Developments in Australian laws requiring the reporting of suspected child sexual abuse

Ben Mathews, Chris Goddard, Bob Lonne, Stephanie Short and Freda Briggs

Thousands of Australian children are sexually abused every year, and the effects can be severe and long lasting. Not only is child sexual abuse a public health problem, but the acts inflicted are criminal offences. Child sexual abuse usually occurs in private, typically involving relationships featuring a massive imbalance in power and an abuse of that power. Those who inflict child sexual abuse seek to keep it secret, whether by threats or more subtle persuasion. As a method of responding to this phenomenon and in an effort to uncover cases of sexual abuse that otherwise would not come to light, governments in Australian States and Territories have enacted legislation requiring designated persons to report suspected child sexual abuse. With Western Australia's new legislation having commenced on 1 January 2009, every Australian State and Territory government has now passed these laws, so that there is now, for the first time, an almost harmonious legislative approach across Australia to the reporting of child sexual abuse. Yet there remain differences in the State and Territory laws regarding who has to make reports, which cases of sexual abuse are required to be reported, and whether suspected future abuse must be reported. These differences indicate that further refinement of the laws is required.

Dr Ben Mathews
Faculty of Law
Queensland University of Technology, Brisbane
Email: b.mathews@qut.edu.au

Professor Chris Goddard
Director, Child Abuse Prevention Research Australia
Monash University, Victoria

Professor Bob Lonne
Faculty of Health
Queensland University of Technology, Kelvin Grove Campus

Professor Stephanie Short
Faculty of Health Sciences
University of Sydney

Emeritus Professor Freda Briggs
University of South Australia

Following the coronial inquest into the tragic death of a child known to the Western Australian child protection department, and accompanied by protracted media attention, the Ford Review (Ford 2007) explored the functioning of the Western Australian child protection system. Similar to events in other states following inquiries into systemic failings, major organisational restructuring was recommended and the specifically mandated Department of Child Protection was created. Although it was not one of the Ford Review recommendations, the Carpenter Labor Government then in power responded to relentless pressure from the Opposition of the time, and to alarming reports of child sexual abuse in Indigenous communities, announcing the introduction of mandatory reporting of sexual abuse.

On 19 June 2008, the Parliament of Western Australia passed the *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2007* (WA). The legislation, which became operational on 1 January 2009, inserted a new Division 9A into the *Children and Community Services Act 2004* (WA). The key provision is s. 124B, which requires doctors, nurses, midwives, police officers and teachers to report a belief on reasonable grounds that a child has been the subject of sexual abuse on or after 1 January 2009, or is the subject of ongoing sexual abuse. The persons required to report must do so only when their belief arises in the course of their professional work.

Until enacting this legislation, Western Australia was the only jurisdiction in Australia which had not enacted legislative duties to report child sexual abuse akin to those enacted in all the other States and Territories. This is the latest of many developments in the Australian legislative context regarding the reporting by designated persons of suspected child sexual abuse. It provides an opportunity to revisit the current law in this area, and to point to other areas where these mandatory reporting laws may be developed or refined due to their inconsistency or ambiguity, principally regarding child sexual abuse, but also to other forms of child abuse and neglect.

RATIONALE FOR LEGISLATIVE REPORTING DUTIES REGARDING SUSPECTED CHILD SEXUAL ABUSE

There are many social policy reasons for democratic governments enacting legislative and systemic responses to deal with social problems. These include the need to ensure the ongoing sustainability of a just and civil society. With regard to child sexual abuse, there are also key moral issues

at stake, including the moral repugnance of such acts and the need to protect vulnerable children from abuse which can have profound negative impacts on their lives.

Legislation is often enacted in this arena both as a method of implementing mechanisms for early detection and reporting of cases of sexual abuse, and as a way for governments to indicate to the community that children's rights to be protected from sexual abuse are taken seriously. Children have rights to be protected from harm, as recognised by other aspects of State and Territory child protection legislation, and by international human rights instruments such as the United Nations Convention on the Rights of the Child (1989). Enhancing the identification of cases of child sexual abuse promotes children's human rights and social justice, and fulfils government responsibility to protect children who are not able to protect themselves. Connected with this, the incidence and effects of child sexual abuse justify measures of social policy.

