



MandateNow

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MandateNow Response to:

NSPCC Policy briefing: ***'Strengthening duties on professionals to report child abuse'***

The NSPCC has proposed "two changes to the reporting requirements on professionals in relation to the behaviour of others within the institution in which they work"

1. **The introduction of a criminal offence to cover-up, conceal or ignore known child abuse.**
This would mean that all professionals working with children would be subject to a duty to report known child abuse and if they fail to do so criminal sanctions could be brought to bear. Such sanctions would make it clear that the protection of children is paramount and a failure to respond to abuse is not an acceptable option.
2. **The introduction of a restricted form of mandatory reporting relating to concerns or suspicions about abuse conducted by those within the institution.** This would remove the option of 'dealing with concerns in-house' from the senior professional, by requiring them to report the concern to an external body and take advice regarding appropriate investigation and response. Should the professional choose to ignore this requirement, criminal sanctions could be brought to bear. This would help prevent the perceived conflict of interest between protecting the child and protecting the institution's reputation.

The NSPCC paper, after stating this spends much of the next two pages explaining why, despite these new proposals, it remains opposed to "universal mandatory reporting whereby all professionals are required to report all concerns".

These objections concern what it calls "unintended consequences".

The NSPCC states that "The evidence from other countries where this form of mandatory reporting has been introduced suggests it may have unintended consequences" and goes on to list a variety of possible consequences.

The list of consequences that may occur are that:

- children might be dissuaded from reporting for fear of getting involved in a criminal investigation
- that more reports will overwhelm the child protection system
- that more reports do not mean more capacity to respond
- that reporting would be driven by process rather than the child's needs

- and that mandatory reporting doesn't address the underlying reasons why people don't report.

These issues are the same as NSPCC raised when it had a blanket opposition to mandatory reporting, and MandateNow has already addressed them in previous documents.

If the NSPCC's concerns are valid then they apply to any form of mandatory reporting, including the limited form of mandatory reporting it is now suggesting. Moreover, some of the NSPCC's objections (the ones concerning capacity to respond) would apply equally to any initiative to improve reporting, including the NSPCC's own #TalkPANTS programme.

It is crucial to note that the NSPCC says there is evidence that mandatory reporting "may have unintended consequences", not that it actually does have unintended consequences.

No assessment is made of the risk of these unintended consequences, nor of the trade-off between the risks and benefits. No evidence is provided that any of these hypothetical possibilities has become reality to any significant extent in any country that has a mandatory reporting scheme.

The second paragraph of the NSPCC policy briefing says this:

'In some cases leadership within the organisation **failed to investigate concerns thoroughly enough** and at the extreme they sought to hide and cover up abuse.'

On page 30, paragraph 107 of Safeguarding Children in Education (April 2014) it states:

"In the first instance, the head teacher or principal, or chair of governors, chair of the management committee or proprietor of an independent school (the 'case manager') should immediately discuss the allegation with the LADO. The purpose of an initial discussion is for the LADO and the case manager to consider the nature, content and context of the allegation and agree a course of action."

Investigation of an incident by the administration has been officially discouraged for decades. It is surprising that the NSPCC has made such an error in the face of current guidance issued by the Department for Education.

The detailed justifications for the NSPCC's specific proposals start halfway down page 3 of their five page document. In support of Proposal 1 it starts by saying:

"It is almost inconceivable that in England and Wales it is not currently a criminal offence for a professional to cover-up, conceal or ignore child abuse occurring within the organisation that they work in or are associated with. Yet at present, professionals who act, or choose not to act, in such a way to prevent the investigation of child abuse are not likely to be subject to criminal sanctions."

But until the NSPCC made this change to its policy briefing, this was not only conceivable, it was (and still is) the legal position in the UK (excluding Northern Ireland). Moreover the NSPCC in a policy statement published on January 2014 - '**Mandatory reporting: a consideration of the evidence**' http://mandatenow.org.uk/wp-content/uploads/2014/09/mandatory-reporting_wdf-consideration-of-the-evidence-010114.pdf explicitly stated that it wanted to keep things that way. **You can read**

our response to it here: <http://mandatenow.org.uk/wp-content/uploads/2014/08/response-to-nspcc-mrca-policy-position-paper.pdf>)

The charity has gone from actively opposing mandatory reporting to considering that the lack of mandatory reporting is inconceivable in a single bound.

It continues:

"Sadly a number of cases have revealed that there are some situations where it is evident that individuals who work in institutions that work with children have sought to cover-up, conceal or ignore known abuse within the institution by 'turning a blind eye', moving staff on, moving staff around, misplaced loyalty to a work colleague, fear for their own job security, etc.

In such instances, where there is no existing criminal investigation and in particular when the cover-up arises as a result of a failure to act (omission) or 'turning a blind eye', criminal sanctions are limited and very difficult to apply."

