

Extract from the consultation paper entitled "Causing or Allowing the Death or Serious Harm of a Child or Vulnerable Adult" released by the Causing or Allowing the Death of a Child or Vulnerable Adult Sub-committee of the Law Reform Commission of Hong Kong

## Chapter 8

# Issues related to reporting of abuse and other observations

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### Introduction

8.1 In addition to reviewing the local and comparative law and procedure relevant to formulating the new offence of "*failure to protect*", we have also taken account during our study of certain other, broader issues relating to the protection of children and other vulnerable persons.

8.2 One such issue concerns obligations on the reporting of abuse – ie, how these obligations operate (whether voluntary or mandatory), what are their implications and how effective are they. Although not strictly within our terms of reference, this is closely allied to the idea underlying our reform proposals – that those in a position to protect the vulnerable from harm should take reasonable steps to do so. We therefore include here, and in Appendix VI, research information on reporting obligations in Hong Kong and in other jurisdictions, as well as some general analysis on relevant issues. We trust that the Government and other organisations involved will find this information useful in considering how to further develop policies in this complex area.

8.3 Before proceeding to look at reporting obligations, we first take the opportunity to revisit below reform proposals related to child protection and the protection of vulnerable adults which have been put forward previously by the Hong Kong Law Reform Commission (LRC) – some of which have yet to be implemented – to bring these proposals once again to the Government's and the public's attention.

### Earlier relevant LRC reform proposals

#### *Protection of the vulnerable in the context of family law proceedings*

8.4 The LRC report on *Child Custody and Access*,<sup>1</sup> published in March 2005, was the final in a series of four reports under the LRC's reference on guardianship and custody of children.<sup>2</sup> The main focus of the report's 72 recommendations was on the introduction of a new shared

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1 HKLRC, report on *Child Custody and Access* (Mar 2005), available at: <https://www.hkreform.gov.hk/en/publications/raccess.htm>

2 The three earlier reports were: *Guardianship of Children* (Jan 2002), *International Parental Child Abduction* (Apr 2002) and *The Family Dispute Resolution Process* (March 2003).

parental responsibility model into Hong Kong's family law, to replace the current “*custody and access*” model of court orders in divorce proceedings. Because of the potential impact of these changes where domestic violence may be a factor in the divorce, Chapter 11 of the report contained 13 recommendations on “*Special consideration for cases involving family violence*.”<sup>3</sup>

8.5 While some of the 72 recommendations in the report have been implemented, we note that many have not. We understand that this is principally because of opposition from within the community to the proposed new shared parental responsibility model for court orders.<sup>4</sup>

#### *A review of Hong Kong's general law on domestic violence*

8.6 Recommendation 33 in the LRC's *Child Custody and Access* report proposed that the Administration should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness. Recommendation 34 proposed the introduction of a broad, all-encompassing definition of domestic violence along the lines of (then) section 3 of the New Zealand Domestic Violence Act 1985. (We note that since those proposals, there have been two major amendments to the then Domestic Violence Ordinance (Cap 189), in 2008 and 2009, resulting in the current provisions of the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189), with its extended injunctive relief from domestic violence and extended scope to cover same-sex relationships.<sup>5</sup>)

#### *Statutory checklist of factors*

8.7 Recommendation 3 in the LRC report proposed the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in considering what is in the best interests of the child when determining [custody and access] proceedings involving children. One of the factors on the checklist proposed by the LRC for the court to consider related to “*any family violence involving the child or a member of the child's family*”.<sup>6</sup> While not yet implemented in statutory form, we note that a checklist of factors broadly along the lines of that proposed by the LRC is, nonetheless, being utilised by the courts in Hong Kong.<sup>7</sup>

#### *On-going training for those handling cases involving family violence*

8.8 In Recommendation 39 of the LRC report, the LRC proposed that there should be “*on-going training and raising of awareness levels in*

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3 HKLRC (Mar 2005), above, at 243 to 267.

4 For the latest position on implementation of the recommendations in the LRC report, see: <https://www.hkreform.gov.hk/en/implementation/index.htm#49>

5 See Anne Scully-Hill, “Domestic Violence in Hong Kong”, Chapter 14 in Philippa Hewitt (ed), *Family Law and Practice in Hong Kong* (2nd ed, 2014).

6 Recommendation 3(v): see HKLRC (Mar 2005), above, at 200.

7 Eg, *SMM v TWM (Relocation of Child)* [2010] HKFLR 308, [2010] 4 HKLRD 37. P v P (Children Custody) [2006] HKFLR 305 at paras 52 and 53.

*relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary.*<sup>8</sup>

8.9 In addition to the legal profession and the judiciary, on-going training on family violence issues is especially important for frontline persons who may come across cases of family violence in their work, such as teachers, social workers, doctors, nurses and the police – so as to promote early identification and intervention in abuse cases (see the discussion later in this chapter on reporting obligations). We note that the Social Welfare Department (SWD) organises different training programmes for frontline professionals to enhance their knowledge in handling domestic violence, including child abuse, spouse/cohabitant battering, elderly abuse, sexual violence and suicides, and to strengthen their capabilities in risk assessment, violence prevention and post-trauma counselling.<sup>9</sup>

8.10 As well as enhancing the training of professionals and frontline workers who handle family violence cases, it is obviously important to promote public education in this area as well, so as to raise awareness within the community of the need to report cases of abuse, to help with early intervention to protect the vulnerable. We understand the SWD has a number of ongoing public education initiatives on this.<sup>10</sup>

#### *Long-term research*

8.11 Recommendation 41 in the LRC report on *Child Custody and Access* proposed that long-term research should be undertaken on the effects on children of witnessing and/or being the victims of domestic violence, and that there should be detailed collection and evaluation of information arising from court proceedings in these cases.

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8 Recommendation 39: see HKLRC (Mar 2005), above, at 266.

9 Paper for discussion on 23 Jan 2018 at meeting of Legislative Council House Committee Subcommittee on Children's Rights: Rights of Children affected by Domestic Violence (LC Paper No. CB(4) 504/17-18(01)) by Labour and Welfare Bureau, Education Bureau, Social Welfare Department, Hong Kong Police Force, Department of Health and Hospital Authority. Available at: [https://www.legco.gov.hk/yr16-17/english/hc/sub\\_com/hs101/papers/hs10120180123cb4-504-1-e.pdf](https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120180123cb4-504-1-e.pdf)

We understand the SWD also deploys staff to provide training in child protection on courses for frontline service personnel organised by the Education Bureau, the Hospital Authority, the Department of Health and NGOs: see same as above.

10 See same as above. I.e:

(1) since 2002, the SWD has promoted the “*Strengthening Families and Combating Violence*” publicity campaign, through which territory-wide and district-based publicity and public education programmes are organised to raise public awareness of the importance of family cohesion and prevention of domestic violence, as well as to encourage people in need to seek early assistance;

(2) the SWD has produced in recent years a series of three animation videos to encourage parents to help their children develop resilience against adversity, and to avoid hurting them with corporal punishment and verbal abuse;

(3) SWD planned to launch in 2017-18 a series of television and radio Announcements of Public Interest, and to display banners and posters to promote the message of protection of children and against child abuse; and

(4) the District Social Welfare Officers of the SWD also organise education programmes relating to combating domestic violence and protection of children.

8.12 However, such research would need be undertaken having regard to the data protection issues noted in the report, so a careful balance would need to be struck between the interests of data subjects in keeping their personal information as private as possible, and the goal of facilitating the important socio-legal research proposed in this recommendation.<sup>11</sup>

#### *Other relevant recommendations*

8.13 *Children in care.* Where statutory protection is required for a child or juvenile, social workers of the SWD or police officers may apply for a care or protection order under the Protection of Children and Juveniles Ordinance (Cap 213) (PCJO). The PCJO empowers the court to grant a supervision order or appoint a legal guardian in respect of such a child or juvenile.<sup>12</sup> It also provides certain powers to detain children who appear to be in need of care or protection in place of refuge or hospital.<sup>13</sup> The powers set out in the PCJO apply where a child requires “*care or protection*” and has been or is being assaulted, ill-treated, neglected or sexually abused; whose health, development or welfare has been, is being, or appears likely to be neglected or avoidably impaired; or is beyond control, to the extent that harm may be caused to him or others.<sup>14</sup>

8.14 In terms of the ill-treatment, what is required as a basis for the intervention:

*“[I]s something more than commonplace human failure or inadequacy, but conduct does not have to be intentional or deliberate. For parent’s right to be taken away, it is enough that the harm, or likelihood of harm, was attributable to them. There must be a deficiency in parental care rather than in parental character, but character remains relevant to the extent that it might affect the quality of parenting.”<sup>15</sup>*

8.15 Where the care of a child is shared between a number of individuals and the child has suffered harm or abuse, in the context of care and protection proceedings, there is no need to prove or identify the particular individuals responsible:<sup>16</sup>

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11 Recommendations 41 (long-term research) and 40 (privacy issues): see HKLRC (Mar 2005), above, at 266 to 267.

12 Paper for discussion on 23 Jan 2018 at meeting of Legislative Council House Committee Subcommittee on Children’s Rights: Rights of Children affected by Domestic Violence (LC Paper No. CB(4) 504/17-18(01)) by Labour and Welfare Bureau, Education Bureau, Social Welfare Department, Hong Kong Police Force, Department of Health and Hospital Authority, at para. 6. Available at: [https://www.legco.gov.hk/yr16-17/english/hc/sub\\_com/hs101/papers/hs10120180123cb4-504-1-e.pdf](https://www.legco.gov.hk/yr16-17/english/hc/sub_com/hs101/papers/hs10120180123cb4-504-1-e.pdf)

13 Sections 34E and 34F of the Protection of Children and Juveniles Ordinance (Cap 213).

14 Section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).

15 Keith Hotten, Azan & Shaphan Marwah, *Hong Kong Family Court Practice* (2nd ed, 2015), at para 5.152.

16 Same as above, at para 5.153.

*“If the identification of the perpetrator is not possible, the court should state that as its conclusion rather than straining to identify a particular person. If it is not possible to identify a particular perpetrator on the balance of probabilities, it is still important to identify the pool of possible perpetrators.”<sup>17</sup>*

8.16 The LRC report on *Child Custody and Access* considered the position of children subject to care and protection orders under the PCJO, and made a series of recommendations for reform, including with regard to the powers of the Director of Social Welfare under the Ordinance.<sup>18</sup>

8.17 *Judicial guidelines to supplement legislative reforms.* In Recommendation 36, the LRC proposed that there should be guidelines for the judiciary at all levels, setting out the approach which the court should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children.<sup>19</sup>

8.18 *More information to be available to the court.* The LRC proposed that consideration should be given to allowing the courts hearing contact applications to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence, and to be kept informed of concurrent proceedings against perpetrators of domestic violence.<sup>20</sup>

8.19 *Privacy issues.* In Recommendation 40, the LRC proposed that the Administration should consider a review of data protection arrangements for victims of family abuse, having regard to the potential susceptibility of the family justice system to disclose location information, etc, of victims.<sup>21</sup>

### ***Protection of the vulnerable in the giving of evidence in court proceedings***

8.20 As noted earlier in this Consultation Paper,<sup>22</sup> one of the LRC’s recommendations in its 2009 report on *Hearsay in Criminal Proceedings*<sup>23</sup> was to empower the court with a discretion to admit hearsay evidence of a declarant who is unfit to be a witness because of his or her age, physical or mental condition, provided the court is satisfied with the reliability of the evidence.<sup>24</sup> The Government has followed up on the recommendations in the LRC report, and the Evidence (Amendment) Bill 2018 was gazetted on 22 June 2018 and was introduced into LegCo on 4 July 2018. As noted

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17 Same as above.

