in providing aftercare service to children as per the area of interest such as education, medical support, vocational training, etc.</li> </ul>
<b>Probation Officer/Child Welfare Officer/ Case Worker/ Social Worker</b>	<ul style="list-style-type: none"> <li>• The PO/CWO/ Case Worker or Social Worker must prepare a post-release plan for the child and submit it to the CWC or the JJB two months prior to the release of the child from the Child Care Institution.</li> </ul>
<b>Juvenile Justice Board, Child Welfare Committees, and the Children’s Court</b>	<ul style="list-style-type: none"> <li>• The JJB or CWC is required to monitor the post release plan.</li> <li>• As part of its monitoring role, the JJB or CWC must look into the effectiveness of the aftercare plan, its utilization, and the progress made by the child.</li> </ul>

### **7.1.8 Compensation**

Section 357A of the Code of Criminal Procedure, 1973 [CrPC] mandates all state governments along with the Central Government to prepare a scheme (Central Victim Compensation Scheme, 2015) to provide for compensation to victims of criminal offences in order to provide for their rehabilitation. This provision is general in nature and is applicable to children and adults alike although child victims below the age of 14 years are eligible to receive 50% additional compensation.

The provision further provides that whenever a Court deems appropriate, it may recommend the award of compensation to a victim. Upon receiving such recommendation, either the relevant District Legal Services Authority or the State Legal Services Authority must conduct an enquiry and may award compensation to a victim. The enquiry by the Legal Services Authority must be completed within two months of receiving the recommendation.

The Legal Services Authority may also, where appropriate, order for immediate first-aid or medical benefits to the victim free of cost or provide for any other interim relief. Such relief is to be provided upon the certificate provided by the police officer (not below the rank of officer-in-charge) or the Magistrate of the area.

On the lines of the mandate in section 357A of the Cr.P.C., the different state

governments have formulated their own state victim compensation schemes for the disbursal of compensation with a tabulation of amounts to be paid in the case of different offences. It is imperative that the police be well-versed with the scheme in the concerned state as these schemes often place duties on the police. For eg., as per the Tamil Nadu State Victim Compensation Scheme, the disbursal of compensation to victims in cities is to be done by the Commissioner of Police.<sup>559</sup>

### Quantum of Compensation

The Central scheme provides for a minimum amount of compensation to be paid for particular offences. The Scheme does not provide for a maximum amount and each of the States promulgating a victim compensation scheme is free to determine the quantum of compensation to be paid as long as it does not fall below the minimum amount.

The tabulation of minimum compensation to be paid as mandated by the Central Scheme is as below:<sup>560</sup>

SI. No.	Description of Injures / loss	Minimum Amount of Compensation
1	Acid attack	Rs. 3 lakhs
2	Rape	Rs. 3 lakhs
3	Physical abuse of minor	Rs. 2 lakhs
4	Rehabilitation of victim of Human Trafficking	Rs. 1 lakh
5	Sexual assault (Excluding rape)	Rs. 50,000/-
6	Permanent Disability (80% or more)	Rs. 2 lakhs
7	Death	Rs. 2 lakhs
8	Partial Disability (40% to 80%)	Rs. 1 lakh
9	Burns affecting greater than 25% of the body (excluding Acid Attack cases)	Rs. 2 lakhs
10	Loss of fertility	Rs. 50,000/-
11	Loss of foetus	Rs. 1.5 lakhs
12	Women victims of cross border firing: (a) Death or Permanent Disability (80% or more) (b) Partial Disability	Rs. 2 lakhs Rs 1 lakh

\* Child victims of the above offences below the age of 14 years are eligible to receive 50% additional of the sum of compensation provided above.

<sup>559</sup> The Tamil Nadu Victim Compensation Scheme, 2013 , Rule 7.

<sup>560</sup> Central Victim Compensation Fund Scheme, Annexure I, available at [http://mha.nic.in/sites/upload\\_files/mha/files/CVCFGuidelines\\_141015.pdf](http://mha.nic.in/sites/upload_files/mha/files/CVCFGuidelines_141015.pdf)

## Chapter 7, Annexure 1: Significant Court Rulings

### 1. *In re: Exploitation of Children in the State of Tamil Nadu*<sup>561</sup>

This case dealt with the poor state of orphanages in Mahabalipuram (Tamil Nadu) with several reported incidences of child sexual abuse within the institutions as well as incidences of children being used to provide sexual services to tourists. During the course of the case, the Supreme Court dealt with several aspects of the implementation of the JJ Act, 2000 including the need for provision of rehabilitative care and protection as envisaged in the Act. In this regard the court reaffirmed the importance of rehabilitation and social re-integration and directed the state governments to ensure the provision of vocational training, skill development, preparation of Individual Care Plans, education, training of personnel, etc.

### 2. *Baby of Neesha v. State of UP*<sup>562</sup>

In this matter, a child was unlawfully taken from the mother immediately after birth by a neighbour by a woman with mental disability. A police complaint was filed in this regard after which the police were able to take custody of the infant and hand it over to the mother. Information was given to Childline regarding the incident who in-turn informed the Superintendent of a Childcare home. The said Superintendent made an application to the police to take custody of the child, which was acceded to and the police took custody of the infant from the mother and handed over the child to the Superintendent.

The CWC having jurisdiction over the matter took cognizance of the incident after reading a newspaper report and ordered for the production of the child as well as an enquiry report. The police alleged that they handed over the child for ensuring the better future of the baby. The Superintendent having custody of the child refused to produce the baby before the CWC claiming that the child was too ill to travel. Further, the Superintendent got the baby declared legally free for adoption after producing the child before a nearer CWC in Lucknow city. Subsequently, the child was given in adoption and custody of the child was handed over to the adoptive parents in the state of Rajasthan.

