

## THE MANDATORY REPORTING DEBATE

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*Mandatory reporting is a tactic in use in New South Wales to combat child abuse and neglect. While it has been widely accepted in numerous jurisdictions worldwide, it has been subject to intense criticism. New South Wales is currently in a process of reviewing and reforming its child protection system through the Special Commission of Inquiry into Child Protection Services in NSW, presided over by the Hon James Wood. The Commission's report, which was released in November 2008, outlines a number of recommendations regarding mandatory reporting in NSW. In order to productively contribute to this dialogue of reform, this article outlines the benefits and disadvantages of mandatory reporting. One of the key disadvantages noted is that mandatory reporting floods child protection agencies with unsubstantiated claims, which drain resources and detract from legitimate cases of abuse and neglect. After reviewing both sides of the debate, it is evident that mandatory reporting plays an important role in bringing cases of abuse and neglect to the attention of the authorities, and therefore, its abolition would not be a productive reform initiative. Rather, a combination approach to reform is necessary, involving greater resourcing, clearer legislation, comprehensive training, public education, and the implementation of more efficient methods of intake, screening and assessment of reported cases.*

### I INTRODUCTION

Child abuse and neglect are significant problems.<sup>1</sup> They present great challenges for governments globally, both in detection and prevention and in the provision of

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<sup>1</sup> Douglas J Besharov, 'Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decision Making' (1988) 22(1) *Family Law Quarterly* 1, 3.

services to families.<sup>2</sup> Some commentators argue that ‘only firm and effective government intervention protects many children from serious injury and even death’.<sup>3</sup> While this approach has merit, it must be emphasised that child protection policies have drastic and long-lasting consequences for children and their families.<sup>4</sup> Therefore, governments are simultaneously required to tread delicately, in order to minimise their impact on the familial sphere, and to act with efficiency and force when necessary. Their fundamental challenge is that ‘there is no definitive way of balancing the conflicting rights of parents and children’<sup>5</sup> and that while families are ultimately responsible for raising their children, the state has a ‘vested interest ... in children as citizens’.<sup>6</sup> Apart from these philosophical concerns, combating abuse and neglect pose significant legal and administrative challenges, such as the appropriate design of legislation,<sup>7</sup> financial resourcing, policy leadership, case administration and the demand for services.<sup>8</sup>

Mandatory reporting has been used as a ‘central tactic’ by governments in combating child abuse and neglect.<sup>9</sup> Generally, these laws provide that members of certain occupations that regularly come into contact with children, such as teachers, health care personnel and police, are required to report to authorities if they have a reasonable belief or suspicion that a child has been, is being, or is likely to be abused or neglected.<sup>10</sup> The intention of these laws is to ‘ensure that children at risk of harm come to the attention of the statutory authority so that they ... can receive services that will prevent [them] from being harmed’.<sup>11</sup> As mandatory reporting legislation makes the duty to report compulsory, reporters are unable to use their discretion in determining whether or not to report. While the removal of discretion is the very aim of mandatory reporting legislation in that it disregards individual reporters’ subjective notions of abuse or neglect, it simultaneously leads to unsubstantiated notifications and overreporting as reporters are unable to use their own judgment to determine whether their mere suspicions are actual cases of real abuse or neglect.

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<sup>2</sup> Ben Mathews and Maureen C Kenny, ‘Mandatory Reporting Legislation in the United States, Canada, and Australia: A Cross-Jurisdictional Review of Key Features, Differences and Issues’ (2008) 13(1) *Child Maltreatment* 50, 50.

<sup>3</sup> Besharov, above n 1, 3.

<sup>4</sup> Legal Aid New South Wales, *Special Commission of Inquiry into Child Protection Services in NSW: Submission on Behalf of Legal Aid New South Wales* (2008) 21.

<sup>5</sup> Eileen Munro, *Effective Child Protection* (2002) 1.

<sup>6</sup> Ann Farrell, ‘Legislative Responsibility for Child Protection and Human Rights in Queensland’ (2001) 6 *Australian and New Zealand Journal of Law and Education* 15, 15.

<sup>7</sup> Ben Mathews, ‘Protecting Children from Abuse and Neglect’ in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (2008) 204.

<sup>8</sup> *Ibid.*

<sup>9</sup> Mathews and Kenny, above n 2, 50.

<sup>10</sup> Mathews, above n 7, 218.

<sup>11</sup> Judy Cashmore, ‘Mandatory Reporting: Is it the Culprit? Where is the Evidence?’ (2002) *Developing Practice* 9, 9.

Mandatory reporting has been widely accepted<sup>12</sup> in numerous jurisdictions, including Australia, the United States of America, Canada and New Zealand. Research indicates that the enactment of reporting laws has led to significant increases in reporting and, as a result, more substantiated cases of abuse have come to light.<sup>13</sup> While this superficially appears to be effective, mandatory reporting has been strongly criticised and debated within academic literature, particularly regarding its costs and benefits.<sup>14</sup> One commentator has even noted that ‘few clinical issues are the source of as much emotionally charged debate as mandated child abuse reporting’.<sup>15</sup>

New South Wales has recently embarked on a process of reform in order to improve the efficiency, productivity and effectiveness of the child protection system. The Special Commission of Inquiry into Child Protection Services in New South Wales,<sup>16</sup> presided over by the Hon James Wood, has been established to investigate and report on ‘the system for reporting of child abuse and neglect, including mandatory reporting, reporting thresholds and feedback to reporters’ as well as other issues regarding child protection.<sup>17</sup> The Commission’s Report,<sup>18</sup> released in November 2008, addresses the issue of mandatory reporting in detail and makes a number of recommendations designed to address the current inefficiencies of the system in NSW.

This article outlines the benefits and disadvantages of mandatory reporting, uniting both general criticisms of the system and criticisms that are particular to NSW. At the outset, it is important to mention that much of the mandatory reporting debate has involved the use of statistical evidence. After reviewing the academic literature on this topic, it is evident empirical evidence is available to support both sides of the debate. Therefore, it is not the purpose of this article to dwell on the correctness of statistics, but rather to provide an overview of the debate, which may be of value to the current dialogue of reform in NSW.

<sup>12</sup> Frank Ainsworth, ‘Mandatory Reporting of Child Abuse and Neglect: Does it Really Make a Difference?’ (2002) 7 *Child Family and Social Work* 57, 57.

<sup>13</sup> Seth C Kalichman, *Mandated Reporting of Suspected Child Abuse: Ethics, Law and Policy* (2<sup>nd</sup> ed, 1999) 41.

<sup>14</sup> In particular see the current debate in *Child Abuse & Neglect*: Gary B Melton, ‘Mandatory Reporting: A Policy Without Reason’ (2005) 29 *Child Abuse & Neglect* 9; Brett Drake and Melissa Jonson-Reid, ‘A Response to Melton Based on the Best Available Data’ (2007) 31 *Child Abuse & Neglect* 344; Ben Mathews and Donald Bross, ‘Mandated Reporting is Still a Policy With Reason: Empirical Evidence and Philosophical Grounds’ (2008) 32 *Child Abuse & Neglect* 511.

<sup>15</sup> Kalichman, above n 13, 30.

<sup>16</sup> Hereafter referred to as ‘the Wood Commission’.

<sup>17</sup> Special Commission of Inquiry into Child Protection Services in NSW, *Terms of Reference* (2007) Lawlink New South Wales <[http://www.lawlink.nsw.gov.au/lawlink/special\\_projects/ll\\_splprojects.nsf/pages/cpsi\\_reference](http://www.lawlink.nsw.gov.au/lawlink/special_projects/ll_splprojects.nsf/pages/cpsi_reference)> at 13 May, 2008.

<sup>18</sup> Special Commission of Inquiry into Child Protection Services in NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW – Volume 1* (2008) (‘Wood Commission Report’) available at <http://www.lawlink.nsw.gov.au/cpsinquiry> at 1 December 2008.

This article first outlines the current legislative provisions in Australia. Second, it addresses the benefits of mandatory reporting, such as the necessity of the system, the facilitation of increased participation of professionals in child abuse prevention, and the view that mandatory reporting is an inherent right for children. Third, this article outlines the disadvantages of mandatory reporting raised in the academic scholarship on this issue. Finally, an analysis of a number of reform proposals directed at the mandatory reporting system in NSW is provided.

## II CURRENT LEGISLATIVE PROVISIONS IN AUSTRALIA

Mandatory reporting legislation was first developed in the United States in the 1960s as a response to the influential work by Kempe and his colleagues regarding the ‘battered child syndrome’.<sup>19</sup> In Australia, mandatory reporting legislation was first introduced in South Australia in 1972 and, since then, all other Australian jurisdictions have enacted reporting requirements.<sup>20</sup>

While the focus of this article is on mandatory reporting in NSW, it is useful to note that the laws in most jurisdictions share a number of common elements.<sup>21</sup> Generally, they identify what level of knowledge, belief or suspicion is required before the duty to report is triggered.<sup>22</sup> While the threshold varies in all jurisdictions, the provisions generally require some kind of ‘reasonable’ suspicion or belief.<sup>23</sup> The laws define what types of abuse and neglect are captured by the reporting duty<sup>24</sup> and the penalties for failure to report.<sup>25</sup> Further, reporters are guaranteed confidentiality regarding their identity and provided with ‘immunity from any legal liability arising from a report made in good faith’.<sup>26</sup> The following includes a brief discussion of the mandatory reporting laws in each Australian jurisdiction, with a particular focus on how the various jurisdictions contrast to the NSW mandatory reporting provisions.