18 Recommendations 55 to 67, HKLRC (Mar 2005), above, at 290 to 302.

19 Same as above, at 263 to 264.

20 Recommendation 37, same as above, at 265.

21 Same as above, at 266.

22 See Chapter 2, above, at paras 2.173 to 2.174.

23 HKLRC report on *Hearsay in Criminal Proceedings* (Nov 2009), The report is available at: <https://www.hkreform.gov.hk/en/publications/rcrimhearsay.htm>

24 See HKLRC (Nov 2009), above, Recommendation 25, at 130 to 133.

previously, the Government anticipates that this reform will be conducive to protecting the special needs and interests of vulnerable persons.<sup>25</sup>

### ***Protection of the vulnerable in the context of sexual offences***

8.21 There are a number of statutory sexual offences in the Crimes Ordinance (Cap 200) aimed at the protection of vulnerable persons, including children and mentally incapacitated person. They include: intercourse with a girl under 13 (section 123), intercourse with a girl under 16 (section 124), intercourse with a mentally incapacitated person (section 125), abduction of unmarried girl under 16 (section 126), abduction of an unmarried girl under 18 for sexual intercourse (section 127), and abduction of a mentally incapacitated person from parent or guardian for sexual act (section 128).<sup>26</sup> There is also further protection against child sexual abuse in the Prevention of Child Pornography Ordinance (Cap 579).

8.22 In November 2016, the LRC's Review of Sexual Offences Sub-committee published a consultation paper making preliminary proposals for the reform of the law concerning sexual offences involving children, persons with mental impairment and young persons over whom others hold a position of trust.<sup>27</sup> The paper is the second of a series of consultation papers intended to cover the overall review of the substantive sexual offences.<sup>28</sup>

8.23 The proposals in the Consultation Paper include a uniform age of consent of 16 years in Hong Kong and the creation of a range of new sexual offences involving children and persons with mental impairment which are gender-neutral and provide improved protection to these vulnerable people. These sexual offences are largely concerned with the protective principle, that is to say, the protection of certain categories of vulnerable persons from sexual abuse or exploitation. The main recommendations contained in the Consultation Paper are:

- (i) there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation;
- (ii) offences involving children and young persons should be gender-neutral with two separate types of offences, one

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25 See Legislative Council Brief, Department of Justice (20 June 2018), at para 24, available at: [http://www.legco.gov.hk/yr17-18/english/bills/brief/b201806221\\_brf.pdf](http://www.legco.gov.hk/yr17-18/english/bills/brief/b201806221_brf.pdf)

26 Other offences include buggery by a man with a mentally incapacitated person ("MIP") (section 118E, Crimes Ordinance (Cap 200)), gross indecency by man with male MIP (section 118I, Crimes Ordinance (Cap 200)), and sexual intercourse with patients (section 65(2), Mental Health Ordinance (Cap 136)).

27 HKLRC Review of Sexual Offences Sub-committee's consultation paper on *Sexual Offences Involving Children and Persons with Mental Impairment* (Nov 2016), available at: <http://www.hkreform.gov.hk/en/publications/sexoffchild.htm>

28 The other consultation papers issued by the Review of Sexual Offences Sub-committee on the substantive sexual offences were: *Rape and Other Non-consensual Sexual Offences* (Sep 2012) and *Miscellaneous Sexual Offences* (May 2018).

involving children under 13 and the other involving children under 16, and capable of being committed by either an adult or a child;

- (iii) the question of whether offences involving children aged between 13 and 16 should be of absolute liability should be a matter for consideration by the Hong Kong community;
- (iv) consensual sexual activity between persons who are aged between 13 and 16 should remain to be criminalised while recognising the existence of prosecutorial discretion;
- (v) the creation of a range of new offences involving children which are gender-neutral, and which provide wider protection to children;
- (vi) the creation of a new offence of sexual grooming to protect children against paedophiles who might groom them by communicating with them on a mobile phone or on the internet to gain their trust and confidence with the intention of sexually abusing them;
- (vii) the creation of a range of new offences involving persons with mental impairment which would be gender-neutral and provide improved protection; and
- (viii) the question of whether there be legislation to deal with conduct involving abuse of a position of trust in respect of young persons aged 16 or above but under 18 should be a matter for consideration by the Hong Kong community.

8.24 The LRC is currently completing a final report on its review of the substantive sexual offences.

## **Reporting of abuse**

### ***Introduction***

8.25 Evidence suggests that the severity of child abuse (and, it may be assumed, abuse of other vulnerable persons) tends to escalate over time, *“making the early detection and intervention crucial in preventing victims from suffering severe abuses.”*<sup>29</sup>

8.26 Anecdotal evidence suggests that some common sources of reporting of child abuse in Hong Kong are by teachers in schools and neighbours of families where abuse is suspected. Other common sources of

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<sup>29</sup> See Phil W S Leung, William CW Wong, Catherine S K Tang and Albert Lee, “Attitudes and child abuse reporting behaviours among Hong Kong GPs” (2010) *Family Practice*; 0:1 to 7, at 1.

reporting include by social workers, police, doctors and nurses. While we understand that the reporting of child abuse cases has increased in recent years with more public awareness, it has been observed that reported instances of abuse “are likely to represent a serious underestimation, as low as 1-2% of total cases.”<sup>30</sup>

### *Types of reporting*

8.27 As we will see below, and in Appendix VI, in some jurisdictions mandatory duties to report abuse are laid down in statute, though the scope and emphasis of the legislation may vary.<sup>31</sup> In other jurisdictions, such as Hong Kong, the reporting of abuse, while advocated as policy, is voluntary not mandatory.<sup>32</sup>

8.28 A “mandatory reporting duty” requires a report to be made in every case where there are suspicions or knowledge of child abuse or neglect (ie, there is limited professional discretion in whether or not to report). The action taken under the duty is limited to reporting, and the duty would be discharged once a report has been made. There are likely to be sanctions for a failure to report.<sup>33</sup>

8.29 Other conceptual models in this area include “duty to act” and “differential response.”<sup>34</sup> A duty to act is a specific duty in a criminal statute requiring all persons subject to the duty to disclose a serious indictable offence which they know or believe to have been committed. The duty would continue to apply after the report has been made. If further action is needed to protect a vulnerable person, a duty to act would require this action to be taken, and places responsibility on those subject to the duty to decide what action is appropriate. There are likely to be sanctions for a failure to properly carry out the duty.<sup>35</sup>

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30 Leung, Wong, Tang and Lee (2010), above, at 2.

31 See, for example, the relevant legislation in the states and provinces in the USA, Canada and Australia, discussed in Benjamin P Mathews and Maureen C Kenny, “Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features, differences and issues” (2008) *Child Maltreatment*, 13(1), 50 to 63.

32 See also, for example, in New Zealand and the United Kingdom, discussed below and in Appendix VI.

33 Ben Mathews & Donald Bross, *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect*, *Child Maltreatment: Contemporary Issues in Research and Policy 4* (2015, Springer), at 11 to 12.

34 See discussion in Ben Mathews, “Chapter 1: Mandatory Reporting Laws: Their Origin, Nature, and Development over Time”, in Mathews & Bross (2015), above, at 6.

35 There may be, in any event, a common law duty to report or act in some circumstances. See Keith Hotten, Azan & Shaphan Marwah, *Hong Kong Family Court Practice*, (2nd ed, 2015), at para 5.161:

*“Identifying and taking appropriate action on suspected abuse is also important because failure to do so may constitute a breach of duty by a parent or a relevant professional involved in a child’s welfare (eg, police officer, teacher, social worker, medical professional). Although there the existence and extent of any persons’ duties will depend upon the circumstances, it is likely that there is a common law duty to report suspected abuse.”*

8.30 Under the differential response approach, child protective service systems are given the flexibility to respond to screened-in reports of child maltreatment in more than one way, depending on the initial level of risk. Once a case has been screened in, a second screening then occurs to determine the type of child protective service response the family will receive.<sup>36</sup>

8.31 Moderate to high risk reports that include allegations of severe physical or sexual abuse, imminent risk of harm to a child, or a high likelihood of court involvement are assigned a traditional investigation and are processed through the child protection system in the same manner as any other investigations. In contrast, low to moderate risk reports, defined in a variety of ways (but generally more often involving neglect and emotional abuse, and sometimes based on poverty needs), can receive a family assessment instead of an investigation.<sup>37</sup> The focus of this assessment is on provision of services to the child's caregivers and the child.<sup>38</sup>

#### *Overview of child abuse reporting in other jurisdictions*

8.32 In 2007, the International Society for Prevention of Child Abuse and Neglect (ISPCAN) sought information from 161 countries about various matters, including the presence of legislative or policy-based child abuse reporting duties.<sup>39</sup> Of the 72 countries which responded, 49 indicated the presence of such duties in law or policy, and 12 indicated the presence of voluntary reporting by professionals.<sup>40</sup>

8.33 The study observed that Brazil, Denmark, Finland, France, Hungary, Israel, Malaysia, Mexico, Norway, South Africa and Sweden have created "*quite general*" legislative reporting duties.<sup>41</sup> Saudi Arabia has also introduced the mandatory reporting laws which have been judged to produce a positive effect on case identification.<sup>42</sup> In contrast, legislatures in the states and provinces across the US, Canada and Australia, "*have given detailed attention to the development of these laws over several decades, and the laws in these jurisdictions continue to evolve in response to new phenomena and evidence of successes and failures in child protection systems.*"<sup>43</sup>

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36 Mathews & Bross (2015), above, at 429 to 430.

37 Same as above.

38 Same as above, at 11 to 12 and 429 to 430.

39 See Mathews & Kenny (2008), above, at 50, citing D Daro (ed), *World Perspectives On Child Abuse* (2007, 7th ed, Chicago, IL: International Society for Prevention of Child Abuse and Neglect).

40 Same as above.

41 Same as above.

42 Mathews & Bross (2015), above, at 14.

43 Mathews & Kenny (2008), above. The writers go on to observe: "*These legislative differences exemplify the contested normative terrain in which these laws operate. Law and policy concerning the detection and reporting of, and the responses to, abuse and neglect is theoretically and practically complex, and exists alongside political, economic, social and cultural forces in each society.*"

8.34 The issue of whether to impose a mandatory duty to report suspected abuse and neglect is a controversial one. On the one hand, the early reporting of suspected abuse can lead to positive action to end the suffering of a child or vulnerable person at risk, and bring those responsible to account. On the other, well-meaning but mistaken reporting of abuse (for example, when genuine accidental injuries or other medical problems have occurred) can have devastating social and legal consequences for the family involved.