Aggrieved by the wrongful handing over of custody, the mother of the child filed a Habeas Corpus petition before the High Court of Allahabad asking for the child to be restored to her. She also moved an application for the conduction of a DNA test, which revealed that she was the biological mother of the child.

The High Court of Allahabad in its judgment highlighted the importance of

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<sup>561</sup> WP 102/2007 [Supreme Court], Decided on 5 May 2017.

<sup>562</sup> Habeas Corpus No. 51 of 2013, High Court of Allahabad (Lucknow Bench).

the restoration provision and stated that “[r]estoration of and protection to a child shall be the prime objective of any children’s home or the shelter home as provided in Section 33.” The Court further opined that when the child was brought before the CWC in Lucknow, every effort should have been made to restore the child to the family in accordance with the Juvenile Justice (Care and Protection of Children) Act, 2000. Finding that the child was not a ‘child in need of care and protection’, the Court found the adoption order illegal and restored the child to the biological mother.

### **3. *Shabnam Hashmi v. Union of India & Ors.*<sup>563</sup>**

In order to clarify certain conflicts which had arisen in adoption cases due to the overlap between personal laws and the Juvenile Justice (Care and Protection of Children) Act, 2000, a PIL was filed in the Supreme Court praying for right to adopt and be adopted be considered as a Fundamental Right under Article 21 of the Constitution unfettered by religious laws.

The All India Muslim Personal Law Board, intervening in this case, stated that although adoption process was provided for in the JJ Act, it was also provided for in Muslim personal Law through the ‘Kafala system’ whereby a child can be placed under the custody of a family for care, well-being and financial support. This child, however, would not be at par with a biological child and have limited rights within the family. Stating this, the Board asked the Court to issue a direction that all Muslim children available for adoption must be given in adoption as per the Muslim personal law.

The Supreme Court rejected the above request of the Board stating that the JJ Act, 2000 was a secular legislation and an enabling Act, whose provisions cannot be nullified by principles of personal law. The Court, however, refused to recognize the right to be adopted and to adopt as a Fundamental Right in view of the conflicting laws and practices in the country in relation to adoption which require to be resolved first.<sup>564</sup>

### **4. *Apne Aap Women Worldwide Trust India v. State of Bihar*<sup>565</sup>**

The High Court of Patna, in this case, was petitioned to look into the menace of trafficking plaguing the state of Bihar and order the strict implementation of the ITPA. Through the course of the proceedings, the court looked into various aspect of trafficking including prevention, raid and rescue, rehabilitation and prosecution.

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<sup>563</sup> (2014) 4 SCC 1.

<sup>564</sup> Id. at para 13.

<sup>565</sup> 2015 (1) PLJR 268.

With specific reference to rehabilitation of victims of trafficking, the Patna High Court mandated that:<sup>566</sup>

- the Social Welfare Department must establish adequate number of Protective Homes, Corrective Institutions in each district of the State to provide vocational training to victims. At least one Protective Home, Corrective Institution and One Stop Crisis/Nirbhaya Centre must be established in every district at the earliest.
- These institutions must be managed by licensed persons with the aid of trained staff.
- Rescue must be followed up with protective care and vocational training to enable the economic independence of the victims for in the absence of training, victims may return to the same profession.
- The Directorate of Social Welfare must ensure the regular training of staff and caregivers at the Institutions housing victims of trafficking.
- Victims of trafficking must be issued identity cards in order to link them with various social security schemes.

### **5. Ankush Shivaji Gaikwad v. State Of Maharashtra<sup>567</sup>**

The Supreme Court in this case dealt with a prosecution under Section 304 of the IPC. Upon upholding the conviction of the accused, the Court had the occasion to look into compensation to be given to the deceased's family under section 357 of the Code of Criminal Procedure, 1973 and examined this issue at length.

Pursuing the jurisprudence of compensation in great detail including several international law documents and judgments from other jurisdictions, the Bench observed that:

“While the award or refusal of compensation in a particular case may be within the Court’s discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion.”<sup>568</sup>

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<sup>566</sup> Id. at para 27.

<sup>567</sup> (2013) 6 SCC 770.

<sup>568</sup> Id. at para 62.

## 6. Tekan alias Tekram v. State of Madhya Pradesh<sup>569</sup>

This case arose out of an alleged sexual intercourse committed upon a blind and illiterate girl by the accused under promise of marriage. The Court upheld the conviction of the accused and proceeded to discuss compensation for the victim. During the course of the hearing the court looked into the different victim compensation schemes of the different states and observed that there was no uniform practice in the country in providing compensation for rape victims and the different amounts ranged from Rs. 20,000 to Rs. 10,00,000.<sup>570</sup>

The Court ordered that all the states must endeavour to follow a uniform scheme in the manner framed by the state of Goa which permits compensation of up to Rs.10,00,000 for rape victims with disability. In the matter before the court, the Bench proceeded to verify the living conditions of the girl in the village and observed that she was living alone without any support by working as a manual labourer. The Bench felt that it would not be possible for her to handle any lump sum of money and thus proceeded to order Rs.8000 to be paid to her every month for her lifetime as compensation as she was a victim with disability.<sup>571</sup>

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<sup>569</sup> 2016 SCC 131.

<sup>570</sup> Id. at para 13.

<sup>571</sup> Id. at para 19.