

**An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children<sup>1</sup>**

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- *Ankita, a 16-year-old girl and a student at a premier school in Bangalore, is in a relationship with Ravi, her classmate. A week after her period is due, she nervously walks into Dr. Ashwathi's clinic. Worried that she might be pregnant, she breaks down and shares with Dr. Ashwathi that she has had sex with Ravi several times. She also shares that her parents are very conservative and they would probably pull her out from school if they learnt about this. Dr. Ashwathi is unsure about the next step. Should she inform Ankita's parents against her wishes? Should she inform the police? Should she counsel Ankita about safe sex and the options before her in the event that she is pregnant?*
- *Vinod, a 12-year-old boy, is sent to the Counsellor's office for being unruly in class and not doing his homework for days on end. The counsellor gains his confidence over several sessions and assures him of confidentiality and support. Vinod finally shares that his grandfather, who has been staying with them for the past three months, has been sexually abusing him. Vinod is in a very fragile state and pleads with the Counselor to not tell anyone about this.*
- *17-year-old Vandana, a girl with mild mental retardation is brought to a psychiatrist's clinic by her husband. A blood test reveals that she is pregnant. The psychiatrist is unsure if she should report this to the police.*

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was enacted to protect children from sexual assault, sexual harassment and pornography, and provides for child-friendly procedures to be followed by the police, medical practitioners, and judges, while dealing with a sexual offence against a child. The term "child" is defined in Section 2(d) of the POCSO Act to mean "a person below the age of eighteen years."

Under the POCSO Act, any person, including a child, having knowledge of the commission of a sexual offence or the apprehension that a sexual offence is likely to be committed, is required to report this to the police or the Special Juvenile Police Unit.<sup>2</sup> Although **the term 'mandatory reporting'** does not appear in the POCSO Act, the **'mandatory' nature of the reporting obligation is evident from Section 21, POCSO Act, which prescribes punishment for failure to report the commission of a sexual offence.** No penalty, however, has been prescribed for failure to report apprehension of the likelihood of commission of an offence. Further, no child can be held liable for failure to report the commission of a sexual offence.

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<sup>2</sup> Section 19(1), POCSO Act, 2012.

A strict interpretation of the POCSO Act would mean that in the scenarios described above, doctors and counsellors have no discretion in the matter and have to mandatorily report to the police. This paper seeks to critically examine the compatibility of the mandatory reporting obligation with the 'best interest' of the child and the rights of children under the Indian Constitution and the UN Convention on the Rights of the Child, 1989. It will discuss the impact of mandatory reporting on the autonomy and privacy of adolescents involved in 'romantic' relationships of a sexual nature. The paper also examines the implications of mandatory reporting on the relationship between the child and the professional to whom information is disclosed under the faith of confidentiality.

Section I traces the legislative history of the provision on mandatory reporting. Section II presents practical dilemmas faced by doctors and counsellors in view of this provision based on interviews conducted with five school counsellors in Bangalore and six doctors (gynaecologists, psychiatrists, and paediatricians) in Bangalore and Chennai. Section III explains the terms 'adolescence' and 'evolving capacity' in the context of sexuality. The rights of adolescents under the Indian Constitution and international Conventions, which might potentially be affected by mandatory reporting, are elaborated in Section IV. Mandatory reporting under the international and regional human rights framework is presented in Section V. Conclusions and recommendations are stated in Section VI.

## I. Legal Framework

### 1.1. Reporting Obligations under Domestic Law

The duty of the public to report any criminal offence is stipulated in Section 39, Code of Criminal Procedure, 1973 (Cr.P.C). This provision places a burden on the public to report "the commission of, or of the intention of any other person to commit" certain offences, as stipulated in the provision, such as offences against the State, murder, kidnapping for ransom, house-trespass, food adulteration etc. Failure to report constitutes an offence under Section 202, Indian Penal Code, 1860 (IPC), which is punishable with imprisonment of either description for a term that may extend to six months, or with fine, or both. Members of the public are, however, not required to report the commission of sexual offences under Section 39, Cr.P.C.

Pursuant to the Criminal Law (Amendment) Act, 2013, Section 357C was introduced in the Cr.P.C, requiring all hospitals - public or private, or run by local bodies or any other person, to provide first aid or medical treatment free of cost and to *immediately inform the police* in cases of acid attack (Section 326-A, IPC), rape (Section 376, IPC), rape that results in death of the victim or in permanent vegetative state of the victim (Section 376-A, IPC), sexual intercourse by husband upon his wife during separation (Section 376-B, IPC), sexual intercourse by a person in authority (Section 376-C), IPC, gang-rape (Section 376D, IPC), and rape by a repeat offender (Section 376-E). Thus, medical practitioners and hospitals are mandatorily obliged to report the commission of rape against a woman irrespective of her age. Failure to report will attract imprisonment up to one year or fine or both.<sup>3</sup>

The Goa Children's Act, 2003 addresses child sexual abuse and several other offences against children. Section 8 of the Goa Children's Act imposes the mandatory obligation to report on developers of photographs or films if they find that the photographs/films contain

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<sup>3</sup> Section 166B, IPC.

sexual/obscene depictions of children,<sup>4</sup> as well as on airport authorities, border police, railway police and traffic police.<sup>5</sup> The latter set of authorities are required to report sexual offence against a child as well as suspicious cases of trafficking of children, or of an adult travelling with a child. Failure to report by developers of photographs or films is punishable with minimum imprisonment of one year and a maximum of three years and/or a minimum penalty of Rs. 50,000. No penalty is prescribed for failure on the part of the various authorities to report suspicion of trafficking.

With the enactment of the POCSO Act, *all* persons are now duty-bound to report sexual offences against children. The offences under the POCSO Act range from penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, and sexual harassment to the use of a child for pornographic purposes. 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. If they come across any material or object that is sexually exploitative of a child they must report it to the police or the Special Juvenile Police Unit.<sup>6</sup> Failure to report the commission of a sexual offence under the POCSO Act is punishable with imprisonment which may extend to six months or fine or both.<sup>7</sup> Children, however, cannot be punished for failure to report an offence.<sup>8</sup> The Act also requires a person in-charge of a company or institution to report the commission of an offence that may have been committed by a subordinate under his/her control. Failure to do so is punishable with imprisonment for a maximum term of 1 year and fine.<sup>9</sup>

By way of a safeguard for those reporting an offence, the POCSO Act specifically states that a person will not incur civil or criminal liability for giving information in good faith about the commission of a sexual offence, or the likelihood of commission of an offence.<sup>10</sup> An explanation of the term “good faith” can be found in Section 52 of the IPC, which states that “Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention.” The reporter is thus expected to have exercised due care and attention before reporting a case of commission of a sexual offence against a child to the police. The POCSO Act does not, however, exempt a person from liability if the matter is notified to a superior or any authority other than the police.

The obligation to report is considered to be an acknowledgement of the prevalence and severity of child sexual abuse, and a means to prevent continuing violence.<sup>11</sup> In a scenario where most instances of sexual abuse and violence go unnoticed, and where children are often unable to protect themselves or bring the perpetrator to justice, imposing a mandatory requirement to report offences ensures that these instances are brought to light and the victim is removed from the abusive situation with the opportunity to seek professional and/or

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<sup>4</sup> Section 8(14), Goa Children’s Act, 2003.

<sup>5</sup> Section 8(15), Goa Children’s Act, 2003.

<sup>6</sup> Section 20, POCSO Act, 2012.

<sup>7</sup> Section 21(1), POCSO Act, 2012.

<sup>8</sup> Section 21(3), POCSO Act, 2012.

<sup>9</sup> Section 21(2), POCSO Act, 2012.

<sup>10</sup> Section 19(7), POCSO Act.

<sup>11</sup> Rekha Menon, *Mandatory Reporting And The Best Interests Of The Child*, Master of Studies Dissertation, University of Oxford (2015) (on file).

medical aid.<sup>12</sup> There exists a moral obligation to protect children from harm, and the concept of mandatory reporting as such strengthens and reinforces that obligation.<sup>13</sup>

The clause on mandatory reporting was carefully considered by the Standing Committee in its Report on the POCSO Bill.<sup>14</sup> The National Commission for Protection of Child Rights (NCPCR), for instance, had suggested that reporting should be optional and not mandatory. The ‘counterproductive’ nature of mandatory reporting was highlighted by several stakeholders because of the possibility that parents and children would hesitate from seeking medical or psychiatric services due to the fear of social stigma.<sup>15</sup> Convinced by these submissions, the Standing Committee observed, “universal mandatory reporting cannot be considered practical.”<sup>16</sup> The Standing Committee placed on record the suggestion that the mandatory reporting obligation be imposed only on certain professionals dealing with children such as “*child care custodians, medical practitioners, child protection agency employees such as Childline, Juvenile Justice functionaries*” and others such as “*commercial film and photographic Print Processors and any establishment employing persons below 18 years of age.*”<sup>17</sup> It recommended that the Bill be amended to reflect this.<sup>18</sup> However, this suggestion was not accepted by the Ministry of Women and Child Development, and the Bill was subsequently passed with the obligation to report cast widely upon the public at large, with little or no guidance.

The objective of mandatory reporting is explained in the Model Guidelines under Section 39, POCSO Act, which stated that “[w]ithout detection, reporting and intervention, these children may remain victims for the rest of their lives, carrying the scars of the abuse throughout their lives and even, in some cases, repeating the pattern of abuse with their own children”.<sup>19</sup> The POCSO Act extends the responsibility to report to all because of:

...the nature of sexual abuse, the shame that the child victim feels and the possible involvement of a parent, family friend or other close person, makes it extremely

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<sup>12</sup> Sibnath Deb, LEGISLATION CONCERNING REPORTING OF CHILD SEXUAL ABUSE AND CHILD TRAFFICKING IN INDIA: A CLOSER LOOK, MANDATORY REPORTING LAWS AND THE IDENTIFICATION OF SEVERE CHILD ABUSE AND NEGLECT, 541-564 (2015).

<sup>13</sup> Pamela Budai, *Mandatory Reporting Of Child Abuse: Is It In The Best Interest Of The Child?*, 30 AUSTRALIA AND NEW ZEALAND JOURNAL OF PSYCHIATRY 794, 799 (1996).

<sup>14</sup> Department-Related Parliamentary Standing Committee on Human Resource Development, *240<sup>th</sup> Report on the Protection of Children from Sexual Offences Bill 2011*, 21 December 2011.

