

RESTORATIVE CARE: INTEGRAL TO ACCESS TO JUSTICE



**HAQ: Centre for Child Rights
B-1/2, Ground Floor, Malviya Nagar
New Delhi-110017**

What is Restorative Care in the Context of Access to Justice?

Access to Justice

Existing research on “access to justice” has shown how the understanding of the term developed as the human rights approach gained ground. The conventional notion of access to justice was limited to securing legal representation and ensuring due process of law.

This included provision of affordable and accessible legal support to those who cannot afford it and are hence deprived of their right to be heard and fair trial in matters affecting them.

Sustainable Development Goal 16

Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels.

Target 16.3: Promote rule of law at the national and international levels, and ensure equal access to justice for all.

Over the years, this understanding of “access to justice” has expanded and come to include legal awareness, rightful conviction, swift justice, rehabilitation, social re-integration and restoration of victims, and monitoring and accountability of justice delivery mechanisms are all part of it. There is also a recognition that increased access to justice is possible only when people stop fearing the legal system and have confidence in the justice system.¹

HAQ: Centre for Child Rights has been working on access to justice for children since 2002. HAQ’s experience shows that any work on access to justice would necessarily include work on factors that impede access to justice. An analysis of such factors drawn from the Report of the United Nations High Commissioner for Human Rights on “Access to Justice for Children” resonates with HAQ’s experience so far:

applies to civil, administrative and criminal spheres of national jurisdictions, including customary and religious justice mechanisms, international jurisdictions, as well as alternative and restorative dispute resolution mechanisms, and covers all relevant judicial proceedings, affecting children² without limitation, including children alleged as, accused of, or recognized as having infringed the penal law, victims and witnesses³ or children coming into contact with the justice system for other reasons, such as regarding their care, custody or protection.

¹ United States Institute of Peace, *Necessary Condition: Access to Justice*. Available at: <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>

²The Convention on the Rights of the Child defines a child as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (article 1).

³“Child victims and witnesses” denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution of the alleged offender or groups of offenders; Economic and Social Council resolution 2005/20, article 9 (a).

And it requires....

...requires the legal empowerment of all children. They should be enabled to access relevant information and to effective remedies to claim their rights, including through legal and other services, child rights education, counselling or advice, and support from knowledgeable adults.⁴ Moreover, access to justice for children requires taking into account children's evolving maturity and understanding when exercising their rights.

Barriers to children's access to justice

- Children as well as their parents and caregivers lack awareness of children's rights, laws and legal procedures, services available, whom to approach and such other information that can enable them to seek justice and participate in the process effectively.
- Lack of child-sensitive legislation and procedures that take into account children's rights and needs and enable sensitive treatment and participation of children in proceedings involving or affecting them.
- Children's lack of capacity to act without their parents or legal representatives, which is particularly problematic in cases of incest where there is a clear conflict of interest or in case of children without parental support, street children or children in alternative care.
- An ill-equipped, insensitive and intimidating medical health care system, law enforcement system, justice delivery system and child protection system.
- Apprehensions regarding police and law enforcement system due to reasons ranging from abuse of power vested in the police, the attitude and behaviour of police, lack of competence to interact and engage with children in a sensitive manner (especially children from poor families), to corruption in general.
- Lack of specialised judges, prosecutors, lawyers and other personnel as well as sufficient resources to provide specialised training.
- Fear of harassment, further stigmatization, abandonment or reprisals at the hands of the justice delivery system leading to lack of trust and confidence in the system.
- Poor quality of legal aid combined with lack of awareness about legal aid services and lack of confidence in the legal aid system.
- Cost of litigation in terms of fee charged by lawyers, travel and other expenses incurred on attending a court hearing, loss of wages on the day of hearing, etc.
- Lack of immediate relief measures to support children and their families in situations of trauma and distress.
- Poor support services and witness protection measures.
- Poor community support structures, particularly in disintegrated urban and/or rural settings in developing nations.

Restorative Care

HAQ's Experience of working with victims of child sexual abuse and exploitation has clearly revealed that justice cannot end with the order of the courts alone – especially if the lives of

⁴UN Common Approach to Justice for Children, p. 4.

the child victims has become at least the same as it was before, if not better. Indeed, there are services that children need in their journey for access to justice to enable them to navigate it. These services may include mental health and trauma counselling, educational, health interventions, family support, compensation and/or skill training for older children, all of which are necessary to enable the child to be restored into a life beyond their abuse and/or exploitation. This is what can be referred to as **Restorative Care**.

