Dear Convener,

CONSIDERATION OF PETITION PE1551

Calling on the Scottish Parliament to urge the Scottish Government to introduce legislation that makes it a criminal offence to fail to report child abuse.

Thank you for the opportunity to respond to this important inquiry. The NSPCC exists to prevent cruelty to children. We believe child abuse is preventable. All of our work is designed to help in that endeavour, by creating better understanding about what it is that works in protecting children and preventing cruelty.

When it comes to the reporting of child abuse, NSPCC Scotland believes that the overriding principle should be that all professionals listen to and act in the best interests of the child.

A strong child’s rights culture across all of society is the most important form of protection, and institutions that provide services to children are a pivotal part of that culture. For many years the NSPCC has worked with institutions to improve child protection to enable institutions to ‘build in’ this type of culture.

During this time, a framework of measures has been developed to both prevent abuse and ensure an effective response in the event it occurs. Most were introduced as a direct result of cases of abuse of children in care coming to light during the 1980s and after. These measures constitute a legal and regulatory framework which has improved the accountability of those responsible for safeguarding vulnerable children and are outlined in full in Kendrick’s recent review (2014).1

1 This reviews developments over the past 25 years in Scotland to protect and safeguard children and young people in residential and foster care.

EVERY CHILDHOOD IS WORTH FIGHTING FOR
In spite of these changes, recent cases have exposed weaknesses in the protection of children in settings which are entrusted with their care, resulting in children being abused by adults or peers within those settings, often over a considerable period of time before action is taken.

NSPCC Scotland welcomes the opportunity to respond to the public petitions committee inquiry into mandatory reporting as it provides a forum to address the complex issues around accountability in our systems and institutions in relation to child abuse. We must rigorously scrutinise the systems and practices which enables child abuse to occur, as called for by Alexis Jay.2

NSPCC Scotland research

NSPCC Scotland has recently conducted considerable research in this area to inform our response to the Scottish Government’s statutory inquiry into historic abuse of children in care in Scotland.

Our research, carried out in 2014, includes:

- Interviews with experts
- Assembling a time-line of publicly reported instances and inquiries into child abuse in institutional settings in Scotland from 1970 to the present and analysis of media coverage and reports about these
- Searches of UK and Scottish parliamentary records
- Investigation of the Human Rights Act and Scottish criminal and civil law in relation to concealment and failure to act in relation to child abuse.

Those to whom we have spoken so far are in no doubt that the same types of issues present in England around failure to act and the cover up and concealment of serious abuse are also to be found in Scotland – both historically and in the present. We have been made aware of specific cases where those in positions of authority have placed political and reputational considerations above the protection of children.

Children and Young People (Scotland) Act 2014

No concerns have been raised with us around the reporting duties of professionals. The statutory duties on professionals around reporting and information sharing have just been reinforced by the Children and Young People’s (Scotland) Act 2014 which provides for a named person for every child. Indeed strengthening professional practice around reporting and sharing concerns, in line with Getting It Right For Every Child, was the centre-piece of the legislation.

The issues here are more nuanced than in other jurisdictions. The named person proposal stimulated a wave of concerns from professionals and professional organisations who, knowing and taking seriously their statutory duties, are concerned about the necessary resources and supportive cultures being in place to make this work effectively in practice. Against this background, the idea of placing an additional criminal sanction on professionals (as suggested by this petition) is wholly unrealistic.

**Existing sanctions in Scots law**

Criminal sanctions already exist in Scots law. According to legal advice received from John Scott QC, there are offences already in place which allow individuals to be prosecuted for failure to act and concealment and/or cover up of child sexual abuse. An overview of this is provided as Appendix A.

There is an issue, however, in the laws not being used. This requires rigorous examination. We need to understand why this is the case if we are to improve the criminal justice system response, and ensure that the sanction is meaningful and works to protect children in practice. Some interviewees highlighted awareness and understanding of children’s rights, and prevailing attitudes towards vulnerable children and young people, especially young women, within criminal justice agencies as being part of the problem.

There are also serious loopholes in the law and in the way in which Human Rights law is interpreted by judges which require redress in order to protect children.

**Improving Accountability and Transparency**

Improving Accountability and Transparency are the priorities: the accountability of those in positions of power and the transparency of decision-making processes.