<sup>15</sup> *Ibid.* para 9.2: “Strong objections were raised by the stakeholders on the proposed provision. It was felt that a child could not be made responsible for reporting the offence on an apprehension that an offence was likely to be committed. NCPCR was of the view that firstly such a reporting on the part of the child (whether as a victim or a witness) should be optional and not mandatory. As a general rule, mandatory reporting was counterproductive. Secondly, it may hinder children and parents from seeking professional help, like medical or psychiatric services.”

Para 10.2: “Strong objections were raised by the stakeholders on the mandatory aspect of reporting of child abuse cases. The Committee was given to understand that due to social stigma, child’s emotional attachment to the abuser etc reporting of abuse was not preferred in a large number of cases. It was contended that awareness on child abuse in India was lacking. Factors like social stigma, community pressure, difficulties of navigating the Criminal justice system, total dependency on perpetrator emotionally and economically, lack of access to support systems etc inhibited children and their families to seek redressal within the legal system. Some of the stakeholders suggested deleting the clause altogether.”

<sup>16</sup> *Ibid.*, para 10.3.

<sup>17</sup> *Ibid.*, para 10.4.

<sup>18</sup> *Ibid.*

<sup>19</sup> Ministry of Women and Child Development, *Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act 2012*, September 2013, <http://wcd.nic.in/act/POCSO%20-%20Model%20Guidelines.pdf>, at 73.

difficult for children to come forward to report sexual abuse. This is why the law provides for mandatory reporting, placing the responsibility to report not on the child but on a surrounding adult who may be in a better position to help.<sup>20</sup>

### How well is the Mandatory Reporting Obligation Working?

The cases that come to the attention of professionals constitute a miniscule percentage of the total number of cases of child sexual abuse. Often it is a parent, relative, sibling, neighbour, teacher, or a friend who is the first to know or understand that a child is being subjected to sexual abuse.

Studies on the Working of Special Courts under the POCSO Act, 2012, by the Centre for Child and the Law, NLSIU Bangalore revealed that parents and the child victim are the principal informants in cases lodged under the POCSO Act. Cases are rarely reported to the police by professionals or persons who are not related to the child victim. In Maharashtra, NGOs, counsellor, social workers, Childline staff, doctorus, a journalist, neighbours, and local villagers constituted 2% reporters outside of the family.<sup>21</sup>

### Profile of Informants based on CCL-NLSIU's Studies

	Parent	Victim	Relatives	Others
Assam <sup>22</sup>	80%	11%	8%	1%
Maharashtra	48%	41%	7%	2%
Andhra Pradesh <sup>23</sup>	48%	43%	6%	3%

However, the provision raises a lot of implementation challenges as it does not offer guidance on when a matter should be reported. For instance, if a 20-year-old girl reveals to a doctor that she was sexually abused when she was 17 years old, will the doctor have to report to the police?

The POCSO Act does not indicate whether or not the reporter should verify facts before reporting or whether the apprehension be merely reasonable? For instance, in *Vinod's case*, should the counsellor report to the police immediately, or should she verify the possibility of the commission of the offence before reporting? Another legal controversy that has arisen is on the point whether a person should be tried for failure to report only after the main offence has been proven? The judicial opinion on this point is divided. In *Kamal Prasad Patade v. State of Chhattisgarh*,<sup>24</sup> the principal of a school in Chhattisgarh was informed of an incident of penetrative sexual assault (punishable under Sections 4 and 6 of the POCSO Act) allegedly committed by the peon against a Class III student, at 8:00 am. Before the principal could complete a local-level investigation into the complaint, an FIR was filed at 10:30 am., the very same day. The principal was arrested the next day for allegedly failing to report the

<sup>20</sup> *Ibid.*

<sup>21</sup> CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra* (2017), p.38, <https://www.nls.ac.in/ccl/jjdocuments/POSCOMaharashtrastudy.pdf>

<sup>22</sup> CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Assam* (2017), p.43, <https://www.nls.ac.in/ccl/jjdocuments/studyspecialcourttassamPOSCOAct2012.pdf> (Assam Report).

<sup>23</sup> CCL-NLSIU, *Study on the Working of Special Courts under the POCSO Act, 2012 in Andhra Pradesh* (2017), p.33, <https://www.nls.ac.in/ccl/POSCOAP2017study.pdf>

<sup>24</sup> *Kamal Prasad Patade v. State of Chhattisgarh*, Writ Petition (Cr.) No. 8 of 2016 decided on 12 May 2016 by the Chhattisgarh High Court.

incident as mandated by Section 19 of the POCSO Act. A Single Judge of the Chhattisgarh High Court held that in order to sustain a prosecution under Section 21(2), POCSO Act it must first be proved beyond reasonable doubt that the primary offence of sexual assault was committed, and thus a simultaneous prosecution of the person charged with committing the sexual offence and the person who failed to report would be a violation of the due process of law. Drawing an analogous link to Section 202 of the IPC (which criminalises failure to give information relating to an offence), the court relied upon the well-established principle that such provisions are not penal in themselves, but are intended to facilitate the trial of the primary offence. Thus, it is only after the establishment of the commission of the primary offence that the question of whether the accused under Section 21(2) was aware of such commission, and wilfully neglected to report the matter, can be considered. Further, the head of an institution (such as the principal) is expected to conduct an institutional-level inquiry into the alleged offence and collect material evidence before reporting the matter, and reasonable time must be given to them to do so before charging them with the offence of failing to report under Section 21(2) of the POCSO Act.

However, it must be taken into consideration that the concept of reasonable time is usually to be adjudged on a case-by-case basis, and is not to be taken as a general rule of law. It has also been pointed out by professionals that in some cases, the obligation to report mandatorily has caused innocent persons to be drawn into the criminal justice system based on unverified suspicions. Not only does this cause great inconvenience to the persons concerned, it also calls into question the reputation and credibility of the professional reporting such a matter.<sup>25</sup>

A Single Judge of the Bombay High Court has, however, rejected the reasoning of the Chhattisgarh High Court and held that such an interpretation would “not only defeat the very object of enactment of the POCSO Act i.e. to protect the child from sexual offences, but it will also violate the provision of Section 33(5) of the POCSO Act, which provides that the child should not be called repeatedly to testify in the court.”<sup>26</sup> In *Balasaheb @ Suryakant Yashwantrao Mane v. State of Maharashtra*,<sup>27</sup> a child residing in a Ashramashal school had been raped by the cook. The applicant, who was the Director of the Trust running the school, had been informed about the incident by the victim as well as her relatives. The applicant asked the victim, the informant, and the victim’s relatives to settle the matter over a cup of tea to prevent disrepute of the school. The High Court reasoned that Section 223(d) Cr.P.C enabled the joint trial of “persons accused of different offences committed in the course of the same transaction”. The term “same transaction” explained in Section 220(1), Cr.P.C was held to imply:

... one series of act so connected together as to form the same transaction. In other words, the term “the same transaction” comprises all the act of all the persons concerned done in the cause of carrying through the affair in question and the prima facie test, as the words “in the course of” indicates, is continuity of action and continuity of purpose.

The Bombay High Court concluded that the act of aggravated penetrative sexual assault by the cook and the failure to report to the police by the Director of the Trust despite knowledge

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<sup>25</sup> Dr. Preeti Jacob, Associate Professor, Department of Child and Adolescent Psychiatry, National Institute of Medical Health and Neuro Sciences, Bangalore, *Public Lecture on Mandatory Reporting*, organised by the Centre for Child and the Law and the Student Initiative for Promoting Legal Awareness, National Law School of India University, Bangalore (November 29, 2017) at the Krishnappa Memorial Hall, NLSIU.

<sup>26</sup> *Balasaheb @ Suryakant Yashwantrao Mane v. State of Maharashtra*, Criminal Revision Application No. 69 of 2017 decided on 22 March 2017.

<sup>27</sup> *Ibid.*

were different offences committed in the course of the same transaction thus warranting joint charge and trial.

As both the above cases indicate, persons who are in charge of educational institutions appear to be amongst the group affected by the duty to report. Due to the nature of the position they occupy, they shoulder an additional burden to ensure the safety of the child in question, while conducting institutional-level inquiries into the matter. Indeed, principals of schools and those otherwise in charge of such institutions have, more often than not, been charged under Section 21(2) of the POCSO Act.<sup>28</sup>

## 1.2. Obligations under International Human Rights Law

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.<sup>29</sup> 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.<sup>30</sup> Reporting mechanisms have been considered to be a method to fulfil that obligation; indeed, they are “...*appropriate for all societies*”.<sup>31</sup> 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.<sup>32</sup>

The key aspects of a reporting system can be gleaned from the Concluding Observations and General Comments by the Committee on the Rights of the Child (CRC). The emphasis of the CRC and UN experts has been on the need for a robust reporting and response *system* that is “safe, well-publicised, confidential, and accessible...”<sup>33</sup> In 2001, the CRC recommended that

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<sup>28</sup> *Amid Protests, Yavatmal School Principal Arrested Under POCSO Act*, THE INDIAN EXPRESS, July 3 2016, <http://indianexpress.com/article/india/india-news-india/maharashtra-amid-protests-yavatmal-school-principal-arrested-under-pocso-act-2890489/>, Accessed on 19 December 2016; *In A First, FIR Lodged For Not Reporting Rape*, THE TIMES OF INDIA, May 21 2013, <http://timesofindia.indiatimes.com/city/jaipur/In-a-first-FIR-lodged-for-not-reporting-rape/articleshow/20161767.cms>, Accessed on 19 December 2016; *Sexual Abuse: MGM Principal Granted Anticipatory Bail*, THE TIMES OF INDIA, March 13 2016, <http://timesofindia.indiatimes.com/city/raipur/Sexual-abuse-MGM-principal-granted-anticipatory-bail/articleshow/51380833.cms>, Accessed on 19 December 2016; Atul Sethi, *POSCO Court Acquits Sherwood College Principal In Oct 2014 Student Molestation Case*, THE TIMES OF INDIA, February 6 2016, <http://timesofindia.indiatimes.com/city/dehradun/POSCO-court-acquits-Sherwood-College-principal-in-Oct-2014-student-molestation-case/articleshow/50880433.cms> Accessed on 19 December 2016; *2 Officials Of Children Home Sacked On Charges Of Child Abuse*, THE TIMES OF INDIA, June 3 2016, <http://timesofindia.indiatimes.com/city/delhi/2-officials-of-children-home-sacked-on-charges-of-child-abuse/articleshow/52574053.cms> Accessed on 19 December 2016.

