

# Royal Commission research paper

## Mandatory Reporting laws for child sexual abuse in Australia: A legislative history –



**This summary of the Royal Commission’s Mandatory Reporting laws for child sexual abuse in Australia: A legislative history report has been prepared by the TJHC**

### **Part 1 – Executive Summary**

This research paper was prepared by Associate Professor Ben Matthews<sup>1</sup> as part of the research program being undertaken by the Royal Commission into Institutional Responses to Child Sexual Abuse. It examines the legislative history of Australian mandatory reporting laws for child sexual abuse in all Australian jurisdictions.

The paper reviews the legislative principles for mandatory reporting in each state and territory in Australia, and traces the development of the laws from 1969 to 2013. In particular, it examines the differences within and between states and territories. It also looks at the factors that precipitated legislative change in each jurisdiction, drawing upon publicly available records in each State and Territory, including significant government inquiries and law reform reports and Parliamentary debates. The report also considers overseas learnings, as well as changes in understanding of the broader child protection context.

The report does not seek to make any recommendations for reform of law, policy or practice.

The paper is divided into five parts:

1. Executive Summary and Major Findings
2. General discussion about mandatory reporting laws, their history and context
3. Legislative developments within each State and Territory over time
4. Learnings from overseas
5. The need for evidence

### **Part 2 – Introduction and context**

‘Mandatory reporting’ laws have been enacted in each State and Territory in Australia.

The laws have the following purposes:

- Identifying cases of child sexual abuse which would otherwise not be revealed
- Preventing continuation of the sexual abuse of the child who is the subject of the report
- Enabling detection of the offender
- Preventing the offender from abusing other children
- Providing medical and other therapeutic assistance to the abused child and her or his family.

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Constitutional power for child protection resides in the States and Territories. Mandatory reporting laws have been enacted in each state and territory in Australia over a period of 40 years, beginning with South Australia in 1969, and most recently in Western Australia in 2009. The result is that in Australia, those laws vary in scope and nature. A uniform approach across Australia has never been agreed.

## **2.1 General nature and effect of mandatory reporting laws**

The paper provides the following definition of ‘mandatory reporting laws’:

“Mandatory reporting laws are laws passed by Parliament requiring designated persons outside the child’s family to report known and suspected cases of child abuse – including sexual abuse – to government authorities. They are distinct from other legal or industry based obligations to report criminal conduct or other types of misconduct” (p.28).

“The law draws on the capacity of people who typically deal with children in the course of their work (such as teachers, police, doctors and nurses) who encounter cases of child sexual abuse, to report these situations to child welfare agencies.”

“The central factor animating the laws is that child sexual abuse is a hidden, harmful and widespread phenomenon that frequently remains undisclosed by victims and perpetrators.” (p.28).

## **2.2 Three rationales: social policy, public health and crime prevention**

There are three rationales for mandatory reporting laws:

1. To protect vulnerable children and stop the continuance of sexual abuse of victimised children
2. Provide health and support services to the child and her or his family
3. Detect perpetrators and prevent the abuse of other children.

## **2.3 Contextual features of child sexual abuse underpinning mandatory reporting law**

There are several features of the context of child sexual abuse which underpin mandatory reporting laws:

1. Child sexual abuse is a widespread phenomenon.
  - Between 2004 and 2013, the annual incidence of child sexual abuse as recorded by government child protection agencies in Australia has been stable, being between 3400 and 4800 Australian children in substantiated annual cases.<sup>2</sup> However, the real incidence is accepted as being much higher.
  - Australian researchers<sup>3</sup> have found that before the age of 16, 12.2% of women and 4.1% of men experienced penetrative sexual abuse, and 33.6% of women and 15.9% of men

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<sup>2</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2011-12*, AIHW, Canberra, 2013.

<sup>3</sup> Dunne, Purdie, Cook, Boyle and Najman (see page 29).

experienced other sexual abuse not involving penetration<sup>4</sup>. Researchers have also found that 1.1% of people reported sexual abuse by a parent, and that 20% of women had experienced sexual abuse involving at least genital contact before the age of 16.

- A recent global review found that Australia has the highest documented prevalence rate of childhood sexual abuse amongst girls.<sup>5</sup>

2. Due to its nature, many and perhaps most cases will remain hidden.

- Most cases are not reported to, or investigated by government authorities.
- The clearest indication of abuse occurs when a child discloses it. However, a sexually abused child will often not disclose it at all, or will only disclose it years later.
- Child sexual abuse is usually inflicted by an adult who is known to the child.
- Non-disclosure can be influenced by many factors, including:
  - The child being preverbal or very young
  - Being persuaded the acts are normal
  - Feelings of guilt, shame, embarrassment and responsibility
  - Fear of reprisals to the child or other family members
  - The perpetrator being a parent or family member or other trusted figure, including a clergy member
  - The fear of the perpetrator being punished.
  - Also, in situations where a child discloses to a parent, the parent may not report the situation to the police.
  - Cases can also be difficult for professionals to identify, because many of the indicators of abuse are consistent with innocent explanations or other types of victimisation.