8.35 Some jurisdictions, such as the United Kingdom and New Zealand, have chosen *not* to enact mandatory reporting laws. Mathews and Kenny observe that this appears to be “*for reasons including the perceived danger of over reporting of innocent cases, which is seen as adversely affecting the interests of children and families, and as diverting scarce resources from already known deserving cases.*”<sup>44</sup>

8.36 A more detailed discussion of mandatory reporting – its ‘pros and cons’ and implications – is set out later below, and further information on the approaches to reporting in a number of common law jurisdictions is included in Appendix VI. We first set out below a description of the voluntary reporting system which operates in Hong Kong.

### ***Voluntary reporting: the current position on reporting of abuse cases in Hong Kong***

#### *Introduction*

8.37 As stated above, Hong Kong currently has no mandatory reporting system for child abuse and abuse of vulnerable persons.<sup>45</sup> Detailed guidelines for *voluntary* reporting of child abuse and elder abuse cases are, however, contained in procedural guides published by the Social Welfare Department (SWD), ie, the *Procedural Guide for Handling Child Abuse Cases*<sup>46</sup> and the *Procedural Guidelines for Handling Elder Abuse Cases*.<sup>47</sup> These provide guidance on handling suspected abuse cases and the level of cooperation among relevant department/units (including social service units, the police, medical personnel, the Housing Department, etc), so as to provide the victim with the most appropriate services and care, and to prevent the recurrence of abuse.

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44 Same as above.

45 See Leung, Wong, Tang and Lee (2010), above, at 1. See also G Fung, Hong Kong Police, “Legal and judicial aspects: crime detection, law enforcement and extradition”, paper presented at *UNESCO Expert Meeting on Sexual abuse of children, child pornography and paedophilia on the internet: an international challenge*, Paris, 18 to 19 January 1999 (CII-98/CONF.605/13 (E)), at 2.

46 SWD, *Procedural Guide for Handling Child Abuse Cases* (Revised 2015), available at: [https://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_family/sub\\_fcwprocedure/id\\_1447/](https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/); and [http://www.swd.gov.hk/doc/fcw/proc\\_guidelines/childabuse/Procedural%20Guide%20for%20Handling%20Child%20Abuse%20Cases\(Revised%202015\)\\_updated%20May%202017\\_EN.pdf](http://www.swd.gov.hk/doc/fcw/proc_guidelines/childabuse/Procedural%20Guide%20for%20Handling%20Child%20Abuse%20Cases(Revised%202015)_updated%20May%202017_EN.pdf)

47 SWD, *Procedural Guidelines for Handling Elder Abuse Cases* (Revised 2006), available at: [https://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_elderly/sub\\_csselderly/id\\_serabuseelder/](https://www.swd.gov.hk/en/index/site_pubsvc/page_elderly/sub_csselderly/id_serabuseelder/)

8.38 The SWD has also published *Procedural Guidelines for Handling Adult Sexual Violence Cases*, and, if the suspected abuse case involves spouse battering, the *Procedural Guide for Handling Intimate Partner Violence Cases*.<sup>48</sup> In relation to mentally impaired persons, SWD has published *Guidelines for Handling Mentally Handicapped/Mentally Ill Adult Abuse Cases*.<sup>49</sup>

#### *SWD's Procedural Guide for Handling Child Abuse Cases*

8.39 The Procedural guide on child abuse cases, most recently revised in 2015, explains how the different aspects of Hong Kong's child protection system are integrated,<sup>50</sup> sets out a "*Checklist for identifying possible child abuse*" (which includes lists of "*indicators*" and "*characteristics*" of child abuse), and a "*Guide to risk assessment*" to help with assessing the likely level of risk (whether "*low*", "*intermediate*" or "*high*") for a particular child reported to be the suspected victim of abuse.<sup>51</sup>

8.40 To assist those making reports, the Procedural guide on child abuse cases includes targeted guidelines (comprised in separate chapters) for those groups of professionals most likely to be in situations to observe and report on child abuse. Specific reporting guidelines (and information on the follow-up procedures which would apply to a reported case) are included for social workers, clinical psychologist, doctors, nurses and para-medical staff of hospitals or clinics, personnel in schools and kindergartens, police and others.<sup>52</sup>

8.41 For example, Chapter 20 of the Procedural guide is directed at those working in Hospital Authority hospitals or clinics. Paragraph 20.1 states:

*"Medical Officers (MOs), nurses and para-medical staff of hospital / clinic of the Hospital Authority should familiarize themselves with the procedures of handling suspected child abuse. They should be alert to the signs of child abuse by making reference to the Indicator of Possible Child Abuse & Guide to Risk Assessment in Chapter 2. If a child has symptoms or signs which indicate that sexual abuse may have taken place, the MOs, nurses and para-medical staff should follow the Guide to People Working with Children Who Disclose Sexual Abuse at Appendix IV and Guidance for Paediatric Wards, A&E and Staff involved with Child Abuse at Appendix XVI."*

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48 SWD, *Procedural Guide for Handling Intimate Partner Violence Cases* (Revised 2011), available at: [https://www.swd.gov.hk/en/index/site\\_pubsvc/page\\_family/sub\\_fcwprocedure/](https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/)

49 SWD, *Guidelines for Handling Mentally Handicapped/Mentally Ill Adult Abuse Cases* (July 2012), available at: <https://www.swd.gov.hk/doc/rehab/vrs/abuse%20guidelines.pdf> (in Chinese only).

50 See generally SWD *Procedural guide on Child Abuse* (Rev 2015), above.

51 See Chapter 2 of the SWD *Procedural guide on Child Abuse* (Rev 2015), above.

52 See Chapters 14 to 26 of the SWD *Procedural guide on Child Abuse* (Rev 2015), above.

8.42 Paragraph 20.4 notes that “*Medical Co-ordinators on Child Abuse (MCCA)*”, working closely with “*medical social workers (MSW)*” and others, are designated in the paediatric departments within the Hospital Authority hospitals to handle child abuse cases, including receiving referrals from doctors and staff of possible child abuse.<sup>53</sup>

8.43 Principles emphasised in the Procedural guide on child abuse cases are that:

- in handling child abuse cases, the safety, needs, welfare and rights of the children should always come first;
- any symptom or report of suspected child abuse must be taken seriously and the related investigation should be conducted as soon as possible;
- all relevant parties should collaborate and share the responsibility for protection of children at relevant stages of the case development; and
- where necessary, the information collected with regard to suspected abuse incidents should be shared as soon as possible with other concerned parties to ensure effective protection of the children.<sup>54</sup>

8.44 In relation to confidentiality of medical information, the Procedural guide on child abuse cases notes that in exceptional cases (such as for the investigation of cases of suspected child abuse) disclosure may be justified. In all circumstances, however, professionals should disclose the least amount of directly relevant confidential information necessary to achieve the desired purpose, and precautions should be taken to ensure and maintain confidentiality of the information transmitted to other parties.<sup>55</sup>

8.45 *Sources of reporting.* The Procedural guide on child abuse cases observes in Chapter 7 that suspected child abuse cases may be identified:

- “(a) *through direct approach in person or by telephone call from the child, the family or the public;*
- “(b) *by teachers, personnel of kindergartens / schools / day child care service / residential child care centres, Student Guidance*

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53 Para 20.4, SWD *Procedural guide on Child Abuse* (Rev 2015), above. The paragraph goes on to state: “*Working closely with medical social workers (MSW), nurses, clinical psychologists, psychiatrists and other related personnel through their expertise in child protection, the MCCA provide support to the suspected child victims by making their physical, emotional and developmental needs understood.*”

54 Same as above, at Chapter 4.

55 Same as above, especially paras 4.19 to 4.22. Within Chapter 4 there are also separate annexes dealing specifically with confidentiality issues for medical practitioners (Annex I), clinical psychologists (Annex II) and social workers (Annex III).

*Officers / Teachers / Personnel serving in primary schools, school social workers serving in secondary or special schools, children and youth centre workers, medical officers or private practitioners, nursing staff of hospitals / clinics, personnel of government departments or non-governmental organisations, etc.;*

(c) *through information from hotlines.*<sup>56</sup>

8.46 In Chapter 6, the Procedural guide on child abuse cases states that a child “*suspected of being abused may be brought to the attention of any welfare service unit, clinic / hospital, school, police station or other service unit of various government departments as well as non-governmental organisations (NGOs) by an informant or a referrer.*”<sup>57</sup>

8.47 The Procedural guide advises that those reporting suspected child abuse would not be liable if the allegations were subsequently not substantiated.<sup>58</sup>

#### *Education Bureau guidance*

8.48 In addition to the guidance from the SWD, the Education Bureau (EB) has also issued a circular to kindergartens to announce arrangements for the reporting mechanism for absentees in kindergartens. Starting from March 2018, kindergartens must report to the EB on students' absence for seven consecutive school days, if such absence is without reason or under doubtful circumstances. The new reporting mechanism is to raise the awareness of school personnel in identifying child abuse and support kindergartens in early identification of students in need of support or who are suspected child abuse victims, so that early intervention and appropriate support and services can be provided. School personnel noticing any wounds or any signs of child abuse are requested to immediately refer to the SWD's *Procedural Guide for Handling Child Abuse Cases* and make a report to the EB as appropriate, and in parallel, report the situation to the SWD or the Police for assistance.<sup>59</sup>

8.49 The EB issued a further circular<sup>60</sup> on 20 August 2018 to update schools on the procedures and points to note for handling suspected cases of

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56 Same as above, at para 7.3.

57 Same as above, at para 6.1. An “*informant*” is defined as a member of the public (eg, neighbour, relative of the child concerned) who provides information on a suspected child abuse case. A “*referrer*” is a staff member of a government department, NGO, HA or other organisation, who comes across the suspected child abuse case in the course of performing his or her duties: same as above.

58 See question 13, in “Frequently asked questions about the application of the Ordinances relating to child protection and child abuse,” in Annex II to Chapter 3, *SWD Procedural guide on Child Abuse* (Rev 2015), above.

59 Press Releases: “EDB announces new arrangements of reporting mechanism for absentees in kindergartens” (23 Feb 2018): <http://www.info.gov.hk/gia/general/201802/23/P2018022300343p.htm>

60 Education Bureau Circular No 5/2018, “Handling Suspected Cases of Child Abuse and Domestic Violence” (20 August 2018), available at:

child abuse and domestic violence. Schools are advised to keep an eye on the conditions of students for early identification and intervention. The circular notes that schools are also reminded to take appropriate measures to provide assistance to the children concerned and their families in accordance with the *Procedural Guide for Handling Child Abuse Cases (Revised 2015)* and the *Procedural Guide for Handling Intimate Partner Violence Cases (Revised 2011)*. An “Overview of Identifying Possible Child Abuse” is attached to the circular to assist school personnel to spot any physical or behavioural indicators of child abuse. The circular also mentions the procedures of handling child sexual abuse cases and domestic violence cases. It is also noted that in the course of handling suspected child abuse cases or domestic violence cases, schools/designated personnel involved are required to adhere strictly to the principle of confidentiality.

