

POCSO 2012 in Action: When and Why it Does Not Work

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**For Karnataka State Commission for Protection of Child Rights
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1. Mandatory Reporting Dilemmas

The purpose of mandatory reporting, under POCSO, is to ensure that sexual offence comes to light and gets punished, to ensure that the child (especially when abuse takes place within the family) is safe and does not continue to suffer abuse, to provide justice to the child concerned and prevent abuse of other children. As justified as it is in its intent, the stipulation of mandatory reporting is ridden with dilemmas. Mandatory reporting is not as straightforward and simplistic as POCSO assumes it to be because of the sensitivity of the issue.

In a society where there are still many taboos that surround sexuality-related issues, adults do not talk to each other about sexuality issues, even in a positive/ celebratory way, let alone in a problem context. Add to this the issue of adult-child relationships, which are largely governed by instruction, order and expectations located in a culture of obedience rather than a culture of conversations, and there is lack of disclosure at a first level on the part of children. When children do choose to disclose, usually to trusted adults (including mental health professionals), it is still with much hesitancy and trepidation. In such a situation, if an adult were to insist on a police complaint due to the mandatory reporting clause in POCSO, children may for reasons of fear, stigma and shame not want the complaint to be made. Reporting without the consent of the child would break the trust of the child in the adult; In NIMHANS, not just children but families have also failed to return for subsequent therapy/ intervention sessions when they have been told that it is mandatory for them/ hospital staff to report CSA. It is also against the rights of the child to report without consent.

If considered from an abuse perspective, the experience of sexual abuse itself is one that undermines the agency of the child and renders the child helpless and powerless; what also takes place is betrayal of trust, in cases where the perpetrator is a known adult/ family member, who instead of caring for and nurturing the child, hurts and exploits him/her. If sexual abuse were reported without the consent of the child, the same issues of helplessness, powerlessness, and betrayal would play out, ironically in a situation wherein the child was actually supposed to receive assistance; so the child would end up feeling more traumatized than comforted or reassured and this is problematic from a healing and recovery perspective. As important as justice is in the healing process, it is also not necessarily true that every survivor of child sexual abuse will definitely heal better from knowing that the perpetrator is being punished...some might and some might not i.e. each individual defines what healing and

recovery means to him/her and while there are commonalities, there also variations in recovery goals and processes (depending on the nature of sexual abuse, the dynamics and methods of abuse, the child's internalization of the abuse, not to mention the child's age, developmental stage and personality and temperament). So when the child's best interests mean healing and recovery (as they do in child sexual abuse cases), it may be problematic to assume punishment of the perpetrator as being a major component of healing and recovery in all sexually abused children.

Finally, when mandatory reporting entails coercion of the child and family, it could be counter-productive—for, if the child and family chose to withdraw the case altogether because they are fearful or not convinced about reporting, then the purpose is not achieved anyway. Thus, while in theory the mandatory reporting is good and necessary as in practice, it is ridden with problems.

Recommendation:

All this is not to say that we should be dismissive of the importance of reporting. Reporting of child sexual abuse is important for the afore-mentioned reasons. The question is: what must we do (as professionals) in a situation where on the one hand there is POCSO which mandates reporting of CSA to the police and on the other hand is a child (or family) pleading with us not to report? How do we bridge this gap? We recommend therefore that mandatory reporting is not a one-off procedure but that it follows a process which entails the following:

- Written documentation of the child's (or family's) report/ account of sexual abuse in an official manner i.e. there should be nothing loose or informal about documentation, which must also be done in a clear and meticulous way.
- Explain to the child and family that there are laws about child sexual abuse (POCSO) and that it is recommended that they report the abuse—with reasons for how and why it could be advantageous to them i.e. how it would ensure safety of the child/ other children, get the perpetrator to be punished etc.
- To also however explain to the child and family that there would be no pressure or coercion—that ultimately no report would be made without their consent and that were they to choose, in due course/ after due consideration, to report, we will assist them to do so.
- To understand the child and family's hesitancy to report i.e. to elicit the reasons and fears they have not to want to report, and then to try and address these fears and concerns one-by-one. (Should their concerns be addressed, they might be more willing to go ahead with the reporting process).
- To start with healing interventions and tell the child that we can re-visit the reporting issue at a later point, when he/she feels ready to do so.

