



# **A Decade of POCSO: Re-Thinking Progress & Possibilities**

## **A Review Consultation on the Protection of Children from Sexual Offences Act 2012**



### **Report on Consultation Proceedings 11<sup>th</sup> - 12<sup>th</sup> February 2023**

#### **SAMVAD**

(Support, Advocacy & Mental health interventions for children in Vulnerable circumstances And Distress),

A National Initiative & Integrated Resource for Child Protection, Mental Health, & Psychosocial Care

Established by Ministry of Women & Child Development,

Government of India

Located in Dept. of Child and Adolescent Psychiatry at National Institute of Mental Health & Neurosciences

(NIMHANS), Bangalore

**In Collaboration with  
National Judicial Academy, Bhopal**



# **A Decade of POCSO: Re-Thinking Progress & Possibilities**

## **A Review Consultation on the Protection of Children from Sexual Offences Act 2012**



### **Report on Consultation Proceedings 11<sup>th</sup> - 12<sup>th</sup> February 2023**

#### **SAMVAD**

(Support, Advocacy & Mental health interventions for children in Vulnerable circumstances And Distress),

A National Initiative & Integrated Resource for Child Protection, Mental Health, & Psychosocial Care

Established by Ministry of Women & Child Development,

Government of India

Located in Dept. of Child and Adolescent Psychiatry at National Institute of Mental Health & Neurosciences

(NIMHANS), Bangalore

**In Collaboration with  
National Judicial Academy, Bhopal**

## Acknowledgements

At the outset, we would like to express our gratitude to the Hon'ble Minister of Women and Child Development, Mrs. Smriti Zubin Irani, for her vision and steadfast support to SAMVAD, which has enabled SAMVAD to organise a consultation of this magnitude. Indeed, it is this vision and support from the Ministry of Women and Child Development, Government of India, that has enabled SAMVAD to engage in learning collaborations of this nature that facilitate knowledge creation and dissemination on critical aspects of child-centric justice, child mental health, protection and psychosocial care.

We are deeply grateful to Hon'ble Justice Amreshwar Pratap Sahi, Director, National Judicial Academy & Former Chief Justice of the Patna and Madras High Courts. We are privileged to have had Justice Sahi's unwavering cooperation during this consultation. His guidance has been instrumental to the organisation of this consultation, without which this event would not have been possible. We are also thankful to Mr. Vijay Chandra, Registrar (Administration), Mr. Yogesh Pratap Singh, Research Fellow (Faculty) and Ms. Jaya Rishi, Law Associate, Faculty, for their steadfast support in liaising with the SAMVAD Team to finalise all preparations for this event at the National Judicial Academy.

The core objective of this consultation was to facilitate debate and deliberation on key issues related to the Protection of Children against Sexual Offences (POCSO) Act, 2012 by Judges of the Hon'ble High Courts. In this endeavour, we are truly privileged and thankful to the Hon'ble Participants in this consultation, including the Hon'ble Chairpersons and Members of the High Court Juvenile Justice Committees, for taking the time out of their busy schedules to share their erudite perspectives on some of the most pressing challenges in the implementation of the POCSO Act.

We would also like to acknowledge the tireless efforts of Mr. Chetan Nehete, Event Manager, and Mr. Salman Khan, Protocol Officer, National Judicial Academy, who were crucial to the effective coordination of all administrative requirements of this Consultation. We are indeed grateful for the warmth and hospitality of the entire staff of the Academy during the consultation.

Our special thanks to our student rapporteurs for this event, namely, Mr. Abhimanyu Singh and Mr. Samyak Mordia, from Jindal Global Law School, O.P. Jindal Global University, who undertook their documentation duties with utmost diligence and professionalism.

Last, but not least, we take this opportunity to thank Hon'ble Justice Madan B. Lokur whose unrelenting support to SAMVAD over the years has informed our work with children and contributed to much of our thinking on the complex issues of child-centric justice. As always, we are indebted to Justice Lokur for his deep commitment and

advocacy on issues of vulnerable children across the country. We hope that this consultation will initiate and sustain much-needed discourse on ways forward in the implementation of the POCSO Act and realisation of its noble objectives.

- ***Saurabh Shashi Ashok, Project Officer (Policy and Law)***
- ***Sheila Ramaswamy, Technical & Operational Lead***
- ***Dr Shekhar Seshadri, Advisor (SAMVAD) & Former Senior Professor, Dept. of Child & Adolescent Psychiatry, NIMHANS)***
- ***Dr John Vijay Sagar (P.I. (SAMVAD) & Head, Dept. of Child & Adolescent Psychiatry, NIMHANS)***

## Contents

1. Background and Rationale.....	7
2. Objectives of the POCSO Review Consultation.....	8
3. Methodology.....	9
4. Key Takeaways from Consultation Proceedings.....	9
4.1. Excerpts from the Keynote address by Justice B.V. Nagarathna.....	9
4.2. Theme 1: Looking Back on 10 Years of POCSO: Progress & Achievements.....	24
4.3. Theme 2: How Far has POCSO Bridged the Gap in Children’s Access to Justice?.....	36
4.4. Theme 3: The Imperative to Strengthen Investigative & Prosecutorial Processes in POCSO Cases .....	48
4.5. Theme 4: Legal Implications of Child Psychosocial & Mental Health Issues: From Intent to Action.....	56
4.6. Theme 5: Trial Procedure in Child Sexual Abuse Cases: Are there Imperatives for a Paradigm Shift?.....	69

## 1. Background and Rationale

The Protection of Children from Sexual Offences Act (POCSO), 2012 is India's first attempt at introducing special legislation to address Child Sexual Abuse (CSA). As was noted in the Parliamentary Standing Committee Report on the POCSO Bill, 2011, the Act was conceived as a mechanism for the development of a legislative framework, that best addressed the needs of the child, in the contexts of sexual abuse from two crucial perspectives: i) dispensation of justice and ii) rehabilitation, social integration and restitution of the child. For such a law to achieve its legislative mandate, it must adequately harmonise criminal justice processes with the child's needs and capacities i.e., processes must ensure the child's best interests are secured from the first point of contact with the legal system (reporting) to the last mile delivery/dispensation of justice through the Special Courts (convictions and orders for restitution/rehabilitation of the victim).

A landmark in child protection legislation, not only in the country, but also in South Asia (where few other countries have a special Act on child sexual abuse), the Act has been important in many ways. Aligned with the protection and privacy imperatives of the UN Convention on the Rights of the Child, the Act provides a classificatory framework, for sexual offences against children, that is comprehensive in the scope of its protective ambit. Therefore, in a departure from previous legal approaches to criminalisation of sexual offences, the POCSO Act was legislated to facilitate a contextual application of legal sanctions in child sexual abuse cases, with particular emphasis on the unique dynamics of sexual abuse perpetrated against children. By establishing child-friendly Special Courts, with time bound trials that protect the identities of children, procedural protections to avoid re-victimisation of the child, victim compensation and rehabilitation, enhanced penal accountability of sexual offenders, and mandatory reporting obligations in cases of CSA, it serves as a major statutory mechanism to address child protection concerns.

In the context of the above, 2022 marks ten years since POCSO has come into force. While there is much to laud, in terms of what the POCSO Act has brought to the children of India, its implementation over a decade, along with new case law and legislative developments, has also propelled into various discourses, particularly amongst child rights activists, child welfare workers, mental health professionals and judicial personnel, the many challenges and dilemmas that require deeper examination and resolution. Indeed, some of these conceptual dilemmas have as much to do with the design of the law, as with its implementation. Specifically, key dilemmas pertain to the extent to which the enactment and implementation of the POCSO Act has provided access to justice for sexually abused children, especially given the challenges of implementing the mandatory reporting clause of the Act, and gender biases in the implementation of POCSO, specifically its implications for 'consenting' adolescent sexual and romantic relationships. Others are regarding the legal Implications of child psychosocial & mental health Issues—in terms of children's

developmental competencies to provide evidence in an adversarial criminal justice system and the risk of children's susceptibility to suggestion and tutoring, as against the need for court preparation and child witness training.

Thus, ten years on, there are, broadly speaking, two levels of reflections we must engage in: the first pertains to implementation questions – namely those relating to mandatory reporting challenges, assessment of children's competency and credibility, ways of strengthening investigative processes in POCSO cases, and ensuring that Special Courts are indeed 'child-friendly'; on another level, we are also called upon to consider deeper questions on the effectiveness of the adversarial system, for dispensation of justice in cases of child victims, and the possible merits of an inquisitorial system in reaching 'the truth'. This discussion is particularly relevant to cases of child sexual abuse, given the incongruence between child witnesses and victim-witnesses' testimonial competence in an adversarial courtroom, and the adult-like standards required by the adversarial criminal justice system. As much of the criminal justice system remains constructed around the concept of 'reasonableness' (particularly the reasonable person standard), significant questions remain about the inherent applicability and fairness of such an absolute standard, that is governed by the contingent notion of the 'reasonable adult'. In essence, what space exists for the child in adversarial hearings, and crucially, what implications does the child's adversarial courtroom experience have, for the quality of adjudication (and by extension...for justice).

In the light of the above, given the imperative to reflect and re-examine various aspects of the POCSO Act, the National Judicial Academy, in collaboration with SAMVAD, a National Initiative & Integrated Resource for Child Protection, Mental Health, & Psychosocial Care, located in the Dept. of Child and Adolescent Psychiatry, National Institute of Mental Health & Neurosciences (NIMHANS) organised a two-day Review Consultation on the POCSO Act from 11<sup>th</sup> – 12<sup>th</sup> February 2023.

## **2. Objectives of the POCSO Review Consultation**

- To present multiple stakeholder perspectives on key dilemmas and challenges in the conceptualisation and implementation of the POCSO Act.
- To facilitate discussion and deliberation on varied perspectives on these key dilemmas and challenges.
- To generate possible solutions and alternative proposals that are critical in addressing gaps and challenges.
- To deliberate on areas of importance that require further research, based on an assessment of challenges under POCSO i.e., to set a research agenda.



### 3. Methodology

#### Contributors & Invitees

The two-day Review Consultation was organized at the National Judicial Academy, Bhopal from 11<sup>th</sup> – 12<sup>th</sup> February 2023. The invitees and contributors to the Review Consultation included:

- Member of the Juvenile Justice Committee, Supreme Court of India
- Director, National Judicial Academy
- Chairpersons of Juvenile Justice Committees of the Hon'ble High Courts
- Current and Former Hon'ble Supreme Court and Hon'ble High Court Judges
- Faculty of National Judicial Academy
- Senior Police Personnel
- Members of SAMVAD-NIMHANS team
- Legal Academicians

### 4. Key Takeaways from Consultation Proceedings

#### DAY 1: 11<sup>th</sup> FEBRUARY, 2023

##### 4.1. Excerpts from the Keynote address by Justice B.V. Nagarathna

Today, India is one of the youngest countries in the world with around 31% of its total population comprising of persons under the age of 18 years. Across the country, millions of children interact with the justice system. Such interaction may be for different reasons: children may either be in **conflict** with the law or in **contact** with the law as victims or survivors, witnesses or because some kind of intervention is needed for their care, protection, health or well-being. In the domestic sphere, children interact with the law in the course of custody battles, divorce proceedings or adoption-related matters.

The backbone of the broad agenda of justice for children is the idea of **child-friendly justice**. This is based on the recognition that children whose lives have become entwined in the legal system need to be dealt with, after understanding their unique vulnerability and their precarious position in the justice system. Child-friendly justice embraces the idea that Courts can be a powerful tool to positively shape children's lives, but at the same time recognises the reality that contact with the legal system is all too often a source of additional trauma for children. The aim of child-friendly justice is to provide a range of strategies that can be used to adapt a legal proceeding to the particular circumstances of the child or children involved.

In my view, the agenda of securing justice for children must begin with a positive recognition of the rights of children. Children's rights are a subset of human rights which are accustomed explicitly to the needs and overall well-being of children, after duly taking into account their fragility or vulnerability. The recognition that children are a vulnerable section of the population and may therefore need special legal attention, is embodied in the Constitutional commitment under Article 15 (3), which specifically permits the State to make provisions or policies directed to benefit children.

#### **4.1.1. Indian Legal Framework of Rights of Children**

Various legislative instruments operate in the Indian legal framework with a view to accord different categories of rights to children and also to ensure that judicial intervention involving children must be based on the rule of law and adapted to secure the best interests of a child. India has a fairly comprehensive legal and policy framework addressing various aspects of child rights and protection for children. Inspired by the ideals contained in the United Nations Convention on the Rights of Child, the Indian legal framework focusses on the following three core categories of child rights: a) Survival Rights;<sup>1</sup> b) Development Rights;<sup>2</sup> c) Protection Rights.<sup>3</sup> Today, we are concerned with the Protection of Children from Sexual Offences Act, 2012, which is a legislation aimed to secure the third category of child-rights, i.e., protection rights.

#### **4.1.2. History of the Law on Child Sexual Abuse in India:**

That children are at the risk of sexual exploitation by caregivers was first highlighted in the 1990s, by the **Freddy Peats case**, especially as it resulted in successful prosecution. The enormity of the conviction in this case is reflected in the first

---

1 Right to be born, Right to minimum standards of food, shelter and clothing, Right to live with dignity, Right to health care, to safe drinking water, nutritious food, a clean and safe environment. The legislations which focus on securing survival rights of children are: The Pre-conception and Pre-Natal Diagnostic Techniques Act, 1994 as amended The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002; Infant Milk Substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992.

2 The most elementary of development rights is the right to education.

3 Right to be protected from all sorts of violence, Right to be protected from neglect, Right to be protected from physical and sexual abuse.

The legislations which focus on securing protection rights of children are: Guardians and Wards act, 1890; Child Marriage Restraint Act, 1929; The Women's and Children (Licensing) Act, 1956; Orphanages and Other Charitable Homes (Supervision and Control Act), 1960; Child Labour (Prohibition and Regulation Act), 1986; Protection of Children from Sexual Offences Act 2012; Juvenile Justice (Care and Protection of Children Act), 2015. In addition to such legislations which are specifically and exclusively enacted for the purpose of securing protective rights to children, several legislations, though applicable in relation to all age groups, contain special provisions for protection of children. Some of such legislations are: The Indian Penal Code, 1860; The Factories Act, 1948; Prevention of Illicit Traffic in Narcotics Drugs and Psychotropic Substances Act, 1987; Transplantation of Human Organs Act, 1994; Information Technology Act, 1996; The Rights of Persons with Disabilities Act, 2016.

paragraph of the Trial Court judgment, which reads and I quote: *“The concept of Justice and the art of Justicing are on trial in this case, which, with its apprehended International linkages and ramifications is reportedly the first of its kind in India, and perhaps the entire SAARC region.”* The case concerned Freddy Peats, a paedophile of German descent, running a *Gurukul* in Goa. He was convicted and sentenced to life imprisonment. The victims were boys staying in a child care institution established and managed by him. The **Peats Case** highlighted the loopholes in the existing laws and the need for a specialised law that specifically dealt with child sexual abuse. It also brought attention to the need for a child friendly system that would ensure the protection and rehabilitation of child victims of sexual abuse.

Following, the said prosecution, the Goa State Legislature enacted the Goa Children’s Act, 2003 with the aim to *“protect, promote and preserve the best interests of Children in Goa and to create a society that is proud to be child friendly.”* It was the first legislation to specifically address the offence of child sexual abuse in India. The Goa Children’s Act is a precursor to the POCSO Act. The Goa Act also contemplated setting up of Children’s Courts, and laid down its procedures. The Act posits that cross-examining of child victims is to be avoided and the same, if necessary, is done through the judge; that a child’s statement should be recorded in the presence of a social worker/counsellor as early as possible after the abusive incident, and adequate translations/interpretations and translators/interpreters who are sensitive to the children’s needs should be provided wherever needed.

The key reason behind the campaign for a special legislation on sexual offences against children is that the existing laws were inadequate to deal with cases of child sexual abuse. The main demands were for a finer statutory calibration of sexual offences committed against children, for a distinct procedure to be stipulated for children at the investigative and trial stage, and for support for children in their journey through the criminal justice system. Prior to the enactment of the POCSO Act, Sections 375 and 376(2) of the IPC were invoked in cases of penetrative sexual abuse of a girl, and Section 377 of the IPC when the victim was a boy. If no penetration had taken place, sexual crimes were reported under Sections 354 and 509 of the IPC, when the victim was a girl, but there was no such corresponding provision for a boy.

In ***Sakshi vs. Union of India, (1999) 6 SCC 591***, the Supreme Court of India highlighted the IPC’s inadequacy to deal with child sexual abuse. Through a Public Interest Litigation, Sakshi, an NGO contended that the interpretation accorded to Sections 375/376 of the IPC cannot be said to be in tune with the current state of affairs existing in the society, particularly in the matter of sexual abuse of children. It was pleaded that the term ‘sexual intercourse,’ as contained in Section 375 of the Indian Penal Code, should include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration, and object/vaginal penetration. Through the Apex Court held

that the definition of 'rape' cannot be altered by a process of judicial interpretation, its intervention led to the 172nd Report of the Law Commission of India, *Review of Rape Law*.

#### **4.1.3. 172<sup>nd</sup> Report of the Law Commission & Min. of WCD's 2007 Study on Child Abuse**

In March 2000, the Law Commission of India published the 172nd Report on *Review of Rape Laws*, wherein it recommended amendments to the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act. It recommended substitution of the word "rape" with "sexual assault", making the offence "gender neutral", and widening its scope so as to include "not only penile penetration but also penetration by any other part of the body (like finger or toe) or by any other object." The Law Commission further recommended that the punishment should be more severe when the perpetrator is "the father, grandfather or brother" or "any other person being in a position or authority towards the other person" because they "more often than not commit the offence of sexual assault on the members of the family or on unsuspecting and trusting young persons." The recommendations for changes to the Criminal Procedure Code were mainly pertaining to special procedures for recording child's statement by the police, medical examination of the child victim, and the child's deposition in court.