8.50 If the parents or guardians are suspected of being involved in the abuse, schools do not need to ask the prior consent of parents when making a referral of a suspected child abuse case to the school social worker, caseworker or to the Family and Child Protective Services Units of the Social Welfare Department. In circumstances that suggest a criminal offence may have been committed, and the case is a severe one or the life of the child concerned is being threatened so that immediate action is needed (such as serious physical abuse), schools should report the case to the police by phone as early as possible.

#### *Research findings on levels of reporting in Hong Kong*

8.51 A detailed study was published in 2010 on the reporting behaviours of general medical practitioners (“GPs”) in Hong Kong who had encountered child abuse cases.<sup>61</sup> At the outset of the paper documenting the study, the authors observe:

*“GPs, the first professional group from whom parents may seek help for their injured children, can play a significant role in prevention. Arguably, doctors have moral and legal responsibilities to report these cases to relevant governmental authorities or social welfare organizations in order to provide early interventions for victims and perpetrators and prevent further abuse.”<sup>62</sup>*

8.52 The study found that underreporting was common among local GPs.<sup>63</sup> Perceived barriers associated with a lower likelihood of making a report included, amongst others: “*lack of sufficient evidence*”, “*reporting may*

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<https://applications.edb.gov.hk/circular/upload/EDBC/EDBC18005E.pdf>

61 See Leung, Wong, Tang and Lee (2010), above.

62 See Leung, Wong, Tang and Lee (2010), above, at 1.

63 The study found that approximately half the GPs who responded had encountered at least one child abuse case in their history of practice, but of these, 40% had never reported. One-third made reports for every suspected case. Nearly 25% of the GPs reported encountering suspected sexual abuse cases. Of these, nearly half reported all cases, while 40% had reported none. See Leung, Wong, Tang and Lee (2010), above, at 3.

*produce more harm than good to the family*”, *“reporting may produce more harm than good to the child.”*<sup>64</sup> Significantly, a higher proportion of GPs who had received child abuse training made reports than those without such training.<sup>65</sup>

8.53 In addition to indicating that there was some support for the introduction of mandatory reporting in Hong Kong (at least among *“many scholars and professionals”*<sup>66</sup>) the authors of the GP study suggested<sup>67</sup> strategies to promote reporting behavior, including providing clearer guidance, mandatory training and ensuring *“sensitive handling by relevant organizations such as SWD and NGOs to maintain confidentiality of the identity of reporters.”* Leung, Wong, Tang and Lee also recommend that *“more research on a multidisciplinary approach is required to explore an optimally beneficial reporting system for the children in Hong Kong.”*<sup>68</sup>

### ***Mandatory reporting duty***

*What is mandatory reporting?*

8.54 Under a policy of *“mandatory”* (or *“mandated”*) reporting in the child protection context, certain designated professionals are obliged to report cases of suspected child abuse and neglect (often including physical, sexual and psychological abuse) to the authorities. These designated professionals are usually those who work frequently with children; for example:

- teachers
- nurses
- doctors
- police, and
- social workers.<sup>69</sup>

8.55 Under a mandatory reporting system, these professionals are usually required to report on specified types of abuse encountered during their work where they have a *“reasonable suspicion”* or *“reasonable belief”* that there has been abuse or neglect of a child.<sup>70</sup>

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64 See Leung, Wong, Tang and Lee (2010), above, at 4.

65 Same as above.

66 Same as above, at 2.

67 Same as above, at 6 to 7.

68 Same as above, at 7.

69 Dr Benjamin P Mathews and Dr Donald C Bross, “Does the Protection of Children’s Rights to Safety Require a System of Mandatory Reporting of Abuse and Neglect? An Argument” (2008), paper presented at *XVIIth ISPCAN International Congress on Child Abuse and Neglect*, September 7-10 2008, Hong Kong: available at: <http://eprints.qut.edu.au/14857/>

70 Benjamin P Mathews and Maureen C Kenny, “An Analysis of Mandatory Reporting Legislation in the USA, Canada and Australia: Features, Differences and Issues for Legislators” (2008),

8.56 The objective of imposing mandatory reporting requirements is to use the expertise of these professionals to increase the discovery of cases of abuse and neglect so that they can be brought to the attention of relevant agencies as early as possible, so as to assist and protect the child.<sup>71</sup> The UK Government has explained the rationale for mandatory reporting as follows:

*“The rationale for [this option] is that earlier reporting of child abuse and neglect would lead to swifter interventions that would prevent an escalation into even more serious cases of child abuse or neglect. In theory, this is because requiring reports about child abuse and neglect to be made to the relevant authorities would result in more cases of abuse being identified, and at an earlier point in a child’s life than a system which allows more discretion. It then follows that such a system would ensure that those best placed to make judgements about whether abuse and/ or neglect is occurring (i.e. children’s social workers) would make these judgements, because discretion is removed from others who might not be trained to the same extent.”<sup>72</sup>*

#### *Features of mandatory reporting systems*

8.57 Mathews and Kenny note that the statutory provisions of the mandatory reporting systems in the US, Canada and Australia “*exhibit many common features*” but also may individually differ in significant respects.<sup>73</sup> The key features of the legislation usually include:

- defining which persons are required to make reports;
- identifying what state of knowledge, belief or suspicion a reporter must have before the reporting duty is activated, ie, “*requiring a ‘reasonable’ suspicion or belief of abuse or neglect, or some synonymous variation of this, and therefore not requiring knowledge of abuse or neglect*”;<sup>74</sup>
- specifying that reporters are not to conduct their own investigation but are simply required to report their suspicions according to the law;
- defining the types of abuse and neglect that attract the duty to report, or stating that a child suspected to be “*in need of protection*” must have their case reported, with key phrases then

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paper presented at *XVIIth ISPCAN International Congress on Child Abuse and Neglect*, September 7-10 2008, Hong Kong (“Mathews & Kenny (2008) (IPSCAN)”). Available at: <http://eprints.qut.edu.au/14856/>

71 Mathews & Bross (2008), above. See also Mathews & Kenny (2008) (IPSCAN), above.

72 See UK Home Office, *Impact Assessment on Reporting and Acting on Child Abuse and Neglect: Government Consultation* (Oct 2015), at 28. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539618/Impact\\_Assessment\\_-\\_Consultation\\_Stage\\_web\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/539618/Impact_Assessment_-_Consultation_Stage_web_.pdf)

73 Mathews & Kenny (2008), above, at 51.

74 Same as above.

further defined;<sup>75</sup>

- penalties for failure to report according to the duty will be stipulated, although these are largely intended to encourage reporting rather than police it;
- a guarantee of confidentiality is provided concerning the reporter's identity;
- the reporter is conferred with immunity from any legal liability arising from a report made in good faith;
- practical requirements will be detailed regarding when and how the report is to be made, and to whom;
- *"a final key element of the legislation is to enable any person to make a report in good faith even if not required to do so, and to provide confidentiality and legal immunity for these persons."*<sup>76</sup>

#### *Arguments in favour of mandatory reporting*

8.58 In arguing the case for mandatory reporting, Mathews and Bross highlight the vulnerability of children. They observe that in most cases, the abuse and neglect are inflicted by the child's parents or caregivers or other adults known to the child, consequently the perpetrators rarely seek assistance and the child is rarely able to seek assistance for himself. Mathews and Bross stress that the harmful consequences of child abuse and neglect can sometimes be fatal, and even when not, may negatively affect a child (physically, psychologically and behaviourally) for a lifetime. They argue that the law therefore needs to make special provision to protect the rights of the most vulnerable in these types of situations.<sup>77</sup>

8.59 In terms of benefits, a mandatory reporting duty could:

- increase awareness of the importance of reporting child abuse and neglect, both by those under a duty to report and the general public;
- lead to more cases of child abuse and neglect being identified, and at an earlier point in a child's life than is currently the case;
- create a higher risk environment for abusers or potential abusers because the number of reports being made would be likely to increase; and

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75 They note also that: *"Often, the degree of abuse or neglect which requires a report will be defined (hence also attempting to define extents of abuse and neglect that do not require reports). Further definitions of types of abuse and neglect may be detailed, and these may include not only exposure to harm, but exposure to risk of future harm."* See Mathews & Kenny (2008), above, at 52.

76 Same as above.

77 Mathews & Bross (2008), above.

- ensure that those best placed to make judgements about whether abuse and/or neglect is happening – social workers – do so. Practitioners (ie, those who work with children in any capacity) have not always been able to confidently conclude when a child is being abused or neglected or is at risk of abuse or neglect. Requiring a wide range of practitioners to report would enable these difficult cases to be examined by social workers.<sup>78</sup>

8.60 In those jurisdictions where mandatory reporting systems are in place, it appears that not only has the number of cases reported substantially increased, but the “*mandated reporters*” (for example, teachers, police, nurses, doctors and welfare officers) “*make the majority of all substantiated reports of child abuse and neglect.*”<sup>79</sup> Mathews and Bross argue that: “*Mandatory reporting may in fact contribute to declines in incidence of serious child abuse.*”<sup>80</sup> Citing a 2005 US study, they observe: “*It has been estimated that due to increased reporting, investigation and treatment services, annual child deaths in the USA have fallen from 3,000-5,000 to about 1,100.*”<sup>81</sup>

8.61 More recently, Mathews and Bross have stated the view that mandatory reporting laws have indisputably resulted in the identification of many more cases of severe child maltreatment than would otherwise have been revealed. The overall effect on child protection and child welfare must be viewed as positive. First, they state, the laws do result in more reports, at least initially, and a substantial proportion of these result in substantiated cases and other outcomes which assist the child. Second, the presence of a reporting law (and associated mechanisms, eg, reporter training) influences case identification by a specified reporter group. Third, the known presence of a reporting law can influence what would otherwise be a reluctance to report.<sup>82</sup>

8.62 The Australian Government has commented that:

- mandatory reporting is a strategy that acknowledges the prevalence, seriousness and often hidden nature of child abuse and neglect, and enables early detection of cases that otherwise may not come to the attention of agencies;
- mandatory reporting requirements reinforce the moral responsibility of community members to report suspected cases of child abuse and neglect. The laws help to create a culture that is more child-centred and that will not tolerate serious abuse and neglect of vulnerable children;

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78 See UK Home Office (Oct 2015), above, at 28.

79 Mathews & Bross (2008), above.

80 Same as above.

81 Mathews & Bross (2008), above, citing D Besharov (2005) “Over reporting and underreporting of child abuse and neglect are twin problems”, in D Loseke, R Gelles & M Cavanaugh (eds), *Current controversies on family violence* (2nd ed, Thousand Oaks, CA), 285 to 298.