<sup>29</sup> Art. 24(1), International Covenant on Civil and Political Rights (ICCPR) [adopted 16 December 1966, entered into force 23 March 1976]; Art. 10, International Covenant on Economic, Social and Cultural Rights [adopted 16 December 1966, entered into force 3 January 1976]; UNHCR, Guidelines on Determining the Best Interests of the Child (2008) 14; Art. 19 and 34, United Nations Convention on the Rights of the Child [adopted 20 November 1989, entered into force 2 September 1990].

<sup>30</sup> Art. 19(1), United Nations Convention on the Rights of the Child [adopted 20 November 1989, entered into force 2 September 1990].

<sup>31</sup> Human Rights Council, *Joint Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Special Representative of the Secretary-General on Violence Against Children*, 2011 UN Doc A/HRC/15/56 112, 112a.

<sup>32</sup> United Nations Office on Drugs and Crime and United Nations Children’s Fund, *Handbook for Professionals and Policymakers on Justice in Matters Involving Child Victims and Witnesses of Crime* (2009), at 94.

<sup>33</sup> Paulo Sérgio Pinheiro, World Report on Violence Against Children,

the response to complaints of violence received under a mandatory reporting procedure or otherwise should be “a coordinated and multidisciplinary response that may or may not involve law enforcement at an initial stage.”<sup>34</sup>

In 2006, Pinheiro, the Independent Expert for the United Nation’s Secretary General’s Study on Violence Against Children, in his *World Report on Violence Against Children*, acknowledged the controversy surrounding mandatory reporting systems and urged States to review reporting systems and to hear children or young adults who have recently experienced child protection services in the review.<sup>35</sup> Pinheiro observed:

Mandatory reporting can establish an adversarial relationship between families and child protection authorities, and may even deter families from seeking formal support. However, the reluctance of professionals and the general public in most parts of the world to report violence in the home suggests that without mandatory reporting laws applying at least to defined groups of professionals, large numbers of children in need of protection will never be identified and given the protection they need. **Whatever approach is chosen, it should present itself as a help-oriented service offering public health and social support rather than as being primarily punitive.**<sup>36</sup> (emphasis added)

In 2011, the CRC’s General Comment No. 13 on *The right of the child to freedom from all forms of violence* echoed Pinheiro’s recommendations and elaborated upon the ingredients of a reporting mechanism. It stated:

The establishment of reporting mechanisms includes: (a) providing appropriate information to facilitate the making of complaints; (b) participation in investigations and court proceedings; (c) developing protocols which are appropriate for different circumstances and made widely known to children and the general public; (d) establishing related support services for children and families; and (e) training and providing ongoing support for personnel to receive and advance the information received through reporting systems.<sup>37</sup>

The CRC also recommended the imposition of the obligation to report instances, suspicions or risk of violence, “at a minimum” on “professionals working directly with children.”<sup>38</sup> In recent years the CRC has urged States Parties, including India, to establish mandatory reporting mechanisms to ensure that all cases of child sexual abuse are adequately investigated, in the light of the rampant sexual abuse that goes undocumented due to the fear of social stigma.<sup>39</sup> In 2014, the CRC, in its concluding observations for India, recommended

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independent expert for the United Nations Secretary-General’s Study on Violence against Children, p.21, [https://www.unicef.org/lac/full\\_tex\(3\).pdf](https://www.unicef.org/lac/full_tex(3).pdf); United Nations Committee on the Rights of the Child, General Comment No. 13 (2011) UN Doc CRC/C/GC/13, Para 49 [GC 13].

<sup>34</sup> United Nations Committee on the Rights of the Child, *Violence against Children, Within the Family and in Schools* (2001), Excerpt from UN Doc CRC/C/111, 28<sup>th</sup> Session, 28 September 2001, para 733(e), <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2001.pdf>.

<sup>35</sup> Paulo Sérgio Pinheiro, *World Report on Violence Against Children*, independent expert for the United Nations Secretary-General’s Study on Violence against Children, p.21, [https://www.unicef.org/lac/full\\_tex\(3\).pdf](https://www.unicef.org/lac/full_tex(3).pdf)

<sup>36</sup> *Ibid*, p.85.

<sup>37</sup> United Nations Committee on the Rights of the Child, General Comment No. 13 (2011) UN Doc CRC/C/GC/13, Para 49 [GC 13].

<sup>38</sup> *Ibid*.

<sup>39</sup> United Nations Committee on the Rights of the Child, *Concluding Observations on the Combined Third and Fourth Periodic Report of India* (2014), UN Doc CRC/C/IND/CO/3-4, Paras 49 and 50(d).



the establishment of mechanisms, procedures and guidelines for the mandatory reporting of cases of child sexual abuse and “necessary measures to ensure proper investigation, prosecution and punishment of perpetrators”.<sup>40</sup>

Article 3(1), UNCRC states, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The CRC emphasizes the need to take into consideration the ‘best interests’ of the child as a guiding principle as well as a substantive right “*in all actions concerning children*”.<sup>41</sup> This applies to children who have been subjected to violence;<sup>42</sup> and would, therefore, also apply to the mandatory reporting obligation.<sup>43</sup>

The CRC in General Comment 14 on *The right of the child to have his or her best interests taken as a primary consideration*, (GC 14), lists factors which must be considered to determine best interests of a child, which include the child’s safety and protection; the rights to health, education and non-discrimination; the need to preserve the family environment and to maintain healthy familial relations; and the vulnerability of the child.<sup>44</sup> To assess the best interest of the child, it is necessary to take the child’s wishes and opinions into account, particularly when the child’s capacity to make decisions evolves with the increasing maturity that accompanies adolescence.<sup>45</sup> The child must be heard,<sup>46</sup> and the child’s right to privacy should be protected, as far as possible.<sup>47</sup> It should also be ensured that the child is not exposed to continued risks to his or her physical safety and mental well-being.<sup>48</sup>

### 1.3. Reporting Obligations under Regional Instruments

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2010 (Lanzarote Convention) requires States parties to ensure that the rules of confidentiality of information imposed on professionals who work with children do not constitute an obstacle to their reporting to child protection services; and to encourage “any person who knows about or suspects, in good faith, sexual exploitation or sexual abuse of children to report these facts to the competent services”.<sup>49</sup> The explanatory report of the Lanzarote Convention states that the objective of this provision “is to ensure the protection of children rather than the initiation of a criminal investigation” which is achieved by reporting to child protection services.<sup>50</sup> Reporting to other competent services is not precluded though.

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<sup>40</sup> *Ibid*, para 10.

<sup>41</sup> Art. (3), United Nations Convention on the Rights of the Child [adopted 20 November 1989, entered into force 2 September 1990; GC 14, Para 6; Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8(1) INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY (1994) at 1-25.

<sup>42</sup> General Comment 13, Paras 3(f) and 61.

<sup>43</sup> Rekha Menon, *Mandatory Reporting and the Best Interests of the Child*, Master of Studies Dissertation, University of Oxford (2015) (on file).

<sup>44</sup> United Nations Committee on the Rights of the Child, General Comment No. 14 (2013) UN Doc CRC/C/GC/14 (General Comment 14), paras 41-45, 52-79.

<sup>45</sup> General Comment 14, paras 43 and 44.

<sup>46</sup> General Comment 13, para 49.

<sup>47</sup> United Nations Economic and Social Council (ECOSOC), Resolution 2005/20, Guidelines on Justice in Matters Involving Victims and Witnesses of Crime (2005), at 26.

<sup>48</sup> General Comment 14, paras 73 and 74.

<sup>49</sup> Lanzarote Convention, Article 12, <https://rm.coe.int/168046e1e1>

<sup>50</sup> Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Council of Europe Treaty Series – No.201, para 89, <https://rm.coe.int/16800d3832>

The African Charter on the Rights and Welfare of the Child states that protection must be afforded to all victims of child sexual abuse, like the UNCRC, although it makes no explicit reference to the establishment of mandatory reporting systems.<sup>51</sup> In a similar vein, the American Convention on Human Rights upholds the protection to be afforded to all children by virtue of their position as minors, but does not refer to child sexual abuse in particular or mandatory reporting.<sup>52</sup>

## II. Implications of Mandatory Reporting for Doctors and Counsellors

### 2.1. *Duty to maintain confidentiality versus duty to report*

Although the POCSO Act prescribes mandatory reporting, doctors and clinical psychologists are ethically bound to maintain client privacy and confidentiality. The purpose of this obligation is to ensure that patients are able to communicate openly and without hesitation, enabling the doctor to extend the best possible treatment. Doctors interviewed for this paper mentioned that the legal requirement to mandatorily report an incident of child sexual abuse, regardless of the consent or wishes of the child, flies in the face of their legal and ethical duty to maintain the confidentiality and privacy of their patients.

Clause 2.2 of The Professional Conduct, Etiquette and Ethics for Registered Medical Practitioners, 2002 by the Medical Council of India refers to this obligation. It reads:

Patience and delicacy should characterize the physician. Confidences concerning individual or domestic life entrusted by patients to a physician and defects in the disposition or character of patients observed during medical attendance should never be revealed **unless their revelation is required by the laws of the State** [emphasis added]. Sometimes, however, a physician must determine whether his duty to society requires him to employ knowledge, obtained through confidence as a physician, to protect a healthy person against a communicable disease to which he is about to be exposed. In such instance, the physician should act as he would wish another to act toward one of his own family in like circumstances.

This duty of confidentiality is therefore subject to the laws of the State, which would include the provision of mandatory reporting under the POCSO Act.

The Code of Ethics for Clinical Psychologists, 2012-2013<sup>53</sup> developed by the Indian Association of Clinical Psychologists (IACP), a registered society, emphasizes client privacy and confidentiality and respect for the right to autonomy and justice of clients. The IACP Code allows disclosure of confidential information with appropriate consent of the individual client.<sup>54</sup> The terms ‘privacy’ and ‘confidentiality’ have been explained in the Code as follows:

Privacy refers to individuals’ rights to choose for themselves circumstances, timings and the extent to which information about them and their behavior may be shared with or withheld from others. Confidentiality refers to the ethical responsibilities of

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<sup>51</sup> Art. 16, African Charter on the Rights and Welfare of the Child [adopted 11 July 1990, entered into force 20 November 1999].

<sup>52</sup> Art. 19, American Convention on Human Rights [adopted 22 November 1969, entered into force 18 July 1978].

