

AN ANALYSIS OF THE MANDATORY REPORTING REQUIREMENT PROPOSED BY THE INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE

GB Senior Solicitor Kate Prestidge provides analysis and commentary on the recommendation to implement mandatory reporting of child sexual abuse, as proposed in the report from the final Inquiry into Child Sexual Abuse published on 20 October 2022. This article complements the earlier publication from GB Speciality which provided an overview of the Inquiry's final report.

The Background to the Inquiry's Mandatory Reporting Recommendation

The Inquiry's proposal that offences of child sexual abuse should be subject to mandatory reporting requirements has long been the subject of discussion in other countries. The first mandatory reporting laws were enacted in the United States during the mid-1960s in response to the recognition that severe physical abuse of children by their parents (otherwise termed battered child syndrome) was a public health issue. This initial legislative enactment imposed a duty upon medical professionals (known as mandated reporters) to report their concerns regarding such abuse. Similar laws were subsequently enacted in Australia and Canada. Over time, the legislation was expanded to widen the category of mandated reporters and encompass broader abuse categories, including neglect and sexual assaults.

The UK government introduced a mandatory reporting duty in October 2015, requiring regulated health/social care professionals and teachers to report female genital mutilation (FGM) in cases where practitioners have either received a disclosure of FGM from a child or observed physical signs that an act of FGM may have occurred (S74 of the Serious Crime Act 2015).

Considering this background and in pursuit of the Inquiry's overarching ambition to raise greater public awareness about child sexual abuse, it is perhaps unsurprising that the Inquiry has recommended the introduction of a broader, mandatory reporting requirement in England and Wales.

The Inquiry's Recommendation for Mandatory Reporting

The Inquiry has recommended the introduction of legislation (in both the UK and Wales) placing specific individuals (mandatory reporters) under a statutory duty to report child sexual abuse in three situations:

1. Where a disclosure of child sexual abuse is received from a child or a perpetrator; or
2. Where the mandated reporter witnesses a child being sexually abused; or
3. Where the mandated reporter observes recognised indicators of child sexual abuse.

A failure to make a report in situations (1) and (2) above would amount to a criminal offence.

The following groups of people would be classed as mandated reporters:

- Anyone working in a regulated activity in relation to children under the Safeguarding Vulnerable Groups Act 2006;
- Anyone working in a position of trust as defined by the Sexual Offences Act 2003 as amended; and
- Police officers.

The mandatory reporting requirement would apply to both recent and non-recent child sexual abuse.

Exclusion to the Mandatory Reporting Duty

The Inquiry has recommended that where a child is aged between 13 and under 16, a report does not need to be made where the mandated reporter reasonably believes that the following apply:

- (i) The relationship between the parties is consensual and not intimidatory, exploitative, or coercive; and
- (ii) The child has neither been harmed nor is at risk of being harmed; and
- (iii) There is no material difference between the parties concerning their capacity or maturity, and the parties are no more than three years apart in age.

This exclusion would not apply where the alleged perpetrator is in a position of trust within the meaning of the Sexual Offences Act 2003.

The legal age of consent in England and Wales is 16, with reference to sections 9–13 of the Sexual Offences Act 2003, which prescribes that it is unlawful for a person aged over 18 to engage in sexual activity with a child under 16. However, the law is not intended to protect teenagers under the age of 16 who engage in mutually consensual sexual activity. In this context, consent is defined in S74 of the Sexual Offences Act 2003 as someone engaging in sexual activity where they agree by choice and have the freedom and capacity to make that choice. For this reason, Crown Prosecution Guidance states that consensual sexual activity between teenagers will not normally be prosecuted unless there are aggravating features, i.e. exploitation or coercion.

The case is different for children under the age of 13 because they are considered less capable of consenting – as such, the law stipulates that children under 13 cannot consent to any sexual activity. This is why the Sexual Offences Act 2003 lists different offences for cases involving children and young people under the age of 13. Similarly, as crown prosecution guidance suggests it is unlikely to be in the public interest to prosecute teenagers in a consensual relationship, the Inquiry considers it would not be in the public interest to criminalise mandated reporters for failing to report consensual teenage sexual activity that would not ordinarily be prosecuted.

This exclusion raises questions regarding harmful sexual behaviour between peers, which are considered in the commentary below.

Regulated Activities in Relation to Children

The issue of what constitutes a regulated activity is a complex area of law. However, regulated activities with children are set out in Schedule 4 of the Safeguarding Vulnerable Groups Act 2006 (legislation.gov.uk), which the Protection of Freedoms Act 2012 (legislation.gov.uk) has since amended.

Regulated activities with children are work that a barred person must not undertake and are defined according to (i) the activity the person carries out and how often it is undertaken, (ii) where the role takes place and how often the person will work there and (iii) working in specified positions in Wales.

Regulated activities with children include teaching, caring, and supervising children, moderating a web service for children, health and personal care, driving a vehicle for children, childminding, and fostering a child (including private fostering).

In addition to the above, a person may be classed as engaging in a regulated activity because of where they work (a specified establishment) as opposed to the role they are performing. Specified establishments include educational institutions providing full-time education for children, pupil referral units, nursery education providers, detention centres for children, children's homes, and relevant childcare premises.

