

# **Mandatory reporting laws for child sexual abuse in Australia: A legislative history**

## **Report for the Royal Commission into Institutional Responses to Child Sexual Abuse**

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## **Project team**

The Royal Commission into Institutional Responses to Child Sexual Abuse commissioned and funded this research project. It was carried out by Associate Professor Ben Mathews.

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The law as stated is current to 31 December 2013.

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**Royal Commission**  
into Institutional Responses  
to Child Sexual Abuse

## Preface

On Friday 11 January 2013, the Governor-General appointed a six-member Royal Commission to inquire into how institutions with a responsibility for children have managed and responded to allegations and instances of child sexual abuse.

The Royal Commission is tasked with investigating where systems have failed to protect children, and making recommendations on how to improve laws, policies and practices to prevent and better respond to child sexual abuse in institutions.

The Royal Commission has developed a comprehensive research program to support its work and to inform its findings and recommendations. The program focuses on eight themes:

1. Why does child sexual abuse occur in institutions?
2. How can child sexual abuse in institutions be prevented?
3. How can child sexual abuse be better identified?
4. How should institutions respond where child sexual abuse has occurred?
5. How should government and statutory authorities respond?
6. What are the treatment and support needs of victims/survivors and their families?
7. What is the history of particular institutions of interest?
8. How do we ensure the Royal Commission has a positive impact?

This research report falls within theme three.

The research program means the Royal Commission can:

- obtain relevant background information
- fill key evidence gaps
- explore what is known and what works
- develop recommendations that are informed by evidence, can be implemented and respond to contemporary issues.

For more on this program, please visit [www.childabuseroyalcommission.gov.au/research](http://www.childabuseroyalcommission.gov.au/research).

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# Part 1

## Executive summary

### 1.1 Scope and purpose of this report

#### 1. History of Australian mandatory reporting legislation for child sexual abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse is required to inquire into, among other things, ‘what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts’.<sup>1</sup>

An aspect of the nature of allegations of child sexual abuse occurring within institutional contexts is that they often relate to events that took place years and sometimes decades before the allegations are brought to light. This report is intended to assist in understanding the development of mandatory reporting laws and to establish a means of determining the existence and scope of mandatory reporting laws in any jurisdiction at a given point in time.

To assist the Royal Commission in addressing our terms of reference, the major focus of this report is to review and explain the legislative principles for mandatory reporting to child welfare agencies of child sexual abuse in each state and territory of Australia, and to trace changes in the development of the laws since their inception to the present day. In doing so, the report identifies differences within and between state and territory laws over a period of 44 years, from 1969 to 2013. The report does not discuss obligations to report criminal conduct to law enforcement agencies in detail (see Part 2.6). It is not the purpose of this report to make recommendations for reform of law, policy or practice. Nevertheless, the outcomes of the legal analyses indicate areas for possible reform, enhancement and research.

The law and historical developments in each state and territory are detailed in **Part 3** of this Report. A timeline is also provided for each jurisdiction showing the major developments in graphic form. Nine **tables** in the **Executive summary** of this report display the most essential information in summary form.

#### 2. Precursors to and reasons for the introduction of the laws in each jurisdiction, and for substantial amendments to the laws

A second purpose of this report is to identify why the legislation changed in each jurisdiction. This task involved research into publicly available records in each state and

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<sup>1</sup> Letters Patent for the Royal Commission into Institutional Responses to Child Sexual Abuse, S No 12 of 2013, 11 January 2013, Term of Reference (b).



territory, focusing on significant government inquiries and law reform reports, and parliamentary debates.

Findings regarding the precursors to legal developments are integrated within the treatment of the historical legal developments in **Part 3** of this report. Discussion of these precursors is presented in shaded boxes. In addition, **Table 9** in the Executive summary of this report highlights the major influential factors.

### **3. Overseas learnings**

A third, minor aspect of the report is to summarise other jurisdictions' reporting laws and developments over time, to identify issues of interest. For feasibility, this is limited to selected jurisdictions having the most detailed experience of mandatory reporting laws and the most detailed data about child protection. This is presented in **Part 4**.

### **4. Fundamental contextual material**

Reasons for the legislative changes need to be understood with reference also to changes in understanding of the broader child protection context. Accordingly, **Part 2** of this report provides fundamental contextual material about the nature of mandatory reporting laws, their rationales, genesis and development, their function in the special context of child sexual abuse, and key aspects of their development and position in the Australian legal landscape. Part 2 of the report also briefly notes normative arguments about the laws.

## **1.2 Major findings**

The major findings regarding the three key components of the report are as follows.

### **1.2.1 History of Australian mandatory reporting legislation for child sexual abuse**

1. Each state and territory in Australia has now enacted legislation commonly known as 'mandatory reporting laws'. These laws require designated persons to report suspected cases of child sexual abuse. The laws have the purposes of:

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

Appendix 1 contains a diagram illustrating the role of mandatory reporting within the child welfare, child protection and criminal justice systems.

The current legislative provisions are cited in **Table 1** of this Executive summary.

2. Each Australian state and territory has constitutional power to make laws relating to child protection. A unified approach has never been agreed across the nation.
3. Accordingly, the laws have been created in different jurisdictions at different times, and are different in scope and nature.
4. Mandatory reporting laws were first enacted in 1969 in South Australia. The last state to enact its first mandatory reporting law was Western Australia in 2009. This is a period of 40 years.

These first enactments are set out in **Table 2** of this Executive summary.

5. Legislative developments have occurred in piecemeal and irregular fashion. Reporting duties have been clarified. New reporter groups have been added, although these have differed and remain inconsistent among jurisdictions. Penalties have been increased, or more rarely, have been removed.

The major changes to the initial enactments, and their commencement dates, are detailed at length in **Table 2** of this Executive summary.

A chronological timeline of the initial mandatory reporting enactments in each jurisdiction, their initial focus and scope, and when a reporting duty was expressly stated to apply to child sexual abuse, is set out in **Table 3** of this Executive summary.

6. Currently, the laws share many features and have a similar schematic approach. For example, across jurisdictions, the duty is obligatory, rather than discretionary. It must be complied with immediately. The report destination is usually the jurisdiction's department of child protection. Confidentiality and immunity from legal liability are universal features.

The substance of each jurisdiction's provision is set out in **Table 4** of this Executive summary.

7. However, several significant differences remain between the laws, as follows:
  - a. **Different reporter groups.** Possibly the most significant difference is in which persons are required to make reports. Normally, the reporting duty is applied to members of at least four occupations who regularly work with children: police, teachers, doctors and nurses. However, even this general approach is not present in every Australian state and territory. There are numerous different approaches. At one end of the spectrum, the Northern Territory makes all citizens mandated reporters. Close to this end of the spectrum are New South Wales, South Australia and Tasmania, which mandate a large range of occupations. Closer to the other end of the spectrum is Queensland, which mandates three professions. South Australia is the only jurisdiction to include clergy as mandated reporters, although the duty does not extend to suspicions developed through confession.

A summary of the mandated reporter groups is set out in **Table 5** of this Executive summary.

- b. **Different states of mind activate the reporting duty.** There are differences in the state of mind that a reporter must have before the duty is activated. Duties are never so strictly limited that it only applies to cases where the person is certain that the child is being abused or neglected; but nor are they so wide as to apply to cases where a person may have the merest inkling that abuse or neglect may have occurred. While this is a reasonable approach, there are differences between the jurisdictions in how this state of mind is expressed, which may cause confusion for reporters. The legislation variously uses the concept of 'belief on reasonable grounds' (four jurisdictions), and 'suspects on reasonable grounds' (four jurisdictions). Technically, belief requires a higher level of certainty than suspicion.

These differences in reporters' states of mind are set out in **Table 6** of this Executive summary.

- c. **Different temporal/situational scope of the reporting duty.** There are differences in whether the reporting duty is applied to past or currently occurring abuse only, or also to perceived risk of future abuse. In all jurisdictions the reporting duty applies to suspected past abuse and currently occurring abuse. However, four jurisdictions (New South Wales, Queensland, Victoria, Northern Territory) extend the duty to cases where the reporter has a reasonable suspicion that a child is at risk of being abused in future, no matter who the suspected future perpetrator may be. South Australia and Tasmania require reports of suspicions that a child is likely to be abused in future, but only if the suspected future perpetrator is a person who lives with the child. In contrast, the Australian Capital Territory and Western Australia limit the duty to cases of past or current abuse.

These different approaches are set out in **Table 6** of this Executive summary.

- d. **Different extent of harm activates the reporting duty.** Generally, mandatory reporting laws are concerned with acts and omissions that are significantly harmful to the child's health, safety, wellbeing or development. In several jurisdictions, this approach is applied *only* to physical abuse, psychological abuse and neglect, and it is made clear that *all* cases of suspected sexual abuse must be reported without the report needing to consider the presence or extent of harm. However, some states' legislation applies the general approach to sexual abuse as well. Where this is done, the legislation differs, but generally uses concepts such as 'significant harm' or 'detriment' to activate the reporting duty. In theory, these provisions beg the question of what constitutes such injuries; for most cases of sexual abuse, this should not be problematic in these jurisdictions but there may still be grey areas (for example, exposure to pornography).

The different concepts and standards are set out in **Table 6** of this Executive summary.

- e. **Different definition of 'child' to whom the reporting duty is owed.** Initial enactments limited the duty to children of various ages, sometimes as low as those aged under 12. The current general approach across states and territories is to apply the reporting duty to suspected abuse of children under 18. However, two differences can be noted. New South Wales restricts the duty to abuse of children aged under 16, and Victoria restricts the duty to abuse of children under 17.

These different provisions are set out in **Table 7** of this Executive summary.

- f. **Different penalties.** Penalties for noncompliance are present in seven of the eight jurisdictions. New South Wales originally provided a penalty, but this was omitted after the Wood Inquiry recommendations and legislation in 2009. The penalties differ substantially across jurisdictions.

The different penalties are set out in **Table 8** of this Executive summary.

- g. **Victoria's parental protection clause.** Victoria is the only jurisdiction which has as part of its mandatory reporting provision a clause which further limits the duty to cases in which the reporter not only has a reasonable belief about the child suffering harm as a result of sexual abuse, but that the reporter must also have a reasonable belief that the child's parent has not protected the child from suffering harm as a result of the abuse (or that the child does not have a parent who is likely to protect the child from suffering harm as a result of it).

Some further observations about this clause are detailed in **Part 3.7**.

### **1.2.2 Precursors to and reasons for the introduction of the laws in each jurisdiction, and for substantial amendments to the laws**

8. The first mandatory reporting laws were generally limited to medical practitioners and were developed primarily to respond to child physical abuse and neglect, but were capable of applying to sexual abuse.
9. In time, as the nature, prevalence and effects of child sexual abuse became the subject of greater recognition and understanding, legislative mandatory reporting provisions developed a clearer focus on this type of abuse. As shown in Part 2.4.2, a body of academic literature exploring child sexual abuse began to appear in the 1970s and proliferated in the 1980s. In the USA, the original federal legislation in 1974 expressly included sexual abuse as a form of maltreatment. In Australia, express legislative provisions requiring reports of sexual abuse began to appear in the mid-1980s.
10. In many instances, developments to the laws – whether the initial enactment, or extension of the reporting duty to members of additional groups or professions – occurred after it became apparent that cases of sexual abuse were occurring and were not being reported. A body of evidence developed about the higher rate of case identification in jurisdictions having mandatory reporting. This influenced further legal developments.
11. Numerous government inquiries and reports, law reform commission reports and similar inquiries from 1977 to 2013 have favoured the introduction of mandatory reporting for child sexual abuse, or, where it already operated, extensions to it or modifications to law, policy and practice in an effort to improve its operation.

The major inquiries and reports, their key recommendations about mandatory reporting legislation, and their translation into legislation, are set out in **Table 9** of this Executive summary.

12. In the Australian Capital Territory, Victoria and Western Australia, inquiries and reports have recommended the introduction of mandatory reporting for child sexual abuse, at least in some form, and governments either did not introduce it, or took several years to do so. These are also noted in **Table 9**.
13. In Victoria and Western Australia, a small minority of government reviews conducted before the introduction of mandatory reporting recommended that it not be introduced for child abuse and neglect generally, without detailed consideration of sexual abuse. Nevertheless, in each of these cases, laws were subsequently enacted soon after for the mandatory reporting of child sexual abuse. These are also noted in **Table 9**.
14. No inquiry or report has recommended the abolition of existing mandatory reporting laws for child sexual abuse.

### **1.2.3 Overseas learnings**

15. Many nations, both developed and developing, have enacted mandatory reporting laws.
16. All jurisdictions within the USA and Canada have mandatory reporting legislation.
17. Some countries are currently in the process of introducing the laws for the first time, including Ireland.
18. Some countries, including the UK and New Zealand, have not enacted mandatory reporting laws.
19. Few countries, including Australia, collect the data required by a coherent and systematic public health approach to child protection. The USA arguably has the most comprehensive approach to data collection and monitoring of reporting systems.
20. Detailed, rigorous research is required into the operation, and differential effects, of the reporting laws in different jurisdictions in Australia, as applied to different reporter groups. This research can provide a more robust evidence base about the different approaches and can also indicate optimal conditions required for better case identification at an early stage, both within and beyond institutions.<sup>2</sup>

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<sup>2</sup> Similar research has been previously recommended by the Australian Law Reform Commission in *Seen and heard: priority for children in the legal process, Report No 84*, Australian Government Publishing Service, Canberra, 1997, Recommendation 168, p 436.

**Table 1: Current legislation containing mandatory reporting duties and key provisions: Australian states and territories**

<b>Jurisdiction</b>	<b>Legislation</b>
<b>ACT</b>	<i>Children and Young People Act 2008</i> (ACT) s 356
<b>NSW</b>	<i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW) ss 23, 27
<b>NT</b>	<i>Care and Protection of Children Act</i> (NT) ss 15, 16, 26
<b>Qld</b>	<i>Public Health Act 2005</i> (Qld) ss 158, 191 (doctors and nurses) <i>Education (General Provisions) Act 2006</i> (Qld) ss 364–366A (school staff) <i>Child Protection Act 1999</i> (Qld) ss 22, 186
<b>SA</b>	<i>Children’s Protection Act 1993</i> (SA) ss 6, 10, 11
<b>Tas</b>	<i>Children, Young Persons and Their Families Act 1997</i> (Tas) ss 3, 14
<b>Vic</b>	<i>Children, Youth and Families Act 2005</i> (Vic) ss 162, 182, 184
<b>WA</b>	<i>Children and Community Services Act 2004</i> (WA) ss 124A-H
<b>Cth</b>	<i>Family Law Act 1975</i> (Cth) s 67ZA

**Table 2: Different times when a mandatory reporting duty was first introduced, and summary of major changes: Australian states and territories**

Jurisdiction	Date mandatory reporting duty was first introduced, and legislation	Major changes to legislation, including extension of duty to other reporter groups, and dates of commencement
ACT	<p><b>1 June 1997</b></p> <p><i>Children's Services Ordinance 1986</i> contained s 103(2) mandatory reporting provision, but this only commenced via <i>Children's Services Act 1986</i> s 103(2) effective 1 June 1997</p>	<p>No major changes since 1 June 1997 except to add midwives (from 18 November 2006) and home education inspectors (from 30 September 2010) as reporters</p> <p><i>Children and Young People Act 1999</i> (ACT) s 159(2) replaced <i>Children's Services Act 1986</i>. Commenced 10 May 2000</p> <p><i>Children and Young Persons Act 2008</i> replaced <i>Children and Young Persons Act 1999</i>. Commenced 27 October 2008</p>
NSW	<p><b>1 July 1977</b></p> <p><i>Child Welfare (Amendment) Act 1977</i> required medical practitioners to report 'reasonable grounds to suspect that a child has been assaulted, ill-treated or exposed': Schedule 5 added s 148B to the <i>Child Welfare Act 1939</i></p>	<p><i>Children (Care and Protection) Act 1987</i> (No 54) s 22 and regulations place doctors under very clear duty to report child sexual abuse; teachers and other school staff are also required to report child sexual abuse. Commenced 18 January 1988</p> <p><i>Children and Young Persons (Care and Protection) Act 1998</i> (No 157) sets out a new legislative reporting framework. Expands reporting duty to broad range of reporter groups. Commenced 18 December 2000</p> <p><i>Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009</i> (No 13) amended s 23 to restore intended focus on significant harm; also removes penalty for noncompliance. Commenced 24 January 2010</p>
NT	<p><b>20 April 1984</b></p> <p><i>Community Welfare Act 1983</i> (No 76) required all citizens to make reports; police had a similar obligation under another provision. However, the duty was limited to cases where a person not only believed on reasonable grounds that a child had been sexually abused, but <i>also</i> that the child's parents, guardians or custodians 'are unable or unwilling to protect' the child</p>	<p><i>Care and Protection of Children Act 2007</i> (No 37) removed the qualification about the protective parent which limited the reporting duty; also added further definitions of sexual abuse. Commenced 8 December 2008</p> <p><i>Care and Protection of Children Amendment Act 2009</i> (No 23) adds duty to report selected scenarios of sexual abuse, including a special duty for health practitioners. Commenced 1 September 2009</p>

Qld	<p style="text-align: center;"><b>14 June 1980</b></p> <p><b>Health Act 1937</b>, as amended by <i>Health Act Amendment Act</i> (No 26) s 4 – for ‘medical practitioners’ only</p>	<p><b>Education (General Provisions) Act 2004</b>: School staff including teachers are required for the first time to report suspected sexual abuse, but only if committed by school staff employees. Commenced 19 April 2004</p> <p><b>Public Health Act 2005</b>: <u>Major amendment</u> adding nurses to doctors as mandated reporters of all suspected cases of child sexual abuse, and clarifying doctors’ duty to report sexual abuse. Commenced 31 August 2005</p> <p><b>Education (General Provisions) Act 2012</b>: <u>Major amendment</u> requiring school staff including teachers to report all suspected cases of child sexual abuse regardless of perpetrator identity; previous limit removed; also required to report suspected likely cases. Commenced 9 July 2012</p>
SA	<p style="text-align: center;"><b>27 November 1969</b></p> <p><b>Children’s Protection Act Amendment Act 1969</b> (No 49), amended the Children’s Protection Act 1936–1965 s 3, inserting new provisions into the principal Act (then called the <i>Children’s Protection Act 1936–1969</i>).</p> <p>This Act received assent, and commenced, on 27 November 1969. The original duty was imposed on medical practitioners and dentists, was limited to children under 12, and applied only to ill-treatment against the child committed by parents or caregivers.</p>	<p><b>Community Welfare Act 1972</b> (No 51) set out an offence for a parent to neglect or ill-treat a child in s 72, and placed the duty to report such ill-treatment in s 73; it was limited to doctors and dentists, and to children under 15. This Act repealed the CPA 1936, the CPAA 1961 and CPAA 1969. Commenced 1 July 1972</p> <p><b>Community Welfare Act Amendment Act 1976</b> (No 111) amended the Community Welfare Act 1972–1975 to insert s 82d duty to report, and s 82e definition of the relevant offences against children. Commenced 7 April 1977</p> <p><b>Community Welfare Act Amendment Act 1981</b> (No 67) amended the Community Welfare Act 1972–1979, substituted s 91 duty to report and s 92 definition of the relevant offences against children. Commenced 2 May 1983</p> <p><b>Community Welfare Act Amendment Act 1988</b> (No 30) amended the Community Welfare Act 1972. Major amendment broadened the scope of the reporting duty to cases of child sexual abuse inflicted by any person, removing the prior limit to maltreatment by parents and caregivers. Commenced 1 September 1988</p> <p><b>Children’s Protection Act 1993</b> (No 93) repealed prior Acts. Major amendment set out clear, broad reporting duty in s 11; key definitions placed in ss 6 and 10. Commenced 1 January 1994</p> <p><b>Children’s Protection (Mandatory Reporting and Reciprocal Arrangements) Amendment Act 2000</b> (No 16) amended s 11 to add pharmacists in s 11(2)(ab). Commenced 1 July 2000</p>



		<p><b>Children's Protection (Miscellaneous) Amendment Act 2005</b> (No 76) increased the penalty to \$10,000. In another major amendment, this Act added new reporter groups: ministers of religion (excluding suspicions developed via the confessional); and employees and volunteers in organisations formed for religious or spiritual purposes.</p> <p>Commenced 31 December 2006</p>
Tas	<p><b>22 October 1975</b></p> <p><b>Child Protection Act 1974</b> (No 104) s 8(2), with selected reporter groups proclaimed by Statutory Rule via <i>Child Protection Order (No 2)</i> 1975, made on 14 October, notified in the Gazette on 22 October 1975.</p> <p>The original duty was limited to children under 12.</p>	<p><b>Child Protection Amendment Act 1986</b> (No 29) s 12 removed the age limit of 12 years, replaced the concept of 'cruel treatment' with 'maltreatment' (including explicit definitions of sexual abuse), and added a duty to report substantial risk of maltreatment as well as maltreatment that had already been experienced.</p> <p>Commenced 8 April 1987</p> <p><b>Children, Young Persons and Their Families Act 1997</b> broadened list of reporters and gave more detailed provisions on the reporting duty</p> <p>Commenced 1 July 2000</p> <p><b>Dental Practitioners Registration Act 2001</b> (No 20) added dental therapists and hygienists as reporters.</p> <p>Commenced 3 October 2001</p> <p><b>Police Service (Consequential Amendments) Act 2003</b> (No 76) added midwives as reporters.</p> <p>Commenced 1 July 2010</p>
Vic	<p><b>4 November 1993; 18 July 1994</b></p> <p><b>Children and Young Persons (Further Amendment) Act 1993</b> (No 10) s 4. This Act amended the <i>Children and Young Persons Act 1989</i> and commenced generally on 11 May 1993, but the reporting provisions commenced later, at various stages for different reporter groups. The obligation was imposed on a wide range of professionals, but only some of these groups were proclaimed as mandated reporters. Some commenced on 4 November 1993; and others commenced on 18 July 1994 (see next column). Others remain unproclaimed and hence have never commenced.</p>	<p><b>4 November 1993</b> – mandatory reporting duty commenced for medical practitioners, nurses, and police officers) (Section 64(1C)(a), (c) and (i): Government Gazette 28 October 1993, p 2932).</p> <p><b>18 July 1994</b> – mandatory reporting duty commenced for teachers and school principals): (Section 64(1C)(d), (da), (db) and (e): Government Gazette 14 July 1994, p 1977).</p> <p><b>Children, Youth and Families Act 2005</b> replaced <i>Children and Young Persons Act 1993</i> from 23 April 2007</p>
WA	<b>1 January 2009</b>	

	<p><b><i>Children and Community Services Act 2004</i></b> as amended by <b><i>Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008</i></b> (No 26 of 2008).</p> <p>Reporting duty imposed on doctors, nurses, midwives, police officers, and teachers (including members of the teaching staff of a community kindergarten).</p>	No substantial changes since 2009.
Cth	<p><b>24 April 1991</b></p> <p><b><i>Family Law Act 1975</i></b> as amended by <b><i>Family Law Act Amendment Act 1991</i></b> (No 37). Imposes reporting duty on members of court personnel (s 70BB).</p>	<p><b><i>Family Law Reform Act 1995</i></b> (No 167 of 1995) s 67ZA re-enacts Section 70BB but extends it to family and child counsellors and family and child mediators. Commenced 11 June 1996</p> <p><b><i>Family Law Act 1975</i></b> s 67ZA currently imposes the reporting duty on: the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; the Registrar or a Deputy Registrar of the Family Court of Western Australia; a Registrar of the Federal Circuit Court of Australia; a family consultant; a family counsellor; a family dispute resolution practitioner; an arbitrator; a lawyer independently representing a child's interests.</p>

**Table 3: National chronological timeline: introduction of mandatory reporting laws for child sexual abuse**

<b>Date of first mandatory reporting provision</b>	<b>Jurisdiction</b>	<b>Major focus of original reporting duty</b>	<b>Whether first reporting provision applied to child sexual abuse, and if so, whether implicitly or explicitly</b>	<b>Date of first mandatory reporting provision with express focus on child sexual abuse</b>
<b>27 November 1969</b>	<b>SA</b>	Neglect and ill-treatment by parents and caregivers	Arguably yes, by implication (use of the term 'ill-treats'); but only regarding sexual abuse by parents or caregivers	<b>1 January 1994</b>
<b>22 October 1975</b>	<b>Tas</b>	Physical abuse and neglect	Arguably yes, by implication (use of the term 'injury through cruel treatment')	<b>8 April 1987</b>
<b>1 July 1977</b>	<b>NSW</b>	Physical abuse and neglect	Arguably yes, by implication (use of the term 'assaulted'; also, case law shows sexual assault was seen as a type of neglect)	<b>18 January 1988</b>
<b>14 June 1980</b>	<b>Qld</b>	Physical abuse and neglect	Arguably yes, by implication (use of the term 'maltreatment' causing 'injury, suffering or danger')	<b>19 April 2004 (teachers, school staff) 31 August 2005 (doctors, nurses)</b>
<b>20 April 1984</b>	<b>NT</b>	All forms of child abuse and neglect, where the child does not have a parent who can protect the child from the abuse	Yes; express provision	<b>20 April 1984</b>
<b>24 April 1991</b>	<b>Cth</b>	All forms of child abuse and neglect	Yes; express provision	<b>24 April 1991</b>
<b>4 November 1993</b>	<b>Vic</b>	Children in need of care and protection as a result of harm from physical injury or sexual abuse, and lack of a parent who can protect the child from that harm	Yes; express provision	<b>4 November 1993</b>
<b>1 June 1997</b>	<b>ACT</b>	Physical abuse and sexual abuse	Yes; express provision	<b>1 June 1997</b>
<b>1 January 2009</b>	<b>WA</b>	Sexual abuse	Yes; express provision regarding sexual abuse	<b>1 January 2009</b>

**Table 4: Legislative provisions for the mandatory reporting of child sexual abuse, abuse vs harm, and the extent of harm: Australian states and territories (see note)**

	Legislative provisions for the mandatory reporting of child sexual abuse	Abuse / harm; significant harm
<b>ACT</b>	<p><i>Children and Young People Act 2008 (ACT)</i></p> <p><b>Section 356(1)(c)</b> If the mandated reporter ‘believes on reasonable grounds that a child or young person <b>has experienced, or is experiencing</b> -</p> <ul style="list-style-type: none"> <li>i. <b>sexual abuse</b>; and</li> </ul> <p>the person’s reasons for the belief arise from information obtained by the person during the course of, or because of, the person’s work’ the person must report it.</p>	<p><i>Focus is ‘abuse’ explicitly for sexual abuse</i></p> <p>Sexual abuse (any; no mention of significance of harm)</p>
<b>NSW</b>	<p><i>Children and Young Persons (Care and Protection) Act 1998 (NSW)</i></p> <p><b>Section 27:</b> If the mandated reporter ‘has <b>reasonable grounds to suspect that a child is at risk of significant harm</b>; and those grounds arise during the course of or from the person’s work’ the person must report it.</p> <p><b>Section 23(1):</b> A child ‘is <b>at risk of significant harm</b> if <u>current concerns exist for the safety, welfare or wellbeing of the child because of the presence, to a significant extent, of any one or more of the following circumstances:</u></p> <ul style="list-style-type: none"> <li>(c) the child or young person <b>has been, or is at risk of being, physically or sexually abused or ill-treated</b>’</li> </ul>	<p><i>Focus is ‘risk of significant harm’ with subsequent provisions focusing on the abuse <u>causing</u> the ‘harm’ specified</i></p> <p>Sexual abuse or ill-treatment (c)</p> <p>Focus on ‘significant harm’ via concept of concern for child’s safety, welfare or wellbeing</p>
<b>NT</b>	<p><i>Care and Protection of Children Act 2007 (NT)</i></p> <p><b>Section 26(1):</b> A person is guilty of an offence if the person (a) ‘believes, on reasonable grounds, any of the following:</p> <ul style="list-style-type: none"> <li>i. a child has suffered or is likely to suffer <b>harm or exploitation</b>;</li> <li>ii. a child aged less than 14 years has been or is likely to be a victim of a sexual offence;</li> <li>iii. a child has been or is likely to be a victim of an offence against Section 128 of the Criminal Code’ and does not report it.</li> </ul> <p><b>Section 26(2):</b> A person is guilty of an offence if the person (a) is a health practitioner or someone prescribed by regulation; and (b) ‘believes, on reasonable grounds,</p> <ul style="list-style-type: none"> <li>i. that a child aged at least 14 years (but less than 16 years) has been or is likely to be a victim of a <b>sexual offence</b>; and</li> <li>ii. that the difference in age between the child and alleged sexual offender is more than 2 years;</li> </ul> <p>and does not report it.’</p>	<p><i>Under s 15, focus is on the child suffering ‘harm’ as a consequence of abuse <u>causing</u> the ‘harm’ specified</i></p> <p>Focus on significant harm via concept of ‘significant detrimental effect’ on the child’s wellbeing</p> <p><i>But note: under s 16, the focus is explicitly on the child being a victim of ‘exploitation’, which is clearly stated to include ‘sexual abuse’, and is not limited by qualifications about</i></p>

