

## **PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012**

### **Praiseworthy but Flawed Legislation**

The Protection of Children from Sexual Offences Bill, 2011 which was passed in the Rajya Sabha on 10 May 2012 and in the Lok Sabha on 22 May 2012 received the assent of the President of India on 20 June 2012. It is now known as the Protection of Children from Sexual Offences Act, 2012 and is the law of the land.

This is a piece of landmark legislation. For the first time a special law has been passed to address the issue of sexual violence against children. It seeks to protect all children below the age of 18 from sexual assault, sexual harassment and pornography. These offences are clearly defined for the first time in Indian penal law. The Act provides for stringent punishment to the offenders. Aggravated Penetrative Sexual Assault, for example, carries an imprisonment of no less than 10 years, which can be extended to imprisonment for life.

#### **Unique Features**

The Act has some remarkable positive features. It provides for the setting up of Special Juvenile Courts and appointment of Special Public Prosecutors for the speedy trial of the accused. The evidence of the child is to be recorded within 30 days and the trial to be completed, as far as possible, within a year.

It provides a number of child friendly measures related to reporting, recording of evidence, investigation and trial of offences.

The statement of the child is to be recorded as far as practicable by a woman police officer not below the rank of sub-inspector. The medical examination of the victim is to be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence. In case the victim is a girl child, the medical examination is to be conducted by a woman doctor. The Act also stipulates that immediate arrangements have to be made, as needed, for the care and protection of the child who has been victimized.

The media has been barred from disclosing the identity of the victim without the permission of the Special Court.

The attempt to commit a crime, even if not successful, is made liable to punishment. The Act also provides punishment for abetment of the offence. Failure to report a known offence is also considered abetment.

In the case of an allegation, the Act places the burden of proof on the accused. At the same time it also provides punishment for false accusation. The Act considers offences as aggravated when committed by a person in a position of trust or authority over the child in any way.

The Act has mandated that Central and State governments give wide publicity to it. An especially appreciative measure mandated is that training be provided periodically to officers of Central and State governments on matters related to the implementation of the Act.

#### **Short Comings**

On the whole the Act is a fine piece of legislation in terms of dealing with cases of abuse of children. However, the Act has totally neglected measures to be taken to prevent abuse. All though the Bill is meant “to protect children from sexual assault, sexual harassment and

pornography,” there is nothing in the Act that refers to prevention of abuse. The Act only deals with actions to be taken after the child has suffered sexual violence. Hence, the Act is a misnomer. Our legislators seem to think that punishment is a valuable deterrent. It has never been so in history! Just like capital punishment in itself has not deterred the committing of murder!

Although The Parliamentary Committee overseeing the Bill, had widely disseminated the Bill (it was also available on the Net) and invited comments and suggestions on the Bill from various organisations working with children, and suggestions had been sent, not many of them were incorporated before the Bill was passed in Parliament. The Act as passed contains some serious defects.

### ***Definition of Offence***

In the earlier version of the bill anyone under age 16 was considered a minor. The Act raised the cut off age to 18. In the course of it, the Act also made any sexual activity, even a consensual one, with children under 18 or between minors a serious criminal offence, punishable with imprisonment. This is unfortunate. Not every sexual act between children below 18 is inappropriate. There is much sexual experimentation among children that is part of healthy psychosexual development. The American Psychological Association, the premier association of psychologists in the world, has stipulated in its definition of sexual abuse that there has to be a difference of five years between a child and a perpetrator for a sexual act to be considered abuse. One redeeming feature of the Act in this context is that if an offence under this Act is committed by a child, such child is to be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

### ***Procedures for Reporting Cases***

Chapter V of the Act that describes is “*Procedures for Reporting of Cases*” is the weakest or the most flawed section of the Act from a psychological and professional perspective.

This section required greater specificity. *Any person* who has reason to believe that an offence under this Act is likely to be committed or knows that such an offence has been committed any time in the past is obliged to inform the Special Juvenile Police or the local police. Failure to report is considered a criminal offence punishable by imprisonment.

Using the phrase “Any person” is making the onus of reporting universally binding, including the victims. Just as in Chapter II, B where various categories of persons whose action can be considered as aggravated sexual assault have been specifically mentioned, so also this section should have specifically listed the categories of persons mandated to report abuse, and who can be exempted.

In this context, what about “privileged information” such as gained through lawyer-client exchange, in psychotherapy or in the Sacrament of Confession (Reconciliation) in the case of catholic priests? Are these professionals also bound to divulge such privileged information? In the case of catholic priests who are obliged by their vow to maintain secrecy about everything heard in the Sacrament of Confession, this requirement becomes a violation of their sacred commitment to protect the sanctity of the Sacrament. It gives rise to conflict of conscience.