82 Mathews & Bross (2015), above, at Chapter 1, at 16 to 17.

- the introduction of mandatory reporting and accompanying training efforts aim to enable professionals to develop an awareness of cases of child abuse and create conditions that require them to report those cases and protect them as reporters. Research has found that mandated reporters make a substantial contribution to child protection and family welfare.<sup>83</sup>

### *Arguments against mandatory reporting*

8.63 A mandatory reporting system could, however, also:

- result in an increase in unsubstantiated referrals. Unsubstantiated referrals may unnecessarily increase state intrusion into family life and make it harder to distinguish real cases of abuse and neglect.<sup>84</sup> Appropriate action may not be taken in every case as a result;
- lead to a diversion of resources from the provision of support and services for actual cases of child abuse and neglect, into assessment and investigation;
- result in poorer quality reports as there might be a perverse incentive for all those who may be covered by the duty (from police officers to school caterers) to pass the buck. This might mean the children are less protected than in the current system;
- focus professionals' attention on reporting rather than on improving the quality of interventions wherever they are needed. This might encourage behaviour where reporting is driven by the process rather than focusing on the needs of the child;
- lead to those bound by the duty feeling less able to discuss cases openly for fear of sanctions, hinder recruitment and lead to experienced, capable staff leaving their positions;
- dissuade children from disclosing incidents for fear of being forced into hostile legal proceedings;
- undermine confidentiality for those contemplating disclosure of abuse. Victims may be more reluctant to make disclosures if they know that it will result in a record of their contact being made; and
- have limited impact on further raising awareness of child abuse and neglect given other media and Government awareness

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83 Child Family Community Australia Resource Sheet, *Mandatory Reporting of Child Abuse and Neglect*, (Sep 2017), available at: <https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>

84 In 2013 to 14, South Australia (the first Australian state to introduce mandatory reporting) had over 44,000 referrals. Only 44% of these were 'screened in' (accepted) and only 15% were investigated. South Australia is reviewing mandatory reporting.

raising efforts.

8.64 Opposition to mandatory reporting laws is often based on a range of arguments, in particular that unsubstantiated reports “*invade privacy and harm those on whom suspicion wrongly falls.*”<sup>85</sup> Opponents consider that mandatory reporting may lead to inflation of unwarranted reports, “*causing huge economic waste and diverting resources from known deserving cases.*”<sup>86</sup> It is also argued that laws on mandatory reporting have been extended too far; that they were originally created “*only for a perceived few cases of physical abuse, not the more varied types of abuse and neglect we now know of.*”<sup>87</sup>

8.65 It has also been stated that mandatory reporting is not a perfect system of case-finding.<sup>88</sup> Even with mandatory reporting laws in place, cases of abuse can evade the attention of authorities for a number of reasons.<sup>89</sup> Leung, Wong, Tang and Lee note that in practice, even where suspected reported abuse is a legal responsibility, as in the US and Australia, “*many medical professionals fail to do so despite potential criminal and civil penalties.*”<sup>90</sup> Mathews and Bross comment that reporters may not report due to feared misdiagnosis or low confidence in child protection services. Many ‘unsubstantiated’ cases will be abusive but lack sufficient evidence to be considered ‘substantiated’. Also, many cases will simply not be perceived by, or even made present before, a mandated reporter.<sup>91</sup> Leung, Wong, Tang and Lee observe that even where mandatory reporting laws are in place, common barriers to reporting include a lack of knowledge and training on identifying child abuse, lack of knowledge on reporting laws and process, professionals’ concerns regarding maintaining anonymity and a reluctance to get involved in litigation.<sup>92</sup>

8.66 The UK government, following a recent public consultation on the subject, has commented:

*“It is difficult to be definitive about the effectiveness (or not) of mandatory reporting. Such a duty would likely increase the volume of reports made to children’s social care. In theory, this might help to identify abuse more quickly to enable swifter preventative and protective action. However, the increased volume of reports might overwhelm the child protection system.*”

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85 Mathews & Bross (2008), above.

86 Same as above.

87 Same as above. The writers note that some critics have even gone so far as to claim that the mandatory reporting laws now in place should be abandoned: see, for example, G Melton (2005), “Mandated reporting: A policy without reason” (2005) *Child Abuse & Neglect*, 29(1), 9 to 18.

88 Mathews & Bross (2008), above.

89 Same as above.

90 Leung, Wong, Tang and Lee (2010), above, at 1. They observe that 43% of GPs in Australia and 28% of paediatricians in the US did not report suspected cases of child abuse they encountered.

91 Mathews & Bross (2008), above.

92 Leung, Wong, Tang and Lee (2010), above, at 1.

*This might mean that an increased number of unsubstantiated reports (ie, reports of children at risk that were later not confirmed as such) detracts from cases where children need help and protection, meaning that the system becomes slower to help these children. While mandatory reporting could encourage a stronger reporting culture, this might not necessarily be positive if that means that professionals ‘pass the buck’ and report to children’s social care rather than trying to take preventative/protective action themselves. Mandatory reporting could also dissuade children from disclosing incidents for fear of being forced into legal proceedings.”<sup>93</sup>*

### *Counter-arguments to criticisms of mandatory reporting*

8.67 In answer to these objections to establishing mandatory reporting laws, Mathews and Bross list the following arguments:<sup>94</sup>

- most abuse and neglect occurs in the family. The welfare of the child within the family needs to be protected and reporting laws promote this goal;
- without the laws, many more cases of abuse will not be disclosed and more children will die;
- the occurrence of ‘unsubstantiated reports’ is a poor argument against the laws, “*as many of these do involve abuse, and are prime candidates for early intervention*”,<sup>95</sup>
- many “*unwarranted reports*” are not even made by mandated reporters, but by other citizens;
- the claimed benefits from abolishing (or presumably, not having) the laws are unproven and would incur far greater loss.

8.68 Mathews and Bross also argue that any deficiencies in the system lie not with the reports, “*but poorly funded child protection services and the quality of post-report responses. Methods of intake, screening and assessment can improve. Service provision needs to improve.*”<sup>96</sup> They also comment that, in order to improve the efficacy of the mandatory reporting system itself: “*Laws, reporter training and public education can better define what should and should not be reported. This may involve reassessing the*

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93 See UK Home Office (Oct 2015), above, at 9. See also similar ambivalent comment in HM Government: *Reporting and acting on child abuse and neglect: Government Consultation* (Jul 2016), at Annex D, 20 and 28. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539615/Reporting\\_and\\_acting\\_on\\_child\\_abuse\\_and\\_neglect\\_-\\_annexes\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539615/Reporting_and_acting_on_child_abuse_and_neglect_-_annexes_web.pdf)

94 Mathews & Bross (2008), above.

95 Same as above, citing the 2007 study by B Drake & M Jonson-Reid, “A response to Melton based on the best available data” (2007) *Child Abuse & Neglect*, 31, at 343 to 360.

96 Mathews & Bross (2008), above.

*scope of the [mandatory reporting] laws.*<sup>97</sup>

8.69 More recently, Mathews and Bross note that:

- close to half of all reports are made by non-mandated reporters;
- a large proportion are multiple reports about the same children;
- many reports are screened out and are not investigated, hence resulting in very little burden;
- the substantiated rate of investigated cases is significantly higher; and
- the bulk of the economic cost involved in child protection is absorbed by foster care and residential care, accounting for at least half of the entire systemic cost.

8.70 These and other arguments have been considered recently by five major government child protection inquiries in Australia when contemplating the merits and parameters of mandatory reporting. The five recent inquiries have occurred in New South Wales (Wood 1997), South Australia (Layton 2003), New South Wales (Wood 2008), Victoria (Cummins et al. 2012), and Queensland (Carmody 2013). According to Mathews and Bross, these inquiries have consistently supported mandatory reporting laws as a necessary component of social policy to identify and respond to child abuse and neglect.<sup>98</sup>

*Mandatory reporting duty: areas for improvement*

8.71 Mathews and Bross cited a finding of the New South Wales Wood inquiry in 2008 that, rather than abolishing the reporting laws, the system needed greater effectiveness in reporting and more appropriate treatment of cases, including by use of a differential response pathway. It was considered that, in addition, amendments to the mandatory reporting provisions should be made to promote reports only being made about the kinds of case the system aimed to receive, namely, cases of significant abuse or harm.<sup>99</sup>

8.72 Mathews and Bross note the following areas where mandatory reporting may be improved:

- research needs to identify what educational measures are most effective in preparing reporters for their role;
- child protection systems need to interact effectively with reporters, providing feedback on reports and their outcomes;

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97 Same as above.

98 Same as above, at 19.

99 Same as above, at 20.

- there are also areas of undesirable reporting practice: poverty *per se* should not be reported, and low levels of neglect and lawful corporal punishment that is clearly disciplinary in intention and not producing clear injuries should not be reported;
- better reporter training and public education are essential;
- refinement of reporting laws is well-worth implementation: if necessary, if carefully constructed, and if supported by principle and data;
- investigation and differential response pathways are likely both needed but require ongoing monitoring to ensure principled and efficient operation;
- marginalised groups such as the homeless, and refugees, should be dealt with particular sensitivity if they are the subject of a report; and
- child protection systems should be better resourced, so they can fulfil their remit.<sup>100</sup>

*Different considerations for vulnerable adults in some cases*

8.73 It has been observed, for example in Australia, that in contrast to child abuse cases, different considerations may apply to mandatory reporting for cases involving vulnerable adults. The Australian Law Reform Commission (ALRC) has commented that:

*“Older people must not be treated like children, and the ALRC considers that professionals should not be required to report all types of elder abuse. Elder abuse is a broad category, and older people should generally be free to decide whether to report abuse they have suffered to the police or a safeguarding agency or not report the abuse at all. However, although not recommended in this report, there is a case for requiring professionals to report serious abuse of particularly vulnerable adults. ... However, although there may be a case for mandatory reporting of some types of serious abuse of at-risk adults, given the widespread concerns about mandatory reporting policies, the ALRC does not recommend that such laws be introduced at this time. Instead, as discussed above, clear protocols should be created setting out when it might be appropriate for professionals to report abuse to safeguarding agencies.”<sup>101</sup>*

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100 Same as above.

101 Australian Law Reform Commission, *Elder Abuse - A National Legal Response* (2017, ALRC Report 131), at paras 14.189 and 14.197. Available at: <https://www.alrc.gov.au/publications/elder-abuse-report>

## ***Our observations on reporting of abuse***

8.74 As stated at the outset of this chapter, we have presented this material on reporting obligations for the information of the public and for those who may make future policy in this area.

8.75 On the question of mandatory reporting, we note from the previous discussion, and from the information set out in Appendix VI, that the relevant overseas models represent a range in approaches, particularly in relation to the scope of cases required to be reported and by whom.<sup>102</sup> It is also apparent that the issues involved and considerations to be applied in formulating such systems are highly complex, if such systems are to fully meet their objectives *“to detect cases of abuse and neglect at an early stage, protect children [and other vulnerable persons], and facilitate the provision of services to children and families.”*<sup>103</sup>

8.76 In this regard, we note the useful list of *“Issues for consideration”* drawn up by Mathews and Kenny in 2008 for *“legislatures ... designing mandatory reporting legislation.”*<sup>104</sup> The issues they cite, should such matters come up for consideration, are as follows.