	Legislative provisions for the mandatory reporting of child sexual abuse	Abuse / harm; significant harm
	<p>Section <b>15(1)</b>: <b>Harm</b> to a child is any <b>significant detrimental effect</b> caused by any act, omission or circumstance on:</p> <ul style="list-style-type: none"> <li>(a) the physical, psychological or emotional wellbeing of the child; or</li> <li>(b) the physical, psychological or emotional development of the child.</li> </ul> <p><b>Section 15(2)</b>: Without limiting Subsection (1), harm can be <u>caused by</u> the following:</p> <ul style="list-style-type: none"> <li>(a) physical, psychological or emotional abuse or neglect of the child;</li> <li>(b) <b>sexual abuse or other exploitation</b> of the child;</li> <li>(c) exposure of the child to physical violence.</li> </ul> <p><i>Example: A child witnessing violence between the child's parents at home</i></p> <p><b>Section 16(1)</b>: <b>Exploitation</b> of a child includes <b>sexual and any other forms of exploitation of the child</b>.</p> <p><b>Section 16(2)</b>: Without limiting Subsection (1), <b>sexual exploitation of a child includes</b>:</p> <ul style="list-style-type: none"> <li>(a) sexual abuse of the child; and</li> <li>(b) involving the child as a participant or spectator in any of the following: (i) an act of a sexual nature; (ii) prostitution; (iii) a pornographic performance.</li> </ul>	<p><i>significance of harm</i></p>
<b>Qld</b>	<p><i>Public Health Act 2005 (Qld)</i></p> <p>Section <b>191</b>: A mandated reporter must report '<b>the harm or likely harm</b>' if they 'become aware, or reasonably suspect, during the practice of his or her profession, that a child has been, is being, or is likely to be, harmed'.</p> <p>Section <b>158</b>: <b>Harm</b> means 'any <b>detrimental effect</b> on the child's physical, psychological or emotional wellbeing—</p> <ul style="list-style-type: none"> <li>(a) that is of a <b>significant</b> nature; and</li> <li>(b) that has been <u>caused by</u>—</li> <li>(i) physical, psychological or emotional abuse or neglect; or</li> <li>(ii) sexual abuse or exploitation.' </li></ul>	<p><i>Focus is on the child suffering 'harm' as a consequence of abuse <u>causing</u> the 'harm' specified</i></p> <p>Sexual abuse or exploitation</p> <p>Focus on significant harm via 'detrimental effect on the child's physical, psychological or emotional wellbeing'— 'of a significant nature'</p>
	<p><i>Education (General Provisions) Act 2006 (Qld)</i></p> <p><b>Sections 365, 366</b> (state and non-state schools respectively): 'if a staff member becomes aware, or reasonably suspects, in the course of the staff member's employment at the school, that a child attending the school has been sexually abused' the person must report it.</p> <p><b>Sections 365A, 366A</b> (state and non-state schools respectively): 'if a staff member becomes aware, or reasonably suspects, in the course of the staff member's employment at the school, that a child attending the school is likely to be sexually abused' the person must report it.</p>	<p><i>Focus is 'abuse' explicitly</i></p> <p>Sexual abuse (any; no mention of significance of harm)</p> <p><b>Section 364</b> defines 'sexual abuse'.</p>

	Legislative provisions for the mandatory reporting of child sexual abuse	Abuse / harm; significant harm
SA	<p><i>Children's Protection Act 1993</i> (SA)</p> <p>Section 6(1): '<b>abuse or neglect</b>', in relation to a child, means –</p> <ul style="list-style-type: none"> <li>(a) sexual abuse of the child; or</li> <li>(b) physical or emotional abuse of the child, or neglect of the child, <u>to the extent that</u> – <ul style="list-style-type: none"> <li>(i) the child has suffered, or is likely to suffer, physical or psychological <b>injury detrimental to the child's wellbeing</b>; or</li> <li>(ii) the child's physical or psychological development is in jeopardy</li> </ul> </li> </ul> <p>Section 10: '<b>abuse or neglect</b>', in relation to a child, has the same meaning as in Section 6(1), but <b>includes a reasonable likelihood</b>, in terms of section 6(2)(b), of the child being killed, injured, abused or neglected by a person with whom the child resides.</p> <p>Section 11(1) 'If (a) a person to whom this section applies suspects on reasonable grounds that a child has been or is being abused or neglected; and (b) the suspicion is formed in the course of the person's work (whether paid or voluntary) or of carrying out official duties', the person must report it.</p>	<p>Focus is 'abuse' explicitly</p> <p>Sexual abuse (any; no mention of significance of harm)</p>
Tas	<p><i>Children, Young Persons and Their Families Act 1997</i> (Tas)</p> <p>Section 3(1): '<b>abuse or neglect</b>', means</p> <ul style="list-style-type: none"> <li>(a) <b>sexual abuse</b>; or</li> <li>(b) physical or emotional <b>injury</b> or other abuse, or neglect, <u>to the extent that</u> – <ul style="list-style-type: none"> <li>(i) the injured, abused, or neglected person has suffered, or is likely to suffer, physical or psychological <b>harm detrimental to the person's wellbeing</b>; or</li> <li>(ii) the injured, abused, or neglected person's physical or psychological development is in jeopardy</li> </ul> </li> </ul> <p>Section 14(2): 'If a prescribed person, in carrying out official duties or in the course of his or her work (whether paid or voluntary), believes, or suspects, on reasonable grounds, or knows –</p> <ul style="list-style-type: none"> <li>(a) <b>that a child has been or is being abused or neglected</b> or is an affected child within the meaning of the <i>Family Violence Act 2004</i>; or</li> <li>(b) <b>that there is a reasonable likelihood of a child being killed or injured or abused or neglected by a person with whom the child resides</b>; or</li> <li>(c) while a woman is pregnant that there is a reasonable likelihood that after the birth of the child – <ul style="list-style-type: none"> <li>(i) the child will suffer abuse or neglect, or may be killed by a person with whom the child is likely to reside; or</li> <li>(ii) the child will require medical treatment or other intervention as a result of the behaviour of the woman, or another person with whom the woman resides or is likely to reside, before the birth of the child' the person must report it.</li> </ul> </li> </ul>	<p>Focus is 'abuse' explicitly</p> <p>Sexual abuse (any; no mention of significance of harm)</p>
Vic	<i>Children, Youth and Families Act 2005</i> (Vic)	Focus is the child being 'in need

	Legislative provisions for the mandatory reporting of child sexual abuse	Abuse / harm; significant harm
	<p><b>Section 184(1):</b> ‘A mandatory reporter who, in the course of practising his or her profession or carrying out the duties of his or her office, position or employment as set out in Section 182, forms the <b><i>belief on reasonable grounds that a child is in need of protection on a ground referred to</i></b> in Section 162(1)(c) or 162(1)(d)’ must report it.</p> <p><b>Section 162(1)</b> ‘For the purposes of this Act a child is <b><i>in need of protection</i></b> if any of the following grounds exist –</p> <p><b>(c)</b> the child has suffered, or is likely to suffer, <b><i>significant harm as a result of physical injury and</i></b> the child’s parents have not protected, or are unlikely to protect, the child from harm of that type;</p> <p><b>(d)</b> the child has suffered, or is likely to suffer, <b><i>significant harm as a result of sexual abuse and</i></b> the child’s parents have not protected, or are unlikely to protect, the child from harm of that type;’</p>	<p><i>of protection’ due to ‘harm’ as a consequence of injury or abuse being the <u>cause</u> of the ‘harm’, plus the absence of a protective parent</i></p> <p>Sexual abuse</p> <p>Clear focus on ‘significant harm’</p>
WA	<p><i>Children and Community Services Act 2004</i></p> <p><b>Section 124B(1)</b> requires a mandated reporter who in the course of their work ‘believes on reasonable grounds that a child (i) has been the subject of sexual abuse that occurred on or after commencement day; or (ii) is the subject of ongoing sexual abuse’ to report it.</p>	<p><i>Focus is ‘abuse’ explicitly</i></p> <p>Sexual abuse (any; no mention of significance of harm)</p> <p>Section 124A defines ‘sexual abuse’.</p>

**Note:** The primary subject matter of the reporting provisions is ‘abuse’ either explicitly, or as a natural and co-existing consequence of being the cause of the significant or serious ‘injury’ or ‘harm’ specified. The two are inextricably linked, and the co-existing causal relationship and link is often acknowledged directly in the provisions by the use of the term ‘caused by’ (see underlined words in the Table below). In six jurisdictions’ statutes, sexual abuse (and in the NT, exploitation) must be reported without any consideration of the extent or significance of harm which may have been caused or which may be likely to be caused (for example, ACT, NT, one statute in Qld, SA, Tas, WA). In five statutes the first concept used is ‘abuse’, with proceeding words or provisions relating to the abuse causing harm, and the extent of this harm required to activate the reporting duty (ACT, one statute in Qld, SA, Tas, WA). In four statutes the first concept used is ‘harm’, with proceeding words or provisions identifying or recognising that this ‘harm’ is caused by the abuse (NSW, one statute in Qld, Vic). Note Victoria’s unusual provision also requiring the absence of a protective parent to activate the reporting duty is discussed further in Part 3.7.

**Table 5: Current mandated reporter groups: Australian states and territories**

<b>Jurisdiction</b>	<b>Teachers</b>	<b>Police</b>	<b>Nurses</b>	<b>Doctors</b>	<b>Others</b>
<b>ACT</b>	Yes	Yes	Yes	Yes	Dentists, midwives, home education inspectors, school counsellors, childcare centre carers, home-based care officers, public servants working in services related to families and children, the public advocate, the official visitor, paid teacher's assistants/aides, paid childcare assistants/aides
<b>NSW</b>	Yes	Yes	Yes	Yes	A person 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 (and managers in organisations providing such services)
<b>NT</b>	Yes	Yes	Yes	Yes	All persons
<b>Qld</b>	Yes	No	Yes	Yes	Nil
<b>SA</b>	Yes	Yes	Yes	Yes	Pharmacists, dentists, psychologists, community corrections officers, social workers, religious ministers, employees and volunteers in religious organisations, teachers in educational institutions; family day care providers; employees and volunteers in organisations providing health, education, welfare, sporting or recreational services to children; managers in relevant organisations
<b>Tas</b>	Yes	Yes	Yes	Yes	Midwives, dentists, psychologists, probation officers, principals and teachers in any educational institution, childcare providers, employees and volunteers in government funded agencies providing health, welfare or education services to children
<b>Vic</b>	Yes	Yes	Yes	Yes	Midwives, school principals
<b>WA</b>	Yes	Yes	Yes	Yes	Midwives



**Table 6: Key features of legislative reporting duties (state of mind – abuse, or extent of harm – temporal scope): Australian states and territories**

Jurisdiction	State of mind	Extent of harm	Past and present only/ both past and present, and future
<b>ACT</b>	Belief on reasonable grounds	Any sexual abuse	Past and present only
<b>NSW</b>	Suspects on reasonable grounds that a child is at risk of significant harm	A child or young person 'is at risk of significant harm if current concerns exist for the safety, welfare or wellbeing of the child or young person because of the presence, to a significant extent, of ... sexual abuse or ill-treatment'	Both
<b>NT</b>	Belief on reasonable grounds	Any sexual abuse	Both
<b>Qld</b>	Becomes aware, or reasonably suspects ( <i>Public Health Act 2005</i> )	Child has suffered, or is likely to suffer, significant detrimental effect on physical, psychological or emotional wellbeing (doctors, nurses)	Both
	Suspects on reasonable grounds ( <i>Education (General Provisions) Act 2006</i> )	Any sexual abuse (school staff)	Both
<b>SA</b>	Suspects on reasonable grounds	Any sexual abuse	Past and present only <sup>3</sup>
<b>Tas</b>	Believes, or suspects, on reasonable grounds, or knows	Any sexual abuse	Past and present only <sup>4</sup>
<b>Vic</b>	Belief on reasonable grounds	Child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type	Both
<b>WA</b>	Belief on reasonable grounds	Any sexual abuse	Past and present only

<sup>3</sup> Also if 'a person with whom the child resides (whether a guardian of the child or not)–

(i) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out; or

(ii) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person'

<sup>4</sup> Also if there is 'a reasonable likelihood of a child being killed or abused or neglected by a person with whom the child resides'.

**Table 7: Legislative definition of ‘child’ and ‘young person’ determining scope of the mandatory reporting duties: Australian states and territories**

<b>Jurisdiction</b>	<b>Legislative definitions of ‘child’ and ‘young person’</b>	<b>Children to whom the provisions apply</b>
<b>ACT</b>	<i>Children and Young People Act 2008</i> (ACT) s 11: a ‘child’ is a person under 12 years old; s 12: a ‘young person’ is a person of 12 years or older, but not yet an adult s 356(1) applies to belief that ‘a child or young person’ has experienced or is experiencing sexual abuse	Children under age 18
<b>NSW</b>	<i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW) s 3: ‘child’ is a person who is under the age of 16; ‘young person’ is a person who is aged 16 or above but who is under the age of 18  The duty to report in s 27 applies where a person ‘has reasonable grounds to suspect that a <i>child</i> is at risk of harm’	Children under age 16
<b>NT</b>	<i>Care and Protection of Children Act</i> (NT) s 13: ‘child’ is a person who is under the age of 18	Children under age 18
<b>Qld</b>	<i>Public Health Act 2005</i> (Qld) Sch 2: ‘child’ means an individual under 18 <i>Education (General Provisions) Act 2006</i> (Qld) ss 364–366A apply to students under 18	Children under age 18
<b>SA</b>	<i>Children’s Protection Act 1993</i> (SA) s 6(1): a ‘child’ is a person under 18 years of age	Children under age 18
<b>Tas</b>	<i>Children, Young Persons and Their Families Act 1997</i> (Tas) s 3(1): a ‘child’ is a person under 18 years of age	Children under age 18
<b>Vic</b>	<i>Children, Youth and Families Act 2005</i> (Vic) s 3(1): ‘child’ means a person who is under the age of 17	Children under age 17
<b>WA</b>	<i>Children and Community Services Act 2004</i> (WA) s 3: a ‘child’ is a person under 18 years of age	Children under age 18

**Table 8: Maximum legislative penalties for noncompliance with reporting duty: Australian states and territories**

<b>Jurisdiction</b>	<b>Current maximum penalty</b>	<b>Legislative provisions</b>
<b>ACT</b>	\$5500, imprisonment for maximum 6 months, or both	As stated in s 356: 50 penalty units, imprisonment for 6 months, or both.  The value of a penalty unit since 23 August 2013 is \$140 ( <i>Legislation Act</i> s 133), due to the <i>Legislation (Penalty Units) Amendment Act 2013</i>
<b>NSW</b>	No penalty	Penalty removed from s 27 by the <i>Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009</i> No 13, Schedule 1.1 [7], commencing 24 January 2010  Previously, the penalty was a maximum 200 penalty units (\$22,000)
<b>NT</b>	\$26,000	Section 26 sets the maximum penalty at 200 penalty units. The <i>Penalty Units Act</i> s 3 sets the value of a penalty unit as \$130.  (Note: <i>Community Welfare Amendment Act 2002</i> (No 61) s 10 increased the maximum penalty from \$500 to 200 penalty units, commencing 9 December 2002).
<b>Qld</b>	For doctors, nurses: \$5500  For school staff: \$2200	<i>Public Health Act 2005</i> s 193: 50 penalty units  <i>Education (General Provisions) Act 2006</i> ss 365, 365A, 366, 366A: 20 penalty units  The value of a penalty unit, since 21 August 2012, is \$110: <i>Penalties and Sentences Act 1992</i> s 5(1)(d)
<b>SA</b>	\$10,000	Section 11(1) sets the maximum penalty at \$10,000  Note: penalty was Increased to \$10,000 by the <i>Children's Protection (Miscellaneous) Amendment Act 2005</i> (No 76) s 10(1) (commencing 31 December 2006).
<b>Tas</b>	\$2400	Section 14(2) sets the maximum penalty at 20 penalty units.  Increased to \$2400 as value of a penalty unit in <i>Penalty Units and Other Penalties Act 1987</i> (Tas) increased to \$120 ( Act 37 of 2007, commencing 24 October 2007)
<b>Vic</b>	\$1408	Section 184(1) sets the maximum penalty at 10 penalty units. Through the <i>Sentencing Act 1991</i> (Vic), s 110 and <i>Monetary Units Act 2004</i> (No 10 of 2004), the value of a penalty provision can be indexed and amended. Under the MUA 2004 s 11(1)(b) a penalty unit for the 2012/13 financial year was \$140.84. The maximum penalty since 1 July 2012 has been \$1408.
<b>WA</b>	\$6000	As stated in s 124B(1).

**Table 9: Major government inquiries and reports, and selected key developments – recommendations and translation into legislation: Australian states and territories**

*Note: This table presents the major inquiries and reviews which are most relevant to the major legislative changes.*

*Amendments were often the result of internal reviews and committee work by governments regarding child protection matters.*

*Further treatment of these inquiries and reviews, and of other precursors to legal developments, is provided throughout Part 3.*

Jurisdiction	Inquiry/Report	Recommendation	Translation into legislation
Federal	<b>Royal Commission on Human Relationships 1977</b> (E Evatt, F Arnott, A Deveson), Canberra, Commonwealth of Australia, Final Report Vol 1	'On balance, and subject to what is said above, we think that there is a value in imposing on certain persons a duty to notify cases of suspected child abuse.' p 190, para 248	No action occurred
ACT	<b>1981 Australian Law Reform Commission Report</b> ( <i>Child Welfare</i> )	Recommendation 106, p xlv: <b>the ACT should introduce mandatory reporting</b> of physical abuse and sexual abuse	Action to introduce mandatory reporting was taken, but only after a prolonged delay. The <b>Children's Services Ordinance 1986</b> s 103 translated this recommendation into law, but this did not commence and lay idle for another 11 years
	<b>2003, Standing Committee: The rights, interests and wellbeing of children and young people Report Number 3</b> ( <i>Standing Committee on Community Services and Social Equity</i> , August 2003)	Recommendation 25; page xix 9.22. The Committee recommends that the Government: i. investigate ways to streamline the procedural mechanisms for mandatory reporting; ii. develop and implement a protocol for responding to instances where mandated persons have failed to report abuse; and iii. <b>review the penalty</b> within the Act for the offence of failing to report a suspected case of abuse.	No action on review of the penalty has occurred
	<b>2004, Vardon Report</b> ( <i>The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management</i> , 14 May 2004)	It was not recommended that the mandatory reporting of child sexual abuse be repealed. It was recommended that mandatory reporting not be extended to other forms of abuse.	Not applicable

NSW	<b>1997 Wood Royal Commission</b> (The Hon Justice J Wood, <i>Royal Commission into the NSW Police Service Final Report (Volumes 4 and 5: The Paedophile Inquiry)</i> , 26 August 1997)	Recommendation 112 (p 1197–1198): The mandatory reporting duty should be <b>extended to a wider category of prescribed persons</b> , namely: <ul style="list-style-type: none"> <li>• chief executives of bodies conducting schools</li> <li>• persons in charge of childcare centres</li> <li>• chief executives or persons in charge of bodies providing welfare, social and sporting activities involving children</li> <li>• persons in charge of residential care centres and refuges for children</li> <li>• social workers, welfare workers and youth workers outside schools; and health workers generally.</li> </ul>	Translated into the legislation by <i>Children and Young Persons (Care and Protection) Act 1998</i> (No 157) commencing 18 December 2000
	<b>2008 Wood Special Committee of Inquiry</b> (The Hon Justice J Wood, <i>Report of the Special Committee of Inquiry into Child Protection Services in New South Wales</i> , Volume 1)	Recommendation 6.2(a), p xiii, 197): amend ss 23–25 to ensure reports are made of ‘ <b>significant harm</b> ’ Recommendation 6.2(d), p xiii, 197): amend s 27 by <b>removing the penalty</b>	Translated into legislation – focus restored on significant harm concept, and penalty removed from s 27 – by the <i>Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009</i> No 13, Schedule 1.1 [7], commencing 24 January 2010
NT	<b>2007, Little Children are Sacred Report</b> (R Wild and P Anderson, <i>Ampe Akelyernemane Meke Mekarle ('Little Children Are Sacred'): Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse</i> )	Recommendation 57 called for ‘an expanded program of mandatory reporting education and training of professionals [to] be carried out as soon as possible’. This was influenced by a finding that many professionals and non-professionals were not reporting cases of sexual abuse	<i>Care and Protection of Children Amendment Act 2009</i> was enacted to place a separate distinct and additional reporting duty on medical practitioners
	<b>2009, Report of the Board of Inquiry</b> ( <i>Report of the Board of Inquiry into the Child Protection System in the Northern Territory (Growing Them Strong, Together)</i> (Bamblett, Bath and Roseby))	Did not make any recommendations about expanding or contracting mandatory reporting of child sexual abuse	Not applicable
Qld	<b>2003, O’Callaghan and Briggs Report</b> ( <i>Report of the Board Of Inquiry Into Past Handling Of Complaints Of Sexual Abuse In The Anglican Church Diocese Of Brisbane</i> )	This was a board established by the Church, not by the government. It found numerous cases of inadequate responses and systems to respond to (and prevent) child sexual abuse by school employees.  However, in response, the Queensland Government established a Ministerial Taskforce to act on these findings.	A legislative duty was created requiring school staff to report suspected sexual abuse of students by school staff members, in the <i>Education (General Provisions) Act 2004</i> , commencing 19 April 2004

	<p><b>2004, Crime and Misconduct Commission:</b> <i>Protecting children: An Inquiry into Abuse of Children in Foster Care</i> (2004)</p>	<p>Recommendation 6.13; page 185: That mandatory reporting of child abuse be <b>extended to registered Queensland nurses</b> by legislating under the Health Act.</p> <p>Recommendation 6.15; page 185: That Section 76K of the Health Act be amended to make it <b>mandatory for doctors and nurses</b> to notify the DCS about their suspicion of child abuse</p>	Both recommendations were translated into legislation through the Public Health Act amendments commencing August 2005
	<p><b>2013, Carmody Inquiry:</b> <i>Queensland Child Protection Inquiry (Taking Responsibility: A Roadmap for Queensland Child Protection)</i></p>	<p>Recommendation 4.2, page xxvii: The Department of the Premier and Cabinet and the Department of Communities, Child Safety and Disability Services lead a whole-of-government process to:</p> <ul style="list-style-type: none"> <li>• <b>review and consolidate all existing legislative reporting obligations into the <i>Child Protection Act 1999</i></b></li> <li>• develop a single ‘standard’ to govern reporting policies across core Queensland Government agencies</li> <li>• provide support through joint training in the understanding of key threshold definitions to help professionals decide when they should report significant harm to Child Safety Services and encourage a shared understanding across government.</li> </ul>	No action yet undertaken
SA	<p><b>1986 Furler Report</b> (<i>Report of the Government Task Force on Child Sexual Abuse</i>)</p>	That the <b>reporting duty be extended so that it applies to suspected child sexual abuse committed by any person</b> , not just by parents and caregivers	Translated into the legislation by <i>Community Welfare Act Amendment Act 1988</i> (No 30) commencing 1 September 1988
	<p><b>2003 Layton Review</b> (<i>Our best investment: A state plan to protect and advance the interests of children: Review of Child Protection in South Australia</i>)</p>	<p>Recommendation 54; page 10.11–10.13 That the <i>Children’s Protection Act 1993</i> be amended to <b>include as mandated notifiers</b>:</p> <ul style="list-style-type: none"> <li>• all church personnel including ministers of religion (except in confessionals)</li> <li>• all individuals in services providing care to or supervision of children</li> <li>• all volunteers who are working with children (including both volunteers working in a supervised and unsupervised settings)</li> <li>• all people who may supervise or be responsible for looking after children as part of a sporting, recreational, religious or voluntary organisation.</li> </ul>	Translated into legislation by the <i>Children’s Protection (Miscellaneous) Amendment Act 2005</i> (No 76) commencing 31 December 2006

	<b>2008, Mullighan Inquiry</b> ( <i>Children on Anangu Pitjantjatjara Yankunytjatjara (APA) lands</i> )	Recommendation 21; page 181–183, 222–224 That Section 11 of the <i>Children's Protection Act</i> be amended to provide that it is an <b>offence to prevent, obstruct or interfere</b> with a person discharging or attempting to discharge the obligation of mandatory reporting pursuant to Section 11(1) of that Act.	Translated into legislation by the <i>Children's Protection (Implementation of Report Recommendations) Amendment Act 2009</i> (No 65) commencing 31 December 2009
	<b>2013 DeBelle Inquiry</b> ( <i>Royal Commission 2012–2013: Report of Independent Education Inquiry</i> )	Recommendation 26; page 277 That Section 11 of the <i>Children's Protection Act 1993</i> be amended by adding a new Subsection 4(a) providing that it is a <b>defence to a charge under Subsection (1) to prove that the knowledge of the facts that gave rise to the suspicion was gained only from a police officer</b> acting in the course of his duty. See para 674.  Recommendation 27; page 278 That consideration be given to whether it is appropriate to <b>relieve a teacher of the duty to report when the only knowledge the teacher has of possible abuse of a child has been obtained from another teacher who has already notified</b> the Child Abuse Report Line.	Both recommendations currently under consideration through the <i>Children's Protection (Notification) Amendment Bill 2013</i>
<b>Tas</b>	There do not appear to have been any major government inquiries or reviews into the topic. Developments seem to have followed from internal government operations.		
<b>Vic</b>	<b>1984, Carney Report</b> (T Carney, <i>Equity and Social Justice for Children, Families and Communities (Final Report of the Child Welfare Practice and Legislation Review Committee, Volume 1: Executive Summary &amp; Recommendations; Volume 2 Report, Melbourne, 1984)</i> )	Volume 2 p 221: A voluntary reporting system should be continued; <b>mandatory reporting should not be introduced</b>	No mandatory reporting legislation was introduced at this time; voluntary reporting system remained.
	<b>1988 Victorian Law Reform Commission Report, Sexual Offences Against Children</b> , Report No 18	Recommendations 18–22 (p 7) Recommendation 18: <b>Mandatory reporting should be introduced in relation to sexual offences against children</b> , but only if there is a commitment to a review of existing service arrangements and the development and maintenance of adequately resourced services	No mandatory reporting legislation was introduced at this time.

		<p>Recommendation 19: The law should not be proclaimed until guidelines about the law have been disseminated to the mandated people and education programs have been conducted</p> <p>Recommendation 20: The <b>proposed mandatory reporting requirement should be limited in the following ways:</b></p> <ul style="list-style-type: none"> <li>(a) It should apply only where a mandated person has reasonable grounds to believe that a sexual offence has been committed.</li> <li>(b) It should apply only in relation to a child who is under 14 years at the time the information came to the attention of the mandated person.</li> <li>(c) It should only apply where that person has reasonable grounds to believe that the child or another child remains at risk.</li> <li>(d) The groups to be mandated should be prescribed by regulation. Initially, only medical practitioners, nurses, psychologists, school, kindergarten and pre-school staff, social workers, welfare workers, probation and parole officers and childcare workers should be mandated to report</li> </ul> <p>Recommendation 21: A mandated report should be made to either CSV or the Police</p> <p>Recommendation 22: The maximum penalty for breach should be a fine of up to \$5,000</p>	
	<p><b>1989, Fogarty and Sargeant Review</b> (Justice John Fogarty and Delys Sargeant, <i>Protective Services For Children In Victoria</i>, Melbourne, February 1989</p>	<p>This Review did not deal with the issue of child sexual abuse in detail, stating that this 'would not be appropriate' (p 82)</p> <p>The Review stated that its scope did not include the ability 'to deal in a definite way with the vexed question of mandatory reporting' (p 86)</p> <p>The Review concluded that because of the extremely dysfunctional and stressed system then existing in Victoria, that it would not be able to cope logistically with a system that included mandatory reporting at that time, and accordingly (p 86–87):</p> <ul style="list-style-type: none"> <li>• 'mandatory reporting, whether generally or related to specific classes of persons, should not be considered for Victoria at present'</li> <li>• the initial focus should be on public and professional education and the encouragement of voluntary reporting</li> <li>• 'When the child protection system in Victoria is on a much stronger footing the question whether any form of mandatory reporting should be introduced can be determined in a much more satisfactory atmosphere and in the light of that experience'.</li> </ul>	<p>No mandatory reporting legislation was introduced at this time.</p>



	<p><b>1990, Fogarty Review</b> (Justice J Fogarty, <i>One Year Later: Review of the Redevelopment of CSV's Protective Services for Children in Victoria</i>, Victorian Family and Children's Services Council, Melbourne, August 1990)</p>	<p>This Review did not deal with the issue of mandatory reporting.</p> <p>The conclusion from the 1989 Report was repeated, again stating that consideration of whether to introduce mandatory reporting should remain on hold while the system develops greater stability.</p>	Not applicable
	<p><b>8 September 1990:</b> Note: on this date, Daniel Valerio was murdered</p>	<p>This event influenced consideration by the Victorian Government of mandatory reporting</p>	<p>Mandatory reporting provisions for child physical abuse and sexual abuse introduced into Parliament via the <i>Children and Young Persons (Further Amendment) Bill</i> on 20 April 1993; the first reporting provisions commenced on 4 November 1993</p>
	<p><b>1993, Fogarty Report</b> (Justice J Fogarty, <i>Protective Services For Children In Victoria</i>, Melbourne, July 1993)</p>	<p>This Report, which was handed down in July 1993, was established in part to consider how best to implement mandatory reporting. Its recommendations were therefore about creation of effective systems and administration, including reporter education and funding, rather than the legislation itself. For completeness, the Review recommended that (p 10–12):</p> <ul style="list-style-type: none"> <li>• an 'extensive campaign of information and education' should be conducted for mandated reporters so they know their legal responsibilities and can comply with them</li> <li>• agreements should be completed between organisations such as hospitals and mandated reporter groups so they each understand their responsibilities and expectations</li> <li>• a public awareness campaign should be conducted</li> <li>• the Department must ensure it is able to provide 'a fully professional response' by ensuring its staff are trained to deal with notifications, provide accurate advice to mandated reporters, and can respond promptly to notifications</li> <li>• specific funds for education and training must be allocated</li> <li>• information about the financial costs involved in administration must be provided and the funding required must be supplied: the required funding 'needs to be available so that no gap develops between the demand and the capacity to service it'</li> <li>• the resulting extra work for the non-government sector and the Children's Court must also be funded.</li> </ul>	Not applicable

	<p><b>2012, Cummins, Scott and Scales</b> (P Cummins, D Scott and B Scales B, <i>Report of the Protecting Victoria's Vulnerable Children Inquiry</i>. Melbourne: State of Victoria Department of Premier and Cabinet</p>	<p><b>Recommendation 44</b> (p 349): 'The Victorian Government should progressively gazette those professions listed in Sections 182(1)(f)–(k) that are not yet mandated, beginning with childcare workers.'</p> <p><b>Recommendation 47</b> ( p 355): '<i>The Crimes Act 1958</i> should be amended to create a separate reporting duty where there is a reasonable suspicion a child or young person who is under 18 is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation. The duty should extend to a minister of religion and a person who holds an office within, is employed by, is a member of, or a volunteer of a religious or spiritual organisation that provides services to, or has regular contact with, children and young people.'</p>	<p>Not yet translated into legislation</p> <p>Not yet translated into legislation</p>
WA	<p><b>2002, Gordon Inquiry</b> (S Gordon, K Hallahan and D Henry, <i>Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities</i>)</p>	<p>Recommendation 187 (p 458): 'The Inquiry recommends that <b>all medical personnel likely to come into contact (directly or indirectly) with children under 13 years who have a sexually transmitted disease be obliged to report</b> the presence of the disease to DCD ... The Inquiry does not have a view on which legislation should be used to enact this obligation'.</p> <p>Recommendation 189 (p 458): 'The Inquiry recommends <b>that serious consideration be given to the requirement for medical personnel to report [all] suspected abuse in children under 13 years as part of the consideration of the report on mandatory reporting</b>'</p>	<p>Mandatory reporting laws even of this restricted nature were not introduced after this recommendation.</p> <p>No mandatory reporting legislation was enacted.</p>
	<p><b>2007, Ford Review</b> (P Ford, <i>Review of the Department for Community Development</i> (the Ford Review)</p>	<p>Recommendation 70, p 119–122: <b>mandatory reporting should not be enacted.</b></p>	<p>Mandatory reporting laws were not introduced after the Ford Review.</p> <p>However, a short time later, mandatory reporting of child sexual abuse was introduced through the <b><i>Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008</i></b>, commencing 1 January 2009. This is treated in Part 3.8.</p>

## Part 2

### Introduction and context

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

Mandatory reporting laws are laws passed by parliament requiring designated persons outside the child's family to report known and suspected cases of child abuse – including sexual abuse – to government authorities.<sup>5</sup> They are distinct from other legal or industry-based obligations to report criminal conduct or other types of misconduct.

