

DRAFT RECOMMENDATIONS

Introduction:

This document seeks to present recommendations pertaining to need based reporting of child sexual abuse cases, preceded by necessary assessment procedures by practitioners, coming in contact with children. It is in the context of the challenges faced by professionals on reporting procedures, as defined in Protection of Children from Sexual Offences Act, 2012.

Background:

RACSHA (Rise Against Child Sexual Harm & Abuse) is a Kolkata based network of professionals and organisations- working for the prevention, recognition, addressing and healing of victims and survivors of Child Sexual Abuse (CSA). We have teachers, activists, lawyers, doctors, psychologists, social workers, special educators and corporates in our team.

We have bi-monthly meetings. At meetings, we have often debated and discussed the challenges practitioners have faced on reporting procedures, as per the POCSO Act, 2012, through case discussions.

Case vignette:

1. Sreyashi (name changed) is a 17 year old girl studying in class IX. She lives in Barasat, in 24 Parganas. She is in love with a boy, of the same age, living in the same neighbourhood. Her parents are aware of this. They do not approve of this. Her mother noticed that she has not attended school for some time, has become irritable and withdrawn. Her mother escorts her to the local physician and also shares this at a local women's group meeting, run by an NGO. The physician conducts tests. Sreyashi shares that she has had consensual sex with her boyfriend, to the doctor, in her mother's absence. She is very nervous. The social worker (from the NGO) learns about this too (from another source). The anxiety & the dilemma faced by the social worker is enormous. Should she share this with the police? Should she advise her on safe sex? How would the mother react? How would the local community respond (assuming that such news travel fast) ? What will happen to Sreyashi and her boyfriend, if the case is reported? These are some of the questions racing through her mind.
2. 15 year old Barsha,(name changed), with moderate mental retardation, is brought to the psychiatrist by her parents, for behaviour problems. There are other health issues too. Blood tests reveal that she is pregnant. She is a regular patient and the doctor is fond of her. He is faced with the dilemmashould he report this to the police? Is the perpetrator within the family? How should he share this with her parents? What happens to Barsha now?

In the light of the above two situations, members of RACSHA have discussed if such cases can truly fall under 'child sexual abuse'? What would the reporting mechanisms be? Don't they need further assessments and investigations, family work, if they have to be reported? Should these be reported right away? What about the child's right to privacy (Article 16 of UNCRC) ? What are the best interests of the

child and right to informed consent and assent of the child and the family (according to Child Protection guidelines based on case management principles)?

The argument:

The enactment of the Protection of Children from Sexual Offences Act, 2012 (henceforth POCSO), has seen a significant rise in the reporting of cases of CSA in its wake. Along with the intent to punish the perpetrators, the law was drafted to prevent the incidents of crime related to child sexual abuse.

However, one of the most contentious sections in this Act is Section 19, under which, every person is required to report apprehensions or knowledge of sexual offences having been committed against children to the police. This is what is popularly referred to by practitioners and others as the **mandatory reporting** clause. An express obligation to report has also been placed upon personnel of hospitals, media, lodges, hotels, or photographic facilities under Section 20 of the POCSO Act. (Ref: *Centre for Child and the Law, National Law School of India University, Bangalore- An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children, 15th June, 2018.*). Proven failure to report is punishable by imprisonment of up to six months and a fine or both.

Mandatory reporting has become a controversial provision in the opinion of a significant section of activists and practitioners working to support children and also in the child rights sector. It is an undisputed fact for many, that mandatory reporting protects children from further abuse and prevents the abuser from abusing again. The legal obligation is believed to be the best way available to detect all cases of abuse and to punish the offenders.

More and more cases of child sexual abuse (henceforth CSA) are being reported all over the country including in West Bengal. “ The number of cases registered for child abuse raised from 8,904 in the year 2014 to 14,913 in the year 2015, under the POCSO Act.”, (Ref: *Study conducted by Save the Children, India, titled - Recent statistics of Child Abuse*).

However, it is also a reality that the increase in reporting are often cases of elopement and false complaints for family disputes and other reasons. (Ref: *Study conducted by Jabala Action Research – ‘Journey Through The Criminal Justice System: A research Study on Children from Sexual Offences Act’*)

Some cases are highlighted, often insensitively and salaciously in the media. A study conducted by the Ministry of Women and Children in 2007 revealed that every second child in the country is facing some form of sexual abuse and the perpetrator in 50% of the cases is a person known to the child. This is a primary reason why the child or the family is hesitant to go for legal reporting. Reports (<https://www.the-newsmminute.com/article /death-penalty-rape-minor-girls-why-experts-don't-think-its-good-idea-72720>) and anecdotal evidences show that in most instances of child sexual abuse, the child and the family want the incident of abuse to primarily stop as opposed to punishing the perpetrator - often being a family member, relative, friend or neighbour. In other instances, family members remain silent due to fear of social stigma and an unwillingness to implicate family members. But even when a family

member may want to take the case to the police, s/he is often pressurised and hounded by other family members or the community, in the name of family and community honour. Further the child and family are highly subjected to stigma and discrimination by community members. Any doggedness to file a case under POCSO is met with threats of retaliation by the family with the serious danger of social and economic abandonment. Invariably, in an overwhelming number of cases, the child is moved to an unknown location and all support services of care and protection, are refused. Often the community coerces the family of the child to let the perpetrator go free in lieu of a financial settlement or social acceptability. This becomes challenging for families to refuse often resulting to withdrawal of reported cases or victim becoming hostile. This obviously does not also serve the purpose of punishing the real perpetrator.