Traditionally, “restorative care” is a term used in the medical and health care system. It refers to follow-up care and rehabilitation of patients whose recovery takes a longer period. It uses a multi-disciplinary approach to bring such patients to their optimal functional level and restore them to their previous living arrangement. Thus, it typically involves an inter-disciplinary team consisting of nursing, occupational therapy, physiotherapy, recreation, social work, and other healthcare professionals who work through a consultative process, based on a comprehensive assessment and restoration plan. The focus is on quality of life including medical, physical, social, spiritual, and psychological needs.⁵

Although “restorative care” per se is not a term that figures in the existing literature on access to justice, its elements are visible in use of words like support services, relief measures, compensation etc.

Given that the goals and process of “restorative care” as used in the medical field are no different from those sought to be achieved for children who are victims of violence and abuse, HAQ strongly recommends incorporation of the term “restorative care” in policy, law and action and as distinct element of “access to justice”.

It is this restorative care philosophy that has driven the HAQ’s interventions in addition to addressing the other barriers to children’s access to justice. **The most critical component of “restorative care” process is case- work management. The case- worker is the support person, who is part of a larger process that needs to be systematic and organised in order to achieve the goals of “restorative care”.**

To HAQ, both numbers of children supported and the process followed is important. **Casework management is therefore a critical component that requires investment of time and resources.** Before getting into more numbers and analysis a brief insight into the process followed at HAQ is shared as a practice that may be replicated by government and non-government agencies assisting children who come in contact with the law as victims of crime. Although, as of now this model is being followed to address children who have come as victims of crime, it can be adapted to children who are in conflict with the law as a measure to re-integrate them in society.

⁵ Restorative Care. Available at: <http://www.centralhealth.nl.ca/restorative-care/>

IMPORTANCE of CASE WORK MANAGEMENT AND ESSENTIAL PRE-REQUISITES:

- Case work management is a systematic process designed to encourage achievement of goals and targets set out, enhance efficiency of the team and individuals and measure impact or desired change.
- Training the case workers, which includes social workers, counsellors and lawyers and providing them tools and support for managing their tasks in best possible manner following the rights-based framework is essential part of case work management.
- Indeed case work management is about documentation of every step, so that the efforts of every individual involved in case work find recognition.
- Case work management helps create and follow a system that enables regular monitoring and review.
- The ground rule to good case work management is to develop formats for documentation, monitoring and review that are easy to use and enhance efficiency instead of adding to the burden of individuals and the team.

Casework Management: Step-by-Step once a case Referred

A case may be referred in a situation that demands an emergency response or at a stage after the FIR is registered or the child's statement under Section 164 of the CrPC is recorded.

1. In case of emergency response –

(a) Filing a complaint and Registration of FIR

- I. On receiving information about a case of child sexual abuse, the social worker should immediately discuss the case with the supervisor or such other senior staff in the organisation (telephonically in case of emergency).
- II. Try to safeguard the evidences, for example, clothes victim was wearing, ask the victim not to wash their body before medical examination, etc.
- III. Where the child is traumatised, the social worker should talk to the family and get the case details from the family instead of insisting on talking to the child.
- IV. The social worker should accompany the child/family to file the FIR. If the child's family is fine with the police coming to their house for registering the FIR, the social worker should ask the police to do so and reiterate that the police cannot be in uniform when reaching out to the child at her/his home.
- V. It is important that complaint is filed by the child or her/his parent/guardian. At the same time, no child below the age of 3 years should be asked to be the complainant. In the case of such young children, it becomes difficult for them to testify in court, which leads to a lot of trauma for both the child and her/his anxious family. As far as possible, their parent/guardian should be the complainant in such cases.

