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[Mathews, Benjamin P.](#)

(2012)

Does the protection of vulnerable children require a system of mandatory reporting of abuse and neglect? [An issues paper for the New Zealand Government Green Paper for vulnerable children].

(Unpublished)

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The New Zealand Green Paper for Vulnerable Children

Issues Paper:

**Does the protection of vulnerable children require a
system of mandatory reporting of abuse and neglect?**

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Introductory Remarks

In this Issues Paper, I intend to raise some key points relevant for any government which is considering its child protection and family welfare policy. In particular, I will raise questions about whether a form of legislative reporting duty is required, and if so, what consequences this has for child protection. The context of child maltreatment - and indeed, *each form* of maltreatment: physical abuse, sexual abuse, psychological or emotional abuse, and neglect - is extremely complex, and the overarching question of how to deal with these phenomena involve challenging normative, economic and practical questions. There are no easy or perfect solutions. Nor, often, is there the amount and quality of evidence available on which public policy approaches should be devised. However, from the best evidence about the history of this context, from research conducted in this field, and from the best evidence available about the nature, incidence and effects of different subtypes of maltreatment, some observations can be made which may help to inform deliberations.

Because of the form of this Issues Paper, the questions raised here are of necessity presented and dealt with in a concise manner. All of them merit detailed conversation and careful consideration of complex and detailed bodies of evidence. I have referred in footnotes to some of the more prominent sources. All of the issues are dealt with in far more detail in papers published by myself and others. My papers can be accessed at the website referred to below, but one which is not yet available online should be of particular assistance: B Mathews, 'Exploring the contested role of mandatory reporting laws in the identification of severe child abuse and neglect' in M Freeman (ed) *Current Legal Issues Volume 14: Law and Childhood Studies*, Oxford University Press, Oxford, 2012, 302-338. I can make this paper available through the conference organisers.

I am aware of the general situation in New Zealand which gave rise to the Green Paper, including the Smith Report and its comments at 8.40-8.46 regarding mandatory reporting. I have outlined 10 key issues related to mandatory reporting legislation while being mindful of the New Zealand context, although I do not claim expertise regarding all relevant features of the situation in New Zealand. My view, based on both research evidence and a concern to protect and promote children's interests, and society's interests, is that reporting laws in some form are necessary and can contribute substantially to child protection and enhancing family and community health and wellbeing. However, they are only one necessary part of a sound child protection system, being a method of tertiary and secondary prevention, and primary prevention efforts must also be prioritised. Moreover, it is essential that if a legislative reporting duty is enacted, it must be designed carefully and implemented soundly, and it must be integrated within a properly resourced child protection and family welfare system.

I would be most interested in responding to questions that may emerge from your discussions and will assist to the greatest extent possible.

Dr Ben Mathews
3 February 2012

1. What is a legislative mandatory reporting duty?

Key issue: *Many people misunderstand the nature and variety of legislative mandatory reporting duties, and there can be much confusion among reporters and the community about the nature of the law in their jurisdiction.*

A legislative mandatory reporting duty is a duty, enacted into legislation, for a designated person to report known or suspected child abuse.

The laws typically have some common elements but it is important to note at the outset that all such laws are not the same, and do not have to take the same form. This fact is seldom noted, and means it is not sound to make simplistic global comments about ‘mandatory reporting laws’ as a whole. For example, every jurisdiction in the USA, Canada and Australia has enacted legislative reporting duties, but these differ, for example, in who is required to report, and what forms of abuse and neglect must be reported.² This clearly affects the scope of the child protection endeavour, and has economic and practical consequences for child welfare systems. Hence, a government in a jurisdiction needs to make important decisions about the nature and extent of the duty, especially in the following respects:

- (a) which persons are required to make reports (usually, members of designated professions, and if so, which ones; but some jurisdictions apply the duties to all citizens);
- (b) the types of abuse and neglect that attract the duty to report;
- (c) what state of knowledge, belief, or suspicion a reporter must have before the reporting duty is activated (usually requiring a reasonable suspicion or belief of abuse or neglect, or some synonymous variation of this, and therefore not requiring knowledge of abuse or neglect) – hence reporters are not to conduct their own investigation but are simply required to report their suspicions according to the law;
- (d) the degree or extent of harm suspected to exist in the case of suspected abuse or neglect that requires a report; consistent with the original laws (see below), usually the law requires cases to be reported only if involving significant harm, or a synonymous variation of this (hence also attempting to define extents of abuse and neglect that do not require reports);
- (e) whether reports are required only of suspected past or presently-occurring abuse, or also of suspected risk of future abuse that has not happened yet.

There are other important elements of these laws:

- a guarantee of confidentiality is provided concerning the reporter’s identity;
- the reporter is endowed with immunity from any legal or administrative liability arising from a report made in good faith;
- practical requirements are detailed regarding when and how the report is to be made and to whom;
- penalties for failure to report according to the duty are stipulated, although these are largely intended to encourage reporting rather than police it;
- where the classes of reporters are limited to members of selected professions, a final key element of the legislation is to enable any person to make a report in good faith, even if not required to do so, and to provide confidentiality and legal immunity for these persons.

Key point: *A legislative reporting duty can take different forms, depending on the extent of the jurisdiction’s ambition regarding child protection and family support.*

² B Mathews and M Kenny, ‘Mandatory Reporting Legislation in the USA, Canada and Australia: a Cross-jurisdictional Review of Key Features, Differences and Issues’ (2008) 13 *Child Maltreatment* 50-63.