The POCSO Act was a response to both domestic and international events. It is therefore important to examine the triggers to and the process of enacting the POCSO Act. Pursuant to a resolution of the General Assembly, the Secretary-General of the United Nations, in the year 2006, appointed an independent expert committee to conduct an in-depth global study on violence against children. With a view to complement this global study, the Ministry of Women and Child Development, Government of India, undertook a pan-India level empirical study on child sexual abuse. The study revealed stunning facts on the extent and magnitude of the problem. The study also highlighted that sexual crimes against children seldom get reported. And when children muster the courage to report their abuse, they are disbelieved or told to forget the incident. The process to enact the legislation that finally became the POCSO Act began in the year 2009, when the Ministry of Women and Child Development circulated the draft *Offences against Children Bill* among stakeholders. The POCSO Act and the Protection of Children from Sexual Offences Rules 2012 simultaneously came into force on 14<sup>th</sup> November, 2012.

Therefore, the POCSO Act may be regarded as India's first state-led attempt to comprehensively confront the perpetration and invisibilisation of child sexual abuse. It is however necessary to evaluate whether the legislation has been effective in harmonizing the criminal justice processes with the needs of the child. It is necessary to critically reflect on whether, the processes under the POCSO Act ensure that the

child's best interests are secured from the first point of contact with the legal system, i.e., at the stage of reporting, till the last step, i.e., dispensation of justice through Special Courts, by way of conviction, orders of restitution, rehabilitation of the victim etc.

#### **4.1.4. POCSO and the Imperative for Victim-Centred Justice**

In the contemporary criminal justice paradigm, when offenders commit a crime, punishing them, often through incarceration or fines, resets the moral balance. Recent studies have demonstrated a drastic shift towards punitive justice, particularly in the context of sexual abuse. However, this paradigm largely ignores the voice and needs of those most impacted by sexual abuse— the child victims. It is necessary to explore the concept of justice from the perspective of the child victim of sexual abuse. It is also imperative that such an approach is adopted as would achieve protection of children's rights while taking into account their unique vulnerability. In this context, it is necessary to evaluate whether the POCSO Act has facilitated application of legal sanctions in child sexual abuse cases, with particular emphasis on the unique dynamics of sexual abuse perpetrated against children.

The POCSO Act provides for a number of measures which are designed to secure child-friendly justice and prevent secondary victimisation. Some of these measures include non-disclosure of the identity of the child,<sup>4</sup> recording of the statement of the child in a familiar environment, by a police officer who is not dressed in uniform,<sup>5</sup> conduct of medical examination of the child in the presence of a parent/guardian.<sup>6</sup> These safeguards were reinforced by the Supreme Court, speaking through Justice Deepak Gupta, in ***Nipun Saxena vs. Union of India, (2019) 2 SCC 703***. By establishing child-friendly Special Courts, with time-bound trials that protects the identities of children; by prescribing procedural protections to avoid re-victimisation of the child; and provisions for victim compensation and rehabilitation; and by enhancing the penal accountability of sexual offenders, etc., the POCSO Act, no doubt has many laudable features. However, we must engage in a reflective exercise pertaining to questions of implementation of the Act; particularly, questions concerning reporting challenges, ways to strengthen investigative processes in POCSO cases, and measures to ensure that the Special Courts are indeed child-friendly.

While it is undeniable that the POCSO Act, provides many safeguards aimed at securing child-friendly justice, the deficiency in setting up of such infrastructure with appropriate man power which results in delay in disposal of cases is not in consonance with the object of the Act. Recognising that the delay in disposal of cases of child

---

<sup>4</sup> Section 23(2), 24(5), 33(7), POCSO Act.

<sup>5</sup> Section 24(2), POCSO Act.

<sup>6</sup> Section 27(3), POCSO Act.



sexual abuse was attributable to the inadequacy in the number of exclusive courts for the trial of cases under POCSO Act, the Supreme Court in ***Re: Alarming rise in the number of child rape incidents, 2020 (7) SCC 87*** issued directions to State Governments on the setting up of exclusive courts for the trial of cases under the POCSO Act. The following parameter was to be adhered to in setting up these Courts: In Judicial Districts where more than 100 POCSO cases were pending, at least one exclusive Court had to be set up and in Judicial Districts where more than 300 POCSO cases were pending, at least two exclusive Courts had to be established.

It is relevant to evaluate the impact of these directions, in light of the fact that current pendency of trials pertaining to offences under the POCSO Act, stands at 2.26 lakhs or more, throughout the Country.<sup>7</sup>

#### **4.1.5. What do the numbers tell us about POCSO Cases: The Imperative for consolidating & streamlining data on sexual offences**

It may be relevant to consider data/statistics on the following parameters:

- i) On an average, it takes 509 days for a POCSO case to be disposed of; Average number of days taken per POCSO case in different states varies between 878 days to 215 days; Average number of hearings taken per POCSO case in different States varies between 11 hearings and 31 hearings.
- ii) While the aforesaid data relates to the Trial Stage alone, the pre-trial stage leading up to filing of a charge-sheet takes up about 10% of the number of days of a trial.
- iii) Notwithstanding judicial intervention to remedy the problem of deficiency in infrastructure, the rate of pendency increased in the year 2020-2021 from 88% to 94%. That is to say that the for every 100 cases filed under the Act, 88 remained pending at the beginning of 2020, while the number of pending cases per 100 cases instituted, rose to 94, by the year 2021, These cases are pending before various Fast Track Courts and Courts established exclusively for the trial of POCSO Act cases.
- iv) As regards the nature of cases and the rates of conviction/acquittal, over 56% percentage of POCSO cases correspond to the offences of penetrative sexual

---

<sup>7</sup> As stated by Hon'ble Mr. Kiren Rijju, Union Minister for Law and Justice, in a reply to a question posed in the Lok Sabha.

Report: *Over 2.26 Lakh POCSO Cases pending in Fast Track Courts*, THE WIRE, <https://thewire.in/law/over-2-26-lakh-pocso-cases-pending-in-fast-track-courts-up-has-over-60000-govt>.

assault and aggravated penetrative sexual assault. The conviction rate for the said offences ranges between 21 and 26%. However, convictions are lowest in cases of sexual harassment (18.16%).

In the fight against the growing menace of child sex abuse, the availability of accurate and timely data could be immensely useful. Legal data on sexual crimes against children in India is largely compiled by different actors in the Indian justice delivery system. This data however is fragmented across different locations, management systems and record-keeping systems. As a case involving child sexual abuse moves through the system, from when it first gets reported to when it is finally disposed by the court, multiple institutions begin recording information.

As a first step to tackle rising cases of child sexual abuse, the NCRB must first address gaps in POCSO data. The highest class of offences registered against children, as per the NCRB data, are those related to kidnapping and abduction, punishable under the Indian Penal Code. For these offences, the NCRB provides data under ten heads, including missing children deemed as kidnapped, kidnapping for ransom, kidnapping and abduction to compel minor girls for marriage and so on. All of these are distinct offences covered by different provisions of law and punished differently. For policymakers to understand trends in these offences, design counter strategies and direct resources, such granular data is useful.

But when it comes to the POCSO Act, different offences are clubbed together for the purpose of reporting, rendering the data unintelligible and devoid of purpose. For instance, penetrative sexual assault (Section 4) is clubbed with its aggravated version (Section 6). Similarly, sexual assault (Section 8) is clubbed with aggravated sexual assault (Section 10). The difference between penetrative sexual assault and its 'aggravated' version is not simply a function of the degree of penetration or harm caused; the legislature, in all its wisdom, has categorised certain circumstances, or an assault committed by certain people, to be of an aggravated nature. These cases are also punished differently, with aggravated offences attracting longer and more stringent imprisonment. **Not only are these offences distinct conceptually, but the clubbing of these offences for the purpose of reporting also deprives policymakers, researchers and the legal fraternity of information that is useful to understand trends and take steps to rectify the problem.**

Similarly, the clubbing of cases from Section 17-22 deprives citizens of insights related to two important protections afforded under the POCSO Act. Section 21 punishes the non-reporting of an offence and can be invoked against the family of a child for trying to suppress incidents of sexual assault by family members or against the police for refusing to record an offence under POCSO. Section 22 makes it punishable to falsely implicate a person under any POCSO offence. Both these sections, again, are conceptually different and serve unique purposes - discouraging the suppression of

offences and discouraging false cases respectively. Clubbing them together defeats the purpose of drawing a distinction between these two offences. As a precaution, the police may sometimes invoke both simple and aggravated charges in cases where the facts are not clear. But by clubbing the reporting of the simple and aggravated sections, the NCRB data makes it impossible to decipher whether the police are clubbing offences while lodging complaints or if aggravated charges are not being invoked where they should be. **The discrepancies must be noted and responded to as soon as possible to avoid questions being raised on the veracity and efficacy of data.**

A child is not a mere 'statistic', and the court a mere 'instrument' for disposal of cases. Sadly, even after the advent of the POCSO Act, the child continues to be just a 'case'; not an individual with a distinct personality, history and circumstances. It is this uniqueness of every child and her/his case that requires to be considered – the motives for non-disclosure, or for not registering an FIR, or for not consenting to medical examination, or being tight-lipped in cross-examination, or turning hostile to the prosecution's case. To ensure justice to a child, it is essential to sensitively delve into her/his circumstances. Towards this end, the import of a support person or lawyer, cannot be undermined. Their role is crucial in safeguarding the child's interests and presenting the child's nuances before the authorities at different stages of the process.

#### **4.1.6. Pre-Trial, Trial and Post-Trial Issues in POCSO's Implementation**

The overarching concerns surrounding the implementation of the POCSO Act may be discussed having regard to three stages of proceedings under the Act: i) Pre-trial stage; ii) Trial stage; and iii) Post-trial stage.

##### *Pre-Trial*

A concern which is characteristic of the pre-trial stage is the delay in investigation and filing of chargesheet. One of the primary reasons for high pendency in POCSO cases is the slow pace of investigation by the police and the delay in depositing samples with the Forensic Science Laboratories (FSLs). It is shocking to learn that investigation is completed in less than 60 days only in 35% of POCSO cases. For 36% of the cases, it takes more than six months just to complete the investigation. If investigation itself takes as long, the possibility of the trial concluding within one year of the date when cognizance is taken, as required by the Act, becomes extremely bleak. Further, it is concerning that in 49% of the cases, it has taken the police anywhere between 31 days to greater than one year to deposit samples with FSLs. Consequently, there are delays in receiving reports, leading to delays in filing the chargesheet.<sup>8</sup> In addition to

---

<sup>8</sup> Pravin Patkar and Pooja Kandula, 4 Years Since POCSO: Unfolding of the POCSO Act in the State of Maharashtra' (2016) Aarambh India.



these problems, there is a lack of adequate number of experts, and infrastructure in FSLs and in some cases, there is a lack of FSLs altogether. This issue has been acknowledged by the judiciary as well. In ***Re: Alarming Rise in the Number of Reported Child Rape Incidents***, the Supreme Court directed the Chief Secretaries of all states to ensure that in all POCSO cases, the forensic science laboratories in their states send back reports promptly and without any delay.

Another issue which surfaces in the pre-trial stage is with regard to non-appointment of sufficient number of support persons. Support persons liaise with various agencies and update victims and their families with important information, in addition to performing their responsibilities listed under the law. They apprise the victims and their families regarding compensation, judicial procedures, and potential outcomes. The issue of non-appointment of sufficient number of support persons raises important questions about the responsiveness of the justice system in sensitive sexual abuse cases. As noted in ***Re: Alarming Rise in the Number of Reported Child Rape Incidents***, while drawing up the panel of support persons for a district, care should be taken to appoint persons who are dedicated to the cause of child rights and apart from possessing the requisite academic qualifications, are also oriented towards child rights and sensitive to the needs of children.

### *Trial*

Infrastructural issues such as lack of Special Courts in all districts, as required under Section 28 of the POCSO Act; lack of Special Public Prosecutors for every Special Court, hinder effective trial in POCSO cases. Another issue associated with the Trial stage is the non-compliance of timelines prescribed under the Act. The Supreme Court's order in ***In Re, Alarming Rise in the Number of Reported Child Rape Incidents*** records that 63% of POCSO cases remain pending for more than one year. Further, in ***Alakh Alok Srivastava vs. Union of India***,<sup>9</sup> the Supreme Court ordered that directions be issued to all Fast Track Courts, not to grant adjournments routinely. In the said case, a direction was also issued the Chief Justices of the High Courts to constitute committees of three Judges to regulate and monitor the progress of the trials under the POCSO Act.

It is also necessary to bear in mind that speedy recording of the child's evidence plays a crucial role towards restoring the child to her/his normal life, effective healing, continuation of education, etc, hence the courts should attempt to honour the time stipulation. Child victims of sexual abuse need to overcome the trauma and heal quickly, and it helps if they can return to their normal life as soon as possible. Minimising the delay in a child's testimony becomes important from this perspective.

---

<sup>9</sup> Alakh Alok Srivastava vs. Union of India (2018) 17 SCC 291.

In that context, I am reminded on my opinion on a reference concerning the POCSO Act, 2012, while in the High Court of Karnataka. In ***Hanumantha Mogaveera vs. State of Karnataka, ILR 2021 KAR 3469***, we were required to consider whether non-recording of a child's evidence, within a period of one month from the date of the taking cognizance of an offence, as required under Section 35 of the POCSO Act, and non-completion of the Trial by the Special Court within a period of one year, would give the accused the right to be released on bail. In keeping with the object of the Act, we observed that the purpose of Act was for the benefit of the child victim and therefore, the timelines prescribed under the Act were not to be considered as clauses which would entitle the alleged perpetrator to be released on bail.

Hearing this matter put into perspective how the process of investigation, which is ideally meant to act as a link between the child and the Special Court, may in some cases result in secondary victimization of the child victim. In that context, I highlighted, through my judgment, the importance of appointing support persons in every State who participate with the child in the investigative process and prepare the child for Court proceedings and ensure that the child's views are heard and are taken into account at every stage of the proceedings. The role of experts, when coupled with a child-centric legal process could in fact help a child victim trek through the emotionally arduous path of recovery following abuse. **The role of mental health professionals is of critical importance. There is need to provide such services at a reasonable cost to be borne by the Government.**

#### *Post-Trial & Compensation*

Moving on to the post-trial stage, much confusion prevails regarding the role of Special Courts in victim compensation under the POCSO Act. Section 33(8) of the POCSO Act empowers the Special Courts to direct payment of compensation in addition to punishment, for physical or mental trauma caused to the child, or for immediate rehabilitation. Rule 7 of the POCSO Rules reveals that the Special Court is required to ascertain whether compensation should be ordered in a particular case, as also to determine the amount of compensation in that case. Rule 7 (3) stipulates the factors that are to be considered by the court when awarding compensation; Rule 7 (4) expresses that the compensation determined by the Special Court is to be paid "by the State Government from the Victims Compensation Fund or other scheme or fund established by it for purpose of compensating and rehabilitating victims".

There is lack of clarity on procedures to be followed for disbursing the compensation, especially, in cases where the child has no family support, or resides in a child care institution without parental support, or there is apprehension that the compensation so awarded may be misused. Needless to say, the child's support person or lawyer may apply for the compensation, but neither the POCSO Rules, nor the Model Guidelines of the Ministry of Women and Child Development, nor any of the existing victim

compensation schemes stipulate the procedure for monitoring the use of compensation to ensure that such child benefits from the same. Under their guardianship jurisdiction, the courts direct that the share of the child is deposited with and invested by the court's accounts office, and the interest on it is periodically paid to the guardian to meet the expenses of that child. On the child attaining majority, the principal amount with the interest is to be handed over to the child. Suitable adjustments could be made to such procedure to ensure the amount of compensation is enjoyed by the child. **In such event, the Special Court may appoint as guardian of the child, any fit person or the District Protection Officer or an officer of the Court.**

The POCSO Act acknowledges that a child may require immediate financial assistance due to physical injury and/or mental trauma. However, perusal of some orders of Special Courts would reveal that improper criteria is being adopted by Special Courts for not recommending/awarding compensation to the child. For instance, it appears that recommending//awarding compensation by the Special Court to the child is founded upon the situation of the accused, i.e., whether he is the sole bread winner in the family, his age, his responsibilities towards his own family, etc.

To clear any confusion with Special Courts in respect of awarding compensation under the POCSO Act – (a) training programmes for judges of the Special Courts should contain a specific module on compensation; (b) Criminal Manuals issued by the High Courts for the Guidance of the Criminal Courts & their Subordinate Officers should include a Chapter on compensation, including compensation under the POCSO Act. Every State Government should create a fund with sufficient credit for payment of compensation, including interim compensation, awarded by the Special Court. **In appropriate cases, the Special Court should award interim compensation “on its own,” without waiting for any application in this regard.**

#### ***4.1.7. Special Issues in implementation of the POCSO Act, 2012***

With that preface as to the overall objectives of the POCSO Act and the primary areas that need to be critically reflected upon, I now move on to the more specific challenges in the effective implementation of the POCSO Act, some of which have been highlighted by the judiciary.

##### ***i. The determination of age of the victim and allied issues: Navigating through ‘age’ and ‘agency’:***

In the year 2000, the Juvenile Justice (Care and Protection of Children) Act, 2000 and later substituted by the 2015 Act was enacted. This Act defined a ‘juvenile’ or a ‘child’ as ‘a person who has not completed eighteenth year of age.’ Section 2(1)(d) of the

POCSO Act, 2012 adopted the same approach while defining a child as ‘any person below the age of eighteen years.’

The Supreme Court of India while deciding the case of **Jarnail Singh vs. State of Haryana, A.I.R. 2013 SC 3467**, observed that the procedure which is used to determine the age of a child who is in conflict with law as have been provided by the Juvenile Justice (Care and Protection of Children) Rules, 2007, can be followed in cases falling under POCSO Act, 2012 as well. However, an important issue pertaining to determination of age of the child victim *vis-à-vis* the implications it can have on the question of applicability of the POCSO Act, is whether ‘age’ is with regard to biological age of the victim; or his/her mental age. There can be a difference between the two ages owing to complications caused due to mental disorders or intellectual disabilities. Thus, it fell to the courts to decide whether a person who has crossed the biological age of 18, but not mental age of 18, could also be included within the holistic conception of the term ‘child’ under the POCSO Act.