In 2007-08, 32,098 Australian children were identified as abused or neglected and, of these, 3511 children were in substantiated cases of sexual abuse (Australian Institute of Health and Welfare 2009). While not all children suffer the same injuries, even where the acts endured are similar, costs to the individual commonly include injury to physical and psychological health, including depression (Spataro, Mullen, Burgess, Wells & Moss 2004; Swanston, Plunkett, O'Toole, Shrimpton, Parkinson & Oates 2003); anxiety (Dinwiddie, Heath, Dunne, Bucholz, Madden, Slutske, Bierut, Statham & Martin 2000); suicidal ideation and attempt (Martin, Bergen, Richardson, Roeger & Allison 2004; Dinwiddie et al. 2000); and post-traumatic stress disorder (Wolfe, Sas & Wekerle 1994). Sequelae often include substance abuse (Swanston et al. 2003), self-harming (Martin et al. 2004) and teenage pregnancy (Roberts, O'Connor, Dunn, Golding & ALSPAC 2004). Child sexual abuse often causes adolescents to run away from home (Rotherham-Borus, Mahler, Koopman & Langabeer 1996) and evidence suggests a link with subsequent criminal offending (Stewart, Dennison & Waterson 2002).

Psychological sequelae often continue through adulthood (Spataro et al. 2004; Horwitz, Widom, McLaughlin & White 2000; Mullen, Martin, Anderson, Romans & Herbison 1993), and coexist with difficulty in adult relationships (Mullen et al. 1993) and problematic parenting and offspring adjustment (Roberts et al. 2004). Some victims become sexual offenders (Salter, McMillan, Richards, Talbot, Hodges, Bentovim, Hastings, Stevenson & Skuse 2003; Briggs & Hawkins 1996). Child sexual abuse is therefore capable of having short-term and long-term consequences, and can have intergenerational effects.

As a whole, all forms of child abuse and neglect also cause huge social and economic cost, with total cost to the nation being estimated conservatively at $10.7 billion per annum (Taylor, Moore, Pezzullo, Tucci, Goddard & De Bortoli 2008). It is impossible to demarcate exactly the contribution of child sexual abuse to this cost, but it seems reasonable to assume that it is significant, most likely in the many hundreds of millions.

It is part of governments' responsibility to their citizens to have an enduring and apolitical commitment to enhancing children's prospects of a safe childhood.

Previously in Western Australia, while legislation did not require reports of child sexual abuse, there were a number of policy-based reporting obligations applying to various professions and organisations. It is necessary to note that where a legislative reporting duty does not exist, is restricted, or does not apply to a broad range of professions, members of occupations not under a legislative reporting duty may still have policy-based duties to report child sexual abuse. For example, this remains the case for teachers in Queensland (Butler & Mathews 2007; Mathews, Cronan, Walsh, Butler & Farrell 2008). Many social care organisations, particularly those receiving government funding for programs and services, also have policies requiring their staff to report to authorities in situations where child abuse and neglect is identified or suspected. In substance, such policy-based reporting duties may require reports of the same type of abuse, in the same circumstances, as the non-applying legislation. However, such a policy does not have the force of legislation, does not possess the Parliament's imprimatur in the same way as legislation does, and, importantly, will not include direct legislative protections afforded to mandatory reporters by legislation (including provisions regarding confidentiality of the reporter's identity, and immunity from civil liability for reports made in good faith in the event that abuse has not occurred). As well, when the reporting duties are enacted in legislation, it may be that training delivered to occupational groups in preparation for commencement of legislative reporting duties is more likely to be adequately funded, centrally sourced, and characterised by consistency and quality of delivery.

Differences remaining regarding reporting of child sexual abuse

The commencement of the Western Australian legislation has brought the law about reporting of suspected child sexual abuse across Australian States and Territories closer to national consistency. However, there are still some significant differences regarding, first, who is required to report; second, which cases of sexual abuse are required to

be reported; and third, whether suspected future abuse must be reported.[1] It is noted that the Commonwealth Government released a discussion paper in May 2008 as the first step in creating a national framework for child protection (Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs 2008). This discussion paper recognised that the legislative differences between States and Territories produce a situation where the equal rights of children to safety, as espoused by the United Nations Convention on the Rights of the Child, were not advanced because children in different jurisdictions had different prospects of their maltreatment being reported and treated. However, it somewhat disappointingly stated that reaching legislative harmony may be a long-term project. It is hoped that the forthcoming national framework has a stronger emphasis on encouraging States and Territories, as far as possible, to create similar conditions for child protection across the nation.

Who is required to report?

Generally, similar occupations are made mandated reporters, with doctors, nurses, teachers and police being the four major groups to which the reporting duties are applied. However, Victoria and Queensland apply the duty to fewer occupational groups than the other States and Territories. The Northern Territory is unique in applying the reporting duty to all citizens.