In NSW, the mandatory reporting requirement is stipulated in section 27 of the *Children and Young Persons (Care and Protection) Act 1998*.<sup>27</sup> This provision states that persons ‘who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children’ must report to the Director-General, as soon as practicable, if the person ‘has reasonable grounds to

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<sup>19</sup> Gary B Melton, ‘Mandated Reporting: A Policy Without Reason’ (2005) 29 *Child Abuse & Neglect* 9, 9; Mathews and Kenny, above n 2, 51; Seth C Kalichman and Cheryl L Brosig, ‘Mandatory Child Abuse Reporting Laws: Issues and Implications for Policy’ (1992) 14 *Law and Policy* 153, 153.

<sup>20</sup> Mathews and Kenny, above n 2, 51.

<sup>21</sup> *Ibid* 52.

<sup>22</sup> *Ibid*.

<sup>23</sup> *Ibid*.

<sup>24</sup> Kalichman, above n 13, 18.

<sup>25</sup> Mathews and Kenny, above n 2, 52.

<sup>26</sup> *Ibid*.

<sup>27</sup> Hereafter referred to as ‘the Act’.

suspect that a child is at risk of harm, and those grounds arise during the course of or from the person's work'.<sup>28</sup> In defining the meaning of 'at risk of harm', section 23 of the Act lists a number of circumstances in which young persons can be classified as being 'at risk of harm'. These generally include instances when the child's basic physical or psychological needs are not being met; the child's parent or caregiver has not arranged for the child to receive medical care; the child has been or is at risk of being physically or sexually abused; the child is exposed to domestic violence and as a result is at risk of serious physical or psychological harm; and when a parent or caregiver acts in a way towards the child causing the child to suffer or to be at risk of suffering serious psychological harm.<sup>29</sup> Therefore, the occupations which are required to report include, and are not limited to, teachers, doctors, nurses, psychologists and psychiatrists, health care workers, social workers and police officers. The types of reportable abuse include physical, sexual or psychological abuse and also 'past or currently occurring abuse, and risk of future abuse'.<sup>30</sup> It is important to note that in NSW the definition of 'child' is a person of 15 years or under.<sup>31</sup>

While there are a number of commonalities between the NSW provisions and those of the other States and Territories, as outlined above, there are significant differences across the jurisdictions. In the Northern Territory, all persons who believe on reasonable grounds 'that a child has suffered or is suffering maltreatment' are required to make a report to the police.<sup>32</sup> 'Child' is defined as 'a person who has not attained the age of 18 years'.<sup>33</sup> This differs markedly from the NSW provisions: *all persons* are required to report in the Northern Territory, as opposed to just particular classes of persons in NSW; the threshold of reasonable belief is much higher than that of reasonable suspicion in NSW; and the Northern Territory provisions apply to persons under the age of 18, rather than 15 years in NSW.

Similarly to NSW, Victorian legislation requires particular classes of persons to report: registered medical practitioners; nurses; teachers; principals; police officers; persons qualified in the care, education and minding of children; social workers; welfare workers; youth justice officers; and youth parole officers.<sup>34</sup> Section 184 of the *Children, Youth and Families Act 2005* (Vic) requires that a mandatory reporter, in the course of his or her profession, who 'forms the belief on reasonable grounds that a child is in need of protection', must report that belief as soon as practicable.<sup>35</sup> The Victorian legislation defines when a child is in need of protection as when the child has no parents or suitable caregiver or when the child has suffered or is likely

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<sup>28</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27.

<sup>29</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23.

<sup>30</sup> Mathews, above n 7, 222.

<sup>31</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3.

<sup>32</sup> *Community Welfare Act 1983* (NT) s 14.

<sup>33</sup> *Community Welfare Act 1983* (NT) s 4.

<sup>34</sup> *Children, Youth and Families Act 2005* (Vic) s 182(1).

<sup>35</sup> *Children, Youth and Families Act 2005* (Vic) s 184(1).

to suffer significant harm as a result of physical injury, sexual abuse, or 'psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged'.<sup>36</sup> Therefore, the most notable difference between the Victorian provisions and the NSW provisions is the higher threshold of reasonable belief in Victoria as opposed to reasonable suspicion in NSW.

In Tasmania the mandatory reporting requirement is found in section 14 of the *Children, Young Persons and Their Families Act 1997* (Tas). Similarly to NSW and Victoria, this section requires prescribed persons (registered medical practitioners, nurses, dentists, psychologists, police officers, probation officers, principals, teachers, and any other person employed by a government agency or organisation that provides health, welfare, education child care or residential services for children), in the course of their work, to report if that person 'believes, or suspects, on reasonable grounds, or knows that a child has been or is being abused or neglected ... or that there is a reasonable likelihood of a child being killed or abused or neglected by a person with whom the child resides'.<sup>37</sup> Abuse and neglect are defined as sexual abuse or physical or emotional injury or other abuse or neglect that is detrimental to the person's wellbeing or physical or psychological development.<sup>38</sup> Unlike any other Australian jurisdiction, the Tasmanian threshold includes either a belief or suspicion.

The South Australian mandatory reporting legislation, like most of the other Australian jurisdictions, requires a number of classes of persons, including doctors, pharmacists, teachers, nurses, dentists, psychologists, social workers, ministers and other persons who provide services to children to report if the person 'suspects on reasonable grounds that a child has been or is being abused or neglected and the suspicion is formed in the course of the person's work'.<sup>39</sup> This threshold is the same as that in NSW: reasonable suspicion. Abuse or neglect is defined in the South Australian legislation as sexual or physical or emotional abuse or neglect to the extent that the child has suffered, or is likely to suffer, physical or psychological injury detrimental to the child's wellbeing, or the child's physical or psychological development is in jeopardy.<sup>40</sup>

Queensland's approach to mandatory reporting laws differs from the approach taken in the other States and Territories. Its reporting obligations are imposed on a lesser number of professions than the other jurisdictions.<sup>41</sup> Sections 365 (State schools), and 366 (non-State schools) of the *Education (General Provisions) Act 2006* (Qld) only require teachers to report any reasonable suspicion of sexual abuse

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<sup>36</sup> *Children, Youth and Families Act 2005* (Vic) s 162(1).

<sup>37</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 14.

<sup>38</sup> *Children, Young Persons and Their Families Act 1997* (Tas) s 3.

<sup>39</sup> *Children's Protection Act 1993* (SA) s 11.

<sup>40</sup> *Children's Protection Act 1993* (SA) s 6(1).

<sup>41</sup> Mathews, above n 7, 222.

of a student by ‘someone else who is an employee of the school’.<sup>42</sup> This is significantly more restricted when compared with the other Australian jurisdictions. Section 191 of the *Public Health Act 2005* (Qld) requires a medical professional to report any reasonable suspicion that a child has been, is being, or is likely to be, harmed.<sup>43</sup> The Act defines ‘harm’ as ‘any detrimental effect on the child’s physical, psychological or emotional wellbeing that is of a significant nature and that has been caused by physical, psychological or emotional abuse or neglect of sexual abuse or exploitation’.<sup>44</sup>

The *Children and Young People Act 1999* (ACT) has recently been repealed by the *Children and Young People (Consequential Amendments) Act 2008* (ACT). The new *Children and Young People Act 2008* (ACT) creates an offence if a mandated reporter (such as a doctor, dentist, nurse, midwife, teacher, police officer, counsellor, child carer) ‘believes on reasonable grounds that a child or young person has experienced, or is experiencing sexual abuse, or non-accidental physical injury’.<sup>45</sup>

The most recent, and final, State to introduce mandatory reporting was Western Australia. It amended the *Children and Community Services Act 2004* (WA) to include a new Division 9A, which commenced operation on 19 June 2008. This new division requires the mandatory reporting of sexual abuse of children by a person who is a doctor, nurse, midwife, police officer or teacher if that person ‘believes on reasonable grounds that a child has been the subject of sexual abuse that occurred on or after commencement date, or is the subject of ongoing sexual abuse’.<sup>46</sup> That person must form the belief ‘in the course of the person’s work (whether paid or unpaid) as a doctor, nurse, midwife, police officer or teacher’.<sup>47</sup> The notable differences between the new Western Australian provisions and those in NSW are that mandatory reporting in Western Australia is limited to sexual abuse and incorporates the higher threshold of belief rather than ‘reasonable grounds to suspect’ that exists in NSW.<sup>48</sup>

### III THE BENEFITS OF MANDATORY REPORTING

Numerous arguments have been made in support of mandatory reporting. Generally, these are that mandatory reporting is necessary as it provides a ‘form of case identification beyond voluntary help-seeking’,<sup>49</sup> which brings more cases of abuse and neglect to the surface; that ‘mandated reporting produces a large number

<sup>42</sup> *Education (General Provisions) Act 2006* (Qld) s 365(1).

<sup>43</sup> *Public Health Act 2005* (Qld) s 191.

<sup>44</sup> *Public Health Act 2005* (Qld) s 158.