3. Child sexual abuse often causes substantial and enduring psychological, behavioural and physical harm to victims.

Initial and immediate effects may include:

- Post-traumatic stress disorder
- Depression and low self-esteem
- Inappropriate sexualised behaviour
- Difficulty with peer relationships
- Increased instability in out-of-home and adoptive placements.

The report also notes that adolescents who have been sexually abused are more likely to experience depression and anxiety than younger children, and to engage in self-harming behaviour, suicidal ideation and behaviour, criminal offending, alcohol abuse, substance abuse and running away from home and teenage pregnancy.

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<sup>4</sup> Rosenman and Rodgers (see page 29).

<sup>5</sup> Stoltenborgh, M, van Ljzendoorn, M, Euser, E and Bakermans-Kranenburg, M 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence around the World' (2011) 16(2) Child Maltreatment 79-101.

Recent research has also found higher rates of suicide and accidental fatal drug overdose in child sexual assault victims (see further page 32). The report notes that “[v]ictims appear more likely than those in the general population to subsequently commit criminal offences themselves” (p.32).

4. Child sexual abuse involves an abuse of power.
5. Sexual abuse often occurs over a substantial period of time, resulting in some children experiencing continuing victimisation
6. Some offenders will have multiple victims, constituting a risk to other children.
7. Acts of child sexual abuse constitute serious criminal conduct.

#### **2.4 The genesis of mandatory reporting laws for child sexual abuse: Kempe and the ‘Battered-child syndrome’**

The work of Colorado paediatrician C Henry Kempe and his colleagues was instrumental in bringing about the first mandatory reporting law of any kind about child abuse. Kempe and his colleagues conceptualised the term ‘the battered-child syndrome’. Kempe acknowledged that the battering could occur on a spectrum of less severe cases to extremely severe cases. He advocated that doctors should provide ‘appropriate management’ by making “the correct diagnosis so that he can institute proper therapy and make certain that a similar event will not occur again. He should report possible wilful trauma to the police department or any special children’s protective services that operate in his community. The report he makes should be restricted to the objective findings which can be verified and, where possible, should be supported by photographs and roentgenograms”. (p.35)

Intensive lobbying for legislative reform accompanied Kempe’s work, and as a result, the first mandatory reporting laws were enacted in every state in the USA (except Hawaii) between 1963 and 1967. The laws were limited to a requirement that medical professionals report suspected serious physical abuse inflicted by a child’s parent or caregiver.

These then expanded to members of additional professional groups required to report suspicions of physical abuse. The types of reportable abuse were also expanded beyond physical abuse to include sexual abuse, emotional or psychological abuse, and neglect. “This development occurred because after Kempe’s initial primary concern with severe physical abuse, different maltreatment types were recognised” (p.35).

Research in the late 1970s and early 1980s brought child sexual abuse to greater prominence.

The principles that motivated mandatory reporting for physical abuse applied equally to child sexual abuse. These were:

- Vulnerable children can suffer some profoundly damaging injuries and experiences – these children cannot protect themselves
- The acts occur in private, hidden situations, away from the scrutiny of others

- Perpetrators of the violent acts will not bring their own wrongdoing to the attention of law enforcement or health agencies
- The child victim either cannot or usually will not bring their experiences to the attention of law enforcement or health agencies
- Members of some professions, through the course of their work and interaction with children, have an opportunity and means to detect this type of harm, and may indeed be the only adults in these children's lives who are able to help them
- The state in a liberal democracy has an interest and necessary role in protecting vulnerable children from this type of severe harm (p.36).

## **2.5 Overview of Australian developments**

The first mandatory reporting laws in relation to physical abuse of children were enacted in Australia in the late 1960s and early 1970s. The laws were originally limited to medical professions, but the language employed was broader than that used in US legislation, and included concepts such as 'ill treatment', 'cruelty', and 'neglect'. These terms were broad enough to capture sexual abuse.

In time, as greater awareness emerged of the prevalence and effects of child sexual abuse, the legislative mandatory reporting provisions developed a clearer focus on this type of abuse. In the USA, federal legislation expressly included sexual abuse as a form of maltreatment – this first occurred in 1974. In Australia, express legislative provisions requiring reports of sexual abuse began to appear in the mid-1980s.

In many instances, developments in the law occurred after it became apparent that cases of sexual abuse were occurring and were not being reported. A body of evidence developed about the higher rate of case identification in jurisdictions with mandatory reporting laws in place. This influenced further developments.