- VI. Prudence demands that the social worker or the organisation should not become the complainant. This cannot be treated as providing support. On the contrary it amounts to disempowering children and their families from taking up their own cause.
- VII. Ensure that the police records the child's complaint and all other information in the FIR accurately and records the statement as spoken by the child.
- VIII. In fact, as far as possible, it is important to ensure that every complaint is given in writing. A written complaint becomes part of the FIR. So when everything is given in writing, the police cannot tamper with it or use their own language. The social worker should therefore help in writing the complaint without becoming the complainant themselves. Writing a complaint for someone does not require the person to be signing it. Signing a written complaint would make the social worker a key witness in the case and it is not feasible for any organisation to sustain such practices as the social worker may change jobs while the case is pending trial. Only the child or her/his parent/guardian should sign a written complaint.
- IX. Social worker should explain the criminal process to the child and her/his family. It is their duty to help them navigate through the process.
- X. The child's family should be told not to sign any blank papers.
- XI. Ensure that the child is kept separate from the accused.

(b) Medical examination

- I. Social Worker should accompany the victim to the hospital.
- II. Before medical examination, prepare the child for the medical examination - explain the process and the importance of giving an informed consent for the medical examination. Many children do not consent to the medical examination because they are scared and shy. Medical examination is an important piece of evidence, even if it is conducted days after the incident.
- III. The Doctor on duty must counsel the child about the medical examination and take case details from the child or her/his parents in case of very young children. Social worker accompanying the child must ensure this. All parents/guardians should be informed about this and also about informed consent because in the case of minors who are unable to give their consent due to their physical or mental condition or age, it is the parent/guardian whose consent is taken. Consent of rape victims aged 12 years and above is mandatory for conducting a medical examination as per the Health Ministry's Guidelines in this regard.

- IV. Ensure that the Doctor has collected the right clothes and made a note of it in the Medical Examination report or the MLC Report.
- V. According to the Indian Medical Association guidelines, all hospitals need to have a safety kit for use at the time of medical examination.
- VI. Injuries and marks need to be mentioned in the medical report, as it tells whether the abuse is recent or a prior one.
- VII. Social worker/Family members can be present at the time of medical examination of the child.
- VIII. A female doctor should conduct the medical examination in the case of a girl child.
- IX. Social workers should be aware of all such requirements.
- X. Objection should be raised if the doctor uses the two-finger test to conclude that the child was “habituated to sexual intercourse”. Two finger tests are allowed only to assess a medical condition and not to arrive at any conclusion casts aspersions on the child’s character.

2. Cr.PC. Section 161 statement

- I. Generally, the police do not record the Section 161 statement of the victim or they do so at the time of filing the FIR or just before the victim appears in the court for her first hearing. Often the victim or her/his parent/guardian does not even come to know when this statement got recorded but it has their signature. The Social worker must therefore insist that the child or the parent/guardian do not sign any statement unless they are sure about what is written in it and agree with it.
- II. Before recording the statement, the social worker should prepare the victim on how to give an accurate statement
- III. S. 161 Statement can be recorded at the place where the victim feels comfortable.
- IV. Ensure that Police writes the statement in the language used by the child.
- V. Ensure that there should not be unwanted interruption while the child is giving the statement and unwanted suggestions from police or any other should not be part of the statement. Ensure that police use appropriate language so that charges can be made as per the description of the statement. You do not require taking up a fight with the police every time. Often the policies over burdened with work or have just

got used to and hence immune to all kinds of crime and have no motivation to be proactive. Therefore, as far as possible, negotiation should be used and when the police is not doing the needful, help may be offered in terms of writing it all up for them or typing out a complaint or an FIR or a statement. Although we all know this is their responsibility, when they don't do it, offering help sometimes gives results.

- VI. Ensure that police should record the statement in civil dress, in case of female child; a female police officer should be present while recording the statement.
- VII. Statement should be recorded in the presence of parents/social worker (in incest cases, it should be done with a little caution and the family should not be present as far as possible).
- VIII. Ensure that the IO should not take a lot of time to write the statement and make the child repeat the incident multiple times; where police is non-cooperative despite your efforts to offer help, SHO/senior police officials can be approached.
- IX. Statement should be read out to the victim before getting her/his or the parent's/guardian's signature.