Some examples:

a. A very significant issue is the lack of transparency around the work of the Crown Office and Procurator Fiscal. As we understand it, it does not have to disclose even basic information about cases it has processed. Practices here need to be opened up to scrutiny.

b. Significant Case Reviews are not published routinely and the criteria for reports being placed in the public domain are inconsistent and unclear. Despite a SG commissioned review there does not seem to have been much movement on these issues.

**A duty of candour for professionals**

The Scottish Government’s proposals to introduce a duty of candour for organisations providing health and social care services has the potential to support a new approach
to accountability - that is supportive of both service users and staff – and may help address inconsistencies across the country in respect of the rigour and standard of open disclosure when harm occurs.

While health and care professionals are already required to tell people about instances of harm, observations made by Healthcare Improvement has shown that ethical and policy guidance has largely failed on its own to improve rates of disclosure. We therefore support in principle, Scottish Government proposals to introduce legislation that will require organisations in Scotland to tell people if there has been an event involving them where there has been harm as a result of their care or treatment.

However legislation of this type is not a silver bullet. Barriers to being open after serious safety incidents have been identified to include fear, worry, embarrassment and lack of institutional support. Therefore, in order for legislation aimed at increasing accountability to work in practice, we need a culture of openness and transparency in our institutions and well trained, confident, supported staff who feel empowered to speak out without fear of retaliation and in the knowledge that appropriate action will be taken.

Creating a protective culture for children

NSPCC Scotland believes that child protection works best when there is an effective structure that; creates good protective, human rights based organisational cultures; supports children speaking out and being heard; supports and invests in the development of a well-trained, well supported and confident work force; has external checks to make sure the right measures are being implemented; and takes action when the system fails to protect children properly, including giving protection to those who report their concerns or take action to make children safe.

There is evidence to suggest that existing mandatory reporting regimes can lead to unintended adverse consequences, such as creating a culture of reporting rather than acting, dissuading children from disclosing incidents for fear of being forced into hostile legal proceedings or overwhelming an already stretched child protection system so that attention is diverted from where it is most required.

Equally important to the reporting duties of professionals, and the implementation of a human rights based cultures, is the need to address the organisational systems and culture within which professionals work. Professionals we have spoken to stressed that the same imbalance in power within organisations between adults and vulnerable

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3 Learning from adverse events through reporting and review: Being Open in NHSScotland (June 2014) NHS Scotland
children also applies, very often, between senior managers and staff within organisations responsible for the care of children. We need to identify measures to strengthen the rights and protection for whistle-blowers, and improve workplace cultures more generally. This requires action at a UK-level.

Conclusion

When it comes to the reporting of child abuse, NSPCC Scotland believes that the overriding principle should be that all professionals listen to and act in the best interests of the child.

One of the main lessons from historic inquiries and investigations is that organisational policies and strategies (and indeed legislation) are as strong as the culture that underpins them.

A strong child’s rights culture across all of society is the most important form of protection, and institutions that provide services to children are a pivotal part of that culture.

Criminal sanctions already exist in Scots law which allow individuals to be prosecuted for failure to act and concealment and/or cover up of child sexual abuse. However, there is an issue that the laws are not used in practice. We need to understand why this is the case if we are to improve the criminal justice system response, and ensure sanctions are meaningful in practice.

The statutory duties on professionals around reporting and information sharing have just been reinforced by the Children and Young People’s (Scotland) Act 2014 and have the potential to support the development of this type of culture. The Children’s Act was introduced in 2014. It is vital that we support efforts to allow this legislation to take effect before considering the introduction of any additional legislation to introduce sanctions for professionals, particularly where there is limited evidence of tangible benefits to children.

A range of measures is required to achieve remedies for systemic failings which harm children. We believe that the learning from adverse events through reporting and review should be utilised by institutions, corporate parents and all other relevant stakeholders to ensure that a children’s rights approach is embedded in their cultures, behaviours and budgetary priorities.

The public petitions committee inquiry into mandatory reporting, the Scottish Government’s statutory inquiry into historic sexual abuse of children in care and legislative proposals to introduce a duty of candour for professionals in Scotland all provide opportunities to interrogate the complex issues around accountability in our systems and institutions in relation to child abuse.
We must utilise these opportunities to rigorously scrutinise the systems and practices which enable child abuse to occur, as called for by Alexis Jay.\(^5\)

NSPCC Scotland would welcome any additional opportunity to further contribute to this important and timely debate.

I hope this information is of use to you. Please do not hesitate to get in touch if you have any questions or seek clarification on any of the points raised.