An important difference is that in Queensland, teachers are not required by legislation to report child sexual abuse unless it is thought to have been inflicted by a school employee (*Education (General Provisions) Act 2006* (Qld) ss 365, 366). As has been demonstrated (Mathews & Walsh 2004), the factual context which motivated this highly restricted legislative duty, and the nature of the duty itself, makes it clear that it is not about child protection. Rather, it is about protecting schools from civil legal liability for failure to ensure adequate safeguards are in place to prevent sexual abuse of students by employees. Teachers in government schools (and most non-government schools) are, however, required by policy to report suspected child sexual abuse (Butler & Mathews 2007; Mathews, Cronan et al. 2008). In addition, unlike other States and Territories, Queensland police are also not required by legislation to make reports, but are under a policy-based duty to report.

[1] These differences, also discussed below, can be discerned in the following key provisions: *Children and Young People Act 1999* (ACT) ss. 151, 151A, 156, 159; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss. 23, 27; *Care and Protection of Children Act 2007* (NT) ss. 15, 16, 26; *Education (General Provisions) Act 2006* (Qld) ss. 365, 366; *Public Health Act 2005* (Qld) ss. 158, 191; *Children's Protection Act 1993* (SA) ss. 6, 10, 11; *Children, Young Persons and their Families Act 1997* (Tas) ss. 3, 4, 14; *Children, Youth and Families Act 2005* (Vic) ss. 162, 182, 184; *Children and Community Services Act 2004* (WA) s. 124B.

Which cases are required to be reported? The requirement of significant harm

Most States and Territories require reports of all suspicions or beliefs of sexual abuse, without imposing a requirement that the abuse has caused or is likely to cause significant harm.[2] Western Australia's new provisions also adopt this approach.[3] In contrast, in Queensland and Victoria the legislative reporting duties, through the definition of the term 'harm' that interacts with the reporting duty set out in a separate provision, specify that a reporter is only required to report cases where the abuse has caused significant harm, or is at risk of causing significant harm.[4]

Should the mandatory reporting legislation require reports of all cases of suspected child sexual abuse, regardless of what harm the child may be thought to have suffered or be at risk of suffering? This question arises because, typically, legislation requiring reports of other forms of child abuse (that is, physical abuse and emotional or psychological abuse) and neglect, limits the reporting duty to more serious cases of abuse or neglect. The legislation does not require reports of so-called 'minor' incidents of 'neglect' or physical or emotional 'abuse', but aims to have reporters notify authorities of cases causing, or likely to cause, *significant* harm.[5] This is done out of a desire not to intervene in cases where it is clear the child is not being abused or harmed and no action is necessary, and to control the flow of reports to a practically manageable number, thus aiming to direct finite resources to the most deserving cases. This may be an acceptable approach for the other forms of abuse (physical abuse, and emotional or psychological abuse) and for neglect.

However, is this approach of imposing the significant harm requirement justifiable for the reporting of sexual abuse? There are risks in treating each type of abuse and neglect as a homogenous group, applying the same standards to all. While all are forms of maltreatment, the different types of abuse have different characteristics and consequences. While the entire domain of child abuse and neglect is extremely complex and variable, making it difficult to make any categorical statement, one of the clearest statements that can

[2] *Children and Young People Act 1999* (ACT) ss. 151, 151A, 156, 159; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss. 23, 27; *Care And Protection Of Children Act 2007* (NT) ss. 15, 16, 26; *Public Health Act 2005* (Qld) ss. 158, 191; *Children's Protection Act 1993* (SA) ss. 6, 10, 11; *Children, Young Persons and Their Families Act 1997* (Tas) ss. 3, 4, 14.

[3] *Children and Community Services Act 2004* (WA) s. 124B.

[4] *Education (General Provisions) Act 2006* (Qld) ss. 365, 366; *Children, Youth and Families Act 2005* (Vic) ss. 162, 182, 184.

[5] As provided generally in the legislative provisions detailed above, n 2. In New South Wales, see also *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW) Schedule 1 cll [1], [2] and [7]. When this legislation commences, these provisions amend the previous legislation, requiring only reports of cases of significant harm.

be made is that, unlike the other forms of abuse, sexual abuse involving physical touching is always criminal conduct, and is always likely to cause some element of harm that is not insignificant and may be extremely hazardous, even if it is not always immediately evident. On this basis, the approach adopted by most States appears more sound than that taken in Queensland and Victoria. It can also be observed in this regard that the recent *Special Committee of Inquiry into Child Protection Services in New South Wales* (Wood 2008) recommended inserting into the New South Wales legislation the significant harm threshold to activate the reporting duty. These recommendations have been adopted in the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW) Schedule 1 cll [1], [2] and [7], so that when this legislation commences, reports will only be required of cases of significant harm. Arguably, this significant harm threshold may be justifiable for physical abuse, emotional or psychological abuse, and neglect, aiming to avoid reports of nonabusive situations that are clearly unnecessary. However, it should not apply to the sexual abuse reporting requirement, not least because of the inherent criminality of the acts and society's moral abhorrence of them.