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

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

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

In the context of child sexual abuse, governments have chosen to enact mandatory reporting laws as a measure for social policy, public health and crime prevention. The aims in reporting cases of sexual abuse are to protect vulnerable children, stop the continuance of sexual abuse of victimised children, provide health and support services to the child and her or his family, detect perpetrators, and prevent the abuse of other children.

#### 2.3 Contextual features of child sexual abuse underpinning reporting laws

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

- First, as demonstrated by prevalence and incidence studies, child sexual abuse affects a substantial number of children. It is a *widespread phenomenon*.
- Second, due to its nature, *many and perhaps most cases will remain hidden*. Child sexual abuse occurs in secret, private situations. The acts remain unseen by others, will often not be disclosed by the child, and are unlikely to be brought to the attention of child welfare or other social agencies by the perpetrator.
- Third, child sexual abuse often causes substantial and enduring psychological, behavioural and physical *harm to victims*.

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<sup>5</sup> In general, this report will refer only to sexual abuse from this point onwards. However, some of the background context will refer to physical abuse since that phenomenon was the impetus for the creation of the first mandatory reporting laws.

- Fourth, child sexual abuse involves an *abuse of power*, normally being inflicted by an adult who is known to the child. It exploits the power imbalance between a physically, cognitively, emotionally, socially and economically powerful perpetrator and a vulnerable child. This power imbalance is further heightened in many cases of abuse where the perpetrator is vested with religious or other institutional authority.
- Fifth, child sexual abuse often continues over substantial periods of time, so that for many children it is a *continuing experience of victimisation*.
- Sixth, some offenders will have multiple victims, constituting a *risk to other children*.
- Seventh, the acts of child sexual abuse constitute *serious criminal conduct*.

A brief summary of these features is now detailed, before moving to the legislative context in Part 3.

## 2.3.1 Contextual features of child sexual abuse

### 2.3.1.1 A widespread phenomenon: prevalence

The annual incidence of child sexual abuse as officially recorded by government child protection agencies in Australia has been stable in the past eight years, with between 3400 and 4800 Australian children in substantiated cases annually from 2004/05 to 2012/13.<sup>6</sup>

However, the real incidence is accepted as being far higher. Prevalence studies showing rates of childhood sexual abuse victimisation support this view. In Australia, Dunne, Purdie, Cook, Boyle and Najman found that before the age of 16, 12.2 per cent of women and 4.1% of men experienced penetrative sexual abuse, and 33.6 per cent of women and 15.9 per cent of men experienced other sexual abuse not involving penetration.<sup>7</sup> Rosenman and Rodgers found 1.1 per cent of people reported sexual abuse by a parent.<sup>8</sup> Fleming found that 20 per cent of women had experienced sexual abuse involving at least genital contact before the age of 16.<sup>9</sup> Another study used a narrower definition of abuse, but still found that 5.9 per cent of women and 2.5 per cent of men had been sexually abused as children under 18.<sup>10</sup> A recent global review found that Australia has the highest documented prevalence rate of childhood sexual abuse among girls.<sup>11</sup>

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<sup>6</sup> Australian Institute of Health and Welfare, *Child protection Australia 2011–12*, AIHW, Canberra, 2013.

<sup>7</sup> Dunne, M, Purdie, D, Cook, M, Boyle, F & Najman, J, 'Is child sexual abuse declining? Evidence from a population-based survey of men and women in Australia' (2003) 27 *Child Abuse & Neglect* 141–152.

<sup>8</sup> Rosenman, S, & Rodgers, B, 'Childhood adversity in an Australian population' (2004) 39(9) *Social Psychiatry and Psychiatric Epidemiology* 695–702.

<sup>9</sup> Fleming, J, 'Prevalence of childhood sexual abuse in a community sample of Australian women' (1997) 166 *Medical Journal of Australia* 65–68.

<sup>10</sup> Dinwiddie, S, Heath, M, Dunne, M, Bucholz, K, Madden, P, Slutske, W, et al, 'Early Sexual Abuse and Lifetime Psychopathology: a Co-twin Control Study' (2000) 30 *Psychological Medicine* 41–52.

<sup>11</sup> Stoltenborgh, M, van Ijzendoorn, M, Euser, E & Bakermans-Kranenburg, M, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence Around the World' (2011) 16(2) *Child Maltreatment* 79–101.

### 2.3.1.2 Many and perhaps most cases will remain hidden: nondisclosure and difficulties of detection

There are several reasons for the gap between the official and the real incidence. The most prominent reason is that most cases are not reported to, or investigated by, government authorities.<sup>12</sup> There are several reasons why the real incidence of sexual abuse far exceeds the number identified by government agencies.

Apart from pregnancy, most sexually transmitted diseases and direct observation of abuse happening, the clearest indication of abuse occurs when a child discloses it. However, a sexually abused child will often not disclose it at all, or will only disclose it many years later.<sup>13</sup> Child sexual abuse is usually inflicted by an adult who is known to the child.<sup>14</sup> Nondisclosure may be influenced by many factors, including: the child being preverbal or very young<sup>15</sup>; being persuaded the acts are normal, or feelings of guilt, shame, embarrassment and responsibility<sup>16</sup>; fear of reprisals to the child<sup>17</sup> or other family members<sup>18</sup>; the perpetrator being a parent or family member, or other trusted figure<sup>19</sup>, including a clergy member<sup>20</sup>; and fear of the perpetrator being punished.<sup>21</sup> Finally, where a child does disclose to a parent, the parent may not report the situation to police.<sup>22</sup>

Cases are difficult for professionals to identify, since many indicators of abuse are consistent with innocent explanations or other types of victimisation. Even professionals who are able to physically examine a child, such as doctors, may be unsure whether a child has been sexually

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<sup>12</sup> Fallon, B, Trocmé, N, and MacLaurin, B, 'Should child protection services respond differently to maltreatment, risk of maltreatment, and risk of harm?' (2011) 35 *Child Abuse and Neglect*, 236–239; 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; Sedlak, A, and Broadhurst, D, *Third national incidence study of child abuse and neglect* (Westat: Rockville, MD, 1996); Sedlak, A, Gragg, F, Mettenburg, J, Ciarico, J, Winglee, M, Shapiro, G, Hartge, J, Li, S, Greene, A, and McPherson, K, *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4) Design and Methods Summary*, (Westat: Rockville, MD, 2008).

<sup>13</sup> Paine, M, and Hansen, D, 'Factors influencing children to self-disclose sexual abuse', (2002) 22 *Clinical Psychology Review*, 271–295; Smith, D, Letourneau, E, Saunders, B, et al, 'Delay In disclosure of childhood rape: Results from a national survey', (2000) 24 (2) *Child Abuse & Neglect*, 273–287.

<sup>14</sup> Smallbone, S, and Wortley, R, 'Child Sexual Abuse: Offender Characteristics and Modus Operandi' (2001) 193 *Trends and Issues in Crime and Criminal Justice* 1–6.

<sup>15</sup> Berliner, L, and Conte, J, 'The process of victimisation: The victims' perspective', (1990) 14 *Child Abuse & Neglect*, 29–40.

<sup>16</sup> Berliner and Conte, (1990); Ney, P, Moore, C, McPhee, J, and Trought, P, 'Child abuse: A study of the child's perspective', (1986) 10 *Child Abuse & Neglect*, 511–518.

<sup>17</sup> Palmer, S, Brown, R, Rae-Grant, N, and Loughlin, M, 'Responding to children's disclosure of familial abuse: What survivors tell us', (1999) 78 *Child Welfare*, 259–282.

<sup>18</sup> Berliner and Conte, (1990).

<sup>19</sup> Arata, C, 'To tell or not to tell: Current functioning of child sexual abuse survivors who disclosed their victimisation', (1998) 3 *Child Maltreatment*, 63–71; Kogan, S, 'Disclosing unwanted sexual experiences: results from a national sample of adolescent women', (2004) 28 *Child Abuse & Neglect*, 147–165.

<sup>20</sup> Parkinson, P, Oates, K, and Jayakody, A, 'Breaking the long silence: Reports of child sexual abuse in the Anglican Church of Australia' (2010) 6 (2) *Ecclesiology* 183–200.

<sup>21</sup> Mian, M, Wehrspann, W, Klajner-Diamond, H, et al, 'Review of 125 children 6 years of age and under who were sexually abused', (1986) 10 *Child Abuse & Neglect*, 223–229.

<sup>22</sup> Finkelhor, D, and Dziuba-Leatherman, J, 'Children as victims of violence: A national survey', (1994) 94 *Pediatrics*, 413–420.

abused, as many cases (including penetrative abuse) leave no physical evidence.<sup>23</sup> In addition, there is evidence of mandated reporters failing to report cases despite suspecting abuse. Most of this evidence of failure to report suspected cases concerns other kinds of child abuse<sup>24</sup>, but some studies have found failure to report suspected child sexual abuse.<sup>25</sup> The most prominent reason for such failure to report even when having a suspicion is likely a lack of certainty about whether the child has been sexually abused or not.

Because of these factors, even where reporting laws exist, it is not expected that reporters will identify every sexually abused child with whom they come into contact. Nor is it expected that every report will turn out to be confirmed.

### 2.3.1.3 Harm to victims

Increasing research has been conducted into the effects of child sexual abuse.<sup>26</sup> Children who experience sexual abuse often suffer numerous adverse consequences, although the nature, severity and extent of these vary for each individual.<sup>27</sup> These consequences, which often continue through adulthood<sup>28</sup>, extend beyond physical injury to psychological injury and effects on behaviour and socialisation. Immediate and initial consequences commonly include post-

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- <sup>23</sup> Anderst, J, Kellogg, N, and Jung, I, 'Reports of repetitive penile-genital penetration often have no definitive evidence of penetration' (2009) 124 (3) *Pediatrics* e403; Heger, A, Ticson, L, Velasquez, O, and Bernier, R, 'Children referred for possible sexual abuse: medical findings in 2384 children' (2002) 26 *Child Abuse & Neglect* 645–659.
- <sup>24</sup> See for example Flaherty, E, Sege, R, Griffith, J, et al, 'From Suspicion of Physical Child Abuse to Reporting: Primary Care Clinician Decision-Making' (2008) *Pediatrics* 122(3):611–619, and other studies cited in Mathews and Bross 2013.
- <sup>25</sup> See Mathews, B, Walsh, K, Rassafiani, M, Butler, D, and Farrell, A, 'Teachers reporting suspected child sexual abuse: results of a three-state study' (2009) 32(3) *University of New South Wales Law Journal* 772–813,
- <sup>26</sup> See Gilbert, R, Widom, C, Browne, K, Fergusson, D, Webb, E, and Janson, S, 'Burden and consequences of child maltreatment in high-income countries' (2009) 373 (9657) *Lancet* 68; Chen, L, Murad, H, Paras, M, Colbenon, K, Sattler, A, Goranson, E, Elamin, M, Seime, R, Shinozaki, G, Prokop, L, and Zirakzadeh, A, 'Sexual abuse and lifetime diagnosis of psychiatric disorders: systematic review and meta-analysis' (2010) 85 *Mayo Clinic Proceedings* 618; Paolucci, E, Genuis, M, and Violato, C, 'A meta-analysis of the published research on the effects of child sexual abuse' (2001) 135 *The Journal of Psychology* 17; Putnam, F, 'Ten-year research update review: Child sexual abuse' (2003) 42 *Journal of the American Academy of Child & Adolescent Psychiatry*, 269–278; Mullen, P, Martin, J, Anderson, J, Romans, S, and Herbison, G, 'Childhood sexual abuse and mental health in adult life' (1993) 163 *British Journal of Psychiatry*, 721–732; Dinwiddie, S, Heath, M, Dunne, M, Bucholz, K, Madden, P, Slutske, W, et al, 'early sexual abuse and lifetime psychopathology: a co-twin control study' (2000) 30 *Psychological Medicine*, 41–52; Daignaut, I, and Hebert, M, 'Profiles of school adaptation: Social, behavioural and academic functioning in sexually abused girls' (2009) 33 (2) *Child Abuse & Neglect*, 102–115.
- <sup>27</sup> Chen, L, Murad, H, Paras, M, et al, (2010); Nelson, E, Heath, A, Madden, P, et al, 'Association between self-reported childhood sexual abuse and adverse psychosocial outcomes: Results from a twin study', (2002) 59 *Archives of General Psychiatry*, 139–145; Paolucci, Genuis, and Violato, (2001); Putnam, (2003); Tyler, K, 'Social and emotional outcomes of childhood sexual abuse: A review of recent research', (2002) 7 *Aggression and Violent Behaviour*, 567–589.
- <sup>28</sup> Chen, Murad, Paras, et al, (2010); Gilbert, Widom, Browne, et al, (2009); Horwitz, A, Spatz Widom, C, McLaughlin, J, and White, H, 'The impact of childhood abuse and neglect on adult mental health: A prospective study', (2001) 42 *Journal of Health and Social Behaviour*, 184–201; Spataro, J, Mullen, P, Burgess, P, et al, 'Impact of child sexual abuse on mental health: Prospective study in males and females', (2004) 184 *British Journal of Psychiatry*, 416–421; Widom, C, Marmorstein, N, and White, H, 'Childhood victimisation and illicit drug use in middle adulthood', (2006) 20 (4) *Psychology of Addictive Behaviours*, 394–403; Cutajar, M, Mullen, P, Ogloff, J, Thomas, S, Wells, D, and Spataro, J, 'Psychopathology in a large cohort of sexually abused children followed up to 43 years' (2010) 34 *Child Abuse & Neglect* 813–822.

traumatic stress disorder<sup>29</sup>, depression and low self-esteem<sup>30</sup>, and may include inappropriate sexualised behaviour<sup>31</sup> and difficulty with peer relationships.<sup>32</sup> Increased instability in out-of-home and adoptive placements is also a frequent consequence.<sup>33</sup>

Adolescents, generally better able to understand the nature of the acts, are more likely to experience depression and anxiety than younger children<sup>34</sup>, and to engage in self-harming behaviour<sup>35</sup>, suicidal ideation and behaviour<sup>36</sup>, criminal offending<sup>37</sup>, alcohol abuse, substance abuse and running away from home<sup>38</sup>, and teenage pregnancy.<sup>39</sup> Low self-esteem often continues throughout adolescence, with associated effects on intellectual, academic and personal achievement<sup>40</sup>, and adult economic wellbeing.<sup>41</sup> Cutajar et al recently found higher rates of suicide and accidental fatal drug overdose in CSA victims.<sup>42</sup> Victims appear more likely than those in the general population to subsequently commit criminal offences themselves.<sup>43</sup>

Abuse of longer duration and severity (for example, involving penetration) and where the abuser is a family member/similar, is generally seen as having, or more likely to have, significant adverse

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<sup>29</sup> Boney-McCoy, S, and Finkelhor, D, 'Prior victimisation: A risk factor for child sexual abuse and for PTSD-related symptomatology among sexually abused youth', (1995) 19 *Child Abuse & Neglect*, 1401–1421; Dubner, A, and Motta, R, 'Sexually and physically abused foster care children and posttraumatic stress disorder', (1999) 67 *Journal of Consulting and Clinical Psychology*, 367–373; Trowell, J, Ugarte, B, Kolvin, I, et al 'Behavioural psychopathology of child sexual abuse in schoolgirls referred to a tertiary centre: A North London study', (1999) 8 *European Journal of Child and Adolescent Psychiatry*, 107–116.

<sup>30</sup> Spataro, Mullen, Burgess, et al, (2004) 184 *British Journal of Psychiatry*, 416–421; Swanston, H, Plunkett, A, O'Toole, B, et al, 'Nine years after child sexual abuse', (2003) 27 *Child Abuse & Neglect*, 967–984.

<sup>32</sup> Mannarino, A, Cohen, J, and Berman, S, 'The children's attributions and perceptions scale: a new measure of sexual abuse-related factors', (1994) 23 *Journal of Clinical Child Psychology*, 204–211.

<sup>33</sup> Nalavany, B, Ryan, S, Howard, J, and Smith, S, 'Preadoptive child sexual abuse as a predictor of moves in care, adoption disruptions, and inconsistent adoptive parent commitment', (2008) 32 (12) *Child Abuse & Neglect*, 1084–1088.

<sup>34</sup> Gidycz, C, and Koss, M, 'The impact of adolescent sexual victimisation: standardised measures of anxiety, depression and behavioural deviancy', (1989) 4 *Violence and Victims*, 139–149.

<sup>35</sup> Martin, G, Bergen, H, Richardson, A, et al, 'Sexual abuse and suicidality: Gender differences in a large community sample of adolescents', (2004) 28 *Child Abuse & Neglect*, 491–503.; Romans, S, Martin, J, Anderson, J, et al 'Sexual abuse in childhood and deliberate self-harm', (1995) 152 (9) *American Journal of Psychiatry*, 1336–1342

<sup>36</sup> Dinwiddie et al., 2000; Martin et al., 2004; Molnar, B, Berkman, L, and Buka, S, 'Psychopathology, childhood sexual abuse and other childhood adversities: Relative links to subsequent suicidal behaviour in the US', (2001) 31 *Psychological Medicine*, 965.

<sup>37</sup> Stewart, A, Livingston, M, and Dennison, S, 'Transitions and turning points: Examining the links between child maltreatment and juvenile offending', (2008) 32 *Child Abuse & Neglect*, 51–66.

<sup>38</sup> Dube et al., 2006; Simpson, T, and Miller, R, 'Concomitance between childhood sexual and physical abuse and substance abuse problems: A review', (2002) 22 *Clinical Psychological Review*, 27–77.

<sup>39</sup> Roberts, R, O'Connor, T, Dunn, J, Golding, J, and The ALSPAC Study Team, 'The effects of child sexual abuse in later family life; mental health, parenting and adjustment of offspring', (2004) 28 *Child Abuse & Neglect*, 525–545.

<sup>40</sup> Perez, CM, and Widom, CS, 'Childhood victimisation and long-term intellectual and academic outcomes', (1994) 18 (8) *Child Abuse & Neglect*, 617–633; Wozencraft, T, Wagner, W, and Pellegrin, A, 'Depression and suicidal ideation in sexually abused children', (1991) 15 *Child Abuse & Neglect*, 505–511.

<sup>41</sup> Currie, J, and Widom, C, 'Long-term consequences of child abuse and neglect on adult economic wellbeing', (2010) 15 *Child Maltreatment*, 111–120.

<sup>42</sup> Cutajar, M, Mullen, P, Ogloff, J, Thomas, S, Wells, D, and Spataro, J, 'Suicide and fatal drug overdose in child sexual abuse victims: a historical cohort study' (2010) 192 (4) *Medical Journal of Australia* 184–187.

<sup>43</sup> Ogloff, J, Cutajar, M, Mann, E, and Mullen, P, 'Child sexual abuse and subsequent offending and victimisation: A 45 year follow-up study' (2012) 440 *Trends and Issues in Crime and Criminal Justice* 1–6.

consequences.<sup>44</sup> Emotional abuse usually accompanies sexual abuse, and also has severe consequences.<sup>45</sup> Children who suffer four or more different types of victimisation in any given year are likely to experience exacerbated psychological effects.<sup>46</sup>

#### **2.3.1.4 Abuse of power**

Child sexual abuse can be inflicted by an adult, or by an older (and sometimes even a younger) child. It is inflicted in secret, and usually by an adult who is known to the child or a family member.<sup>47</sup> It can be inflicted in circumstances where force or coercion is clearly apparent, but it can also be inflicted where such coercion is not as stark but where the victim is not developmentally capable of understanding the acts and or where the child is in a position of physical, cognitive, emotional or psychological vulnerability such that consent is not freely given.

#### **2.3.1.5 Nature**

Child sexual abuse includes acts not only of penetrative abuse, but also acts of masturbation, oral sex, fondling, voyeurism, exposure to sexual acts, exposing the child to pornography, involving the child in pornography, and other acts done to sexually gratify the abuser.

Where the perpetrator is an adult or a person in a clearly defined position of power, most sexual abuse occurs, or at least commences, when the child is under 13. A national study in the USA found that of 416 women and 169 men reporting child sexual abuse, 78 per cent and 69 per cent respectively were aged 12 or under at onset of abuse, and the median ages were 9.6 and 9.9 respectively.<sup>48</sup> Australian studies have found mean ages at first episode of 10<sup>49</sup> and 10.8<sup>50</sup>

As demonstrated by prevalence studies, child sexual abuse is more likely where the child is female<sup>51</sup>, apart from some subsets of clerical abuse.<sup>52</sup> It is also more likely where there is marital

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<sup>44</sup> See eg Cutajar, M, Mullen, P, Ogloff, J, Thomas, S, Wells, D, and Spataro, J, 'Schizophrenia and Other Psychotic Disorders in a Cohort of Sexually Abused Children' (2010) 67 (11) *Arch Gen Psychiatry* 1114–1119.

<sup>45</sup> Egeland, B, 'Taking stock: Childhood emotional maltreatment and developmental psychopathology', (2009) 33 *Child Abuse & Neglect*, 22–26; Shaffer, A, Yates, T, and Egeland, B, 'The relation of emotional maltreatment to early adolescent competence: Developmental processes in a prospective study', (2009) 33 *Child Abuse & Neglect*, 36–44.

<sup>46</sup> Finkelhor, D, Ormrod, R, and Turner, H, 'Poly-victimisation: A neglected component in child victimisation', (2007) 31 *Child Abuse & Neglect*, 7–26; D. Finkelhor, *Childhood Victimization*, Oxford University Press, Oxford, 2008.

<sup>47</sup> Smallbone and Wortley, (2001); Finkelhor, D, Ormrod, R, Turner, H, and Hamby, S, 'The victimisation of children and youth: A comprehensive, national survey', (2005) 10(1) *Child Maltreatment*, 5–25.

<sup>48</sup> Finkelhor, D, Hotaling, G, Lewis, I, and Smith, C, 'Sexual abuse in a national survey of adult men and women: Prevalence, characteristics, and risk factors', (1990) 14 *Child Abuse & Neglect*, 19–28.

<sup>49</sup> Fleming, J, 'Prevalence of childhood sexual abuse in a community sample of Australian women', (1997) 166 *Medical Journal of Australia*, 65–68.

<sup>50</sup> Dinwiddie, et al (2000).

<sup>51</sup> Dunne, et al (2003). In contrast, Smallbone and Wortley (2001) found a higher than expected level of victimisation of boys.

<sup>52</sup> See for example John Jay College of Criminal Justice, *The nature and scope of sexual abuse of minors by Catholic priests and deacons in the United States, 1950–2002*. Washington, DC: United States Conference of Catholic Bishops, 2004.



conflict, low parental attachment, overprotective parenting, parental alcohol abuse, absence of a parent, and presence of a stepfather.<sup>53</sup>

#### **2.3.1.6 Multiple victims, and continued abuse**

Studies have found that substantial proportions of perpetrators have multiple victims.<sup>54</sup> Chronic offenders may be more likely to have male victims. Studies have also found that substantial proportions of offenders inflict sexual abuse on the same child over substantial periods of time.<sup>55</sup>

#### **2.3.1.7 Criminal conduct**

The various acts which can constitute sexual abuse of a child who is not legally capable of consenting are criminal offences, as is made clear in Australian criminal laws.<sup>56</sup>

#### **2.3.1.8 Civilly actionable**

The acts constituting child sexual abuse are also civilly actionable, as they constitute both negligence and battery.<sup>57</sup>

### **2.4 The genesis of mandatory reporting laws for child sexual abuse: Kempe and the 'battered-child syndrome'**

#### **2.4.1 Child physical abuse: the battered-child syndrome**

The impetus for the first mandatory reporting law about any kind of child abuse was the work of the Colorado paediatrician C Henry Kempe and his colleagues in identifying cases of severe child physical abuse, and conceptualising this as 'the battered-child syndrome'.<sup>58</sup> Kempe defined the battered-child syndrome as<sup>59</sup>:

A term used by us to characterise a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent ... It is a significant cause of childhood disability and death. Unfortunately, it is frequently not recognised or, if diagnosed, is inadequately handled by the physician because of hesitation to bring the case to the attention of the proper authorities ... The battered-

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<sup>53</sup> Putnam, (2003).

<sup>54</sup> See for example Smallbone and Wortley, (2001).

<sup>55</sup> See for example Smallbone and Wortley, (2001).

<sup>56</sup> *Crimes Act 1900* (ACT); *Crimes Act 1900* (NSW); *Criminal Code* (NT); *Criminal Code 1899* (Qld); *Criminal Law Consolidation Act 1935* (SA); *Criminal Code* (Tas); *Crimes Act 1958* (Vic); *Criminal Code Act Compilation Act 1913* (WA).

<sup>57</sup> *Mason v Mason* [1997] 1 VR 325; *Wilson v Horne* (1999) 8 Tas R 363.

<sup>58</sup> Kempe, C, Silverman, F, Steele, B, Droegemueller, W, and Silver, H, 'The battered-child syndrome' (1962) 181 *Journal of the American Medical Association* 17.

<sup>59</sup> Kempe, (1962), p 17. Kempe and his colleagues proceeded to discuss the type and number of cases they were seeing in their hospitals; an example was given of one day's intake including four infants suffering parent-inflicted battering, two of whom died, another of whom died four weeks later, with the fourth recovering.

child syndrome may occur at any age, but, in general, the affected children are younger than 3 years.

Kempe acknowledged that battering occurred on a spectrum of less severe cases to extremely severe cases. However, the emphasis was on severe injury, especially cases involving bone fractures (whether of the skull, arms or legs) and or subdural hematoma.<sup>60</sup> Kempe asserted that appropriate management by doctors involved making<sup>61</sup>:

the correct diagnosis so that he can institute proper therapy and make certain that a similar event will not occur again. He should report possible wilful trauma to the police department or any special children's protective services that operate in his community. The report that he makes should be restricted to the objective findings which can be verified and, where possible, should be supported by photographs and roentgenograms.

Kempe's work was accompanied by intensive lobbying for legislative reform. As a result, the first mandatory reporting laws were enacted in every state of the USA (except Hawaii) between 1963 and 1967. In accordance with the scope of Kempe's work at this time, these laws were initially limited to requiring medical professionals to report suspected serious *physical* abuse inflicted by a child's parent or caregiver.<sup>62</sup>

#### **2.4.2 Expansion of the USA mandatory reporting law to child sexual abuse**

Changes then occurred in the USA and the scope of the reporting laws broadened. This was motivated in part by federal legislation – the 1974 *Child Abuse Prevention and Treatment Act* – which allocated funds to states based on the parameters of their laws. Most relevantly for this discussion, the first development was for members of additional professional groups to be required to report suspicions of physical abuse.