Even the child who has been abused is obliged to report the matter. This is not a very child-friendly measure. For a variety of reasons, including fear of reprisal, a child can refrain from

reporting. I feel the child victim should have been exempt from this requirement to report. Fortunately the child is exempt from punishment for failure to report [Section 21(3)].

There is also no punishment stipulated for children who make false accusations or provide false information. In one sense, this is child friendly. However, this is also a questionable exemption in the context of a child being defined by the Act as someone below the age 18. A malicious adolescent can make a false allegation and face no consequences for it, ruining in the process the reputation and even careers of innocent people.

The Act does not mention any Statute of Limitation. Should an act committed 20 or 50 years ago be reported? Some differentiation should have been made between ongoing or recent abuse and abuse which happened a long time ago.

An important issue in regard to Reporting of Abuse that is missing from the Act is the protection of those reporting the abuse. When a teacher, for example, reports that a student is being abused by a family member (most abuse happens in the family), he or she may face negative consequences, including threat to life; the child too may suffer negative consequences including beatings and further assault etc. Section 19(5) and (6) provide for the protection and care of the child who has been victimised. However, no protective measures are offered for the person who reports abuse. Obligation to report, without providing protection for the one who reports, including children other than the victim, can be dangerous. We are aware of the dangers that whistleblowers face these days.

### ***Non-inclusive Definitions***

The wording of the act is such that a male bias can be read into it. The Definition of Penetrative Sexual Assault in Chapter II, Section A (3), for example, uses the masculine pronoun “he” to refer to the offender; this excludes women as offenders. What about women who engage in digital rape of boys or girls, or insert objects into the anus or vagina of children? Or, is penetrative sex applicable only to use of the male organ?

Even though the opening sentence of *Section 19 (1)* of Chapter V, uses “any person,” referring to those who are to report known cases of abuse, the pronoun used in the rest of the section is “he.” Here again we can read a male bias; by using the pronoun “he” the Bill can be interpreted to exclude women from the responsibility of reporting.

There is an assumption among many people that sexual abuse is perpetrated only by men; this is not true. Even though most abusers are men, women also sexually abuse both male and female children. Even though most victims generally are female, latest available statistics indicate that there is an increase in the number of boys who are sexually abused in India; in some states the number of boys abused outnumbers abused girls.

### ***Better Late Than Never***

The Act was long overdue in the context of statistics showing that more than 53 percent of children in India experience some form of sexual exploitation. Until the Act was passed there was no law in India specifically addressing the protection of children from sexual exploitation, even though such a law was mandated by the United Nations Convention on the Rights of Children, 1989 which was ratified by India on 11th December, 1992. The Convention required the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity. It took India 20 years to fulfill that mandate. Better late than never!

The approach to the Bill by our lawmakers has also been rather lackadaisical. It had been drawn up in 2005. But it was introduced in the Rajya Sabha only on March 23, 2011. The same Bill was introduced in the Lok Sabha and passed hastily in the Lower House at the last minute without much of a discussion (the only point raised was that it could be misused) on the last day of the budget session of Parliament.

Another point to note: The Act states that it is applicable to the whole of the country, except Jammu and Kashmir. I am not in the know of the reasons for this exception. However, don't the children of Jammu and Kashmir require protection against sexual assault? In the violent climate existing in that State, there is the greater likelihood of children being victims of sexual exploitation. Shouldn't some provisions be made to prevent this happening?

### ***In Conclusion***

Over all, despite its shortcomings, the Act is highly commendable and one that is long overdue. It clearly defines sexual assault, sexual harassment and pornography and gives very clear guidelines to be followed when incidence of abuse comes to be known. Abused children will have the consolation that their violators as well as those who abet their victimisation will face due course of the law. Those who care for children also can have the confidence now that they can avail of legal recourse in cases of sexual exploitation of children.

### ***Church Response***

I understand that the CBCI has been working on the Church's policy statement on sexual abuse of minors. It appears this has been an in-house enterprise and the document was not circulated among a wider group for feedback and suggestions. There has also been delay, for whatever reasons, in publishing it. The website of the Catholic Bishop's Conference makes no reference to the proposed policy.

It is important that the Church's policy statement incorporates and address the requirements of the recent Act.

I am curious especially about the Church's response to the legislative requirement that any one who comes to know of sexual abuse, present or past, no matter what the source or medium (and this includes sacramental confession) has to report the matter to the police or would be considered as abetting crime.

### **Jose Parappully, PhD**

The author is a Salesian priest and a clinical psychologist. He is the Founder-Director of Sumedha Centre for Psychology and Spirituality at Jeolikote, near Nainital, Uttarakhand. Email: [sumedha.bps@gmail.com](mailto:sumedha.bps@gmail.com)