<sup>53</sup> Available at <http://www.iacp.in>

<sup>54</sup> IACP, Code of Ethics for Clinical Psychologists, 2012-2013, para 4.5.

psychologists to protect clients and research participants from unauthorized disclosure of protected information.<sup>55</sup>

While the IACP Code has been developed by an independent entity and does not have any legal foundation, it guides the practice of clinical psychologists in India and must therefore be considered while assessing the impact of the mandatory reporting obligation under the POCSO Act on counsellors. Moreover, recently, the Supreme Court of India, in *Justice K.S. Puttuswamy & Anr. v. Union of India*,<sup>56</sup> has held that the right to privacy is a fundamental right under Article 21, Constitution of India and observed:

The notion of a reasonable expectation of privacy has elements both of a subjective and objective nature. Privacy at a subjective level is a reflection of those areas where an individual desire to be left alone. On an objective plane, privacy is defined by those constitutional values which shape the content of the protected zone where the individual ought to be left alone.<sup>57</sup>

## 2.2. Dilemmas and Concerns

A plain reading of the provisions of the POCSO Act suggests that health care professionals such as gynaecologists - who often deal with teenagers who come with unwanted pregnancies), counsellors, psychiatrists, and paediatricians will have to bring such cases to the notice of the police, irrespective of whether or not the child and/or the family wish to report the matter. Thus, in Ankita and Vinod's cases referred to earlier, the doctor and the counsellor would be bound to report the (likely) commission of an offence to the concerned authorities, even if doing so would mean going against the child's explicit wishes or considering whether reporting is in their best interest.

While the Act makes it mandatory to report, it does not require the reporter to alert or inform the child/parents of the decision to report. However, all doctors and counsellors interviewed believed that it is important to inform the child and family of this duty. Even in extremely serious matters where confidentiality is required to be breached, most counsellors believe that no action should be taken without the child's knowledge and awareness, or without ensuring that the child understands the reasons for it.<sup>58</sup>

### When should one report?

A primary concern among the medical fraternity is about *when* to report. By mandating health professionals to report the commission of sexual offences, the professionals have been left with no choice but to report all cases irrespective of the age and maturity of the child or the nature of the relationship. The fear that such reporting might jeopardise medical treatment is not baseless. For instance, if Vandana's case is reported to the police, it is highly improbable that she will not return to the hospital for ante-natal care or for a medical termination of pregnancy. Vinod on the other hand, faces the risk of continued sexual abuse by a close family member, thus thwarting this psycho-social development, recovery and

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<sup>55</sup> IACP, Code of Ethics for Clinical Psychologists, 2012-2013, para 2.

<sup>56</sup> WRIT PETITION (CIVIL) NO 494 OF 2012, decided on August 24, 2017 (Supreme Court of India) [Jagdish Singh Khehar, J. Chelameshwar, S.A. Bobde, R.K. Agrawal, Rohinton Fali Nariman, Abhay Mohan Sapre, Dr. D.Y. Chandrachud, Sanjay Kishan Kaul, S. Abdul Nazeer JJ.]

<sup>57</sup> *Ibid*, at p. 246, para 169.

<sup>58</sup> Interview with counsellor; date: 24.11.2016 (3).

compromising his safety, if the matter is not brought to the immediate attention of the authorities and his parents.

The POCSO Act does not provide any exceptions for failure to report. Indeed, except in cases where it is obvious that reasonable time has not been given to report, inaction on the part of these professionals, whatever be the intention, has not been condoned. For instance, in a case in Kerala involving the alleged commission of sexual assault by a priest on a minor girl, the co-accused, an assistant surgeon, was charged with the offence of failing to report under Sections 19 and 21(2) of the POCSO Act. The Kerala High Court observed that the doctor, who was in a position to treat the minor girl and was aware of the commission of an offence, could not be excused for her failure to report, for the burden to report lies, as a matter of practice, more heavily on such professionals than on the general public.<sup>59</sup>

### **Impact on reporting and protection from further abuse**

While the intent of this provision is clear, healthcare professionals have had conflicting reactions to its introduction. Some believed that mandatory reporting is necessary, as other methods have failed to address the issue of sexual abuse adequately. One doctor felt that this provision will not only ensure child sexual abuse is stopped in that specific case, it will also bring the perpetrator to book, and thus prevent abuse of other potential victims by removing him from the environment.<sup>60</sup> One school counsellor pointed out that in India, an obligation to report is necessary to tide over the gulf that exists between rural and urban areas, and to uniformly ensure that no instance of child sexual abuse goes unreported.<sup>61</sup>

While some counsellors believed that the mandatory reporting provision is useful insofar as it helps ensure that the threat of immediate physical abuse will be removed,<sup>62</sup> other counsellors pointed out that in most cases, the abuse would have occurred a long time prior to the reporting of the case, as children do require time to recover their self-esteem and confidence before revealing it to anyone. In such cases, the question of a continuing physical threat does not arise. Moreover, in such cases it becomes harder to procure evidence. Thus, the social and mental trauma that children suffer from having to relive their experience in public results in more harm than good to them.<sup>63</sup>

### **Reporting may result in further victimization**

Others articulated the serious dilemma in the minds of healthcare professionals – both physicians and psychiatrists. On the one hand, their primary duty is to offer therapeutic services aimed at achieving the well-being and healing the patient; on the other, mandatory reporting to the police will trigger a criminal justice proceeding that is likely to result in acquittal due to lack of adequate evidence, lack of support to the victim, or pressure from the accused. Further, it may even result in system induced stigmatization and victimization which makes healing much more challenging. Their obligation as mandated reporters under law supersedes their obligation to maintain doctor-patient confidentiality under the code of ethics applicable to them.<sup>64</sup> Some doctors were very concerned about the absence of a strong child

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<sup>59</sup> *Ajitha v. State of Kerala*, CrI. Rev. Pet. No. 818 of 2016 [Ker HC] decided on 09.08.2016.

<sup>60</sup> Interview with doctor; date: 10.5.2014.

<sup>61</sup> Interview with counsellor; date: 24.11.2016 (3).

<sup>62</sup> Interview with counsellor; date: 29.11.2016; 24.11.2016 (3).

<sup>63</sup> Interview with counsellor; date: 1.12.2016.

<sup>64</sup> David L. Kerns, Donna L. Terman & Carol S. Larson, *The Role of Physicians in Reporting and Evaluating Child Sexual Abuse Cases*, 4(2) THE FUTURE OF CHILDREN (1994), 119-134.

protection system to support the child and the family after the matter is reported. Most counsellors interviewed believe that reporting an offence means that the focus is no longer on the survivor - who ought to be the primary concern - but on the abuser, and that the lack of a supportive atmosphere can only add to the child's discomfort and trauma.<sup>65</sup> Violating the relationship of trust and confidence that the child seeks when approaching a counsellor would only amplify the negative effect of the sexual abuse— another instance of the child's trust being violated— thereby negatively impacting the child's ability to effectively develop and sustain relationships of any kind in the future.<sup>66</sup> It is not surprising, therefore, that some of the psychiatrists interviewed felt that the obligation forced them to violate one of the most fundamental tenets of the medical profession, that is, to do no harm.

A gynaecologist in a leading hospital in Chennai explained that while she understands the intention and the expectation that reporting would go up and this would be a deterrent, the current system would not actually lead to such a result. The reality of the judicial process, she believes, would only result in further trauma to the child, as it is still far from being “child-friendly”.<sup>67</sup> According to her, the only cases where reporting is necessary, even in the absence of the consent of the child and his/her non-offending parent, are cases where the perpetrator is a parent or guardian, and in cases where the injuries are severe. However, since she is legally bound to report, she is forced to comply in all cases in spite of her discomfort.

Another doctor explained that she feels that the current system needs to improve before children and their families feel comfortable to report. Until such time, the mandatory reporting obligation should not be enforced. Several doctors expressed their fear that this provision will prevent children from approaching doctors. One doctor even stated that as a mother, she herself would not want to be forced into a legal case against her will, and believed that each family and child should be given the option to decide what course of action they wish to take.<sup>68</sup>

Others spoke of the insensitive manner in which children are questioned by the police and in Court, often leading to further system induced victimization. One of the doctors explained that the incident of abuse is extremely traumatic and often the case leads to disclosure of identity, which leads to further trauma.<sup>69</sup> All counsellors interviewed were united in their opinion that exposing a survivor of child sexual abuse to the unsensitised and intimidating judicial system is harmful to the welfare of the child.<sup>70</sup>

This dilemma is not peculiar to India and has been experienced in several other countries. As pointed out by Richard Krugman in 1991:

Throughout the United States, many pediatricians are faced with a major dilemma; they are knowledgeable about statutes that require them to report all cases of suspected abuse and neglect and yet, in many communities, they observe that their reports are received but inadequately acted on. The child protection system in the United States is fragmented, underfunded, overworked, episodic and unable to generate any information that would let us know that children are, in fact, being protected. Some physicians have deliberately followed a pattern of civil disobedience

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<sup>65</sup> Interview with counsellor; date: 24.11.2016 (1).

<sup>66</sup> Interview with counsellor; date: 1.12.2016.

<sup>67</sup> Interview with doctor; date: 10.5.2014.

<sup>68</sup> Interview with doctor; date 16.7.2014.

<sup>69</sup> Interview with doctor; date: 17.7.2014.

<sup>70</sup> Interview with counsellor; date: 24.11.2016 (2).

and do not report child abuse because of their belief that above all they should 'do no harm'.<sup>71</sup>

A former supporter of mandatory reporting, Dr. Eli Newberger of Children's Hospital in Boston, explained the shift in perspective when he wrote: "had professionals, like me, known then what we know now, we would never have urged on Congress, federal and state officials broadened concepts of child abuse as the basis for reporting legislation."<sup>72</sup> In his article, *The Helping Hand Strikes Again - Unintended Consequences of Child Abuse Reporting*,<sup>73</sup> he explained that the issues faced in the medical practice go beyond the mere act and consequences of reporting. Mandatory reporting targets the families of poor and ethnic minority. Hospitals significantly underreport abuse of children from white and affluent families. Class and race are the determining factors for the reporting of cases and not the severity of the abuse. Keeping in mind the reality of medical care and social services, he questioned if reporting should be the chosen method to address the problem, which in his opinion has not proved to be an "unqualified success".<sup>74</sup>

While this aspect did not emerge from the interviews, the possibility of biased reporting based on caste and religion by public and private hospitals cannot be ruled out.

### **2.3. Impact on access to medical care and treatment**

In addition to the ethical dilemma expressed by several healthcare professionals, there exists the concern about the impact this provision will have on the child and families, and their comfort in approaching a doctor for medical treatment in a case of child sexual abuse. The fear that the doctors will report the incident and compel them to engage with the criminal justice system, even when they are clear they do not want to file a case is likely to deter them from going to a hospital. This could easily result in unsafe termination of pregnancies or adversely affect the survivor's right to health.