Thus, we recommend that reporting be embedded in the process of psychosocial interventions for the child and family rather than a disconnected, stand-alone process that needs to be done immediately—and which then only serves to exacerbate the confusion and trauma that the child and family is already experiencing soon after the abuse incident/ disclosure or discovery. The POCSO Act would be more realistic if it acknowledged and took into consideration the dilemmas of mandatory reporting in practice and allowed for it to be a process of gentle persuasion, a

discussion rather than an instruction, that could occur over time, within larger healing and recovery processes, instead of insisting on a more immediate reporting method and expecting it to be followed by all.

2. The Need for Child-Friendly Medico-Legal Processes in CSA Enquiry.

A critical aspect of child protection, CSA warrants systemic approaches that are uncompromisingly child-centric.

When an event occurs, it is addressed by systems of criminal justice, police, schools, families, and healthcare, which generate a flurry of incoherent activity, albeit in good faith, thereby compromising the child's best interests. The major emphasis of these activities are directed towards the child 'victim' through enquiry, interrogation and intrusive detailing of the event to verify it and then bring the perpetrator to book.

Over the past year, the Dept. of Child & Adolescent Psychiatry at NIMHANS has received several children with CSA issues. When they come for help, they are extremely overwhelmed after visits to the Child Welfare Committee, police station, the hospital; by then, the child has been subjected to questioning on multiple occasions and therefore to re-traumatization. There are many areas which have to be systematically addressed namely, the child's reaction to the abuse, ensuring the child's immediate safety, medical and mental health needs of the child, and the concerns of the family. On the other hand, there is a sense of urgency to in legal procedures. Towards this, there is an understandable emphasis by the police on evidence and enquiry processes and related pressure from media and civil society, raising questions on the timely nature and effectiveness of these processes.

In all this, the balance between the need for justice and empowered recovery of the child becomes precarious. There is thus an urgent need to develop a protocol-based systemic response ensuring that the child's agenda i.e. healing and recovery, is at the core of it. The focus of initiative and consultation is to device processes involving medico-legal systems for the child and the family.

Recommendation:

- Clear protocol to be developed by POCSO as to where child/family goes first, next...
 - First, child should go for medical assistance and treatment of injuries/PEP kit administration for pregnancy/STD/ HIV prevention (even if they report to the police first, they need to be sent for medical aid immediately);
 - this should be followed by referral to mental health services—to address post-traumatic stress issues (through supportive work/therapy with child & family); police/legal inquiry should be EMBEDDED WITHIN THE PSYCHOSOCIAL ASSISTANCE PROCESSES (the idea is not to obtain legal evidence first and 'let counselling carry on' as police personnel have often told us).
- Inquiry with the child be conducted once instead of multiple times, and only by mental health professionals and/or police personnel/SJPU trained in CSA/ forensic interviewing with children (to avoid re-tarumatization)—again, as part of the psychosocial and healing processes.

- POCSO needs to streamline all the stakeholders/ those who assist child after abuse incident so that each of them has role clarity and functions in a systematic way to aid the child's recovery.

3. Rejection of Adolescent Sexual Rights

The issue of boys/ adolescents being charged under POCSO is a complex one and has several implications. First, when applied to cases wherein adolescents are in mutually consenting sexual and romantic relationships with their (female) peers, the use of POCSO to convict them of an offence speaks of a society wherein adolescent sexual rights are not respected; convicting adolescents who are in mutually consenting sexual relationships reeks of the 'moral policing' that some sub-groups within our society are up in arms against in other (adult) contexts of romance and sexuality.

If the issue of complaint really is that adolescents should not be engaging in sexual relations and all those adolescents who are doing so should be convicted, then thousands of adolescent boys (and girls if the law was unbiased) would have to be convicted for 'being in love' and engaging in sexual activities—and the existing numbers of Observation Homes in the country would be unable to accommodate them!

4. Gender Bias

In addition to coming from a strongly moral position, with pre-conceived notions and prejudices about adolescent sexuality and sexual rights, the application of the law is extremely gendered. Where there are mutually consenting sexual relationships between adolescents, and conflicts and disagreements around this, only the boy seems to be culpable as he is convicted, not the girl; the girl does not seem to have to be (legally) accountable or responsible for decisions jointly made by both boy and girl. In fact, in many cases reported at the observation home, the girl was reported to have 'pressured' the boy to run away/ 'take her away' due to her family conflicts and fears that she may be married off elsewhere. The law does not take into account the girl's role and decision at all. Thus, the law becomes extremely gendered in its implementation, ensuring that only boys are convicted, irrespective of the role girls play in mutually consenting relationships.