<sup>45</sup> *Children and Young People Act 2008* (ACT) s 356.

<sup>46</sup> *Children and Community Services Act 2004* (WA) s 124B(1)(a)–(b).

<sup>47</sup> *Children and Community Services Act 2004* (WA) s 124B(1)(c).

<sup>48</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27.

<sup>49</sup> Ben Mathews and D Bross, ‘Mandated Reporting is Still a Policy with Reason: Empirical Evidence and Philosophical Grounds’ (2008) 32 *Child Abuse & Neglect* 511, 511.

of substantiated reports and to sacrifice this compromises child protection’;<sup>50</sup> that mandated reporting facilitates participation of professionals in child abuse prevention; that mandatory reporting is an inherent right of children; and that mandatory reporting serves an important symbolic purpose. Academic commentary supporting mandatory reporting suggests that ‘the most serious problems in systems having mandated reporting appear to lie not with the reports, but with the responses, and that the economic and social justice advantages of mandated reporting far outweigh any disadvantages’.<sup>51</sup>

#### A *The Necessity of a Reporting System*

Mandatory reporting serves an important symbolic function. Jessica Yelas notes that ‘mandatory reporting makes it clear to society that child abuse is a public concern – not a private prerogative’.<sup>52</sup> It provides a signal to society that child abuse and neglect will not be tolerated. More importantly, a common argument put forward in favour of mandatory reporting is that it plays a vital role in bringing cases of abuse and neglect to the attention of authorities and ‘sends a clear message that it is important for all information about a child being at risk to be assessed independently’.<sup>53</sup> Ben Mathews and Donald Bross argue that ‘without a system where people outside these children’s families bring the children’s circumstances to the attention of authorities, many and perhaps most cases will remain hidden’.<sup>54</sup> This argument is predicated on three important assumptions: first, that children are unable to protect themselves and need others to act for them, second, that abusive parents generally will not request assistance voluntarily,<sup>55</sup> and third that persons who deal directly with children are best placed to detect abuse or neglect.

It has been argued that ‘a society with mandated reporting will have more cases of abuse and neglect brought to the attention of authorities than a society with no such system’.<sup>56</sup> Critics argue that this increase in reporting can have negative consequences, as unsubstantiated reports tend to clog the system, burden agencies and drain resources (discussed in detail below). While unsubstantiated reports are a great concern for some commentators,<sup>57</sup> Mathews and Bross argue that reports made by mandatory reporters comprise a large majority of substantiated reports.<sup>58</sup> Yelas similarly argues that in order to legitimately commit to the protection of children, despite the rise of unsubstantiated cases, ‘the very increase in genuine

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Jessica Yelas, ‘Mandatory Reporting of Child Abuse and the Public/Private Distinction’ (1992) 7 *Auckland University Law Review* 781, 788.

<sup>53</sup> Roderick Best, ‘Where Child Protection Systems and Schools Meet’ (2001) 6(1) *Australia and New Zealand Journal of Law and Education* 3, 5.

<sup>54</sup> Mathews and Bross, above n 49, 511.

<sup>55</sup> Elizabeth D Hutchison, ‘Mandatory Reporting Laws: Child Protective Case Finding Gone Awry?’ (1993) 38(1) *Social Work* 56, 57.

<sup>56</sup> Mathews, above n 7, 224.

<sup>57</sup> Melton, above n 19.

<sup>58</sup> Mathews and Bross, above n 49, 512.

cases must outweigh other considerations'.<sup>59</sup> While it is difficult to disagree with these logical arguments, it must be noted that a system is only effective if it can be practically implemented. It is important for mandatory reporting to play a philosophical and symbolic role, but it is essential for it to be practically effective. That being said, one must not be overly critical of a system that is effective albeit not perfect. Therefore, mandatory reporting, while not currently a perfect system, is an integral part of the child protection system and, without it, many thousands of cases of child abuse and neglect could go undetected.<sup>60</sup>

### B *The Increased Participation of Professionals in Abuse Prevention*

Another argument advanced in favour of mandatory reporting is that it facilitates the increased participation of professionals in the prevention of child abuse and neglect. Lorna Bell and Patrick Tooman argue that 'reporting laws give a clear and unequivocal role and responsibility to all professionals who are in a position to identify those children who are suspected of being abused'.<sup>61</sup> Mandatory reporting forces those who are regularly in contact with children to engage actively in abuse prevention.

### C *Mandatory Reporting as an Inherent Right*

A less frequently discussed benefit is that it protects a child's right not to be violated by adults. Mathews and Bross argue that 'a liberal society must not ignore wrongs committed by adults against children [and that] abolishing mandated reporting would undermine children's rights to safety and increase their vulnerability to harm'.<sup>62</sup> This recognises that children are vulnerable to abuse and neglect and that parental rights are secondary to a child's right of safety and security.<sup>63</sup> Under mandatory reporting children's rights are upheld against adult interests because individual adults do not have discretion as to whether or not to report. Therefore, under mandatory reporting a child's right to protection is not dependant on a subjective determination by an individual adult and mandatory reporting provides an effective practical mechanism to enforce children's right to security. Conversely, it has been argued that while this argument is 'emotionally compelling ... there is no evidence of mandatory reporting as a platform for child rights'.<sup>64</sup> This criticism does not carry much weight as one cannot deny that mandatory reporting is a system designed to safeguard the rights of children.

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<sup>59</sup> Yelas, above n 52, 788.

<sup>60</sup> Mathews and Bross, above n 49, 515.

<sup>61</sup> Lorna Bell and Patrick Tooman, 'Mandatory Reporting Laws: A Critical Overview' (1994) 8 *International Journal of Law and the Family* 337, 347-8.

<sup>62</sup> Mathews and Bross, above n 49, 514.

<sup>63</sup> Ibid.

<sup>64</sup> Discipline of Social Work and Social Policy University of Western Australia, *Mandatory Reporting of Child Abuse: Evidence and Options* (2002) 34-5.

While it is evident that there are compelling arguments for mandatory reporting, it should be emphasised that ‘even the strongest supporters of mandatory reporting are unlikely to offer their unqualified endorsement of existing reporting policies’.<sup>65</sup> It is suggested that the mandatory reporting system in NSW, regardless of its obvious benefits, is in need of reform.

#### IV THE DISADVANTAGES OF MANDATORY REPORTING

Mandatory reporting has been the subject of significant and wide-ranging criticism, from those who merely advocate minimal reform to those who advocate complete abandonment. Recently, there has been a dialogue between scholars Gary Melton, Brett Drake, Melissa Jonson-Reid, Ben Mathews and Donald Bross in *Child Abuse & Neglect* regarding the benefits and disadvantages of mandatory reporting. This article outlines the various perspectives of this debate as well as the views of other scholars, writing over the past two decades.

Melton, a particularly scathing critic of mandatory reporting, describes it as a ‘bankrupt policy’ and a ‘policy without reason’ that has ‘negative side effects, some of which probably adversely affect children’s safety’.<sup>66</sup> Similarly, Frank Ainsworth labels the Australian system as ‘inefficient and ineffective’.<sup>67</sup> Conversely, Drake and Jonson-Reid argue that ‘while there is no doubt that the current child welfare system has flaws, we can find little empirical data supporting the scathing critiques ... made by Melton’.<sup>68</sup> Drake and Jonson-Reid argue that ‘critiques of a system be grounded in empirical data’.<sup>69</sup> While this argument is extremely logical, how is one to approach this task when empirical data is available to support both sides of the debate?

##### *A Information Overload:<sup>70</sup> Overreporting, Unsubstantiated Notifications and Multiple Reporting*

One of the most significant criticisms of mandatory reporting laws is that ‘they produce many unsubstantiated notifications, increasing the workload for already strained child protection [agencies] ... which wastes resources and reduces quantity and quality of time and service given to known deserving children’.<sup>71</sup> Some commentators indicate that this represents a fundamental failure of reporting laws as they have been unsuccessful in their primary task to protect children: ‘the

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<sup>65</sup> Kalichman, above n 13, 182.

<sup>66</sup> Melton, above n 19, 15.

<sup>67</sup> Ainsworth, above n 12, 62.

<sup>68</sup> Brett Drake and Melissa Jonson-Reid, ‘A Response to Melton Based on the Best Available Data’ (2007) 31 *Child Abuse & Neglect* 344, 357.

<sup>69</sup> *Ibid*, 358.

<sup>70</sup> Eileen Munro and Nigel Parton, ‘How far is England in the Process of Introducing a Mandatory Reporting System?’ (2007) 16 *Child Abuse Review* 5, 10.

<sup>71</sup> Mathews, above n 7, 224. This problem of overreporting was similarly discussed in Kalichman and Brosig, above n 19, 160.

purported goal of identifying every possible cause of child abuse comes at an expense to the very system designed to help children'.<sup>72</sup>

The reason attributed to the vast increase in unsubstantiated reports<sup>73</sup> is that 'the net cast to capture child abusers is too broad to be effective'.<sup>74</sup> Melton argues that mandatory reporting has resulted in substantially more reports being made, often less serious reports that inevitably divert scarce resources from more serious instances of abuse and neglect, and other support services that children require.<sup>75</sup> Ainsworth argues that the cost of investigating unsubstantiated reports is too great, and that 'up to three quarters of the financial resources devoted to the New South Wales mandatory reporting system may be going to support services that confirm that the particular families suspected of abuse and neglect were not guilty in the first place'.<sup>76</sup> The increase in unsubstantiated reports, which potentially drain the system, indicates that the mandatory reporting system is not operating optimally in NSW, but it does not necessarily require a complete abolition of mandatory reporting.