A fallout of reporting is the attention it draws from the media. A doctor in a government hospital in Chennai<sup>75</sup> explained that in the child sexual abuse cases he had been involved in after the introduction of the POCSO Act, the incidents of abuse were reported by the media in a manner that disclosed the identity of the child in spite of clear prohibition under the Act. While his hospital reports all cases as a matter of protocol, he is of the opinion that after informing the police, details of the case reach the media who brazenly publish the story without taking into account the needs/interests of the child and the family. This complete betrayal of trust and confidentiality resulting from approaching a doctor after such a traumatic incident, will only dissuade victims from accessing timely medical care.

### **2.4. Complexities presented by "romantic cases"**

Another issue raised by the doctors during the interviews conducted was the fact that the POCSO Act does not provide for any exceptions in terms of reporting. It does not recognize "consensual" sexual relationships between adolescents or exempt sex within a child marriage

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<sup>71</sup> Richard Krugman, *Child Abuse And Neglect: Critical First Steps In Response To A National Emergency*, 145(5) AMERICAN JOURNAL OF DISEASES OF CHILDREN (1991), at 513-15.

<sup>72</sup> Richard Wexler, *Increasing Mandatory Reporting Of Alleged Child Abuse And Neglect Will Hurt Children*, December 11 2011, NCCPR, <http://www.nccpr.org/reports/mandatoryreporting.pdf>

<sup>73</sup> Eli H. Newsberger, *The Helping Hand Strikes Again: Unintended Consequences of Child Abuse Reporting*, 12(3) JOURNAL OF CLINICAL CHILD & ADOLESCENT PSYCHOLOGY (1983), at 307-311.

<sup>74</sup> *Ibid.*

<sup>75</sup> Interview with doctor; date: 11.7.2014.

from criminal liability. Thus, in Ankita and Vandana's case, their consensual relationship or marriage does not dilute the reporting obligation of the healthcare providers.

One doctor stated that while it is important to have sex education for children and talk to them about the issues associated with unprotected sex, teenagers, particularly those over 16, cannot be treated as criminals if they voluntarily engage in sexual intercourse.<sup>76</sup>

Another doctor explained, often children come to hospitals to get an abortion and would like to move on with their lives. They do not want to get entangled in a legal battle. In cases of "consensual" sex, they are also afraid that if people find out they will force them into a marriage they do not want.<sup>77</sup> One counsellor believed that the best way to approach "consensual" sexual relationships between adolescents would be to involve all stakeholders in an open discussion and to provide support and guidance without passing any moral judgment or triggering the criminal justice process. However, the POCSO Act does not provide space for this approach.<sup>78</sup>

### ***2.5. Impact on healing and recovery***

School counsellors, who seek to build and maintain a relationship of mutual trust with children fear that the breach of confidentiality that will result from reporting to the police will not only negatively impair the child's recovery and growth, but may also cause children who are brave enough to speak up in the first instance to subsequently withdraw. One counsellor believed that the age and the maturity of the child must be taken into account; older adolescents who are capable of understanding the need to breach confidentiality in some cases might not object to, or be deterred from approaching counsellors in the future.

Some of the apprehensions of doctors were confirmed by survivors of sexual abuse who responded to an online questionnaire framed by Arpan, a NGO, to understand the implications of mandatory reporting.<sup>79</sup> While 37.5% of survivors were in favour of mandatory reporting, 62.5% of the victims were not. Those in favour of mandatory reporting stated:

- "The abuser was a family member. So I would have been scared to get them reported. It would be better if the report was done without my consent, as at that age I wasn't capable of making the right decisions and was fear driven. I would not report even if the abuser was someone I didn't have any family relation with, because I was very scared and had no one to support me. If my family understood me and stood by me, I would probably report the abuse."
- "It is mandatory because a child has very little knowledge of right and wrong. And not everyone has the courage to speak up. Mandatory reporting may cause embarrassment to victim in the short run specially if it's a family member but in the longer run it will [be] of benefit."
- "The reason these things need to be reported is to primarily prevent the abuser from abusing another little one and giving them a sore and jilting experience that could haunt and harm them their entire life the way it does me."<sup>80</sup>

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<sup>76</sup> Interview with doctor; date: 16.7.2014.

<sup>77</sup> Interview with doctor; date: 16.7.2014.

<sup>78</sup> Interview with counsellor; date: 24.11.2016 (2) and (3).

<sup>79</sup> Arpan, *Recounting Abuse: Reporting Abuse Reflections from Survivors on Mandatory Reporting*, <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf>, Accessed on 19 December 2016.

<sup>80</sup> *Ibid*, p.6.

Those against mandatory reporting stated the following:

- “I don’t think it should be forced upon the victim to report their abuse. The reason most of them don’t come out is because of poor availability of social support once they do, fear of being stigmatized and possibly losing even existing supportive relations that they might not afford to lose. So unless a better conducive environment is created for victims to confidently pursue justice on their abuse, making it mandatory for them to report it is not helpful.”
- “Child Sexual Abuse involves breaking of trust. To have someone you confided in to do the same without ones consent is worse. It cannot be incumbent upon those providing care to report and violate the foremost principle of confidentiality.”
- “If a child reported abuse to me, my immediate instinctive response would be to look for at least one adult in its proximity a) to whom it may be comfortable talking about it b) who would have an active hand in altering the circumstances under which the child faces abuse (change school bus times, intervene at home or at school, change school if it wants a fresh start (I did), etc.) I would want to report it to the police and thereby make it public only after ascertaining the child had enough of a distance and dissociation from it. If that distance isn’t possible, at the cost of the abuser probably staying at large, I wouldn’t be too easy about reporting charges. What followed would probably scar the child equally if not more than the abuse.”<sup>81</sup>

### III. Implications of Mandatory Reporting on Adolescents

The term “child” is defined under the POCSO Act to mean any person below 18 years of age.<sup>82</sup> The POCSO Act does not define the term “adolescent”, but the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 (CALPRA) as amended in 2016 defines it to include a person who has completed 14 years of age but has not completed 18 years of age.<sup>83</sup> For the purpose of this paper, the term adolescent will be as defined in the CALPRA.

There is no denying that teenagers in India are sexually active. As per the National Family Health Survey (NFHS-4), 16% women age 15-19 years were already mothers or pregnant at the time of the survey and 47.4% women age 20-24 years were married before they turned 18.<sup>84</sup> 11% women between 25-49 had sex before 15 and 39% before age 18, while 1% men age 25-49 first had sexual intercourse before age 15 and 7% had sexual intercourse before 18.<sup>85</sup>

Under the POCSO Act, any sexual contact or interaction with a child is an offence and consent of the child is irrelevant. While the objective behind the age of consent is to protect children from sexual abuse and exploitation, the inevitable consequence is the criminalization of any and all form of sexual activity among children, who are legally defined as persons below the age of 18 years. By doing so, has the POCSO Act reduced children to being objects of protection? Has it overlooked their developmental needs, evolving capacities, and right to privacy?

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<sup>81</sup> *Ibid*, pp. 7-8.

<sup>82</sup> POCSO Act, Section 2(d).

<sup>83</sup> The Child Labour (Prohibition and Regulation) Act, 1986 as amended in 2016, Section 2(i).

<sup>84</sup> International Institute for Population Sciences, *National Family Health Survey -4 (2015-16), India Fact Sheet*, p.2, <http://rchiips.org/NFHS/pdf/NFHS4/India.pdf>

<sup>85</sup> *Ibid*, p.158.



The CRC explains the adolescence period and the challenges it poses:

Adolescence is a period characterized by rapid physical, cognitive and social changes, including sexual and reproductive maturation; the gradual building up of the capacity to assume adult behaviours and roles involving new responsibilities requiring new knowledge and skills. While adolescents are in general a healthy population group, adolescence also poses new challenges to health and development owing to their relative vulnerability and pressure from society, including peers, to adopt risky health behaviour. These challenges include developing an individual identity and dealing with one's sexuality. The dynamic transition period to adulthood is also generally a period of positive changes, prompted by the significant capacity of adolescents to learn rapidly, to experience new and diverse situations, to develop and use critical thinking, to familiarize themselves with freedom, to be creative and to socialize.<sup>86</sup>

The late Professor Alan Flisher, a child psychiatrist at the University of Cape Town, and Anik Gevers, a clinical psychologist specialising in child mental health at the University of Cape Town, provided an expert report to the Constitutional Court of South Africa on adolescent sexual behaviour in *Teddy Bear Clinic v. Minister of Justice and Constitutional Development*.<sup>87</sup> The issue before the court was the constitutionality of subjecting children to criminal sanctions to deter early sexual intimacy and combat the associated risks. The findings of the report were considered by the Constitutional Court and quoted:

During adolescence children ordinarily engage in some form of sexual activity, ranging from kissing to masturbation to intercourse. Exploration of at least some of these activities is “potentially healthy if conducted in ways for which the individual is emotionally and physically ready and willing.” What is of utmost importance is ensuring that children are appropriately supported by the adults in their lives, to enable them to make healthy choices. This is particularly so given the awkwardness and embarrassment children often feel when discussing sexual relations with adults. **If children are not made to feel that there are safe environments within which they can discuss their sexual experiences, they will be stripped of the benefit of guidance at a sensitive and developmental stage of their lives. Such guidance is particularly important given the “high rates of negative experiences and consequences of sexual behaviour” unearthed by the expert report.**

**“Sexual experiences during adolescence, in the context of some form of intimate relationship, are “[n]ot only . . . developmentally significant, they are also developmentally normative. (emphasis added)**

The Constitutional Court concluded that the criminalisation of sexual conduct between consenting adolescents will adversely impact their development, trigger mixed feelings of guilt, shame, anger, regret and embarrassment and negative attitudes to sexual relationships, make them less likely to seek help about problems relating to their sexuality, more likely to engage in risky behaviour, and will lead to isolation.<sup>88</sup>

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<sup>86</sup> General Comment No. 4 (2003) on adolescent health and development in the context of the Convention, Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 41 (A/59/41), annex X, para. 2 [GC 4].

<sup>87</sup> CCT 12/13, [2013] ZACC 35.

<sup>88</sup> *Ibid.*

A narrow criminal lens renders all children who engage in sexual activity as children in conflict with the law. It labels every normative sexual expression as a sexual offence, disregards the evolving sexual capacity of children, and deprives adolescents' protection of the law for engaging in normal sexual exploration.