This has been happening for decades, but it appears the NSPCC has only just noticed.

It closes its argument in favour of Proposal 1 by stating the following.

"The NSPCC is calling on the Government to make it a criminal offence in England and Wales for a professional working with children, to cover-up, conceal or ignore child abuse by those within the institution. Such sanctions would make it clear that the protection of children is paramount and a failure to respond to abuse is not an acceptable option."

There are a few problems with this.

- First, nothing in the NSPCC's explanation describes why the problem it has outlined is best addressed by this specific proposal.
- Second, the proposal is alarmingly vaguely stated and, as came to light having taken informal legal advice, it presents significant challenges. An individual is already committing a criminal offence if they deliberately conceal the commission of a crime (as opposed to merely not reporting it) and they thereby make themselves an accessory to the commission of a crime. The 'gap' between being an accessory to the commission of the crime of child abuse on the one hand and failing to report it on the other cannot realistically be bridged in this way, The concepts of "covering up and concealing", and "ignoring", are fundamentally different and cannot be made to meld together in this way. The proposal can only lead to confusion.

We then move on to the NSPCC's Proposal 2, "A restricted form of mandatory reporting in particular institutions".

It starts with a brief description of the problem the proposal is intended to address:

"There have been a concerning number of child abuse cases where it is evident that professionals have failed to report child protection concerns or suspicions about the

behaviour of an individual associated with their organisation. These have led to calls for such reporting to be mandatory with a failure to do so meaning criminal charges could be brought to bear.

A duty to report concerns or suspicions of abuse, together with a criminal sanction for failing to do so, is intended to encourage the reporting of concerns to an external body to enable appropriate investigation and response."

That is a reasonable albeit very brief description of the problem. Its proposed solution starts as follows:

"For this reason the NSPCC supports the introduction of a restricted form of mandatory reporting. Such a duty would remove the option of 'dealing with the concern in-house' from the professional, by requiring them to report the concern to an external body and take advice regarding appropriate investigation and response. Should the professional choose to ignore this requirement, criminal sanctions could be brought to bear. This would help prevent the perceived conflict of interest between protecting the child and protecting the institution's or individual's reputation."

If it had stopped there, then the NSPCC position would have been fairly close to what MandateNow has been calling for - sufficiently close that we could have had some useful dialogue in refining the proposal.

But NSPCC went and spoiled it by adding lots of restrictions designed to limit the scope and therefore the effectiveness of its proposal. The first one is:

"A duty to report should apply when the concerns are about the behaviour of those within the institution."

So if abuse occurs outside one of these residential settings but where evidence or suspicion becomes known inside the institution it is to be excluded from the NSPCC's proposal.

Then there are further limitations.

"The duty is initially limited to those offering residential accommodation to children."

It clarifies this by offering a list of the sorts of institutions covered.

"This would include hospitals, care homes, police custody facilities, young offender institutions, scouts/guides, outward bound facilities, boarding schools etc"

This appears to be a response to Savile. The NSPCC has listed the range of settings he targeted as if the next serial abuser will target the same institutions.

With the restriction to residential settings there are many questions that arise. For instance, numerous boarding schools also have day pupils. Will "concerns" about abuse of a day pupil by a member of staff be covered, or is the day pupil unprotected by virtue of not making use of the residential accommodation? Does the pupil suddenly become protected if he or she happens to spend a week boarding at the school for a trial period?

Similarly, hospitals have outpatient departments. Is the abuse of an outpatient covered by this duty? Or it may be that a child was an in-patient but the concern only becomes visible once the child has been discharged and is now visiting as an outpatient. Does the duty apply then? These kinds of mixed residential and non-residential settings are likely to have to operate two different categories of child protection reporting within the same institution. The scope for confusion with the already very complex child protection framework is immense. The residential restriction is unworkable.

The NSPCC's proposal appears designed to **limit** the protection to as few children as possible, given that the vast majority of children at any moment are not in residential institutions.

For instance, its proposal would not have assisted the pupils at Southbank International School (a day setting) where the administration of the school was criticised in a report by Hugh Davies OBE QC for not reporting an incident involving William Vahey in 2012 to the Local Authority. Instead he was permitted to continue teaching at the school as if nothing had happened. Investigations indicate he abused in excess of fifty children at the setting.

The NSPCC goes on to explain why it wants to limit the duty to just residential settings.

"This is in recognition of the risk of unintended consequences presented by 'universal' mandatory reporting regimes experienced in other jurisdictions and the greater likelihood of the features of institutions in which abuse occurs being present in those institutions which provide residential care."