3. Cr.PC. Section 164 statement

- I. The first statement of the victim in any court is the statement recorded under Section 164 of the CrPC. This is an important statement as it becomes the basis for the case when it comes up for trial. All courts rely upon the Section 164 statement at the time of trial because it is given before a Judicial Magistrate of First Class.
- II. It is therefore important that the victims inform the court about everything that happened in detail. Even if the police do not record the FIR properly and miss out on important facts, a proper and detailed recording of the Section 164 CrPC statement before the Magistrate will help in the long run.
- III. Therefore, it is also important to make sure that the child is taken for S. 164 statement when she/he is ready to give the statement (sometimes it is good to record 164 immediately while in some cases where the child is traumatized, she/he needs to be given some time).
- IV. The social worker needs to prepare the child for the statement because the child will be alone before the Magistrate. But preparing the child does not mean putting words into the child's mouth or asking the child to manipulate or misrepresent facts which the social worker thinks may affect the case negatively. Our fears and apprehensions should not get transferred to the child. All that is required is to instill confidence in the

child to stand before the Magistrate without any fear or shame or guilt and narrate the incident as it happened and also point out all the parts of the body attacked by the perpetrator. The child should also be told that merely telling that the Magistrate that the accused did “*ganda kaam*” with her/him will not help. The child should be told not to feel ashamed about the wrong done by the accused and that if the accused did not feel ashamed about it when he was doing it then why should they feel shy or guilty?

- V. It is also important to inform the victim that if she/he is uncomfortable, they can easily share their discomfort with the Magistrate. They can ask for a break in between, they can also ask for water and if they need to use the washroom, they can make a request for that also.
- VI. Family person/support person/person whom child trust can be present at the time of recording the statement.

4. Immediate care and protection

- I. Every victim of child sexual abuse is not required to be produced before the CWC. Only those who are victims of incest, or those who do not have any home or parental support, or those who are living in a child care institution are required to be produced before the CWC.
- II. However, some children may not fall into these categories and may still require alternative shelter as a measure of safety and security. They may be under threat from the accused, who may or may not have arrested, or from the family and friends of the accused. Social worker must therefore assess whether the victim can safely return to their home, or whether the victim needs urgent alternative shelter.
- III. If the victim cannot safely return to their home, then the social worker should look for appropriate shelter options and prepare written submission to the CWC making recommendations regarding immediate shelter and care.
- IV. Social worker should request the CWC to appoint her/him as the ‘support person’ under the POCSO Act, if the victim child is comfortable with them.

5. First interaction check-list:

In the first meeting itself, the case-workers sit with the child and the family and run through the first interaction check-list, which ensures that the case-worker has explained to the family the entire process that is likely to be followed if the family decides to accept support from the organisation. Once the family agrees to receive support, they are informed about the need to sign the check-list so that there is record of the entire interaction for future use. This makes the process formal and experience shows that families appreciate some degree of formality. Some may not agree to sign the check-list and may want to go back home and think before they take a final decision to receive support from HAQ. A week's time may be given in such cases.

The check-list also helps the case-worker ascertain whether the case fits into the organisation's mandate and criteria for support.

HAQ's criteria for providing support to victims of child sexual abuse is as follows:

i. Preliminary Needs Assessment in Every Case:

Needs assessment forms, which can be filled in easily by the case workers are used to make a preliminary assessment of the child's immediate needs resulting from the incident. A system that enables a case worker to fill and submit the needs assessment form from wherever they are is ideal so that the next person in line can take the cue and initiate the necessary process for meeting such needs without delay. Hence, physical presence in office to fill and submit these forms should not become a necessary evil. Such forms should be filled in quickly and posted by the case worker through email or on a mobile app or any dashboard that may be created by the organisation for intra-organisational use on cloud or google drive. Clearly, this involves use of technology and access of every case worker to tools and gadgets that can address the urgency of the situation while also enhancing efficiency.

Details can be filled in later and maintained in a hard file.

A quick needs assessment tells the case worker and the supervisor whether the case fits into the organisation's criteria and can be accepted for support. Such needs assessment should also be made on the first interaction with the family, once the family accepts the organisation's services.

ii. Formal acceptance and assigning a case ID:

Every case that fits into the organisation's criteria must be accepted formally by assigning a case ID to it. This case ID is then to be used for all updates on the case. Prior to assigning a case ID, a pseudonym should be given to every child so that the child's privacy and confidentiality remains protected and even if an outside agency/individual such as a lawyer is involved in the case at some stage for supporting the child, their updates are received on the pseudonym and the Case IDs.

iii. Detailed Needs Assessment in every case formally accepted:

A detailed needs assessment could cover several aspects, which the organisation may decide upon and define through a consultative process, so that there is no ambiguity in filling the formats and everyone is on the same page. All detailed needs assessment must be filed in hard copy and a physical case file must be maintained for every case.