POCSO as it is implemented currently has serious implications for the implementation for the new Juvenile Justice Act 2015 that contains the amendment regarding transfer of 16 to 18 year olds to the adult system for heinous crimes. Precipitated by the Nirbhaya case and the alleged role of the 16 year old in the gang rape, the JJ amendment has a list of heinous crimes for which adolescents can be tried as an adult—and sexual abuse is one of them...all the more reason to be careful as to what we define as sexual abuse under POCSO or what we judge to be sexual abuse, as this has life-changing consequences for a child charged with POCSO.

5. Not Cognizant of Children's Developmental Milestones and Needs

The above issues of adolescent sexual rights lead to a key question: how is child sexual abuse defined or understood as per POCSO? A key element that determines sexual abuse is the issue of consent. It is therefore fully agreed that the law should apply to young children who, due to their developmental stage and cognitive processing, would not be able to give informed consent and of course are not biologically or emotionally prepared for sexual relationships. But can the

same be said of an adolescent—who is at a different stage in his/her life cycle, with developmental needs and abilities that are so different from that of a younger child? POCSO therefore does not acknowledge or make the distinction between the developmental needs and abilities of a 6 year old versus a 15 year old—and this is problematic because a blanket application of a law, without consideration of age, child and adolescent development and psychology leads to unfair conviction of adolescents, thereby violating their rights.

(Note: This discussion does not apply to an adolescent who may have legitimate sexual needs and desires but coerces or assaults another child or adolescent/peer in order to meet his needs—in which case the issue is unequivocally one of sexual abuse).

Recommendations for Issues 3,4 and 5:

- POCSO needs to recognize the developmental age and stage of children versus adolescents. In case of children, let us say below age 12 (pre-adolescence), POCSO can apply as it because i) children are not physiologically ready for sexual engagement; ii) they have not developed the requisite knowledge and understanding of sex and sexuality—consequently, they are not psychologically ready for physical intimacy, nor do they have the capacity for (informed) consent. Therefore, for any child under age 12 who is engaged in sexual activity, it must be considered as sexual abuse and POCSO must apply. But for adolescents, a more nuanced understanding of the situation is required—taking into consideration that adolescents are at a life stage wherein they are (unlike children) physiologically ready for physical intimacy and there is an emotional need and desire that makes them feel ready for sexual involvement. (See next point for further details).
- POCSO needs to make the distinction between situations of abuse and mutually consenting sexual relationships between adolescents. The key difference is the issue of consent—an element that is absent in case of abuse. The adolescents concerned can be interviewed to understand whether or not there was consent to engage in sexual acts/ physical intimacy. This means that boys and girls both need to be interviewed/ assessed to establish the nature of the relationship, whether or not there was consent by both parties—the onus of the relationship/ sexual act decision cannot be only on boys. Such interviewing may be done by mental health professionals. Where there is mutual consent, both the boy and girl need to continue to receive psychosocial and mental health interventions on life skills in the context of relationships and sexuality.

**The Community Child & Adolescent Mental Health Service Project, Dept. of Child & Adolescent Psychiatry/NIMHANS has developed an intervention module on this and has been successfully using it with vulnerable adolescents in various child care institutions, enabling them to acquire assertiveness, negotiation, refusal, problem-solving skills in the context of relationships and sexuality, including reflecting on issues of running away/ early marriage/ coercion and other health, safety and relationship issues. This intervention module is based on a recognition and acknowledgement of adolescent sexual rights but provides them with a clear framework for decision-making in the context of love/relationships and sexuality.*

6. Low Conviction Rates of Adult Perpetrators of Child Sexual Abuse

The continual reporting of child sexual abuse (CSA), while it has prompted many discussions and recommendations for prevention, has largely left unaddressed the challenge of how to respond when an incident occurs. What is both interesting and saddening is that there are exceedingly low conviction rates for adults who have committed child sexual abuse and been charged under POCSO. However, children/ adolescents seem to be quickly and easily convicted under POCSO, not granted bail even when they have been in mutually consenting romantic and sexual relationships with their peers (in fact, there appears to be little inquiry and evidence gathering around this, especially to get the peer-partner's point of view). What this shows is that a law that is essentially meant to protect children/ adolescents from abuse is being unjustly and whimsically used to convict and detain adolescents, in violation of their rights—is this really a legitimate use of a law meant to protect the rights and safety of children and adolescents?

Again, unless there is a strong response system, and this includes convicting adult perpetrators of child sexual abuse, the law in itself cannot prevent or act as a deterrent to child sexual abuse.