Second, the *types* of reportable abuse were expanded beyond physical abuse, to also include *sexual abuse*, emotional or psychological abuse, and neglect.<sup>63</sup> This development occurred because after Kempe's initial primary concern with severe physical abuse, different maltreatment types were recognised.

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<sup>60</sup> Kempe, (1962), p 19–24.

<sup>61</sup> Kempe, (1962), p 23. It is important to note that the authors tried to ascertain the national incidence of severe battering through a national survey of hospitals (only 71 responded) and a survey of 77 District Attorneys. As a result, nationwide they found 749 known cases reported by these sources in a one-year period (302 reported by the hospitals and 447 by the attorneys).

<sup>62</sup> Paulsen, M, Parker, G, and Adelman, L, 'Child abuse reporting laws-some legislative history', (1966) 34 *George Washington Law Review* 482; Paulsen, M, 'The legal framework for child protection' (1966) 66 *Columbia Law Review* 679; Paulsen, M, 'Child abuse reporting laws: the shape of the legislation' (1967) 67 *Columbia Law Review* 1–49. See also Nelson, B, *Making an issue of child abuse*, (University of Chicago Press, Chicago, 1984).

<sup>63</sup> A third development was for a broader spectrum of cases to be reported, by lifting prior limits restricting reportable cases to those involving serious harm: Kalichman, S, *Mandated reporting of suspected child abuse: Ethics, law and policy* (American Psychological Association, Washington: DC, 1999), 15–16. This would later be reversed, reinstating the 'serious harm' qualification. The *Child Abuse Prevention and Treatment Act* s 5106g(2) now defines 'child abuse and neglect' as 'at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm'.

Research in the late 1970s and early 1980s brought child sexual abuse to greater prominence. Most of the early work on child sexual abuse tended to focus on incest, but gradually extended to other manifestations of sexual abuse.<sup>64</sup> Research into the prevalence and effects of different maltreatment types gradually developed, and child sexual abuse received substantial attention.<sup>65</sup>

#### 2.4.3 Salient principles: from physical abuse to sexual abuse

While initially limited to a duty to report severe child physical abuse, the salient principles motivating mandatory reporting laws can be discerned as being applicable to child sexual abuse. These principles were that:

- there are some profoundly damaging injuries and experiences suffered by vulnerable children who cannot protect themselves
- these acts occur in private, hidden situations beyond the scrutiny of others
- perpetrators of the violent acts will not bring their own wrongdoing and the child's suffering to the attention of law enforcement or health agencies;
- the child victim either cannot or usually will not bring their experience to the attention of law enforcement or health agencies
- members of some professions or occupations who ordinarily deal with children in the course of their work have an opportunity and the means to detect this kind of harm and bring it to the attention of law enforcement and health agencies, and indeed may be the only adult the child encounters who is capable of helping them
- the State in a liberal democracy has a justified interest and a necessary role in protecting these vulnerable children from this type of severe harm, whether inflicted by parents and caregivers, or other parties, even if it means enabling a level of intrusion into the private sphere.

These principles can be discerned in discussions in Australian state and territory parliaments surrounding the introduction of reporting laws.

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<sup>64</sup> Important early works include Sgroi, S, 'Sexual molestation of children: The last frontier in child abuse' (1975) 4(3) *Child Today* 18–21; Giarretto, H, 'Humanistic treatment of father-daughter incest' (1977) 1 *Child Abuse and Neglect* 411–426; Kempe, C, 'Sexual Abuse, Another Hidden Pediatric Problem: The 1977 C. Anderson Aldrich Lecture', (1978) 62(3) *Pediatrics*, 382–389; Summit, R, and Kryso, J, 'Sexual abuse of children: A clinical spectrum' (1978) 48 *American Journal of Orthopsychiatry* 237–251; Finkelhor, D, *Sexually Victimized Children*, (Free Press, New York, 1979); Rosenfeld, A, Nadelson, CC, Krieger, M, and Backman, JH, 'Incest and sexual abuse of children' (1979) 16 *Journal of the American Academy of Child Psychiatry* 327–339; Steele, B, and Alexander, H, 'Long-term effects of sexual abuse in childhood', in Mrazek, P, and Kempe, C, (eds) *Sexually abused children and their families*, (Oxford, Pergamon, 1981); Russell, D, 'The incidence and prevalence of intrafamilial and extrafamilial sexual abuse of female children' (1983) 7 *Child Abuse and Neglect* 133–146; Finkelhor, D, *Child Sexual Abuse: New Theory and Research* (New York, The Free Press, 1984); Russell, D, *The secret trauma: incest in the lives of girls and women*, (Basic Books, New York, 1986); Kempe, R, and Kempe, C, *The common secret: Sexual abuse of children and adolescents*, (Freeman, New York, 1984); Finkelhor, D, *A Sourcebook on Sexual Abuse*, Sage, Beverly Hills, 1986; see also J Myers, *A History of Child Protection in America*, (XLibris, 2004), 387ff.

<sup>65</sup> For significant recent reviews and research see for example: Gilbert, Widom, Browne, et al, (2009); Chen, Murad, Paras, et al, (2010); Paolucci, Genuis and Violato, (2001); Putnam, (2003); Mullen, Martin, Anderson, et al, (1993); Dinwiddie, Heath, Dunne, et al, (2000); Daignaut and Hebert, (2009).

## 2.5 Overview of Australian developments

### 2.5.1 Early Australian developments: the first Australian mandatory reporting laws

Soon after Kempe's work, some early Australian research also made observations about the physical abuse of children.<sup>66</sup> This research helped to inform the development of the first mandatory reporting laws in Australia, including the first enactment in South Australia in 1969.

As will be seen in Part 3, the first Australian mandatory reporting laws in the late 1960s and early 1970s focused primarily on physical abuse, and, to an extent, severe neglect (neglect had been the key focus of child welfare laws from the late 1800s and throughout the 1900s to this stage). Also, like their American counterparts, usually the first laws were limited to requiring medical practitioners to report. However, the concepts used in these initial provisions – 'ill-treatment', 'cruelty' and even a species of 'neglect' – were capable of including sexual abuse.

Subsequent amendments would more clearly provide for sexual abuse as a separate and distinct category of abuse which was required to be reported. They would also expand the range of persons required to report.

### 2.5.2 Subsequent Australian legislative developments: a disjointed course

In Australia, each jurisdiction possesses constitutional power to legislate for matters relating to child protection. This has contributed to the states and territories developing mandatory reporting laws at different times, and in different ways.

The first Australian mandatory reporting law was enacted in South Australia in 1969, albeit in a fairly restricted form.<sup>67</sup> Since that time all eight states and territories have introduced, and incrementally expanded, mandatory reporting requirements. Accordingly, there have been substantial differences between Australian jurisdictions regarding the presence of *any* legislative duty to report child sexual abuse, and its *extent* in applying to which categories of designated occupational groups.

Some states have only recently introduced legislative reporting duties, in some cases decades after other jurisdictions. Western Australia and Queensland have relatively recently introduced mandatory reporting laws for child sexual abuse. Overall, the first reporting law commenced in South Australia in 1969, and the most recent reporting law commenced in Western Australia in 2009: a period of 40 years.

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<sup>66</sup> Wurfel, L, and Maxwell, G, 'The battered child syndrome in South Australia' (1965) 1 *Australian Paediatric Journal*, 127–130; Birrell, R, and Birrell, J, 'The "Maltreatment Syndrome" in Children' (1966) 2 *Medical Journal of Australia* 1184; Birrell, R, and Birrell, J, 'The maltreatment syndrome in Australia: A hospital survey' (1968) 2 *Medical Journal of Australia* 1023–1029. Some of this scholarship was referred to in South Australia's Parliament: see Part 3.5. Another paper was written on neglect: see Bialestock, D, 'Neglected babies' (1966) 2 *Medical Journal of Australia* 1129–1133.

<sup>67</sup> See further Part 3.5.

Consequently, there are differences in mandatory reporting laws across Australian jurisdictions. The most significant difference concerns who has to report child sexual abuse. There are other differences as well, such as whether the duty applies to suspected cases that have not occurred yet but are thought likely to happen (applying, for example, to case of grooming). As well, there are differences in what state of mind is required to activate the duty, and in the penalty for noncompliance.

### 2.5.3 A common schematic approach

Despite the differences in the legislative duties, a common schematic approach to the legislation can be identified. The laws:

- define which persons must make reports
- identify what state of mind a reporter must have before the reporting duty is activated
- define the types of abuse and neglect, or the ‘harm’ caused by abuse, that must be reported
- define the extent of abuse or neglect, or harm, which requires a report
- state whether the duty applies only to past or present abuse, or also to future abuse which has not occurred yet but which is thought likely to occur
- state penalties for failure to report
- provide a reporter with confidentiality regarding their identity
- provide a reporter with immunity from liability arising from a report made in good faith
- state when the report must be made
- state to whom the report must be made
- state what details a report should contain
- enable any other person to make a report in good faith, even if not required to do so, and grant confidentiality and legal immunity to these persons.

### 2.5.4 How and to whom are reports made?

While it is beyond the scope of this report to cover operational matters, some brief observations can be made about reporting processes.

As is consistent with the legislation and child protection system in each jurisdiction, reports are generally made to the jurisdiction’s child protection department (see the summary in **Table 10** below). This is also consistent with the nature of child sexual abuse, which differs, for example, from most cases of neglect, and so would not activate the possibility of reporting to differential response mechanisms where these exist.<sup>68</sup>

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<sup>68</sup> On differential response systems in Australia, see Mathews, B, and Bromfield, L, ‘Australian laws and policies on child neglect’ in Dubowitz, H, (ed) *World Perspectives on Child Abuse*, (ISPCAN, Aurora: CO, 2012), 61–66. In Victoria, for example, the *Child and Family Information, Referral and Support Teams* (ChildFIRST) system enables individuals who have a significant concern about a child’s wellbeing to refer their concern to ChildFIRST for help,

Usually, a central phone hotline established within the department is the first destination of the report and this intake office represents the ‘Director-General’ or ‘CEO’ stipulated in the legislative provision. The intake agency receives the report and evaluates it to determine the appropriate response. Generally, where an assessment or investigation is required, this will involve joint activity between child protection officers having multidisciplinary expertise, and police. This is consistent with child sexual abuse being both a child protection matter, and a criminal justice matter.

Protocols and associated documents may provide mandated reporters with further confirmation or clarification of reporting processes. Forms and procedures for reporting are typically set out on departmental websites.<sup>69</sup> Guides to assist in the making of decisions to report or not may also be provided: for example, the New South Wales Mandatory Reporter Guide (2013)<sup>70</sup> sets out guidelines for reporting to the Department of Community Services. Regulations may also provide details on the reporting form and mechanism.<sup>71</sup>

**Table 10: To whom is the report made, under the legislation: Australian states and territories**

Jurisdiction	Legislation	Director-General or CEO of Department	Police
ACT	<i>Children and Young People Act 2008</i> (ACT) s 356(1)(e)	✓	
NSW	<i>Children and Young Persons (Care and Protection) Act 1998</i> (NSW) ss 27(2)	✓	
NT	<i>Care and Protection of Children Act</i> (NT) ss 26(1)(b), 26(2)(c)	✓ Report can be made to either D-G or police	✓ Report can be made to either D-G or police
Qld	<i>Public Health Act 2005</i> (Qld) s 191(2) (doctors and nurses);	✓	
	<i>Education (General Provisions) Act 2006</i> (Qld) ss 364–366A (school staff);		To school principal, and then principal to police
SA	<i>Children’s Protection Act 1993</i> (SA) s 11(1)	✓	
Tas	<i>Children, Young Persons and Their Families Act 1997</i> (Tas) s 14(2)	✓	
Vic	<i>Children, Youth and Families Act 2005</i> (Vic) s 184(1)	✓	
WA	<i>Children and Community Services Act</i>	✓	

rather than reporting to the department responsible for child protection (*Children, Youth and Families Act 2005* (Vic) s 31). This provision complements the mandatory reporting provisions, where reports of specified cases of a child being ‘in need of protection’ must be made to the Secretary of the Department (s 184). Children and families who are referred to ChildFIRST are assessed and may be offered home-based family support or referred to other health and welfare services (s 33). ChildFIRST must forward reports to child protection services if the community-based child and family service considers that the situation may involve more significant harm or risk of harm; that is, that the child may be ‘in need of protection’ (s 33(2)). Equally, reports made to child protective services may be redirected to ChildFIRST if deemed not to require a child protection response (ss 30, 187).

<sup>69</sup> For example, for Queensland health professionals, see Queensland Health, *Reporting child abuse and neglect*, <http://www.health.qld.gov.au/child-youth/webpages/rep-childabuse.asp>. For Victorian reporters, see Department of Human Services, *Guide to Making a Report to Child Protection or Child FIRST*, [http://www.dhs.vic.gov.au/\\_\\_data/assets/pdf\\_file/0003/582591/flowchart-mandatory-reporting-27-5-10.pdf](http://www.dhs.vic.gov.au/__data/assets/pdf_file/0003/582591/flowchart-mandatory-reporting-27-5-10.pdf)

<sup>70</sup> National Council on Crime and Delinquency, *New South Wales Mandatory Reporter Guide*, 5th edition, 2013.

<sup>71</sup> See for example in Queensland the Education (General Provisions) Regulation 2006 r 68 (suspected sexual abuse) and r 68A (suspected likely sexual abuse).

### 2.5.5 A note on enforcement of the legislative duty

While New South Wales recently amended its law to remove the penalty<sup>72</sup>, the mandatory reporting duty usually contains a penalty provision. However, prosecutions for failure to report are very rare, both in Australia and overseas. This is partly because the focus of the provision is on encouraging reporting, rather than policing it.

However, it is also influenced by the nature of the duty and context. In many cases where a reporter has the requisite state of mind and nevertheless fails to report, nobody else may know of the reporter's circumstances, including the child victim or his or her legal guardian. Even where there is evidence of a reporter's state of mind, it may be difficult to prove that the reporter had the sufficient state of mind to activate the reporting duty.<sup>73</sup>

Yet, several prosecutions have been conducted for failure to report suspected child sexual abuse in at least five Australian jurisdictions, although they are rare. These are listed below.

- In New South Wales, a medical practitioner was successfully prosecuted for failure to report suspected child sexual abuse.<sup>74</sup>
- In 1997 in Victoria, the Ringwood Magistrates Court dismissed a charge against a primary school principal – who had received an initial alert by a five-year-old boy's teacher – for failing to report child sexual abuse. It was found that she had become aware of the allegations, but was not sure of their substance and had not developed the required belief that the child had been abused. This was despite the boy making frank statements about the abuse.<sup>75</sup>
- In South Australia, a decision of the Holden Hill Magistrates Court resulted in the court not recording a conviction against a social worker who pleaded guilty to failing to report her suspicion of child abuse.<sup>76</sup>

<sup>72</sup> See Part 3.2.

<sup>73</sup> For several reasons, there are few instances of a reporter's failure to comply with a duty to report being referred to authorities. A reporter's previously unreported suspicion will rarely be made known at a later date to authorities or the courts. Because of the frequency of nondisclosure, most cases of abuse will not come to the attention of courts, so litigation procedures which enable gathering of testimony from witnesses will not be engaged. Even where a child does disclose to helping agencies (whether medical, or during litigation), the child may be unaware of the reporter's suspicion, unless the case involves a direct disclosure, or the exhibition of behaviour or symptoms strongly indicating abuse. In addition, in the infrequent situations where litigation is commenced, the child may have reached adulthood due to the often long delay since the events, and any teacher whose suspicion may have crystallised at that prior time may be unlocatable, deceased, or have a faded memory of the situation.

<sup>74</sup> *Department of Community Services v K* (Unreported, Local Court, Albury, Magistrate Murray, 1 December 1998). The prosecution of a medical practitioner for failing to report suspected child sexual abuse was successful: see further R Best, 'Where Child Protection Systems and Schools Meet', (2001) 6 *Australia & New Zealand Journal of Law & Education*, 3–13, p 7.

<sup>75</sup> Reported in 'Abuse and the system', *The Age*, 23 October 2002; cited in the Layton Review, 10.16. The boy later indicated that he continued to be abused and in due course a police investigation resulted in the boy's father being convicted on 20 charges of incest and 23 charges of sexual penetration of a minor.

<sup>76</sup> Russell, L, "Abuse Case 'Bit Sad'" *Messenger Standard*, Wednesday, 24 July 2002 p 3; cited in the Layton Review, 10.16.

- There has also been at least one successful prosecution for failure to report child abuse in South Australia, where some of the injuries may have been characterised as sexual abuse (the two-year-old child in this case died three days after the doctor saw him).<sup>77</sup>

More recently, cases have been brought in Queensland<sup>78</sup> and the Northern Territory.<sup>79</sup> The Queensland case is particularly notable as it demonstrates not only the relevant legal contexts, but also the sexual abuse context and potential consequences of failure to report.

### The Queensland case

In *Police v Hayes*<sup>80</sup>, a prosecution for failure to report suspected child sexual abuse was commenced, but failed.<sup>81</sup> The accused, who was a school principal, was found not liable on the basis that while he had not officially lodged a report complying with the relevant regulation complementing the legislative duty<sup>82</sup>, the forwarding by him of relevant information to more senior officers in the school hierarchy was sufficient to have complied in substance with the nature of his duty under Queensland's convoluted provisions in the *Education (General Provisions) Act 2006* s 366. The provisions at the time were complex, but in essence they required the school principal (as the 'first person' to develop the suspicion of abuse) to report his suspicion immediately *to a director of the school's governing body*, and that director was then required to forward the report immediately to the police.<sup>83</sup> The principal was charged with the offence of failure to report *to police*. If the senior educational officers had been charged with failure to report to police, then it appears they would have been liable, as they did not do so.<sup>84</sup>

As detailed in the Magistrate's decision, the facts of the case were not in dispute. A school principal developed a reasonable suspicion that a school student had been sexually abused by a school staff member. The admissions made by the school principal in the course of proceedings showed that he developed the suspicion in circumstances under which there could be little doubt that abuse had happened and was continuing. In September 2007, a nine-year-old girl told her parents she had been sexually abused by her Year 4 teacher over several months. On 3 September 2007, the girl's father informed the principal of this, and on 6 September 2007 the girl and her

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<sup>77</sup> South Australia *Advertiser*, 20 January 2000, cited in Best, R, 'Where child protection systems and schools meet', (2001) 6 *Australia & New Zealand Journal of Law & Education*, 3–13; professional disciplinary consequences were imposed in *Medical Board of South Australia v Christpoulos* (No 1) No DCCIV–99–353 [2000] SADC 47.

<sup>78</sup> McKenna (2010a); (2010b).

<sup>79</sup> Statham, L, 'First for child sex abuse reporting laws', *Sydney Morning Herald*, 6 January 2011. This was the first (and, to date, to the best of my knowledge) only prosecution in the NT. A youth worker was prosecuted for allegedly failing to report suspected sexual abuse. The woman allegedly failed to report witnessing sexualised behaviour of a five-year-old child at a remote community on October 9, 2010. She later witnessed further sexualised behaviour and made a report to her management who then reported both incidents to police. The outcome of this case is not readily identifiable from the public record.

<sup>80</sup> [2009] QMC 13 (Magistrate Stjernqvist).

<sup>81</sup> For further details on this case, see Morris, Bishop William, *Statement*, 10 December 2009; McKenna (2009; 2010a; 2010b).

<sup>82</sup> *Education (General Provisions) Regulations 2006* r 68.

<sup>83</sup> As an aside, it can also be noted that in addition, the school principal would have been under a common law duty of care to take appropriate steps to prevent further harm to the child (and other children), and that the principal would also have had a duty based on the relevant educational authority policy to take certain steps about the school staff member's employment and duties.

<sup>84</sup> The Magistrate observed at [35–36] that 'it is clear that a person in the school or the school's governing body has committed an offence ... [but] That person in my view is not Mr Hayes'.



father met with the principal and provided further details. The principal informed the girl's father that the educational authority office would be contacted, and that they had the right to complain to police. The principal admitted that by the end of this meeting, the girl had made disclosures which caused him to develop a reasonable suspicion that sexual abuse had occurred.

After this meeting, the principal sent a number of emails detailing the girl's statements to officers of the educational authority. Significantly, when the principal was prosecuted for failing to comply with the legislative reporting duty, these communications were deemed sufficient to comply with the technical requirements of the principal's legislative reporting obligation, and so the principal was not convicted of breaching this duty, even though the Magistrate found that the principal made this 'report' while 'completely oblivious to his obligations under Section 366'.<sup>85</sup> However, three omissions at this time in September 2007 produced terrible consequences. First, the educational authority's officers who received the principal's communications did not forward them to the police, as required by the legislation. Second, the principal neither reported the matter personally to the police, nor ensured that the educational authority's officers forwarded the report to police. Third, the principal did not act according to policy-based obligations to ensure student safety, and allowed the Year 4 teacher to remain on duty in charge of his class.

The teacher remained employed and in charge of girls of this age. This allowed the teacher, for the next 14 months, to repeatedly sexually assault another 12 girls. The offences occurred in class and after class. They involved numerous incidents of sexual touching, some incidents of oral stimulation, and several incidents of digital penetration.<sup>86</sup> The girls were aged nine and 10.

The school had further opportunities to intervene. The Year 4 teacher retired in the middle of 2008. However, the principal re-appointed him only weeks later as a relief teacher. The teacher continued working at the school until November 2008. The only reason the teacher's offending was interrupted was because another of his classroom victims complained directly to police about the abuse she had suffered. The teacher was arrested on 14 November 2008, and was charged with 46 counts of sexual offences, including 12 counts of rape, committed against 13 girls.

In 2009, the school principal was charged with breaching the legislative reporting duty, but was found not guilty because technically the duty had been complied with. However, the magistrate stated that the principal seemed unaware of his legislative duty, and that the forwarding of the information was not done in conscious compliance.

Importantly, the Magistrate also stated that the educational authority officers who received the details from the principal did not forward the report as required, and that they too appeared unaware of their legislative reporting duty.<sup>87</sup> It can be noted as an aside that due to the time that had elapsed from the relevant events, and because of the effect of the *Education (General Provisions) Act 2006* (Qld) s 408, it would not appear to be possible for police at that point to prosecute the two educational authority officers for their breach of the legislative duty.

Despite neither the principal nor the two educational authority officers being liable for breaching the legislative reporting duty, they did experience personal consequences. These school authority employees were liable to professional disciplinary consequences for failing to comply with policy

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<sup>85</sup> *Police v Hayes* [2009] QMC 13, [27].

<sup>86</sup> As described in the appeal against sentence by the Attorney-General: *R v Byrnes; ex parte A-G (Qld)* [2011] QCA 40.

<sup>87</sup> *Police v Hayes* [2009] QMC 13, [28–29].

requirements. In December 2009, the employment of all three was terminated for failing to act on the first complaint.

On 14 April 2010, the teacher pleaded guilty to 44 offences, including 10 counts of rape, 33 counts of indecent treatment of a child under 12, and one count of maintaining a sexual relationship with a girl under 12. He was sentenced on 4 October 2010 to 10 years imprisonment for each of the rape and maintaining offences, and seven years imprisonment for each of the indecent treatment offences.<sup>88</sup> The teacher had been one of this school's child protection officers until his retirement.

### **Legal liability of the school authority**

As a result of these employees' failure to act appropriately, and in view of the high level of knowledge they possessed about the abuse suffered by the girl who made the initial complaint, these employees breached their common law duty of care to prevent further harm being caused to the first girl, and to other children to whom the teacher had continuing access. Because the school authority employed these individuals, it is vicariously liable in compensatory damages for harm suffered by the teacher's victims as a result of the negligent omissions. Civil proceedings were commenced by some of the victims. In July 2010, the Catholic Church admitted liability in all thirteen cases.<sup>89</sup>

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

Some brief comments can be made regarding other sources of a duty to report in this context. It can be noted here that a person may be under a duty to report known or suspected child sexual abuse as a result of other obligations, whether legal or non-legal, even if she or he is not under a legislative 'mandatory reporting' duty. However, the mandatory reporting duty is different in substance and kind to these duties, and provides specific legal protections to reporters. It is also amenable to jurisdiction-wide and occupation-wide administrative arrangements, appropriations, reporter training programs, and systemic supports and response mechanisms. Mandatory reporting systems are thus part of a more sophisticated and organised child protection culture and system in a way that these other legal duties are not.

### **2.6.1 Common law duty of care**

First, a person in these occupations may have a common law tortious duty of care to the child, the scope of which extends to a duty to report knowledge or a reasonable suspicion that the child has been or is being sexually abused.<sup>90</sup> While civil suits in such cases are very rare, they are not unprecedented.<sup>91</sup>

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<sup>88</sup> *R v Byrnes*, Unreported, District Court of Queensland (Toowoomba) (Bradley J), 4 October 2010.

<sup>89</sup> McKenna, (2010b).

<sup>90</sup> See generally Butler, D, Mathews, B, Farrell, A, and Walsh, K, 'Teachers' duties to report suspected child abuse and tortious liability' (2009) 17 *Torts Law Journal* 1–23.

<sup>91</sup> See for example *AB v Victoria* (Unreported, Supreme Court of Victoria, Gillard J, 15 June 2000), where a child who suffered ongoing sexual abuse successfully obtained damages for injury suffered after school personnel's failure to report their belief she was being abused.

### 2.6.2 Legislative duty to report criminal offences

Second in some jurisdictions, a person may be under a legislative duty to report known criminal offences. An example of this can be seen in New South Wales, where the *Crimes Act 1900* s 316 makes it a criminal offence for a person to conceal knowledge or belief that an offence has been committed, even where the person does not obtain a benefit from such concealment.<sup>92</sup>

Third, in a similar but not identical manner to the second duty, some jurisdictions make it a criminal offence for a person to conceal a known criminal offence where they derive a benefit.<sup>93</sup>

### 2.6.3 Limited common law duty to report known criminal offence: misprision of a felony

Similarly, in some jurisdictions, at some times, a person may have been under a general common law duty to disclose certain offences by virtue of having a public duty to do so, regardless of whether the person derived a benefit from nondisclosure. The common law contained, and in some very limited cases may still provide for, this offence of ‘misprision of a felony’.<sup>94</sup>

### 2.6.4 Policy-based duty to report

A person in these occupations may have an occupational or industry-based policy duty to report these cases (whether or not there is a legislative mandatory reporting duty). Failure to comply with such a duty may present grounds for professional disciplinary proceedings.<sup>95</sup> Co-existing professional disciplinary consequences can be imposed for failure to comply with a legislative mandatory reporting obligation.<sup>96</sup>

### 2.6.5 Breach of statutory duty

Finally, it can be noted that where a legislative mandatory reporting duty exists, an action for a reporter’s failure to comply with the duty may also lie in breach of statutory duty.<sup>97</sup> Such an action

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<sup>92</sup> The *Crimes Act 1900* (NSW) s 316 ‘Concealing serious indictable offence’ states:

(1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

<sup>93</sup> Compounding an offence: see *Crimes Act 1958* (Vic) s 326; *Criminal Code 1999* (Qld) s 133; *Criminal Code* (Tas) s 102. See also *Criminal Code* (WA) s 136; *Criminal Code* (NT) s 104.

<sup>94</sup> *A v Hayden* (1984) 156 CLR 532; *Sykes v DPP* [1962] AC 528. However, in most Australian jurisdictions this offence has been abolished, whether in common law states (due to the abolition of the distinction between felonies and misdemeanours meaning that the offence is not capable of existing, or due to more explicit abolition), or in those jurisdictions having a Criminal Code (due simply to the offence not existing in the Code). Yet, several cases demonstrate the capacity for this offence to be made out for acts or omissions done where the common law offence had either not yet been abolished, or where the distinction between felonies and misdemeanours had not been withdrawn: see eg *R v Wozniak* (1989) 16 NSWLR 185; *R v Lovegrove* (1983) 33 SASR 332; *R v Crimmins* [1959] VR 270.

<sup>95</sup> See Mathews, B, Cronan, J, Walsh, K, Butler, D, and Farrell, A, ‘teachers’ policy-based duties to report child sexual abuse: a comparative study’ (2008) 13(2) *Australia & New Zealand Journal of Law & Education* 23–37.

<sup>96</sup> See for example *HCCC v Dene & Donnelly (No 2)* [2010] NSWPS 4; *EM v St Barbara's Parish School* [2005] SAIRComm 10; *Medical Board of South Australia v Christopoulos (No 1)* [2000] SADC 47.

<sup>97</sup> See generally Butler, Mathews, Farrell, et al, (2009).

would be in the nature of a private action against the reporter. The availability of this cause of action is a question of law. If the legislation does not make an explicit statement about its availability, whether or not it exists would have to be determined by relevant factors as referred to in the case law.<sup>98</sup> On balance, it is likely that the cause of action would be available, but it may be of limited practical application due to the individual reporter infrequently having extensive capacity to satisfy a substantial judgment.

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

A detailed analysis of normative arguments favouring and opposing mandatory reporting laws for child sexual abuse, including perspectives from fields such as political philosophy and bioethics, is not one of the aims of this report. However, some brief observations can be provided as part of the context for the historical legal analysis. It is evident that the weight of scholarly literature and government inquiries regarding mandatory reporting has favoured the principle of mandatory reporting, applying especially to child sexual abuse.