In **Eera vs. State (NCT of Delhi), (2017) 15 SCC 133** the assault victim’s biological age was 38 years, but mental age was 6 because she had been suffering from cerebral palsy since her birth. While adjudicating on the applicability of the POCSO Act to the facts of the said case, the Apex Court declared that it would be doing violence both to the intent and language of the Parliament if the word ‘mental’ is read within the definition of a child under the POCSO Act. According to the Apex Court, the legislature never intended to include the concept of mental age while determining the age of a child for the purpose of the POCSO Act and doing so would amount to encroaching upon the function of the legislature. The Court observed that judges could not assume a ‘creative constructionist personality’ when the provision in question was clear and unambiguous, hence, only the biological age is considered in POCSO cases at the moment. In my view, it is unfair to suggest that intellectually underdeveloped adults be linked with children. However, there is much to be done as regards the manner in which intersectional claims of sexual violence are dealt with. This case highlights the need for an intersectional approach to law and legal reform. Intersectionality suggests that human experience is a product of conjoined and intersecting patterns of oppression/abuse. While age may be one aspect of this experience, age intersects with class, caste, religion, disability, race, and many other attributes to produce unique forms of abuse, sexual or otherwise. Disability will make people likelier targets of sexual violence. Yet, the inadequacy of the of the criminal justice system will prevent the effective prosecution of their perpetrators.

I agree that it is not right to equate differently abled people with children, as this would perpetuate negative stereotypes about persons with disabilities, who are often infantilised and treated as being permanently weak, childlike and needy. However, there is a need to initiate a more nuanced dialogue on the ways in which the criminal justice system fails while trying to stretch and adapt procedures that have been set up

with a different demographic (victims of child sex abuse) in mind rather than to innovate new standards meant for a specific demographic (disabled persons who are subject to several abuse).

**ii. Concern surrounding the ‘age of consent’ under the POCSO Act:**

By rendering teenagers incapable of giving consent to sexual relationships, consensual ‘romantic relationships’ between teenagers often get criminalised. The seriousness of this issue has not escaped judicial attention. In **Arhant Janardan Sunatkari vs. State of Maharashtra, 2021 SCC OnLine Bom 136 (Bom H.C.)** the Bombay High Court observed that incidents of consensual sex between minors have been a grey area under the law as a minor’s consent is not valid in the eyes of law. The Madras High Court in **Sabari vs. Inspector of Police, 2019 (3) MLJ CrI 110 (Mad H.C.)** recommended that the definition of ‘child’ under Section 2(d) of the POCSO Act should be inclusive only of children below the age of 16 years of age (and not 18 years of age) and consensual relationships after the age of 16 years should be excluded from rigorous punishments under the Act. Drawing from the rationale of a Canadian Law, it recommended a suitable amendment to the effect that the age of the offender ought not to be more than five years or so than the age of the victim girl (who should be 16 years or older).

The Madras High Court in **Vijayalakshmi vs. State, 2021 SCC OnLine Mad 317 (Mad H.C.)** furthered its views in 2021, where it held that consensual teenage relationships are a part of biosocial dynamics and therefore *“painting a criminal colour to this aspect would only serve counter-productively”* and also that *“punishing an adolescent boy who enters into a relationship with a minor girl by treating him as an offender, was never the objective of the POCSO Act.”*

Criminalising sex with persons under 18 years of age, virtually pushes it beyond the purview of health professionals and school counsellors who might be reluctant to impart safe sex advice or treat effects of unsafe or reckless sexual practices. ‘Child protection’ includes protecting a child from the rigours of the criminal justice system and restoring a sense of justice to the victim child. Raising the age of consensual sexual activity from 16 years to 18 years, exposes a child to the criminal justice system, with its pitfalls. Instead of criminalising expected, and till recently, acceptable behaviour in such age-group, should we not explore other options, such as age-appropriate sex education in schools? This aspect of the law, is for the Parliament to clarify, having regard to the presumption of the law is that there is no consent among those below the age of 18.

At this juncture, it is relevant to note that the judiciary has ironed out the creases as regards the interplay between the POCSO Act and Exception 2 to Section 375 of the



IPC, wherein an exception has been carved out to the effect that sexual intercourse by a man with his wife who was more than 15 years of age, is not rape. This interplay was considered problematic because the acts falling in this exempted category would still fall within the scope of the POCSO Act. The question therefore was whether the husband in such cases could be tried under the provisions of the POCSO Act, although not liable under the IPC. Supreme Court clarified in ***Independent Thought vs. Union of India, (2017) 10 SCC 800*** that the Exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child. This artificial distinction, it held, is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The court found that the Exception was directly in conflict with the Preamble of the POCSO Act. Referring to Section 42A of the POCSO Act, the court held that the provisions of the POCSO Act will override the provisions of any other law (including the IPC) to the extent of any inconsistency.

#### **4.1.8. Conclusion**

The POCSO Act must be commended for expanding the scope of offences to be included under child sexual abuse to more comprehensively address the issue. It also encourages a child-enabling environment during the investigation and trial of such offences, which immensely helps the victim. However, what is lacking is the methodical operationalisation and implementation of the legislation to meet its objectives. As we complete the tenth year of the operation of the Act, we hope that the gaps will be addressed and bridged. Of greater worry are certain provisions in the POCSO Act, which do not adhere to the legislation's goal and require re-appraisal. It is important that debates among stakeholders are facilitated to draw out more such issues, as also to strengthen the legislation.

Successful prosecution is not the only test to measure whether a child has attained justice. The concept of justice extends to providing a child-friendly process through the special procedures, infrastructure and human resources envisioned under the POCSO Act. The rehabilitative component is also an essential part of justice delivery, and is not limited only to victim compensation, but rests on effective coordination with the juvenile justice system. Justice is not onefold; the interest of a specific child requires to be identified, and her/his needs fulfilled. The solution may not always lie within the criminal justice system; other avenues also require to be explored.

On that note, I conclude my lecture with the earnest hope that deliberations which are to take place over the next two days will address various socio-legal and psychological aspects of child sexual abuse, and how these parameters have been addressed by the POCSO Act. The journey towards achieving the lofty ambition of protecting every one of such children from various manifestations of abuse, will be an arduous one. I thank all institutions and individuals, committed to this endeavour and appeal to one

and all present here to demonstrate the highest degrees of compassion, dedication and foresight in this regard.

## **4.2. Theme 1: Looking Back on 10 Years of POCSO: Progress & Achievements**

As a part of the first theme for the review consultation, the Hon'ble Speakers were invited to provide a perspective on some of the key achievements observed since the enactment of the POCSO Act, and, equally importantly, the significant challenges that remain to be addressed today, following a decade of the POCSO Act's implementation.

### **4.2.1. *Session 1: What do the Numbers tell us about POCSO Cases?***

*Speaker 1: Apoorva, Research Fellow (Justice, Access, and Lowering Delays in India) (JALDI), Vidhi Centre for Legal Policy*

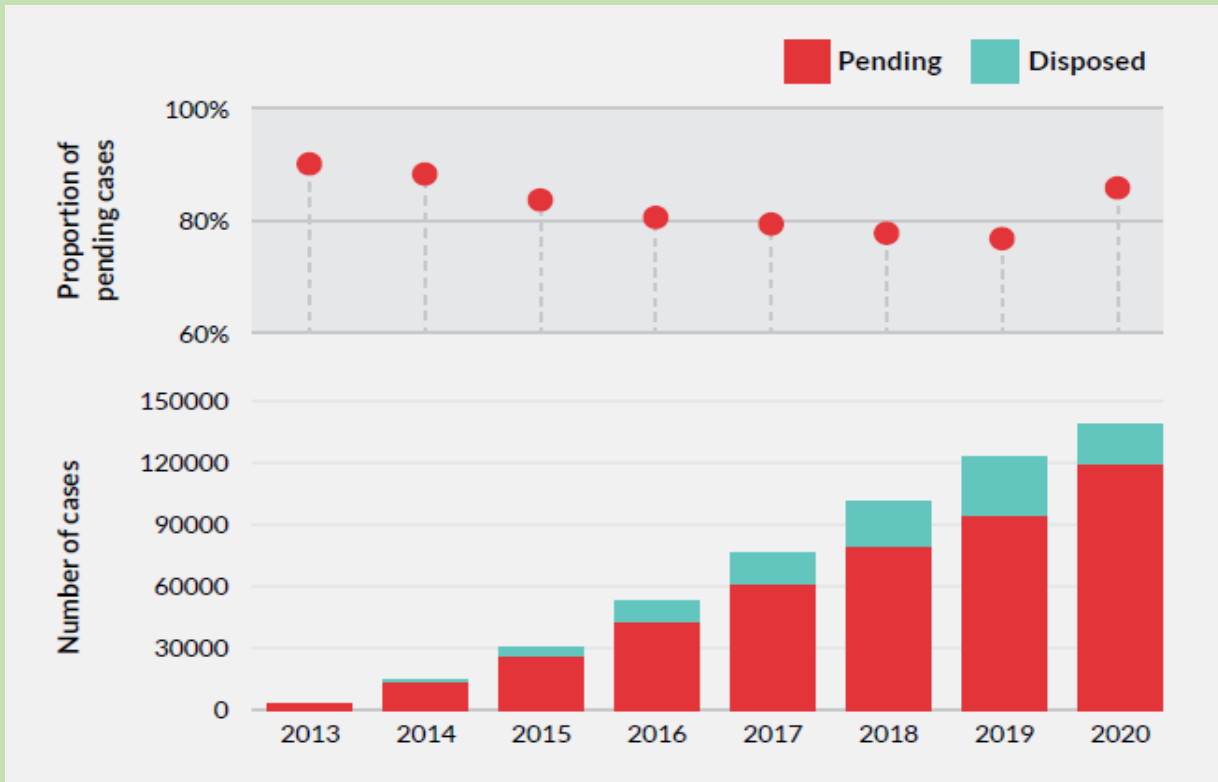
#### **❖ Challenges in analysing data: A methodological perspective**

The speaker provided an overview of the key findings of JALDI's recent report on **A Decade of POCSO: Developments, Challenges, and Insights from Judicial Data**, beginning with a discussion of the methodology adopted in dealing with data collection, cleaning and organization, analysis, and a sample study of judgments. In this regard, certain methodological issues were discussed in the context of undertaking research on the implementation of the POCSO Act (utilizing available district-level e-courts data):

- i) *Data is messy*: 2,30,730 cases were considered for metadata analysis. From this analysis 688 variations in the POCSO Act's name, 964 unique case types, 2,729 unique purposes of hearing, and 717 types of case disposals, were recorded. 17% of the cases were also discarded from the dataset due to quality issues such as lack of sufficient information for appropriate classification of cases according to case type.
- ii) *Data is limited*: One of the key findings included limitations in the available data, particularly in regards to the utilization of provisions of the Indian Penal Code and POCSO together. Additionally, the data did not contain sufficient information in regards to identification of cases of romantic relationships. Despite these limitations, however, certain overarching observations were made from the study.



## ❖ Pendency and Disposal



*Fig. 1: Pendency of POCSO Cases during the COVID Pandemic (JALDI, VIDHI Centre for Legal Policy)*

One of the key insights reported was that the responsibility of disposing POCSO cases is not of the courts alone. The speaker highlighted that higher incidence of reporting of sexual offences under POCSO is potentially attributable to increased awareness and utilization of the Act, and is not necessarily linked to an overall increase in incidence of crime. In this regard, it was reported that while the total number of POCSO cases has been increasing, the number of disposals was also steadily increasing until the advent of the COVID pandemic. One of the COVID-related impacts included a reduction in the quantum of case disposals. For example, more than 75% of the POCSO cases in Uttar Pradesh were pending, reportedly the highest pendency rate in the country. As the speaker noted, this raised the imperative for contextualised state-wise and district-wise plans to deal with pendency of POCSO cases.

Additionally, in regards to the disposal of cases, the study provided key insights on the average number of days and the average number of hearings taken for disposal of a case. For instance, while the average time taken for case disposals is 1 year 4 months in most parts of the country, the analysis highlighted significant variations across states, with some states like Himachal Pradesh reporting an average time of 2 years 5 months, while others like Haryana reported an average time of 7 months.

### ❖ ***Trends in Case Disposals: Acquittals, Convictions & Transfers***

As the speaker highlighted through the study's findings, JALDI also found that there are more acquittals than convictions, with convictions comprising just about 14% of all disposed cases, while acquittals were reported to constitute over 43% of cases. In some states, the gap between convictions and acquittals was reported to be alarmingly high. For example, In Andhra Pradesh, acquittals are reportedly eight times more than convictions. This can vary from state to state, with Kerala only reporting a 4% gap between convictions and acquittals with reference to the total disposed cases. In addition to convictions and acquittals, however, states across the country reported 23% case transfers vis-à-vis total case disposals over a 10-year period i.e., cases transferred from one court to another due to administrative mismanagement or wrongful appreciation of facts by the police. As the report notes, this trend raises significant concerns pertaining to overall delays and consequent impacts on pendency rates across the country.

### ❖ ***Delays in evidence stage of trial***

In its analysis of average time taken for disposal of cases, one of the key questions sought to be answered by this study related to identifying underlying causes of commonly reported delays in trial proceedings. The evidence stage was identified as being the most time-consuming with 40% of the total hearings in disposed cases attributable to this stage. On an average, the findings reported that 183 days are spent on this stage i.e., over 50% of the 1-year time-limit for completion of a trial under the POCSO Act. As the speaker noted, one of the possible explanations for this trend relates to the difficulties in securing physical attendance of victim-witnesses, experts etc. on allotted days for hearings.

### ❖ ***Implementation of the scheme of statutory offences under POCSO***

Key insights from the study in relation to the utilisation of the statutory scheme of offences under the POCSO Act were also discussed. In regards to registration of offences, the speaker highlighted that 56% of all POCSO cases analysed correspond to either the offence of penetrative sexual assault (31%) or aggravated penetrative sexual assault (26%). Additionally, with respect to conviction percentages for these statutory offences, the lowest number of convictions was recorded under the offence of sexual harassment. This was identified as an area of concern, particularly in light of the evidentiary issues in establishing sexual intent in cases of sexually-coloured remarks or gestures constitutive of sexual harassment.

## ❖ **Recommendations**

To address the issues outlined above, several recommendations were made during this session. First, the imperative for data to be made more accessible and standardized was recognized in the context of performance evaluation and data-driven policy-making. Second, integrated capacity building programs were highlighted in the context of facilitating better coordination amongst the myriad stakeholders under the Act. Third, periodic impact assessments were emphasized in the context of the policy imperative for studying legislative performance in the country. Fourth, in the context of the integration of mental health and legal systems, the importance for judicial officers to be oriented to the role of a support person in assisting victims, was also discussed. Finally, as a matter of inclusivity, it was recognized that procedural approaches to children inside and outside the courtroom must necessarily be contextualised to their divergent needs i.e., differently-abled children, young children, adolescents etc. require different procedural approaches rooted in an ethos of child-friendly justice.

### **4.2.2. Session 2: New Legislative Developments & Case Law on Child Sexual Abuse and POCSO**

*Speaker 2: Hon'ble Justice Mukta Gupta (Chairperson, Delhi High Court Committees on Juvenile Justice & POCSO)*

#### ❖ **Adolescent Consent & the Victim-Perpetrator Conundrum: The argument for greater judicial discretion**

This session began with an overview of the imperative to adopt a contextual approach in the judicial implementation of the POCSO Act. Hon'ble Justice Gupta explicated the example of a case of incestual adolescent sexual engagement (involving factual consent) and the impact of the POCSO Act in this regard. The case in question involved two siblings engaging in sexual intercourse, which resulted in pregnancy. An FIR was also subsequently registered against the brother. At 23 weeks, the girl could not get termination without a court order, following which the termination was ordered. Both children were put in separate boarding schools. Justice Gupta raised a key question in this case related to the 'graveness' of the act from a criminal justice perspective, and appropriateness of criminal justice interventions in a case concerned with the behavioural implications of children's developmental immaturity.

Justice Gupta noted that it was difficult to determine who the 'accused' and 'victim' were in this case as developmental immaturity was a factor to consider in both their cases. The impact of a lack of awareness and a poor psychosocial environment were factors that could not be discarded. Contrastingly, the severity of the crime is reflected in the stipulated punishments under the law. It was noted that while enacted laws are designed for the majority of cases, conventional laws that give courts discretion in

sentencing are still the best approach, as illustrated by this case, wherein the high statutory punishments severely restricted judicial discretion. It was further noted that the Supreme Court has established that the higher the punishment, the stricter the need for judicial scrutiny at the trial level, further contributing to a higher burden of proof. Indeed, it was pointed out that in most cases of sexual harassment under sections 11 and 12, the accused are acquitted.

Additionally, Justice Gupta noted that adolescent relationships can be complex, particularly in the context of difficulties in age-determination. In many cases, girls never attended school, and if they did, there was often an absence of age proof like birth certification, with school records found to be unreliable in many instances. This creates problems for courts when trying to determine the age of the parties involved. This issue is particularly relevant when the parties are aged 15, 16, 17, or 18. Justice Gupta emphasized that there are significant challenges in dealing with such situations without discretion in the sentencing aspect of the law.

#### ❖ ***Interpretation of POCSO vis-à-vis Personal Law & related child legislation***

Justice Gupta noted that while personal law does not render marriage between minors null and void; they nonetheless remain voidable. The overriding effect of the POCSO Act was therefore highlighted in view of its status as a special legislation. The Hon'ble Supreme Court's decision was also highlighted in the case of ***X v. Chief Secretary Health & Family Welfare***, which established that an unmarried woman has the right to sexual autonomy and is also entitled to abortion services subject to the stipulated statutory requirements.