2. What were the first legislative mandatory reporting duties and why were they enacted?

Key issue: It is important to recall the context for, and the nature of, the first reporting laws.

It is important to recognise that the initial legislative reporting duties were quite limited in scope, and to appreciate the context within which they were created. The landmark legal change in identifying severe child maltreatment occurred in the USA in the 1960s. Preceding the legal change was a groundbreaking 1962 publication by C. Henry Kempe, a Colorado pediatrician, and his medical colleagues in which severe physical abuse of children, especially those aged under 3, was identified and conceptualized as the ‘battered-child syndrome’.³ Importantly, the emphasis was on *severe* injury - often involving fractures to the skull and or subdural haematoma, and other fractures - but not *any* injury no matter how slight. As well as identifying the intentional infliction by parents of severe physical injury, the authors effectively declared that such treatment could no longer be ignored or tolerated; they alluded to the medical profession’s ‘gaze aversion’ in this regard, and their customary failure to act in such cases. Hence, they recommended that medical practitioners should report this condition to agencies which could intervene to protect the child.⁴

Kempe and his colleagues recognized the fact that severe maltreatment occurs in private, inflicted by parents, most frequently and seriously against very young children, and the likely lack of disclosure of severe maltreatment by parents. They had encountered numerous fatalities and cases of severe injury presenting at their hospital. This constellation of factors produced the need for a person outside the family to facilitate the identification of maltreatment where neither the child nor the child’s parents would. After sustained lobbying and advocacy, by 1967 laws were passed in each American State requiring medical practitioners to report reasonable suspicions of severe child physical abuse. These were the first legislative reporting duties, often called ‘mandatory reporting laws’.

In ensuing years, the legislative obligation to report reasonably suspected severe child physical abuse was extended to other groups of professionals whose work involved frequent contact with children, such as teachers and police. As well, with evidence emerging of other forms of maltreatment, reporting duties were extended to other types of maltreatment: sexual abuse, emotional or psychological abuse, and neglect. More recently, some States have even extended the duty to report suspected exposure to domestic violence, and exposure to drug-related activity. A review of the nature and scope of these laws demonstrates not only their expansion beyond the original laws, but the legal differences that now exist between States even in the same country.⁵

Key point: The enduring principle motivating the initial and subsequent laws is the need for persons outside the family to identify cases of severe child maltreatment which would otherwise likely remain hidden, and to allow the protection of children from severe harm and the provision of appropriate assistance to children and families.

³ C Kempe, F Silverman, B Steele, W Droegemueller and H Silver, ‘The Battered-Child Syndrome’ (1962) 181 *Journal of the American Medical Association* 17-24.

⁴ D Bross & B Mathews, ‘The Battered Child Syndrome: Changes in the Law and Child Advocacy’ in R Krugman & J Korbin (eds) *C. Henry Kempe: A 50 Year Legacy to the Field of Child Abuse and Neglect*, Springer Scientific, 2012 (in press).

⁵ Mathews and Kenny (2008) above n 2. Many other countries have also enacted reporting laws in various forms, such as Brazil, Denmark, Finland, France, Hungary, Israel, Malaysia, Mexico, Norway, South Africa, and Sweden.

3. What are the main reasons legislative mandatory reporting duties are now enacted?

Key issue: *It is essential to understand the context of severe child maltreatment before considering whether a legislative reporting duty is required.*

Severe maltreatment is inflicted in private, by parents and caregivers

This enduring principle continues to motivate legislative reporting duties. The central idea is that reporting laws of *some type* are required because in many cases, only someone outside the family can bring the child's severe abuse to the attention of helping agencies.⁶ The infliction of severe maltreatment is generally perpetrated by the child's parent(s) or caregiver(s), *within the home*. This is especially true of sexual abuse, which is even more likely to occur in private and to be kept secret than other forms of maltreatment. However, it applies also to severe physical and emotional abuse, and to neglect. A key point in this whole context is that many and perhaps most cases of severe child maltreatment is hidden and will not come to light without the involvement of persons outside the child's family. A related point is that the statistics about proven cases generally are only those identified by governments after official investigations. They represent the 'tip of the iceberg' of actual cases. Population-based incidence studies reveal a much more accurate picture of the true extent of severe child maltreatment. As a rough guide, the US data suggest approximately 10 children per 1000 are victims each year; population studies indicate a higher incidence.⁷ Other countries' incidence studies also indicate this mismatch between official data and actual incidence.

Developmental vulnerability

Furthermore, it is *infants and young children* who are most likely to be severely maltreated and to suffer the most severe and enduring injuries. The most detailed statistics, maintained and published in the USA,⁸ show that younger children are more vulnerable to maltreatment. There are some variations by type of abuse: for example, children aged under 4 are less likely to be sexually abused than older children, and there are similar numbers of physically abused children from age 1. However, younger children are much more likely to suffer neglect, medical neglect, and psychological abuse. Except for sexual abuse, there is a clear developmental vulnerability: infants under 1 are the most vulnerable to every type of maltreatment (including physical abuse), followed by infants aged 1, aged 2, and so on. Three quarters of all victims were aged under 12: nearly one third (32.6%) were younger than 4, another quarter (23.6%) were aged 4-7, and almost another one fifth (18.9%) were aged 8-11.⁹

Table 1: USA 2008-09, numbers of children victimized, by age and maltreatment type

| | Physical abuse | Sexual abuse | Psychological abuse | Neglect |
|----------------------|----------------|--------------|---------------------|---------|
| Less than 1 year old | 15,658 | 470 | 4171 | 71,968 |
| 1 year old | 5917 | 558 | 3634 | 44,166 |
| 2 years old | 5780 | 968 | 3327 | 41,431 |
| 3 years old | 5678 | 2394 | 3221 | 37,011 |
| 4-7 years old | 27,510 | 15,232 | 13,373 | 126,918 |
| 8-11 years old | 23,480 | 16,122 | 12,233 | 96,755 |
| 12-15 years old | 26,644 | 23,959 | 10,584 | 84,627 |
| 16-17 years old | 9819 | 7946 | 3419 | 29,270 |

⁶ B Mathews & D Bross, 'Mandated reporting is still a policy with reason: empirical evidence and philosophical grounds' (2008) 32(5) *Child Abuse & Neglect* 511-516.