Parliamentary inquiries, reports, law reform commission reports and similar inquiries from 1977 to 2013 favoured the introduction of mandatory reporting for child sexual abuse, or where it was already in existence, extensions or modifications to the law, policy and practice in an effort to improve its operation.

There are differences in the approaches taken in State and Territory laws. Some differences between jurisdictions include:

- Who has to report the abuse
- Whether the duty applies to cases that have not yet occurred but are thought likely to happen (eg because of grooming behaviour)
- The state of mind required to activate the duty
- Penalty for non-compliance.

Some common elements of the laws are that they all:

- Define which persons must make reports
- Identify the state of mind that a reporter must have before the reporting duty is activated
- Define types of reportable abuse and neglect, or harm caused by abuse
- Define the extent of abuse or neglect, or harm, which requires a report

- State whether the duty applies only to past or present abuse, or also to likely future abuse
- Outline penalties for failure to report
- Provide a reporter with confidentiality regarding their identity
- Provide a reporter with immunity from liability arising from a report made in good faith
- State when the report must be made
- State to whom the report must be made
- State what details a report should contain
- Enable any other person to make a report in good faith, even if not required to do so, and grant confidentiality and legal immunity to these persons (p.38).

Reports are generally required to be made to the jurisdiction's child protection department. The intake agency receives the report and evaluates it to determine the appropriate response. There is usually a joint response between child protection officers with multidisciplinary expertise and the police. This is because child abuse is both a child protection matter, and a criminal justice matter.

*A note on enforcement of the legislative duty*

Mandatory reporting duty usually contains a penalty provision. But prosecutions for failure to report are very rare, both in Australia and overseas. One of the reasons is that the focus is on encouraging reporting rather than policing it.

Some cases of note include:

- A NSW medical practitioner who was successfully prosecuted for failure to report suspected child sexual abuse.<sup>6</sup>
- A primary school principal had a charge of failure to report dismissed – it was found that she had become aware of the allegations, but was not sure of their substance and had not developed the required belief that the child had been abused.<sup>7</sup>
- SA – a decision of the Holden Hill Magistrates court resulted in the court not recording a conviction against a social worker who pleaded guilty to failing to report her suspicion of child abuse.<sup>8</sup>
- At least one successful prosecution for failure to report child abuse occurred in South Australia, where some of the injuries may have been characterised as sexual abuse (the two year old died three days after the doctor saw him).<sup>9</sup>
- The Queensland decision in *Police v Hayes*<sup>10</sup>, concerning a principal of a school who was prosecuted for failure to report suspected child sexual abuse to police. The charge failed

<sup>6</sup> *Department of Community Services v K* (Unreported, Local Court, Albury, Magistrate Murray, 1 December 1998).

<sup>7</sup> Reported in 'Abuse and the system', *The Age*, 23 October 2002; cited in the Layton Review, 10.16. (see further p.40 of the report).

<sup>8</sup> Russell, L, "Abuse Case 'Bit Sad'" *Messenger Standard*, Wednesday, 24 July 2002 p 3; cited in the Layton Review, 10.16. (see further p.40 of the report).

<sup>9</sup> *South Australia Advertiser*, 20 January 2000, cited in Best, R, 'Where child protection systems and schools meet', (2001) 6 *Australia & New Zealand Journal of Law & Education*, 3-13; professional disciplinary consequences were imposed in *Medical Board of South Australia v Christpoulos* (No 1) No DCCIV-99-353 [2000] SADC 47.

<sup>10</sup> [2009] QMC 13 (Magistrate Stjernqvist). This case involved the former school principal of the primary school in the Diocese of Toowoomba, which was examined by the Royal Commission in Case Study 6, February 2014.

because the principal forwarded relevant information to more senior officers in the school hierarchy. Whilst the provisions in force at the time were complex, in essence they required the school principal to report his suspicion immediately to a director of the school's governing body, and that director was then required to forward the report immediately to the police.

## **2.6 Other types of legal reporting duty**

Other types of duty that may require a person to report known or suspected child sexual abuse include:

- Common law duty of care
- Legislative duty to report criminal offences (eg NSW s.316 Crimes Act 'concealing serious indictable offence')
- Limited common law duty to report known criminal offence: misprision of a felony
- Breach of statutory duty
- Policy-based duty to report

## **2.7 Normative arguments about the laws**

### *Justifications for mandatory reporting of child sexual abuse*

The most fundamental argument for mandatory reporting laws for child sexual abuse is the right of each child to 'bodily inviolability' and to be protected from sexual abuse and the harm it causes. Children are particularly vulnerable, and 'sexual abuse by its nature possesses certain qualitative and contextual characteristics justifying the recruitment of persons outside the child's family to report known and suspected cases' (p.45). The laws aim to give sexually victimised children the possibility of social support and assistance in circumstances where access to society's supportive and protective mechanisms is severely compromised.