#### ❖ ***Socio-economic realities and Implementation of POCSO***

Justice Gupta highlighted the challenges posed to the effective implementation of POCSO in the context of difficult socio-economic and cultural realities of familial abuse. In many cases of sexual harassment and incest, the perpetrator is a father or brother, and the entire family may be dependent on his income. This can create a situation where the family is reluctant to report the crime or cooperate with law enforcement because they fear losing their sole source of income. In some cases, the mother may even defend the perpetrator. In the context of such cases, Justice Gupta noted the importance of providing compensation and aid to the victim and the family to ensure that they can survive without the perpetrator's income. Additionally, in the context of rehabilitation, Justice Gupta highlighted that restoring the personhood of the victim stands on an equal footing with the imperative for financial compensation. Rehabilitation in this regard necessarily includes mental health and trauma-focused interventions, vocational training and social reintegration through livelihood assistance provided to survivors i.e., state-led efforts to provide job opportunities with dignity.

### **4.2.3. Session 3: Prosecutorial Delays & High Pendency in POCSO Cases**

*Speaker 3: Hon'ble Justice Anand Pathak, Chairperson, Juvenile Justice Committee, High Court of Madhya Pradesh*

Justice Pathak provided an overview of the key factors contributing to prosecutorial delays and high pendency with a particular emphasis on the underlying issues in Madhya Pradesh. Additionally, this session discussed systemic concerns with implications for states across the country. The following is an explication of these key factors and relevant recommendations to address the same.

#### **❖ Status of Pendency of POCSO Cases**

The Hon'ble Supreme Court of India's order in ***In Re, Alarming Rise in the Number of Reported Child Rape Incidents*** recorded that 63% of POCSO cases remain pending for more than one year. Furthermore, Justice Pathak cited NCRB data from 2020, wherein it was highlighted that of 1,37,552 cases of crimes against children, investigation was completed for only 79,297 cases, while 58,186 (42%) cases were still pending investigation by the end of the year. In this regard, 94.7% cases, from the total POCSO cases pending trial at the beginning of 2020, still remained pending at the end of the year. The substantial increase in the pendency of POCSO cases was also discussed in the context of the non-functioning of the district judiciary during the COVID pandemic.

In addition to the pandemic, several structural, and procedural issues were highlighted as contributing to delays in completion of POCSO trials. For instance, in the absence of a dedicated unit within the police, it was highlighted that **summons are not served in a timely manner in numerous instances**. These delays further impeded the rehabilitation and reintegration of child victims, who are often called to court several years after the abuse to testify. Additionally, owing to the high pendency of cases, courts also find it **challenging to complete examination-in-chief and the cross-examination on the same day**. From an administrative and case management perspective, the pressure of meeting the target number of judgments to be passed in a month was also discussed as a relevant factor affecting the time available for recording of evidence of child victims.

#### **❖ Factors Causing Prosecutorial Delay in POCSO Cases**

Further to the above, Justice Pathak discussed the following key factors that specifically affected prosecution of cases before the relevant courts in POCSO cases.

- **Slow Investigation and Charge-sheeting**

Slow Investigation and delayed submission of chargesheets was highlighted as a major cause of high pendency. Significantly, it was noted that in only 35% of POCSO

cases, investigation was completed in 60 days. In 36% Cases, investigations were observed to take more than 6 months to complete. In Madhya Pradesh, as of 2022, it was highlighted that the chargesheet is pending in over 1,058 cases, out of which the chargesheet has been pending for more than one year in 407 POCSO Cases.

- **Lack of support persons**

It was highlighted that support persons play an important role in assisting children during the recording of evidence, including through making necessary arrangements in accordance with the special needs of children with disability (wherein the assistance of an interpreter or special educator is required). As a result, the lack of availability of support persons was highlighted as a significant factor affecting their ability to provide cogent and coherent evidence in court.

- **Delays in receipt of Deoxyribonucleic Acid (DNA) and Forensic Science Laboratory (FSL) reports:**

In terms of forensic evidence, it was highlighted that the FSL and DNA report are often not received on time by the Special Court which contributes to delays in the disposal of cases. The volume of POCSO cases being handled by the DNA section in FSLs of Madhya Pradesh was also noted to have dramatically increased from 3 cases in 2012 to 3,931 in 2020 and 3,163 in 2021. The timely disposal of cases by the DNA section in FSL dropped from 100% in 2017 to 77% in 2020 and further declined to 54% in 2021, thereby indicating critical disruptions during the COVID pandemic. Additionally, given the centrality of forensic evidence across a spectrum of criminal cases, the absence of DNA labs within the FSL dedicated to deal with crimes against women and children was raised as a systemic concern affecting timely forensic analysis.

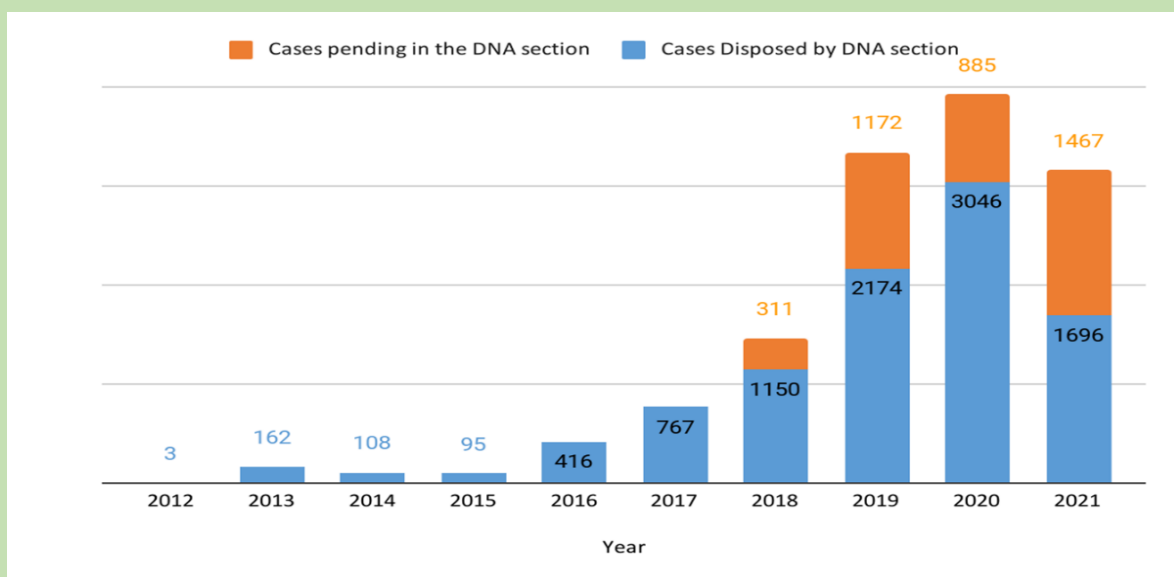


Fig. 2: Status of cases pending and disposed by FSL in Madhya Pradesh



- ***Delay in Age determination process***

In remote or tribal areas, children lack school documents or birth certificates and parents often find it difficult to recall the date of birth. Even if records such as school admission register and date of birth register are present, they are often not maintained properly. In many instances, it was highlighted that Investigation Officers (IOs) do not secure education documents of the children at the first instance. There is also the issue of conflicts arising between the age provided in school documents from different classes, and indeed, between the age provided in school documents and birth certificates. In light of these difficulties, requisite medical tests in accordance with the framework for age determination provided under the Juvenile Justice Act, 2015 assume significance. However, it was noted that Bone Ossification Test facilities are unavailable in some districts, contributing to delays.

- ***Exclusive Special Public Prosecutors (SPPs) for Special Courts***

One of the main issues discussed is the issue of SPPs not exclusively dealing with POCSO cases. As a result of the same, it was highlighted that SPPs do not have time to meet the child in advance, as a result of which the child takes a long time to feel comfortable. Often children also have difficulty in understanding the language of the court or the manner of communication of the prosecutor.

- ***All POCSO cases not being heard at Fast Track Special Courts (FTSC)***

As of 2022, Justice Pathak noted that 16,794 POCSO cases were pending in Madhya Pradesh. Yet, FTSCs for POCSO courts are hearing only 10,428 POCSO Cases. This discrepancy was highlighted, wherein it was noted that 6,366 POCSO cases are currently pending before non-exclusive courts with serious implications for child witnesses.

- ***Delay in Tamili of Summons***

Special Courts face significant challenges in *tamili* of summons in cases from rural areas as the victim and the family migrates from the village in search of labour, and sometimes, due to the social stigma attached with the victims of sexual abuse. Also, in the absence of a dedicated unit within the police, summons are not always served in a timely manner.

- ***Delay Tactics by the Accused***

Justice Pathak also highlighted that the accused, in many cases, delay the recording of evidence and court proceedings by not appointing the defence counsel in a timely manner.

- ***Conflict between the practices of customary laws and implementation of POCSO Act***

Amongst some tribal communities, where customary practices and community norms recognize and accept early marriages or live-in-relationships, the strict application of POCSO Act results in the criminalisation of young boys and men, on one hand, and the institutionalisation of tribal girls in Children's Homes, on the other. In this regard, it was noted that in some instances, POCSO cases were also lodged when a disagreement arose on monetary aspects during early marriages or live-in-relationships. Subsequently, these cases are often settled between parties out-of-court. Following such arrangements, the victim and the victim's family evade summons, are not ready to give a statement, and do not support the prosecution causing delay in trials. This issue of settlement of cases was observed to be a systemic one with implications for all communities in the state.

- ***Romantic/consensual cases***

It was noted that mutually consenting cases consume significant time and resources of the police and judiciary. The statutory imposition of the minimum mandatory sentence under the POCSO Act further results in significant hardship to adolescents and young adults (wherein there is no significant age gap between the two) in consensual relationships, especially when they are married and have children or are pregnant. The Special Court often finds it difficult to send the accused to jail for a minimum of 20 years in these cases, given the significant consequences for parties who may be living as a family. Rehabilitation of adolescent girls in romantic cases is also affected as they are stigmatised, usually rejected by their families, and are institutionalised for prolonged periods in One Stop Centres or Children's Homes.

- ***Human resource challenge***

Justice Pathak highlighted the impact of vacancies in posts of Legal-cum-Probation Officers (District Child Protection Units) on the timely preparation and submission of Social Investigation Reports, in inquiries of POCSO cases, against children in conflict with the law before the Juvenile Justice Boards. Furthermore, in terms of health personnel, it was noted that medical examinations are often delayed due to the unavailability of adequate doctors in government hospitals, which further contributes to the loss of key evidence. In terms of shortage of human resources, timely service of summons and delivery of samples to FSLs were also observed to be impacted by delays due to the multiple responsibilities of limited number of police personnel.



- ***Lack of child Friendly methods***

Given the adversarial nature of POCSO criminal trials, it was highlighted that direct questioning by defence counsel often causes distress in the victim and thereby delays the proceedings. This critical issue in cross-examination continues to be a key impediment in efficient recording of evidence.

- ***Difficulty in recording witness testimony of children with disability***

The District Child Protection Units lack district-level directories of interpreters, translators, special educators, and experts whose assistance can be sought while recording the statement or testimony of a child with disabilities. In rural areas, such experts are also not easily available. This affects the timely recording of statements and testimony and also undermines the access to justice of children with disabilities.

- ***Lack of proper infrastructure in special courts causes delay***

Infrastructure was highlighted as an issue faced by special courts across Madhya Pradesh. In this regard, lack of isolated chambers for recording the statements and issues in internet connectivity during deposition of vulnerable witness through video conference were highlighted.

#### ❖ ***Proposed Solutions for Delay in POCSO Cases***

In light of the many issues discussed above, Justice Pathak highlighted the following possible ways forward. Relevant recommendations, in this regard, include the following:

- **Establishing exclusive POCSO Courts** in all districts to ensure that the cases are taken before the exclusive courts and not before the tehsil courts which lack child-friendly infrastructure and are already handling significant caseloads.
- **Ensuring availability of exclusive Special Public Prosecutors** for POCSO cases. The SPPs must meet the victim and the family in advance to build a rapport with them.
- The state must take initiatives towards **securing registration of all births**. Further, the Registrar issuing birth certificates and school authorities must be called upon by the special courts to testify on the authenticity of documents presented for determination of age.
- Timely extension of **free legal aid and legal counsel** to the victim and their family.
- A **Statutory Grid** of all child-centric laws can be developed. This would help in bringing all the child centric laws on the same page, thereby reducing potential ambiguities, and providing clarity on existing areas of confusion across various legislation.

- Focus must be on strengthening the system by providing **adequate and efficient human resources** in the special courts, JJBs, SPPs, Child Welfare Committees, DCPUs, Support Persons, Special Juvenile Police Units, Court Staff, FSL and Medical officers.
- **Fund allocation to ensure child-friendly infrastructure** in JJBs, CWCs, and Special Courts that will enable conduct of in-camera proceedings, and provision for separate waiting rooms and entrances for the survivor and the accused to save precious time of the court otherwise utilised in making necessary arrangements for every proceeding.
- **Capacity building programs** need to be developed for lawyers and court staff as time-bound child friendly proceedings would require their support and cooperation.
- A **separate unit** may be established within the police for **service of summons** in cases of sexual violence.
- The Police Department needs to ensure that **IOs dealing with serious crimes** are not drawn into law-and-order related responsibilities.
- The Health Departments of the respective states should conduct training programs on the **formats, provisions, and guidelines that need to be complied with, along with the samples that need to be collected** based on the nature of the offence and the time-lapse from the date of commission to date of examination.
- **District hospitals may assign one doctor to deal with Medico-Legal Case requisitions** and report on the number of cases attended to on a daily basis, in order to make sure that there is no delay in facilitation of medical examination. **FSL and DNA reports** should also be **directly emailed to the Special Courts** to avoid delays. **Additional FSL laboratories** must also be opened in areas where the pendency rate of DNA disposal is high.
- **Guidelines for Support Persons** may be issued to outline their appointment, responsibilities, remuneration, and accountability. The State must ensure appointment of support persons in each POCSO case by CWCs.
- **Developing a State-level and Divisional-level Grid of interpreters, translators, experts, special educators Counsellors, Psycho-social experts and support persons to ensure the availability of expert assistance in the least possible time.** Further, the DCPU may be tasked with developing and updating a local directory of such experts.
- **A real-time comprehensive Management Information System (MIS) on POCSO** to enable the State and National level review of the status of POCSO Cases against the time period specified in the legislation.

#### **4.2.4. Theme 1: Plenary discussions**

Following the presentations by the Resource Persons, the following points emerged during the plenary discussions with the Hon'ble Judges from High Courts across the country:

- One challenge in the proper implementation of the POCSO Act is the overlapping of the act with other laws when the person involved in a crime (which they committed as a juvenile) is still a minor when the case comes to court. The legal system needs to reconcile these overlapping aspects of the law so that juvenile offenders who become adults during the process are treated fairly and justly.
- '*Shaurya Didi*,' a program in Madhya Pradesh aimed at facilitating first-level interventions and awareness on issues concerned with crime against women and girls, has female police officers who work as liaisons with the victims and their families to provide support and help to rebuild their lives. The program has been successful in providing timely support to the victims.
- Stakeholders, including judges and students, need to be trained on the POCSO Act to understand its positive and negative impacts. The Act aims to protect the children, but stakeholders need to understand how to balance justice with the child's welfare.
- The service of summons is a time-consuming process, leading to delays in the case proceedings. This can also lead to witnesses and victims turning hostile due to societal pressure. False reports of cases are also a reason for acquittals, in some cases, and therefore, the legal system needs to address such issues.

### **4.3. Theme 2: How Far has POCSO Bridged the Gap in Children's Access to Justice?**

Given that one of the essential objectives of the POCSO Act was to ensure that child victims and witnesses were able receive timely redressal in cases of sexual offences, this theme sought to examine some of the grey areas pertaining to implementation of the law and the consequences they have for enabling the dispensation of justice, in the best interest of children.

#### **4.3.1. Summary of Opening remarks by the Chairpersons:**

- *Hon'ble Justice (Dr) Shalini Phansalkar- Joshi (Former) Judge, Bombay High Court*

Child sexual abuse is a heinous crime that has far-reaching consequences on the victim's life. To tackle this issue, the Indian government enacted the Protection of Children from Sexual Offences (POCSO) Act in 2012. POCSO has helped bridge the gap to some extent in handling child sexual abuse cases. However, there are hardly any sections in the Indian Penal Code (IPC) or other acts that deal with child sexual abuse. Furthermore, the Acts that handle sexual offenses against children are not adequately comprehensive.

POCSO is gender-exclusive, and it provides protection to both boys and girls who have been victims of sexual offenses. However, there is social stigma surrounding child sexual abuse that makes it difficult for the child to disclose that sexual violence has taken place. The child may feel embarrassed or ashamed, and they may also fear retaliation or victim-blaming. Therefore, it is essential to create an environment that is safe and supportive for the child to come forward and report the abuse.

One approach to encourage reporting is the mandatory duty of reporting. This approach requires anyone who has information about child sexual abuse to report it to the authorities. There are pros and cons to this approach. One pro is that if the child is unable to disclose the abuse, then someone else can step in and report it. However, one of the cons is that the child may not want the abuse to be disclosed to the world. Additionally, the child and their family may not be ready for such disclosure.

Most people do not want mandatory reporting because it can lead to a lack of trust between the child and the person reporting the abuse. Furthermore, in many cases of acquittal, the child is not prepared to testify, resulting in serious issues in recording of evidence. This brings into question whether the criminal justice system is ready for the provision of mandatory reporting. Additionally, it is important to consider whether, in appreciation of evidence, due weightage is given to the evidence provided by children. In this regard, if a child does not want something to be disclosed or is in a consensual

relationship, their trust can be betrayed by reporting it. Therefore, it is important to consider the child's wishes before reporting the abuse. This issue raises ethical concerns that need to be addressed by the criminal justice system and are crucial to our discussions on access to justice.

