

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.

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 minimize 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.

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.

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 Organizations, Civil Society Organizations, voluntary organizations, 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 of the child. The Cell will also assist the concerned in making a decision regarding various options available to pursue the case and if required help in formulation of complaints, petitions, etc.

Other services offered by the Legal Services Authority:

i) Payment of court and other process fee;

ii) Charges for preparing, drafting and filing of any legal proceedings;

iii) Charges of a legal practitioner or legal advisor;

iv) Costs of obtaining decrees, judgments, orders or any other documents in a legal proceeding;

v) Costs of paper work, including printing, translation etc.

1.4. Mode of selection of lawyers to represent children who have been sexually abused:

The DLSA shall draw a panel of qualified and experienced advocates to represent child victims of sexual abuse. This panel should comprise of a mix of advocates having practice experience of more than 3 to 5 years as well as junior advocates. Conviction, commitment and experience in the field of child rights should be relevant considerations for empanelment. Advocates may initially be empanelled for a period of one year which can be extended on the basis of performance.

1.5. Payment of Legal Aid Counsellors

The Legal Aid Counsellors will be paid for their services by the LSA as per the approved schedule of fees.

2. Guidance on examining child victims and witnesses

During criminal investigation, some minimum levels of protection are required in relation to any interviews with the victim. These should be carried out in a sensitive manner and advocates as well as law enforcement officials should have received appropriate training to this end. Such training should ensure that these persons know appropriate methods of interviewing which will take account of a victim's particular situation, minimize distress and maximize the collection of high-quality evidence. In order to ensure that the child-friendly trial procedures established under the Act are optimized, 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 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 judgment 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.