

## Chapter 7 Child Development Experts

Child development refers to the various stages of physical, social, and psychological growth that occur from birth through young adulthood. A child who has been the victim of a sexual offence is likely to have been severely traumatised, both mentally as well as physically. A child development expert is therefore a person who is trained to work with children with physical or mental disabilities, to evaluate such a child's mental and physical development in the context of that child's experience, and to accordingly facilitate communication with the child.

### 1. Legal Provisions:

As per the definitions in the rules framed under the POCSO Act, 2012, Rule 2(c) states:

*"Expert" means a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with a child whose ability to communicate has been affected by trauma, disability or any other vulnerability.*

Section 26(3) states, *"the Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.*

Section 38(2) states, *"if a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child".*

Thus, the Act envisages a role for child development experts at the stage of taking evidence from the child and recording his/her statement for the purpose of investigation and trial under the Act. The role of this expert is to facilitate communication between the child and the authority concerned.

Rule 3 provides for the engagement of various experts, including child development experts, for

the purposes of the Act. It specifies the qualifications and experience of the experts engaged for facilitating communication with the child, stating that such an expert shall be qualified in the relevant discipline from a recognized University or an institution recognized by the Rehabilitation Council of India.

The Rehabilitation Council of India runs programmes in various aspects of child development, including working with physically and mentally disabled children. It also recognises courses run by other universities in these disciplines.

Rule 3(6) provides that payment for the services of an expert shall be made by the State Government from the Fund maintained under section 61 of the Juvenile Justice Act, 2000, or from other funds placed at the disposal of the DCPU, at the rates determined by them. It is thus for each DCPU to fix the rates payable to experts in various disciplines. However, it is suggested that these rates be fixed at the level of the State to provide for administrative consistency.

The following is also to be kept in mind while engaging the services of an expert:

- i) Any preference expressed by the child as to the gender of the expert, may be taken into consideration, and where necessary, more than one such person may be engaged in order to facilitate communication with the child – Rule 3(7).
- ii) The interpreter, translator, Special educator, expert, or person familiar with the manner of communication of the child engaged to provide services for the purposes of the Act shall be unbiased and impartial and shall disclose any real or perceived conflict of interest. He shall render a complete and accurate interpretation or translation without any additions or omissions, in accordance with section 282 of the Code of Criminal Procedure, 1973 - Rule 3(8).
- iii) In proceedings under section 38, it is for the Special Court to ensure that there is no conflict of interest in engaging a particular expert to provide services under the Act – Rule 3(9).
- iv) Any expert appointed under the provisions of the Act or its rules shall be bound by the rules of confidentiality, as described under section 127 read with section 126 of the Indian Evidence Act, 1872 – Rule 3(10).

## 2. General Comments:

The dynamics of child sexual abuse are such that often, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behaviour.

In such a situation, when the child finally discloses abuse, and a report is filed under the POCSO Act, 2012 more information will have to be gathered so that the child's statement may be recorded.

Information so obtained will become part of the evidence.

However, given the experience that the child has gone through, he is likely to be mentally traumatised and possibly physically affected by the abuse. Very often, law enforcement officers interview children with adult interrogation techniques and without an understanding of child language or child development. This compromises the quality of evidence gathered from the child, and consequently, the quality of the investigation and trial that are based on this evidence.

The interviewing of such a child to gather evidence thus demands an understanding of a range of topics, such as the process of disclosure and child-centred developmentally-sensitive interviewing methods, including language and concept formation. A child development expert may therefore have to be involved in the management of this process. The need for a professional with specialized training is identified because interviewing young children in the scope of an investigation is a skill that requires knowledge of child development, an understanding of the psychological impact sexual abuse has on children, and an understanding of police investigative procedures.

Such a person must have knowledge of the dynamics and the consequences of child sexual abuse, an ability to establish rapport with children and adolescents, and a capacity to maintain objectivity in the assessment process. In the case of a child who was disabled/ physically handicapped prior to the abuse, the expert would also need to have specialised knowledge of working with children with that particular type of disability, e.g. visual impairment, etc.