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

The fundamental normative argument underpinning mandatory reporting laws for child sexual abuse is grounded in the child's right to bodily inviolability and therefore to be protected from sexual abuse and the serious harm it causes. Moreover, in the context of sexual abuse, children are particularly vulnerable, and sexual abuse by its nature possesses certain qualitative and contextual characteristics justifying the recruitment of persons outside the child's family to report known and suspected cases. The laws aim to give sexually victimised children the possibility of social support and assistance in circumstances where access to society's supportive and protective mechanisms is severely compromised. These rights and interests are consistent with other legal rights held by children and adults in domestic laws<sup>99</sup>, and rights promoted for children by international instruments such as the United Nations Convention on the Rights of the Child.<sup>100</sup>

The corollary of the child's right to be protected from sexual abuse and from the harm caused by it is the duty of the responsible citizen who knows, or who reasonably believes or suspects, that a child has been sexually abused (or who is likely to be sexually abused), to take reasonable steps to inform an appropriate government agency of those circumstances. The duty of the responsible citizen in a community of individuals forming a healthy society is to take this simple step to take care for another person, and in this context, to take care for a person who is particularly vulnerable, unable to protect themselves, and who is suffering or is likely to suffer substantial and possibly lifelong harm. As is reflected in the law – both mandatory reporting laws, and also criminal and civil laws – the duty of the citizen does not extend to investigating the case to ascertain that abuse is definitely occurring, or to act in ways beyond what can reasonably be expected, to assist the child or the child's family. It is simply to bring the case to the attention of

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<sup>98</sup> See for example *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, p 405. These factors include whether the holder of the duty is also subject to a common law duty of care, and whether the duty is in place to promote the health and safety of members of the public or subsection of the public: *O'Connor v S P Bray Ltd* (1877) LR 2 Ex D 441; the presence of both such factors indicate the action is more likely to be available.

<sup>99</sup> See above, Parts 2.3.1.7 and 2.3.1.8.

<sup>100</sup> Article 19 obliges states parties to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of abuse and exploitation.

the appropriate authorities, and, within the ordinary scope of the person's profession, to continue to support the child and her or his family in an appropriate way.

Wide support for mandatory reporting from the academic community, the general community, and from government inquiries, is apparent, and is premised both on the normative grounds expressed above, and on empirical evidence of the positive effect of mandatory reporting on identifying cases of child sexual abuse. Academic support for mandatory reporting has been strong and consistent for serious forms of child abuse including child sexual abuse.<sup>101</sup> Community support and departmental support has been noted by major inquiries including the Wood Inquiry in 2008, and the Layton Review in 2003. The Layton Review concluded that<sup>102</sup>:

- mandatory reporting 'has significant support within the community across all professional groups as well as the wider community' (10.6)
- 'The majority of submissions received by the Review gave strong support for the continuation of the mandatory reporting system and there were no submissions received expressing the view that mandatory reporting should be abolished' (10.4)
- 'Concerns about the effectiveness of mandatory reporting within the wider child protection system need to be separated from the philosophy that underpins it, the development of appropriate skills for reporting among people who are mandated notifiers and creating a more effective child protection system' (10.5).<sup>103</sup>

Australian government inquiries have consistently supported mandatory reporting laws as a necessary component of social policy to identify and respond to child sexual abuse (see details provided in **Table 9**). Five recent major examples include:

- the Wood Royal Commission in 1997 in New South Wales<sup>104</sup>
- the Layton Review in 2003 in South Australia<sup>105</sup>
- the Wood Inquiry in 2008 in New South Wales<sup>106</sup>
- the Cummins, Scott and Scales Inquiry in 2012 in Victoria<sup>107</sup>

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<sup>101</sup> Besharov, D, 'Overreporting and Underreporting child abuse and neglect are twin problems' in Donileen Loseke, Richard Gelles and Mary Cavanaugh (eds), *Current controversies on family violence*, (Thousand Oaks, California, 2005); Drake, B, and Jonson-Reid, M., 'A response to Melton based on the best available data' (2007) 31 *Child Abuse & Neglect*, 343–360; Finkelhor, D, 'Is child abuse overreported? (1990) 48 (1) *Public Welfare*, 22–29; Finkelhor, D, Ormrod, R, Turner, H, and Hamby, SL, 'The victimisation of children and youth: A comprehensive, national survey', (2005) 10(1) *Child Maltreatment*, 5–25; Mathews, B, and Bross, D, 'Mandated reporting is still a policy with reason: empirical evidence and philosophical grounds' (2008) 32(5) *Child Abuse & Neglect*, 511–516.

<sup>102</sup> Layton, R, *Our best investment: A State plan to protect and advance the interests of children (Review of Child Protection in South Australia)*, Adelaide, 2003.

<sup>103</sup> Layton also noted the observation by then Associate Professor Dorothy Scott that after Victoria introduced mandatory reporting the increase in notifications which followed (at least in the short term) was 'primarily driven by notifications from the community, not from [mandated] professionals' (10.5).

<sup>104</sup> The Hon Justice J Wood, *Royal Commission into the NSW Police Service Final Report (Volumes 4 and 5: The Paedophile Inquiry)*, Government of the State of New South Wales, Sydney, 1997, <http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>

<sup>105</sup> Layton, R, *Our best investment: A State plan to protect and advance the interests of children (Review of Child Protection in South Australia)*, Adelaide, 2003.

<sup>106</sup> Wood, J, *Report of the Special Committee of Inquiry into Child Protection Services in New South Wales*, Volume 1, Government of the State of New South Wales, Sydney, 2008, <http://www.lawlink.nsw.gov.au/cpsinquiry>.

- the Carmody Inquiry in 2013 in Queensland.<sup>108</sup>

### Empirical evidence

One of the reasons for this level of support is not only endorsement of the normative principles underpinning the laws, but also recognition of empirical evidence about the effect of mandatory reporting on identification of cases of child sexual abuse. As shown in the discussion below, it is well-established that with only voluntary reporting, professionals including doctors, and others, are less likely to report, and this has a consequential adverse effect on the identification of cases of sexual abuse. This clear difference made by mandatory reporting on child protection has been acknowledged by numerous government inquiries and parliamentary debates, most notably by the Royal Commission in 1977, the Australian Law Reform Commission in 1981, the Victorian Law Reform Commission in 1988, and Victorian Parliament's lengthy discussion in 1993.

Four kinds of evidence are capable of indicating the contributions made to case identification by mandated reporters, and the impact of introduction and presence of a reporting law and associated mechanisms. These are set out below, with examples of data on each phenomenon:

#### 1) *the numerical and proportional contributions to case identification by mandated reporters compared to nonmandated reporters*

- In the USA, 74 per cent of substantiated cases of sexual abuse are identified through reports by mandated reporters.<sup>109</sup>

#### 2) *comparison of reporting practice by mandated reporters within a jurisdiction before and after the reporting law*

- Lamond found that reports, and substantiated reports, by teachers of child sexual abuse tripled in the study's time period after the introduction of a reporting law and associated education.<sup>110</sup>
- In the 12-month period after introducing mandatory reporting in Western Australia, 43 per cent more substantiated cases of child sexual abuse were found than in the previous year when mandatory reporting did not exist: an increase of 152 to 218 cases.<sup>111</sup>

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<sup>107</sup> Cummins, P, Scott, D, and Scales, B, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, Victoria Department of Premier and Cabinet, Melbourne, 2012.

<sup>108</sup> Carmody, T, *Taking responsibility: A roadmap for Queensland child protection*, Queensland Child Protection Commission of Inquiry, Brisbane, 2013.

<sup>109</sup> US Department of Health and Human Services, *Child Maltreatment 2007*, US Government Printing Office, Washington DC, 2009, p 45, Table 3–9.

<sup>110</sup> Lamond, D, 'The impact of mandatory reporting legislation on reporting behaviour' (1989) 13 *Child Abuse & Neglect* 471.

<sup>111</sup> Mathews, B, 'Consequences of introducing mandatory reporting legislation for child sexual abuse' Paper presented at *International Society for the Prevention of Child Abuse and Neglect – European Conference*, Dublin, September 2013.

- In Tasmania, before mandatory reporting, 'Sexual abuse was very rarely notified to the board [the Tasmanian Child Protection Board] in its early years.' However, after introducing mandatory reporting, 'By 1980 it was forming about 10 per cent of notifications and in 1985 it reached 20 per cent of notifications.'<sup>112</sup>

3) *comparison of reporting practice by occupational groups across jurisdictions which do, and do not, have mandatory reporting*

- In Australia, over a two-year period, teachers in a jurisdiction without mandatory reporting made three times fewer substantiated reports of child sexual abuse than did teachers in jurisdictions with mandatory reporting.<sup>113</sup>
- The Victorian Law Reform Commission Report in 1988 found that doctors in Victoria (without mandatory reporting) reported five to nine times fewer cases than their counterparts in jurisdictions having mandatory reporting.<sup>114</sup>
- In Victoria's Parliamentary Debates in 1993, it is noted that Victoria (without mandatory reporting) received almost five times fewer reports of child sexual abuse than New South Wales in a 12-month period.<sup>115</sup>

4) *qualitative evidence of reporters' reporting practice informed by the anticipated effect of a reporting law on reporting decisions*

- Studies have consistently found that when asked if their decision not to report a suspected case would be changed if they knew at the time they were under a legal duty to report, a substantial number of initial non-reporters would change their mind and make a report.<sup>116</sup>

The Victorian Law Reform Commission Report conducted the most extensive analysis of empirical evidence of any of the inquiries analysed in this study. It even commissioned an independent analysis of one aspect of the data. In the context of child sexual abuse, the Victorian Law Reform Commission Report concluded (p 54–56, 66)<sup>117</sup>:

'In each case [of the available evidence] there is evidence that a mandatory reporting law produces beneficial reporting behaviour and better outcomes for children subject to sexual abuse.'

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<sup>112</sup> Tasmania, Parliamentary Debates, House of Assembly, 9 April 1986, p 811 (Mr Bennett, Attorney-General). The Tasmanian Child Protection Board received only 42 reports of child maltreatment in its first year of operation under the 1974 legislation. Reports increased from 346 in 1983 to 672 in 1985.

<sup>113</sup> Mathews, B, Walsh, K, Butler, D, and Farrell, A, *Teachers reporting child sexual abuse: Towards evidence-based reform of law, policy and practice (Report for New South Wales, Queensland and Western Australia)*, Queensland University of Technology: Brisbane, 2010, p 64.

<sup>114</sup> Victorian Law Reform Commission Report, p 54.

<sup>115</sup> Victoria, Parliamentary Debates, *Children and Young Persons (Further Amendment) Bill 1993*, Second Reading, Legislative Assembly, p 1384, Mrs Garbutt (Labor Party, Bundoora), 29 April 1993.

<sup>116</sup> Webberley, H, 'Child maltreatment reporting laws: Impact on professionals' reporting behaviour' (1985) 20 (2) *Australian Journal of Social Issues*, 118–123; Shamley, D, Kingston, L, and Smith, M, 'Health professionals' knowledge of and attitudes towards child abuse reporting laws and case management, in Victoria', (1984) 9 (1) *Australian Child and Family Welfare* 3–8; Kaufman et al, cited in the Victorian Law Reform Commission Report, p 55; Mathews, Walsh, Butler, et al, (2010).

<sup>117</sup> Victorian Law Reform Commission, p 54–56, 66.

‘In short, mandatory reporting can significantly increase the detection of abuse without a massive waste of investigative resources, and without greater unwarranted intrusion into people’s lives than a voluntary reporting system.

‘that the anticipated superior reliability of reporting in Victoria has not eventuated indicates the importance of the context in which both mandatory and voluntary systems operate ... criticisms [of mandatory reporting] have generally been directed at particular [implementation-related] aspects of the reporting systems, not at the principle of mandatory reporting itself’.

It was also concluded that the rate of unsubstantiated cases under a system of mandatory reporting is not significantly greater than that which eventuates under a system of voluntary reporting; in this regard, the conclusion of the Victorian Law Reform Commission’s independent study by De Vaus and Powell was that ‘The statistics provide no basis for opposing mandatory reporting – at least in the limited form in which it applies in New South Wales.’<sup>118</sup>

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

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

Where arguments opposing mandatory reporting laws have been made, they have not been made in the specific context of child sexual abuse as a discrete form of abuse. Rather, they have been made about mandatory reporting of *all four* major forms of maltreatment (physical abuse, sexual abuse, emotional or psychological abuse, and neglect). The literature most often cited in this regard gives little or usually no analysis of sexual abuse as a phenomenon, nor does it seek to distinguish it from other forms of abuse or extents of harm.<sup>119</sup>

These arguments have been based primarily on grounds regarding the alleged effect of mandatory reporting laws on child protection systems as a whole, if those systems are not adequately resourced. The concern behind these arguments is that if introduced, mandatory reporting of child abuse generally will result in a large increase in reported cases, most of which are unwarranted, with which the child protection system – on the assumption that it is under-resourced, and will remain so – will be unable to cope. The argument proceeds that these additional reports will mean diverting existing scarce resources to additional tasks (for example, intake and assessment), which means there will be fewer resources available to deal with those cases which are already known. In addition, with added resources being allocated to mandatory reporting and responses to it – a form of tertiary and secondary prevention – there would be fewer resources available for primary prevention. There is consensus in the field that governments of all persuasions need to provide sufficient resourcing for primary, secondary and tertiary prevention of child abuse, and this applies

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<sup>118</sup> Victorian Law Reform Commission, p 60–61, 162.

<sup>119</sup> Ainsworth, F, and Hansen, P, ‘Five tumultuous years in Australian child protection’ (2006) 11 *Child and Family Social Work* 33–41; Ainsworth, F, ‘Mandatory reporting of child abuse and neglect: Does it really make a difference?’ (2002) 7 *Child and Family Social Work*, 57–63; Ainsworth, F, ‘Mandatory reporting of child abuse and neglect: Why would you want it?’ (2002) 4 *Developing Practice* 5–8; Hansen, P, and Ainsworth, F, ‘Australian child protection services: A game without end’ (2013) 22 *International Journal of Social Welfare* 104–110; Melton, G, ‘Mandated reporting: A policy without reason’ (2005) 29 *Child Abuse & Neglect* 9–18.



to child sexual abuse. A difficulty arises because there is an apparent finite pool of resources which is insufficient to meet demand.

Yet, the argument about the adverse effect of mandatory reporting purely on report numbers is problematic. Mandated reporters make approximately 55–60 per cent of all reports, with the rest made by nonmandated reporters; hence, reports are not only made by those professionals designated by law.<sup>120</sup> Other authorities including the Wood Inquiry have also rejected the argument that the laws create an intolerable number of reports.<sup>121</sup> As shown by the Wood Inquiry in 2008, large proportions of reports are multiple reports about the same small group of children. Most reports are not about sexual abuse. As well, there does not appear to be an ‘ever-widening net effect’ with ever-increasing numbers of children drawn into the child protection system. In New South Wales, for example, there is evidence that as a proportion of total children, the number of children who were the subject of a report for the first time had *fallen* every year since 2001/02.<sup>122</sup> Nationally, the number of children involved in all maltreatment notifications has fallen from 207,462 in 2008/09 to 173,502 in 2011/12.<sup>123</sup>

Allied with this fundamental claim, a connected normative argument asserts that where reports are not founded, investigations of those reports constitute an unjustified and distressing intrusion into family life. Yet, this argument has also been disputed by others, and is premised on an assumption that only substantiated reports are ‘good’ reports; an assumption that for many is not borne out by the evidence.<sup>124</sup>

It seems that the argument is based not on a normative position related to children and their right to safety (especially in the context of sexual abuse), and more on a genuine and completely understandable concern about the availability and use of resources. The opposition is also at least in part premised on a claim that mandatory reporting laws are no longer required to identify cases – Melton asserted that in the USA, ‘It is clear that the primary problem is no longer case finding’<sup>125</sup> and a similar argument is seen elsewhere<sup>126</sup> – but this assertion is simply not supported by the evidence about the gap between the officially recorded incidence of child sexual abuse, and the actual incidence. Moreover, given the relatively small proportion of all reports that are made concerning child sexual abuse, it is doubtful that this argument can be sustained in the case of sexual abuse.

Overall, if the opponents of mandatory reporting generally for all forms of child abuse and neglect do in fact extend those arguments to child sexual abuse – something which is not evident in the

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<sup>120</sup> Mathews, B, and Bross, D, ‘Mandated reporting is still a policy with reason: empirical evidence and philosophical grounds’ (2008) 32(5) *Child Abuse & Neglect*, 511–516; U.S. Department of Health and Human Services, Administration for Children and Families, 2010, p 6, Fig 2-1.

<sup>121</sup> Wood, (2008), Volume 1, p 181–182.

<sup>122</sup> Wood, (2008), Volume 1, p 170.

<sup>123</sup> AIHW (2013). Data on sexual abuse reports is not publicly available.

<sup>124</sup> Finkelhor D, ‘Is child abuse overreported?’ (1990) 48(1) *Public Welfare* 22–29; Drake B and Jonson-Reid M, ‘A response to Melton based on the best available data’, (2007) 31 *Child Abuse & Neglect* 343–360; Kohl P, Jonson-Reid M, and Drake, B, ‘Time to leave substantiation behind: findings from a national probability study,’ (2009) 14(1) *Child Maltreatment*, 17.

<sup>125</sup> Melton G, ‘Mandated reporting: A policy without reason’ (2005) 29 *Child Abuse & Neglect* 9–18, p 10.

<sup>126</sup> Hansen P and Ainsworth F, ‘Australian child protection services: A game without end’ (2013) 22 *International Journal of Social Welfare* 104–110, p 106.

literature – it appears difficult for the arguments given against mandatory reporting laws to be persuasive in the context of sexual abuse, due to several factors:

- the significant qualitative and contextual differences between sexual abuse and other forms of child abuse and neglect
- evidence of identification of cases of sexual abuse by reports from mandated reporters
- evidence of differential success in finding cases of child sexual abuse in jurisdictions where mandatory reporting and associated mechanisms exist, in contrast to those jurisdictions where it does not exist
- the lack of a clearly intolerable counterbalancing factor, at least in the context of child sexual abuse
- the continuing gap between the real incidence of child sexual abuse and its officially recorded incidence.

## Part 3

# Legislative developments within each state and territory over time

In Australia, reporting laws have developed since 1969. Each state and territory has constitutional power to pass legislation about child protection. In the absence of a coordinated national approach, and with states and territories having different priorities and preferences about child protection and family welfare, each jurisdiction has enacted its own mandatory reporting legislation at different times, in different ways, and with occasional amendments which usually broaden the scope of the duty.

What follows is an historical review and analysis of the development of the mandatory reporting laws in each state and territory.<sup>127</sup> For each jurisdiction, I describe:

- the nature and commencement of the first legislative provisions as enacted
- key legislative changes made since that first enactment, until December 2013
- an identification of the key reasons for and precursors to the introduction of the law, and to major amendments to it, using information available from the public record (government reports and inquiries, and Hansard) – these are presented in shaded boxes
- a summary of the current position in each state and territory at 31 December 2013
- a summary timeline for each state and territory depicting the major changes.

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<sup>127</sup> Note that the state and territory laws synthesised and traced below do not contain references to the Commonwealth provisions under the *Family Law Act*, which apply nationally.

## 3.1 AUSTRALIAN CAPITAL TERRITORY

### 3.1.1 The first legislation

#### ***Children's Services Ordinance 1986 (No 13): 1 June 1997***

When enacted in 1986, the *Children's Services Ordinance 1986* (No 13) contained a mandatory reporting provision in s 103(2). However, this provision did not commence for over a decade; it was only proclaimed to commence on **1 June 1997**.<sup>128</sup> The voluntary reporting provision in the *Children's Services Ordinance 1986* s 103(1) commenced on 26 April 1988.

The initial provision, commencing 1 June 1997, extended to suspicions on reasonable grounds that a child had been sexually abused. The duty was imposed on the following groups by s 103(2)(a)-(c):

medical practitioners, dentist, nurse, police officer, teachers, persons employed to counsel children in a school,  
departmental employees whose duties relate to child welfare, and  
persons providing childcare at licensed premises

Notification of children in need of care and of child abuse

103. (1) Where a person, on reasonable grounds, suspects that there exists, have existed or may come into existence with respect to a child such circumstances as may make it appropriate that proceedings should be taken with respect to the child under this Part, the person may notify the Youth Advocate of those circumstances or may cause the Youth Advocate to be so notified.

(2) Where—

(a) a medical practitioner, dentist, nurse, police officer, teacher or person employed to counsel children in a school, in the course of practising his or her profession or carrying on his or her calling in the Territory;

(b) a person employed in the Department or by the Health Authority whose duties include matters relating to children's welfare, in the course of performing those duties;  
or

(c) a person providing childcare at premises in respect of which a licence under Part VII is in force, in the course of providing that care, on reasonable grounds, suspects that a child has suffered physical injury (otherwise than by accident) or has been sexually abused, the person shall notify the Youth Advocate accordingly or cause the Youth Advocate to be so notified.

Penalty: \$1,000 or imprisonment for 6 months, or both.

#### **Precursors to and influences on the legislative change**

The Australian Law Reform Commission conducted an inquiry into child welfare and published its report in 1981.<sup>129</sup> In the course of the inquiry, the ALRC explored the issue

<sup>128</sup> Australian Capital Territory Gazette No S121, Wednesday 14 May 1997 (Chief Minister Kate Carnell).

<sup>129</sup> Australian Law Reform Commission, *Child Welfare*, Report No 18, Australian Government Publishing Service, Canberra, 1981.

of mandatory reporting. It concluded that the ACT should introduce mandatory reporting of physical abuse and sexual abuse.<sup>130</sup> One of the reasons given was that the experience of jurisdictions with mandatory reporting shows that more cases of serious abuse are brought to the attention of authorities.<sup>131</sup>

Despite this recommendation being made in 1981, it was another five years until a provision was enacted in 1986, in the *Children's Services Ordinance 1986* s 103. The Explanatory Statement to the Ordinance stated that it was informed by the ALRC Report on Child Welfare in the ACT. However, this provision was not proclaimed to commence, and lay idle for another 11 years. There is no clear indication in Hansard from 1986 of the reasons for this.<sup>132</sup>

The provisions finally commenced on 1 June 1997. Again, Hansard does not fully inform of the reasons for the delay, although there are implications made regarding a previous unwillingness to devote resources to the general area of child protection.<sup>133</sup>

### 3.1.2 Key changes

#### Changes after 1997

There were no changes to the duty between its commencement on 1 June 1997 and the repeal of the *Children's Services Act 1986*, which was replaced by the *Children and Young People Act 1999* (ACT) s 159(2).

#### ***Children and Young People Act 1999***

The *Children and Young People Act 1999* commenced on 10 May 2000. The duty was slightly reworded to clarify that the duty applied to reasonable suspicions of past sexual abuse or sexual abuse that was happening currently. The duty was also applied to a slightly broader range of reporter groups, as follows:

159 Mandatory reporting

(1) This section applies to a person who is—

(a) a doctor; or

(b) a registered dentist within the meaning given by the *Dentists Act 1931*, Section 3;

or

(c) a person who is an enrolled nurse or a registered nurse within the meaning of the *Nurses Act 1988*, Section 3; or

(d) a teacher at a school; or

(e) a police officer; or

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<sup>130</sup> Australian Law Reform Commission, *Child Welfare*, Report No 18, Australian Government Publishing Service, Canberra, 1981: see especially p xliv (Recommendation 106), and paragraphs 391 (p 300), and 396 (p 302).

<sup>131</sup> Australian Law Reform Commission, *Child Welfare*, Report No 18, Australian Government Publishing Service, Canberra, 1981, p 297 n 59. This finding would be reproduced and reiterated as the policy reason for mandatory reporting of serious child abuse in other jurisdictions such as Victoria: see Part 3.7.

<sup>132</sup> Parliamentary Debates, Australian Capital Territory, 3 March 1986, p 3877–3882; 4 March 1986, p 3883–3889.

<sup>133</sup> ACT Legislative Assembly, Parliamentary Debates, 21 June 1995, p 982–985; 17 April 1996, p 1021ff, 1024–1026.

- (f) a person employed to counsel children or young people at a school; or
- (g) a person caring for a child at a childcare centre; or
- (h) a person coordinating or monitoring the provision of home based care on behalf of a family day care scheme licensee; or
- (i) a public servant who, in the course of his or her employment, provides services related to the health or wellbeing of children, young people or families; or
- (j) the community advocate; or
- (k) the official visitor; or
- (l) a prescribed person.

As in other jurisdictions, voluntary reports could be made of situations outside the mandatory reporting duty (s 158). For mandated reports, immunity was conferred by s 163(1)(a) and (b). Confidentiality was conferred by ss 404 and 405. Uniquely in Australia, the Australian Capital Territory penalty provision included the possibility of imprisonment: s 159(2) set a maximum penalty of 50 penalty units (at the time, a penalty unit was \$100, hence \$5000), 6 months' imprisonment, or both.

### **New excuse in 159(3)**

However, it can also be noted that a new excuse for not reporting was inserted into the Act. Section 159(3) provided an excuse for not reporting and was inserted by *Children and Young People Amendment Act 2006 (Act 6)* s 16, which commenced on 1 August 2006. The excuse applied if a reporter had a reasonable belief that someone else has made a report about the same child or young person in relation to the same abuse and the other person reported the same reasons for their belief as the person has for their belief.

### **Addition of midwives as a mandated reporter group**

Midwives were added as a reporter group in 159(1)(e). This occurred when the *Health Legislation Amendment Act 2006 (No 2)* Sch 2 Pt 2.2 commenced on 18 November 2006, which renumbered subsections in s 159(1) and added midwives as a reporter group:

- (c) a nurse; or
- (ca) an enrolled nurse; or
- (cb) a midwife

#### **Precursors to and influences on the legislative change**

It can be noted that a Parliamentary Committee Inquiry recommended in 2003 that the government review the penalty for failing to report, due to a concern of a widespread lack of compliance.<sup>134</sup> However, no such amendment has been made.

In 2004, the Vardon Report<sup>135</sup> recommended that mandatory reporting should not be expanded<sup>136</sup>, although it did not recommend removing the requirement to report child sexual abuse.

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<sup>134</sup> Legislative Assembly for the Australian Capital Territory, Standing Committee on Community Services and Social Equity, *The rights, interests and wellbeing of children and young people*, Report No 3, 2003, Recommendation 25, p 91–92. In Recommendation 26, this Committee also recommended the expansion of mandatory reporting to cases of serious neglect, but this has not occurred.

## ***Children and Young Persons Act 2008 (commencing 27 October 2008)***

The *Children and Young Persons Act 2008* replaced the *Children and Young Persons Act 1999*, commencing 27 October 2008. The *Children and Young Persons Act 2008* made the following changes:

- Some provisions were renumbered (the key mandated reporting provision, formerly s 159, was renumbered s 356, without changing the scope; the offence provision for a false or misleading mandatory report is in s 358; immunity was provided, in s 874; confidentiality was provided, in s 857; the excuse in the former s 159(3) was renumbered s 357(1) ie where a reporter has a reasonable belief that someone else has made a report about the same child or young person in relation to the same abuse, and the other person reported the same reasons for their belief as the person has for their belief.
- There was a clarification of the scope of some mandated reporter groups (s 356) by stating that:
  - ‘teacher’ at a school includes a teacher’s assistant or aide if the person is in paid employment at the school
  - person caring for a child at a childcare centre includes a childcare assistant or aide caring for a child at the childcare centre if they are in paid employment there (but not volunteers caring for a child).
- A new excuse was added by s 357(2) for not reporting in situations where a reporter had a reasonable belief that physical injury was caused to a child by another child or young person, and a person with parental responsibility for the child is willing and able to protect the child from further injury.

### **Precursors to and influences on the legislative change**

Hansard indicates that these changes responded to perceived confusion about who was a mandated reporter, and duplicate reporting of the same situation by employees of the same organisation.<sup>137</sup>

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<sup>135</sup> Commissioner for Public Administration, *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management*, 2004, Canberra (the Vardon Report). The impetus for the Vardon Report was the Chief Executive of the Department of Education, Youth and Family Services informing the responsible Minister that the Department had failed to comply with s. 162(2) of the Children and Young People Act 1999 since its enactment in May 2000. Section 162(2) of the Children and Young People Act provides children already in the care and protection of the Chief Executive – the Territory Parent – with additional protection through the advocacy and action of an external scrutiny agent, the Office of the Community Advocate. The provision states that if the chief executive has parental responsibility for a child about whom a report under s158 or s159 is made at the time of reporting, the chief executive must provide a copy of any record mentioned in subsection (1)(a) about the report to the Community Advocate as soon as practicable. This means that children who have already been removed from their families for safety reasons but are subject to further child protection reports must be afforded additional protection and advocacy.

<sup>136</sup> Commissioner for Public Administration, *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management*, 2004, Canberra (the Vardon Report), Recommendation 6.1, p 118; see p 115–118.

<sup>137</sup> ACT Legislative Assembly, Parliamentary Debates, 15 December 2005, p 4887 (Mr Stanhope), 7 March 2006, p 406 (Mrs Burke).

Several other amendments have been made since 2008.

### **Change in penalty (commencing 21 October 2009)**

The penalty was unchanged in its form but in substance it is higher, due to changes in the definition of a 'penalty unit'. A penalty unit was redefined as \$110 in the *Legislation Act s 133*, by the *Legislation (Penalty Units) Amendment Act 2009* (No 35), so from 21 October 2009 to 31 December 2012 the penalty was 50 penalty units (\$5,500), 6 months' imprisonment, or both.

### **New reporter group: home education inspectors (commencing 30 September 2010)**

An addition was made to the list of mandated reporters in s 356(2)(g) of 'persons authorised to inspect education programs, materials or other records used for home education of a child or young person' as a mandated reporter group (inserted by *Children and Young People Amendment Act 2010* (No 2)).