1. Are mandated reporters limited to selected occupations (and if so, which), or is the reporting duty imposed on all citizens?
2. What types of abuse (physical, emotional, sexual) and neglect are required to be reported?
3. What level of suspicion is required to activate the reporting duty (and how is this expressed)?
4. Within the three major types of abuse, are reports required of suspected abuse from all sources, or from selected perpetrators such as parents and caregivers (and how is this to be clearly expressed)?
5. Are any ‘new’ types of abuse required to be reported, and if so, which?
6. Are the types of abuse that are required to be reported defined to indicate the extent of harm required to be suspected to have been suffered (and if so, how), or does the reporting obligation apply to any occurrence of the abuse?

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102 For a useful comparative analysis of these differences in approach, see Mathews & Kenny (2008), above.

103 Mathews & Kenny (2008), above, at 50 Abstract.

104 Mathews & Kenny (2008), above, at 62.

7. Are reports required only of past or present abuse, or are reports also required of suspected risk of future abuse (and if so, under what circumstances)?

To these, we would suggest the following further heads of inquiry:

8. To what extent, if at all, should penalties be imposed for failure to comply with the mandatory duty?
9. Should child victims of abuse be able to recover compensation for harm they have been proved to have suffered as a result of the failure to report abuse?
10. Should there be any specified circumstances where liability may be incurred in cases where a report is incorrectly made and causes harm to be suffered by a person or persons wrongly accused of child abuse?

8.77 For members of the public, while the material above relates largely to policy makers and frontline persons involved professionally in the protection of children and other vulnerable persons, it is important that members of the public are aware of the role they too can play. By taking simple steps to bring possible cases of abuse to the attention of the authorities (like making a telephone call to SWD or the police), a crucial early intervention can take place to protect the victim, support the family, and prevent an escalation of harm and suffering.

8.78 For members of the victim's family and other carers under a duty to protect the victim, we saw in Chapter 3 the types of "*reasonable steps*" which should be taken, including:

- reporting suspicions of abuse to the police;
- contacting social services (perhaps through websites and helplines which are available for those seeking further advice);
- making sure that the child or vulnerable person is treated promptly and appropriately for any injuries or illnesses which they may suffer;
- explaining concerns to their family medical practitioner or health visitor;
- contacting their teacher, head teacher or school nurse;
- contacting relevant child welfare organisations and/or NGOs;
- contacting grandparents, an aunt or uncle, or other responsible adult member of the family;

- exploring concerns with neighbours or others who may have contact with the person who is at risk.<sup>105</sup>

8.79 The most vulnerable in society often cannot speak for themselves, so we must speak for them.

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105 See Chapter 3, above, at para 3.60, citing UK Ministry of Justice, Criminal Law & Legal Policy Unit, "Domestic Violence, Crime and Victims (Amendment) Act 2012" (Circular No 2012/03, June 2012), at para 25.

## REPORTING OF ABUSE

### Further details on overseas systems (see Chapter 8)

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#### Introduction

1. In addition to the information on types of reporting systems referred to in Chapter 8 of this paper, we set out below further details on the reporting systems in other jurisdictions.

#### AUSTRALIA

##### *The current position on child abuse reporting in Australia*

##### *Overview*

2. Australian States and Territories have different mandatory reporting laws. There are two major areas of difference between the different schemes: which persons are designated as “*mandated reporters*”; and which types of child abuse and neglect they are required to report. There are also other differences, such as the “*state of mind*” that activates the reporting duty (ie, having a concern, suspicion or belief on reasonable grounds) and the destination of the report.<sup>1</sup> Some jurisdictions have relatively broad reporting laws, and others have narrower laws.
3. In addition to state and territory laws, the Commonwealth *Family Law Act 1975* creates a mandatory reporting duty for personnel from the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia. This includes registrars, family consultants and counsellors, family dispute resolution practitioners or arbitrators, and lawyers independently representing children’s interests. Section 67ZA of the Act states that when in the course of performing duties or functions, or exercising powers, these persons have reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the

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1 Mandatory reporting of child abuse and neglect, Child Family Community Australia Resource Sheet – September 2017. Available at: <https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>

person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.<sup>2</sup>

*Who is mandated to make a notification?*

4. The legislation generally contains lists of particular occupations that are mandated to report. The groups of people mandated to notify cases of suspected child abuse and neglect range from persons in a limited number of occupations (eg, Queensland), to a more extensive list (Victoria, Western Australia), to a very extensive list (Australian Capital Territory, South Australia, Tasmania), through to every adult (Northern Territory, New South Wales; and Victoria for sexual offences). The occupations most commonly named as mandated reporters are those who deal frequently with children in the course of their work: teachers, doctors, nurses and police.<sup>3</sup>
5. Any person can make a report if they are concerned for a child's welfare even if they are not required to as a mandatory reporter.<sup>4</sup>
6. Although particular professional groups (such as psychologists) or government agencies (such as education departments in some states) may have protocols outlining the moral, ethical or professional responsibility, or the organisational requirement to report, they may not be officially mandated under their jurisdiction's child protection legislation. For example, in Queensland, teachers are required to report all forms of suspected significant abuse and neglect under school policy, but are only mandated to report sexual abuse under the legislation.<sup>5</sup>

*What types of abuse are mandated reporters required to report?*

7. In addition to differences describing who is a mandated reporter across jurisdictions, there are also differences in the types of abuse and neglect that must be reported. In some jurisdictions it is mandatory to report suspicions of each of the four classical types of abuse and neglect (ie, physical abuse, sexual abuse, emotional abuse and neglect). In other jurisdictions it is mandatory to report only some of the abuse types (eg, Victoria, Australian Capital Territory). Some jurisdictions also requires reports of exposure of children to domestic violence (eg, New South Wales, Tasmania).
8. It is important to note that in most jurisdictions, the legislation generally specifies that except for sexual abuse (where all suspicion must be reported), it is only cases of significant abuse and neglect that must be reported. Reflecting the original intention of the laws, the duty does not apply to any instance of "*abuse*" or "*neglect*" but only to cases that are of

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2 Same as above.

3 Same as above.

4 Same as above.

5 Same as above.

sufficient significant harm to the child's health or wellbeing to warrant intervention or service provision.<sup>6</sup>

#### *Protections given to reporters*

9. In all jurisdictions, the legislation protects the reporter's identity from disclosure. In addition, the legislation provides that as long as the report is made in good faith, the reporter cannot be liable in any civil, criminal or administrative proceeding. Any person making a voluntary (non-mandated) report is also protected with regard to confidentiality and immunity from legal liability.<sup>7</sup>

#### *About whom can notifications be made?*

10. Legislation in all jurisdictions requires mandatory reporting in relation to all young people up to the age of 18 years (whether they use the terms "children" or "children and young people").

#### *Developments in mandatory reporting legislation<sup>8</sup>*

11. In recent years, legislative amendments to reporting laws have occurred in many jurisdictions. It has been commented that nearly all of these amendments enlarged the reporting duties, but some confined them, most notably in New South Wales.<sup>9</sup> In 2018, the Crimes Act 1900 (NSW) was amended<sup>10</sup> to introduce new offences of concealing a child abuse offence<sup>11</sup> and failing to remove the risk that a worker will commit a child abuse offence.<sup>12</sup> Also, three jurisdictions enacted new methods of reporting less serious cases of child maltreatment and family support needs to differential response agencies in an attempt to create more efficient pathways to connect cases of family need directly to community

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6 Same as above. See also Table 2: Mandatory reporting requirements across Australia by state.

7 Same as above.

8 Much of the content of the section below is drawn from the following source: *Child Abuse and Neglect: A Socio-legal Study of Mandatory Reporting in Australia: Report for Australian Government Department of Social Services* (April 2015), available at: [https://www.dss.gov.au/sites/default/files/documents/03\\_2016/child-abuse-and-neglect-v1-aust-gov.pdf](https://www.dss.gov.au/sites/default/files/documents/03_2016/child-abuse-and-neglect-v1-aust-gov.pdf)

9 Same as above, at 5, 75 and 76. Four substantial amendments were introduced by the Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 (NSW), which affected the concept of harm, category of reportable harm, penalty provision and reporting mechanism.

10 The Crimes Act 1900 (NSW) was amended by the Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW) and the Community Protection Legislation Amendment Act 2018 (NSW), in response to the recommendations published by the Royal Commission into Institutional Responses to Child Sexual Abuse in its *Criminal Justice Report* (August 2017).

11 Section 316A (1) of Crimes Act 1990 (NSW). An adult who knows, believes or reasonably ought to know that a child abuse offence has been committed against another person and that he/she has information which might be of material assistance in securing the apprehension of the offender but fails to bring that information to the attention of a member of the NSW Police Force without reasonable excuse is guilty of an offence.

12 Section 43B (1) of Crimes Act 1990 (NSW). An adult (a position holder) who knows that another person, who is engaged in a child-related work, poses a serious risk of committing a child abuse offence and the position holder has the power or responsibility to reduce or remove the risk but negligently fails to do so is guilty of an offence.

service agencies.<sup>13</sup> In Queensland in 2014, the *Child Protection Reform Amendment Act 2014* was passed to make substantial changes to Queensland's mandatory reporting legislation. These changes will shift Queensland's position towards the current position in Victoria. The changes will broaden some mandatory reporting duties, but will narrow others. The changes will also introduce a more formal statutory footing for differential response pathways.<sup>14</sup>

### ***Mandatory reporting laws v differential response systems***<sup>15</sup>

12. While mandatory reporting laws focus on serious cases which are more likely to require child protection and services, differential response systems focus on less serious cases requiring services and assistance.

#### *Mandatory reporting laws*

13. Mandatory reporting laws are part of a system of responses to child protection and family welfare concerns. It has been observed<sup>16</sup> that the different components of this system are necessary, owing to the differences between types of maltreatment, and recognising that, within the spectrum of circumstances, different responses are appropriate. A case of severe battering of a six month-old infant, or of sexual abuse of a three year old, requires different responses than a case of mild neglect of a 14 year-old arising only from conditions of poverty in an otherwise healthy and well-functioning family. Different responses cater to the needs of children, families, communities, and child protection systems. The Australian Government considers that there is nothing to be gained from the inappropriate use of mandatory reporting laws for cases which are not their primary object; an analogy might be the inappropriate use of an ambulance to deal with a minor health complaint. It is important to avoid overburdening child protection systems wherever possible.<sup>17</sup>

#### *Differential response systems*

14. Some jurisdictions have formalised these different responses – commonly called 'differential response' – to a greater extent than others. The aim is not to apply mandatory reporting laws to any and all cases of 'abuse' and 'neglect', but to limit those laws to severe cases, and to enable referral to and deployment of supportive community agencies to situations of less severe problems. At one end of the differential response continuum, in cases of serious abuse and neglect statutory responses such as child protection orders can be made. At the other end of the continuum, ideally, are supports such as assistance with housing, finance,

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13 Same as above, at 5.