⁷ A Sedlak et al, *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4) Design and Methods Summary*. Westat: Rockville, MD, 2008; D Finkelhor, D, H Turner, R Ormrod & S Hamby, 'Trends in childhood violence and abuse exposure: Evidence from two national surveys' (2010) 164(3) *Archives of Pediatrics & Adolescent Medicine* 238-242.

⁸ US Department of Health and Human Services, *Child maltreatment 2008* (US Government Printing Office, Washington: DC, 2010), 47 (Table 3-12). Data from previous years also show these patterns: US Department of Health and Human Services, *Child maltreatment 2007* (US Government Printing Office, Washington: DC, 2009), 47.

⁹ US Department of Health and Human Services, *Child maltreatment 2008* (US Government Printing Office, Washington: DC, 2010), 25 (Figure 3-3).

A child-centred approach, which also enables early intervention and downstream cost saving

The laws are clearly aimed at intervening at an early stage to interrupt severe child maltreatment and to protect the child from future harm. They are a classic example of a promotion of the aspirations embodied in the United Nations Convention on the Rights of the Child, which is a rights-based document intended to guide the substance of law, policy and practice. The widespread ratification of the UNCRC indicates at least a rhetorical commitment to protecting children from maltreatment, since article 19(1) requires States parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of maltreatment while in the care of parents or guardians.

However, as seen below, the laws also aim to enable the provision of support to the child when necessary, and in appropriate cases to facilitate family support. Such support mechanisms can take many forms, including the provision of economic and housing assistance, counselling, drug and mental health services, respite care, parenting information and advice, employment assistance, and medical care and advice. The massive economic cost of maltreatment is well established, both to the individual and to society. From a purely economic perspective, such responses incur initial cost but result in substantial downstream cost savings.¹⁰

Key point: *Severe child maltreatment is a significant problem with extensive and longlasting costs to the child and society. It is usually inflicted by parents and caregivers, and affects the youngest children the most frequently.*

4. Do legislative mandatory reporting duties result in better identification of severe child maltreatment, and even declines in maltreatment?

Key issue: *Despite difficulties in obtaining data, it is important to know whether legislative reporting duties result in better case identification, and even in long-term declines.*

The success of reporting laws can be seen in evidence regarding the number of reports made by mandated reporters, the proportion of substantiated cases identified as a result of these reports, and the numbers of cases referred by these reporters which may not have been officially substantiated after investigation but which still resulted in the provision of helpful services to the child and her or his family. The most detailed evidence is collated in the USA in its annual reports by the US Department of Health and Human Services. Unfortunately, other jurisdictions do not report data in sufficient detail.

Reports by mandated reporters identify the majority of maltreatment cases, and contribute to declines

Annual records consistently indicate that mandated reporters make approximately 55-60% of all reports.¹¹ Reports made by mandated reporters result in the identification of approximately 70% of all proven cases.¹² Detailed data reported in 2009 by subtype and profession indicates that an even higher proportion of substantiated cases of physical abuse (78.1%) and sexual abuse (74.0%) are identified after reports by mandated reporters.¹³ Similar outcomes are discernible in Canada, where

¹⁰ See Mathews and Bross (2008) n 6, and the sources cited therein.

¹¹ US Department of Health and Human Services, *Child Maltreatment 2009* (US Government Printing Office, Washington DC, 2010), 6 (Figure 2-1).

¹² US Department of Health and Human Services, *Child Maltreatment 2008* (US Government Printing Office, Washington DC, 2010), 9 (Figure 2-3).

¹³ US Department of Health and Human Services, *Child Maltreatment 2007* (US Government Printing Office, Washington DC, 2009), 45, Table 3-9.

reports by mandated reporters disclosed 75% of all cases of substantiated severe maltreatment.¹⁴ Non-mandated reporters make a significant but far smaller contribution to case identification. Perpetrators are rarely the source of substantiated reports, and victimized children hardly ever report their own situation.¹⁵ These statistics suggest mandatory reporting does work to identify the majority of cases of severe child maltreatment that are detected.