... it seems that a harmonised national approach would produce many social and economic benefits.

Are cases of suspected risk of future sexual abuse required to be reported, even if no abuse is thought to have occurred yet?

In most jurisdictions, the reporter has to report a reasonable belief or suspicion of past abuse, presently-occurring abuse, and suspected risk of future abuse that may not have happened yet (although in South Australia and Tasmania, this requirement to report suspected likely future abuse is limited to circumstances where the suspected perpetrator lives with the child).[6] However, the Australian Capital Territory limits the reporting duty to cases of past and presently-occurring abuse, and Western Australia has also limited its new reporting obligation to recently-past and presently-occurring cases.[7]

[6] *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss. 23, 27; *Care and Protection of Children Act 2007* (NT) ss. 15, 16, 26; *Public Health Act 2005* (Qld) ss. 158, 191; *Children's Protection Act 1993* (SA) ss. 6, 10, 11; *Children, Young Persons and their Families Act 1997* (Tas) ss. 3, 4, 14; *Children, Youth and Families Act 2005* (Vic) ss. 162, 182, 184.

[7] *Children and Young People Act 1999* (ACT) ss. 151, 151A, 156, 159; *Children and Community Services Act 2004* (WA) s. 124B.

Arguably, the most crucial work of a child protection system is to prevent the abuse happening in the first place, rather than merely to respond after the event. On this basis, the legislative duty is better framed as applying not only to cases of suspected past or presently-occurring abuse, but also to cases of suspected risk of future abuse, even where that abuse has not yet occurred. Such a provision should be framed carefully though, as the concept of 'risk' in child protection is imprecise and contested, and is open to misinterpretation (Lonne, Parton, Thomson & Harries 2009). Training should explain what kinds of circumstances would fulfil this type of report (an example might be the making of serious threats to a child by someone who has previously sexually abused that child).

DIFFERENCES REMAINING REGARDING REPORTING OF OTHER TYPES OF CHILD ABUSE AND NEGLECT

Significantly, when the Western Australian legislation was passed, the Labor Party was in power and refused to extend the new reporting provisions to other types of child abuse and neglect. In Parliamentary debates, the Liberal Party, then in opposition, proposed extending the new provisions so that reports would be required of all types of child abuse and neglect: physical abuse, emotional or psychological abuse, sexual abuse, and neglect. When previously in opposition, the Liberal Party had introduced as a private member's bill the *Children and Community Services (Mandatory Reporting) Amendment Bill 2006*, which was opposed by the then Labor Government and was defeated at the second reading stage on 21 November 2007.

These motions to extend the new legislation were narrowly defeated in both the Legislative Assembly and the Legislative Council, and the second reading speeches evince a longstanding division between the two major political parties in Western Australia on the issue of whether to introduce mandatory reporting laws (Western Australia, *Parliamentary Debates*, Legislative Assembly, 2008; Western Australia, *Parliamentary Debates*, Legislative Council, 2008).

However, the Labor Party was defeated in the 2008 election, and the Liberal Party has since reportedly indicated that it remains committed to the extension of mandatory reporting laws to require reports of other types of child abuse and neglect (Perpitch 2008). This challenge of deciding whether and how to extend the laws raises a number of significant questions for the Western Australian Parliament (Mathews & Kenny 2008). Who will be required to report, what types of abuse will need to be reported, which cases of abuse will be required to be reported, and what terms will be used to describe the reporter's state of mind, and the extent of harm making cases reportable? Will reports be required of 'emerging' forms of child abuse, namely, the situation where a child is living in a home featuring domestic violence? An overview of the different approaches taken in different

Table 1. Legislated reporter groups, abuse types required to be reported, extent of harm suspected to require a report

	NSW	ACT	Qld	SA	Tas	Vic	WA	NT
Key mandated reporter groups included/excluded by legislation			Police not included; teachers generally not required to report					All citizens required to report
Physical abuse	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Sexual abuse	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Emotional abuse	Yes	No	Yes	Yes	Yes	No	No	Yes
Neglect	Yes	No	Yes	Yes	Yes	No	No	Yes
Exposure to domestic violence	Yes	No	No	No	Yes	No	No	Yes
Extent of harm needed to require a report	Must report all cases		Only report if suspect significant harm					