During the drafting of the POCSO Bill, the NCPCR had proposed that consensual non-penetrative sexual act "between two children who are both over 12 years of age and are either of the same age or whose ages are within 2 years of each other" and consensual penetrative sexual act "between two persons who are both over 14 years of age and are either of the same age or whose ages are within 3 years of each other" should be decriminalized.<sup>89</sup> Further, it proposed:

Any sexual act with a Child aged between 16 – 18 years is unlawful when, a person engages in a sexual act with that Child in any of the following circumstances:

Firstly: With or without the Child's consent when the sexual act is accompanied or preceded by express or implied force or violence on the Child or on any other person in whom the Child is interested, which overpowers or intimidates or subdues that Child;

Secondly: With or without the Child's consent when the sexual act is accompanied or preceded by coercion which is enough to make a Child submit to the sexual act in the circumstances of the case;

Thirdly With or without the Child's consent when the sexual act is accompanied or preceded by threat of serious harm or injury to the Child or to any other person in whom the Child is interested, or conduct instilling in the Child a reasonable fear of such harm, violence or injury, and the said threat or conduct is enough to make a Child submit to the sexual act in the circumstances of the case;

Fourthly With or without the Child's consent when that person impersonates another person to engage in the sexual act, and knows, or has reason to know, that the Child is mistaken about that person's identity;

Fifthly With or without the Child's consent when the Child is made to engage in the sexual act mistaking it to be something else and that person knows or has reason to know that the Child is so mistaken;

Sixthly With or without the Child's consent when, by reason of intoxication or the administration by that person personally or through another of any stupefying or unwholesome substance, the Child is unable to understand the nature and consequences of the sexual act.

Seventhly With or without the Child's consent when that person has taken undue advantage of the mental or physical incapacity of the Child to understand the nature and consequences of the sexual act or to voluntarily participate in it or to resist it.

Eighthly When the Child is sleeping or unconscious;

Ninthly Against the Child's will or without the Child's consent to engage in or continue with that sexual act.

Explanation:

(a) The fact that a Child did not say or do anything to indicate consent to a sexual act is enough to show that the act took place without that Child's consent.

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<sup>89</sup> Exception 1, Clause 3A, *National Commission for Protection of Child Rights (NCPCR)*, Protection of Children from Sexual Offences Bill, 2010: "(i) Any consensual non-penetrative sexual act penalized by this chapter (except for sections 23, 25, 27 and 31) is not an offence when engaged in between two children who are both over 12 years of age and are either of the same age or whose ages are within 2 years of each other."

- (b) A Child is not to be regarded as having consented to a sexual act only because–
- (i) the Child did not protest or physically resist; or
  - (ii) the Child did not sustain any physical injury; or
  - (iii) on that or an earlier occasion the Child had consensually engaged in or consented to engage in a sexual act (whether or not of the same type) with that or another person.

These provisions did not, however, make their way into the POCSO Act. It adopted a protectionist approach and failed to recognize the autonomy and evolving capacities of children as well as the need to ensure that children or adolescents engaging in consensual sexual exploration are not treated as children in conflict with law.<sup>90</sup> Hence, even a consensual sexual relationship among children is termed as child sexual abuse, rendering both parties involved vulnerable to legal prosecution. In practice, however, prosecution mostly lies against the male party involved in ‘romantic relationships’.

With the passage of the Juvenile Justice (Care and protection of Children) Act 2015, adolescents in the age group of 16 to 18 years are considered as *deliberative, intentional adults*<sup>91</sup> and can be tried as adults when they allegedly commit heinous crimes but are deemed incapable when it comes to making a sexual choice.

Should Ankita’s case be handled differently from 12 year-old Vinod’s? Most doctors believed that children over 12 or 14 years should be treated differently under the law. In addition to the age-gap, doctors expressed the need for carving out exceptions to the law to provide for realities like consensual sex amongst teenagers.<sup>92</sup> All counsellors interviewed were in agreement that a “consensual” adolescent relationship and an exploration of sexuality, a normal facet of adolescent development, cannot be contained by any Act, and the only reasonable step would be to provide adolescents with guidance and support when dealing with consequences such as unwanted pregnancies. One counsellor pointed out that merely directing survivors of abuse to adult authorities is counter-productive when those authorities are not equipped to handle nuances of sexuality and sexual abuse; it is essential to target society’s perception of abuse and to refine the law to ensure that procedures are more child-sensitive in practice.<sup>93</sup>

This begs the question whether the POCSO Act should be amended to consider normative sexual behaviour among adolescents.

## **IV. Implications of Mandatory Reporting on the Rights of Children**

### **4.1. Right to health**

Article 21 of the Indian Constitution provides that “No person shall be deprived of his life or liberty except according to procedures established by law”. The Directive Principle contained in Article 47 further imposes a duty on the State to raise the nutrition level and the standard of living, and to improve public health. The Supreme Court in various decisions has

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<sup>90</sup> Swagata Raha, *Love and Sex in the Time of POCSO Act, 2012*, <http://www.tarshi.net/blog/voices-love-and-sex-in-the-time-of-the-pocso-act-2012/>

<sup>91</sup> Joseph.J.Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279 (2010)

<sup>92</sup> Interview with doctor; date: 16.7.2014.

<sup>93</sup> Interview with counsellor; date: 1.12.2016.

interpreted the right to health as a part of the right to life.<sup>94</sup> The right to health is broad and comprehensive, which not only implies a life without disease, but also includes many subsets such as the right to procreate, right to bodily integrity, right to sexuality, right to nutrition, right to safe drinking water, etc.

Children are entitled to the same fundamental rights as adults, for they are not just mere extension of their parents but are right-holders too. The National Policy for Children, 2013 affirms this.<sup>95</sup> The State is obligated to provide conditions in which children grow in a healthy manner with freedom and dignity. The Policy further elaborates that “The right to life, survival, health and nutrition is an inalienable right of every child and will receive the highest priority”. Thus it is the duty of the State to provide an enabling framework for children to access information, systems, and services in order to achieve the highest standards of health, both in terms of physical and mental health.

Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) provides "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while Article 12(2) provides the steps to be taken by the State parties for the full realization of this right. The Committee on Economic, Social and Cultural Rights has emphasised that:

The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, **including sexual and reproductive freedom** [emphasis added], and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.<sup>96</sup> (emphasis supplied)

The Committee on Economic, Social and Cultural Rights has elaborated on the obligation of States towards adolescents as follows:

States parties should provide a safe and supportive environment for adolescents that ensures the opportunity to participate in decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-sensitive health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.<sup>97</sup>

The UNCRC also recognises the right of the child to enjoy the highest attainable standards of health and requires State Parties to take steps to ensure that no child is deprived of access to health care services.<sup>98</sup> The UNCRC specifically requires that State parties ban all traditional

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<sup>94</sup> *State of Punjab v. Mohinder Singh Chawla*, (1997) 2 SCC 83; *Mahendra Partap Singh v. State of Orissa*, AIR 1997 Ori 37; *Paschim Banga Khet Mazdoor Samiy v. State of West Bengal*, AIR 1996 SC 2426.

<sup>95</sup> National Policy for Children (2013), <http://childlineindia.org.in/pdf/The-National-Policy-for-Children-2013.pdf>

<sup>96</sup> United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) UN Doc E/C.12/2000/4, para 8.

<sup>97</sup> *Ibid*, para 23.

<sup>98</sup> Art. 24, UNCRC.

practices which are prejudicial to the health of children. In its General Comment on *Adolescent health and development in the context of the Convention on the Rights of the Child*,<sup>99</sup> the CRC underlined the risk that adolescents face of contracting STDs, including HIV/AIDS and the need for States to:

... develop effective prevention programmes, including **measures aimed at changing cultural views about adolescents' need for contraception and STD prevention and addressing cultural and other taboos surrounding adolescent sexuality.**<sup>100</sup>  
(emphasis added)

It also urged States to enact laws to “combat practices that either increase adolescents’ risk of infection or **contribute to the marginalization of adolescents who are already infected with STDs, including HIV**” and “to take measures to remove all barriers hindering the access of adolescents to information, preventive measures such as condoms, and care.”<sup>101</sup>

A key determinant of the health of children is whether or not they live in a “safe and supportive environment.”<sup>102</sup> According to the CRC, constructing such an environment requires “addressing attitudes and actions of both the immediate environment of the adolescent - family, peers, schools and services - as well as the wider environment created by, inter alia, community and religious leaders, the media, national and local policies and legislation.”<sup>103</sup> The Committee recommended that States develop legislation, policies, and programmes to promote the health and development of adolescents by “providing adequate information and parental support to facilitate the development of a relationship of trust and confidence in which issues regarding, for example, sexuality and sexual behaviour and risky lifestyles can be openly discussed and acceptable solutions found that respect the adolescent’s rights (Art. 27 (3))”<sup>104</sup>.

Recognizing the role of schools in promoting health and development, the CRC has urged State Parties to “initiate and support measures, attitudes and activities that promote healthy behaviour by including relevant topics in school curricula.”<sup>105</sup> The Committee emphasized the need for the family to recognize adolescents as “active right holders who have the capacity to become full and responsible citizens, given the proper guidance and direction.”<sup>106</sup>

However, strict implementation of the mandatory reporting obligation is likely to prevent sexually active adolescents from reaching out to doctors for advice or intervention. A study revealed that around 20-30% of all clients seeking abortion are unmarried (young) women and adolescent girls, who constitute a highly vulnerable group.<sup>107</sup> In one study, 24% of 500 unmarried adolescent abortion seekers reported that their parents had taken punitive

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<sup>99</sup> Committee on the Rights of the Child, General Comment No. 4 (2003) on adolescent health and development in the context of the Convention, Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 41 (A/59/41). (CRC General Comment 4)

<sup>100</sup> CRC General Comment 4, para 30.

<sup>101</sup> CRC General Comment 4, para 30.

<sup>102</sup> CRC General Comment 4, Para 14.

<sup>103</sup> *Ibid.*

<sup>104</sup> CRC General Comment 4, Para 16.

<sup>105</sup> CRC General Comment 4, Para 17.

<sup>106</sup> CRC General Comment 4, Para 7.

<sup>107</sup> Shveta Kalyanwala, A.J. Francis Xavier, Shireen Jejeebhoy & Rajesh Kumar, *Abortion Experiences of Unmarried Young Women In India: Evidence from a Facility-Based Study*, INTERNATIONAL PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH (2010) at 62-71.

measures, such as beating or starving them for prolonged periods.<sup>108</sup> Approximately 16.7% of women seeking such abortions are victims of sexual abuse.<sup>109</sup> Around 56% of abortions are unsafe, and the fatalities caused due to these abortions account for almost 8% of all maternal deaths in India.<sup>110</sup> Lack of access to safe and legal abortions often causes many young girls to lie and distort their actual age in order to seek termination of pregnancy in some form or another. In cases where there is no other resort, contraceptive pills are taken with no thought as to their effect.<sup>111</sup> Considering the stigma surrounding teenage pregnancy and sexuality, the legal framework should not discourage access to medical services and counselling or place them at further risk.