- *Dr K. John Vijay Sagar, Professor & Head, Dept. of Child & Adolescent Psychiatry, NIMHANS*

The POCSO Act was introduced in India in 2012, and since then, it has brought a significant change in the way cases of sexual offenses against children are handled in the country. The Act has bridged a significant gap from the pre-POCSO period, where sexual offenses against children were often neglected, or perpetrators were let off with minimal punishment. However, the implementation of the act raises the concern that every child is unique, and there cannot be a one-size-fits-all policy. To ensure the safety and well-being of the child, it is also necessary to work with caregivers and family members of the victim. By doing so, we can create a supportive environment where the child feels comfortable and confident to speak up about the incident. Moreover, psychological support should be provided to the child on a continuous basis to help them cope with the trauma. Many times, the trauma may not allow the child to recall the act during the recording of evidence. The integration of mental health with legal systems is also a factor to consider in discussions on access to justice in POCSO cases.

#### **4.3.2. Session 1: Dilemmas in POCSO's Mandatory Reporting Provisions**

*Speaker 1: Saurabh Shashi Ashok, Project Officer (Policy and Law), SAMVAD-NIMHANS*

##### **❖ *Background of Child Sexual Abuse & History of Mandatory Reporting***

The speaker provided an overview of the context of child sexual abuse and the subsequent genesis of mandatory reporting provisions in the Indian context. It was highlighted that the topic of child sexual abuse is one that has been largely stigmatized and ignored in many societies around the world. This can be attributed in part to complex processes of socialization and conditioning which historically made it uncomfortable for individuals, both young and old, to talk about nudity, genitalia, and other sensitive topics. Additionally, prior to the enactment of POCSO, in the Indian context, there was a commonly-held view of child sexual abuse i.e., "this does not happen here," which further contributed to an invisibilisation of the issue and a lack of reporting of cases of child sexual abuse.

Subsequently, the development of mandatory reporting laws and their context was briefly discussed in other jurisdictions. In this regard, the first mandatory reporting laws

were enacted in the United States in the 1960s. They were driven by a growing societal awareness of the existence and consequences of physical abuse of children, in part prompted by the research and advocacy undertaken by the Colorado pediatrician C. Henry Kempe, and his colleagues who identified the “battered-child syndrome”. Through their work, Kempe and his colleagues also identified many doctors who were reluctant to believe that children’s parents and caregivers would intentionally harm their children, and therefore averse to reporting cases.

The first laws therefore were conceived to require medical practitioners to report physical abuse. Laws expanded to require other professionals to make reports, and then, with developing evidence of the prevalence and sequelae of different forms of abuse, the laws expanded to include other forms of child abuse and neglect (including child sexual abuse). Laws have developed in jurisdictions like Australia and Canada, prior to becoming an integral part of the POCSO and Juvenile Justice legislations in India as well. The speaker highlighted the observable trends in mandatory reporting provisions across different contexts, with some countries adopting a sanctions-based and protectionist legal framework, while others instead opting for a family service orientation to reporting, rooted in an ethos of strengthening family structures through the creation of comprehensive support services.

#### ❖ ***Differences in India’s Reporting Framework***

Following an overview of reporting provisions in other countries, the speaker highlighted key differences in India’s reporting framework that has essentially emerged out of a protectionist framework rooted in a sanctions-based approach to failures in reporting. These key differences include: i) Blanket Reporting Obligation i.e., No mandated reporters; ii) No civil penalties for non-reporting i.e., sanctions are primarily criminal; iii) No specifications as to confidentiality for reporters or process of reporting and registration of the offence. In essence, owing to a criminal approach to reporting, it is policed more than encouraged.

## ❖ Barriers to Mandatory Reporting



Fig. 3: Conceptual Framework for Balancing Children's Rights to Participation & Decision-Making with the Mandatory Reporting Law

The speaker subsequently discussed the key barriers to reporting of sexual offences against children, that have emerged over the decade of POCSSO's implementation and the existing dilemmas in its implementation for children and service providers. It was highlighted that parents/caregivers are often reluctant to report child sexual abuse owing to: i) stigma and discrimination; ii) fear of legal procedures and systems; iii) children's issues relating to fear of perpetrator reprisal; iv) self-blaming and misconceptions surrounding the abuse; v) children's internalization of the abuse in the context of grooming; vi) mutually-consenting relationships amongst adolescents.

## ❖ Dilemmas for Child Mental Health Professionals

Given that mental health professionals are oftentimes recipients of sexual abuse disclosures during the course of therapeutic engagements, certain key dilemmas faced in reporting were highlighted by the speaker. Firstly, it was highlighted that the view that punishment *ipso facto* helps in the child's healing is not supported by the literature on apology, justice and trauma recovery. Furthermore, it was reiterated that



strong beliefs in retributive justice may be counter-productive for the victim's recovery, as these beliefs inadvertently place the victim at the mercy of the judicial system which may or may not be able to punish the perpetrator.

### ❖ **8-Step guidance for Service Providers on Mandatory Reporting**

In order to balance the criminal justice system's imperatives with the child's perspective, NIMHANS' Practise Guidelines for Service Providers on Mandatory Reporting was highlighted. The following 8-steps of the guidelines were briefly discussed during this session:

- Step 1: Prioritizing Mental Health Assessments and Plan for Psychosocial & Therapeutic Interventions Directed at Healing and Recovery of the Child
- Step 2: Educating children on abuse.
- Step 3: Providing Children with Information on the POCSO Law
- Step 4: Elicit and Respond to Child's Fears and Worries about Reporting
- Step 5: Negotiate with the Child
- Step 6: Explain Legal Processes that Follow Reporting
- Step 7: Explain How Confidentiality Works in Case of Reporting
- Step 8: Obtain the Child's Consent or Parental Assent

Further to the above, additional guidance was provided on cases where children may still be unwilling to report and considerations that need to be factored in decision-making of service providers. The following factors were highlighted in decision-making on overriding children's consent: i) Assessment of the risk for (re)abuse & Responding to Children's Refusal to Mandatory Reporting; ii) Feasibility of Modifying the child's Physical Environment. Following the risk assessment, as discussed above, if the offence is not reported immediately, the imperative for careful maintenance of official files of the child, containing detailed formal documentation on the discussions on mandatory reporting that were conducted (at various points of the treatment and intervention) with the child and family, was also highlighted.



### ❖ **Good Practices on Mandatory Reporting**

This session also provided a comparative perspective on possible good practices in the context of reporting in relation to the designation of mandated reporters and stipulation of guidelines. To ensure that cases of child sexual abuse are properly reported, the importance of reporting obligations tied to institutions that have some interface with the child, such as mental health professionals, pediatricians, and other such professionals, was discussed.

While reporting abuse is common in many countries, some countries require reporting only in certain cases, while others have no reporting obligations at all. It is important to ensure that reporting is encouraged, but not policed as both under and over-reporting can have negative consequences. Additionally, the possibility of introducing non-criminal penalties for individuals who do not report abuse was also discussed. Keeping in mind concerns raised by child-related professionals over the years, the imperative for confidentiality in reporting laws was discussed, in the context of protecting the privacy and safety of the child who is reporting the abuse. Additionally, the imperative to have trained professionals who can handle these cases effectively was also outlined.

Lastly, from a research perspective, considerable gaps in research were identified, pertaining to statistics on compliance with mandatory reporting, hindrances and processes of mandatory reporting, training for professionals on reporting, and the relationship between training, reporting and child outcomes—all of which could potentially guide the development of best practices in clinical CSA interventions. Overall, the reporting and prevention of child sexual abuse require a multi-faceted approach that involves various professionals, institutions, and a society that is committed to creating a safe environment for children.

#### **4.3.3. Session 2: The ‘Notoriously Dangerous Child Witness’: Evaluating Child Witness Competencies**

*Speaker 2: Dr Shekhar Seshadri Advisor, SAMVAD-NIMHANS, (Former) Senior Professor, Dept. of Child & Adolescent Psychiatry, NIMHANS & (Former) Director, NIMHANS*

### ❖ **Child Witnesses in the Adversarial Criminal Justice System**

During this session Dr. Seshadri spoke about the complex nature of the adversarial criminal justice system, and challenges faced by children who are victims or witnesses of a crime during court proceedings. In the context of child interviewing, it was also

emphasized that the issue is not what to ask, but how to ask. The way evidence is presented in court can significantly impact the credibility of the witness, and in an adversarial justice system, children are viewed as either reliable or incompetent. However, the orientation of the adversarial system (designed to resolve disputes), as opposed to discovering the truth, was discussed in the context of several dilemmas, particularly in the context of the Indian Evidence Act (IEA) and POCSO.

#### ❖ ***Competency under Section 118 of the Indian Evidence Act***

According to the IEA, any person who can understand and respond to questions put to them is competent to give evidence. Dr Seshadri outlined two types of child witness competency from a legal perspective i.e., basic competency (memory, language etc.) and truth-lie competency. It was reiterated that contextual inquiry makes a significant difference, and it is not enough to merely ask questions. From a psychosocial perspective, it was posited that in addition to age, developmental ability is also determinative of children's competency to testify. Dr Seshadri provided a developmental perspective on children's competencies and stipulated the scientific and practical difficulties with soliciting evidence from children under the age of 3-3.5 years. In such cases, the imperative to seek the assistance of a mental health professional was also highlighted.

#### ❖ ***Developmental and Psychosocial Implications for Children's Performance in Legal Proceedings***

In judicial efforts to determine children's competencies for testimony, Dr Seshadri provided a comprehensive perspective on the necessity to understand children's cognitive capacities and communication abilities from a developmental and environmental perspective. In this regard, ascertaining child witness competency exists as a contingent rather than a fixed evaluation i.e., it is not sufficient to simply ask if a child satisfies certain threshold abilities (like language, memory etc.). It is equally important to enquire whether the environment and approach of the interview is developmentally appropriate.

While providing a developmental perspective, Dr Seshadri outlined children's competencies across various normative age-groups and developmental stages i.e., i) infancy (0-18 months); toddlers (18-36 months); preschool (3-5 years); elementary school-age (6-9 years); puberty (9-13 years); and adolescence (13-18 years). On the basis of this explication, certain developmentally-informed recommendations were made for recording of evidence:

- At a minimum, a child must be about 3.5 years of age, to even attempt taking a statement.

- Even then, some children will have language delays and be unable to report.
- Children with intellectual disability will need to be assessed to understand what their abilities and deficits are...and if they can report.
- Narration is a function not only of speech & language abilities but also of social and cognitive skills of the child. As a result, a child development/ mental health professional should be requested to assist, through the use of play and other creative methods to elicit narratives from young children and/or children with intellectual disability.

❖ **Methods used by Mental Health Professionals/ Developmental Psychologists to Assess Child Witness Competency**

The abilities of a child become critical in determining not just their competence but the subsequent reliability of their testimony. Descriptive ability, cognitive ability (identifying objects, describing actions and behaviors, recognizing spaces, knowledge of sequences, identifying similarities and differences, identifying body parts), truth and lies, and recognizing spaces are all vital abilities that were identified as critical to any evaluation of children’s developmental competencies for providing evidence. It was also reiterated that mental health professionals can assist the courts by providing expert opinions on children’s competencies across these skill domains, ensuring that the determinations of competency and credibility are scientifically informed.

<b>Core Competencies</b>	<b>Relevance to Child Witness Testimony</b>
<b>Identifying Common Objects and their functions</b>	Indicative of basic cognitive abilities.
<b>Describing Actions &amp; Behaviours</b>	Required to describe the abuse incidents/ what the perpetrator did to child.
<b>Identifying Body Parts</b>	
<b>Knowledge of Sequences</b>	
<b>Recognizing Spaces</b>	Required for child’s narrative on details regarding place of abuse.
<b>Identifying Similarities &amp; Differences</b>	⌚ Indicative of child’s capacities to differentiate between the appearance of objects and people. ⌚ Important to establish child’s ability to identify perpetrator
<b>Memory</b>	⌚ Required for communication of facts about which they are knowledgeable because they directly perceived and remember them. ⌚ Also important for provision of details of the abuse narrative.
<b>Descriptive Ability</b>	
<b>Differentiating between Truth &amp; Lies</b>	⌚ Indicative of child’s ability to distinguish between fact and fiction or fantasy. ⌚ Required for child to be able to provide an accurate account of the abuse incident.

Fig. 4: Core Competencies & their Relevance to Child Witness Testimony

#### **4.3.4. Session 3: The Abuse-Consent Conundrum: Adolescent Sexual Consent and the POCSO Act**

*Speaker 3: Hon'ble Justice N. Anand Venkatesh, Judge, High Court of Madras*

The Protection of Children from Sexual Offences Act, 2012 (POCSO) was enacted with the aim of protecting children from sexual exploitation and abuse. However, the implementation of the act has raised several concerns, with reports of the act not being applied to the people for whom it was meant i.e., not in consonance with the objectives of the Act.

##### **❖ *Socio-legal context of adolescent sexual relationships under POCSO***

Justice Venkatesh briefly discussed a case which highlights the issue of underage consenting relationships and the potentiality of legal complications. In this particular case, a school-going girl was in a relationship with an auto-driver, who was about 19 years old. The girl was not of legal age for marriage, but he professed his love for her. The girl, however, did not want to get married, but wanted to continue a sexual relationship. When people found out about their relationship, the girl's mother wanted to get her daughter married, which ultimately led to a POCSO case being registered against the boy for penetrative sexual assault and aggravated penetrative sexual assault. Justice Venkatesh highlighted that this case raises the importance of being aware of the rigidity of statutory age limits and understanding the consequences of underage relationships from a socio-cultural and legal perspective.

##### **❖ *Criminalization of Adolescent Sexual Relationships***

One of the problems with the act is the criminalization of consensual sexual relationships between individuals under the age of 18. While the act targets beneficiaries who are children, there is a need to differentiate between underage relationships that transcend platonic relationships and those that become sexual. Additionally, the proportionality of criminalization as a response to adolescent sexual relationships necessarily also has to be discussed.

In regards to this point, Justice Venkatesh cited the **240th Report of the Law Commission of India** which has recommended that persons of age 16 to 18 should not be criminalized for consensual relationships. The commission has stated that criminalizing such relationships has the propensity to do more harm than good. It is important to note that one of the hallmarks of adolescence, as a developmental stage, is sexual development. Justice Venkatesh reiterated that various stages of adolescence i.e., from early (10-13) to middle (13-16) to late adolescence (16-18) have

significant implications for children's sexual development and consequent desires to enter into sexual relationships with persons of their choice.

As a result of these developmental considerations, Justice Venkatesh stated that criminalizing adolescent consensual sexual acts is currently a problem in the statutory conception of the POCSO Act. Adolescents have a constitutional right to make decisions about their lives and live with a person of their choice. Criminalizing such acts violates their right to dignity, bodily integrity, and privacy. It was reiterated, in this regard, that statutory provisions that punish forms of sexual engagement that are developmentally normal cannot claim to be in the interest of propriety.

### ❖ ***Paternalism in POCSO***

Justice Venkatesh also highlighted that the paternalistic approach is another problem with the implementation of POCSO. This approach assumes that the state knows what is best for individuals, including adolescents. This is not always the case, and the best interest principle (codified under the juvenile justice framework) should be the guiding principle. The motive behind POCSO is also the best interest of the child, and this principle should be keenly considered when statutory provisions are against the best interest of children.

### ❖ ***Ways forward***

In light of the points discussed above, Justice Venkatesh recommended that proposals may be legislatively considered for lowering the age of consent (possibly to 16 years) with relevant legal provisions pertaining to abusive sexual engagement applicable to adolescents aged 16-18. Justice Venkatesh also highlighted the possibility of considering close-in age exceptions to the statutory age of consent to avoid rigidity in the application of age limits under the POCSO Act. Close-in age exceptions would ensure that if both parties are close in age, and the act is consensual, then the act is not criminalized. In this regard, the importance of judicial discretion was highlighted when it comes to consensual relationships between adolescents.

In conclusion, it was stated that the implementation of POCSO needs to be reviewed to ensure that it is applied to the people for whom it was meant. The criminalization of consensual sexual relationships between individuals under the age of 18 is certainly a problem, and poses a challenge to the application of the best interest principle. Justice Venkatesh reiterated that considering some of these recommendations, we can ensure that children are protected from sexual exploitation and abuse, whilst also ensuring that their constitutional rights are not encroached upon.

#### 4.3.5. Theme 2: Plenary discussions

Following the presentations by the Resource Persons, the following points emerged during the plenary discussions with the Hon'ble Judges from High Courts across the country:

- The issue of legalizing consensual underage relationships is a complex and controversial one that requires a nuanced examination of multiple factors. On one hand, the law deems any physical relationship with a child under 18 years of age as an offense, whilst, on the other, there are questions of implementation to consider. The ***Independent Thought v. Union of India (2018)*** judgment has been instrumental in creating a safeguard for the rights of minors, and acknowledging the overriding effect of POCSO as a special legislation. In line with the same it is crucial to ensure that minors are protected from sexual exploitation and abuse.
- However, the World Health Organization (WHO) is set to release a report in 2024, advocating for the decriminalization of sexual acts by adolescents. The report highlights the natural sex drive of adolescents and urges lawmakers to respect their sexual autonomy. It argues that criminalizing sexual behavior among adolescents often exacerbates problems and leads to a host of social and psychological issues.
- It is important to consider the cultural and familial restraints that often come into play when it comes to adolescent relationships. In many cases, such relationships are viewed as taboo and are met with fierce opposition from family members and the community at large. This can create a significant emotional and psychological burden for the adolescents involved.
- The ***Vardarajan*** case of Madras High Court is an important precedent that must be considered in this context. The case concerned a couple in a consensual relationship, where the girl was 17 years old. The Madras High Court held that the girl had the right to choose her partner and the relationship was not illegal since it was consensual. The Court's judgment recognized the importance of individual autonomy and provided a safeguard against forced marriages and other forms of coercion.
- While the decriminalization of consensual adolescent relationships is a significant step forward, there are concerns about whether too much weightage should be given to such relationships. It is important to acknowledge that adolescents are still in the process of developing emotionally, mentally, and physically, and may not always be able to make informed decisions.