It is interesting to note that on 12th June 2014 the NSPCC hosted a roundtable discussion with undefined "stakeholders" to which MandateNow was not invited. In the document that followed the meeting: *Exploring the case for mandatory reporting: a summary of a roundtable hosted by the NSPCC the scope of* <http://mandatenow.org.uk/wp-content/uploads/2014/09/NSPCC-Roundtable.pdf> mandatory reporting was discussed and reported upon at page 13 when the question was: "To which organisations and/or institutions should the proposed duty apply?"

The conclusion reached was:

"The general view was that it would be difficult to narrow the range of institutions."

NSPCC has ignored the conclusion of the 'professionals' who attended the meeting, and chosen to narrow the range of institutions to just residential settings.

If NSPCC has come across examples of unintended consequences that were actually observed during studies of mandatory reporting regimes in other countries, then it would have been useful to describe them so that they can be considered. If needed UK law could then be framed in the light of this knowledge. But it chooses to leave us uninformed.

One can only conclude that NSPCC has no evidence of actual unintended consequences.

If evidence from other jurisdictions demonstrated that the **risk alone** of these unintended consequences was sufficiently high that mandatory reporting was judged to be a bad idea, then that would justify opposing mandatory reporting even in residential settings. But the charity doesn't make that argument. It does not offer any such evidence.

It seems that NSPCC simply wants to keep the number of settings to which the duty applies as small as possible. This in turn means the number of children protected by mandatory reporting is a fraction of the whole. In essence what it is proposing is a pilot scheme, as is made clear in their next few sentences.

"Limiting the initial introduction of a restricted form of mandatory reporting would enable assessment of impact and effectiveness. If considered successful, the model could be enlarged incrementally or more rapidly to include a wider group of institutions. If found to be undesirable, it would be easier to repeal legislation."

We don't even have the legislation yet, and the NSPCC is already talking of revoking it. But this passage makes it abundantly clear that it wants to use "the initial introduction of a restricted form of mandatory reporting," as a pilot.

So, it seems perfectly clear that the NSPCC does not have any evidence of unintended consequences, and (to put the most charitable possible interpretation on it) wants to use a pilot to find out if any such unintended consequences do in fact come about.

If that is the intention then it would be somewhat more helpful openly to say so. If it has decided that the evidence from other countries is so unclear that a pilot scheme is needed, then we could look at what kind of trial would be the best test of the effectiveness of mandatory reporting.

It is a characteristic of well-run pilot schemes that you compare the behaviour of the "pilot" group with a "control" group that as far as possible shares all the characteristics of the pilot group except for the change that is being made to the pilot group, so that any difference in outcomes can reasonably be ascribed to that change.

If a pilot scheme were to be introduced, then it would be better to make it geographically limited, so that the outcomes in one part of the country with mandatory reporting can be compared with those in another part without mandatory reporting. But for any trial to be effective a mandatory reporting law has to be introduced and then restricted to the trial area.

In any case, is not clear why a pilot scheme is necessary. A survey of 62 nations indicated that 86.4%¹ had a form of mandatory reporting, seemingly without issue. A pilot scheme is only needed if we don't know what will happen with mandatory reporting. There are plenty of nations that can be consulted. Mandatory reporting is the default for the significant majority of the Americas, Asia, Europe, and Africa. Furthermore Northern Ireland had law that could have delivered mandatory reporting NORTHERN IRELAND CRIMINAL LAW ACT (1967), but it was only used for this purpose in regulated activities from 2005 following the Cabin Hill School Inquiry into child abuse and its cover up at that setting.²

¹ Daro, D, (ed), World Perspectives on Child Abuse, 7th ed, International Society for the Prevention of Child Abuse and Neglect, Chicago, 2006

² The 2005 report concluded that unless concerns and incidents of abuse were reported it's impossible to stop and so mandatory reporting was made to work and has been operating in the Province ever since. (Department of Education Northern Ireland)

The NSPCC frequently claims to be "evidence-based" in its approach to policy, and yet this proposal seems to be based on fear rather than evidence, and is also designed in such a way that good evidence would be almost impossible to obtain.

There is one further restriction the NSPCC proposes.

"The duty is limited to those in leadership positions, the head of the organisations and/or a designated person such as a child protection lead or the head of unit."

Their reasoning for this is as follows.

"The advantages of this restriction include reinforcing the use of organisational safeguarding policies and procedures, limiting the number of reports and retaining the potential for confidentiality of disclosure."

This yet further limits the number of reporters without it seems a detailed appreciation of the inherent failures it introduces to child protection in Regulated Activities. From its paper one might almost think NSPCC doesn't want child abuse to be reported, which would be an exceedingly strange position for it to hold.

A key weakness of the present 'discretionary reporting' arrangement is the lack of protection for staff who manage to speak up because at present they are nothing more than whistleblowers and could be destroying a twenty year career for daring to do the right thing and report.