In this context reporting by the family becomes mostly challenging and then the onus of reporting often falls on the practitioners to whom the case is disclosed to, who by virtue of this mandatory reporting need to go against the informed consent and assent of the child and family. The anxiety of service providers is justifiable and of profound concern.

We have also come across cases where children demonstrated harmful sexual behaviour with their peers. This could be due to learnt behaviour from adult caregivers, or they are experiencing sexual abuse themselves. However due to the burden of mandatory reporting, practitioners are bound to report such instances. This causes further harm to both the children with them being criminalised by the law.

We, at RACSHA and allied organisations, are faced with the lack of clarity in the law relating to the need for necessary assessments in view of the child's best interests prior to reporting to the police.

It would be pertinent to note that the difference between mandatory reporting under POCSO and under the laws of other countries is that every person is obliged to report sexual abuse of a child. However in most states of the USA, Australia and most member states of the European Union countries ([https:// sciencedirect.com-Child Abuse Reporting](https://sciencedirect.com-Child-Abuse-Reporting)), only certain professionals such as doctors, teachers, counsellors, social workers, and psychologists are required to report mandatorily. The understanding is that because of the fact that they come in frequent contact with children, they have greater understanding of the context of child sexual abuse and can therefore report sensitively because of their expertise. It is widely believed that this advantage is lost when every citizen is mandated to compulsory report. Fears of false complaints, the most common argument adopted by opponents of mandatory reporting, cannot be wished away.

While the issue of child sexual abuse has been addressed in international treaties and guidelines, the obligation on States Parties to recognise mandatory reporting has not received any explicit mention in any instrument.²⁹ The United Nations Convention on the Rights of the Child, 1989 (UNCRC) imposes a positive obligation on State parties to ensure protection of children from violence.³⁰ Reporting mechanisms have been considered to be a method to fulfil that obligation; indeed, they are "...*appropriate for all societies*" Thus, the duty to ensure the safety of children can be understood to extend to the duty to compulsorily report crimes against children, although this obligation need not

be imposed upon the general public at large, but only upon professionals working with children. (Ref: *Centre for Child and the Law, National Law School of India University, Bangalore- An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children, 15th June, 2018., Page 7*). Proven failure to report is punishable by imprisonment of up to six months and a fine or both.

However, since we already have mandatory reporting, the focus should be on what needs to be done to make it work in favour of children's best interests while empowering those professionals who come into contact with children to judiciously use the provision without the fear of unnecessary harassment.

Our recommendations are the following:

1. Review the mandatory reporting provision in the light of socio-economic location of abused children and their immediate caregivers in the context of the socially sanctioned veto on reporting by the family and the community. It must also consider the fact that practitioners are bound by the commitment to confidentiality about those children they interact with and who thereby may have access to information related to child sexual abuse. In this context it will be important to ensure that the agency of the child is taken into consideration and relevant information has to be shared with non-offending safe adults, following necessary assessment in order to arrive at a solution. This is recommended in light of the best interests of the child.
2. Identify and establish support services on behalf of the State and civil society that may need to be put in place to provide assistance to the child, her/his immediate caregivers or a supportive community, so that they can confidently lodge their complaints without having to surrender to conditions which may restrict their freedoms by compulsorily confining them to institutional care.
3. Address the issue of harmful sexual activity between children and adolescents by ensuring that such acts are not criminalised and minors are not put through the trauma of the justice system which has been proven to have a detrimental impact on their future development. Rather investments should be made on education related to sex and sexuality in schools and communities.
4. To address age appropriate consensual peer sexual exploration properly as criminalization of consensual sexual activity among or with adolescents between 16-18 years has severe implications on their right to life, privacy and right to health.
5. Collaborate with communities everywhere and explore sustainable and appropriate ways of empowering members to seamlessly extend community resources to the child and her/his immediate caregivers.
6. Redefine Open Shelters to reintroduce into its operations a flexibility to respond to the unique situations that children (and their immediate caregivers) are forced into.
7. Organise a State Consultation on the issue convened by the WBCPCR to discuss the issues with a wide range of stakeholders including non-governmental organisations, CWC chairpersons, JJB members, members of SLISA and DLSA's, officials of the SCPS, POCSO public prosecutors, POCSO judges and SJPU officials. This should be followed up by an initiative at the national level by organising a National Consultation on the same issue.

8. Suggest evidence based research on why and how children and families have not wanted to report and if reported what has been their experiences in light of the Indian context
9. Support system for the victims and care givers to be strengthened such as implementation of Victim and Witness Protection Program and NALSA's victim compensation scheme
10. System strengthening to be taken care of such as establishment of exclusive Special Courts; investment in infrastructure; setting up of more integrated, innovative, victim friendly one stop support centre