Table 2: Percentage of substantiated reports by maltreatment type and report source

| | USA 2007 | | | | Canada 2003 | | |
|---------------------|--------------------|--|-------|-------------|--------------------|--|-------|
| | Mandated reporters | Nonmandated reporters (including child victim) | Child | Perpetrator | Mandated reporters | Nonmandated reporters (including child victim) | Child |
| Physical abuse | 78.1 | 21.9 | 0.6 | 0.1 | 79% | 19% | 5% |
| Sexual abuse | 74.0 | 25.9 | 0.8 | 0.1 | 62% | 39% | 3% |
| Psychological abuse | 68.7 | 31.3 | 0.8 | 0.1 | 71% | 26% | 2% |
| Neglect | 63.6 | 36.4 | 0.3 | 0.1 | 63% | 26% | 2% |

Declines in maltreatment

In addition, several sources of data in the USA indicate an actual *decline* in some subtypes of child maltreatment, especially since the 1990s, and particularly in physical abuse and sexual abuse, which have both experienced a decline of over 50%. Fatalities have also substantially decreased in the USA. These sources of data include both annual official government investigations into reports of suspected maltreatment,¹⁶ and repeated population studies.¹⁷ The influence of reporting laws and other public education, response and prevention efforts have been noted as factors influencing the declines in child maltreatment, especially those regarding fatalities, and in physical and sexual abuse.¹⁸

Key point: Statistics from several countries suggest mandatory reporting does work to identify the majority of cases of severe child maltreatment that are detected, and US data indicates that contributes to long-term declines.

¹⁴ N Trocme, B Fallon, B MacLaurin et al, *Canadian incidence study of reported child abuse and neglect—2003: Major findings* (Ottawa: Minister of Public Works and Government Services, 2005), 86 (Table 8-1). Australia does not publish equivalent data, but does detail the sources of reports of investigated cases, showing similar patterns of the infrequency of perpetrator and child reports, and the predominance of reports by mandated reporter groups, especially police and health and educational personnel: Australian Institute of Health and Welfare (2010), *Child protection Australia 2008-09*, 58 (Table A1.5).

¹⁵ Although especially for older children, some reports made by mandated reporters probably result from a disclosure by the child to the reporter, who then makes the report.

¹⁶ US Department of Health and Human Services, *Child Maltreatment 2010* (US Government Printing Office, Washington DC, 2011), 37 (Table 3-7).

¹⁷ D Finkelhor et al, above n 7; A Sedlak et al, above n 7.

¹⁸ D Finkelhor and L Jones, 'Why Have Child Maltreatment and Child Victimization Declined?' (2006) 62(4) *Journal of Social Issues* 685-716; D Besharov, 'Overreporting and underreporting of child abuse and neglect are twin problems', in D Loseke, R Gelles, & M Cavanaugh (eds), *Current controversies on family violence* (2nd ed., pp 285–298). Thousand Oaks, CA: Sage, 2005; Murray Straus and Richard Gelles, 'Societal Change and Change in Family Violence from 1975 to 1985 As Revealed by Two National Surveys' (1986) 48 *Journal of Marriage and the Family* 465-479.

5. What systemic responses are needed to deal with reports of different kinds of maltreatment?

Key issue: *It is important to acknowledge that under broader modern reporting laws, different types of response are necessary after reports*

Formal investigations of some reports are required to ascertain whether maltreatment has occurred, the extent of harm caused or likely to be caused in future, and to ensure the child is protected from fatal or severe harm. Such investigations can also determine whether a child may need to be removed from an extremely dangerous situation at home, and placed in out-of-home care. As well, investigations can help assess what services are required for a child and his or her family.

Legislative reporting duties also facilitates provision of assistance to children and families
However, the making of reports also facilitates the use of a ‘differential response’ approach to child and family welfare after receiving a report of maltreatment. Differential response approaches emphasise assessing the family’s needs and delivering helpful services, rather than initiating investigation to determine whether maltreatment has occurred. Clearly, they are particularly appropriate for low-risk and moderate-risk cases, especially for cases involving neglect, although they may be far less appropriate for other cases such as sexual abuse, and severe abuse involving infants. There is an increasing emphasis on enabling these quicker, sensitive responses to identify the child’s and family’s needs and to provide services which meet those needs. In the USA, over 20 States now implement these systems.¹⁹

It is important to note that reporting of suspected maltreatment enables the provision of assistance not only in cases that are substantiated after investigation, but also in those that are not. In the USA, substantiated victims are proportionally more likely to receive post-response services, but almost twice the actual number of children (and families) in ‘unsubstantiated’ cases receive ‘postresponse services’ than those who are in substantiated cases.²⁰ This further demonstrates the utility of referrals, and the inappropriateness of labelling only those referrals that are ‘substantiated’ as ‘good’ referrals. There are many reasons why a report may be treated as ‘unsubstantiated’, including the decision not to investigate at all, but this does not mean the case does not involve maltreatment.²¹ The making of a referral and the provision of helpful support can itself act as a *preventive mechanism*, stopping maltreatment from happening or preventing it from getting worse.

Key point: *If establishing legislative reporting duties (and even if not), child protection systems need to be able to respond in different ways to different cases, and to make the best possible decisions about appropriate responses. Moreover, a failure to ‘substantiate’ a report may still result in an extremely positive outcome for the child and her or his family.*

¹⁹ A Conley and J Berrick, ‘Community-Based Child Abuse Prevention: Outcomes Associated With a Differential Response Program in California’ (2010) 15 *Child Maltreatment* 282-292.

²⁰ US Department of Health and Human Services, *Child Maltreatment 2009* (US Government Printing Office, Washington DC, 2010, 84, 89).

²¹ B Drake and M Jonson-Reid, ‘A response to Melton based on the best available data’ (2007) 31 *Child Abuse & Neglect* 343-360; P Kohl, M. Jonson-Reid and B. Drake, ‘Time to Leave Substantiation Behind: Findings From A National Probability Study’ (2009) 14(1) *Child Maltreatment* 17; B Mathews, ‘Exploring the contested role of mandatory reporting laws in the identification of severe child abuse and neglect’ in M Freeman (ed) *Current Legal Issues Volume 14: Law and Childhood Studies*, Oxford University Press, Oxford, 2012, Chapter 19, 302-338.