- Another issue to consider is that in many cases, it is the parents who file complaints against the adolescents involved in such relationships. While it is understandable that parents may have concerns about their children's well-being, it is essential to recognize that adolescents have a right to sexual autonomy and personal freedom. Parents should not be allowed to stifle their children's sexual expression and autonomy.
- As the world continues to evolve and society changes, it is essential that legislative intervention keeps pace with the times. The law should protect minors from exploitation and abuse, while also recognizing their autonomy and personal freedom. It is important to find a balance between these competing interests and create a legal framework that safeguards the rights of adolescents while also protecting them from harm.
- In conclusion, the issue of legalizing consensual underage relationships is a complicated and sensitive one that requires a thoughtful and nuanced approach. While it is important to protect minors from exploitation and abuse, it is equally crucial to respect their autonomy and right to personal freedom. With careful legislative intervention, it is possible to find a balance that safeguards the rights of all parties involved.

#### **4.4. Theme 3: The Imperative to Strengthen Investigative & Prosecutorial Processes in POCSO Cases**

Given that POCSO cases are rendered complex by the secluded nature of the offence, wherein child victims are often the only witnesses, the investigations necessitate child-centered methods and processes for eliciting credible statements of the child victim. Therefore, while some of POCSO's most significant legislative changes have been in the domain of courtroom processes, the robustness of investigations in POCSO cases, and the gaps thereof, have been identified as crucial determinants of the outcome of the case, as was discussed under this theme.

##### **4.4.1. Summary of Opening remarks by Chairperson:**

- *Hon'ble Justice S. Vimala, (Former) Judge, Madras High Court*

*"All pain is not obvious, all wounds are not shown"*. This adage holds particularly true for child victims of sexual abuse. The Convention on the Rights of the Child recognizes that every child has the right to be protected from all forms of physical or mental violence, injury or abuse, neglect, maltreatment, or exploitation. However, the sad reality is that children continue to be victimized, and the criminal justice system often fails to provide them with the necessary protection and support. The best interest of the child is supposed to be the primary consideration in all decisions and actions concerning children. Unfortunately, this is not always the case, and the interests of the child often take a backseat to other considerations. It is essential that we prioritize the well-being of child victims and ensure that their voices are heard and their rights protected.

One way to achieve this is by increasing the participation of Public Prosecutors in cases of child sexual abuse. The role of Public Prosecutors needs to be reconsidered, and they should be empowered to act in the best interest of the child. This can be done by providing them with specialized training and resources, so they can better understand the needs of child victims and provide them with the necessary support.

The POCSO Act provides for stringent punishments for perpetrators of child sexual abuse. However, there are concerns that the presumptions under the Act may not always be in the best interest of the child. For instance, if a charge sheet is filed in a POCSO case, it is deemed sufficient proof of the charges. While this may be necessary to ensure speedy justice for the child, it also places a significant burden on the investigating officer to present all evidence before the court.

The Investigating Officer plays a critical role in building a strong case against the perpetrator. It is essential that they understand the importance of their role and present all evidence before the court. This requires specialized training and resources, which

must be provided to them. It is also important that the Investigating Officer works closely with the Public Prosecutor to ensure that the best interests of the child are always kept in mind. Public Prosecutors often view a case as little more than a number, and believe that the outcome of the case has nothing to do with them. This is a problematic attitude that needs to change. The outcome of the case can have a significant impact on the life of the child victim, and it is the responsibility of the Public Prosecutor to ensure that justice is served.

Finally, it is crucial to remember that the victim is often a forgotten part of the criminal justice system. The criminal justice system can be traumatic and intimidating for child victims, and it is essential that we provide them with the necessary support and protection. This requires a coordinated effort from all stakeholders, including the Investigating Officer, Public Prosecutor, and the Court. Child sexual abuse is a grave violation of human rights, and the criminal justice system must prioritize the best interests of the child in all cases. This requires increased participation by Public Prosecutors, specialized training for Investigating Officers, and a commitment to supporting child victims. Unless we take an active role in protecting children from sexual abuse, we cannot hope to build a just and equitable society.

#### **4.4.2. Session 1: Gaps & Challenges in Child Sexual Abuse Investigative Processes: Areas for Capacitating Stakeholders**

*Speaker 1: Shikha Goel, Additional Director General of Police, Women Safety Wing, Telangana State Police*

Ms. Goel provided an overview of the context of BHAROSA's establishment and outlined various facets of the model and the status of its current operations.

##### **❖ *Context of child sexual abuse: The imperative for support***

Ms. Goel recalled that the adage that the "victim wins the battle but loses the war" has unfortunately become a common reality for many victims of child sexual abuse. In this regard, it was highlighted that the trauma of abuse can be life-changing and it is essential that victims receive the necessary support and services to help them heal and recover. The Convention on the Rights of the Child recognizes that all children have the right to be protected from abuse and exploitation, and the best interest of the child should always be the primary consideration. However, in many cases, the criminal justice system falls short of providing adequate support to victims.

### ❖ ***Genesis of BHAROSA in Telangana***

Recognizing the need for specialized services for victims of sexual abuse, the Telangana government established the BHAROSA centers. These centers provide integrated services to victims of child sexual abuse, including medical, legal, and mental health support. They are run by trained civilian staff and professionals who are equipped to handle the specific requirements of child victims. The centers are also recognized as hospitals with medical teams, and police officers are present to ensure that evidence collection is done in a sensitive and professional manner.

Ms. Goel also highlighted that one of the biggest challenges in prosecuting cases of child sexual abuse is the underreporting of the crime. Victims are often afraid to come forward due to the fear of revictimization or lack of trust in the criminal justice system. In this context, it was discussed that BHAROSA centers aim to provide a safe and supportive environment for victims to seek help and support.

### ❖ ***The BHAROSA Model***

The BHAROSA centers, it was pointed out, are not just about providing services; they are also about empowering victims. The BHAROSA Society administers all the centers and serves as a registered society and has been granted the requisite exemption under Section 80(G) of the Income Tax Act, 1961, thereby enabling the society to receive Corporate Social Responsibility (CSR) funds for building and operation of centers under the society. In this regard, Ms. Goel also provided a framework for identification of funding sources and design of efficient budgets for construction and operation of these centers. The BHAROSA society also provides financial assistance to victims, which is a crucial confidence-building measure. Additionally, in regards to support services, it was highlighted that the method of recording of police statements under Section 161 of the Criminal Procedure Code, is fundamentally unique in BHAROSA centers given the presence of counsellors in BHAROSA centers round-the-clock. Additionally, the centers' capacity for conducting medical examinations and its registered status as a hospital preclude the necessity for police personnel to approach external hospitals.

### ❖ ***Gaps in Investigation of POCSO Cases***

The POCSO Act is one of the most comprehensive and detailed laws in India, providing stringent punishment for the perpetrators of child sexual abuse. However, Ms. Goel highlighted that there remain many challenges that still need to be addressed, such as the issue of shelter homes, infrastructural issues, and the remoteness of location. The usage of body cams and tamper-proof evidence bags was

also discussed as a potentially effective way to record statements and facilitate evidence collection, thereby reducing the reliance on *panch* witnesses.

In regards to certain good practices, it was also highlighted that the victim compensation process has been delinked from treasury control in Telangana, which has contributed to expediting the processing of compensation claims significantly. Additionally, in terms of coordination and training, Ms. Goel cited monthly convergence meetings which are held with all stakeholders, and indeed, the multidisciplinary trainings that are conducted to improve the skills and knowledge of all those involved in the investigation and prosecution of POCSO cases.

#### ❖ **Challenges in BHAROSA's implementation**

Despite these measures, many challenges were highlighted. Witnesses turning hostile, especially in cases of child sexual abuse in closed households, were specifically identified. Additionally, it was discussed that quick chargesheets filed within two months can sometimes have the unintended consequence of leading to early grant of bail applications, allowing perpetrators to sometimes intimidate or influence witnesses and victims. Furthermore, many victims of child sexual abuse come from marginalized communities, and accessing the services of a government *panch* witness has been observed to be a challenge. It was stated that these issues require legislative intervention and sustained efforts from all stakeholders to ensure that victims receive the support and justice they deserve.

To conclude, Ms. Goel stated that the BHAROSA centers in Telangana are a significant step towards providing support to victims of child sexual abuse. The centers provide integrated services that are critical to the healing and recovery of victims, and they are a crucial confidence-building measure. However, many challenges remain, and concerted efforts are needed from all stakeholders to address these challenges. It is essential that the criminal justice system recognizes the rights of victims, respects their sexual autonomy, and prioritizes their best interests. Only then can we truly ensure that victims win the war, not just the battle.

#### **4.4.3. Session 2: The Role of the Prosecutor in POCSO Cases**

*Speaker 2: Tara Narula, Partner, Narula and Associates & External Counsel, HAQ: Centre for Child Rights*

#### ❖ **Public Prosecutors in the Criminal Justice System**

The protection of children is one of the most pressing concerns of society, and it is therefore important to have a legal system that is child welfare centric. It was reiterated that the POCSO Act was enacted with the objective of protecting children from sexual

offenses and securing their welfare. However, in many cases, the legal system falls short in its responsibility to protect the victim and unravel the truth. Therefore, there is a need for a different role to be carved out for Special Public Prosecutors (SPPs) from that of Public Prosecutors (PPs) and for fresh training to be provided to SPPs.

Furthermore, Ms. Narula identified that there exists a very real gap between the underlying vision of principles of criminal justice system enshrining the right to fair trial and the ground reality. Public Prosecutors, in this regard, are duty bound to assist the Court in the administration of justice and are entrusted with powers to unravel the facts of the matter by way of evidence and at the same time protect the interest of society.

#### ❖ ***Special Public Prosecutors under POCSO***

The role of an SPP should be to secure the free, fair, and accurate testimony of the victim. This requires a specialized skill set and training, as children who have suffered sexual offenses may not be able to describe what has happened to them. Therefore, the duty of the SPP to ensure that the child is handled in a special manner to secure his/her testimony, was outlined, given the centrality of their testimony to the case, despite the reversal of the burden of proof. Additionally, it was noted that in POCSO cases, often, families cannot be relied upon to support the survivor. Therefore, the system must necessarily be skewed towards ensuring the safety and comfort of the victim, and be hypervigilant against undue influence and evidence tampering. In the peculiar context of incest cases, it was reiterated that this point assumes further significance as the state is required to assume a *parens patriae* role entirely to protect the interests of the state's 'star witness' i.e., the child.

#### ❖ ***Role in Police Investigation***

Ms. Narula provided a brief historical context of the administrative superintendence of public prosecutors and highlighted that since 1973, prosecutors have typically been brought under the supervisory control of the Directorate of Prosecution, at the state-level, with no formal relationship outlined for interactions with the police. Ms. Narula noted that the absence of such a prosecutorial system, wherein effective guidelines are put in place to outline the role of the prosecutor at the investigation stage is keenly felt in POCSO cases, where far too many lapses in evidence gathering are observed at the investigation stage, thereby severely affecting the prosecutor's ability to argue the State's case at the trial stage. There is, furthermore, a lack of training for the police in evidence gathering, which leads to poor evidence collection in many cases. Legal assistance needs to be provided to police, and the police and SPPs must benefit from a framework wherein they are facilitated to work in tandem.



It was also observed that there seems to over-reliance on the fact that the clear, cogent testimony of the victim is sufficient to lead to a conviction. Ms. Narula noted that when chargesheets are sent to the SPPs for review, that review must be more than perfunctory. Even once a charge sheet is submitted, it was emphasized that the SPP can advise on the gathering of additional material and submission of supplementary charge sheets.

One of the basic responsibilities noted, in this regard, was that the SPP must check if requisite searches and seizures have been conducted, statements of material witnesses recorded, adequate age proof submitted, and, if the child has any special needs. Expediting gathering, forwarding, and testing of samples by FSL is also something that was discussed in the context of the responsibilities of the SPP.

#### ❖ ***Interaction with the child & Pre-trial support***

It was noted that the intersectionality of various factors makes a child vulnerable, and the family may not be relied upon to support the survivor. Therefore, the SPP should have a duty to protect and rehabilitate the victim. Generally, one of the problems discussed in this session is the lack of opportunity afforded for the SPP to meet the child before Victim's Testimony (VT). Ms. Narula noted that this ought to change, wherein opportunity is provided for a meeting between the SPP and the child at a time prior to filing the charge sheet.

Additionally, it was noted that SPPs must have an opportunity to familiarize the child with the court and the basic sequence of proceedings. From a pre-trial perspective, it was noted that this enhances the child's preparation, and therefore, increases the possibility of the child providing a full and cogent testimony, while reducing the chances of children turning hostile.

#### ❖ ***Charge***

In regards to framing of charges by the court, it was noted that the SPP bears a responsibility to argue on charge independently, and not just rely on the chargesheet prepared by the police. SPPs may advise on adding, altering, or amending charges as per the facts laid out in the chargesheet post investigation and ensure that no offence punishable by law is left out, including charges under the Juvenile Justice Act, Immoral Trafficking (Prevention) Act and other special laws as may be applicable.

#### ❖ ***Recording of child's evidence***

During the trial stage, before commencement of prosecution evidence, steps must be taken to ensure that the child has all the necessary assistance required for proper

deposition. Section 38 of POCSO was highlighted, in this context, as it provides ample discretion to the court to provide all required assistance while recording of evidence of child “whenever necessary”. Additionally, a point was raised that SPPs must first ensure ability of the child to communicate. The Hon’ble High Court of Allahabad’s judgment in **Vikas Singh v State of UP (2019) SCC OnLine All 4064**, was highlighted wherein significant observations were made about the ability of child to communicate and when requisite assistance may be provided.

In regards to facilitating communication, another point raised was in relation to the use of anatomically correct dolls during statement recording. Additionally, the imperative for maintenance of a list of interpreters, experts, etc., so that children can get necessary assistance was also highlighted.

#### ❖ **Ensuring child’s safety**

The dynamics and role of a SPP requires active interaction with multiple stakeholders. In this regard, it was reiterated that SPPs must ensure that they are aware of any threats being extended to the child or their family. The Hon’ble Supreme Court’s judgement in **State of Bihar v Rajballav Prasad (2017) 2 SCC 178** was cited, wherein it was noted that prime consideration for a fair trial is that witnesses must feel protected for free, frank, and fearless deposition. It is important that SPP is aware of any attempt to influence the child witness or their family to withdraw the case such as encouraging compromise / marriage, or extension of any threat or coercing the witness to turn hostile.

As in most cases, the accused is known to the child and their family members, and often related as well, it was emphasized there are very high possibilities of such instances happening, prejudicing the trial as well as safety of the child. SPP must bring forth such instances before the Court and seek appropriate action against the accused or any such person involved in such tempering and endangerment of safety of the child.

#### ❖ **Limiting child’s exposure to judicial process**

Section 35 of POCSO Act mandates that evidence of child shall be recorded within a period of 30 days of the Special court taking cognizance of the offence. Section 33 (5) of the Act further mandates that child should not be called repeatedly to testify in Court. In this regard, it was highlighted that SPPs must oppose applications by the accused for re-examination or re-calling of child witnesses. The Hon’ble Supreme Court’s decision in **Vinod Kumar v. State of Punjab (2015) 3 SCC 220** was also highlighted wherein it was held that “*It is inconceivable in law that the cross-examination should be deferred for such a long time. It is anathema to the concept of proper and fair trial*”.

No representation from the family on bail opposition is another issue that needs to be addressed.

#### ❖ ***Chargesheet checklist for SPPs***

One of the suggestions made in regards to preparation of chargesheet was also the possibility of making a checklist which may prove to be useful for both the police and prosecution. In addition to the same, it was also suggested that victim impact assessment reports may be made a part of the chargesheet itself, so as to ensure that the true impact of the crime is readily apparent to the presiding officer of the court.

#### **4.4.4. Theme 3: Plenary discussions**

Following the presentations by the Resource Persons, the following points emerged during the plenary discussions with the Hon'ble Judges from High Courts across the country:

- When it comes to child sexual abuse cases, the role of prosecutors is quite different from that in cases involving adult victims. The main reason for this difference is that children cannot answer questions like adults. They may not be able to explain their condition or disclose what happened to them, which means that prosecutors need to approach these cases with special care. Prosecutors must be gentle in their approach and use non-threatening techniques to elicit information from child victims. The use of anatomically correct dolls and other aids may be necessary to help the child communicate what happened to them.
- The current legal system in many countries is adversarial in nature. This means that both the prosecution and the defense are responsible for presenting evidence in court, and the judge or jury then makes a determination based on that evidence. However, some experts have suggested that an inquisitorial system may be better suited to child sexual abuse cases. In an inquisitorial system, the judge takes a more active role in the investigation, evidence gathering and interviewing witnesses. The goal of an inquisitorial system is to uncover the truth rather than to win a case.
- Finally, it is critical that children are not exposed to their alleged perpetrators during the legal process. This is important for several reasons. First, it can be traumatic for the child to see their abuser again. Second, it can make it more difficult for the child to provide accurate testimony if they are intimidated or afraid. Third, it can be dangerous if the alleged perpetrators attempt to threaten or intimidate the child during the legal process.

## **DAY 2: 12<sup>th</sup> FEBRUARY, 2023**

### **4.5. Theme 4 - Legal Implications of Child Psychosocial & Mental Health Issues: From Intent to Action**

This theme focused on bringing to the fore initiatives and best practises in assisting sexually abused children, suggesting that transdisciplinary approaches which integrate knowledge of law and child mental health are most likely to enable the child protection and well-being mandate of the POCSO law.