Drake and Jonson-Reid disagree with Melton and argue that mandatory reporting cannot be the only significant cause of the massive increase in reports being made, as their empirical data suggests that 'both professional and non-professional reports have increased considerably'.<sup>77</sup> Mathew and Bross are also critical of Melton, stating that 'there is insufficient evidence in experience or science to justify leaving child protection to voluntary help-seeking by parents alone'.<sup>78</sup>

Additionally, Melton argues that mandatory reporting is not suited to the current social context, as the 'assumptions that guided the enactment of [the] laws were largely erroneous'.<sup>79</sup> He argues that the designers of child protection systems made a fundamental mistake in that they assumed that 'the problem of child maltreatment was reducible to "syndromes" – in effect, that abusive and neglecting parents were either very sick or very evil'.<sup>80</sup> When mandatory reporting was developed, it was only designed to illuminate cases of immoral and depraved parents who abused their children. Therefore, Melton argues that the early advocates of mandatory reporting were mistaken, as instead of neglect and abuse inflicted by immoral perpetrators, they are overwhelmingly inflicted by parents or caregivers 'suffering from a range of personal, social and financial problems'.<sup>81</sup> While acknowledging

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<sup>72</sup> Kalichman, above n 13, 31.

<sup>73</sup> Mathews and Kenny, above n 2, 52.

<sup>74</sup> Kalichman, above n 13, 31.

<sup>75</sup> Melton, above n 19, 13.

<sup>76</sup> Ainsworth, above n 12, 62. Ainsworth also articulates this view in Frank Ainsworth, 'Mandatory Reporting of Child Abuse and Neglect. Why Would You Want It?' (2002) *Developing Practice* 5, 7.

<sup>77</sup> Drake and Jonson-Reid, above n 68, 356.

<sup>78</sup> Mathews and Bross, above n 49, 512.

<sup>79</sup> Melton, above n 19, 10.

<sup>80</sup> *Ibid* 11.

<sup>81</sup> Drake and Jonson-Reid, above n 68, 344.

Melton's view,<sup>82</sup> Mathew and Bross disagree with his conclusions and argue that, while the laws were initially introduced to detect instances of abuse by immoral or evil perpetrators, mandatory reporting now plays a pivotal role in illuminating many instances of abuse that would otherwise have remained hidden.<sup>83</sup>

In order to address the issues regarding mandatory reporting, the Wood Commission held a Public Hearing<sup>84</sup> on 15 February 2008. The problem of mandatory reporters making multiple reports was identified as a key problem. It was stated that 'anecdotal evidence currently available to the inquiry and statistics support the conclusion that mandatory reporters often report the same child more than once for the same issue'.<sup>85</sup> Reasons for multiple reporting were listed as: frustration on the part of the reporter 'at the perceived lack of action by DoCS' (NSW Department of Community Services); 'lack of timely and meaningful feedback'; and disillusionment with the system.<sup>86</sup> Dimitra Tzioumi, from the Sydney Children's Hospital, noted that 'if we feel that the child remains in significant risk, but whatever information has been given on the first report to the department does not translate into an intervention, then we will make further reports, especially on the same issue'.<sup>87</sup> Similar types of experiences were observed in the education system: 'many principals continue to report until they do get some response'.<sup>88</sup> These types of criticisms suggest that child protection agencies need to provide timely feedback to reporters in order to prevent multiple reporting. Further, suggestions to combat multiple reporting included appointing a nominated person in each institution who would be responsible for the reporting.<sup>89</sup>

Another issue noted at the Hearing was that police domestic violence policy, which requires police to report to DoCS any instance of domestic violence where children are present, was 'quite significantly at odds with the requirement in the Act for what amounts to a risk of harm in domestic violence situations'.<sup>90</sup> The Act requires police to report regarding children or young persons living in a household only where there have been *multiple* incidents of domestic violence.<sup>91</sup> The Commissioner noted that, due to the wide definition of domestic violence employed by the police, coupled with police policy to report every child present at every domestic violence incidence, 'DoCs are getting a huge number of domestic violence reports swamping

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<sup>82</sup> Mathews and Bross, above n 49, 515.

<sup>83</sup> Ibid.

<sup>84</sup> Hereafter referred to as 'the Hearing'.

<sup>85</sup> Merrill Legal Solutions, 'Transcript: Special Commission of Inquiry into Child Protection Services In New South Wales', Public Hearing on 15 February 2008 at 10am, 7, (Wood Commission Transcript) available at [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Mandatory\\_Reporting\\_15-02-08.pdf/\\$file/Mandatory\\_Reporting\\_15-02-08.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Mandatory_Reporting_15-02-08.pdf/$file/Mandatory_Reporting_15-02-08.pdf) at 11 November 2008.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid 15.

<sup>88</sup> Ibid 18.

<sup>89</sup> Ibid 14.

<sup>90</sup> Ibid 25.

<sup>91</sup> Ibid.

the system and taking up time at the Helpline'.<sup>92</sup> A suggestion made by the Commissioner in order to combat this problem was that police could 'review the operating procedures to provide some greater threshold and coordination'.<sup>93</sup> It was also suggested at the Hearing that police reports to DoCS could come through the domestic violence liaison officer (DVLO) or other similar officer rather than through general duties officers.<sup>94</sup> Although, both the Commissioner and Detective Superintendent Helen Begg, from the New South Wales Police Force, agreed that this would not be a viable option.<sup>95</sup> Detective Superintendent Begg noted:

I think that there would be some issues with physical, sexual and neglect matters going through the DVLO. Police, like Health Services, are operating 24 hours a day, seven days a week, 365 days a year. In a lot of instances we're reporting things at three o'clock in the morning. If you move the domestic reporting to a single officer, for example, the domestic violence liaison officer, there may be a lag time.<sup>96</sup>

Other options for reform of the mandatory reporting system are explored below.

### B Underreporting

While overreporting has been identified as a significant disadvantage, ironically underreporting has also been raised as an ongoing problem. It has been noted that 'case-finding remains a massive challenge'.<sup>97</sup> Even commentators who support the system recognise that many cases are still not brought to the attention of the authorities.<sup>98</sup> Mathews and Bross argue that 'a large proportion of cases known to professionals will be officially unrecognized and therefore ignored, and many "unsubstantiated" cases will be abusive or neglectful but will lack sufficient evidence to substantiate'.<sup>99</sup> Reasons cited for underreporting include: 'fear of misdiagnosis';<sup>100</sup> 'lack of confidence in child protection authorities';<sup>101</sup> 'low confidence that the act of reporting would lead to an improvement in the circumstances of the child';<sup>102</sup> and complexities of some circumstances of abuse, where no overt indicators of abuse are present.<sup>103</sup> More specifically regarding the underreporting of teachers, it has been noted in other jurisdictions that 'research indicates that teachers, among other professionals, continue to underreport cases of

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<sup>92</sup>

Ibid.

<sup>93</sup>

Ibid 26.

<sup>94</sup>

Ibid 23.

<sup>95</sup>

Ibid.

<sup>96</sup>

Ibid.

<sup>97</sup>

Mathews and Bross, above n 49, 512.

<sup>98</sup>

Ibid.

<sup>99</sup>

Ibid.

<sup>100</sup>

Mathews, above n 7, 226.

<sup>101</sup>

Ibid.

<sup>102</sup>

Louise Mulroney, 'Workers' Experiences of Mandatory Reporting' (2004) *Developing Practice* 33, 33.

<sup>103</sup>

Mathews, above n 7, 226.

suspected child maltreatment'<sup>104</sup> due to: lack of adequate training;<sup>105</sup> lack of awareness of proper reporting requirements;<sup>106</sup> lack of sufficient evidence;<sup>107</sup> and fear of negative consequences for the child or the family.<sup>108</sup> With detailed and sound training these problems could be remedied.<sup>109</sup>

### C Lack of Resources and Training

As noted above, mandatory reporting produces an increase in reports of abuse and neglect, which requires substantial resources in order to investigate, potentially redistributing valuable resources from deserving cases.<sup>110</sup> Generally, child protection agencies are grossly under-resourced,<sup>111</sup> and mandatory reporting has been identified as an unnecessary burden on the system. Due to the massive task of 'regulating the private realm' states are reluctant to devote too many resources to enforcing reporting legislation.<sup>112</sup> Under-resourcing and insufficient training appear to be on the agenda of the current reform process in NSW.<sup>113</sup>

While many commentators note insufficient resources as a factor that discredits mandatory reporting, some are critical of this view. Mathews argues that 'despite their weight, these problems do not inform a principled argument against mandatory reporting'.<sup>114</sup> Rather, it can be argued that 'this is not an argument against mandated reporting, but against insufficient resourcing, and, perhaps, ineffective reporter training and practice, less than optimum screening and vague reporting laws'.<sup>115</sup> Mathews and Bross argue that 'mandated reporting is separate from the responses of child protective agencies'.<sup>116</sup> Mathews argues that 'the issues are separate and should not be conflated'.<sup>117</sup> While this argument does have merit, it can often be unproductive to draw artificial distinctions between theory and practice, as a good system needs to have both a sound theoretical base and the ability to be practically implemented.