## Chapter 8

### Legal Representatives

#### 1. Free Legal Aid

Under Section 12(c) of the Legal Services Authorities Act, 1987, every child who has to file or defend a case shall be entitled to legal services under this Act. The POCSO Act, 2012 confirms the right to free legal aid under **Section 40**, providing that the child or his/her family shall be entitled to a legal counsel of their choice, and that where they are unable to afford such counsel, they shall be entitled to receive one from the Legal Services Authority<sup>6</sup>.

In every District, a District Legal Services Authority has been constituted to implement the Legal Services Programmes in the District. The District Legal Services Authority is usually situated in the District Courts Complex in every District and chaired by the District Judge of the respective district.

#### 1.1 Public Prosecutor

The Protection of Children from Sexual Offences Act, 2012 provides, under **Section 32**:

*32. (1) The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special Court for conducting cases only under the provisions of this Act.*

*(2) A person shall be eligible to be appointed as a Special Public Prosecutor under subsection (1) only if he had been in practice for not less than seven years as an advocate.*

*(3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973 and provision of that Code shall have effect accordingly.*

#### 1.2. Child-friendly procedures

The Act provides for child-friendly pre-trial and trial procedures to minimise the trauma felt by child victims and to eliminate the possibility of revictimisation at the time of trial. The child-friendly pre-trial procedures cast duties on the police and are to be implemented at the time of

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<sup>6</sup>Section 40: Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act: Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them.

reporting of offences and recording of the child's statement. These are given in detail in Sections 19-26 of the Act.

The child-friendly procedures during the trial are to be followed by the Special Courts set up under Section 28(1) to try offences under the Act. They aim to ensure that the child is protected from intimidation, whether intentional or not. All legal representatives, whether representing the accused or the child, must be aware of these provisions. Given the particular vulnerabilities of children, additional measures should also be made available and utilised even in normal circumstances. The child-friendly trial provisions are detailed in Section 33 – 38 of the Act.

### 1.3 Services that may be provided by Legal Aid Authorities:

#### i) Legal Representation

The abused child should be provided with such care and protection as required by law. Any such action shall be in accordance with the procedures established by the State Legal Services Authority and the National Legal Services Authority. The Form for Application for Legal Services should be provided to the child by the police at the time of making the report under Section 19(1).

#### ii) Legal Counselling

Complainants in need of legal aid/ assistance/ advice in cases of violations of child rights may seek aid/ assistance from the Legal Aid Cell so that the child is able to testify in court without fear.

#### iii) Legal Advice

The Cell shall render such aid/ assistance/ advice to the complainant as well as send its legal opinion in such cases to the concerned govt. authorities for suitable action. Governmental and Non Governmental Organisations, Civil Society Organisations, voluntary organisations, parents, relatives, concerned friends and members of the public may, on behalf of the child in need of care & protection, approach the Cell and receive legal advice regarding the legal rights of the child and the means for accessing those rights. The Cell will provide requisite information and advice to the concerned persons regarding the legal options available for protecting the interests

the Act are optimised, the following guidance should be kept in mind by legal representatives of a child who has been a victim of an offence under the Act:

2.1 Before trial

- i) List cases for an as soon as possible and avoid adjournments: It is in the interest of the child that the trial is concluded as quickly as possible. Prolonging the judicial process will only cause more trauma to the child.
- ii) Ensure that communication with the child is in an understandable language and manner: The majority of young witnesses experience communication difficulties while giving evidence, often because questioning is developmentally or otherwise inappropriate. Before a child gives evidence, try having a conversation with him outside the Court so that you have an idea about his/her communication abilities and concentration span.
- iii) Consider what special measures may be taken in light of the child's wishes and needs: Make whatever applications are necessary to ensure that the child receives the benefit of existing child-friendly measures. Ensure applications are made within time limits so that the child can be informed of decisions before trial.
- iv) Ensure that the child is able to exercise his/her right to be accompanied by an adult in whom he has trust and confidence: This could be the child's parent, guardian, or other person, or the support person appointed by the CWC.
- v) Chart all stages of children's evidence to minimize time at court and give them a fresh start in the morning: The start of children's testimony should not be delayed by other matters on the court list. It is best to make an estimate of the amount of time the child will have to be present in Court, and in doing this, to bear in mind his/her concentration span, the length of any recording, the best time to view it and the need for breaks. Request the Special Court to accommodate these requirements.
- vi) Request that the child is given an opportunity to visit the court to familiarize himself with it before the trial: This will enable the child to experience the atmosphere in Court so that he is not intimidated at the trial and avoid the need for him to attend early on the day of trial to see facilities. It will also allow him to express an informed view about special measures, so that a revised application can be made if necessary in advance of trial.