14 Same as above, at Important note.

15 Same as above, at Stage 1: Legal Analysis, para 1.3.

16 Same as above.

17 Same as above.

employment, substance abuse, alcohol dependency, mental health conditions, domestic violence respite care, and parenting skills. Cases of serious abuse and neglect may require a blend of both statutory intervention and support to the family.

### **Victoria**

15. Examples include Victoria's Child and Family Information, Referral and Support Teams (ChildFIRST) system, which enables individuals who have a significant concern about a child's wellbeing to refer their concern to ChildFIRST for help, rather than reporting to the department responsible for child protection. This provision complements the mandatory reporting provisions, where reports of specified cases of a child being 'in need of protection' must be made to the Secretary of the Department. Children and families who are referred to ChildFIRST are assessed and may be offered home-based family support or referred to other health and welfare services. ChildFIRST must forward reports to child protection services if the community-based child and family service considers that the situation may involve more significant harm or risk of harm; that is, that the child may be 'in need of protection' (Government of Victoria, 2006). Equally, reports made to child protective services may be redirected to ChildFIRST if deemed not to require a child protection response (Government of Victoria, 2006).

### **Tasmania**

16. The ChildFIRST model was adopted in Tasmania under the name 'Gateways'. Tasmania also amended its mandatory reporting laws to facilitate a preventative approach. Mandatory reporters could report their concerns about the care of a child to a 'Community-Based Intake Service', and this would fulfil their reporting duty (*Children, Young Persons and Their Families Act 1997*, Part 5B).

### **New South Wales**

17. In New South Wales, to renew an emphasis on limiting mandatory reporting to cases of significant harm, the *Keep Them Safe: Annual Report 2010-11* set out the new system requiring mandated reporters to report to the department only cases of suspected significant harm.
18. Section 27A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) then enabled mandated reporters to make reports to 'Child Wellbeing Units' which were established in the four major State government departmental groups (health, education, police, and family and community services).

19. These units provide support and advice to mandated reporters on whether a situation warrants a mandated report and on local services which might be of assistance (NSW Department of Premier and Cabinet, 2011). The units' focus is on ascertaining what the family needs to minimise or overcome their present situation and on facilitating the most appropriate assistance.

## NEW ZEALAND

### ***The current position on child abuse reporting in New Zealand***

#### *Overview*

20. In New Zealand, it is not mandatory to report child abuse.<sup>18</sup> Under section 15 of *Children's and Young People's Well-being Act 1989*<sup>19</sup> any person can report suspected child abuse at any time if they believe that a child or young person has been, or is likely to be:
- harmed (whether physically, emotionally, or sexually)
  - ill-treated
  - abused
  - neglected, or
  - deprived.
21. Child abuse can be reported to the police or to a social worker from the Ministry for Vulnerable Children. Section 16 provides statutory protection for health care providers who suspect child abuse and/or neglect to report.<sup>20</sup> Under section 17, where any social worker or the police receives a report, that social worker or police shall investigate into the matters contained in the report and consult with a care and protection resource panel in relation to the investigation.

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18 New Zealand Ministry of Health: Family violence questions and answers: <https://www.health.govt.nz/our-work/preventative-health-wellness/family-violence/family-violence-questions-and-answers>

19 *Children's and Young People's Well-being Act 1989*, Reporting (section 15):  
"Any person who believes that any child or young person has been, or is likely to be, harmed (whether physically, emotionally or sexually) ill-treated, abused, neglected, or deprived may report the matter to [a Social Worker] or a member of the Police."

20 *Children's and Young People's Well-being Act 1989*, Protection when disclosing (section 16):  
"No civil, criminal, or disciplinary proceedings shall lie against any person in respect of the disclosure or supply, or the manner of the disclosure or supply, by that person pursuant to section 15 of information concerning a child or young person (whether or not that information also concerns any other person), unless the information was disclosed or supplied in bad faith."

22. [See also Chapter 5 of this consultation Paper] Under the *Crimes Act 1961*, sections 150A, 152, 195, 195A, anyone who is over 18 and who is aware of child abuse occurring in a household in which they live, or are a member of, must take reasonable steps to protect that child from death, serious harm or sexual assault. Practically, this means they must report child abuse that is serious. The law also applies to staff members of hospitals, institutions or residences where a child is living. Further, guardians have a duty to protect children in their care from injury. The maximum penalty for not taking reasonable steps to protect a child from death, serious harm or sexual assault is 10 years' imprisonment. People are not legally required to report less serious suspected child abuse. A person who reports abuse is protected from civil, criminal or disciplinary proceedings, unless they knew that the information they gave was not true.<sup>21</sup>
23. For healthcare providers, best practice recommends staff who identify or suspect child abuse report their concerns to a statutory agency, the police or Oranga Tamariki – Ministry for Children. In some district health boards this is mandatory. Whilst the legislation does not require mandatory reporting of child protection, district health boards, have within their child protection policies the requirement to report child protection concerns to Police and/or Child Youth and Family (now Oranga Tamariki). In addition, all district health boards have signed a Memorandum of Understanding (MOU) with Child, Youth and Family and the New Zealand Police that requires that the parties to the MOU practice in accordance with their organisations policies/procedures.<sup>22</sup> The Ministry of Health has also published a Family Violence Assessment and Intervention Guideline to help health providers make safe and effective interventions to assist victims of interpersonal violence and abuse.<sup>23</sup>

#### *White Paper on Vulnerable Children*

24. In October 2012, the New Zealand Ministry of Social Development issued the *White Paper on Vulnerable Children*.<sup>24</sup> The White Paper included legislation changes and a range of solutions aimed to better identify, support and protect vulnerable children.

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21 See Community Law:  
<http://communitylaw.org.nz/community-law-manual/chapter-27-dealing-with-the-ministry-for-vulnerable-children-oranga-tamariki/reporting-child-abuse-chapter-27/>

22 New Zealand Ministry of Health: Family violence questions and answers:  
<https://www.health.govt.nz/our-work/preventative-health-wellness/family-violence/family-violence-questions-and-answers>

23 Family Violence Assessment and Intervention Guideline: Child abuse and intimate partner violence (Jun 2016), available at:  
<https://www.health.govt.nz/publication/family-violence-assessment-and-intervention-guideline-child-abuse-and-intimate-partner-violence>

24 New Zealand Ministry of Social Development: The White Paper for Vulnerable Children (at 7 to 8, Volume I), available at:  
<https://www.orangatamariki.govt.nz/assets/Uploads/white-paper-for-vulnerable-children-volume-1.pdf>

25. The White Paper did not recommend that the Government should legislate for mandatory reporting of child abuse for the following reasons:

*“The issue of mandatory reporting of child abuse has been debated for many years. There are pros and cons. In some places where it has been introduced there has been an increase in the number of children who slip through the cracks because child protection agencies are so swamped with notifications that they can’t cope. There are also concerns about child protection getting needlessly involved in the lives of everyday families.*

*New Zealand already has high levels of notification – the same or higher than some Australian states which have mandatory reporting. In fact, the vast majority of New Zealand children who are seriously abused are already known to government agencies.*

*Because of this the Government will not be legislating for mandatory reporting.*

*What we will do is introduce a range of initiatives that will raise expectations on agencies and make it easier for frontline staff and the public to identify vulnerable children and report concerns.”*

#### *Children’s Action Plan*

26. Following the release of the White Paper noted above, a *Children’s Action Plan* was introduced to provide the set of actions and initiatives to respond to the issues affecting vulnerable children and to achieve the changes documented in the White Paper.

## **UNITED KINGDOM**

### ***The current position on child abuse reporting in UK***

27. In the UK, practitioners and agencies work within a legislative and structural framework summarised in the *Working Together to Safeguard Children* <sup>25</sup> (“*Working Together*”) statutory guidance. Under this, practitioners should make an immediate referral to local authority children’s social care if they believe that a child has suffered harm or is likely to do so. This is set out in the cross-sector *Working Together* statutory guidance which is supplemented by *What to do if you’re worried a child is being abused* guidance, <sup>26</sup> which aims to help practitioners identify when abuse or neglect might be occurring and provide advice on what to do next.

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25 Statutory Guidance: Working Together to Safeguard Children, available at: <https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

26 Child abuse concerns: guide for practitioners, available at: <https://www.gov.uk/government/publications/what-to-do-if-youre-worried-a-child-is-being-abused--2>

28. There is currently no general legal requirement on those working with children to report either known or suspected child abuse or neglect. Statutory guidance, however, is very clear that those who work with children and families should report to the local authority children's social care immediately if they think a child may have been or is likely to be abused or neglected. While statutory guidance does not impose an absolute legal requirement to comply, it does require practitioners and organisations to take it into account and, if they depart from it, to have clear reasons for doing so.
29. In 2015, the UK Government introduced a specific requirement on teachers, health professionals and social workers to report known cases of female genital mutilation ("FGM") on girls under 18 to the police. This was in order to address the particular issue of a lack of successful prosecutions. The requirement is intended to ensure that girls subject to this horrific practice get the help and support they need and help to eradicate this crime in England and Wales. As with any other suspected forms of child abuse, suspected cases of FGM should be referred to local authority children's social care, in line with the cross-sector Working Together statutory guidance.<sup>27</sup>

#### *Government consultation*

30. In July 2016, the UK Government launched a consultation<sup>28</sup> which set out the Government's wide-ranging programme of reform to provide better outcomes for vulnerable children. The consultation also sought views on the possible introduction of mandatory reporting of child abuse and neglect or a duty to act in relation to child abuse or neglect. It sought views on the possible introduction of one of two additional statutory measures:
- a mandatory reporting duty, which would require certain practitioners or organisations to report child abuse or neglect if they knew or had reasonable cause to suspect it was taking place; or
  - a duty to act, which would require certain practitioners or organisations to take appropriate action in relation to child abuse or neglect if they knew or had reasonable cause to suspect it was taking place
31. The consultation also sought views on whether the scope of these possible changes should extend to vulnerable adults.