Hence, since 30 September 2010, the reporting duty and the list of mandated reporters in the Australian Capital Territory has been as follows:

356 Offence – mandatory reporting of abuse

(1) A person commits an offence if –

(a) the person is a mandated reporter; and

(b) the person is an adult; and

(c) the person believes on reasonable grounds that a child or young person has experienced, or is experiencing –

(i) sexual abuse; or

(ii) non-accidental physical injury; and

(d) the person's reasons for the belief arise from information obtained by the person during the course of, or because of, the person's work (whether paid or unpaid); and

(e) the person does not, as soon as practicable after forming the belief, report (a mandatory report) to the director-general –

(i) the child's or young person's name or description; and

(ii) the reasons for the person's belief.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(2) In this section:

**mandated reporter** – each of the following people is a **mandated reporter**:

(a) a doctor;

(b) a dentist;

(c) a nurse;

(d) an enrolled nurse;

(e) a midwife;

(f) a teacher at a school;

(g) a person authorised to inspect education programs, materials or other records used for home education of a child or young person under the *Education Act 2004*;

(h) a police officer;

(i) a person employed to counsel children or young people at a school;

(j) a person caring for a child at a childcare centre;

(k) a person coordinating or monitoring home-based care for a family day care scheme proprietor;

(l) a public servant who, in the course of employment as a public servant, works with, or provides services personally to, children and young people or families;

(m) the public advocate;



(n) an official visitor;

(o) a person who, in the course of the person's employment, has contact with or provides services to children, young people and their families and is prescribed by regulation.

***person caring for a child at a childcare centre*** includes a childcare assistant or aide caring for a child at the childcare centre if the assistant or aide is in paid employment at the childcare centre, but does not include anyone caring for a child as an unpaid volunteer.

***teacher***, at a school, includes a teacher's assistant or aide if the assistant or aide is in paid employment at the school.

### **Summary of current position: Australian Capital Territory**

The duty to report child sexual abuse is applied to a wide range of professionals in the ACT. A substantial penalty is provided, and uniquely in Australia includes the possibility of imprisonment. The duty to report is limited to reasonable suspicions of abuse that a child has experienced or is experiencing sexual abuse and therefore does not apply to suspected likely future abuse.

### 3.1.3 Timeline showing key developments, Australian Capital Territory

**1969:** no mandatory reporting

**1 June 1997:** Duty imposed on medical practitioners, dentist, nurse, police officer, teachers, persons employed to counsel children in a school, departmental employees whose duties relate to child welfare, and persons providing childcare at licensed premises

**27 October 2008:**  
Clarification that  
paid teacher  
aides and  
childcare centre  
carers are  
mandated

1969	1986	1997	2006	2007	2008	2009	2010	2011	2012	2013
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1969	1986	1997	2006	2007	2008	2009	2010	2011	2012	2013
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1969	1986	1997	2006	2007	2008	2009	2010	2011	2012	2013
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1969	1986	1997	2006	2007	2008	2009	2010	2011	2012	2013
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1969	1986	1997	2006	2007	2008	2009	2010	2011	2012	2013
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1969	1986	1997	2006	2007	2008	2009	2010	2011	2012	2013
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**4 June 1986:**  
Children's  
Services  
Ordinance s  
103 contains  
reporting duty:  
provision did  
not commence

**18 November 2006:** Midwives added as a reporter group

## 3.2 NEW SOUTH WALES

### 3.2.1 The first legislation

Child welfare legislation had existed in New South Wales for many decades<sup>138</sup>, but it was not until 1 July 1977 that new provisions required any member of a professional group to report a named type of abuse. The *Child Welfare (Amendment) Act 1977* (No 20) required medical practitioners to report ‘reasonable grounds to suspect that a child has been assaulted, ill-treated or exposed’, through Schedule 5 adding a new s 148B to the *Child Welfare Act 1939* (No 17). This commenced on **1 July 1977**.<sup>139</sup> Arguably, on a construction of the Act and its context, this duty would apply to sexual assault as a species of ‘assault’, even though sexual assault or abuse was not expressly included in the provision; case law also indicates that sexual assault is able to be treated as a category of ‘neglect’.<sup>140</sup> However, Hansard indicates that the provisions were designed to respond to physical abuse.<sup>141</sup> Any remaining doubt about this would be removed in 1987.

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<sup>138</sup> As long ago as 1939, New South Wales legislation created offences specifically regarding child abuse and neglect. The *Child Welfare Act 1939* (NSW) s 148(1) provided that ‘any person, whether or not the parent of the child or young person, who without reasonable excuse neglects to provide adequate and proper food, nursing, clothing, medical aid, or lodging for any child or young person in his care’ would commit an offence. Section 149(1) made it an offence for any person to assault, ill-treat, or expose any child or young person, if it resulted or appears likely to result in bodily suffering or permanent or serious injury to the child’s health.

<sup>139</sup> Proclaimed by New South Wales Government Gazette No 68, 24 June 1977, p 2508.

<sup>140</sup> ‘Neglect’ was defined extensively in s 72, but the concepts of ‘assault’ and ‘ill-treatment’ were not defined. Section 72(d) included as a species of ‘neglect, a situation of a child being ‘ill-treated or exposed’, and s 72(j) classed a child as neglected if being under ‘improper guardianship’. In *McMahon-Winter v Larcombe* [1978] 2 NSWLR 155, a father’s alleged indecent assault of his five-year-old son was treated as ‘neglect’ under s 72(j) for this purpose (although s 72(d) seems more applicable, and at the time, such an act also breached the *Crimes Act 1900* s 81, being ‘an indecent assault upon a male person of whatever age, with or without the consent of such person’).

There is other case law on s 148B, which not only supports this interpretation of the applicability of s 72(d) to sexual abuse, but which also concerns issues related, but peripheral to, the core subject matter of this report. In particular, there is a series of cases regarding the duty of care owed by the department to the child in the exercise of its duty under s 148(5) to investigate a mandated report and take such action as thought appropriate. In *TC v State of New South Wales* [1999] NSWSC 31 (Studdert J); *TC v State of New South Wales* [2000] NSWSC 292 (Studdert J); *TC v State of New South Wales* [2001] NSWCA 380, it was accepted that a government department does owe a duty of care to a child who is the subject of a report of suspected sexual abuse, and that the measure of that duty is to exercise reasonable care in the discharge of the response required in relation to that report (including timely response: see at first instance Studdert J at [94–185; 186–191]). This case involved an unsuccessful claim for damages for the department’s alleged negligent failure to promptly investigate complaints of child sexual abuse. It was found that a duty was owed to the child, and that there had been two breaches of the duty, but that the breaches did not cause the plaintiff’s alleged damage. In *MA v Swanson* [2004] NSWSC 30, where a child and the child’s parents claimed damages for being removed from the home after an investigation in response to a report, it was held that no duty of care is owed, as such a duty would be inconsistent with the department’s statutory obligations to respond to reports.

See also *SB v State of New South Wales* [2004] VSC 514, where Redlich J found the state owed the plaintiff (who had been made a ward of the state when an infant) a duty to exercise reasonable care in restoring (and maintaining) her living arrangements with her biological father, after she had been sexually abused by her foster father, and the subject of a child protection notification under the *Child Welfare Act*. Because it was aware of her sexual abuse by her foster father, the department knew of her vulnerability and had breached its duty of care to her in light of this knowledge and the relationship of guardian and ward that existed between them (see Redlich J at [294–307]). The plaintiff was removed from the care of the foster father after she disclosed sexual abuse to her school counsellor (2 November 1983); after an initial placement broke down, she was placed in March 1984 into

### 3.2.2 Key changes

#### *Children (Care and Protection) Act 1987*

A decade later, this mandatory reporting provision was (more clearly) expanded when medical practitioners were required to report suspected child sexual abuse by the *Children (Care and Protection) Act 1987* (No 54) ss 22(2)(a) and 22(4). The Act clearly applied to sexual abuse through the definition in s 3(1) of ‘abuse’ clearly including sexual assault. At this time, a ‘child’ was defined as a person aged under 18 (s 3(1)). These provisions commenced on **18 January 1988**.<sup>142</sup>

Also at this time, two more future expansions to the law were enabled. First, s 22(2)(b) enabled other professions to be added by Regulation to the category of mandated reporters. Second, s 22(3) enabled Regulations to require other professions to report sexual abuse.

#### **Change in definition of ‘child’**

The *Children (Care and Protection) Amendment Act 1987* (No 269) Sched 1 (2) amended the definition of ‘child’ to a person aged under 16. This amendment commenced on 13 January 1988.

#### **Declaration of reporter groups**

One of the future expansions enabled by the *Children (Care and Protection) Act 1987* (NSW) ss 22(2)(b) and s 22(3), was realised on 19 July 1987 when subordinate legislation designated **teachers and other school staff (counsellors, social workers and early childhood teachers at schools)** as being required to report suspected child sexual abuse.<sup>143</sup> This commenced on **18 January 1988**.<sup>144</sup>

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the care of her biological father, who she hardly knew and who had barely seen her while she was in care. Her biological father then sexually abused her for a period of approximately 10 years and she gave birth to two children by him. Redlich J found that the duty was breached, not by the initial restoration, but by failure to act once there was sufficient evidence that she was being abused by her biological father: [524–525].

In *TB v State of New South Wales* [2009] NSWSC 326; *DC v State of New South Wales* [2009] NSWSC 297 (decisions delivered together on 28 April 2009 in two cases concerning TB and DC, who are sisters), Mathews J held that while a duty of care exists in relation to the discharge of the mandatory reporting obligations – as held by Studdert J in *TC* – its scope does not necessarily, as a matter of law, require the department to make subsequent reports to the police: [56–66]. However, on appeal, in *DC v State of New South Wales* [2010] NSWCA 15, the New South Wales Court of Appeal allowed the appeal and accepted that the plaintiffs’ statement of claim was wide enough to embrace the argument that in the circumstances of the case, such a failure to report to police may have breached the duty of care (but did not necessarily as a matter of law automatically breach the duty: [47–57].

<sup>141</sup> Parliamentary Debates, Legislative Assembly, New South Wales, 2 March 1977, p 4701ff, 4704ff (Mr Jackson); 8 March 1977, p 4858ff.

<sup>142</sup> Proclaimed by New South Wales Government Gazette No 2, 8 January 1988, p 12. The *Child Welfare Act 1939* was repealed by the *Miscellaneous Acts (Community Welfare) Repeal and Amendment Act 1987* (No 58) s 3.

<sup>143</sup> *Children (Care and Protection – General) Regulation 1988* r 10(1). There is a complex legislative history behind this development but in essence the change was made by a Regulation amending the *Child Welfare Regulation 1940*, inserting r 74, which contained the duty. After enactment of the *Children (Care and Protection) Act 1987*, the *Children (Care and Protection – General) Regulation 1988* (NSW) r 10 embodied the duty, commencing on 18 January 1988: r 2. Regulation 10(1) named teachers, counsellors, social workers and early childhood teachers at schools as reporters, and r 10(3) defined a ‘school’ as a state school or a registered school within the meaning of the *Education and Public Instruction Act 1987*, which effectively included nongovernment schools within the remit of the reporting duty. On 1 September 1996, the *Children (Care and Protection) Regulation 1996* (No 401) repealed the *Children (Care and Protection – General) Regulation 1988* and replaced it with a substantially identical

### Precursors to and influences on the legislative change

In the discussion of the *Children (Care and Protection) Bill 1987* detailed in Hansard, there are no clear references to the reporter groups being expanded.<sup>145</sup>

## ***Children and Young Persons (Care and Protection) Act 1998 (No 157)***

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) imposed a new reporting framework including a broad range of mandatory reporting obligations. The relevant provisions (ss 23 and 27) commenced on 18 December 2000.<sup>146</sup>

Under s 23, the duty applied to a broad range of child abuse and neglect, including sexual abuse. The state of mind activating the duty was 'reasonable grounds to suspect a child is at risk of harm'. The duty applied to both suspected past or presently occurring harm, and to risk of suspected future harm.

Under s 27, the duty was extended to a broad range of professionals in professions including education, health, welfare and law enforcement who delivered services to children, and to those in management positions in these organisations. The penalty was 200 penalty units, which equated to \$22,000. A limiting feature in this legislation was that a 'child' was defined as a person under 16; hence the reporting duty only applied to those aged 15 or under (s 3). Immunity from proceedings was provided by s 29(1)(a)–(e). Confidentiality was conferred by s 29(1)(f).<sup>147</sup>

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provision in r 16, which provided that for the purposes of s 22(3), the same four groups were prescribed as reporters; curiously r 16(3) defined a 'school' as a government school within the meaning of the *Education Reform Act 1990*. Subsequently, the *Children (Care and Protection) Amendment (Notification of Child Abuse) Regulation 1997* (No 101) extended the duty to teachers at registered non-government schools, with r 2 adding 'or a registered non-government school' to r 16 of the 1996 Regulation.

<sup>144</sup> Children (Care and Protection – General) Regulation 1988 r 2.

<sup>145</sup> See the second reading speeches in either House (New South Wales, Parliamentary Debates, House of Assembly, 8 April 1987, Mr Aquilina, p 10,535ff; Legislative Council, 13 May 1987, Mr Hallam, p 11,709ff).

<sup>146</sup> Proclaimed by New South Wales Government Gazette No 159, 8 December 2000, p 12778. An associated provision, s 122, required reports by persons providing residential accommodation of situations where a child was suspected of living away from home without parental permission. This is somewhat different to a standard mandatory reporting provision as its main purpose was to avoid wasting police resources searching for missing children whose whereabouts were known to police or the Director-General.

<sup>147</sup> As in other jurisdictions, provision was made for voluntary reports by non-mandated reporters (s 24). In addition, s 20 provided that a child or young person may voluntarily seek assistance from the Director-General. Section 21 enabled parents, children and young persons to seek assistance to obtain services enabling the child to remain in or return to the child's family.

## A child 'at risk of harm'

For the purpose of the mandatory reporting duty, a child was defined as being 'at risk of harm' by s 23 'if current concerns existed for the safety, welfare or wellbeing of the child' because of any of the following circumstances:

- (c) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated

The definition combined with the reporting provision in s 27 as follows:

### 27 Mandatory reporting

(1) This section applies to:

- (a) a person 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, and
- (b) a person who holds a management position in an organisation the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children.

(2) If:

- (a) a person to whom this section applies has reasonable grounds to suspect that a child is at risk of harm, and
- (b) those grounds arise during the course of or from the person's work, the person must, as soon as practicable, report to the Director-General the name, or a description, of the child and the grounds for suspecting that the child is at risk of harm.

### Precursors to and influences on the legislative change

*Wood Royal Commission into the NSW Police Service (The Paedophile Inquiry)*<sup>148</sup>

This Royal Commission was instigated after evidence was disclosed of police involvement in concealing organised paedophile activity in New South Wales, some of which was alleged to involve prominent members of society. While it had a broad-ranging remit, the Royal Commission inquired into the sufficiency of the monitoring and screening processes of government departments and agencies to protect children in their care or under their supervision from sexual abuse (p 21, Vol 4).

The Commission concluded that the mandatory reporting duty should be extended to the named categories of reporters on the basis that the mandatory reporting duty (p 1183):

constitutes an important part of the system for the reception and dissemination at an official level, of information concerning child sexual abuse. The repetitive nature of the offence, its considerable under-reporting, and the risks in allowing a known or suspected offender to remain unreported are such that its impact should not be minimised.

Accordingly, Recommendation 112 (p 1197–1198) urged the extension (by Regulations)

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<sup>148</sup> The Hon Justice J Wood, *Royal Commission into the NSW Police Service Final Report (Volumes 4 and 5: The Paedophile Inquiry)*, Government of the State of New South Wales, Sydney, 26 August 1997, <http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>.

of the mandatory reporting obligations under the *Children (Care and Protection) Act 1987* to a wider category of prescribed persons, to include, in addition to those already named:

- chief executives of bodies conducting schools
- persons in charge of childcare centres
- chief executives or persons in charge of bodies providing welfare, social and sporting activities involving children
- persons in charge of residential care centres and refuges for children
- social workers, welfare workers and youth workers outside schools
- health workers generally.

The second reading speech detailed in Hansard indicates that the amendment aligned with the recommendation made by Justice Wood.<sup>149</sup>

### ***Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13, Schedule 1.1***

After the Wood Inquiry into child protective services in New South Wales (see below), several substantial amendments were introduced. Most of these are more germane to reporting of other kinds of child abuse, but two are notable in the context of sexual abuse.

#### **Change to concept of harm – ‘significant’ harm (commencing 24 January 2010)**

The *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13* (hereafter referred to as the Wood legislation) added a qualification of ‘significant harm’ to the reporting duty in s 23 definition of ‘risk of harm’ (Schedule 1.1). This limited the class of reportable cases in a clearer manner than had previously existed (Schedule 1.1[1] and [2]). This was achieved by:

- changing the heading (so it reads ‘Section 23 Child or young person at risk of significant harm’)
- adding the word ‘significant’ to s 23(1) (so the sentence reads: ‘a child or young person is at risk of significant harm’ rather than the previous ‘at risk of harm’)
- adding the words ‘to a significant extent’ so the provision reads as follows:

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<sup>149</sup> Parliamentary Debates, Legislative Assembly, New South Wales, 11 November 1998, p 9761. Faye Lo Po, Minister for Community Services, introducing the *Children and Young Persons (Care and Protection) Bill* stated: Consistent with the recommendations of the police royal commission, this bill significantly expands the range of professionals required to report circumstances where a child is at risk of harm. These will now include all those who in the course of their professional work or other paid employment deliver health care, welfare, education, children’s services, residential or law enforcement services to children. The requirement also includes managers and supervisors in these areas. The proposed reforms reflected in clause 27 will have the benefit of providing much greater clarity to the law on mandatory reporting. This reform will allow for a consistent approach and also make a clear statement to the community about the high expectations placed on those who are in the privileged position of working with children and young people. This was confirmed in the Parliamentary Debates, Legislative Council, New South Wales, 1 December 1998, p 10899, by the Attorney-General (Jeff Shaw).

- 23 Child or young person at risk of significant harm
- For the purposes of this Part and Part 3, a child or young person is at risk of significant harm if current concerns exist for the safety, welfare or well-being of the child or young person because of the presence, to a significant extent, of any one or more of the following circumstances.

Since sexual abuse always involves significant harm, this change does not substantially alter the position, except perhaps in unusual cases.

### **Removing the penalty from s 27(2) (commencing 24 January 2010)**

The Wood legislation removed the penalty from s 27 (*Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* No 13, Schedule 1.1 [7]).<sup>150</sup> New South Wales is now the only jurisdiction in Australia which does not have a legislative penalty for failure to report.<sup>151</sup>

#### **Precursors to and influences on the legislative change**

#### **Conclusions of the Wood Report of the Special Committee of Inquiry into Child Protection Services in New South Wales and reforms in 2010**

Another inquiry into child protection was conducted by Justice Wood in New South Wales, a decade after the inquiry into the police service and paedophilia. Completed in 2008, this inquiry investigated Child Protective Services in New South Wales.<sup>152</sup> It was instigated in response to the deaths of several children in tragic circumstances.

<sup>150</sup> Amendments to the NSW *Children and Young Persons (Care and Protection) Act 1998* made by the Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 related to the Wood Inquiry recommendations 6.2 and 10.1.

For completeness, while due to their nature reports of sexual abuse should still be made to the Director-General, it can also be noted that to enable the new focus on differential response which was promoted by the Wood legislation, the amendments also added a new s 27A (Sch 1.1 [8]). This enabled mandated reporters to make a report to the assessment officer of designated agencies who had created such arrangements (child wellbeing units: eg in health, education, police and juvenile justice) (s 27A(2)), and this report would meet the mandated reporter's duty under s 27 (s 27A(6)). After receiving the report, the assessment officer is to assess whether the matter should be reported to the Director-General under s 27 (s 27A(3)).

If so, then the assessment officer or the reporter must report the matter to the Director-General (s 27A(4)).

If not, the assessor or the staff member may, if either have concerns for the wellbeing for the child, make such referral or take such action as considered necessary or appropriate (or as is reasonably available) to safeguard or promote the safety, welfare and well-being of the child (s 27A(5)).

Under these arrangements, the normal protections to reporters are provided (s 29(1)(a)-(c) provides immunity; s 29(1)(f) confers confidentiality). Protocols may also be in place to permit schools to report via principals.

<sup>151</sup> Although as mentioned in Part 2.3, other consequences and causes of action may be available.

<sup>152</sup> J. Wood, *Report of the Special Committee of Inquiry into Child Protection Services in New South Wales*, 2008, Volume 1, <http://www.lawlink.nsw.gov.au/cpsinquiry>. The terms of reference were to conduct an inquiry to determine what changes within the child protection system are required to cope with future levels of demand once the current reforms to that system are completed and specifically to examine, report on and make recommendations in relation to: the system for reporting of child abuse and neglect, including mandatory reporting, reporting thresholds and feedback to reporters; management of reports, including the adequacy and efficiency of systems and processes for intake, assessment, prioritisation, investigation and decision-making; management of cases requiring ongoing work, including referrals for services and monitoring and supervision of families; recording of essential information and capacity to collate and utilise data about the child protection



The Wood Inquiry noted that the child protection system in New South Wales was under strain. It noted that there 'was limited, and primarily academic support expressed to the Inquiry for abolition of the mandatory reporting provisions' in a general sense with the main claim being that the system was 'flooded with reports, the response to which used up scarce resources and diverted attention from those families whose children were in need of the State's intervention'.<sup>153</sup> This claim was effectively rejected by Commissioner Wood.<sup>154</sup>

The Inquiry concluded that 'the requirement to report should remain'<sup>155</sup>, for several reasons including that:<sup>156</sup>

- child protection system workers generally supported mandatory reporting while endorsing amendments to how it operated
- on a closer inspection of the data there was in fact no 'evidence of a flood of reports with a reduction in outcomes, at least by reference to investigations and substantiations'
- rather, a very large proportion of reports involved the same small group of children, and many reports were multiple reports about the same child or the same incident
- multiple reporting had increased
- the reporting of less serious circumstances had increased
- a decrease had occurred in the number of children subject to reports
- mandatory reporting is not the cause of undue increased reporting as reports increase in jurisdictions without mandatory reporting
- substantiation rates had almost doubled in three years
- reports receiving SAS 2 had more than doubled since 2004/05
- abolishing the laws may leave people obliged to report under industry policy without the protections in the legislation.

It was concluded that rather than abolishing the reporting laws, the system needed greater effectiveness in reporting and more appropriate treatment of cases, including by differential response.<sup>157</sup> In addition, amendments to the mandatory reporting provisions could be made to promote reports only being made about the kinds of case the system aimed to receive; namely, cases of *significant* abuse or harm. Furthermore, it was acknowledged that the substantial penalty in the provision may influence defensive reporting (at least in reporters from the education sector). Accordingly, Wood recommended that:

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system to target resources efficiently; professional capacity and professional supervision of the casework and allied staff; the adequacy of the current statutory framework for child protection including roles and responsibilities of mandatory reporters, DoCS, the courts and the oversight agencies; the adequacy of arrangements for inter-agency cooperation in child protection cases; the adequacy of arrangements for children in out of home care; and the adequacy of resources.

<sup>153</sup> Wood, Volume 1, p 179.

<sup>154</sup> For a detailed treatment of this see 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, p 302–338, 2012.

<sup>155</sup> Wood, Volume 1, p 181.

<sup>156</sup> Wood, Volume 1, p 181ff.

<sup>157</sup> Wood, Volume 1, p 181–182.

- ss 23–25 should be amended to insert ‘significant’ before the word ‘harm’ where it first occurs; and s27 amended to insert ‘significant’ before the word ‘harm’ wherever it occurs (Recommendation 6.2(a), p xiii, 197)
- the penalty should be removed (Recommendation 6.2(d), p xiii, 195–197).

Informed by these conclusions, the legislation was amended in 2010 to limit matters to be reported to cases of suspected risk of significant harm, rather than any harm.<sup>158</sup> The penalty was removed. The title of the amending legislation clearly indicates that the Wood Inquiry’s recommendations were the impetus for the changes, and this is further confirmed by Hansard.<sup>159</sup>

### Summary of current position

New South Wales applies the reporting duty to a very broad range of persons. The duty is worded in a somewhat complex fashion but applies to current concerns for the safety, welfare or well-being of a child because of a suspicion of the child having been, or being at risk of being, sexually abused. Uniquely, no penalty applies for noncompliance.

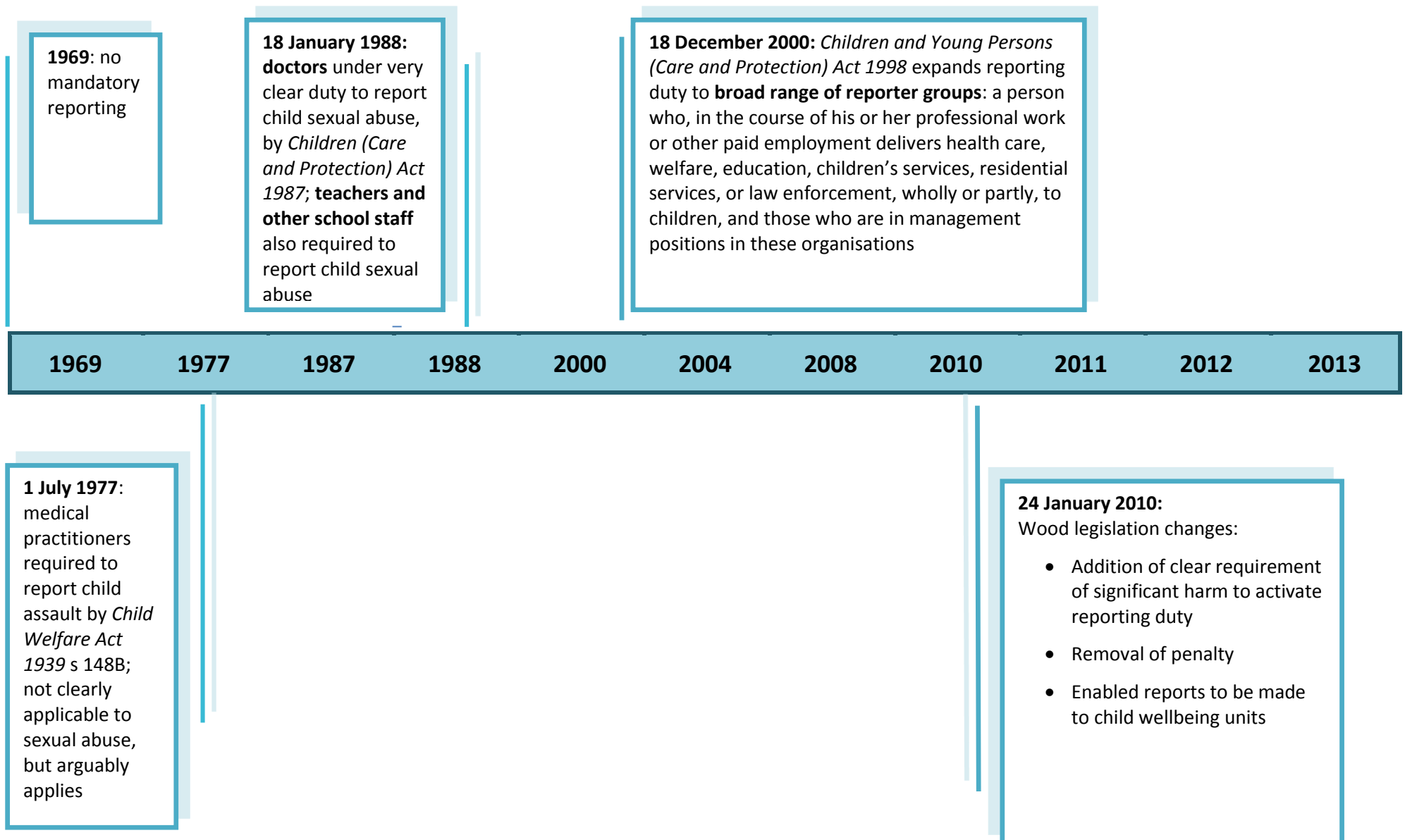
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<sup>158</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27, as amended by the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW) Sched 1.1.

<sup>159</sup> Further, see the discussion of the *Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009* in Parliamentary Debates, New South Wales, Legislative Assembly, 5 March 2009, p 13036ff; Legislative Council, 1 April 2009, p 14198ff.

### 3.2.3 Timeline showing key developments, New South Wales

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## 3.3 NORTHERN TERRITORY

### 3.3.1 The first legislation

#### Community Welfare Act 1983

The *Community Welfare Act 1983* (No 76) commenced on 20 April 1984. The Act contained wide mandatory reporting provisions which, uniquely for Australian jurisdictions, applied to *all persons* (s 14); a separate provision specifically applied to police officers (s 13).<sup>160</sup>

Section 14 required a person other than a member of the police force ‘who believes, on reasonable grounds, that a child has suffered or is suffering maltreatment’ to report it. Section 4(3) provided that a child<sup>161</sup> will have suffered ‘maltreatment’ to include situations where:

(d) he has been sexually abused or exploited, or where there is substantial risk of such abuse or exploitation occurring, **and** his parents, guardians or persons having the custody of him or her are unable or unwilling to protect him or her from such abuse or exploitation (author’s emphasis).