vii) Request that the child sees or can be briefed on his/her statement for the purpose of memory-refreshing before trial

viii) Consider the witness's access to the building and suitability of waiting areas: Where it is difficult to segregate young witnesses from defendants within and around the building, consider standby arrangements or the use of remote live links.

## 2.2 At trial

i) Children have the right to be heard in any judicial and administrative proceedings affecting them. They must be given a reasonable opportunity to express their views on all matters affecting him and these must be taken into account. He should also be allowed to provide initial and further information, views or evidence during the proceedings.

ii) Children have the right to information about the case in which they are involved, including information on the progress and outcome of that case, unless the lawyer considers that it would be contrary to the welfare and best interests of the child. It would be best if the lawyer coordinates with other persons or agencies concerned with the child's welfare, such as the support person, so that this information is conveyed in the most effective manner. Victims should receive the most appropriate information on the proceedings from all their representatives, and the assistance of a support person appointed under Rule 4(7) most often constitutes the best practice in ensuring that full information is conveyed to the victim.

### Such information would include:

- (a) Charges brought against the accused or, if none, the stay of the proceedings against him;
- (b) The progress and results of the investigation;
- (c) The progress of the case;
- (d) The status of the accused, including his/her bail, temporary release, parole or pardon, escape, absconding from justice or death;
- (e) The available evidence;
- (f) The child's role in the proceedings;
- (g) The child's right to express their views and concerns in relation to the proceedings;
- (h) The scheduling of the case;

- (i) All decisions, or, at least, those decisions affecting their interests;
  - (j) Their right to challenge or appeal decisions and the modalities of such appeal;
  - (k) The status of convicted offenders and the enforcement of their sentence, including their possible release, transfer, escape or death.
- iii) Ensure ahead of time that equipment is working, recordings can be played and that camera angles will not permit the witness to see the defendant. Do not wait until the young witness is in the live link room to run checks; delays and malfunctions can be disruptive to the child. Where a live link is being used during the child's testimony, ensure that they are able to see all of the questioner's face.
- iv) Explain that the judge or magistrates can always see the witness over the live video link. Explain that this is the case even when the witness cannot see the judge or magistrates.
- v) Request the Public Prosecutor to himself to the child before the trial and to answer his/her questions. Judges and magistrates may also ask if the child would like to meet them before the trial starts, to help to establish rapport and put the child at ease. Under the POCSO Act, 2012 questions to the child will be routed through the Judge, and it would be useful for the child to be familiar with their manner of conversation, and vice versa.
- vi) Encourage the child to let the court know if they have a problem: They may not understand a question or questions that are too fast, or they may need a break. However, many children will not say they do not understand, even when told to do so. Professional vigilance is therefore always necessary to identify potential miscommunication, and it is the child's counsel who will have to be mindful of any instance where the child is losing concentration, feeling ill, etc.
- vii) Do not ask the child at trial to demonstrate intimate touching on his/her own body: This may be construed as abusive. The child can instead be asked to point to a body-outline diagram.

**3. Role of lawyer for the child**

The Legal Aid services lawyer, or, as the case may be, the private lawyers appointed by the child and/ or his/her family, plays a critical role. While it is the Special Public Prosecutor appointed under the POCSO Act, 2012, who will essentially be in charge of the trial in the Special Court,

the child's lawyer is entrusted with the task of ensuring that the child's interest is protected. Thus, his/her role extends to representing the child, helping uncover the nature and extent of abuse, identifying responsible parties and securing damages to compensate the victim and facilitate the healing process.

In addition to this, the legal aid or private lawyer should also be able to build a good rapport with the Special Public Prosecutor, as this would ensure that all concerns in respect of the child are raised before the Court in the course of the trial.

