

EDITORIAL COMMENTARY

Childhood sexual abuse and the law: More problems than solutions?

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The Protection of Children From Sexual Offences Act, 2012 (No. 32 of 2012) was published in the Gazette of India on June 20, 2012, after receiving the assent of the President of India on the previous day.^[1] This Act seeks to protect children (defined as those below the age of 18 years) from the offences of sexual assault, sexual harassment, and pornography; and provides for the establishment of special courts for the trial of such offences. The Act extends to the whole of India, except the state of Jammu and Kashmir.

The Act lists sexual offences against children to include sexual harassment, sexual assault, aggravated sexual assault, penetrative sexual assault, aggravated penetrative sexual assault, and use of children for pornography. All offences are defined in detail, including variations in possibilities. The Act also addresses attempts to commit a sexual offence, and the abetment of sexual offences against children. Acts of omission are included, as are acts of commission.

The punishment prescribed is imprisonment for a variable term, up to a maximum of life imprisonment, depending on the gravity of the offence; for example, the punishment for penetrative sexual assault is a minimum of 7 years and can extend to life imprisonment. Punishments may include a fine, as well as payment of compensation to the child for trauma suffered and for rehabilitation, as necessary.

The Act is comprehensive and necessary and brings India closer to standards established in other countries. However, it contains an extraordinary clause (Chapter VII, Clause 29) which indicates that the accused person is guilty unless proven innocent. This is a matter of jurisprudence and will not be considered further in the present article, except to state that it could complicate situations that may arise as described below.

There are some ambiguities in the Act, such as the definition

and identification of sexual intent with regard to certain offences, which could result in the harassment of innocent individuals; but it is hard to see how these ambiguities could have been avoided without diluting the content of the Act. The real problem for medical professionals in general and mental health professionals, in particular, lies in the provisions for mandatory reporting to the police of anticipated or actual offences under the Act. The mandatory reporting clause overrides the confidentiality of physician-client interactions, and the Act specifically states that no person shall incur civil or criminal liability for providing information in good faith. According to the provisions of the Act, the failure to report childhood sexual abuse will be punished with a fine, or with imprisonment for up to 6 months, or both.

One cannot find fault with the Act for requiring the mandatory reporting of serious sexual offences. However, reporting of minor offences could result in a paradoxical situation where the solution is worse than the crime. Consider the situation where, for example, during assessment or therapy, a mental health professional learns from a child client that a male family member has exposed himself before the child, or has touched or attempted to touch the child inappropriately. Before the Act, most professionals would have handled the situation through family sessions, usually with satisfactory resolution of the affair. Under the new dispensation, however, the mandatory involvement of the police would result in the arrest of the sexual offender, and in a long drawn out criminal case. This, in turn, would trigger complications that could compromise the earning capacity of the family if the offender is an earning member, induce guilt in the victim, provoke resentment in the family against the victim, and split the family apart if sides are taken; all of which are serious matters that can have long-lasting repercussions. The police have also been armed with powers to take the

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child into protective custody, which may include admission of the child to a hospital or shelter home; this could create a fresh set of social difficulties.

There are plenty of situations that are likely to pose especial problems, upon which the Act is completely silent. Examples are situations that have social sanction, such as child marriage; those that are commonplace, such as teenagers involving in consensual sexual foreplay or even intercourse; or for that matter, those that are innocent, such as children exploring each other sexually, out of curiosity. There is also the matter of bullying to be considered, where male-male sexual victimization may occur between children as a one-off instance, which is far from a criminal event. According to the current terms of the Act, all these occurrences require mandatory reporting to the police, followed by prosecution as described in the Act.

The Act provides detailed guidelines for the protection of the identity of the child. The Act describes how the statement from the child should be recorded so as to minimally traumatize the child. The Act also provides guidelines for the conduct of the court proceedings. Nevertheless, there is reason to expect problems in implementation because there is no evidence, so far, to believe that the police have been specially trained to handle delicate matters such as those described under the Act, regardless of the seriousness of the offence. There is also little clarity on the nature of the psychosocial support that the victim and the family can expect to receive, given the inescapable trauma associated with the criminalization of the event. This is an ocean of uncertainty, given the extraordinary poverty of proper state-run psychosocial services in the country.

The Act requires State Governments to prepare guidelines for nongovernmental organizations, healthcare professionals, and other trained individuals to be involved in pretrial and trial proceedings. The Act notes that the Central and State Governments must provide periodic training to government and police officers who may be involved in childhood sexual abuse cases. The Act requires the governments to give regular, wide publicity to the provisions of the Act through various print and electronic media. Whereas one guideline has been issued by the Ministry of Women and Child Development,^[2] the rest of the requirements appear to have been largely ignored.

Child abuse and childhood sexual abuse has for long been the subject of study in the field of mental and social health; there are more than 4,000 entries on the subject in PubMed, alone. There is a need for mental health organizations in India, such as the Indian Psychiatric Society, to make representations to the Government for the involvement of mental health professionals in the management of such cases at the discretion of the police, following mandatory reporting. This is the best that may be possible given that the Act came into force on November 14, 2012.^[3] For starters, it could help if the Indian Psychiatric Society Task Force on Position Statements were to take up the matter formally. Happily, there is some informal indication that this is already being done.

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