Because of this definition, the duty applied to sexual abuse thought to have already occurred or to be presently occurring, and to situations where there was believed to be a substantial risk of sexual abuse. However, according to its strict terms, the legislative duty only applied to cases where the reporter *also* thought the child’s parents, guardians or custodians were unable or unwilling to protect the child. At least according to its terms, this contracted the scope of the reporting provision to cases where the reporter believed a child had been sexually abused (or was at substantial risk of it) *and* the child’s parents were not willing or able to protect the child.<sup>162</sup>

The maximum penalty was \$500 (this would be increased in 2002 to 200 penalty units).<sup>163</sup> Immunity from liability for making a report was provided by s 14(2). Confidentiality was indirectly protected by s 97, although initially this was not as clear a protection as existed elsewhere.

This definition and the reporting duty remained essentially unchanged until a new legislative regime commenced in 2007.

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<sup>160</sup> **13. Investigation of maltreatment** – (1) Where a member of the Police Force believes on reasonable grounds that a child has suffered or is suffering maltreatment, he or she – (a) shall, as soon as practicable, notify the Minister of the circumstances and the knowledge that constitutes the reasonable grounds for his or her so believing; and (b) may investigate the circumstances to ascertain if the child has suffered or is suffering maltreatment. (2) Where a member of the Police Force carries out an investigation under subsection (1)(b), he or she shall, within 24 hours after completing the investigation, furnish to the Minister a report on his or her investigations and, if he or she is satisfied on reasonable grounds that the child has suffered maltreatment, all material facts on which the knowledge that constitutes the reasonable grounds for his or her belief is based.

<sup>161</sup> Defined as a person aged under 18: s 4(1).

<sup>162</sup> Similar to the approach still current in Victoria’s legislation; this approach effectively imports the concept of whether the child is in need of protection, rather than whether a child needs proper assistance and the case needs to be formally investigated by a suitable agency for the purpose of determining this. It is an unsound approach for sexual abuse. Whether this technical qualification affected actual reporting decisions is another question. This qualification would be removed in 2007.

<sup>163</sup> Sections 12–14 were amended by the *Community Welfare Amendment Act 2002* (Act No. 61, 2002; commenced 9 December 2002) s 10, which increased the maximum penalty from \$500 to 200 penalty units.

### **Precursors to and influences on the legislative change**

There do not appear to have been any formal government inquiries into child sexual abuse as a discrete phenomenon prior to this development. However, there was a review of the entire child welfare context. The legislative developments in the Northern Territory in 1983 followed a comprehensive review of child welfare and social welfare as a whole. A board of inquiry was established in 1978 to assess welfare needs in the Northern Territory, and this inquiry presented its report in 1979. Parliament conducted research into comparable legislation and this resulted in the presentation in 1983 of the *Community Welfare Bill*. From Hansard, it appears as if the child abuse reporting provisions had been enacted shortly before the introduction of the bill.<sup>164</sup>

## **3.3.2 Key changes**

### **Change in nomenclature from ‘maltreatment’ to ‘harm’ (commencing 8 December 2008)**

The *Care and Protection of Children Act 2007* (Act 37) received assent on 12 December 2007, and Chapter 2 Part 2.1 (the new mandatory reporting provisions) commenced on 8 December 2008.<sup>165</sup> Until then, the previous provisions continued. From 8 December 2008, the provisions in the *Care and Protection of Children Act 2007* applied, replacing the former *Community Welfare Act 1983*.

These new provisions in the *Care and Protection of Children Act 2007* had the following effects:

- The key change was replacing the concept of maltreatment with the concept of ‘harm’, which was defined very broadly in s 15, and included sexual abuse. ‘Harm’ was defined as:
  - (1) any significant detrimental effect caused by any act, omission or circumstance on:
    - (a) the physical, psychological or emotional wellbeing of the child; or
    - (b) the physical, psychological or emotional development of the child.
  - (2) Without limiting Subsection (1), harm can be caused by the following:
    - (a) physical, psychological or emotional abuse or neglect of the child;
    - (b) sexual abuse or other exploitation of the child;
    - (c) exposure of the child to physical violence.
- It is also significant that this new definition omitted the qualification that to have suffered reportable abuse or maltreatment, the child must be in a situation where the parents, caregivers or custodians are unable or unwilling to protect the child from such abuse or exploitation. This meant that the duty was broadened.
- Defining ‘exploitation’ (s 16) to include sexual and other forms of exploitation of the child. Section 16(2) non-exhaustively defined sexual exploitation as including (a) sexual abuse;

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<sup>164</sup> On the Child Welfare Bill generally, see Northern Territory, Legislative Assembly, Parliamentary Debates, 1 September 1983, p 1025ff. On Mr Tuxworth introducing the second reading of the bill, note the statement that ‘The recently introduced provisions for compulsory reporting of child abuse have been retained’ (Thursday 1 September, p 1026).

<sup>165</sup> Chapter 1 (definitions) commenced on 7 May 2008 and other provisions.

and (b) involving the child as a participant or spectator in (i) An act of a sexual nature; (ii) Prostitution; or (iii) A pornographic performance.

- Placing the reporting duty in s 26 in the following terms:
  - (1) A person is guilty of an offence if the person:
    - (a) believes, on reasonable grounds, that a child:
      - (i) has been or is likely to be a victim of a sexual offence; or
      - (ii) otherwise has suffered or is likely to suffer harm or exploitation; and
    - (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer.
- Immunity from proceedings was provided by s 27. Confidentiality was indirectly protected by s 97, although this was not as clear a protection as existed elsewhere. The maximum penalty was 200 penalty units.

### **Precursors to and influences on the legislative change**

The bill preceding the 2007 amendments was already in draft mode at the time of the release of the Report of the *Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (the “Little Children are Sacred” Report).<sup>166</sup> The bill was placed on hold to enable consideration of the Inquiry’s recommendations. The key change effected by the bill was to remove the limit on the reporting duty presented by the protective parent qualification, which technically broadened the reporting duty. However, a problem was presented by s 26(1)(a)(i) as enacted in its initial form, which technically required people to report consensual sexual activity between children aged under 16; this would be remedied in 2009 (see below).

The *Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* was appointed in 2006 after revelations of endemic child sexual abuse and associated social problems affecting Indigenous children in the Northern Territory.<sup>167</sup> This Inquiry produced the report commonly referred to as the ‘Little Children are Sacred’ Report. The Inquiry found high rates of indigenous children in child sexual abuse cases, and high rates of sexually transmitted infections in children.<sup>168</sup> It found that many professionals (and non-professionals) were not reporting suspected sexual abuse, and had not been educated about their responsibilities, and it recommended that ‘an expanded program of mandatory reporting education and training of professionals be carried out as soon as possible’ (Recommendation 57), as well as the establishment of a child protection helpline to advise persons about what actions they could take if they suspected sexual abuse (Recommendation 58).<sup>169</sup> No further recommendations were made regarding legislative reform.<sup>170</sup>

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<sup>166</sup> R Wild and P Anderson, Ampe Akelyernemane Meke Mekarle (“Little Children Are Sacred”): Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Darwin, 2007, p 87.

<sup>167</sup> R Wild and P Anderson, Ampe Akelyernemane Meke Mekarle (“Little Children Are Sacred”): Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Darwin, 2007, p 41.

<sup>168</sup> See for example at p 14, 161–162ff (influence of alcohol on child sexual abuse); p 238 (STIs).

<sup>169</sup> R Wild and P Anderson, Ampe Akelyernemane Meke Mekarle (“Little Children Are Sacred”): Report of the Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Darwin, 2007, p 157, 160.

## Further significant change regarding sexual abuse reporting (commencing 1 September 2009)

The *Care and Protection of Children Amendment Act 2009 (Act 23)* repealed s 26 as it had been inserted by the *Care and Protection of Children Act 2007* and substituted a new s 26.<sup>171</sup> This had the effect of removing the problematic s 26(1)(a)(i) which previously technically required the reporting of consensual sexual activity between children under 16, and substituting a new s 26.

The new s 26:

- simplified but did not substantially alter the primary existing duty to report harm or exploitation, and likely harm or exploitation
- added duties to report selected sexual abuse scenarios as follows:
  - to report a belief on reasonable grounds that a child aged **less than 14** has been or is likely to be a victim of a sexual offence<sup>172</sup>, or an offence against s 128 of the Criminal Code (a child 16–17 years old and under the offender’s special care, eg teacher or step-parent)
  - for health practitioners, and others performing work of a kind prescribed by regulation, who believe on reasonable grounds that a child **aged 14 but less than 16** has been or is likely to be a victim of a sexual offence and the difference in age between the child and alleged offender is more than two years.

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<sup>170</sup> It can be noted that soon after the release of the Inquiry’s Report, the federal government intervened to enable health checks for children, control the sale of alcohol, and quarantine a component of welfare payments in cases of parental neglect: see the *Northern Territory National Emergency Response Act 2007*; *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*.

<sup>171</sup> Influenced by the federal government intervention? The provision read as follows: Section 26 – repeal, substitute: 26 Reporting obligations

(1) A person is guilty of an offence if the person:

(a) believes, on reasonable grounds, any of the following:

- (i) a child has suffered or is likely to suffer harm or exploitation;
- (ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence;
- (iii) a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code; and

(b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer:

- (i) that belief; and
- (ii) any knowledge of the person forming the grounds for that belief; and
- (iii) any factual circumstances on which that knowledge is based.

Maximum penalty: 200 penalty units.

(2) A person is guilty of an offence if the person:

- (a) is a health practitioner or someone who performs work of a kind that is prescribed by regulation; and
- (b) believes, on reasonable grounds: (i) that a child aged at least 14 years (but less than 16 years) has been or is likely to be a victim of a sexual offence; and (ii) that the difference in age between the child and alleged sexual offender is more than 2 years; and (c) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer: (i) that belief; and (ii) any knowledge of the person forming the grounds for that belief; and (iii) any factual circumstances on which that knowledge is based.

Maximum penalty: 200 penalty units.

<sup>172</sup> For the definition of ‘sexual offence’, see the *Sexual Offences (Evidence and Procedure) Act* s 3.

### **Precursors to and influences on the 2009 legislative change**

In Hansard, it is made clear that the *Care and Protection of Children Amendment Bill 2009* was enacted to remedy the previous problematic aspect of s 26, to further strengthen reporting in relation to child sexual abuse generally, and in particular to ensure that medical practitioners reported cases of children they saw who had contracted sexually transmitted infections or were pregnant.<sup>173</sup> In explaining the purpose of the amendment, it was explicitly stated in Parliament that one of the key questions underpinning the “Little Children are Sacred” Report and the federal government intervention was the inadequate reporting of child sexual abuse by clinicians. The Minister stated that ‘One of the positions I want to ensure ... is [that] every health practitioner across the Northern Territory needs to recognise we could not go back to a time when people did not report when a child came before them with STIs or was pregnant.’<sup>174</sup>

Finally, it can be noted that the *Report of the Board of Inquiry into the Child Protection System in the Northern Territory 2010* did not make any recommendations regarding the expansion or contraction of the mandatory reporting provisions.<sup>175</sup>

### **Summary of current position**

The mandatory reporting duty in the Northern Territory applies to all persons. There is a very high penalty for failure to report (maximum \$26,000).

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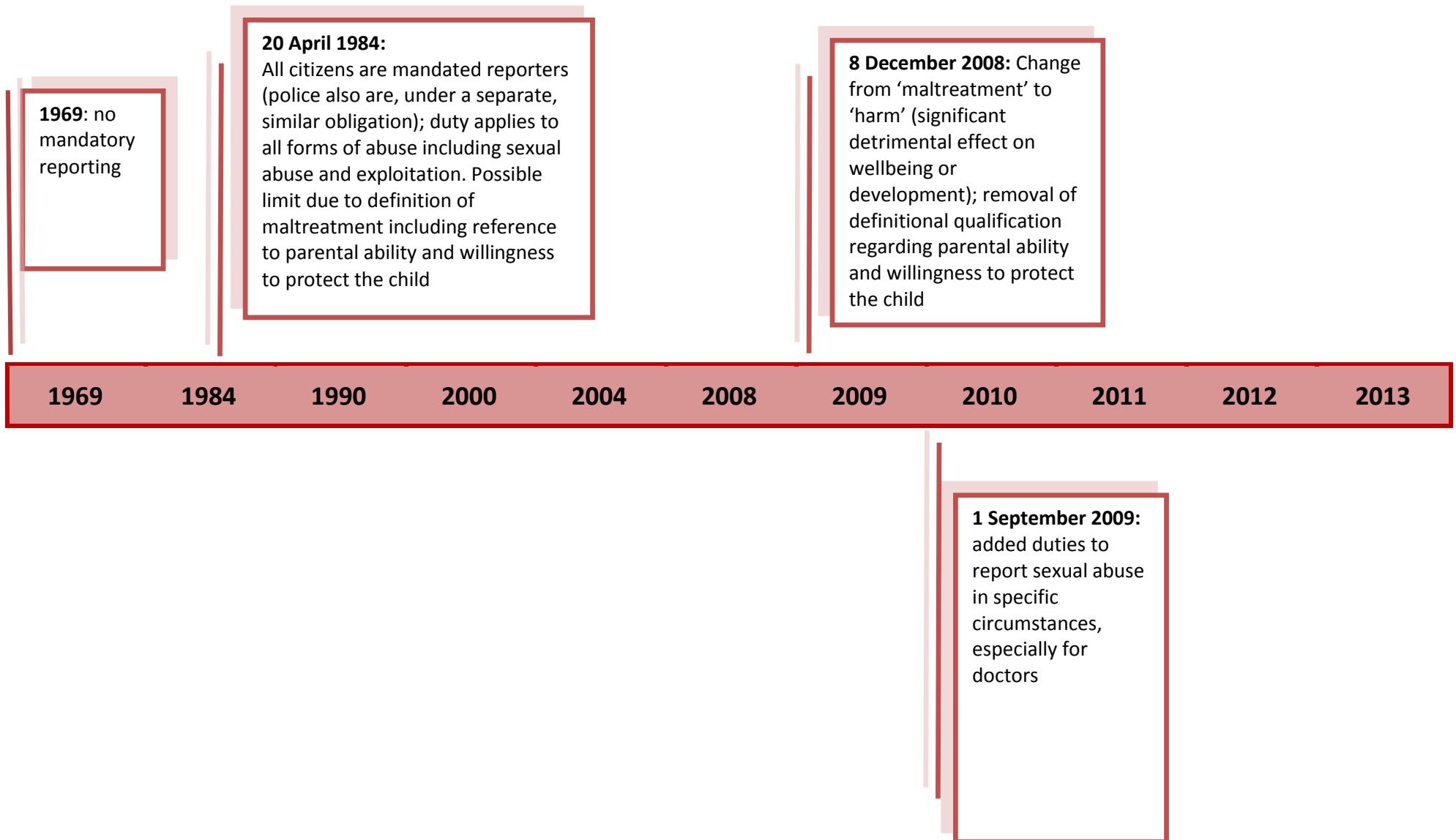
<sup>173</sup> Northern Territory, Parliamentary Debates, 17 August 2009 (Ms McCarthy); 20 August 2009 (Ms McCarthy). It can be noted that a bill presented by the opposition to amend s 26 was defeated (the *Care and Protection of Children Amendment (Reporting Obligations) Bill*: Northern Territory, Parliamentary Debates, 18 August 2009 (Ms Carney); 5 May 2010.

<sup>174</sup> Northern Territory, Parliamentary Debates, 20 August 2009 (Ms McCarthy, Minister for Children and Families).

<sup>175</sup> M Bamblett, H Bath, and R Roseby, Report of the Board of Inquiry into the Child Protection System in the Northern Territory (Growing Them Strong, Together: Promoting the safety and wellbeing of the Northern Territory’s children), Northern Territory Government, Darwin, 2010.



### 3.3.3 Timeline showing key developments, Northern Territory



## 3.4 QUEENSLAND

### 3.4.1 The first legislation

#### The original legislation: doctors (*Health Act 1937*)

In Queensland, as in many other jurisdictions, medical practitioners were the first mandated reporter group. The first legislative reporting duty was enacted in the *Health Act 1937* s76K(1), which commenced on **14 June 1980**.<sup>176</sup>

The provision was unlike any other in Australia. The provision required a ‘medical practitioner’ who suspects on reasonable grounds the ‘maltreatment or neglect of a child in such a manner as to subject or be likely to subject the child to unnecessary injury, suffering or danger’ to report within 24 hours to a person authorised under a regulation to be notified.

Apart from the stated concepts of ‘unnecessary injury, suffering or danger’, the terms ‘maltreatment’ and ‘neglect’ were not defined. The terms ‘unnecessary injury, suffering or danger’ were not otherwise defined. ‘Child’ was defined as a person under the age of 17 (s 76M). Immunity from proceedings was conferred by ss 76K(6) and (7). Also unusually, there was no penalty for failure to comply.

#### Precursors to and influences on the legislative change

The 1980 amendments were made through the *Health Act Amendment Act (No 26)* s 4 (commenced 14 June 1980). Prior to this, the provisions had been inserted in 1978<sup>177</sup>, but for reasons that are not explicit in the public record, were never proclaimed into force and did not commence. The 1978 amendment was apparently influenced by growing concern about the incidence of serious child physical abuse and lack of reporting of it by doctors, although concerns were noted also about sexual abuse and neglect.<sup>178</sup> The 1980 amendment was influenced by the same factors.<sup>179</sup> There are comments in Hansard about the need for other professionals such as teachers to report<sup>180</sup> but this issue was not further addressed and the initial legislation remained limited to a duty imposed on medical practitioners.

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<sup>176</sup> This provision was inserted in 1980 by the *Health Act Amendment Act (No 26)* s 4 (commenced 14 June 1980). Insubstantial amendments occurred in 1995 (Act No 57 s 4 sch 1); Act No 58 s 4 sch 2); and in 1998 (Act No 41 s 14(1) sch 1).

<sup>177</sup> The provisions had originally been inserted in 1978 by Act No 65 s 9 but were never proclaimed into force and did not commence. These uncommenced provisions were omitted in 1980 by Act No 26 s 3.

<sup>178</sup> Queensland Legislative Assembly, Parliamentary Debates, 14 September 1978, p 1745–1756 (initiation in committee); and second reading speeches on 24 October 1978 at p 2443–2461.

<sup>179</sup> Queensland Legislative Assembly, Parliamentary Debates, 27 March 1980, 3046–3047; and second reading speeches on 1 April 1980, p 3132–3141; see at p 3133 an indication that reporting in Brisbane was four to six times less than a comparable city in the USA which had mandatory reporting; see further an acknowledgment at p 3139 that reporting of cases was lower in Queensland than other jurisdictions.

<sup>180</sup> See for example Queensland Legislative Assembly, Parliamentary Debates, 24 October 1978, p 2450.

### 3.4.2 Key changes

The legislation has changed significantly in the last decade, but in different ways, for doctors and nurses, and teachers and school staff respectively. These groups are governed by different statutes in Queensland and they will be discussed in turn.

#### Doctors and nurses in Queensland

##### Major legislative change for doctors, and applying to nurses – broader duties (commencing 31 August 2005)

The *Child Safety Legislation Amendment Act (No. 2) 2004* (No 36)<sup>181</sup> amended the *Health Act 1937* to extend doctors' reporting duties and made the provisions much more specific and detailed. In a major development, these provisions were also extended to nurses. These provisions imposed a wide reporting duty for all four forms of child abuse and neglect including sexual abuse. The duty applied to an awareness or reasonable suspicion that abuse/neglect that had already occurred, and to suspected risk of harm.

The provisions had the following effects:

- Added a new s 76K containing new definitions of 'child' (an individual under 18), 'harm', 'professional' (a doctor or registered nurse) and 'registered nurse' (a person registered under the *Nursing Act 1992* as a registered nurse)
- 'Harm' to a child was defined in s 76K as meaning:
  - 'any detrimental effect on the child's physical, psychological or emotional wellbeing
  - (a) that is of a significant nature; and
  - (b) that has been caused by
    - (i) physical, psychological or emotional abuse or neglect; or
    - (ii) sexual abuse or exploitation'
- Section 76KC imposed the reporting duty in the following terms:
  - (1) This section applies if –
  - a professional becomes aware, or reasonably suspects, during the practice of his or her profession, that a child **has been, is being, or is likely to be, harmed**; and
  - as far as the professional is aware, no other professional has notified the chief executive (child safety) under this section about the harm or likely harm.
  - '(2) The professional must immediately give notice of the harm or likely harm to the chief executive (child safety) – orally; or by facsimile, email or similar communication.
  - (4) To remove any doubt, it is declared that a professional may need to seek further information about harm or likely harm to a child before forming a reasonable suspicion about the matter.

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<sup>181</sup> This Act commenced on 31 August 2005 (2005 SL No. 62).

- Under s 76KE if the notification required under 76KC or 76KD was not given, a maximum penalty was provided of 50 penalty units (\$3750)
- The *Child Protection Act 1999* ss 22 and 186 were expressly provided to be relevant to a professional giving a notice or other information under these provisions, by s 76KB(1)
- Confidentiality was also provided to notifiers by s 76KH.

The relevant provisions in the *Health Act 1937* were then placed into the *Public Health Act 2005* (No 48) (Qld), which commenced on 1 December 2005.<sup>182</sup> The *Public Health Act 2005* (No 48) Schedule 1 amended the *Health Act 1937* and omitted Part 3, which contained the reporting provisions.

#### **Precursors to and influences on the 2005 legislative change**

After revelations of child sexual abuse in foster care and deficient systemic responses to them were made known, the Queensland Crime and Misconduct Commission conducted two misconduct investigations and a public inquiry. The inquiry was the *Inquiry into Abuse of Children in Foster Care in Queensland*.<sup>183</sup> The Inquiry recommended that nurses (but not other professional groups) be added to doctors as mandated reporters.<sup>184</sup> The *Child Safety Legislation Amendment Bill 2004* (Qld) (No 2) clearly acknowledged the Inquiry and its recommendation as the impetus for the legislative change.<sup>185</sup>

#### **The current position for doctors and nurses under the *Public Health Act 2005***

Accordingly, since 1 December 2005 the relevant provisions for doctors and nurses have been in the *Public Health Act 2005*. The key provisions are in Chapter 5 Part 3. The provisions are unaltered from the original *Public Health Act 2005*, but are renumbered.

Section 158 defines relevant terms. Section 191 sets out the duty. The state of mind which activates the duty to report is 'aware, or reasonably suspects'. The duty applies to awareness or reasonable suspicion of past/presently occurring abuse meeting the definition of significant harm, and extends to suspected likely future abuse/risk of significant harm. The term 'harm' is defined in s 158 as 'any detrimental effect on the child's physical, psychological or emotional wellbeing (a) that is of a significant nature; and (b) that has been caused by (i) physical, psychological or emotional abuse or neglect; or (ii) sexual abuse or exploitation'. Section 195 provides protection

<sup>182</sup> The *Health Act 1937* (Qld) was amended by the *Child Safety Legislation Amendment Act (No 2) 2004* (Qld), with the relevant amending provisions in Pt 8 of that statute commencing on 31 August 2005 (SL 2005 No 62). The provisions in the *Health Act 1937* were later omitted and inserted into the *Public Health Act 2005* (Qld), operational on 1 March 2006.

<sup>183</sup> Queensland Crime and Misconduct Commission, *Inquiry into Abuse of Children in Foster Care in Queensland*, Brisbane, 2004.

<sup>184</sup> Queensland Crime and Misconduct Commission, *Inquiry into Abuse of Children in Foster Care in Queensland*, Brisbane, 2004, Recommendation 6.13, p 185.

<sup>185</sup> Queensland Legislative Assembly, Parliamentary Debates, 28 September 2004, p 2398–2401.

for giving information to professionals. Section 196 confers confidentiality on notifiers. The *Child Protection Act 1999* ss 22 and 186 are expressly provided to be relevant to a professional giving a notice or other information under these provisions, by the *Public Health Act* s 186(2). Section 193 is the offence provision (maximum 50 penalty units; which now equates to \$5500).

There have been no further changes since 2005, apart from the value of the penalty due to change in the definition of 'penalty unit' (see Table 8).

## Teachers and school staff in Queensland

### New duty for teachers to report sexual abuse (commencing 19 April 2004)

From **19 April 2004**, teachers were required to report reasonable suspicions of specific circumstances of suspected sexual abuse. The provisions were introduced into the *Education (General Provisions) Act 1989* (Qld) ss 146A–146B (applying to State and non-State schools respectively) by the *Education and Other Legislation (Student Protection) Amendment Act 2003* (Qld) (No 88 of 2003).<sup>186</sup>

However, this duty was very limited, as the legislation restricted the duty to cases of suspected sexual abuse **perpetrated by a school staff member**. The duty was also limited to suspected past and presently occurring abuse; it did not apply to suspected future cases. The provisions imposed an obligation on a staff member of a school who 'becomes aware, or reasonably suspects, that a student under 18 years of age attending the school has been sexually abused by someone else who is an employee of the school' to immediately give a written report about the abuse or suspected abuse to the school's principal or the principal's supervisor. It was an offence not to give such a report (s 146A(2); s 146B(2): maximum penalty of 20 penalty units (\$1500)). Reporters were granted immunity from civil and criminal liability connected with making the report (s 146A(6) and (7); s 146B(5) and (6)). Confidentiality was conferred by the *Child Protection Act 1999* (Qld) s 186.

#### Precursors to and influences on the legislative change

The new 2004 obligation was motivated by the findings of the 2003 Report Of The Board Of Inquiry Into Past Handling Of Complaints Of Sexual Abuse In The Anglican Church Diocese Of Brisbane.<sup>187</sup> In substance, the new duty was primarily directed at managing educational authorities' legal liability in cases of sexual abuse of students by school staff, rather than being concerned with child protection from all forms of sexual abuse. The explanatory notes to the *Education and Other Legislation (Student Protection) Amendment Bill 2003* state that the object of these provisions is to ensure

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<sup>186</sup> This Act was passed on 18 November 2003, but the provisions relevant here (in Part 4 of the amending Act) commenced on 19 April 2004. Under ss 365 and 366 (after amt from 146A and 146B, the teacher made the report to the principal; the principal was then required to report to the CE's nominee; the nominee was then required to report to the police: overall, a series of four steps in the reporting chain (s 146A). For non-state schools, there were only three steps (teacher – principal or director of school's governing body – police): s 146B.

<sup>187</sup> P O'Callaghan and F Briggs, Report Of The Board Of Inquiry Into Past Handling Of Complaints Of Sexual Abuse In The Anglican Church Diocese Of Brisbane, 2003.

there is an appropriate response to complaints of sexual abuse of school children by school-based employees. The Bill was motivated by the report of a Ministerial Taskforce which was formed to act on the recommendations of the Anglican Church Report. The explanatory notes observe that the Anglican Church Report ‘highlighted the issue of sexual abuse in schools and weaknesses in existing systems for checking and monitoring the suitability of teaching and non-teaching staff to work with children and for responding to complaints of sexual abuse perpetrated in school settings’.

### **Minor change to name of legislation for teachers (commencing 11 August 2006)**

There was no change to this situation until 2006, when the title of legislation changed to the *Education (General Provisions) Act 2006* (No. 39) commencing 11 August 2006. The key provisions were renumbered ss 364–366, with no change to their content.

### **Minor change to clarify children who were the object of the legislation’s concern**

Sections 365 and 366 were amended by the *Education and Training Legislation Amendment Act 2009* (No 40) to clarify that the duty applied to ‘any of the following’ who the staff member was aware or reasonably suspected had been sexually abused by another person who is an employee of the school:

- a student under 18 years attending the school
- a pre-preparatory age child registered in a pre-preparatory learning program at the school
- a person with a disability who is being provided with special education at the school.

### **Major amendment to require reports of all cases of sexual abuse, and likely future sexual abuse (commencing 9 July 2012)**

Substantial change occurred in 2012. The uniquely restricted position for teachers’ reporting of child sexual abuse was amended in 2012 by the *Education and Training Legislation Amendment Act 2011* (Qld) (No 39), which commenced on 9 July 2012. The key changes, in Part 3 of the amending Act, were:

- to define (non-exhaustively) the concept of ‘sexual abuse’
- to extend the reporting duty to all suspected cases of sexual abuse, without limiting the class of reportable cases by perpetrator
- to extend the reporting duty to suspected ‘likely sexual abuse’ (new ss 365A and 366A)
- to create in state schools a more direct chain of reporting (teacher to principal to police officer (3 steps); previously teacher to principal to CE’s nominee to police (4 steps))
- to enable delegation of the reporting function by a non-state school’s governing body director, both where the governing body has only one director (new s 366B(1) and (2)), and where there are more than one director (new s 366B(3) and (4)).

### Precursors to and influences on the legislative change

The most substantial amendments were a result of research in Queensland into the law, policy and practice of teachers' reporting of child sexual abuse, and recommendations for law reform made to Parliament and educational policy leaders.<sup>188</sup> The research recommended extending the reporting duty to all suspected cases of sexual abuse regardless of the perpetrator's identity (Recommendation 1, p 46); extending the duty to cases of suspected likely sexual abuse (Recommendation 2, p 46), and streamlining reporting processes (Recommendation 5 (p 55)).<sup>189</sup> This research was acknowledged in Hansard in introducing the bill, and in the Explanatory Notes.<sup>190</sup>

### Current position for Queensland teachers and school staff

Under the current law, the key provisions are in Chapter 12 Part 10 (ss 364–366B). Section 364 defines relevant terms, including 'employee' and 'sexual abuse'. Unlike the other Queensland legislation (the *Public Health Act 2005*), and in contrast to all other Australian jurisdictions except Western Australia, 'sexual abuse' is defined in s 364 in extensive conceptual terms which do not include plain explanations of the kinds of acts included – namely:

- 'sexual abuse' includes sexual behaviour involving the relevant person and another person in the following circumstances –
- (a) the other person bribes, coerces, exploits, threatens or is violent toward the relevant person;
  - (b) the relevant person has less power than the other person;
  - (c) there is a significant disparity between the relevant person and the other person in intellectual capacity or maturity.