Positions of Trust

A person working in a position of trust is defined under the Sexual Offences Act 2003, as amended in 2022. Individuals falling within the scope of a 'position of trust' definition include those who look after children in the following settings: local authority accommodation, care homes, hospitals, educational institutions, regular coaching or teaching in sports, and regular coaching or teaching in religion.

The Inquiry's Rationale for Introducing Mandatory Reporting

The mandated reporting recommendation is intended to directly address the concerns of victims and survivors who fear they will not be believed if they report the abuse they have suffered. According to 89% of the Inquiry's victims and survivors forum participants, mandatory reporting of child sexual abuse should be introduced. This view was largely motivated by an understandable desire to bring more perpetrators to justice and thus prevent further acts of child sexual abuse.

The proposed mandatory reporting is also intended to remove subjective barriers to making a referral of child sexual abuse, such as self-interest, fear of repercussions, the seriousness of the abuse, and credibility issues. As a result, the Inquiry believes that a mandatory reporting requirement would significantly improve the ability of the Police and Social Services Departments to provide targeted support to child victims of sexual abuse.



The Logistics of how a Mandatory Reporting Requirement would Operate

The mandated reporter(s) would be required to refer their concerns to the local authority children's social services department or the police. If a child were deemed to be in immediate danger, the expectation would be that the police should be notified immediately.

Institutions would be expected to make arrangements to ensure no multiple reports of the same disclosure are referred – this is most likely to be achieved by directing all reports through the organisation's Designated Safeguarding Lead. They would also be expected to assure individuals that they would be afforded protection from repercussions when filing reports in good faith and in line with their duty to report.

Where a mandated reporter has either witnessed or received a disclosure of child sexual abuse, and the Inquiry has recommended that a failure to report should amount to a criminal offence (recommended sanction unspecified). The justification for imposing a criminal sanction is that for those working with children or in a position of trust, a failure to facilitate a referral is inexcusable; the sanction for such an omission should be commensurate.

Commentary

The Inquiry's recommendation to introduce a mandatory reporting scheme in England and Wales will require enactment through legislation. The UK government previously considered the prospect of introducing a mandatory reporting requirement in July 2016 by way of public consultation. However, in March 2018, they concluded that the case for mandatory reporting had 'not currently been made', and as such, a reporting duty would not be introduced. While it remains to be seen whether the UK and the Welsh governments elect to follow the Inquiry's recommendation, considering the presence of mandatory reporting requirements in other EU member countries, a legal duty to report child sexual abuse will likely be enacted in some form. Whilst we welcome consideration of legislative changes that facilitate increased disclosure of child sexual abuse and, in turn, increased prosecution of perpetrators, there are aspects of the Inquiry's recommendation that we feel require further consideration and guidance.

In the context of the abuse that should be reported, there should be guidance as to what the 'recognised indicators' of child sexual abuse are and whether this would include psychological indicators (which may be challenging for a mandated reporter to identify). For example, with reference to the exclusion of the duty to report, it may not be possible for a mandated reporter to know whether a relationship is consensual and devoid of coercion without entering into detailed discussions with both parties. This will not always be possible or practical and may have adverse consequences (particularly where coercion is present). Similarly, with the exclusion, expecting mandated reporters to be able to assess whether a child has suffered harm or whether they present with a material difference in capacity or maturity to the other party will be a subjective assessment which is likely to vary significantly amongst those tasked with assessing and adjudicating over referrals. As part of its investigation into children in local authority care, the Inquiry contemplated the escalating issue of harmful sexual behaviour among looked-after children. During the investigation into children in the care of Nottinghamshire Councils, the Inquiry concluded that harmful sexual behaviour in children had not been well understood by professionals and highlighted the need for national guidance to assist local authorities in addressing the issue. In our opinion, this guidance needs to be in situ before a mandatory reporting requirement is enacted.

There must be a genuine concern that mandating the reporting of child sexual abuse (particularly in circumstances where the victim or survivor has made a disclosure) removes autonomy and choice from the child. Whilst we would not propose that this consideration negates a duty to report, it is a concern that should be addressed in legislative guidance should the mandatory reporting recommendation be enacted. Indeed, the sad reality is that some children will be deterred from disclosing when they know that confidentiality cannot be offered.

As identified through the Inquiry's research into mandatory reporting in other member nations, an increase in referrals to children's social services departments will likely lead to concerns that resourcing would become unmanageable. For example, statistics published by the Department for Education in October 2022 revealed an 8.8% increase in child-in-need referrals made since 2021 (the highest number since 2019). Many social services departments are already over-stretched and underfunded. There must therefore be a legitimate concern that they could become overwhelmed with increased reporting levels, leading to the diversion of resources away from proactive support and into reactive investigations.

We welcome and fully support the move to encourage increased reporting of disclosures of child sexual abuse in pursuit of improved child protection and safeguarding practices. We also urge the UK and the Welsh governments to seriously consider the legislative guidance that will be required should this recommendation be enacted.