A time-frame within which such detailed needs assessments are to be completed must be clearly laid down for the case-workers to follow. The time-frame should be decided at the very outset, applicable for all cases, and no deviation should be allowed unless the case-worker can explain the need for seeking extension of time in writing and the same is discussed and accepted by the case-work supervisor.

Based on HAQ's work on access to justice and restorative care, following are few types of needs a case-worker may be able to identify and follow-up on, with time-lines. Some of these might need caseworker's immediate attention.

- Emotional/Psychological Needs
- Medical Needs
- Shelter/Protection Needs
- Educational Needs
- Financial Needs
- Para-legal assistance required

While carrying out a detailed needs assessment and interacting with the child and her/his family, it is important to ensure that at no point does the case-worker send out a message that all the needs will be fulfilled by the organisation. It is equally important to tell the family that the case-worker is there to provide information and facilitate access to the needs, but the family has to be ready to run around for their own needs.

The case-workers have to be cautious about ensuring that the child or the family does not become dependent on the case-worker or the organisation for every little need in their life.

The various forms which the case-workers may use while engaging with any case:

- 1. Emotional/Psychological needs:** This will require a basic tool to be used by the case-worker to identify emotional issues faced by a child and some training.

Once the case-worker is trained on how to use the tool, they should be able to come up with the following results:

- a. The case-worker can fulfill basic counselling needs
- b. Thorough psychological counselling or psychotherapy is required
- c. Psychiatric treatment is needed

- 2. Medical needs:** This could include a list of medical issues for which the organisation is willing to provide support either by way of reimbursing the expenses, finding the child assistance through the legal system in the form of compensation, or referral to appropriate agencies, or through the organisation's existing partnerships, if any, with hospitals and nursing homes/doctors.

The organisation will require clear SOPs in this regard and may further add to the SOPs what kind of medical expenses can be reimbursed e.g. expenses for laboratory tests, surgeries, medicines, etc.

In addition, the medical needs assessment form should include some aspects of follow-up and list of persons with whom follow-up is required and at what intervals.

Every form should allow the case-worker to write down important steps and observations. This could include apprising the child and her family or head of the institution where she is living with details of the child's medical assessments, doctor's prescription, follow-up visits to the doctor etc. as also whether there is a need for counselling the care givers on certain aspects of medical care.

Example 1: A child may need medical care in case of pregnancy resulting from sexual abuse, and may require support for an abortion or delivery. Such a need may be identified by the case-worker, but the institute in which the child is living or her family may be against abortion or may not be in favour of the child's decision to go full-term. Indeed, a new cycle of exploitation of the child begins which includes the new born baby too, and these are issues a case-worker should be able to address within a rights-based framework.

Example 2: In a case a child had lost sight in one eye and was losing the sight in other one too very fast. In court she still had not identified the accused and losing sight would have

rendered her incapable to do so. Although loss of vision is not directly related to the incidence of rape, the case-worker should be able to see it as part of the larger goal of access to justice.

Example 3: In some cases a child may need to undergo colostomy due to the injuries caused by penetrative sexual assault. This often requires 3 to 4 surgeries and carries a simple cost of changing the bag in which the child passes urine or excreta since the original openings have to be closed through surgery and then re-opened subsequently. The bag may only cost 10 or 20 Rupees a day, but the organisation's SOPs on medical care must clarify whether such small costs are also to be borne or left to the family and what would be the criteria for a case-worker to follow if the costs are to be borne by the organisation.

- 3. Shelter Protection needs:** There are a whole range of shelter and protection needs that can be identified. For example, in a case of incest, a child may have to be kept in a shelter home or with a relative found to be fit by the CWC. In some cases, given that the law only provides for victim/witness protection in the course of trial, the child and her family may need protection from the accused or his family/relatives/friends even before the trial commences, especially if the accused is released on bail. In some other cases, living in the neighbourhood may become so difficult for the child and/or the family that it may only be in the best interest of the child to be shifted to another location, temporarily or permanently. In such cases it is easier for families living in rented accommodation to move out to a new location than for those who have their own property. Moreover, shifting to a new location may not always be the appropriate solution, especially if the parent's source of livelihood is located near their residence. A case-worker should be able to assess all these factors while identifying the shelter/protection needs.