- i) The lawyer must provide independent representation and advice to the child.
- ii) The lawyer has a duty to put before the Court the views of the child, but should not require the child to express a view if he does not want to do so. However, the lawyer shall not be required to put before the Court any views expressed to him in confidence.
- iii) Where a lawyer has been appointed to represent a number of children, some of whom are able to provide a view as to representation and some of whom are unable to do so, the lawyer must be alert to the possibility of conflict. In some cases the lawyer may be obliged to seek separate representation for one or more of the children.
- iv) Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.
- v) Where a conflict arises between a child's views and information relevant to the welfare and best interests of the child, the lawyer should:
  - a) discuss the issues and the lawyer's obligations with the child;
  - b) attempt to resolve the conflict with the child; and
  - c) advise the Court of the lawyer's position and, in the case where the lawyer is unable to resolve the conflict and as a matter of professional judgement can advocate only the child's views, invite the Court to appoint another lawyer.

### **3.1 The lawyer shall represent the child in accordance with the child's welfare and best interests.**

Where a child is:

- i) by virtue of his/her age, maturity or disability, unable to express a view; or
- ii) able to express a view but his/her age, maturity or disability are such that any view should be treated with caution; or
- iii) unable or unwilling to express a view or in any way guide representation,

In such cases, the lawyer may be guided by the following general guidance:

- i) The older the child, the more weightage should be given to the child's instructions. The younger the child, the more representation shall be in accordance with the child's welfare and best interests.
- ii) The lawyer has a duty to see that all factors that impact on the child's welfare and best interests are put before the Court.
- iii) In determining what best serves the child's welfare and best interests, the lawyer must take into account the principle that decisions affecting the child should be made and implemented within a timeframe that is appropriate to the child's sense of time.
- iv) The lawyer must meet with the child he is appointed to represent, unless there are exceptional circumstances to prevent this. The timing and venue for such meeting and any further meetings should be at the discretion of the lawyer. However, the lawyer shall meet with the child at a time which ensures that the child's views are up to date at the time of the hearing so that they can be taken into account by the Court.
- v) As a general rule, the lawyer shall act in terms of the child's instructions, conveying them to the Court by direct evidence if possible, call such witnesses as are required to carry out those instructions and examine and cross-examine and make submissions on behalf of the child.
- vi) The Act provides under Section 33(8) that the Special Court may award compensation to the child. The lawyer should ensure that the child and his/ her family are aware of this, and should make the appropriate applications for interim and final compensation as provided under Rule 7.

**3.2 At a hearing, the lawyer should:**

- i) Identify all relevant issues which need to be determined in regard to the child's welfare and best interests;
- ii) Ensure that the Court has all the necessary information that is relevant to the welfare and best interests of the child, including the views of the child, so that an informed decision can be made;
- iii) Call evidence where appropriate (other than any Court's witness), for example, from psychological and/or medical professionals and teachers;
- iv) Ensure the lawyer does not give evidence himself or herself;
- v) Cross-examine to ensure all relevant issues are fully explored; and
- vi) Make submissions on behalf of the child.

### 3.3 After the conclusion of the trial

- i) The lawyer should communicate and explain the given decision or judgment to the child in a language adapted to the child's level of understanding. He should give the necessary information on possible measures that could be taken, such as appeal or other mechanisms for complaints as well as compensation.
- ii) When a decision has not been enforced, the child should be informed through his/her lawyer of available remedies either through non-judicial mechanisms or access to justice.
- iii) The child's lawyer, guardian or legal representative should take all necessary steps to claim compensation for the child. Rule 7(6) provides that nothing shall prevent a child or his/her parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government. Thus, if there is any additional scheme for compensation, the child's lawyer should inform the child of this and seek instructions on how to proceed further.

### 4. Child-Friendly Courtrooms and Waiting Areas

Many children find the courtroom experience intimidating and this intimidation can create stress in child victims. Under these circumstances, a child can be a poor witness, and the process of navigating the criminal justice system can compound a child's trauma. The POCSO Act, 2012 provides for a number of child-friendly procedures to be followed in the Special Court. In addition to this, some measures can be put in place in the Special Court to ensure that the child is not overcome by the circumstances. However, the rights of the accused, for example that of cross-examination of the child, must be protected while balanced against the rights and needs of these child victims.