#### **4.2. Right to Information**

According to Article 17, UNCRC, a child has the right to “access information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health”. The CRC was of the view that this right is “crucial” for adolescents especially if the State intends to address “health-related situations...such as family planning...protection from harmful traditional practices, including early marriages...”.<sup>112</sup> To facilitate this right, States must provide adolescents with:

access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs). In addition, States parties should ensure that they have access to appropriate information, regardless of their marital status and whether their parents or guardians consent.<sup>113</sup>

The CRC has urged State parties to:

- Develop and implement programmes that provide access to sexual and reproductive health services, including family planning, contraception, safe abortion services where abortion is not against the law, and adequate and comprehensive obstetric care and counselling;
- Foster positive and supportive attitudes towards adolescent parenthood for their mothers and fathers; and
- Develop policies that will allow adolescent mothers to continue their education.<sup>114</sup>

This is particularly vital in the case of adolescent girls, who must have access to information regarding the harms that early pregnancy due to early marriage can cause. Moreover, those who become pregnant must have access to healthcare services that are sensitive to their rights

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> Meena Menon, *Unsafe Abortions Killing a Woman Every Two Hours*, THE HINDU, May 6 2013, <http://www.thehindu.com/news/national/unsafe-abortions-killing-a-woman-every-two-hours/article4686897.ece>

<sup>111</sup> Tarini Peshawarial, *Docs Worried About Rising Teen Pregnancy, Self-Abortion In Gurgaon*, THE TIMES OF INDIA, 24 July 2013, <http://timesofindia.indiatimes.com/life-style/people/Docs-worried-about-rising-teen-pregnancy-self-abortion-in-Gurgaon/articleshow/21274442.cms>

<sup>112</sup> CRC General Comment 4, Para 10.

<sup>113</sup> CRC General Comment 4, Para 28.

<sup>114</sup> CRC General Comment 4, Para 31.

and particular needs. The maternal mortality ratio (MMR) in India, estimated to be at around 174 out of 1,00,000 live births in 2015, remains high amongst adolescent girls.<sup>115</sup> The MDG goal of achieving an MMR of 109 out of 1,00,000 live births by 2015 has not been met, demonstrating that India is not yet on the path to achieving the Sustainable Development Goal (SDG) of achieving an MMR of 70 out of 1,00,000 live births by 2030.<sup>116</sup> India must take measures to reduce maternal morbidity rates (particularly those caused by early pregnancy and unsafe abortion practices) through increased information, and support to adolescents.

With mandatory reporting under the POCSO Act, the focus is primarily on the bringing the offender to book. The POCSO Act is essentially a penal legislation and its scope does not extend to addressing information and safe access to health services for children and families who do not wish to report to the police.

#### **4.3. Right to be heard**

According to the CRC:

States parties need to ensure that adolescents are given a genuine chance to express their views freely on all matters affecting them, especially within the family, in school, and in their communities. In order for adolescents to be able safely and properly to exercise this right, public authorities, parents and other adults working with or for children need to create an environment based on trust, information sharing, the capacity to listen and sound guidance that is conducive for adolescents' participating equally including in decision-making processes.<sup>117</sup>

Application of this right and the best interest principle would require that the child's wishes on reporting sexual abuse and the possible threats to the child's well-being caused by triggering the criminal justice system be considered by the person reporting the matter, while of course taking into account the age and maturity of the said child.

#### **4.4. Right to privacy**

With respect to privacy, the CRC has stated:

Health-care providers have an obligation to keep confidential medical information concerning adolescents, bearing in mind the basic principles of the Convention. Such information may only be disclosed with the consent of the adolescent, or in the same situations applying to the violation of an adult's confidentiality. Adolescents deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services, including treatment.<sup>118</sup>

Adherence to this right would require medical practitioners and counsellors to acquire the adolescent's consent before reporting to the police. It would also require them to respect a mature adolescent's right to receive counselling and treatment in private.

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<sup>115</sup> WHO, UNICEF, UNFPA, World Bank Group, and the United Nations Population Division, *Trends in Maternal Mortality: 1990-2015* (2015).

<sup>116</sup> United Nations Development Programme, *The UN Millennium Development Goals Report 2015*, [http://www.un.org/millenniumgoals/2015\\_MDG\\_Report/pdf/MDG%202015%20rev%20\(July%201\).pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf)

<sup>117</sup> CRC General Comment 4, Para 8.

<sup>118</sup> CRC General Comment 4, Para 11.

## V. Mandatory Reporting in other Jurisdictions

Mandatory reporting of child abuse or child sexual abuse can be found in the penal statutes of most countries. Laws of several countries impose criminal sanction (or, in some cases, civil penalties) for the failure to report an offence.

In most States in Australia and United States, the duty to report has been primarily imposed on professionals such as doctors, counsellors and teachers who work closely with children or are likely to come in contact with them.<sup>119</sup> According to an analysis of the laws in the United States, Australia, and Canada, “in all three countries, the laws are most concerned with abuse perpetrated by the child’s parent or adult caregiver” or if they are unwilling or unable to protect the child.<sup>120</sup>

The United States introduced mandatory reporting in 1963-67, largely as a response to the increasing prevalence of the ‘battered-child syndrome’.<sup>121</sup> While the obligation was initially restricted to medical professions and to reporting of physical abuse, the federal Child Abuse and Treatment Act, 1974 (CAPTA) expanded it by requiring states to add more professional groups and included sexual abuse, emotional or psychological abuse, and neglect.<sup>122</sup> The CAPTA as amended by the CAPTA Reauthorization Act of 2010, defined child abuse and neglect as, at minimum:<sup>123</sup>

Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation"; or

An act or failure to act which presents an imminent risk of serious harm."

48 States in the United States legally require professionals such as social workers, teachers, principals, school personnel, health-care workers, counsellors, therapists, child care providers, medical examiners, and law enforcement officials to report child maltreatment if they “suspect” or have “reason to believe” that a child has been abused or neglected.<sup>124</sup> Child Abuse Identification and Reporting Guidelines issued by the California Department of Education instruct that persons employed into positions mentioned in the list of mandated reporters should be provided a statement informing them of their legal obligation.<sup>125</sup> It further states, “It is not the job of the mandated reporter to determine whether the allegations are valid. If child abuse or neglect is reasonably suspected or if a pupil shares information with a mandated reporter leading him/her to believe abuse or neglect has taken place, the report must be made.”<sup>126</sup> It also clarifies that the legal obligation is not discharged by reporting to a supervisor or to the school and to make a report, the employee should contact the local law enforcement agency or county child welfare agency.<sup>127</sup>

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<sup>119</sup> Benjamin Peter Mathews & Maureen C. Kenny, *Mandatory Reporting Legislation In The USA, Canada And Australia: A Cross-Jurisdictional Review Of Key Features, Differences And Issues*, 13(1) CHILD MALTREATMENT (2008), at 50-63 available at <http://eprints.qut.edu.au>

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> “Definitions of Child Abuse and Neglect in Federal Law”, <https://www.childwelfare.gov/topics/can/defining/federal/>

<sup>124</sup> Child Welfare Information Gateway, “Mandatory Reporters of Child Abuse and Neglect – State Statutes Current through August 2015”, p.2 <https://www.childwelfare.gov/pubPDFs/manda.pdf>

<sup>125</sup> California Department of Education, Child Abuse Identification & Reporting Guidelines”, <https://www.cde.ca.gov/ls/ss/ap/childabusereportingguide.asp>

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*



Australia lists certain classes of persons who are obligated to report incidents of sexual abuse to the State Department, which range from a limited number of professionals (in Queensland), to a larger list of professionals (Australian Capital Territory (ACT), New South Wales, Western Australia, Tasmania, Victoria and South Australia). The Northern Territories impose this obligation on every adult.<sup>128</sup> The list of professionals includes, but is not limited to, doctors, teachers, social workers, psychologists, police officers, and those who occupy positions of authority with respect to children, such as heads of institutions.<sup>129</sup> From 1 July 2017, in Queensland, early childhood education and care (ECEC) professionals such as staff from family day care, kindergarten, limited-hours care, long day care and after-school hours care are under an obligation to report.<sup>130</sup> It is necessary in all states to report cases of abuse that might harm the child's growth and development. South Australia, Queensland and the ACT impose penalties for the failure to report, which take the form of a heavy fine (to the maximum extent of \$2500), or imprisonment (up to six months) or penalty units.<sup>131</sup> There are no consequences for the failure to report in the other five states. Reporters bound by these laws who are faced with a child exhibiting sufficient symptoms of abuse or injury will have to report regardless of the suspected identity of the perpetrator.<sup>132</sup>

In Canada, all persons are required to report, but the penalty for failure to report is only imposed on professionals who fail to report. For instance, under Section 125(1) of Ontario's Child, Youth and Family Services Act, 2017:

“if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following, the person shall immediately report the suspicion and the information on which it is based to a society:

...

3. The child has been sexually abused or sexually exploited by the person having charge of the child or by another person where the person having charge of the child knows or should know of the possibility of sexual abuse or sexual exploitation and fails to protect the child.

4. There is a risk that the child is likely to be sexually abused or sexually exploited as described in paragraph 3.

The children's aid society, which are legally mandated to investigate allegations that children are in need of protection and protect children where necessary,<sup>133</sup> will then assess and verify the information and the child protection worker will then take necessary action to protect the child.<sup>134</sup> Failure to report on the part of a health care professional, teacher, school principal, social worker, family counsellor, employee of a child care centre, religious official, lawyer,

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<sup>128</sup> *Mandatory Reporting of Child Abuse and Neglect*, Australian Institute of Family Studies, July 2013, <http://www.aifs.gov.au/cfca/pubs/factsheets/a141787/>

<sup>129</sup> *Mandatory Reporting of Child Abuse and Neglect*, Australian Institute of Family Studies, July 2013, <http://www.aifs.gov.au/cfca/pubs/factsheets/a141787/>

<sup>130</sup> Queensland Government, Department of Communities, Child Safety and Disability Services, Mandatory Reporting, <https://www.communities.qld.gov.au/childsafety/protecting-children/about-child-protection/mandatory-reporting>

<sup>131</sup> *Supra* n.129.

<sup>132</sup> *Supra* n.119.

<sup>133</sup> Ontario's Child, Youth and Family Services Act, 2017, Section 35(1).