6. Do legislative mandatory reporting duties result in ‘overreporting’ and ‘systems burden’?

Key issue: *Some commentators argue that legislative reporting duties produce so many extra and unnecessary reports that they cause overwhelming systems burden, economic waste, and damage the child protection endeavour. Others say this claim is simplistic, inaccurate and not borne out by data or reality.*

It is undeniable that when compared with the first laws and their context, the differences in modern reporting laws and the societies in which they exist raise questions about the justifiability of broader reporting laws. Essentially, the question presented is whether, even if accepting the soundness of the principle animating the original law, extensions to the original law are, on balance, desirable developments. The claim that these broader reporting laws have produced massive numbers of unsubstantiated reports (in other words, ‘overreporting’) offers an ostensibly powerful critique of the laws and reporting practices.

It is important to ascertain through rigorous and precise research whether ‘overreporting’ occurs, and if so, what is its nature and extent. There is evidence indicating that legislative reporting duties will produce an increase in the number of reports which when investigated result in a finding of being ‘unsubstantiated’.²² Overall, many reports are ‘screened out’ at intake, many more are referred directly to assisting agencies, and hence a relatively low percentage of all reports result in both an investigation and a substantiation of that investigation. Some have labelled all such reports as problematic and have argued that this so-called ‘overreporting’ and the effects on scarcely-resourced child protection systems are a reason for not adopting the legislative model.²³

However, many others have responded to these claims, arguing that it is not sound to simply rely on the number or proportion of ‘unsubstantiated’ cases to draw global conclusions about the success or failure of reporting laws and practices, and that it is not appropriate to use ‘substantiated’ cases as a proxy for a justified report.²⁴ Drake has concluded that:²⁵

Even some of the very best researchers in the field have a tendency to view the appropriateness of a report and substantiation as similar or identical concepts. The evident conceptualization of substantiation assumes that unsubstantiated reports represent invalid reports, instances of overreporting...The critical factor in understanding substantiation data is to question the common tendency to assume that unsubstantiated reports represent situations in which maltreatment did not occur and in which the family does not need services...this conclusion does not logically follow from the inability of a CPS worker to substantiate a case; a report may be unsubstantiated for many reasons.

²² This is generally accepted due to the surge in reports in the USA after introduction of the laws, and similar surges in Australia. For more specific analyses see D Lamond, ‘The Impact of Mandatory Reporting Legislation on Reporting Behaviour’ (1989) 13 *Child Abuse & Neglect* 471; for further detailed treatment see B Mathews (2012), above n 21.

²³ G Melton, ‘Mandated reporting: A policy without reason’ (2005) 29 *Child Abuse & Neglect* 9-18. See also Besharov (2005), above n 18.

²⁴ See Mathews and Bross, above n 6; B Drake and M Jonson-Reid, M, ‘A response to Melton based on the best available data’ (2007) 31 *Child Abuse & Neglect* 343-360; P Kohl, M Jonson-Reid and B Drake, ‘Time to Leave Substantiation Behind: Findings From A National Probability Study’ (2009) 14(1) *Child Maltreatment* 17; Mathews (2012) above n 21; see also D Finkelhor, ‘Is child abuse overreported?: The data rebut arguments for less intervention’ (1990) 48(1) *Public Welfare* 23; D Finkelhor, ‘The main problem is underreporting child abuse and neglect’, in D Loseke, R Gelles & M Cavanaugh (eds), *Current controversies on family violence* (2nd ed, pp 299-310), Thousand Oaks, CA: Sage, 2005.

²⁵ B Drake, ‘Unraveling “Unsubstantiated” ’ (1996) 1(3) *Child Maltreatment* 261, 262-263.

Recently, Mathews conducted a detailed study of the ‘overreporting claim’, and concluded that it was not sustained by evidence.²⁶ Several important additional arguments identified by Mathews in this regard are:

- many reports (and unsubstantiated reports) are made by members of the public, not by mandated reporters;
- reporting patterns by discrete mandated reporter groups can vary dramatically (for example, reports by one reporter group of one type of maltreatment can account for the vast majority of all reports);²⁷
- reports of different subtypes of maltreatment can differ enormously (for example, reports of physical and sexual abuse generally account for a relatively small minority of all reports);
- the maltreatment subtypes themselves are discrete and reports are only one feature of a child protection and child welfare system.
- often, more than one report is made about a child (both in quick succession by an individual or multiple reporters, or through the year); this can mean that a very large proportion of all reports are being made about a relatively small number of children, as has been found in Australia.

Overall, it is problematic to make global normative statements about ‘overreporting’ and hence about the normative justifiability of the laws. Quantitative and qualitative data may indeed disclose undesirable or ‘hypersensitive’ reporting practices which may be influenced by the legislation and or inadequate policy and reporter training, but such evidence needs to be identified with precision and rigor.²⁸

***Key point:** Debates exist about the nature and extent of ‘overreporting’, and its consequences for public policy. It is inevitable that some reports made by mandated reporters will not involve maltreatment (see Issue 9). However, powerful and detailed arguments have been made against the ‘overreporting’ claim. Extremely precise questions need to be asked of data about reporting to ascertain the nature of trends in reporting practice by discrete reporter groups, for each maltreatment subtype, and the outcomes of these subsets of reports, to relate them to law, policy and practice, and to make informed judgments about matters of concern which may need attention.*

7. Are legislative reporting duties preferable to reporting duties based in industry policy documents?

***Key issue:** Many jurisdictions do not have legislative reporting duties, but do have industry-based policies which require reports of maltreatment. Are such policy-based duties as effective as legislative duties, in nature and effect?*

Demonstrating ideological and political differences, and different practical imperatives which relate to decisions about enacting legislative reporting duties, other nations including the United Kingdom and New Zealand have chosen not to enact mandatory reporting laws. However, in many of these jurisdictions, policy-based duties to report child maltreatment have been created by peak industry groups such as medical and educational professions.²⁹

²⁶ Mathews (2012) above n 21.