Some of the ways to ensure the child's comfort is that screens are permanently in place in the Special Courts for the witness stands for the children. Additionally, the child-friendly courtrooms can be equipped with closed circuit television capabilities, which allow the child to testify in a separate room from the accused. Special waiting rooms should be provided within the court premises to allow the families to wait in privacy throughout the court proceedings.

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## Chapter 9

### Guide to Mandatory Reporting

Section 21(1) of the POCSO Act, 2012 requires mandatory reporting of cases of child sexual abuse to the law enforcement authorities, and applies to everyone including parents, doctors and school personnel. Failure to report a suspicion of child abuse is an offence under the Act. The legislation makes it clear that the reporting obligation exists whether the information was acquired through the discharge of professional duties or within a confidential relationship. Any private person who fails to report suspected child abuse, having acquired the information in the discharge of his or her professional responsibilities, commits a summary conviction offence.

Similarly, school personnel, doctors and other professionals may, in the course of delivering services, receive information which causes them to suspect that a child has been sexually abused. It is possible that the information obtained includes the identity of the perpetrator. The alleged perpetrator may be a person who is unknown to the reporter of the offence, but the suspicion could also involve a colleague, co-worker, friend or other associate. The obligation to report is unrestricted by any pre-condition that the complaint be first reported within the respective departments, services or agencies, even if the perpetrator is alleged to be an employee of that institution, service or agency. Thus, a person who has knowledge that an offence has been committed under the child can directly report it to the police or magistrate.

#### 1. Why report?

The purpose of reporting is to identify children suspected to be victims of sexual abuse and to prevent them from coming to further harm. Without detection, reporting and intervention, these children may remain victims for the rest of their lives, carrying the scars of the abuse throughout their lives and even, in some cases, repeating the pattern of abuse with their own children.

However, the nature of sexual abuse, the shame that the child victim feels and the possible involvement of a parent, family friend or other close person, makes it extremely difficult for children to come forward to report sexual abuse. This is why the law provides for mandatory reporting, placing the responsibility to report not on the child but on a surrounding adult who may be in a better position to help.

## 2. Obligation to inform the child

The Act does not lay down that a mandatory reporter has the obligation to inform the child and/or his/her parents or guardian about his/her duty to report. However, it is good practice to let them know that this will need to be done.

For example, where a doctor is confronted with a situation where a child brought into his/her care is exhibiting symptoms of child sexual abuse, he should inform the child and/or his/her caregiver that he has a legal duty to report the abuse. This will help establish an open relationship and minimize the child's feelings of betrayal if a report needs to be made. When possible, discuss the need to make a child abuse report with the family. However, be aware that there are certain situations where if the family is warned about the assessment process, the child may be at risk for further abuse, or the family may leave with the child.

## 3. What to Report?

Explain, as well as you can, what happened or is happening to the child. Describe the nature of the abuse or neglect and the involved parties. Be as specific as possible. Be prepared to give the name, address, and telephone number of the child and also the name of the parent or caretaker if known. Even if you do not know all of this information, report what you do know. Tell all you know about the situation.

However, the reporter is not expected to investigate the matter, know the legal definitions of child abuse and neglect, or even know the name of the perpetrator. This should be left to the police and other investigative agencies.

A report of sexual abuse should contain the following information, if it is known:

- i) The names and home address of the child and the child's parents or other persons believed to be responsible for the child's care.
- ii) The child's present whereabouts.
- iii) The child's age.
- iv) The nature and extent of the child's injuries, including any evidence of previous injuries.
- v) The name, age, and condition of other children in the same household.
- vi) Any other information that you believe may be helpful in establishing the cause of the abuse to the child.

- vii) The identity of the person or persons responsible for the abuse or neglect to the child, if known
- viii) Your name and address.

#### 4. Sanctions

##### 4.1 Failure to Report Child Abuse

The POCSO Act, 2012 provides under Section 21(1) that any person, who fails to report the commission of an offence or who fails to record such offence shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

##### 4.2 Reporting False Information

The POCSO Act, 2012 makes it an offence to report false information, when such report is made other than in good faith. It states that any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both. Where such information is provided against a child, the punishment may extend to one year.

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