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<sup>104</sup> Kirk A Beck, James R P Ogloff and Ann Corbishley, 'Knowledge, Compliance and Attitudes of Teachers Towards Mandatory Child Abuse Reporting' (1994) 19(1) *Canadian Journal of Education* 15, 15.

<sup>105</sup> Ibid 16.

<sup>106</sup> Ibid 25.

<sup>107</sup> Ibid 26.

<sup>108</sup> Ibid.

<sup>109</sup> Mathews, above n 7, 226.

<sup>110</sup> Mathews and Bross, above n 49, 513.

<sup>111</sup> Mathews, above n 7, 224.

<sup>112</sup> Yelas, above n 52, 790.

<sup>113</sup> Wood Commission Transcript, above n 85, 30.

<sup>114</sup> Mathews, above n 7, 225.

<sup>115</sup> Mathews and Bross, above n 49, 513.

<sup>116</sup> Ibid.

<sup>117</sup> Mathews, above n 7, 225.

### D Provisions are Exceedingly Broad, Ambiguous, Vague and Confusing

Within the mandatory reporting debate, criticisms of the wording of provisions have emerged. It has been noted that ‘critics of the statutory language of reporting laws originate from both those who oppose the laws and those who support them’.<sup>118</sup> These arguments suggest that the current provisions ‘are not functioning optimally and pose numerous problems for children, families, and the delivery of human services’.<sup>119</sup> It appears that criticisms of the provisions stem from a recognition that statutory wording significantly impacts on reporting tendencies.<sup>120</sup>

Across all jurisdictions, examples of vague and ambiguous provisions can be found. Studies have shown that phrases such as ‘significant harm’, ‘reasonable suspicion’ and ‘reasonable belief’ have caused confusion for reporters.<sup>121</sup> As a result, ‘much discretion is left to the reporter’,<sup>122</sup> which can lead to both underreporting and overreporting.<sup>123</sup> In NSW, underreporting and overreporting have been attributed to the extension of the grounds for notification in numerous ways:<sup>124</sup> the definition of abuse has been widened to cover all types of abuse, including physical, sexual and psychological; the reporters required to report now include numerous professions; and a very low threshold test of ‘reasonable grounds to suspect that a child is at risk of harm’ has been adopted.<sup>125</sup> The criticisms of statutory provisions can be summarised as follows: first, definitions of abuse are inadequate; second, the threshold test has caused significant problems; and third, reporters are confused by the provisions.

The first issue, the definition of abuse and neglect, has posed significant problems for reporters<sup>126</sup> and ‘commentators have been struggling to find a workable and appropriate definition since the concept of a mandatory reporting law came into being’.<sup>127</sup> Margaret Meriwether suggests that there are two tensions with regard to the definition of abuse: ‘the merits of a broad versus a limited definition, and whether the definition should focus on the parent’s behaviour or the harm to the child’.<sup>128</sup> Generally, ‘narrow definitions of maltreatment may limit and restrict reporting, while broad definitions may contain such ambiguity that mandated reporters will not know when reporting is required’.<sup>129</sup> The NSW provisions contain

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<sup>118</sup> Kalichman, above n 13, 32.

<sup>119</sup> Kalichman and Brosig, above n 19, 165.

<sup>120</sup> *Ibid.*, 157.

<sup>121</sup> Mathews and Kenny, above n 2, 52.

<sup>122</sup> Mathews, above n 7, 225.

<sup>123</sup> Kalichman and Brosig, above n 19, 154.

<sup>124</sup> Ainsworth, above n 12, 61.

<sup>125</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23.

<sup>126</sup> Theodore J Clements, ‘Child Abuse: The Problem of Definition’ (1974) 8 *Creighton Law Review* 729.

<sup>127</sup> Margaret H Meriwether, ‘Child Abuse Reporting Laws: Time for a Change’ (1986) 20(2) *Family Law Quarterly* 141, 149.

<sup>128</sup> *Ibid.*

<sup>129</sup> Kalichman and Brosig, above n 19, 156.

very broad conceptions of abuse, simply differentiating between physical, sexual and psychological abuse.<sup>130</sup>

Similarly, the lack of a definition of neglect could attribute to both underreporting and overreporting. The Wood Commission raised the issue regarding the lack of clarity of the meaning of 'neglect', particularly that the 'provisions do not specifically refer to neglect, chronic or otherwise, or substance abuse by the carer of the child'.<sup>131</sup> It was considered whether the legislation should be amended to 'better reflect the risk of harm, given that we know that neglect and substance abuse by the carer are often reasons given for reporting a child to be suspected of at risk of harm'.<sup>132</sup> Detective Superintendent Helen Begg from the New South Wales Police Force stated that 'having clear parameters about what is real risk and what is only a potential risk or a small likelihood of risk, would filter down the number of reports significantly'.<sup>133</sup>

Second, the threshold regarding what level of knowledge or suspicion of abuse is required to make a report has caused significant problems for reporters. Legislatures have often not wanted to restrict the types of conduct constituting abuse, and have consequently drafted vague<sup>134</sup> and ambiguous reporting thresholds, which allow vast discretion to the reporter.<sup>135</sup> This approach is based on the assumption that it is better practice to investigate families where maltreatment is not present than to overlook a child at risk.<sup>136</sup> In NSW, the requirement of 'reasonable grounds to suspect' implies a level of objectivity,<sup>137</sup> but Seth Kalichman and Cheryl Brosig argue that provisions drafted like this realistically do 'not offer an objective standard'.<sup>138</sup> For example mental health professionals 'express concerns that reason to suspect abuse is insufficient grounds for reporting because they commonly experience many hunches and subjective impressions in the course of providing treatment'.<sup>139</sup>

The issue of threshold requirements was addressed at the Hearing and in the Wood Commission Report. It was stated at the Hearing that 'it may be that the threshold, depending on the existence of reasonable grounds to suspect a risk of harm, is imperfectly understood by those who must report'.<sup>140</sup> There was significant discussion regarding whether or not the threshold should be raised from 'reasonable

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<sup>130</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23.

<sup>131</sup> Wood Commission Transcript, above n 85, 8.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid 24.

<sup>134</sup> Douglas J Besharov, "'Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention' (1985) 8 *Harvard Journal of Law and Public Policy* 539, 568.

<sup>135</sup> Mathews and Kenny, above n 2, 52.

<sup>136</sup> Robert Deisz, Howard J Doueck and Nancy George, 'Reasonable Cause: A Qualitative Study of Mandated Reporting' (1996) 20(4) *Child Abuse & Neglect* 275, 284.

<sup>137</sup> Kalichman and Brosig, above n 19, 157.

<sup>138</sup> Ibid 161.

<sup>139</sup> Kalichman, above n 13, 32.

<sup>140</sup> Wood Commission Transcript, above n 85, 7.

grounds to suspect the child is at risk of harm' to something more similar to 'reasonable grounds for suspecting that there is a real likelihood of harm'.<sup>141</sup> This received mixed responses, with some arguing that this would be beneficial as it 'would give the [reporter] greater flexibility to exercise judgment' and others suggesting that this would have a negative effect as many cases would be missed.<sup>142</sup> The Wood Commission Report also advocates legislative change, calling for amendment of the Act 'to require that only children and young people who are suspected, on reasonable grounds, to be at risk of *significant* harm should be reported to DoCS'.<sup>143</sup> It must be emphasised that a threshold needs to realistically reflect the purpose of the legislation and the practicalities of implementing it. If the purpose is to prevent child abuse and neglect, raising the threshold test does not necessarily better protect children, but just makes things administratively easier to handle. But, on the other hand, making things administratively easier to handle may allow authorities to better protect the children at greatest risk. Logical reform initiatives will take a combination approach, balancing a workable threshold and the practical measures necessary to handle reports.

Third, it has been suggested that the laws in their current state produce confusion for reporters. Mathews argues that concepts such as 'reasonable suspicion' need clarification in order to 'assist reporters, and to reduce the reporting of cases that clearly do not require it'.<sup>144</sup> One example of where the NSW legislation creates additional confusion is where it limits the type of cases required to be reported with regards to psychological harm.<sup>145</sup> In NSW, reports of psychological harm are only required 'when the source of that harm is the child's parent or caregiver'.<sup>146</sup> This provision would be 'intended to prevent reports of abuse perpetrated through known or suspected school bullying'.<sup>147</sup> However, Mathews and Kenny question the likely operation of this limit in practice,<sup>148</sup> using the following example:

If a reporter in New South Wales is aware of a child's severe psychological harm, but not of its exact source, there would be no good reason not to report because the source could be one stipulated by the statute and the reporter is not meant to investigate their suspicion to identify the perpetrator.<sup>149</sup>

This is a very legalistic interpretation, and it is doubtful as to whether professionals would read the legislation in this manner.

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<sup>141</sup> Ibid 28.

<sup>142</sup> Ibid 27–8, 36.

<sup>143</sup> Wood Commission Report, above n 18, vi (emphasis added).