While ticking on the shelter/protection needs, it will be useful if the form also allows the case-worker to also mention steps that can be taken to meet such needs. A list of possible schemes of the government that may be useful can help. Delhi for example, has a witness protection scheme that can be used.

- 4. Educational needs:** Such a form must assess the child's education level, whether the child has ever been to a school or is a drop-out, whether the child is able to continue in school after the incident or requires extra coaching due to difficulty in concentrating on class-room lectures, whether the child has lost interest in studies due to the trauma, does the child feel comfortable in school after the incident, are the teachers and the school authorities aware of the incident, what is their attitude towards the child after the incident, is the child being subtly pushed out of the school because of the stigma, will it help if the case-worker/support person talks to the school authorities, etc. In such cases the case-worker has to work with the school and parents to see the best interest of the child and if required shift the child to a different school.

5. Financial Needs: Any immediate financial need may have to be addressed at times. For example, in a case of incest, if the accused is the bread-earner, the family will need some immediate means of sustenance. While organisations engaging in providing support services must have necessary linkages and identified sources of getting immediate support in such situations, they may also have to be prepared to meet an immediate financial need of a family till such time other forms of support can be garnered. Every case-worker must have a list of government schemes that can come to the family's assistance in such times. Meanwhile, the financial needs form should provide the case-worker the window to look at victim compensation as a means of financial support to the victims. Although this will require finding the child a lawyer to represent her in court and seek victim compensation or approaching a legal aid lawyer to do the needful or getting the investigating officer to file an application for victim compensation in the court or with the appropriate authority, the case workers should know how to process such needs. Section 357 A of the Code of Criminal procedure (Cr.PC) allows the courts to provide interim as well as final compensation to victims of sexual abuse and such compensation is irrespective of the outcome of the case in the form of conviction or acquittal. But the courts have to be satisfied that the child has been sexually abused. In cases under the POCSO Act, the courts are not bound to follow the scheme of compensation laid down by the state governments. They have to make their own assessments and can award compensation amounts that are higher than those prescribed under the scheme. Case-workers can assist the courts in determining the real needs of the child and the family and the needs assessment forms they fill in can be very useful for assisting the courts. In other cases, victim compensation is dependent on the state victim compensation scheme and the case-workers should be aware of such schemes.

6. Para-legal needs: Laws like the POCSO Act as well as the courts are increasingly recognising the victim's right to be legally represented by a lawyer of their choice. The case-workers must be trained to inform the children and their parents/guardians about such rights and how can the child find legal support. An organisation may tie-up with legal aid services or have their own lawyers on a retainer/consultancy basis to provide assistance to the children, or tie-up with lawyers/legal firms willing to provide pro bono services.

Organisations offering legal support should decide on whether they will provide support only at the trial court level or also at the appellate court level. Some time, in a trial court case itself a need may arise to go to the appellate court or the High Court, or even the Supreme Court. At times such need may arise even before the trial, for example, if the case needs to be transferred to another jurisdiction in order to protect the interests of the child. For bails granted by trial courts, the organisation may decide to help the family in getting the bail cancelled if it is causing threat or danger to the child or family. The organisation may have to take the case to the High Court against an order of age determination of the child. In one case

taken up by HAQ, the court refused to accept the vakalatnama signed by the superintendent of the care home where the child was living. Although the child had parents who could have signed the vakalatnama, the parents were unfit since they were responsible for selling their child into domestic work. HAQ had to approach the High Court to get the matter settled and got an order from the High Court, which allowed CWCs to declare the Superintendent as the “Guardian” of the child for the limited purpose of assisting the child with the legal proceedings. Organisations must decide on how far they wish to go with the support services they offer and every support service must form part of case management.

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Contact Persons:

Ms. Bharti Ali /Kumar Shailabh

bharti@haqcrc.org

shailabh@haqcrc.org

HAQ: Centre for Child Rights

B-1/2, Malviya Nagar, Ground Floor,

New Delhi- 110017, INDIA

E-mail: info@haqcrc.org;

Web: www.haqcrc.org