²⁷ Mathews (2012) above n 21 showed this occurred in New South Wales, with police reports of exposure to domestic violence.

²⁸ Mathews (2012) above n 21.

²⁹ Mathews (2012) above n 21.

There are complex questions about whether policy duties are as effective as legislative duties in creating a harmonised and well-informed professional culture best able to identify cases of severe child abuse. While further research into this question is required, there is some evidence that policy-based duties are not as effective as legislative duties. Doctors in the UK, for example, have a policy-based reporting duty that does not provide the normal protections given to reporters by legislative duties regarding confidentiality and immunity from proceedings. This less robust and coherent approach has not only exposed doctors making good faith reports to harassment by parents and to professional disciplinary proceedings; there has been a reduction in doctors' willingness to make child protection reports and to occupy child protection roles.³⁰ As well, policy duties do not possess the imprimatur of Parliament, are decentralized and fragmented (and hence prone to error), and inhibit best practice in the development and administration of training for reporters.³¹

Key point: *The stronger view may be that if a jurisdiction is going to have a duty to report at all, then legislation is superior to policy. Legislation enables a unified approach; makes a powerful statement from the community and the Parliament that child maltreatment is taken seriously (and is not just an industrial bureaucratic requirement that can be ignored); allows for harmonised training of reporters; and provides protections to reporters that policy cannot.*

8. What issues are faced by legislators and policymakers when considering what kind of duties to enact?

Key issue: *Legislative reporting duties can be broad or narrow, and legislators and policymakers need to carefully consider many factors when enacting a legislative duty.*

The role of legislation in helping to identify cases of severe maltreatment presents challenges for legislators, policymakers, reporters, and child protection system workers. The fact that different jurisdictions enact laws of varying breadth - differing particularly in which subtypes of maltreatment must be reported, and by which groups of reporters - demonstrates that for ideological, political, economic and practical reasons, the decision to enact a reporting law is not straightforward.

Breadth of the law

A legislature intending to create its first reporting laws, and any legislature continually monitoring its existing legislative approach, will benefit from careful consideration of several questions.

Regarding the nature and scope of the laws, such questions include:³²

- (a) What types of maltreatment are required to be reported?
- (b) Which occupations are to be mandated reporters?
- (c) What state of mind is required to activate the reporting duty?
- (d) What extent of harm, if any, is required to be reported; is this harm qualification the same for each subtype; and how is this to be expressed?
- (e) Are reports required only of past or present abuse, or are reports also required of suspected risk of future abuse (and if so, how is this to be expressed)?

³⁰ B Mathews, H Payne, C Bonnet and D Chadwick, 'A Way To Restore British Paediatricians' Engagement With Child Protection' (2009) 94(5) *Archives of Disease in Childhood* 329-332.

³¹ B Mathews, K Walsh, M Rassafiani, D Butler & A Farrell, 'Teachers reporting suspected child sexual abuse: results of a three-State study' (2009) 32(3) *University of New South Wales Law Journal* 772-813; B Mathews, J Cronan, K Walsh, D Butler & A Farrell, 'Teachers' Policy-Based Duties To Report Child Sexual Abuse: A Comparative Study' (2008) 13(2) *Australia & New Zealand Journal of Law & Education* 23-37.

³² Mathews and Kenny (2008) above n 2.

Properly-resourced child protection system and service provision systems

Whatever form of legal reporting obligation is created, a government must ensure that there is a sufficiently well-resourced child protection system to receive, act on and respond to reports, and that there are agencies to provide services to children and families in need. Where used, these laws must be framed so that their content fits the realistic ambition of the jurisdiction's overall child protection and family welfare plan. Whatever the scope of such a plan, it should be considered, coherent and adequately resourced. The relationship of reporting laws with differential response and investigative responses must be soundly designed and both these response methods should be implemented appropriately.

Key point: *A jurisdiction's law must be soundly drafted, and the law must be sensitive and adapted to its entire child protection apparatus.*

9. What difficulties are faced by reporters?

Key issue: *Reporting child maltreatment is sometimes straightforward, but often is complex. If a profession's members are to be legislatively required to report child maltreatment, how will these reporters be trained for and supported in their role?*

Training of reporters

Legislatures and policymakers also will need to consider how reporters are to be trained, since it is well established that legislative reporting duties alone are insufficient. Studies have repeatedly found that mandated reporters often have not had the training required to equip them to fulfil their role, which can produce failure to report, and clearly unnecessary reporting.³³ Those persons who are required by such laws to report suspected maltreatment require excellent, repeated, interdisciplinary training to ensure they have a sound knowledge of the indicators of various types of maltreatment, what types of maltreatment they are required to report, the state of mind required which activates their reporting duty (which is not certainty, or even a state of mind near this; reporters are not expected to be perfect), the protections provided to them upon making a report, and how to make a report. Some jurisdictions, such as South Australia, have enacted legislation requiring the training of mandated reporters; this approach helps to facilitate high quality and coherent training approaches.