<sup>144</sup> Mathews, above n 7, 225.

<sup>145</sup> Mathews and Kenny, above n 2, 55.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid.

In summary, it can be stated that there is sufficient consensus that the provisions regarding mandatory reporting need evaluation if they are to be more efficient in detecting substantiated cases of abuse and filtering out unsubstantiated cases.<sup>150</sup>

#### E *Tensions with Methods of Parental Discipline*

Any analysis of the mandatory reporting debate inevitably highlights the inextricable tension between appropriate parental discipline and mandated reporting. Yelas states that 'in most Western legal systems, parents are awarded the right to beat their children through a statutory defence to assault'.<sup>151</sup> According to the common law in Australia, 'parents are entitled to use reasonable and moderate force to chastise their children'.<sup>152</sup> Additionally, section 61AA of the *Crimes Act 1900* (NSW) provides a defence of lawful correction which allows the 'application of physical force to a child ... if the physical force was applied by the parent of the child or by a person acting for a parent of the child, and the application of that physical force was reasonable having regard to the age, health, maturity or other characteristics of the child, the nature of the alleged misbehaviour or other circumstances'.<sup>153</sup> Section 61AA notes that the application of force cannot be considered reasonable 'if the force is applied to any part of the head or neck of the child, or to any other part of the body of the child in such a way as to be likely to cause harm to the child that lasts for more than a short period'.<sup>154</sup> The main problem with the reasonable punishment defence is in defining what is 'reasonable'.<sup>155</sup> While courts have their own objective mechanisms for determining the meaning of 'reasonable', parents might have completely different conceptions of what is 'reasonable', which is often too severe in the eyes of the courts. A recent example of this was in August 2008 when an Ipswich woman was almost jailed for beating her children with a leather belt, whipping them up to 14 times, for failing to properly clean their bedrooms.<sup>156</sup> Therefore, while excessive punishment is condemned by the courts, and courts will generally apply an appropriate determination of what is reasonable, this is often far too late for the child. Some commentators go even further, stating that laws, such as section 61AA of the *Crimes Act 1900* (NSW) 'in effect condones physical punishment ... [and] perpetuates the view that physical punishment is normal and a parent's right'.<sup>157</sup>

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<sup>150</sup> Kalichman and Brosig, above n 19 165.

<sup>151</sup> Yelas, above n 52, 792.

<sup>152</sup> David Brown et al, *Criminal Laws: Material and Commentary on Criminal Law and Process of New South Wales* (4<sup>th</sup> ed, 2006) 698.

<sup>153</sup> *Crimes Act 1900* (NSW) s 61AA(1).

<sup>154</sup> *Crimes Act 1900* (NSW) s 61AA(2).

<sup>155</sup> Chih (Peter) L Chen, 'Is There a Right Way to Discipline a Child?' (2007) 16 *Journal of Contemporary Legal Issues* 105, 109.

<sup>156</sup> Tony Keim and Margaret Wenham, 'Smacking row reignited after mother thrashes two children', *Courier Mail* (Brisbane), 7 August 2008.

<sup>157</sup> Natasha Wallace, 'Partial ban on smacking condones other physical punishment, says expert', *The Sydney Morning Herald* (Sydney), 25 November 2003, referring to the views of Bernadette Saunders of the Child Abuse and Family Violence Research Unit at Monash University.

While the reasonable chastisement of children by parents is permitted by statute in NSW, Article 19(1) of the United Nations *Convention on the Rights of the Child*, which was ratified by Australia in December 1990, outlaws the physical punishment of children. It states:

State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child.

Corporal punishment of children can be seen as a breach of a child's right to 'human dignity and physical integrity'.<sup>158</sup> Additionally, research indicates 'that there are a variety of negative long-term consequences of using physical punishment as a method of family discipline'.<sup>159</sup> There is a global movement to end the corporal punishment of children, with 23 countries now outlawing all forms of corporal punishment of children. They include: Sweden (1979); Finland (1983); Norway (1987); Austria (1989); Cyprus (1994); Denmark (1997); Latvia (1998); Croatia (1999); Bulgaria (2000); Israel (2000); Germany (2000); Iceland (2003); Ukraine (2004); Romania (2004); Hungary (2005); Greece (2006); the Netherlands (2007); New Zealand (2007); Portugal (2007); Uruguay (2007); Venezuela (2007); Spain (2007); and Costa Rica (2008).<sup>160</sup>

The mandatory reporting debate illuminates the paradoxical nature of current practice whereby 'battering children ... cause[s] horror and almost total condemnation whilst corporal punishment of children ... remain[s] socially sanctioned'.<sup>161</sup> This leads to definitional problems regarding abuse:<sup>162</sup> where is the line drawn between reasonable punishment and abuse? Yelas suggests that this problem can arise in situations where parents physically chastise their children according to what they believe is lawful, but a mandatory reporter might observe this punishment and report in line with their personal views about what constitutes abuse.<sup>163</sup> By outlawing the corporal punishment of children, the ambiguity for mandatory reporters about when to report is removed as any physical assault on a child would need to be reported regardless of a person's views about 'appropriate' physical chastisement of children.

<sup>158</sup> Global Initiative to End All Corporal Punishment of Children, *Introduction* (2008), Global Initiative to End All Corporal Punishment of Children <<http://www.endcorporalpunishment.org/pages/frame.html>> at 21 October 2008.

<sup>159</sup> Anne B Smith, 'The Effects of Physical Punishment' (2006) 15 *Developing Practice* 10, 10.

<sup>160</sup> This list is compiled from information from the website of the Global Initiative to End All Corporal Punishment of Children <<http://www.endcorporalpunishment.org/pages/frame.html>> at 21 October 2008.

<sup>161</sup> Michael Freeman, *The Rights and Wrongs of Children* (1983) 111 quoted in Yelas, above n 52, 792.

<sup>162</sup> Yelas, above n 52, 792.

<sup>163</sup> *Ibid.*

### F *Punitive Sanctions Encourage Overreporting*

The punitive nature of the mandatory reporting system has been subject to significant criticism, as it has been argued that severe penalties for breach can lead to underreporting. In NSW, the penalties for failure to report can result in prosecution and the individual can be fined up to \$22 000. However, it is important to note that 'there have been no prosecutions under the Act resulting from a failure to report'.<sup>164</sup> In order to avoid these penalties 'reports of suspicion or any concern at all have now become much more frequent',<sup>165</sup> leading to an increase in the overall level of unsubstantiated cases and potentially bringing families previously beyond the scope of the Act to the attention of authorities.<sup>166</sup> Melton argues that the punitive nature of mandatory reporting renders the system ineffective.<sup>167</sup> This criticism was similarly raised in the Hearing. It was noted that 'it may be that the potential to be prosecuted and significantly fined or indeed disciplined by an employer or a registering authority results in mandatory reporters erring on the side of caution and reporting what can objectively be seen as insubstantial matters'.<sup>168</sup> Specifically, Brian Chudleigh from the Public Schools Principals' Forum noted that 'many principals we have discovered are very concerned about the potential for legal liability' and therefore do not exercise any great degree of discretion or judgment in deciding what cases to report once they have been notified by a teacher.<sup>169</sup> Generally, the fear of liability for teachers is a pervasive issue as teachers and school authorities have a non-delegable duty of care 'to ensure that reasonable care is taken for the safety of the children'.<sup>170</sup> It must be noted that if breaches are not penalised, reporting could decline as the removal of sanctions would practically dissolve the 'mandated' element and would serve to undermine the very nature of mandatory reporting. The Wood Commission Report does not suggest any legislative reform on this issue, but rather recommends that the main agencies which employ mandatory reporters should be responsible for implementing internal disciplinary measures to ensure compliance with the Act.<sup>171</sup>

### G *Too Much Emphasis is Placed on Reporting and Investigation*

Another criticism of mandatory reporting is that it forces agencies into a primarily investigative role, which overwhelms other functions, such as the provision of support and services to families.<sup>172</sup> Melton argues that, as a result of mandatory

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<sup>164</sup> Special Commission of Inquiry into Child Protection in New South Wales, *Public Forum: Mandatory Reporting Fact Sheet*, Lawlink NSW <<http://www.lawlink.nsw.gov.au>> on 13 May 2008.

<sup>165</sup> Ainsworth, above n 12, 61.

<sup>166</sup> *Ibid.*

<sup>167</sup> Drake and Jonson-Reid, above n 68, 344.

<sup>168</sup> Wood Commission Transcript, above n 85, 7.

<sup>169</sup> *Ibid.* 12–3.

<sup>170</sup> Des Butler and Ben Mathews, 'School Education' in Geoff Monahan and Lisa Young (eds), *Children and the Law in Australia* (2008) 304.

<sup>171</sup> Wood Commission Report, above n 18, 196.