<sup>134</sup> Ontario Ministry of Children and Youth Services, "Reporting Child Abuse and Neglect", <http://www.children.gov.on.ca/htdocs/English/childrensaidthereportingabuse/index.aspx>

service provider and an employee of a service provider, etc., would attract a fine of not more than \$5000.<sup>135</sup>

In view of the Lanzarote Convention, most European countries impose a duty to report instances of abuse, although criminal sanctions upon a failure to report are not widespread. For instance, Denmark<sup>136</sup> and the Netherlands<sup>137</sup> provide for a general social responsibility upon “*any person*” to report suspicious and potentially abusive activities, although the primary duty to report lies upon those who hold public office and those who work closely with children. There are, however, no criminal consequences for a failure to report. Similar provisions exist in Finland,<sup>138</sup> Norway,<sup>139</sup> and Sweden,<sup>140</sup> all of which require the reporting of an offence by medical practitioners, social welfare workers, heads of institutions, and others who are in a position to exert influence over children without imposing any penalty in the case of failure. The laws in countries such as France<sup>141</sup> and Ireland,<sup>142</sup> on the other hand, cast a wider obligation to report upon “*any person*” who is aware of, or has reason to suspect, the commission of a sexual offence. Failure to report is a punishable offence, with the penalty generally being imprisonment up to three years and/or a fine.

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<sup>135</sup> Ontario’s Child, Youth and Family Services Act, 2017, Sections 125(5), (6), and (9), available at [https://www.ontario.ca/laws/statute/17c14?\\_ga=2.108611201.2089152923.1528711518-781672546.1528711516#BK169](https://www.ontario.ca/laws/statute/17c14?_ga=2.108611201.2089152923.1528711518-781672546.1528711516#BK169)

<sup>136</sup> Article 153(1), Consolidation Act on Social Services: “*Public services or holding public offices shall notify the municipal authorities if, in the exercise of their duties, they learn or become aware of any circumstances giving rise to the presumption that a child or young person under the age of 18 has been exposed to abuse.*”

<sup>137</sup> Section 21, Youth Care Act, 2005.

<sup>138</sup> Section 25, Child Welfare Act: “*Persons employed by, or positions of trust for, social and health care services, education services, youth services, the police service or a parish or religious community, and persons employed by some other social services or health care services provider, education or training provider, or unit engaged in asylum seeker reception, in emergency centre activities or in morning and evening activities for school children, and health care professionals, have a duty to notify the municipal body responsible for social services without delay and notwithstanding confidentiality regulations if, in the course of their work, they discover that there is a child for whom it is necessary to investigate the need for child welfare on account of the child’s need for care, circumstances endangering the child’s development, or the child’s behaviour.*”

<sup>139</sup> Section 6-4, Child Welfare Act: “*Notwithstanding the duty of confidentiality, Public authorities shall of their own initiative provide information to the municipal child welfare service when there is reason to believe that a child is being mistreated at home or is subjected to other forms of serious neglect, or when a child has shown persistent, serious behavioural problems for the central government, county municipality county municipality or municipality are considered to be on a par with public authorities. Public authorities are also obligated to disclose such information when ordered to do so by bodies that are responsible for implementing the Act. By order of these bodies public authorities are also obligated, in connection with cases to be decided by the county social welfare board pursuant to section 4-19, 4-20 and 4-21, to disclose any information necessary to be able to assess whether moving a child back to his or her parents, or his or her access to them, might give rise to a situation for or risk to the child as mentioned in sections 4-10, 4-11 or 4-12.*”

<sup>140</sup> Section 71, Social Service Act, 1980: “*Whosoever becomes apprised of anything which can imply that the social welfare committee needs to intervene for the protection of a minor should report the matter to the committee. It is the duty of authorities whose activities relate to children and young persons, as well as other authorities in health and medical care and social services, to notify the social welfare committee immediately if, in the course of their activities, anything comes to their knowledge which may imply that the social welfare committee needs to intervene for the protection of a minor. This also applies to the employees of such authorities. The same duty of notification is also incumbent on persons active in professional private activity concerning children and young persons or other professional private activity in health and medical care or in the context of social services. Concerning family counseling, the provisions of subsection three apply instead. It is the duty of persons active in family counseling to notify the social welfare committee immediately if in the course of their activity it comes to their knowledge that a minor is being sexually exploited or maltreated in the home. It is the duty of authorities, officials and practitioners referred to in subsection two to furnish the social welfare committee with all information which can be material to an investigation of a minor’s need of protection.*”

<sup>141</sup> Article 434-3, French Penal Code.

<sup>142</sup> Protections For Persons Reporting Child Abuse Act, 1998.

The United Kingdom, in its Common Assessment Framework for Children and Young People<sup>143</sup> prescribes an entirely voluntary reporting mechanism, which relies upon inter-agency protocols such as the Open Home Foundation Protocol for the reporting of child abuse, Youth For Christ procedures for dealing with sexual or physical abuse, Barnardo's policy, and the Children's Health Child and Adolescent Mental Health Service (CAMHS) Board Policy.<sup>144</sup> There exists no statutory obligation on the part of any person to report an offence, for it is expected that professionals who work with children should, in the ordinary course of their duty, work with each other and facilitate the exchange of information.<sup>145</sup> This system works in much the same manner as statutorily mandated reporting does, although it does not consider a failure to report to be a punishable offence.<sup>146</sup>

## VI. Conclusion

The POCSO Act imposes a blanket obligation on all persons, including doctors and counsellors to report cases of child sexual abuse and suspected child sexual abuse. It does not specify situations in which a report should be filed, the time-frame within which it should be filed, or the nature of the apprehension. The POCSO Act does not provide any room to consider the differences in Ankita, Vinod, and Vandana's situation, their age, vulnerability, their evolving capacity, their views, or the implications of reporting to the police on their health, education, autonomy, safety, and well-being. The assumption in the POCSO Act is that mandatory reporting of sexual offences against children to the police is in the best interest of all child victims.

At a minimum, it is important that mandatory reporting not interfere with the access to health care services and information about sexuality and reproduction by children, particularly adolescents. Importantly, it should also not compromise the best interest principle, right to privacy, right to information, and the right to be heard.

Indira Jaising, Former Additional Solicitor General, suggested the following amendments to the provision on mandatory reporting in the POCSO Act with a view to recognise views of children or their guardian:

- i. Provided that except in the cases of life threatening injury, communication of informed refusal by the child/woman/guardian shall be sufficient compliance with this section;

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<sup>143</sup> *Child Abuse: What Are The Statistics Behind Mandatory Reporting?*, September 2013, [https://fullfact.org/factchecks/mandatory\\_reporting\\_child\\_abuse\\_daniel\\_pelka-29203](https://fullfact.org/factchecks/mandatory_reporting_child_abuse_daniel_pelka-29203), Accessed on 19 December 2016.

<sup>144</sup> *Breaking the Cycle- Inter Agency Protocols for Child Abuse Management*, NEW ZEALAND CHILDREN AND YOUNG PERSONS SERVICE, 1996, <http://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0CDUQFjAC&url=http%3A%2F%2Fwww.mmsi.org.nz%2Fadvocate%2Ftoolkit-downloads%2F3%2F101-1-breaking-the-cycle-interagency-protocols-for-child-abuse-management%2Fdownload.html&ei=yxFzU7jKIIe1uAT-yoKADg&usg=AFQjCNESNFhwz1z7vvWtMgH-KhgbXKi6Qw&bvm=bv.66699033,d.c2E>, Accessed on 13 May 2014.

<sup>145</sup> Isla Wallace & Lisa Bunting, *An Examination Of Local, National, International Arrangements For The Mandatory Reporting Of Child Abuse: The Implications For Northern Ireland*, August 2007, <https://www.nspcc.org.uk/globalassets/documents/research-reports/mandatory-reporting-research-ni.pdf>, Accessed on 19 December 2014.

<sup>146</sup> Isla Wallace & Lisa Bunting, *An Examination of local, national, international arrangements for the mandatory reporting of child abuse: The implications for Northern Ireland*, <https://www.nspcc.org.uk/globalassets/documents/research-reports/mandatory-reporting-research-ni.pdf>, Accessed on 19 December 2016.

ii. Provided further that in the case of a child below 18 years of age, and where the offender is a guardian, the child and the parents must be immediately referred to the nearest Child Welfare Institution for mandatory counselling.<sup>147</sup>

Mandatory reporting works in two ways - as a protection measure to prevent further abuse, but also a means in the hands of families, society, and State to police children, control their sexuality and choices, and curb their autonomy. It highlights the tension between protection and autonomy, especially in the case of adolescents who claim to be in a consensual relationship with another adolescent or adult. Remedies should certainly be available against sexual violence of any kind, including within intimate relationships. However, the POCSO Act disregard normative sexual exploration during adolescence, and ends up criminalizing and stigmatizing adolescents. It also places doctors who are approached by adolescents for contraception or termination of pregnancy in a bind.

By mandating that information be reported to the police, children and their families are left with no choice but to participate in the criminal justice system. Studies on the working of Special Courts under the POCSO Act, 2012 in five States, by the Centre for Child and the Law, NLSIU have revealed that the child-friendly procedures are poorly implemented and support systems are weak or largely absent. There is a need to create a protective environment for children and ensure consistent availability of support. In keeping with international standards, the focus should be on creating systems that encourage reporting and safety, as well as the best interest of children and not just punishing people for their failure to report.

Mandatory reporting under the POCSO Act leaves us with some questions that need to be discussed to effectively address low reporting as well as appropriate interventions in sexual offences against children:

- Is the mandatory reporting system in India predominantly punitive or help-oriented?
- What should be the components of a help-oriented system?
- What would a reporting system that is respectful of children's best interests and right to be heard look like?
- What measures should be taken to ensure that reporting mechanisms are safe, confidential, and accessible?
- What steps should be taken to ensure that children, particularly adolescents receive access to information and reproductive healthcare services with due regard for their privacy?
- Who should assess whether or not it is in the best interest of the child for the matter to be reported to the police and how?
- Should the mandatory reporting obligation be placed on all or only those professionals in contact with children, or both?
- Should there be a limitation clause? For instance, if abuse is mentioned a year after it occurred or if the person is no longer a child, should it be reported?
- Can the report be sent to an authority other than the police, which could assess the needs of the child and then decide whether the matter should be reported to the police? Who could this authority be?
- What structures and services need to be in place to support the child after abuse is reported?

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<sup>147</sup> Opinion of Addl. Solicitor General, Ms. Indira Jaising to the MoHFW on Mandatory Reporting, 19 December 2013.

- Should there be any exceptions to reporting?
- Should there be any provision for protecting the identity of the person who reports such offences?