"As is reflected in the law – both mandatory reporting laws, and also criminal and civil laws – the duty of the citizen does not extend to investigating the case to ascertain that abuse is definitely occurring, or to act in ways beyond what can reasonably be expected, to assist the child or the child's family. It is simply to bring the case to the attention of the appropriate authorities, and, within the ordinary scope of the person's profession, to continue to support the child and her or his family in an appropriate way" (p.45).

There is wide support for mandatory reporting laws from the academic community, the general community and from government inquiries.

### *Empirical evidence*

- In the USA, 74% of substantiated cases of sexual abuse are identified through reports by mandated reporters.
- In the twelve month period after introducing mandatory reporting in WA, 43% more substantiated cases of child sexual abuse were found than in the previous year when mandatory reporting did not exist: an increase of 152 to 218 cases.

- In Tasmania, before mandatory reporting, sexual abuse was very rarely notified to the Tasmanian child protection board in its early years. However, after introducing mandatory reporting, by 1980, it was forming about 10 per cent of notifications and in 1985 it reached 20 per cent of notifications.
- In Australia, over a two year period, teachers in a jurisdiction without mandatory reporting made three times fewer substantiated reports of child sexual abuse than did teachers in jurisdictions with mandatory reporting
- The Victorian Law Reform Commission Report in 1988 found that doctors in Victoria (without mandatory reporting) reported 5-9 times fewer cases than their counterparts in jurisdictions having mandatory reporting
- In Victoria's parliamentary debates in 1993, it is noted that Victoria (without mandatory reporting) received almost five times fewer reports of child sexual abuse than New South Wales in a twelve month period<sup>11</sup>.

The Victorian Law Reform Commission conducted an extensive analysis of empirical evidence. It commissioned an independent analysis of one aspect of the data. In relation to child sexual abuse, the Commission Report concluded:

‘... mandatory reporting can significantly increase the detection of abuse without a massive waste of investigative resources, and without greater warranted intrusion into people's lives than a voluntary reporting system’ (p.48).

#### *Opponents of mandatory reporting laws for child maltreatment generally*

There is relatively little scholarly refereed literature which provides reasoned normative arguments against the authentic original principle underpinning mandatory reporting laws, as identified by Kempe.

Where arguments have been made against mandatory reporting laws, they are not made specifically in the context of child sexual abuse as a discrete form of abuse.

The paper notes that arguments are usually directed at the finite resources that are available, in general, to deal with child abuse, and the pressure that mandatory reporting adds to a system that is already under-resourced. These additional reports will mean diverting existing scarce resources to additional tasks, and away from the cases that are already known.

#### **Part 3 - Legislative developments within each State and Territory over time**

This part outlines on a state and territory basis, the development of mandatory reporting for each jurisdiction, including when legislation was first enacted, key legislative changes since the first enactment until December 2013, identifying the key reasons for and precursors to the introduction of the laws and major amendments, summary of the current position for each state and territory, and a summary timeline for each state and territory, depicting major changes.

#### **Part 4 - Learnings from overseas**

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<sup>11</sup> Victoria, Parliamentary Debates, *Children and Young Persons (Further Amendment) Bill 1993*, Second Reading, Legislative Assembly, p 1384, Mrs Garbutt (Labor Party, Bundoora), 29 April 1993.

- All jurisdictions within the USA and Canada have mandatory reporting laws.
- Canada and the United States have mandatory reporting legislation for child sexual abuse in every jurisdiction.
- The major difference between Australia and the US and Canada is that the group of mandated reporters is more extensive in the US and Canada.
- In the US, 27 jurisdictions include 'clergy' as mandated reporters.
- Denmark, Norway, Sweden, France, Hungary, Israel and Brazil all have mandatory reporting laws in place.
- France and Israel have their mandatory reporting duty enshrined in their respective penal codes. Other nations (such as Sweden) enshrine the mandatory reporting duty in social services legislation.
- Saudi Arabia has recently introduced mandatory reporting laws. Ireland is currently in the process of introducing mandatory reporting laws.
- The Netherlands, Germany, the UK and New Zealand have chosen not to enact mandatory reporting laws. They instead adopt a policy of voluntary reporting, 'normally embodied in industry policy approaches' (p.127).

#### **Part 5 – The need for evidence**

“On a broad level, Australia lacks even the most basic rigorous evidence about the national prevalence, incidence and characteristics of child sexual abuse. Population based incidence and prevalence studies, repeated over time, provide jurisdictions with evidence on which to inform sound policy and intervention approaches, and on which conclusions can be drawn about the success of interventions. Such studies are a precondition of an approach claiming to have a public health model as one of its driving constructs”. (p.128)