At present, if a member of staff makes a report to the administration which then declines to act, it forces that individual either to stay silent or whistleblow to the local authority. Anonymity in these circumstances is impossible and because staff have no legal duty to make a report and also have no legal protection other than the WHISTLEBLOWER PROTECTION ACT OF 1989 (with its very limited practical defence from the many actions an administration might take against the reporter) often results in the whistleblower's swift departure from the scene. Whistleblowers are commonly forced out of their jobs and even sometimes driven out of their profession.

Restricting the duty to report to those in a few leadership roles provides no support or protection for staff who are often the ones who see concerns.

However, if the legal obligation were on **all** staff and the administration then chooses not to act in passing on a report, the individual staff member has a legal obligation to make the report directly. No employment contract can require a member of staff to break the law, so with a mandatory reporting law, staff are much better protected from any consequences coming from an administration more concerned with reputation than child protection.

The NSPCC recognises that its proposal is limited. It goes on to say the following:

"We recognise that these restrictions mean that not all institutions working with children will immediately be subject to a duty to report. However, because of the risks of significant unintended consequences of introducing any form of mandatory reporting, we propose this option as providing a realistic starting point."

Saying that "not all institutions working with children will immediately be subject to a duty to report" is a huge understatement as indicated earlier. But the NSPCC appears to wish to keep mandatory reporting as limited as possible because of the hypothetical 'unintended consequences.'

The following is a non-exhaustive list of those Regulated Activities excluded from the NSPCC proposal

- Local Authority maintained primary and secondary schools
- Free Schools
- Academies
- Trust Schools
- Faith settings, including Church of England, Catholic Church, Methodists, Judaism, Muslim, Hindu, and Sikh.
- Sports Organisations and clubs that are part of National Sports bodies

These settings for the most part do not have a residential aspect but are just as prone to abuse, and a long list of examples of abuse in these settings could be provided. It is a fact that they account for the vast majority of time children spend in regulated activities (estimated more than 94% of child days in such settings) .This offers a stark indication of just how small in scale the NSPCC's proposal really is.

The last page of the paper starts by recognising that NSPCC needs to "explore" aspects of its proposal in more detail with "stakeholders". Who those stakeholders are is not stated, but it appears not to include MandateNow, the group which has been making the running on proposing mandatory reporting these last few years.

The list of items it thinks needs exploration is as follows,

1. the definition of the institutions to which the proposed duty should apply;
2. the individuals which the proposed duty should apply to;
3. the behaviour that should be subject to a duty to report or the threshold for reporting;
4. what level of knowledge of abuse would trigger the proposed reporting duty;
5. whether an external reporting mechanism necessary or desirable and how would such a reporting mechanism operate;
6. whether increased governance obligations on board members, trustees or governors would support a duty to report

That, quite apart from the weaknesses mentioned earlier is quite a formidable list of things that still need to be worked out.

So let's summarize the situation

1. The NSPCC's proposals are so limited as to protect almost nobody.
2. The duty relating to unreported "known" abuse in Proposal 1 is a confused proposition which contributes little to the contemporaneous protection of children within Regulated Activities.
3. The duty to report concerns in Proposal 2 is limited only to abuse within the institution. It explicitly excludes suspected abuse occurring outside the institution where evidence of the abuse becomes available within the institution.
4. The duty to report concerns is restricted to residential settings, which cover only a very small proportion of child days spent in Regulated Activities.
5. The duty to report is restricted to those in leadership positions, which provides no protection to whistleblowers and will not change the culture of child protection in a setting and therefore positively impact its effectiveness.
6. The only justification offered for all these restrictions is concern about "unintended consequences" for which the risks are unassessed.
7. If the NSPCC's concerns about unintended consequences were valid, they would apply to its own limited proposal for mandatory reporting, and so the NSPCC should in such a case be opposing its own proposal.
8. If the NSPCC's concerns about unintended consequences were valid, some of them would apply to any initiative to improve reporting, including its own #TalkPANTS programme.
9. The proposal for what is in essence a pilot scheme is designed in such a way that reliable data on the effectiveness of mandatory reporting could not be obtained.

The last half page of the NSPCC proposal is titled "Protecting children – what else is needed?" and describes a range of other measures concerning organisations, cultures, external checks, enforcement, inspection and professional guidance which would be needed in order to make a mandatory reporting regime effective. These have always been part of the MandateNow proposals, and it welcomes the fact that the NSPCC has belatedly recognised shortcomings in this area.

MandateNow has been asserting for a considerable period that the substandard safeguarding inspection of the schools inspectorates needs to be overhauled so that they make the important contribution of safeguarding which parents mistakenly believe they are currently doing. But unless the legal foundations of child protection are sound, nothing built on top of them will be stable.

If the objective is the introduction of sound legislative foundations the proposals from the NSPCC are profoundly flawed.