<sup>172</sup> Melton, above n 19, 13.

reporting, child protection agencies<sup>173</sup> are ‘largely engaged, as a matter of legal obligation, in evidence gathering and preparation of actual or potential court cases’<sup>174</sup> rather than on ‘the task of increasing the safety of children’.<sup>175</sup> He further states that ‘attention to children’s own security is diminished as workers spend their time checking off boxes in regard to parental conduct ... [and that] [b]y law, social workers’ time is focused first and foremost on the question of “What happened?” not “What can we do to help?”’<sup>176</sup> Melton argues that policymakers and even researchers<sup>177</sup> are ‘drawn into arcane issues about the legal definition of child abuse and neglect, rules for gathering evidence’<sup>178</sup> and are ‘distracted from the fundamental question of the ways that law and policy can be used to make communities and families safer for children’.<sup>179</sup> Drake and Jonson-Reid dispute Melton’s argument, stating that ‘the available data suggests that ... agencies invest a small portion of their worker’s time in investigative functions compared to other functions, particularly foster care’.<sup>180</sup> Mathews and Bross similarly are critical of Melton, stating that mandatory reporting is compatible with the type of support-oriented community that Melton envisages.<sup>181</sup>

#### H *Negative Impacts on the Provision of Professional Services*

The potential for mandatory reporting to interfere with and disrupt the provision of professional services is a negative impact.<sup>182</sup> It has been noted that ‘professionals reliably indicate that they do not report suspected maltreatment because they believe the relationship with their patient/client will suffer from reporting’.<sup>183</sup> Many of these service providers suggest that mandatory reporting ‘breaches confidentiality, and is therefore destructive to their services’.<sup>184</sup> Seth Kalichman offers an example of this: ‘when abuse is detected during the course of family therapy, reporting can impair the progress of an intervention that may offer the greatest hope of preventing further abuse’.<sup>185</sup> Melton argues that mandatory reporting of health professionals may ‘compromise their own or their client’s perception of them as helpers’.<sup>186</sup> He further asserts that reporting laws have acted

<sup>173</sup> Note that Melton is particularly discussing the issue regarding mandatory reporting in light of the CPS, but his analysis is relevant to other jurisdictions facing similar problems to those in the United States.

<sup>174</sup> Melton, above n 19, 13.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid 14.

<sup>177</sup> Alan M. Steinberg et al, ‘Are Researchers Bound by Child Abuse Reporting Laws?’ 23(8) *Child Abuse & Neglect* 771.

<sup>178</sup> Melton, above n 19, 14.

<sup>179</sup> Ibid.

<sup>180</sup> Drake and Jonson-Reid, above n 68, 357.

<sup>181</sup> Mathews and Bross, above n 49, 514.

<sup>182</sup> Kathleen Coulborn Faller, ‘Unanticipated Problems in the United States Child Protection System’ (1985) 9 *Child Abuse & Neglect* 63, 64.

<sup>183</sup> Kalichman and Brosig, above n 19, 163.

<sup>184</sup> Kalichman, above n 13, 31.

<sup>185</sup> Ibid 32.

<sup>186</sup> Melton, above n 19, 14.

as a barrier to perpetrators disclosing abuse in treatment situations citing that in one-quarter of cases in which persons are receiving mental health treatment, mandatory reporting has led to a disruption in treatment.<sup>187</sup>

Drake and Jonson-Reid disagree, stating that 'from the client's perspective, the common and much-repeated assertion that CPS [Child Protective Services] is viewed negatively and is harmful to most families is simply wrong'.<sup>188</sup> According to their evidence, 'mental health service providers do not generally see [agency] interventions in a negative light'.<sup>189</sup> Similarly, while acknowledging that numerous conflicts of interest could arise in the therapeutic context,<sup>190</sup> Anderson et al argue that mandatory reporting can have positive effects in that it can strengthen alliances between psychologists and their clients, allowing them to 'weather the storm of reporting together'.<sup>191</sup> While it is acknowledged that mandatory reporting can have adverse effects on the provision of professional services, the first and primary step is to notify the relevant authorities so that the abuse or neglect can cease. Other considerations must be secondary to this objective.

### *I Reporting Can Have Negative Impacts on Children and Families*

Critics of mandatory reporting argue that 'withholding a report of suspected abuse is justified when it is in the best interest of children and families'.<sup>192</sup> These arguments suggest that 'reporting and investigative procedures are, at best, intrusive and, at worst, coercive'.<sup>193</sup> According to this view, unsubstantiated reports can negatively impact children and families, and it is suggested that a narrower legislative threshold serves to greater protect families from unnecessary intrusive interventions.<sup>194</sup> On the contrary, Yelas argues that 'too many arguments [within the mandatory reporting debate] rely on some form of the public/private distinction as an excuse not to intervene effectively where child abuse most often occurs'.<sup>195</sup> Yelas labels these types of arguments as 'inherently weak' and suggests that they 'divert attention from an underlying concern to protect the private'.<sup>196</sup> Yelas' argument is compelling as it is essential that the primary objective be to prevent the abuse and neglect and to remove children from immediate danger.

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<sup>187</sup>

Ibid.

<sup>188</sup>

Drake and Jonson-Reid, above n 68, 357.

<sup>189</sup>

Ibid.

<sup>190</sup>

Elizabeth Anderson et al, 'Consequences and Dilemmas in Therapeutic Relationships with Families Resulting from Mandatory Reporting Legislation' (1992) 14 *Law and Policy* 241, 254.

<sup>191</sup>

Ibid.

<sup>192</sup>

Kalichman, above n 13, 32.

<sup>193</sup>

Ibid.

<sup>194</sup>

Ibid.

<sup>195</sup>

Yelas, above n 52, 782.

<sup>196</sup>

Ibid.

## VI THE PATH TO REFORM IN NSW

A *Overhaul of the Reporting System*

After examining the arguments for and against mandatory reporting, it is clear that some reform of the current system in NSW is necessary. The exploration of alternative methods and systems of reporting is one way in which the mandatory reporting system in NSW could be improved. Having the Helpline as the only avenue of reporting to DoCS logically leads to a bottleneck of reports. Therefore, an overhaul of the reporting system and the way it operates is required. There have been numerous suggestions as to how to achieve this. First, the Wood Commission Report recommends that DoCS improve its case practice procedure in order 'to develop clear guidelines for classifying risk of harm reports made and information given to the Helpline'.<sup>197</sup> Specifically, the Commission recommends that only information that satisfies the statutory tests should be classified as a report, and all other information should be classified as a 'contact'.<sup>198</sup> This approach would mean that the urgent and significant cases of abuse and neglect would be priority, and cases which do not satisfy the statutory test would remain in DoCS files as contacts.

Second, the Wood Commission Report recommended that The Children's Hospital at Westmead, the Area Health Services, the Department of Education and Training, the Department of Ageing Disability and Home Care, the Department of Juvenile Justice and the NSW Police Force should each establish a central unit which advises staff as to whether a report should be made to DoCS. In the case where reporting to DoCS is not appropriate the unit should assist the child or young person by referring them to other services which may assist them, such as the early intervention program, Brighter Futures.<sup>199</sup> This recommendation has great merit as a central unit would provide mandatory reporters with guidance as to when to report and it would act as a filter to unsubstantiated reports.

Third, it was suggested at the Hearing that the three different sectors required to report (police, health and education) should have different systems of reporting that work most effectively for them.<sup>200</sup> Mark Palmer, representative of the Sydney Children's Hospital at the Hearing, was in support of the abandonment of a one-size-fits-all approach to reporting. He noted:

I think the system needs to have different reporting systems to reflect the different roles of Police, Health and Education. I think the systems described by the Helpline in having teams responding to identified reporters sounds like it shows some promise, but I don't think a one-size-fits-all solution will work.<sup>201</sup>

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<sup>197</sup> Wood Commission Report, above n 18, 197.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid, vi.

<sup>200</sup> Wood Commission Transcript, above n 85, 21.

<sup>201</sup> Ibid.

Fourth, it has been suggested that there needs to be numerous ways of approaching DoCS.<sup>202</sup> It was noted at the Hearing that one approach to reforming the system could be to establish multiple avenues to notify DoCS about child abuse or neglect concerns. Brian Chudleigh noted that one way of improving the system is

by returning to the relationship [schools] had formerly, that is, prior to the establishment of the Helpline, the direct relationship between school and the local DoCS office. We would see that if schools could return, and DoCS return, to that direct relationship, that would be extremely beneficial.<sup>203</sup>

This approach would allow schools and DoCS to work together with ‘known families’, allowing both institutions to be better placed to protect children at serious risk of abuse and neglect.

Electronic reporting has been suggested as a way in which to alleviate some of the burden on the Helpline.<sup>204</sup> This method could result in an improvement to the quality of information received by DoCS, by police, medical personnel and school authorities.<sup>205</sup> DoCS recently conducted a trial of electronic reporting with a small number of State Education schools.<sup>206</sup> DoCS’s recent evaluation of this trial was generally positive, finding that the system was easy to use and resulted in some time savings when compared to phone and fax reports. However, the Wood Commission Report noted that ‘the quality of information contained in the e-reports was not as good as reports received by fax’.<sup>207</sup> The Wood Commission Report also recommends that the trial of e-reporting should be extended to include NSW Health, each Area Health Service, The Children’s Hospital at Westmead, the Department of Juvenile Justice and the NSW Police Force.<sup>208</sup>

Further, the electronic organisation of information needs to be improved and more consideration needs to be made to report management.<sup>209</sup> The NSW Ombudsman in its submission to the Wood Commission suggested that ‘information about child protection concerns should be treated as “intelligence” that can be built on to provide effective risk profiles and IT systems need to provide easy access to child protection histories, and enable identification of “high risk” families’.<sup>210</sup>

Finally, the Wood Commission Report recommends that mandatory reporters should be provided with feedback and more comprehensive training. The Report notes that ‘reporters should be advised, preferably electronically in relation to

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<sup>202</sup> Ibid 30.