Kind regards,

Matt Forde
Head of Services, NSPCC Scotland

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Concealment of child abuse - an overview of Scots law

- It would currently be a crime in Scotland to **actively cover up** child abuse which is itself a crime under section 12 of the Children and Young People Act 1937, *cruelty to persons under 16*. The crime libelled, however, would not be ‘active concealment of the abuse’ but most likely ‘attempting to defeat the ends of justice’ or perhaps, in some very specific circumstances, ‘perverting the course of justice’.

- In order for the crime of attempting to defeat the ends of justice to be established, there would in all likelihood need to have been an action, i.e. a person such as a head teacher has knowledge that the abuse is happening and has acted in a way that allowed it to happen, rather than omitting to report it *per se*. Establishing that a crime had been committed, however, would depend on establishing knowledge of commission of abuse in evidence. Demonstrating knowledge of an act would clearly show criminal intention, however demonstrating knowledge of commission of abuse is profoundly difficult.

- In summary, the act of concealment of abuse, or the omission to act, must be linked to proven knowledge that the crime that has taken place, in order for a crime of attempting to defeat the ends of justice to have been committed. Where it can be conclusively demonstrated that there has been a greater knowledge, it could also be regarded as a crime of conspiracy: an agreement to commit an offence.

- There may also be circumstances where a person could be found ‘**art and part** guilty’ in the commission of child abuse offences by another person. A recent case in Scotland involving the serious assault of a child saw the conviction of a couple; the man for serious assault and the child’s mother for ‘allowing it to happen’, or omitting to act to stop it. The case against the mother relied on establishing knowledge of commission. This scenario might also involve a crime against the course of justice in Scotland and, under these circumstances, it could be feasible for the second person to also be charged with the main offence. However, cases such as these are most commonly seen in couples, where it is significantly easier to prove (or infer) knowledge of commission. For example, it was significant in the case mentioned that the second accused was the child’s mother.

- In cases of other persons (teacher etc.) - simply ‘being there’ when the abuse took place would probably not be enough to establish that a crime has been committed. Rather the fact that the authority had **actively enabled the abuse to happen** would have to be proved in evidence in order for there to be a case.
There have been no prosecutions in Scotland to date for cases of ‘concealment of child abuse’ as far as we are aware. ‘Defeating the ends of justice’ would be a broad enough provision to cover most scenarios of active concealment of child abuse and subsequently there is no reason why prosecutions could not take place. Getting the police to gather the strongest evidence to support such a conviction, however, is in all likelihood more of a problem than question of whether the law in Scotland is adequate to cover any crime in this area.

Failing to report child abuse

Failing to report child abuse would not be a crime in itself, under Scots law. A crime of attempting to defeat the course of justice would only have been committed if the person in authority (e.g. Head Teacher) fails to report abuse to police and also destroys materials (reports/papers etc) which may have provided evidence of the abuse taking place, or takes some other similar step. The fact that the person holds public office or is carrying out a public function is not necessarily relevant in and of itself: anyone can be found guilty of concealment of a crime. Being in public office would simply be an aggravation owing to the position of trust.

Under section 9 of Protection of Vulnerable Groups (Scotland) Act 2007, an organisation commits an offence if it fails to report an employee or volunteer to the Disqualified from Working with Children List, where it has dismissed that person or moved them to another area where they are not working with children, because of actual harm or suspected harm to a child.

Proving knowledge of commission in evidence would also be key to establishing an offence under PVG/holding the organisation criminally responsible for failing to report the employee to DWCL. In all likelihood, such a case would rely on whistle blowing, and that person, perhaps actively involved as well, may incriminate themselves in doing so.

There have been no prosecutions for failure to report a person to DWCL under PVG (Scotland) Act, as far as we are aware. It is likely that the Crown will be looking for a suitable case to take, given the length of time since the law was enacted. The fact that there has been no case so far however, may point to insurmountable evidential problems in taking one forward.

Civil law

There are clear positive duties arising out of article 3 and article 2 of the European Convention on Human Rights which, attached to strong professional duties around protecting children from harm, could be invoked in establishing the liability of a public body for failing to take action to protect a child from abuse. For example, a local authority not investigating allegations of child abuse against one of its staff; police not adequately investigating a reported allegation of child abuse.
This is an area where courts in Scotland and in Strasbourg have ruled that *insufficient was done to investigate serious allegations under the Convention*, for example, deaths in custody, some killings by the State in NI. Articles 3 and 2 are ripe for efforts to get more done: child abuse would most certainly be considered a serious enough allegation, especially if it is endemic or systematic.