Key problems for reporters

Several difficulties are posed for legislatively mandated reporters, caused by this multifaceted and complex context. Some of these are caused by conceptual difficulties within the reporting laws. For example, the laws generally use the terms 'reasonable suspicion' or 'reasonable belief' to activate the reporting duty,³⁴ and the concept of 'significant harm' (or a synonymous concept) to limit the

³³ A Reiniger, E Robison and M McHugh, 'Mandated Training of Professionals: A means for improving reporting of suspected child abuse' (1995) 19 *Child Abuse & Neglect* 63-69; Mathews, Walsh et al (2009), above n 31; N Abrahams, K Casey and D Daro, 'Teachers' knowledge, attitudes and beliefs about child abuse and its prevention' (1992) 16 *Child Abuse & Neglect* 229-238; R Hawkins and C McCallum, 'Mandatory notification training for suspected child abuse and neglect in South Australian schools' (2001) 25 *Child Abuse & Neglect* 1603-1625; M Kenny, 'Teachers' attitudes toward and knowledge of child maltreatment' (2004) 28 *Child Abuse & Neglect* 1311-1319; K Walsh, R Bridgstock, A Farrell, M Rassafiani and R Schweitzer, 'Case, teacher and school characteristics influencing teachers' detection and reporting of child physical abuse and neglect: Results from an Australian survey' (2008) 32 *Child Abuse & Neglect* 983-993; B Mathews, 'Teacher Education to Meet the Challenges of Child Sexual Abuse' (2011) 36(11) *Australian Journal of Teacher Education* 13-32; C Christian, 'Professional Education in Child Abuse and Neglect' (2008) 122(1) *Pediatrics* S13-S17; S Starling, K Heisler, J Paulson and E Youmans, 'Child Abuse Training and Knowledge: A National Survey of Emergency Medicine, Family Medicine, and Pediatric Residents and Program Directors' (2009) 123(4) *Pediatrics* e595-e602.

³⁴ B Levi and K Crowell, 'Child Experts Disagree About the Threshold for Mandated Reporting' (2011) 50(4) *Clinical Pediatrics* 321-329; B Levi and S Portwood, 'Reasonable Suspicion of Child Abuse: Finding a Common Language'

reporting duty to sufficiently serious cases. Studies show reporters may fail to report because while they have a suspicion that the injury has been caused by maltreatment, they are not certain, or are not sufficiently sure.³⁵ Reporters need to be reassured that the legislative duty requires only a reasonable suspicion (or a reasonable belief, depending on the jurisdiction), and that this does not require certainty; nor is their role an investigative one. They also need to know that the terms of the legislation require (generally) the reporting only of significant harm, not of any degree of harm.³⁶

Other difficulties are caused by the nature of maltreatment. Many cases will not be reported because maltreatment is frequently not readily apparent and reporters may simply not be able to detect it. Reporters are not expected to be perfect detectors of maltreatment. Even severe maltreatment can be difficult to detect, even for medical practitioners who are able to conduct physical examinations. Indicators of maltreatment can be consistent with innocent explanations, or other medical conditions.³⁷ Serious intentional head injuries are often misdiagnosed.³⁸ Even penetrative sexual abuse frequently leaves no physical signs in female genitalia.³⁹

Yet, there is evidence of failure to report despite having suspicions of abuse. Studies of actual past reporting behaviour have found medical practitioners' failure to report suspicions of severe physical abuse,⁴⁰ and failure to report by other reporter groups such as teachers and nurses.⁴¹ There are varied reasons why reporters sometimes fail to report, which can differ according to the type of maltreatment involved. As well as the lack of sufficient certainty referred to above, prominent among these is the belief that child protection agencies will not respond effectively even when a report is made.⁴² Sufficiently resourced child protection agencies need to establish excellent working relationships with the professional groups who are required to report suspected maltreatment, and each of these parties must understand the difficulties and constraints experienced by the other.⁴³ Importantly, reporters should be made aware that not all reports will be investigated (and the reasons why); that even when investigated there can be many reasons for a finding of unsubstantiated (and that this does not mean the report was not worthwhile or that the child was not protected); and reporters should be told by the child protection agency of the outcome of their

(2011) *Journal of Law, Medicine & Ethics* 62-69 (Spring); B Levi and G Loeben, 'Index of Suspicion: Felling not believing' (2004) 25 *Theoretical Medicine* 277-310.

³⁵ Mathews, Walsh et al (2009) above n 31; J-Y Feng and M Levine, 'Factors associated with nurses' intention to report child abuse: a national survey of Taiwanese nurses' (2005) 29 *Child Abuse & Neglect* 783-795; G Zellman, 'Child Abuse Reporting and Failure to Report among Mandated Reporters' (1990) 5(1) *Journal of Interpersonal Violence* 3-22; S Kalichman and C Brosig, 'Practicing Psychologists' Interpretations of and Compliance with Child Abuse Reporting Laws' (1993) 17(1) *Law and Human Behavior* 83-93.

³⁶ B Mathews, J Fraser, K Walsh, M Dunne, S Kilby and L Chen, 'Queensland nurses' attitudes towards and knowledge of the legislative duty to report child abuse and neglect: Results of a State-wide survey' (2008) 16(2) *Journal of Law and Medicine* 288-304. This is often glossed over, and can produce undesirable consequences: see further Mathews (2012) above n 21.