#### **4.5.1. Summary of Opening Remarks by Chairpersons**

- *Hon'ble Justice Madan B. Lokur (Former) Judge & Chairperson Juvenile Justice Committee, Supreme Court of India*

Justice Lokur highlighted the significance of discussing the concept of 'child-friendly' and what this entails from a practical standpoint. In this context, he recalled a child custody case during his time at the Hon'ble Delhi High Court, wherein the Judge wanted to enquire about the child's wishes regarding the issue of custody. When the child entered the lobby of the court building, he began screaming and running around in panic. After he was comforted by his parents, he shared that he saw so many people dressed with white bands and in black coats – a very strange thing for him. Such an observation triggered a panic attack. Justice Lokur reiterated that such instances provide key insight into children's perceptions of the courtroom and its constituents. In regards to the overarching discussion on 'child-friendly' justice, the imperative for acclimatising the child to the courtroom environment was highlighted.

Justice Lokur recalled another instance concerning two girls who had been trafficked. They were found in a brothel. When they were produced in court, one person approached the Judge claiming he was the father of the girl present at that time. He said he had sold them to the brothel but would like for them to return. The Judge gave custody of the girl, but the girl was unable to understand what was happening since she only knew Bengali. Fortunately, as someone present in court could understand Bengali, the child was able to communicate that the person claiming to be her father, was in fact, the person who trafficked her. This case was discussed in the context of the linguistic difficulties faced by children (especially in contexts such as trafficking where the child's spoken language may be different from the court language).

#### **❖ Pre-trial Assistance**

In regards to pre-trial assistance, Justice Lokur highlighted the significance of pre-trial assistance and the role of organisations like SAMVAD in assisting child victims of sexual offences so that they can be prepared to testify before court. It was highlighted that there are significant questions of trauma and mental health to consider while discussing difficult contexts like trafficking. In relation to the above, Justice Lokur

further reiterated the significance of differentiating scientific and forensically-accurate court preparation from cases of tutoring. The example of the BHAROSA Centres was highlighted in this context wherein counsellors and other support services are available even during the time of statement recording.

#### ❖ **Appreciation of Evidence**

In the context of appreciation of evidence, Justice Lokur noted that there continues to subsist some uncertainty in regards to appreciation of children's testimony given that there are judgements explicitly acknowledging the evidentiary value of sole testimony of the child, while others have simultaneously emphasised the importance of corroborative evidence as a matter of 'practical concern.' Justice Lokur further highlighted the significance of re-evaluating our standards for appreciation of evidence, given the use of the internet and the numerous instances of abuse related to interactions therein.

- *Prof. Shekhar Seshadri, Advisor, SAMVAD-NIMHANS, (Former) Senior Professor, Dept. of Child & Adolescent Psychiatry, NIMHANS & (Former) Director, NIMHANS*

Dr Seshadri stressed upon the importance of adopting a child-centred approach to instances of child sexual abuse, wherein the focus is not simply adjudication, but restoration of the child's sense of personhood. Additionally, Dr Seshadri stressed upon the need further reflection on what should constitute the ecology of the legal sphere (physical buildings, legal procedure etc.) in the context of vulnerable witnesses. Dr Seshadri further highlighted the significance of understanding the context of the case, the dynamics of abuse, the number of perpetrators and other relevant information so as to be able to facilitate the best possible assistance to child victims and child witnesses. While recalling the Muzzaffarpur Shelter Home Case, it was reiterated that when there are multiple perpetrators (known and unknown) and multiple episodes of abuse, the nature of evidence gathering and child interviewing must be contextualised to these dynamics.

#### **4.5.2. Session 1: Re-imagining the Courtroom: India's First Vulnerable Witness Deposition Complex)**

*Speaker 1: Hon'ble Justice Gita Mittal, Chairperson, Vulnerable Witness Committee (Constituted by the Hon'ble Supreme Court) & (Former) Chief Justice, High Court of Jammu & Kashmir and Ladakh*

#### ❖ **Vulnerable Witnesses and the Courtroom**

Justice Mittal began the session with an overview of the rationale for setting up of special procedures for recording of evidence of a certain group of witnesses i.e., vulnerable witnesses. In this context, it was pointed out that vulnerable witnesses can

exist in criminal cases other than those relating to child sexual abuse and even in civil actions.

Justice Mittal narrated her first encounter with a child sexual abuse case as a judge in 2009. On a single judge bench, she was faced with an appeal against conviction in a rape case. The legal aid lawyer in this case stated that there was no evidence against the accused, and therefore, he should be acquitted. Justice Mittal recalls it was a daunting task to adjudicate over a matter involving the rape of a 6–7-year-old child. The contention was that the accused had asked the child to buy biscuits for him and then committed the offence of rape. The police had said that the accused had committed a *bure kaam* or ‘wrong act’. In the Section 164 CrPC statement, the magistrate had also specifically recorded that the accused had done ‘*bure kaam*’ or ‘*wrong acts*’. Additionally, in the trial court’s judgement, it was recorded that the accused had done ‘what couples do at night’. Based on these descriptions the accused had been convicted. Justice Mittal observed that the child (from Tamil Nadu) was tutored in that case, given that it was highly unlikely she gave her evidence in Hindi. Following this incident, Justice Mittal made two significant observations: i) language can be a barrier; ii) the stigma surrounding sexual offences resulting in a situation where the police, the magistrate and the trial judge were embarrassed to go into the necessary level of detail required for a conviction.

Linguistic barriers were also discussed in the context of persons with disability and the necessary accommodations required to be made therein. A question was posed as to whether an identification by a mentally incapacitated person should be disbelieved when they are able to identify their mother and other persons, and therefore possess the capability to distinguish between persons. Also, whether corroboration would be required in such cases, and, if yes, to what extent?

### ❖ ***Genesis of the Vulnerable Witness Courtrooms***

Justice Mittal provided an overview of the various issues in recording of evidence in the adversarial courtroom, given the critical concerns in regards to secondary traumatization. In this regard, the model for vulnerable witness courtrooms was also conceptualized in keeping with existing court infrastructure and resource constraints. On 12<sup>th</sup> September 2012, the first vulnerable witness complex was setup in the Karkardooma courts complex.

In the context of the ecology of the court, Justice Mittal pointed out the role played by the physical environment in intimidating and alienating vulnerable witnesses. For instance, it can be deeply worrisome for the child if the concerned defense lawyer is present in court with 10 juniors to defend the accused, while the prosecution has not more than 2 or 3 lawyers on their side. In light of the many concerns, Justice Mittal cited her discussions with Dr. Achal Bhagat and the subsequent approach to designing the VWC to reduce the negative impact of courtrooms on the victim. In this regard, it



was highlighted that efforts were made to reduce secondary victimization by minimizing exposure to anything that reminds children of the traumatic event.

Justice Mittal asserted that pushing witnesses back and making them re-live their trauma is not helpful for the judicial process, and furthermore, reflects a lack of substantive equality in the judicial procedure.

#### ❖ ***Secondary Traumatization & The case for support in court***

While discussing Suzette John's case (of group sexual assault), Justice Mittal highlighted key aspects of the victim's experience with trial proceedings. Some of the key observations from the victim's experience included: i) multiplicity of lawyers given that there were multiple accused; ii) no person in the courtroom supporting the victim apart from the prosecutor. It was also highlighted, during this session, that when the victim raised this issue, she was told to submit a petition asking for a family friend to be allowed to accompany her. As was highlighted, this is not information that children were privy to.

In addition to the presence of a support person in court, Justice Mittal reiterated that multiple visits to the court needs to be circumscribed, unless necessary in a given case, wherein the child may provide piecemeal information over the course of multiple hearings. In regards to the recording of evidence, Justice Mittal reiterated the importance of the use of age-appropriate language with vulnerable child witnesses. Additionally, it was also reiterated that hearings must not be scheduled in such a way as to disrupt the child's schedule (relating to school time, exams etc.), nor should presence in court cause loss of livelihood to the child's family as this may greatly dissuade the child from providing clear and cogent evidence.

#### ❖ ***Pre-trial support***

Justice Mittal highlighted the Delhi High Court guidelines for the Vulnerable Witness Deposition Complex Scheme, which was subsequently accepted by the Supreme Court in ***Smruti Tukaram Badade v. State of Maharashtra, 2022 SCC Online SC 78***. In accordance with the guidelines, Justice Mittal highlighted the significance of pre-trial visits by the child to the court during which the SPP or Judge can familiarize the child with the court environment. It was stressed here that there is no question of tutoring which can arise in just taking the child through the VWC structure and physical environment.

The imperative here is minimization of secondary traumatization and to ensure the child provides evidence clearly without significant omission of important detail.

### ❖ *Ecology of the VWDC*

Following the above, Justice Mittal provided some key information on the important elements of the VWDC in terms of physical infrastructure. These points were also highlighted in the context of the suitability of the Delhi High Court Guidelines in regards to adapting existing courtroom infrastructure:

- i. It was noted here that the corridor could be used as a waiting area, along with a small toilet, a small pantry; and that the courtroom itself, and the judge's chamber can fulfill the major requirements.
- ii. In Delhi's Karkardooma Court Complex's VWC, the following key aspects were outlined:
  - A separate entrance has been created for the vulnerable witnesses through the judges' entrance and judges' elevator. This shields the vulnerable witnesses from the unfamiliar court environment and possibly coming in contact with the accused.
  - The VWC has a relaxed environment with carom, stationery etc., to engage the child and a washroom, pantry, telecom to satisfy their needs.
  - No photos have been put on the walls in consultation with psychologists. This is because the young are impressionable, and seemingly neutral pictorial arrangements can also remind them of their trauma.
  - The judge's chamber has been transformed into a deposition area with a 360-degree camera. The witnesses are led in here for giving evidence.
  - Carpets and cushions have been put in the corridor, which functions as the waiting room.
  - In the concerned courtroom, submissions of lawyers are taken and then electronically conveyed to the witness's support person via earphones. The support person then relays the questions to be posed to the witness.
  - To reduce the intimidation of the courtroom, a one-way glass has been installed. The accused can see through it inside the courtroom, but the vulnerable witness present within the courtroom is unable to see the accused on the other side of the glass. This shields the vulnerable witness from traumatic exposure to the accused.
  - If there is no separate room with a view inside the courtroom to install the glass in, it can be put within a section of the courtroom itself.
  - An intercom has also been installed for conversing with the defense counsel for accused.

#### **4.5.3. Session 2: Integrating Mental Health and Law: Practice Methods in Pre-Trial and Trial Assistance to Vulnerable Child Witnesses**

*Speaker 2: Sheila Ramaswamy, Technical and Operational Lead, SAMVAD-NIMHANS*

##### **❖ NIMHANS Dept. of Child Psychiatry's Support to Child Witnesses: Muzaffarpur Shelter Home Case: Context of the abuse**

To begin with, in the Muzaffarpur shelter case, it was highlighted that odd behaviours were observed amongst children (including children observed to be roaming around the shelter home without clothes). Following a social audit of the institutions, many concerning issues came to light following which the trafficking operation was unearthed. Typically, the victims ranged from 11–18-year-olds, with all children having been subject to adverse childhood experiences. They came from difficult family backgrounds. Most of the children had run away from their homes and were observed to have serious mental health issues like severe anxiety, depression, PTSD. There was a total of 45 victims out of which 27 were evaluated to be competent witnesses. 18 child witnesses were assessed to have moderate to severe disabilities, as a result of which they were not assessed as having the capacity to testify.

In terms of the context of the abuse, it was also highlighted that the children in the shelter home were mostly runaways and rescues. The children were not provided opportunities for education, development, or recreation. As was pointed out, these children were also not permitted to maintain contact with their families, nor were they permitted to be restored back to their families by the Child Welfare Committees. As a result, it was observed that many children had not stepped out of the institution for 3-4 years.

Within the shelter home, children were made to undress and sleep next to women staff to normalise such behaviour through a process of grooming and desensitisation. Physical abuse was also used extensively to coerce children into submitting to sexual abuse to maintain silence about the same. It was also highlighted that children were coerced into acquiescing to medications for sleep inducement, following which drug-facilitated sexual assault was also perpetrated against the children. Unfortunately, as the FSL was unable to procure this evidence of drug consumption, the evidence was lost.

##### **❖ NIMHANS' work with the child witnesses**

Following transfer of the Muzaffarpur Shelter Home Case from Bihar Police to the Central Bureau of Investigation (CBI) vide orders of the Hon'ble Supreme Court in the case of ***Nivedita Jha v. State of Bihar (2018)***, the NIMHANS Team was brought on board with the investigation to assist the CBI in gathering evidence, provide mental

health and psychosocial support and provide further recommendations for their rehabilitation. To facilitate the same, it was highlighted that the NIMHANS Team developed comprehensive developmental and mental health assessment reports (to ascertain the psychological impact of the sexual abuse), and consequently, to ascertain their capacity to provide testimony in court.

Following these assessments, SAMVAD categorised children into three categories to develop a plan for implementation of court preparation interventions. The first category i.e., children with socio-emotional skill deficits comprised young children who were institutionalised at relatively young ages. These children were observed to have significant socio-emotional and communication difficulties. The second category comprised older children (15–16-year-olds) who were institutionalised at a relatively older age and possessed near normal social and emotional development. The third comprised children with below average intelligence/mild intellectual disability, who joined the shelter home at the ages of around 15-16 years but who had cognitive capacities below age-appropriate levels i.e., of 11–12-year-olds.

#### ❖ ***Pre-trial Court Preparation Interventions for Child Witnesses***

The following is an overview of the key court preparation interventions implemented with child witnesses (as discussed during this session):

- *Mental health and trauma-focused interventions*

A number of pre-trial court preparation interventions were implemented with the children. The first category of interventions consisted of mental health and trauma related interventions. This included: i) treatment of mental health disorders (including techniques of self-relaxation and self-soothing such as holding a teddy bear); ii) psychological empowerment (building children's courage and confidence); iii) empowering children to face the hostility of the defence; iv) addressing children's fears about consequences of testifying in court.

- *Information on court geography, facilities and personnel*

In addition to mental health and trauma-related interventions, children were also equipped with knowledge about the courtroom, court staff and legal processes, in order to facilitate greater awareness and build confidence amongst the child witnesses. Children were also briefed about the different court personnel. They were informed about what the role of the judge is, the fact that the prosecution is 'on our side and will tell our story,' while the defence lawyer is their lawyer and will 'tell their story'. It was explained through this intervention that the judge listens to both these stories and then finally decides what will happen next.

- *Techniques for Refreshing Children's Memory*

Three types of pre-trial interventions were implemented with the children to improve their ability to recall critical information about the abuse in court. These interventions

included: i) cues for memory retrieval; ii) memory rehearsal; and iii) identification of the accused. Importantly, it was highlighted here that memory rehearsal was conducted in ways that are forensically accurate through the exclusion of suggestive information relating directly to the incidents of abuse. The only abuse-related information provided to children was a refresher of the earlier 161 and 164 statements made by the children themselves.

In regards to identification of the accused, as there were concerns surrounding the accused changing their appearance, children were assisted in developing the requisite skills for identification. In this context as well, children had to be assisted in developing the skill without the intervention being 'suggestive' in any way. As a result, children were shown different pictures of famous individuals (wherein their appearance was varied i.e., with a beard/wig etc.) and were asked to identify these individuals.

- *Techniques for Skilling Children to Respond to Court Interrogation*

The last set of pre-trial interventions provide children with the skills necessary to respond to questions (including difficult or confusing questions), and how to provide sufficient detail in descriptions of sexual offences. Exercises were implemented wherein children were required to reflect on their use of ambiguous terminologies and the possible implications of using those words. For example, if a child said '*galat kaam*', a list was prepared of all bad things, so as to develop an understanding of how the judge is going to interpret such language. Body-mapping exercises were conducted as a part of these interventions to give children a vocabulary relating to body parts and facilitate a process of desensitisation in relation to the use of language to properly identify 'private parts'/genitalia.

#### ❖ ***In-trial Support for children***

In addition to the various pre-trial interventions discussed above, this session also highlighted the in-trial support provided to children by the NIMHANS Team. The fact that the trial took place in a Vulnerable Witness Deposition Complex also greatly assisted children in terms of mitigating some of the harsher impacts of the adversarial courtroom. It was highlighted herein that the children were prepared until the evening before they had to go to court. This was done also to evaluate their readiness to depose. Depending on mental status and ability, the court was also advised on the order of appearance of children and the requirement for necessary accommodations such as breaks/length of depositions etc. The NIMHANS Support Persons also accompanied children through the trial (including during travel to and from the courtroom and during wait times).

During instances where the hostile cross-examination made the child leave the courtroom, the support person also helped children in regulating their emotions and assisted children in repeating the self-soothing exercises practised earlier.

### ❖ **Post-trial support**

With reference to the post-trial stage, it was highlighted that SAMVAD helped in assessing which institutions are suitable for children (in line with their assessment profile and documented needs), and furthermore provided recommendations on whether they should be repatriated, or placed in a different shelter home. Recommendations pertaining to medium-to-long term mental health assistance and rehabilitation was also provided. The NIMHANS Team also coordinated with the relevant state tertiary mental health institutions to facilitate the provision of long-term assistance (where required).

#### **4.5.4. Session 3 - Re-thinking Appreciation of Evidence in Child Sexual Abuse Cases**

*Speaker 3: Dr Mrinal Satish, Professor, National Law School of India University, Bangalore (Former Member, Research Team, Justice Verma Committee)*

### ❖ **Questions relating to evidence**

Prof. Satish began by highlighting the key types of evidence available in sexual offences with specific reference to POCSO i.e., testimony of the victim, other witness statements, medical and forensic evidence, and other corroboratory evidence. Further, this session highlighted the salient differences in appreciation of key forms of evidence, like witness statements, in adult vis-à-vis child contexts. These differing standards are partly owed to jurisprudential concerns regarding the credibility of children's evidence.

### ❖ **Issues relating to evidence**

In the POCSO context, while sole testimony of a child witness is sufficient for conviction (provided that it is credible and without material inconsistency), there is also a jurisprudential preference for corroboration as a 'rule of practical wisdom'. Additionally, while the absence of medical evidence is not a ground for disbelieving the victim's testimony or acquittal, the factual circumstances of children's testimony (plagued by concerns of credibility) nonetheless pose a significant challenge. Prof. Satish also discussed the 2013 amendments to the CrPC, based on the Verma Committee Report, wherein section 164 statements were made mandatory in cases involving any physical and mentally challenged individuals, given their evidentiary importance and the challenges posed by courtroom examination in such cases.