There are however, significant loopholes to finding public bodies liable under the Human Rights Act and Scotland Act, most notably the definition of what constitutes a ‘public body’ in Scotland. For example, in a case against a private care home the court ruled the care home not to be a public body, because its primary function is not a public one but rather a private one (of accruing profit for shareholders).

Change in the law is undoubtedly required to close this potentially significant loophole, however this is likely to take a long time and the current climate in relation to Human Rights is immensely unhelpful (see, for example, publicity arising out of the recent Conservative Party conference).

A key challenge obviously lies in the outsourcing of public functions to private bodies. As well as being potentially unlikely to be defined as public bodies under the Human Rights Act, private bodies are also unlikely to be as aware of their human rights duties. The Scottish Human Rights Commission is currently engaged in work around the area of accountability and the ‘human rights proofing’ of organisations in terms of meeting their obligations. Whilst some organisations are being supported to conduct a Human Rights Audit, a key issue is to make the outsourcing of public functions to private bodies subject to audit for human rights outcomes in a more consistent and complete manner.

Whilst some might argue that there are loopholes in the criminal law in relation to individuals failing to report child abuse that need closed, it is imperative that the law does not simply make it ‘easy’ to convict someone of a serious crime. Child abuse is a heinous crime. Accordingly substantial safeguards need to exist to protect individuals against conviction following on from false allegations. Scotland is likely to lose corroboration next year, and whilst cases of false or malicious allegations (of child abuse) are likely to be extremely rare, the law must contain substantial safeguards to protect people from same. In reality, it is the response of public bodies to allegations of child abuse that is likely to be at the heart of the problem, rather than an insufficiency in the law.

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1 See appendix II for a legal blog in the wake of Rotheram, discussing the considerable liabilities of the police and the local authority under the Human Rights Act 1998, given child abuse and neglect have long been held to fall within the scope of Article 3 ECHR.
Appendix I: Child sexual abuse scandal in Rotherham and the potential liability of the authorities under the ECHR.

The Jay Report has revealed an horrific catalogue of protracted and highly organised sexual abuse by predatory offenders in Rotherham. By a conservative estimate 1,400 children have been assaulted, trafficked, abused and exploited over a sixteen year period. Indeed, the Jay Report indicates that this abuse may in fact still be continuing. This abuse, as the Jay Report details, was known to both the local authority and the police.

The liabilities of the police and the local authority under the Human Rights Act 1998 must be considerable. Child abuse and neglect have long been held to fall within the scope of Article 3 ECHR. In Z v UK [2001] ECHR 29392/95 the European Court held that:

‘Article 3 ECHR requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals .... These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.’ (paras 73-74)

As in Z v UK there has been a systemic failure to prevent the abuse of children in Rotherham.

The matter does not end there. For the police have, by their own admission, failed to adequately investigate these cases, which include allegations of rape, kidnap and trafficking. In 2003 the European Court not only emphasised the need for states to enact and effectively apply penal provisions punishing rape and sexual abuse, but also the importance of an effective investigation in such cases leading to proper punishment. (MC v Bulgaria [2003] ECHR 39272/98)

Of course, as the European Court has consistently held, these duties are not to be interpreted in such a way to impose an ‘impossible or disproportionate burden … in particular, to the operational choices which they must make in terms of priorities and resources (see Osman v UK [1998] ECHR 87/1997/871/1083, para 116). But in Rotherham the problem was long standing, and by 2005 widely-known, yet was allowed to persist.

The positive obligations of Article 3 ECHR should have been at the forefront of both police and local authority minds when dealing with these cases. Yet they were not. Indeed, by failing to act in this context the police and local authority undoubtedly acted unlawfully under s.6 HRA. But moreover the details of the Rotherham case may require further investigation. Why? Here the approach taken to the interpretation
of Article 2 ECHR could usefully inform the application of Article 3 ECHR.

In *Oneryildiz v Turkey* [2004] ECHR 48939/99 the European Court held that in cases where a loss of life has occurred in circumstances where ‘the negligence attributable to state officials or bodies on that account goes beyond an error of judgement or carelessness, in that the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity (*Osman v UK* [1998], para 116), the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2 ECHR.’ (para 93)

It is arguable that a similar approach should be taken under Article 3 ECHR with respect to the investigation of serious sexual assaults. Justice demands no less.