Australian jurisdictions demonstrates that other States and Territories have considered these questions and have arrived at quite different answers (see Table 1). While all jurisdictions in the USA, Canada and Australia have mandatory reporting laws and an increasing number of other countries around the world have adopted mandatory reporting laws and policies (Mathews & Kenny 2008), the presence and scope of mandatory reporting laws is still the subject of debate in Western nations (Ainsworth 2002; Ainsworth & Hansen 2006; Drake & Jonson-Reid 2007; Harries & Clare 2002; Mathews & Bross 2008; Melton 2005). Most recently, the *Special Committee of Inquiry into Child Protection Services in New South Wales* rejected calls for the abolition of mandatory reporting for a number of reasons, among which it was noted that arguments about over-reporting were weakened by the fact that more than half of all reports were made about a relatively small group of the same children (Wood 2008, p. 170).

Clearly, it is not only the drafting of the laws that is a critically important task, but the design and operation of several other aspects of the child protection system. To begin with, the mechanism of reporting must be devised so that it is efficient and practicable. Under the *Children and Community Services Act 2004* (WA) s. 124C, a report can be made orally or in writing but, if made orally, it must be made in writing as soon as this is practicable. This requirement of a written record is almost universal in reporting laws, although an exception can be seen in the Northern Territory.[8] The requirement of a written report is generally sound. However, this approach may need to be interpreted with sensitivity to local conditions, especially in a jurisdiction such as Western Australia, where some reporters will be in remote areas without reliable communications, and with some reporters who may have English as their second language. It may be that in such cases, the report could be made orally by the reporter, with the written record made contemporaneously by the centralised intake system staff.

Furthermore, there are broader questions about the design of the child protection system. How will reporters be trained, what resources will be devoted to this, and what follow-up training will be involved? Especially given the difficulty of anticipating demand, what resources will be devoted to child protection department intake and assessment, and investigation processes? How will resource allocation be balanced across intake and investigation, service provision, and out-of-home care? How will sufficient, and sufficiently skilled, staff be attracted to work in these areas, and how will departmental strategy ensure their workload is kept at manageable levels to minimise burnout and retain those staff? How will referrals be made to helping agencies? Possibly most importantly, what service provision will be available for children and families, and how will this be funded and monitored to ensure quality? In addition, the area of prevention programs and services is another critical facet of the system which must be accorded due attention and resources. Intervening to prevent abuse and neglect occurring in the first place is just as important as responding after the event. An increased focus on prevention must be part of a sound policy approach.

As well, as important as mandatory reporting arguably is (whether in legislation, policy, or both), it should not be thought of as a measure of social policy that is exclusive, or is antithetical to coexisting measures of other types (Mathews & Bross 2008). For example, for some types of abuse, methods to encourage help-seeking by parents themselves may be just as necessary. These tactics may also be more effective, more economical, and more immediately helpful. So, methods of attracting parents to seek financial assistance, respite care, housing assistance, parenting counselling, drug rehabilitation, employment, and skill development, should be developed. In addition, there is an ongoing need for policy and practice to be informed by a sound evidence base constituted by rigorous research.

[8] In the Northern Territory, the *Care and Protection of Children Act 2007* (NT) s. 26 allows a report in writing or orally.

CONCLUSIONS

These challenges will be of particular relevance to Western Australia as it embarks on a new era in child protection. Who is required to report different types of suspected child abuse and neglect, and which cases of abuse and neglect should be reported? However, other States and Territories are faced with these challenges as well, and it seems that a harmonised national approach would produce many social and economic benefits. The parameters of such a united, coherent approach should be considered by the parties involved in developing the national framework on child protection. Within the domain of mandatory reporting alone, there is a need for evidence-based best practices; governments need to know what works best to avoid failure in identifying cases of serious abuse and neglect, and to avoid the making of hypersensitive or otherwise unwarranted reports in situations where a child has not been harmed. As well, governments need to ensure that adequate responses are promptly made to cases of abuse and neglect, so that numerous re-reports are not made by reporters frustrated by inaction. The problems of child abuse and neglect are human problems that are not ultimately solvable, but they can and should be reduced in ways that are possible. It is part of governments' responsibility to their citizens to have an enduring and apolitical commitment to enhancing children's prospects of a safe childhood. For governments, this should be not only a social and economic priority, but a moral imperative. ■

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