### ❖ **Special Measures for recording evidence**

Prof. Satish also highlighted the Vulnerable Witness Guidelines in relation to chief and cross examination via live link, and emphasised the importance of evidentiary standards accommodating such relaxations, so as to ensure that utilisation of a live link does not work to the detriment of the child.



### ❖ **Challenge in POCSO Cases**

Regarding victims turning hostile, Prof. Satish stated that there are significant variations across cases, where the trial ranges from a few months to a few years. During this time, the witnesses are subject to multiple pressures, especially when a family member is involved in the case i.e., a case of intra-familial abuse. In such instances, the child is separated and kept in a children's home, away from their familiar home environment. Yet, such institutionalisation does not necessarily preclude people from contacting children and persuading them to turn hostile. Additionally, trial delays and long-running trials were also discussed in the context of out-of-court settlements that currently frustrate the implementation of POCSO.

### ❖ **Recording of Evidence in child sexual abuse cases**

Prof. Satish provided a comparative perspective and observed that in the context of UK and New Zealand legislations, one of the questions considered was whether evidence can be recorded through a live link. The legislations have said that police's interview of the child if recorded can be considered as the child's examination in chief, if child is available for the prosecution to ask further questions to them.

The principle behind such a provision was to avoid multiple interviews for the same occurrences. In the Indian context too, Section 164 (5A) (b) read with Section 137 of the Indian Evidence Act provides a similar accommodation wherein the statement recorded by the magistrate can be considered in lieu of examination in chief, subject to cross-examination in-person. Given that this provision has been extended to those who are 'temporarily or permanently mentally or physically disabled', this session raised question of utilisation of such provisions and considered whether it was necessary to extend this facility to other child witnesses as well.

### ❖ **Exclusion of hearsay, Hearsay rule and res gestae: India**

While looking at the exception to the exclusion of hearsay, Prof. Satish provided an overview of Sections 6 and 157 of the Indian Evidence Act, 1872 and outlined the key requirements for admissibility of certain kinds of hearsay (covering children's disclosure of sexual abuse to parents/caregivers). Further, this session also delved into some of the criticism to the hearsay rule in jurisdictions like the US, where the Wigmore excited utterance assumption is applied, given that arbitrary time limits to evaluate 'genuine' disclosures have been debunked in studies on child sexual abuse disclosure.

The following cases were discussed in relation to the hearsay rule:

- *Tamil Nadu v. Suresh* 1988 2 SCC 372 – laid down the rule regarding contemporaneity i.e., “at or about same time when the fact took place” and held that this is to be broadly interpreted.

- *Sukhar v. UP 1999 9 SCC 507* – stated that hearsay must be contemporaneous. Wigmore’s effusion of excitement standard is mentioned.
- *Jitendar v. NCT 2017 SCC Online Del 8723* –Statement of the child victim made to the mother moments after the incident, held to be admissible as *res gestae* evidence.
- *Manish v. 2019 SCC Online Bom HC 1154* - Narration by child victim to two other witnesses contemporaneously, held to be admissible as evidence.

#### ❖ **Hearsay exceptions**

Prof Satish highlighted the use of judicial discretion in the US (in states like Minnesota) where the exception to hearsay is based on the judge’s estimation of the time, content, and circumstances of the statement, on one hand, and the reliability of the person to whom it was made, on the other. Prof. Satish further discussed the *R v. Khan (Canadian Supreme Court case)* wherein it was held that hearsay evidence can be admitted when it is necessary (in the absence of other admissible evidence) provided it is reliable. Necessity was interpreted in the context of preventing trauma to the child. Citing Wharton’s Criminal Evidence, this case held that *res gestae* should be applied liberally in cases of CSA especially when the victim is too young (necessity).

While discussing the above, Prof. Satish also highlighted the importance of considering whether, in the presence of sections 29 and 30 under POCSO (wherein the burden of proof is lower), exceptions to rules of evidence are in consonance with the requirements of a fair trial.

#### ❖ **Medical evidence in sexual offences (including POCSO)**

Regarding medical evidence, Prof. Satish also highlighted how it has been a struggle in India to stop practise of the 2-finger test despite Hon’ble Supreme Court and Hon’ble High Court judgements proscribing the same. This was discussed in the context of the stereotypes that continue to govern the implementation of the POCSO Act. Prof. Satish also addressed the practical challenges in appreciation of medical evidence. In 2016, a revised edition of Modi’s Medical Jurisprudence (edited by Justice Kannan) had done away with the part on virginity testing. Yet, Prof. Satish noted that the practise continues because the judicial practitioners still refer to older editions.

#### ❖ **Sentencing in POCSO Cases**

Regarding sentencing, Prof. Satish stated that in his analysis of cases from 1984-2009 (25 years), no case was found wherein the minimum sentence was given when the sexual act was consensual. The courts ordered that the time already served is sufficient. Prof. Satish highlighted that the assumption that the UNCRC requires the

age of consent to be 18 is erroneous and has been recognised as a misinterpretation in the Justice Verma Committee report as well.

While discussing the fluid theory of discretion, Prof. Satish reiterated that if you take away discretion in one domain, it goes in another part of the system. For example, if you take away judicial discretion to decide on sentencing, the police's discretion will assume greater significance in regards to decision-making on sections under which the chargesheet is to be filed. Therefore, it was noted that judicial discretion needs to be brought back in sentencing.

Prof. Satish also outlined the role played by the mandatory minimum sentencing requirement in facilitating higher number of acquittals. The case of *Aparna Bhatt v. State of MP Live Law 2021 SC 168* was highlighted in light of the Supreme Court's guidance on exercise of judicial discretion.

#### **4.5.5. Theme 4: Plenary discussion**

Following the presentations by the Resource Persons, the following points emerged during the plenary discussions with the Hon'ble Judges from High Courts across the country:

- One of the key points raised in the discussion was in relation to situations where the child is unable to depose in court. A case was discussed wherein the court had proceeded to solely rely on forensic evidence thereby raising the issue of whether convictions can take place even without the testimony of the victim given that forensic evidence only possesses corroborative value.
- One judge also recommended the use of anatomical dolls to facilitate witness depositions when children do not have the language capabilities to name private parts. Justice Mittal stated that this is a debated issue and has therefore not been incorporated in the vulnerable witness guidelines. It was further stated that the debate has not reached a conclusion yet.
- A part of the debate also revolved around what stage such aids be employed in. If they are used in the beginning of evidence gathering, concerns of tutoring can arise. But using them at a later stage to help them confirm what they have already said can be less controversial.
- A judge pointed out that when the distance between the court and jail is too much, production of accused through VC is allowed. Therefore, a question was raised in regards to whether child witnesses can be similarly allowed to depose remotely. Concerns were subsequently raised regarding the possibility of tutoring by family or other interested parties. Additionally, considering the inability of court to provide witness protection, such testimony may be called into question.

- Because of the lack of discretion in sentencing, participants also pointed out that district judges express a disinclination to be appointed in a POCSO special court. This is also because in cases where they grant acquittal, questions are raised at the appellate level.
- The relevance of the witness's demeanour in judging their statement's reliability was also discussed. The **Gurmit Singh** case was mentioned in this regard. The 'sleeper effect' of trauma was mentioned regarding PTSD as a condition, as per which the symptoms of PTSD can lay dormant until a later point in the person's life. In light of the wide range of factors that influence demeanour, it was posited that the child's testimony should not be disregarded on this account.
- One judge pointed out that judicial officers are not equipped to appreciate the psychology of a child, particularly in the context of traumatic cases of sexual violence. It was reiterated that there exists a difference between giving testimony regarding a crime which was committed against someone else and giving a testimony regarding a crime committed against oneself. When a judge is faced with such situations, appreciation of facts should be from the perspective of the child, not from an adult perspective.
- Cases relating to section 11 of POCSO (sexual harassment) were also discussed. One Judge stated that school going girls upon facing harassment register a case under section 11 of POCSO or under section 354 IPC. The accused then gets bail. And even after conviction, section 389 of the CrPC comes to the accused's rescue again granting them bail. This has become the usual way of how cases progress. Therefore, the girl comes to the court expecting redressal for her trauma, but the accused ends up remaining outside the jail for a significant amount of time.
- A response to this was that section 389 uses the word 'may' and therefore does not cast a mandatory obligation to grant bail. It was also stated that conditions may be imposed in the bail order.
- Additionally, the labelling of the 'notorious child witness' vis-à-vis 'vulnerable child witnesses' was also discussed. A point was raised in regards to treating child witnesses on par with other witnesses. It was pointed out that child witnesses are vulnerable on account of their developmental and age-related limitations. Therefore, appreciation of their evidence from a 'reasonable adult standard' may not be in consonance with requirement of fairness in adjudication.

#### **4.6. Theme 5: Trial Procedure in Child Sexual Abuse Cases: Are there Imperatives for a Paradigm Shift?**

This session facilitated debates on the current trial procedure in child sexual abuse cases, and whether there are imperatives for a paradigm shift in the structure of legal and judicial proceedings, in order to move towards a more inclusive, rights-based model of criminal justice, with possible adaptations of adversarial and inquisitorial approaches in child sexual abuse cases i.e., to re-think the relationship between the victim, the accused and the State, enabling victims not only to tell their story but also to protect the integrity of the criminal justice system's endeavour for the truth.

##### **4.6.1. Speaker 1: Hon'ble Justice S. Vimala, (Former) Judge, Madras High Court**

Regarding the debate as to whether adversarial or inquisitorial system is better in cases of child sexual offences, Justice Vimala highlighted the need for further research.

In the context of procedural justice, Justice Vimala stated that children's communication abilities are vastly distinct from courtroom legalese. It was further stated that child friendliness in this context includes the courtroom environment, the attitude towards children, behaviour towards children and relaxation of procedure to accommodate children's needs. Justice Vimala also highlighted the imperative of secondary victimisation and the need for further research to explore alternatives to the adversarial system and procedures that can help address this issue.

In regards to the high number of acquittals, Justice Vimala raised the following points:

- Although special courts have been constituted, they are also told to take other matters. The situation prevails where in the morning the court in other matters orients itself towards upholding the rights of the accused. Then in the afternoon, they are expected to shift their mindset and uphold the interest of the victim child. Justice Vimala highlighted this as a concern as presiding officers should not be expected to shift their orientation in such a manner.
- Another reason is that many times the higher courts realise that a chargesheet is not officially taken on file in the trial courts. If there is an enquiry as to what is the date of the chargesheet, this is not mentioned on the file. The police says that the chargesheet is there but the same is not reflected on the file. To mitigate this, there is now a mechanism in place to ensure that police receive a receipt once the chargesheet is submitted.

In the context of trial delays, Justice Vimala stated that time bound adjudication should not cause mechanical adjudication. The case of *Alakh Alok Srivastava Writ Petition (c) no.76 of 2018* was discussed in this context.

Justice Vimala also discussed factors in the current trials of POCSO cases that contribute to issues in prosecution, especially when witnesses turn hostile. The issue of compensation was specifically highlighted as a critical factor affecting victim's sustained involvement in trial proceedings

#### **4.6.2. Speaker 2: Hon'ble Justice Aniruddha Bose, Judge, Supreme Court of India**

Justice Bose discussed the imperative for training initiatives aimed at addressing current gaps in judicial understanding, particularly from the perspective of child mental health. Justice Bose stated that notwithstanding the question of whether we should have inquisitorial or adversarial procedures, the bottom-line still remains that the judiciary requires more intensive training on other disciplines like child mental health.

Justice Bose also highlighted that, typically, judges have been taught about the presumption of innocence with respect to the accused. In certain disadvantaged sections, such as the SC/ST, women and children, it was noted that the adversarial system was not the best. In this context, it was highlighted that legislative frameworks like POCSO have moved away from traditional adversarial approaches. Justice Bose further stated that while questions were earlier directed at child witness credibility, POCSO has proved to be a comprehensive statute addressing various dilemmas that the court faced.

It was further highlighted that, previously, the accused could get acquitted because of delay in filing of the complaint. Subsequently, however, the context of cases of sexual offences revealed that delays could be caused because of social stigma against such instances, dilemmas that the child faces in regards to disclosure, and dilemmas that the parents can face while considering approaching the police.

Justice Bose also emphasised that specially trained judges are needed to shift this adversarial paradigm towards upholding the child's interests. But this paradigm shift is a second level step. First, it was posited that research must be conducted to understand the implementation of the Act better. Following this, it is necessary to analyse whether reporting is happening sufficiently; what hesitations are being faced in registering a complaint; what are the victim's feelings towards a trial, whether there is a hostile climate or not?

In light of concerns regarding registration of false cases, it was reiterated that further research is necessary to identify contexts of misuse of the statute and possible safeguards that can be instituted to address the same.



#### **4.6.3. Speaker 3: Hon'ble Justice Madan B. Lokur, (Former) Judge & Chairperson, Juvenile Justice Committee, Supreme Court of India**

While there were various aspects of the adversarial system discussed in the context of POCSO, Justice Lokur highlighted some key questions and dilemmas to consider as this topic is taken up for discussion. The following are summarised excerpts of a few critical points raised:

- A debate had arisen in the 1950s which has also revived in the recent past - talking about special courts for particular offences. For example, regarding cases against politicians. In 2003, to deal with pendency, fast track courts were set up. Then came fast track special courts. In the context of the debate regarding adversarial or inquisitorial systems, the basic and ultimate objective is to deliver quick justice and closure. But a mere change in nomenclatures is not useful. For example, the JJB conducts inquiries, but actually these inquiries are conducted in trial-like fashion.

In the context of the Juvenile Justice Board holding inquiries like trials, there is no new procedure that has been created for these inquiries. Is it necessary to file a chargesheet? Is it necessary for evidence to be led? These questions have been left unaddressed, since we do not know about the procedure. Therefore, even when we seek to adopt inquisitorial procedures, we end up following the adversarial ones. Instead, what we must consider are frameworks like in the Commissions of Inquiry Act, 1952, wherein a 6 months deadline has been prescribed, within which the adjudicating authority is empowered to create its own procedure.

Additionally, we do not even know how the inquisitorial system is supposed to work. In the Juvenile Justice Board, social workers are involved as Members of the Board. Yet, whatever the magistrate says, is typically agreed on. We need empirical data, to see the results of these experiments also in other countries. Did they lead to any prejudice? Did they expedite the process? Was justice given to the victim? We do not even know if the adoption of such procedures will impact the constitutional rights of accused.

- One of the suggestions during this consultation was to conduct a judicial impact assessment after new legislations are enacted. For example, under the Negotiable Instruments Act, 1881, lakhs of cases were being filed, which led to pendency of cases. Even with respect to the Narcotics, Drugs and Psychotropic Substances Act, 1985, it was not studied what the impact on the judiciary will be. A report was filed but to no outcome.
- Certain case management rules were adopted by the Supreme Court in 2004-05. These have yet to be implemented in letter and spirit. Justice Lokur pointed out

that while there have been many experiments to expedite trials, these have not succeeded. One of the reasons for this is that we do not have any Standard Operating Procedures in place.

- In the Motor Vehicles Act, 1988, Section 140 casts a no-fault liability. Right at the start compensation is supposed to be paid to the affected party. Thereafter, an inquiry is conducted rather than a trial. The aspect of the no fault liability may be considered in POCSO cases, in an inquisitorial manner, given the issues in processing of compensation claims.

#### **4.6.4. Plenary Discussion**

Following the presentations by the Resource Persons, the following points emerged during the plenary discussions with the Hon'ble Judges from High Courts across the country:

- One Judge posited that the testimonies of children should be recorded as a narration rather than in a question-and-answer format. Asking questions like 'is this what happened to you?' can lead a child to just say yes (on account of suggestibility). Additionally, POCSO's provisions are already tilted towards the child's interest. It is, therefore, important to exercise caution especially in cases with no medical evidence, so as to minimise the possibility of misuse of the act.
- A point was also raised in regards to the need for a handbook for the reference of public prosecutors and judicial officers in relation to case management in POCSO.
- In addition to the above, the propensity for false cases in custody contexts was also highlighted, particularly in light of the existing and proposed procedural relaxations under POCSO.
- In response to the creation of protocols, it was also noted that creating strict protocols can have adverse consequences especially if it is implemented in an excessively rigid manner.
- Issues in conducting cross-examinations were also discussed, wherein, it was pointed out that sometimes, the defence counsel is unable to give a list of questions beforehand as the practise of cross-examination is heavily dependent on the responses of the witness.

As a result, the witness is blindsided by the questions which can be excessively hostile. It is not sufficient, in such a context, if the question is disallowed after the fact. An example of this is when the defence counsel asks questions regarding sexual history of the witness while claiming that the question is directed at the veracity of the allegation.

## ABOUT SAMVAD

SAMVAD (Support, Advocacy & Mental health interventions for children in Vulnerable circumstances And Distress) is a National Initiative & Integrated Resource for Child Protection, Mental Health and Psychosocial Care established by the Ministry of Women & Child Development, Government of India. This initiative is located in the Dept. of Child & Adolescent Psychiatry, NIMHANS. With the aim of enhancing child and adolescent psychosocial well-being, through promotion of transdisciplinary and integrated approaches to mental health and protection, it was established to extend technical support and services to all the states in the country.

SAMVAD comprises of a multidisciplinary team of child care professionals, with expertise in training and capacity building, program and policy research pertaining to child mental health, protection, education, and law.

SAMVAD is reachable on [info@nimhanschildprotect.in](mailto:info@nimhanschildprotect.in) for any queries or assistance on child protection, mental health, and law – policy related issues.

# CONTACT INFORMATION



Address

2<sup>nd</sup> floor, Child Psychiatry Center,  
Dept. of Child & Adolescent Psychiatry,  
National Institute of Mental Health & Neurosciences  
(NIMHANS), Bangalore – 560029



Phone

+91 080-2697-2240



EMAIL

[info@nimhanschilprotect.in](mailto:info@nimhanschilprotect.in)