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27 HM Government: Reporting and acting on child abuse and neglect: Government Consultation (21 July 2016), see Part A, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539642/Reporting\\_and\\_acting\\_on\\_child\\_abuse\\_and\\_neglect\\_-\\_consultation\\_document\\_web\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539642/Reporting_and_acting_on_child_abuse_and_neglect_-_consultation_document_web_.pdf)

28 Same as above, see Part C.

### *Consultation responses and Government action*

32. In March 2018, the UK Government published the *Reporting and acting on child abuse and neglect: Summary of consultation responses and Government action*.<sup>29</sup>
33. The majority of respondents to the consultation (63%) were in favour of allowing the Government's existing programme of reforms time to be fully embedded. Only a quarter of respondents (25%) favoured introducing a duty to act, with less than half of that number (12%) favouring the introduction of mandatory reporting.<sup>30</sup>
34. Having considered all of the evidence and the views raised by the consultation, the UK Government believes that the case for a mandatory reporting duty or duty to act has not currently been made. Therefore, it does not intend to introduce a mandatory reporting duty or duty to act at this time.<sup>31</sup>
35. Respondents were more concerned about the potential negative impact of introducing a mandatory reporting regime. Over two-thirds of respondents (68%) agreed that such a duty would have an adverse impact on the child protection system. Eighty-five percent (85%) of respondents agreed that mandatory reporting would not ensure that appropriate action would be taken to protect children. Just over two-thirds of respondents (70%) agreed that a statutory mandatory reporting duty would generate more child abuse and neglect reports, but a similar proportion of respondents (66%) agreed that it could divert attention from the most serious child abuse and neglect cases.<sup>32</sup>
36. The consultation asked for feedback on the key issues within the current child protection system. The areas where respondents thought that improvement was most needed was in better joint working between different local agencies (93%), further work to encourage new and innovative practice (85%) and better training for practitioners (81%).<sup>33</sup>
37. The majority of respondents (51%) agreed that a duty to act would have an adverse impact on the child protection system (such as impacting recruitment and retention of staff, and negatively impacting the serious case review process). A quarter of respondents (25%) were attracted to the idea of the duty to act. Two-thirds of respondents (67%) agreed that a duty to act would strengthen accountability in the system. Over half of

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29 Reporting and acting on child abuse and neglect: Summary of consultation responses and Government action. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/685465/Reporting\\_and\\_acting\\_on\\_child\\_abuse\\_and\\_neglect\\_-\\_response\\_to\\_consultati...pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685465/Reporting_and_acting_on_child_abuse_and_neglect_-_response_to_consultati...pdf)

30 Same as above, at para 9.

31 Same as above, at para 17.

32 Same as above, at para 12.

33 Same as above, at para 10.

respondents (57%) agreed that it would be more likely to improve outcomes for children than a duty focused solely on reporting. A number of respondents suggested that further consultation would be required should such a duty be developed in future.<sup>34</sup>

38. One argument made in individual responses to the consultation was for different forms of mandatory reporting based on reporting within ‘closed institutions’ or ‘regulated activities’.<sup>35</sup> A small number of individual respondents (including the Office of the Children’s Commissioner and the NSPCC<sup>36</sup>) raised the idea of a concealment offence in relation to child abuse and neglect. It was felt this might address scenarios where there is a conflict between reporting and the potential reputational damage to an institution.<sup>37</sup>

#### *Argument for mandatory reporting*<sup>38</sup>

39. The key premise behind a mandatory reporting duty is the threat of sanctions that would then be imposed on those who choose not, or otherwise fail to report concerns about child abuse and neglect. This in turn would lower the threshold for practitioners choosing to report a concern, with a lower likelihood of being dissuaded from doing so – including in cases where, for example, they are unsure what they have seen, they are influenced by professional cautiousness, or they are fearful of the reputational damage that making a report may cause. Supporters of mandatory reporting argue that this reduces the risk that serious cases will pass unnoticed and therefore results in better protection for children.

#### *Argument against mandatory reporting*<sup>39</sup>

40. The UK Government recognises the importance of these points – and the effect following the introduction of mandatory reporting in other countries such as Australia, suggests that referrals do indeed increase where mandatory reporting is in place. However, even compared to countries which have mandatory reporting systems, the rate of referrals is comparable or already higher in England: 54.8 per 1,000 children in England (2016/17), compared to 53.2 per 1,000 children in the USA (2015), and 42.0 per 1,000 children in Australia (2015/16).
41. The UK Government considers that this would not necessarily lead to an increase in subsequent engagement with children brought into the child protection system, and notes that the increasing number of referrals rather risks creating a ‘needle in a haystack’ effect in which it is less likely, rather than more likely, that the social care system will identify key cases.

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34 Same as above, at para 11.

35 Same as above, at para 13.

36 National Society for the Prevention of Cruelty to Children.

37 Same as above, at para 14.

38 Same as above, at para 18.

39 Same as above, at paras 19 to 26.

Implementation of a mandatory reporting duty may also result in less consideration of the most appropriate stage for referrals, leading to a ‘tick box’ procedural approach – not only by social workers, but also those practitioners referring cases including in health, education and the police. Again, this would not help children’s social care workers to identify key cases.

42. If a mandatory reporting duty or duty to act were introduced, it is expected that alongside the increase in referrals, there would be an increase in the intervention in the lives of children and families. This may undermine confidentiality for those contemplating disclosure of abuse with victims more reluctant to make disclosures if they know that it will result in a record of their contact being made. The prospect of such contact may cause families to disengage with services.
43. The UK Government considers that most fundamentally, the evidence and submissions received through the consultation has not demonstrated conclusively that the introduction of a mandatory reporting duty or a duty to act improves outcomes for children. Professional experience and other evidence generally does not find reporting to be a key issue in cases where a child is failed.

*“Whether a child is already known to social care workers or not, translating practitioners’ knowledge of a child’s ongoing needs into appropriate support can be the difference between life and death. Such evidence suggested that issues around information sharing, professional practice and decision making are more likely to be at the crux of incidents where children do not receive the protection they need. What would ultimately be most effective is improved information sharing, supported by better multi-agency working, better assessments, better decision making and better working with children at all stages of their engagement with the safeguarding system.”<sup>40</sup>*

#### *Government action*

44. In response to issues raised by the consultation, the UK Government plans to take out the following targeted action. In particular, it will address four key issues around reporting and acting on child abuse. These include the importance of understanding and reporting abuse, information sharing between agencies that work with children, best practice and professional training, and continuing to assess the legal framework and evidence to ensure the approach that the Government is taking is effective and adequate.<sup>41</sup>

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40 Same as above.

41 Same as above, at 7. See para 27-50.

## UNITED STATES

45. Commenting on the position on reporting requirements in the US, Mathews and Bross observe<sup>42</sup> that the scope of states' initial legislation was restricted to requiring medical practitioners to report serious intentional physical injury. Only a few states included a requirement to report serious injury caused by neglect. The general ambit of these laws soon expanded in three ways.
46. First, state laws were gradually amended to require members of additional professional groups beyond medical practitioners to report suspected cases of abuse (such as teachers, nurses, social workers and mental health professionals); and some states would require all citizens to make reports. Second, the types of reportable abuse were expanded to include not only physical abuse but sexual abuse, emotional or psychological abuse, and neglect. Third, in order to activate the reporting duty, the extent of harm caused or suspected was required to be unqualified by expressions such as "serious" or "significant" harm. A qualification of "serious harm" was inserted later, thus effectively contracting the required scope of state legislation. However, state legislatures may still choose to adopt a broader definition.<sup>43</sup>

### ***The current position on child abuse reporting in the US***

47. All States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the US Virgin Islands have statutes identifying persons who are required to report suspected child maltreatment to an appropriate agency, such as child protective services, a law enforcement agency, or a State's toll-free child abuse reporting hotline.<sup>44</sup>

#### *Professionals Required to Report*

48. Approximately 48 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands designate professions whose members are mandated by law to report child maltreatment. Individuals designated as mandatory reporters typically have frequent contact with children. Such individuals may include:
- Social workers
  - Teachers, principals, and other school personnel

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42 Mathews & Bross (2015), above, at Chapter 1, at 9 to 11.

43 Mathews & Bross (2015), above, at Chapter 1, at 9 to 11.

44 Child Welfare Information Gateway, (2016): Mandatory reporters of child abuse and neglect. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau. Available at: <https://www.childwelfare.gov/pubPDFs/manda.pdf>

- Physicians, nurses, and other health-care workers
- Counselors, therapists, and other mental health professionals
- Child care providers
- Medical examiners or coroners
- Law enforcement officers.

### *Reporting by Other Persons*

49. In approximately 18 States and Puerto Rico, any person who suspects child abuse or neglect is required to report. Of these 18 States, 16 States and Puerto Rico specify certain professionals who must report, but also require all persons to report suspected abuse or neglect, regardless of profession<sup>45</sup>. New Jersey and Wyoming require all persons to report without specifying any professions. In all other States, territories, and the District of Columbia, any person is permitted to report. These voluntary reporters of abuse are often referred to as “*permissive reporters.*”

### *Institutional reporting*

50. The term “*institutional reporting*” refers to those situations in which the mandated reporter is working (or volunteering) as a staff member of an institution, such as a school or hospital, at the time he or she gains the knowledge that leads him or her to suspect that abuse or neglect has occurred. Many institutions have internal policies and procedures for handling reports of abuse, and these usually require the person who suspects abuse to notify the head of the institution that abuse has been discovered or is suspected and needs to be reported to child protective services or other appropriate authorities.

### *Circumstances under which a mandatory reporter must make a report*

51. The circumstances under which a mandatory reporter must make a report vary from State to State. Typically, a report must be made when the reporter, in his or her official capacity, suspects or has reason to believe that a child has been abused or neglected. Another standard frequently used is in situations in which the reporter has knowledge of, or observes a child being subjected to, conditions that would reasonably result in harm to the child. In Maine, a mandatory reporter must report when he or she has reasonable cause to suspect that a child is not living with the child’s family. Permissive reporters follow the same standards when electing to make a report.

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45 Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, and Utah.

### *Privileged communications*

52. Mandatory reporting statutes also may specify when a communication is privileged. “*Privileged communications*” is the statutory recognition of the right to maintain confidential communications between professionals and their clients, patients, or congregants. To enable States to provide protection to maltreated children, the reporting laws in most States and territories restrict this privilege for mandated reporters. For instance, the physician-patient and husband-wife privileges are the most common to be denied by States. The attorney-client privilege is most commonly affirmed.

### *Inclusion of the Reporter’s Name in the Report*

53. Most States maintain toll-free telephone numbers for receiving reports of abuse or neglect. Reports may be made anonymously to most of these reporting numbers, but States find it helpful to their investigations to know the identity of reporters.

### *Disclosure of the Reporter’s Identity*

54. All jurisdictions have provisions in statute to maintain the confidentiality of abuse and neglect records. The identity of the reporter is specifically protected from disclosure to the alleged perpetrator in 41 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, and Puerto Rico.
55. Release of the reporter’s identity is allowed in some jurisdictions under specific circumstances or to specific departments or officials, for example, when information is needed for conducting an investigation or family assessment or upon a finding that the reporter knowingly made a false report. In some jurisdictions (California, Florida, Minnesota, Tennessee, Texas, Vermont, the District of Columbia, and Guam), the reporter can waive confidentiality and give consent to the release of his or her name.

### *Elder abuse*

56. Nearly all states have mandatory reporting laws with respect to elder abuse, but each varies on who is required to report.<sup>46</sup> Most mandatory reporting laws include healthcare professionals, nursing home and care facility employees, and law enforcement officers, whereas some controversy exists over whether certain other professions, such as members of the clergy and attorneys, should be required by law to report known or suspected elder abuse or neglect.<sup>47</sup>

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46 See, for example, Kentucky Revised Statutes, §209.030; Florida Statutes, §415.1034; and Maryland Code, Family Law §14-302.

47 Lara Queen Plaisance, ‘Will You Still...When I’m Sixty Four: Adult Children’s Legal Obligations to Aging Parents’ (2008) 21(1) *Journal of the American Academy of Matrimonial Lawyers* 245, at 255 to 256.