<sup>203</sup> Ibid 31.

<sup>204</sup> Ibid 48.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Wood Commission Report, above n 18, 189.

<sup>208</sup> Ibid, 198.

<sup>209</sup> NSW Ombudsman, *Special Commission of Inquiry into Child Protection Services in NSW Submission of NSW Ombudsman, Part 4: Mandatory Reporting* (2008) 9.

<sup>210</sup> Ibid.

mandatory reporters, of the receipt of their report, the outcome of the initial assessment, and, if referred or forwarded to a CSC [Community Services Centre], contact details for that CSC should be provided'.<sup>211</sup> Providing mandatory reporters with feedback on their report will hopefully combat the problem of multiple reports by the same person and reassure the mandatory reporter that the issue is being investigated by DoCS. The Wood Commission Report also suggests that:

Targeted training strategies for each of the key mandatory reporters, namely the NSW Police Force, NSW Health, each Area Health Service, The Children's Hospital at Westmead and the Department of Education and Training in relation to the circumstance in which reports need to be made and in relation to the information required, so as to ensure its relevance and quality, should be developed and implemented by each agency in collaboration.<sup>212</sup>

More comprehensive and targeted training will ensure that mandatory reporters are well equipped to make a valid report that meets the threshold requirements of the legislation.

### B *Legislative Reform*

The Department of Community Services has suggested that one way in which to lower the number of unsubstantiated reports flooding the system and detracting from legitimate cases of abuse and neglect is to raise the evidentiary threshold from 'reasonable grounds to suspect' abuse and/or neglect to a 'real likelihood of a child being at risk of harm' or 'reasonable evidence of a risk of harm'.<sup>213</sup> The obvious benefit of this approach is that it would allow more resources to be focused on substantiated cases of abuse and neglect.<sup>214</sup> A disadvantage of this approach is that by setting the threshold higher, reporters are required to use their discretion and to make a judgment about the risks to that child.<sup>215</sup> The New South Wales Department of Education and Training was critical of these types of amendments as they would, among other issues, require reporters to play an investigative role, which they are not trained to do and which could result in delays in reporting.<sup>216</sup> Similarly, Bruce Barbour, the NSW Ombudsman, did not support these suggested amendments, stating that 'the threshold of "reasonable grounds to suspect" is more readily understandable – and more appropriate – than thresholds such as "reasonable

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<sup>211</sup> Wood Commission Report, above n 18, 197.

<sup>212</sup> Ibid, 198.

<sup>213</sup> Department of Community Services, *Submission of the Department of Community Services on Mandatory Reporting* (2008), 24; Department of Community Services, *Discussion Paper for Review, Statutory Child Protection in NSW: Issues and Options for Reform* (2006) 22.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid 21.

<sup>216</sup> New South Wales Department of Education and Training, *Department of Education and Training Response to the NSW Government Discussion Paper: Statutory Child Protection in NSW – Issues and Options for Reform* (2007) 4–5.

evidence” and “real likelihood”<sup>217</sup>. Simply raising the threshold in order to alleviate administrative strain on the system does not naturally lead to greater detection and prevention of child abuse and neglect. The Wood Commission Report similarly does not suggest incorporating ‘reasonable evidence’ or ‘likelihood of harm’ tests, noting that ‘the former calls for a level of investigation capable of providing tangible evidence while the latter introduces a need for foresight or prediction of what is likely to occur’.<sup>218</sup>

The Department of Community Services has also suggested that the current legislation could be amended so that the concept of a child being ‘at risk of harm’ is not only limited to ‘current concerns’<sup>219</sup> but also to future concerns. The Department of Community Services noted that section 23 could be amended so that ‘a child or young person may be considered to be at risk on the basis that “concerns exist for the current safety, welfare or well-being of the child or young person or if there is evidence of behaviour which could cause future harm”’.<sup>220</sup> This type of amendment would allow mandatory reporters to play a more preventative role in combating child abuse and neglect.

The Wood Commission Report recommends that sections 23, 24 and 25 of the Act ‘should be amended to insert “significant” before the word “harm” where it first occurs; and s 27 amended to insert “significant” before the word “harm” wherever it occurs’.<sup>221</sup> This recommendation raises the reporting threshold from requiring mandatory reporters to report when they have reasonable grounds to suspect that a child is at risk of harm to requiring them to report only *significant* harm. The reason given for raising the threshold is ‘so that families and children do not have the stigma of being “known to DoCS” in circumstances where the risk of harm does not warrant attention’.<sup>222</sup> While this approach aims to reduce the number of unsubstantiated reports by requiring a higher threshold of harm, this amendment would arguably inject further ambiguity to the mandatory reporting provisions. Mandatory reporters in NSW currently have to determine what it is to have ‘reasonable grounds to suspect that a child is at risk of harm’; a heavily ambiguous phrase. Introducing the vague concept of ‘significant harm’ would further confuse reporters and could potentially lead to underreporting. However, the Wood Commission Report notes that sufficient training, coupled with the operation of a central unit to advise staff as to when a report is required, would overcome these linguistic uncertainties.<sup>223</sup>

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<sup>217</sup> Letter from Bruce Barbour, Ombudsman to the Department of Community Services, *Discussion Paper – Statutory Child Protection in NSW: Issues and Options for Reform* (2006) 1–2.

<sup>218</sup> Wood Commission Report, above n 18, 185.

<sup>219</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23.

<sup>220</sup> Department of Community Services, *Discussion Paper*, above n 213, 24.

<sup>221</sup> Wood Commission Report, above n 18, 197.

<sup>222</sup> *Ibid*, 185.

<sup>223</sup> *Ibid*, 186.

## VII CONCLUSION

An overview of the debate suggests that there are compelling arguments both for and against mandatory reporting. Generally, complete abolition of reporting legislation has not been suggested as a productive response to combat child abuse and neglect. The Commissioner of the Wood Commission stated:

I don't think anybody has suggested to us so far that mandatory reporting as such should disappear and it does have some advantages in that the existence of mandatory reporting does give rise to a duty which then attracts the various protections and immunities from breach of ethics and professional competence and everything else.<sup>224</sup>

Additionally, the Wood Commission Report noted that 'mandatory reporting has the useful effect of overcoming privacy and ethical concerns by compelling the timely sharing of information where risk exists and of raising awareness among professionals working with child and young persons'.<sup>225</sup> Rather, a combination approach<sup>226</sup> to reform would be most productive, which would involve greater resourcing, clearer legislation, detailed and thorough training, public education and the improvement of methods of intake, screening and assessment.<sup>227</sup> This combination approach was suggested at the Hearing and in the Wood Commission Report, evidenced by the following proposals for reform: legislative change to clarify what types of abuse and neglect should be reported; raising the threshold from simply 'harm' to 'significant harm';<sup>228</sup> the possibility that the three different sectors required to report (police, health and education) should have different systems that work most effectively for them;<sup>229</sup> improved training for mandatory reporters;<sup>230</sup> establishing a central unit to provide advice for mandatory reporters;<sup>231</sup> alternative modes of reporting to the Helpline system;<sup>232</sup> greater cooperation and communication between DoCS, police and schools to identify families at risk or 'known families';<sup>233</sup> electronic reporting;<sup>234</sup> and more comprehensive feedback for reporters.<sup>235</sup>

Most of the criticisms regarding mandatory reporting surround its implementation, rather than the notion of mandatory reporting itself.<sup>236</sup> In order to make productive reforms in the area of child protection, one needs to 'balance ideals with reality of

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<sup>224</sup> Wood Commission Transcript, above n 85, 53.

<sup>225</sup> Wood Commission Report, above n 18, 181.

<sup>226</sup> Kalichman, above n 13, 42.

<sup>227</sup> Mathews and Bross, above n 49, 513.

<sup>228</sup> Wood Commission Report, above n 18, 197.

<sup>229</sup> Wood Commission Transcript, above n 85, 21.

<sup>230</sup> Wood Commission Transcript, above n 85, 29; Wood Commission Report, above n 18, 197.

<sup>231</sup> Wood Commission Report, above n 18, vi

<sup>232</sup> Wood Commission Transcript, above n 85, 30.

<sup>233</sup> Ibid 31.

<sup>234</sup> Wood Commission Transcript, above n 85, 48; Wood Commission Report, above n 18, 197.

<sup>235</sup> Wood Commission Transcript, above n 85, 58; Wood Commission Report, above n 18, 197.

<sup>236</sup> Mathews and Bross, above n 49, 513.

child protection practice'.<sup>237</sup> What is evident is that mandatory reporting is an essential element in combating child abuse and neglect and should not be abolished, as the essential flaws of the system can be overcome through legal and structural reform. It must be emphasised that both the government and the public have a duty to protect children, and that whether mandated or not, we should all be united in the effort to alleviate the unnecessary suffering of our children.

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<sup>237</sup> Adam Tomison, 'Mandatory Reporting: a Question of Theory Versus Practice' (2002) *Developing Practice* 13, 17.