³⁷ D Besharov, *Recognizing Child Abuse*, Free Press, New York, 1990.

³⁸ C Jenny, K Hymel, A Ritzen, S Reinert and T Hay, 'Analysis of Missed Cases of Abusive Head Trauma' (1999) 282(7) *JAMA* 621-626.

³⁹ J Anderst, N Kellogg & I Jung, 'Reports of Repetitive Penile-Genital Penetration Often Have No Definitive Evidence of Penetration' (2009) 124(3) *Pediatrics* e403.

⁴⁰ E Flaherty, R Sege, J Griffith, L Price, R Wasserman, E Slora, N Dhepyasuwan, D Harris, D Norton, M Angelilli, D Abney and H Binns, 'From Suspicion of Physical Child Abuse to Reporting: Primary Care Clinician Decision-Making' (2008) 122(3) *Pediatrics* 611-619; E Flaherty, R Sege, L Price, et al, 'Pediatrician characteristics associated with child abuse identification and reporting: Results from a national survey of pediatricians' (2006) 11(4) *Child Maltreatment* 361-369.

⁴¹ Mathews, Walsh et al (2009) above n 31; B Mathews, J Fraser, K Walsh, M Dunne, S Kilby and L Chen, 'Queensland nurses' attitudes towards and knowledge of the legislative duty to report child abuse and neglect: Results of a State-wide survey' (2008) 16(2) *Journal of Law and Medicine* 288-304.

⁴² R Jones, E Flaherty, H Binns, L Price, E Slora, D Abney, D Harris, K Christoffel and R Sege, 'Clinicians' Descriptions of Factors Influencing Their Reporting of Suspected Child Abuse: Report of the Child Abuse Reporting Experience Study Research Group' 2008 122(2) *Pediatrics* 259-266.

⁴³ C McCarthy, 'Doing the Right Thing: A Primary Care Pediatrician's Perspective on Child Abuse Reporting' (2008) 122 *Pediatrics* S 22.

report. Other mechanisms may also assist reporters, such as the availability of child abuse experts with whom the reporter can consult.⁴⁴

Key point: Reporters must be given adequate protections, and excellent training, and be supported by child protection systems so that they can fulfil this difficult role.

10. What other support systems and public health approaches are needed even if a legislative reporting duty is enacted?

Key issue: Legislative reporting duties help to identify severe child maltreatment but they are only one part of a sound child protection system. Governments must make choices about resource allocation and system-wide approaches.

Even the strongest advocate of legislative reporting duties would acknowledge that much maltreatment will still go undetected, and that other policy approaches are necessary to prevent, identify and respond to child maltreatment. For the most part, legislative reporting duties are a component of tertiary prevention, after maltreatment has occurred, although in some cases, reports can be made of situations where a child has not been maltreated yet but there are reasons to suspect maltreatment will happen (in many cases, this depends on the scope of the law). Child protection workers and other personnel involved in the child protection endeavour must be adequately trained, protected and supported in their role. Service provision systems for children and families must be adequately resourced and monitored for quality assurance.

Importantly, it should be noted that enacting legislative reporting duties does not mean that other strategies cannot coexist to help identify and respond to child maltreatment, and to prevent it worsening. For example, strategies to encourage help-seeking from families in need, whose children may be experiencing or vulnerable to various forms and extents of neglect due to poverty, mental illness, or drug use, should always be encouraged and supported.

Primary and secondary prevention measures should be prioritised as much as possible, since there is good evidence of their success,⁴⁵ although it is accepted that these may initially incur substantial cost. A difficult political issue in this context is that in a crude economic sense, many resources may need to be invested into child protection before downstream cost savings occur, and these savings can be difficult to measure. Such long-term and intensive investment is seldom viewed favourably by political parties, even when there is compelling evidence of the economic gain to be made in the long-term, as has been demonstrated by researchers including James Heckman, Nobel Prize Winner in Economics.⁴⁶ In the best of all possible worlds, a bipartisan approach supporting this strategy would likely offer the best chance of overcoming this political obstacle.

Data collection and monitoring

The collection of detailed data about child maltreatment, ideally with as much information standardized across regions or jurisdictions within a nation, is also an essential element of a well-functioning system. This monitoring is an essential feature of a public health approach to child maltreatment, enabling understandings of the features of maltreatment (data about numbers and characteristics of child victims, perpetrators, who makes referrals, outcomes of referrals, and more).

⁴⁴ E Flaherty, R Sege and T Hurley, 'Translating Child Abuse research Into Action' (2008) 122 *Pediatrics* S1-S5; C Berkowitz, 'Child Abuse Recognition and Reporting: Supports and Resources for Changing the Paradigm' (2008) 122 *Pediatrics* S10-S12.

⁴⁵ See for example those referred to in Mathews & Bross (2008) n 6.

⁴⁶ J Heckman, 'Skill formation and the economics of investing in disadvantaged children' (2006) 312 *Science* 1900-1902; and see other sources referred to in Mathews & Bross (2008) n 6.

This also enables tracking of trends over time, and assessments of the impact of policy approaches. If the data is sufficiently detailed, it enables more precise identification of the nature and extent of failures and successes, within and across systems, jurisdictions, reporter groups and maltreatment subtypes. In the USA, legislation requires the establishment of a system of national data collection and analysis, and the conduct of population-based incidence studies.

Key point: *Better reporting of child maltreatment is essential, but is only one part of a sound child protection system which ideally requires sustained investment in high quality primary and secondary prevention.*