Sections 365 and 366 set out the duty to report sexual abuse for staff members of state and non-state schools respectively. This duty applies to suspected cases of sexual abuse that have already occurred, or which are occurring. Sections 365A and 366A set out the duty for staff members of state and non-state schools respectively to report suspected likely sexual abuse. This duty applies to suspected cases of sexual abuse that have not yet occurred, but which are thought likely to occur (an example is where the suspicion arises by observing the child being groomed for abuse).

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<sup>188</sup> Mathews, Walsh, Butler, et al (2010).

<sup>189</sup> Mathews, Walsh, Butler, et al, (2010), 1–144. See further Mathews B, Walsh K, Rassafiani M, Butler D, and Farrell A, 'Teachers reporting suspected child sexual abuse: results of a three-state study' (2009) 32(3) *University of New South Wales Law Journal* 772–813; Mathews B, Cronan J, Walsh K, Butler D, and Farrell A, 'Teachers' policy-based duties to report child sexual abuse: a comparative study' (2008) 13(2) *Australia & New Zealand Journal of Law & Education* 23–37; Walsh K, Mathews B, Rassafiani M, Farrell A, and Butler D, 'Understanding teachers' reporting of child sexual abuse: Measurement methods matter' (2012) 34(9) *Children and Youth Services Review* 1937–1946; Butler, Mathews, Farrell, et al, (2009).

<sup>190</sup> Introduction by Minister Cameron Dick of the *Education and Training Legislation Amendment Bill 2011*, and Referral to the Industry, Education, Training and Industrial Relations (IETIR) Committee, Queensland Legislative Assembly, Parliamentary Debates, 2 August 2011, p 2236; cited in the Explanatory Notes to the Education and Training Legislation Amendment Bill, p 3 (<http://www.legislation.qld.gov.au/Bills/53PDF/2011/EducTrainLAB11Exp.pdf>).

In the case of ss 365 and 366, the state of mind which activates the duty to report exists when the staff member ‘becomes aware, or reasonably suspects, in the course of the staff member’s employment at the school’. In the case of ss 365A and 366A, the state of mind which activates the duty to report exists when the staff member ‘reasonably suspects, in the course of the staff member’s employment at the school’. The report must be written and provided immediately (365(2); 365A(2); 366(2); 366A(2)). For suspected cases of past and present abuse, a penalty for noncompliance exists of 20 penalty units (\$2200).<sup>191</sup> However, no penalty is attached to the obligation to report suspected likely abuse.<sup>192</sup>

Immunity from civil, criminal and administrative proceedings in relation to a report made in good faith is conferred (ss 365(6) and (7), 365A(8) and (9), 366(5) and (6), and 366A(7) and (8)). Confidentiality of the reporter’s identity is conferred by the *Child Protection Act 1999* (Qld) s 186 (which applies to those who make reports to police, the CEO, or an authorised officer).<sup>193</sup>

### Summary of current position

Queensland is unique in having two separate statutes containing professionals’ mandatory reporting duties, neither of which appears in its child protection statute. Doctors and nurses have a mandatory reporting duty under the *Public Health Act 2005* to report reasonable suspicions of harm caused by sexual abuse. School staff have a duty under the *Education (General Provisions) Act 2006* to report reasonable suspicions of child sexual abuse. In both cases, the duty extends to suspicions of suspected likely harm or abuse respectively. Queensland has a narrower range of legislatively mandated reporters than most other Australian jurisdictions. It is the only jurisdiction in which police are not legislatively mandated reporters.

As a final observation, it can be noted that the 2013 Queensland Child Protection Commission of Inquiry recommended that there be a review and consolidation of all existing legislative reporting obligations into the *Child Protection Act 1999*.<sup>194</sup> No new legislation has been enacted yet, and no bills have been introduced.

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<sup>191</sup> Under the *Penalties and Sentences Act 1992* (Qld), a penalty unit is \$110: s 5(1)(d).

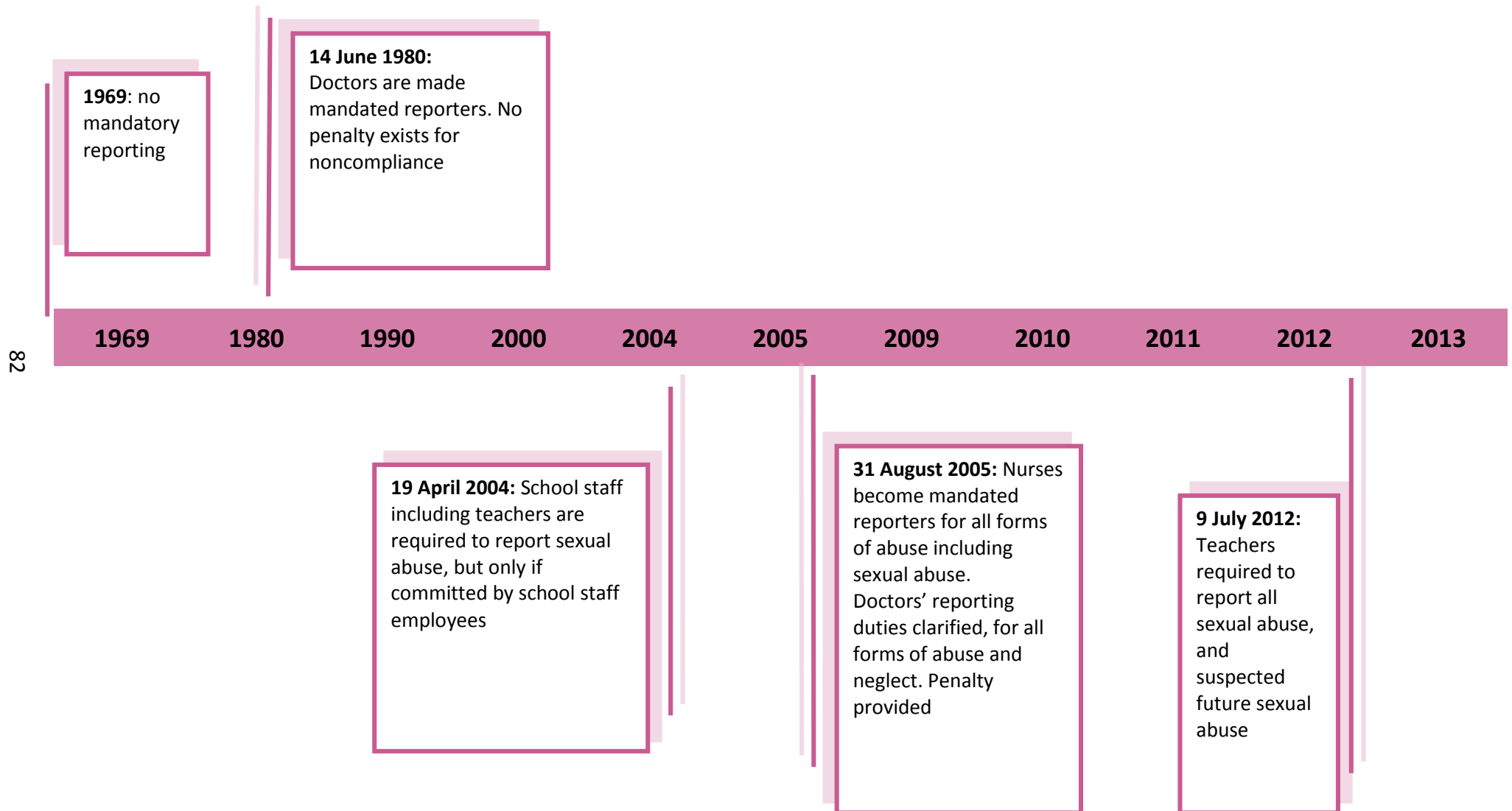
<sup>192</sup> Reporting procedures. Reports must contain certain details as set out in the *Education (General Provisions) Regulations 2006* (Qld) (r 68 for past/present; r 68A for suspected likely abuse). In state schools, for past/present and suspected likely abuse respectively, reports must be made to the principal or the principal’s supervisor (365(2); 365A(2)); this person must then give a copy of that report to a police officer (365(4); 365A(5)). If the person suspecting abuse is the principal, the principal must give a written report to a police officer (365(2A); 365A(3)). If the report is about suspected abuse by a state school employee, a report must also be given to a person nominated by the chief executive (365(4A) and (5); 365A(6) and (7)). In non-state schools, for past/present and suspected likely abuse respectively, reports must be made to the principal or a director of the school’s governing body (366(2); 366A(2)); this person must then give a copy of that report to a police officer (366(4); 366A(6)). If the person suspecting abuse is the principal, the principal must give a written report to a police officer (366(2A); 366A(3)) and to a director of the school’s governing body (366(2B); 366A(4)).

<sup>193</sup> Technically, there may be a loophole in this provision because under Schedule 3 of the CPA, an ‘authorised officer’ is defined as ‘a person holding office as an authorised officer under an appointment under this Act’. If a school principal is not such a person, then the teacher making a report may not be satisfactorily protected.

<sup>194</sup> Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection*, Brisbane, 2013, Recommendation 4.2, p xxvii. This recommendation leaves the situation somewhat unclear, given that the legislative reporting duties in several Queensland statutes are inconsistent.



### 3.4.3 Timeline showing key developments, Queensland



## 3.5 SOUTH AUSTRALIA

### 3.5.1 The first legislation

South Australia was the first Australian jurisdiction to enact a legislative mandatory reporting duty. The ***Children's Protection Act Amendment Act 1969*** (No 49), amended the *Children's Protection Act 1936–1965* (the 'principal Act'), inserting new provisions (most significantly, s 5a) into the principal Act. The principal Act would then be called the *Children's Protection Act 1936–1969*. The *Children's Protection Act Amendment Act 1969* received assent and commenced on 27 November 1969.<sup>195</sup>

The effect of the amendment inserting s 5a(1) was to impose a duty to report if a designated person:

- reasonably suspects that an **offence against Section 5** of the Act has been committed in relation to a child aged under 12; **or**
- finds evidence of such bodily harm done to a child aged under 12 as, in the circumstances believed by him to exist, leads him reasonably to suspect that the harm resulted from an offence *against any Act* (author's emphasis)

The report had to be made to a police officer as soon as was reasonably practicable. Section 5(2) provided immunity from proceedings in relation to the report. Significantly, the reporting duty was limited to children under 12. Under s 5(3), the duty was imposed on (a) medical practitioners, (b) dentists, and (c) others who were proclaimed to be a person to whom the duty applies. Section 5b empowered the Governor to make declarations about which persons and classes of persons were reporters.

#### The reporting duty in s 5a(1)(a) was quite narrow

Due to the restricted definition of the relevant offences in s 5 of the *Children's Protection Act 1936*, the reporting duty in s 5a(1)(a) was quite narrow, only applying to ill-treatment by parents, guardians and those having the charge of a child. Under the original *Children's Protection Act 1936*, s 5 made it an offence for **a parent, guardian or person having the charge of a child** to 'ill-treat' the child or cause the child to be ill-treated, in a way in which the court deems the child is likely to be injured ('child' was defined as a boy or girl under the age of 16: s 4). The section stated:

Protection of Children.

5. Any near relative, guardian, or other person having the care, custody, control, or charge of a child, who, without lawful excuse:

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<sup>195</sup> The key provisions were not proclaimed, but due to the law at the time (which remains current today) about the commencement of legislation in South Australia, these provisions would have commenced on the date the Act received assent. In 1969, the *Acts Interpretation Act 1915* (SA) s 7(1) stated that 'Every Act whenever passed wherein no time is prescribed for the coming into operation thereof, shall, for all purposes whatsoever, be deemed to have come or shall come into operation on the day whereon such Act was or is assented to by the Governor'. Note that the current *Acts Interpretation Act 1915* s 7(a) states similarly that 'An Act that contains no provision fixing the date of its commencement, or providing for the fixing of that date, comes into operation on the day on which it is assented to by, or on behalf of, the Crown'.

- (a) neglects to provide all such food, clothing, and lodging for the child as to the court seems reasonably sufficient:
  - (b) ill-treats, neglects, abandons, or exposes the child, or causes the child to be ill-treated, neglected, abandoned, or exposed, in a manner which the court deems likely to subject the child to unnecessary risk, danger, injury, or suffering,
- shall be guilty of an offence against this Act and liable to imprisonment for any period not exceeding one year, and to a fine not exceeding one hundred pounds.

### **The reporting duty in s 5a(1)(b) was broader**

Section 5a(1)(b) was, on its face, a broader obligation as it extended to situations where the reporter ‘finds evidence of such bodily harm done to a child under the age of 12 as, in the circumstances believed by him to exist, leads him reasonably to suspect that the harm resulted from an offence against *any Act*’ (author’s emphasis). The inclusion of the words ‘offence against any Act’ suggest the duty applies to sexual assaults by *any person*. However, Hansard indicates the duty was only intended to apply to abuse by parents or caregivers.<sup>196</sup> The duty would subsequently be amended to more clearly confine it to a narrower class of situations, until later major legislative change with further clarifications in 1988.

#### **Precursors to and influences on the legislative change**

The Parliamentary Debates referred to evidence of the battered child syndrome, and to recommendations made by South Australia’s Law Reform Committee and the Social Welfare Advisory Committee in support of the legislative change.

## **3.5.2 Key changes**

### **Change in 1972**

The *Community Welfare Act 1972* (No 51) commenced on 1 July 1972. This Act repealed the *Children’s Protection Act 1936*, the *Children’s Protection Amendment Act 1961* and the *Children’s Protection Amendment Act 1969*.

This Act set out the offence provision to neglect or ill-treat a child in s 72, and placed the reporting duty in s 73. The duty was limited to doctors and dentists, and applied to children aged under 15.

The provisions in this Act more clearly indicated a narrow ambit of the reporting duty, extending only to acts committed by parents or caregivers. Section 72 stated that it was an offence for ‘any person having the care, custody, control or charge of a child, who without lawful excuse – (b) illtreats the child, or causes the child to be ill-treated, in a manner that the court thinks likely to subject the child to unnecessary risk, danger, injury or suffering. Section 73(1) set out the duty to report a suspicion on reasonable grounds that an offence under s 72 had been committed against a child under the age of 15. The reporter was obliged to report as soon as practicable to a member

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<sup>196</sup> South Australia, Parliamentary Debates, Legislative Council, 12 November 1969, 2898–2899 (C Hill); 13 November 1969, p 2994 (A Shard).

of the police force or an officer of the Department. At this time, the duty still only applied to medical practitioners and dentists and any person declared by proclamation to be subject to the duty.

## Amendment in 1976

The *Community Welfare Act Amendment Act 1976* (No 111) amended the *Community Welfare Act 1972–1975* to insert in s 82d the duty to report, and in s 82e the definition of the relevant offences against children. This Act commenced on 7 April 1977.

This Act repealed ss 72 and 73. It set out the offence provision to neglect or ill-treat a child in s 82e(1), as follows:

82e. (1) Any person having the care, custody, control or charge of a child, who maltreats or neglects the child, or causes the child to be maltreated or neglected, in a manner likely to subject the child to unnecessary injury or danger shall be guilty of an offence and liable to a penalty not exceeding five hundred dollars or imprisonment for a period not exceeding twelve months.

The reporting duty was set out in s 82d(1)(b), stating that where a person who is obliged to comply with this section suspects on reasonable grounds that an offence under this Division has been committed against a child, that person shall notify an officer of the Department as soon as practicable after forming the suspicion.

The key change made in this 1976 Act was to **enlarge** the reporter groups, in s 82d(2) to include:

- (a) any legally qualified medical practitioner;
- (b) any registered dentist;
- (c) any registered or enrolled nurse;
- (d) any registered teacher;
- (e) any member of the police force;
- (f) any employee of an agency established to promote child welfare or community welfare; or
- (g) any person of a class declared by regulation to be a class of persons to which this section applies.

In addition, the duty was broadened to apply to children under 18 (due to the definition of ‘child’ in s 6). However, the duty was *restricted* to cases where the parent or caregiver maltreated the child; it did not apply to cases of abuse by others falling outside this class of perpetrators. The (mistaken) assumption was that where a child was sexually abused by a person outside the family, the child’s parents would be able to meet the child’s needs. This assumption would be challenged successfully by the 1986 Task Force.

### Precursors to and influences on the legislative change

These changes were influenced by recommendations made in a report of an advisory committee chaired by Judge Murray, which again mostly concerned physical abuse.<sup>197</sup>

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<sup>197</sup> South Australia, Parliamentary Debates, Legislative Council, 1 December 1976, 2669–2671 (D Banfield); 7 December 1976, 2809 (D Carnie).

## Amendment in 1981

The *Community Welfare Act Amendment Act 1981* (No 67) amended the *Community Welfare Act 1972–1979*, repealing the previous provisions in ss 82d and 82e. In their place, this Act inserted s 91(1) (identical duty to report) and s 92 definition of the relevant offences against children (identical to prior version). This Act commenced on 2 May 1983.

A key change was to again enlarge the classes of mandated reporters in s 91(2), by adding psychologists, pharmacists, teacher aides and kindergarten employees:

- (a) any legally qualified medical practitioner;
- (b) any registered dentist;
- (c) any registered or enrolled nurse;
- (d) any registered psychologist;
- (e) any pharmaceutical chemist;
- (f) any registered teacher;
- (g) any person employed in a school as a teacher aide;
- (h) any person employed in a kindergarten;
- (i) any member of the police force;
- (j) any employee of an agency that provides health or welfare services to children;
- (k) any social worker employed in a hospital, health centre or medical practice; or
- (l) any person of a class declared by regulation to be a class of persons to which this section applies.

### Precursors to and influences on the legislative change

Hansard does not indicate any substantial influence on this change.<sup>198</sup>

## Major amendment in 1988

The *Community Welfare Act Amendment Act 1988* (No 30) amended the *Community Welfare Act 1972* in significant ways. This Act commenced on 1 September 1988.

First, it **broadened** the scope of the reporting duty by removing the limit on reports about an *offence* as specified in the legislation having been committed against a child, and instead applying the reporting duty to situations where a person suspects on reasonable grounds that “a child has been maltreated or neglected”. This means the duty would apply *not only* to cases of maltreatment by a parent or caregiver or someone having charge of the child, but to a wider class of cases of maltreatment committed by *any person*.

This Act did not amend the s 92 offence provision. The term ‘maltreated’ was not defined in more detail than existed in the s 92 expression of maltreating the child ‘in a manner likely to subject the child to unnecessary injury or danger’.

In addition, reporter groups were clarified, as follows:

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<sup>198</sup> South Australia, Parliamentary Debates, Legislative Council, 3 December 1980, p 2486–2491 (J Burdett).

- (a) a legally qualified medical practitioner;
- (b) a registered dentist;
- (e) a registered or enrolled nurse;
- (d) a registered psychologist;
- (e) a pharmaceutical chemist;
- (f) a member of the police force;
- (g) a probation officer;
- (h) a social worker employed in a hospital, health centre or medical practice;
- (i) a registered teacher;
- (j) a person employed in a school as a teacher aide;
- (k) a person employed in a kindergarten;
- (l) an employee of, or voluntary worker in, an agency that provides health, welfare, educational, childcare or residential services for children;
- (m) a person of a class declared by regulation to be a class of persons to which this section applies

### **Precursors to and influences on the legislative change**

As indicated in Hansard,<sup>199</sup> this broadening of the scope of the provision arose from the *Report of the Government Task Force on Child Sexual Abuse*, and a specific recommendation it made in this regard. The *Task Force on Child Sexual Abuse* was established by Cabinet at the Minister of Health's instigation in response to increasing public concern about child sexual abuse, to identify problems associated with the existing laws and methods of service delivery regarding sexually abused children and their families, and to make recommendations about how problems caused by child sexual abuse could be alleviated and about how its occurrence could be prevented.<sup>200</sup>

The Task Force made the following recommendations in relation to mandatory reporting:<sup>201</sup>

- that reporting of suspected child sexual abuse continue to be mandatory
- that professionals required to report be given special training to enable recognition of sexual abuse and compliance with the duty
- that the legislation be amended to require reports of sexual abuse inflicted by any person, not just by parents or caregivers
- that the categories of mandated reporters be extended to include: any employee of an agency (and any unpaid or volunteer worker) providing health, welfare, educational, childcare or residential services; family court counsellors; and probation officers; but not lawyers.

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<sup>199</sup> South Australia, Parliamentary Debates, House of Assembly, 29 March 1988, p 3634 (G Crafter); South Australia, Parliamentary Debates, House of Assembly, 6 April 1988, p 3858 (G Crafter).

<sup>200</sup> Furler, E, *Report of the Government Task Force on Child Sexual Abuse*, Adelaide, South Australian Health Commission, 1986, p 3.

<sup>201</sup> Furler, E, *Report of the Government Task Force on Child Sexual Abuse*, Adelaide, South Australian Health Commission, 1986, p 83–91.

## Clear, broad reporting duty: *The Children's Protection Act 1993*

The *Children's Protection Act 1993* (No 93 of 1993; commencing 1 January 1994) set out a more detailed reporting duty, which clearly included a duty to report reasonable suspicions of sexual abuse of a child by any person. More detailed definition provisions clarified the meaning of 'abuse'. In addition, the duty extended to cases of risk of future abuse by some perpetrators. This broadened the duty from its previous limit to cases of abuse that had already happened or were happening.

Section 6(1) defined 'abuse' as including sexual abuse. Unlike other forms of abuse and neglect, no significance of harm threshold was stipulated in this definition.<sup>202</sup>

Section 10 expanded on the s 6 definition to clarify that:

In this Division, 'abuse or neglect', in relation to a child, has the same meaning as in Section 6(1), but includes a reasonable likelihood, in terms of Section 6(2)(b),<sup>203</sup> of the child being killed, injured, abused or neglected by a person with whom the child resides.

Section 11 set out the reporting duty and the mandated reporter groups.<sup>204</sup>

Notification of abuse or neglect

11. (1) Where:

(a) a person to whom this section applies suspects on reasonable grounds that a child has been or is being abused or neglected; and

(b) the suspicion is formed in the course of the person's work (whether paid or voluntary) or of carrying out official duties, the person must notify the Department of that suspicion as soon as practicable after he or she forms the suspicion.

Penalty: Division 7 fine.

(2) This section applies to the following persons:

(a) a medical practitioner;

(b) a registered or enrolled nurse;

(c) a dentist;

(d) a psychologist;

(e) a member of the police force;

(f) a probation officer;

(g) a social worker;

(h) a teacher in any educational institution (including a kindergarten);

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<sup>202</sup> Section 6(1) provided: 'abuse or neglect', in relation to a child, means-

(a) sexual abuse of the child; or

(b) physical or emotional abuse of the child, or neglect of the child, to the extent that:

(i) the child has suffered, or is likely to suffer, physical or psychological injury detrimental to the child's wellbeing;

or

(ii) the child's physical or psychological development is in jeopardy,

and 'abused' or 'neglected' has a corresponding meaning.

<sup>203</sup> Section 6(2)(b) stated that 'a child is at risk if:

(a) the child has been, or is being, abused or neglected; or

(b) a person with whom the child resides (whether a guardian of the child or not);

(i) has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out; **or**

(ii) has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person.

<sup>204</sup> Immunity was conferred by s 12. Confidentiality was conferred by s 13.

- (i) an approved family day care provider;
- (j) any other person who is an employee of, or volunteer in, a Government department, agency or instrumentality, or a local government or non-government agency, that provides health, welfare, education, childcare or residential services wholly or partly for children, being a person who:
  - (i) is engaged in the actual delivery of those services to children; or
  - (ii) holds a management position in the relevant organisation the duties of which include direct responsibility for, or direct supervision of, the provision of those services to children.

## **Other changes**

The *Children's Protection (Mandatory Reporting and Reciprocal Arrangements) Amendment Act 2000* (No 16) amended s 11 to add pharmacists as a mandated reporter group in s 11(2)(ab). This provision commenced on 1 July 2000.

## ***Children's Protection (Miscellaneous) Amendment Act 2005: Changes after the Layton Review 2003***

### **New mandated reporters from religious organisations, and sporting or recreational organisations, and increase in penalty (commencing 31 December 2006)**

The *Children's Protection (Miscellaneous) Amendment Act 2005* (SA) (No 76) s 10(1) increased the penalty to \$10,000. Significantly, s 10(2) also added new categories of mandated reporters as follows:

- (ga) a minister of religion
- (gb) a person who is an employee of, or volunteer in, an organisation formed for religious or spiritual purposes.

However, a limit was placed on clergy's mandated reporting duty by s 10(5) inserting a new s 11(4) as follows:

- (4) This section **does not** require a priest or other minister of religion to divulge information communicated in the course of a confession made in accordance with the rules and usages of the relevant religion.

In addition, s 10(4) added to s 11(2)(j) 'sporting or recreational' organisations to the list of services included in the mandatory reporting organisations.



### **Precursors to and influences on the legislative change**

The changes described above were consistent with the Layton Review 2003,<sup>205</sup> which recommended (Recommendation 54, 10.13) that the classes of mandated reporters be extended to include:

- all church personnel including ministers of religion (except in confessionals)
- all individuals in services providing care to or supervision of children
- all volunteers who are working with children (including volunteers working in supervised and unsupervised settings)
- all people who may supervise or be responsible for looking after children as part of a sporting, recreational, religious or voluntary organisation.

The rationale for this recommendation was that children would be better protected and that it is preferable to adopt a broad approach due to technical legal issues around determining who is a mandated reporter (10.11–10.13).

It can be noted that the Layton Review also recommended amending the definition of ‘abuse’ and ‘neglect’ to adopt the Queensland model of using concepts of ‘significant risk’ and ‘harm’; it was claimed that this would result in simpler and more understandable definitions.<sup>206</sup> These suggestions were not adopted.

### **Offence of impeding the exercise of mandatory reporting**

It can also be noted that the *Children’s Protection (Implementation of Report Recommendations) Amendment Act 2009* (No 65) (commenced 31 December 2009), inserted a new s 11(6), which makes it an offence to threaten or intimidate, or cause damage, loss or disadvantage to a mandated reporter because the person has made or proposes to make a report (maximum penalty \$10,000). This Act also modified the wording of s 11(2)(j).<sup>207</sup>

### **Precursors to and influences on the legislative change**

This amendment was influenced by Recommendation 21 of the 2008 Mullighan Inquiry (Children in State Care and Children on Anangu Pitjantjatjara Yankunytjatjara (APA) Lands).<sup>208</sup> The Mullighan Inquiry also recommended that where a child under the guardianship or in the custody of the Minister makes an allegation of sexual abuse, it be mandatory for the chief executive of the Department for Families and Communities or Commissioner of Police to notify the Guardian for Children and Young People (Recommendation 20).<sup>209</sup> This recommendation was not adopted.

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<sup>205</sup> Layton, R, *Our best investment: A State plan to protect and advance the interests of children* (Review of Child Protection in South Australia), 2003.

<sup>206</sup> Layton, R, *Our best investment: A State plan to protect and advance the interests of children* (Review of Child Protection in South Australia), 2003, Recommendation 166, 23.10–23.13.

<sup>207</sup> Deleting in s 11(2)(j) the words ‘a Government department, agency or instrumentality, or a local government or non-government organisation’, and substituting for them the words ‘a government or non-government organisation’.

<sup>208</sup> Mullighan Inquiry (Children on the APY Lands Commission of Inquiry), 2008, Recommendation 21, p 183.

<sup>209</sup> Mullighan Inquiry (Children on the APY Lands Commission of Inquiry), 2008, Recommendation 21, p 420.

Hence, since 31 December 2006, the reporting duty and the list of mandated reporters in South Australia has been as follows:

11 Notification of abuse or neglect:

(1) If:

- (a) a person to whom this section applies suspects on reasonable grounds that a child has been or is being abused or neglected; and
  - (b) the suspicion is formed in the course of the person's work (whether paid or voluntary) or of carrying out official duties,
- the person must notify the Department of that suspicion as soon as practicable after he or she forms the suspicion.

Maximum penalty: \$10,000.

(2) This section applies to the following persons:

- (a) a medical practitioner;
- (ab) a pharmacist;
- (b) a registered or enrolled nurse;
- (c) a dentist;
- (d) a psychologist;
- (e) a police officer;
- (f) a community corrections officer (an officer or employee of an administrative unit of the Public Service whose duties include the supervision of young or adult offenders in the community);
- (g) a social worker;
- (ga) a minister of religion;
- (gb) a person who is an employee of, or volunteer in, an organisation formed for religious or spiritual purposes;
- (h) a teacher in an educational institution (including a kindergarten);
- (i) an approved family day care provider;
- (j) any other person who is an employee of, or volunteer in, a government or non-government organisation that provides health, welfare, education, sporting or recreational, childcare
- (i) is engaged in the actual delivery of those services to children; or
- (ii) holds a management position in the relevant organisation the duties of which include direct responsibility for, or direct supervision of, the provision of those services to children.

(3) A notification under this section must be accompanied by a statement of the observations, information and opinions on which the suspicion is based.

(4) This section does not require a priest or other minister of religion to divulge information communicated in the course of a confession made in accordance with the rules and usages of the relevant religion.

(5) A person does not necessarily exhaust his or her duty of care to a child by giving a notification under this section.

(6) A person must not threaten or intimidate, or cause damage, loss or disadvantage to, a person to whom this section applies because the person has discharged, or proposes to discharge, his or her duty under subsection (1).

Maximum penalty: \$10,000.

## **Current consideration of amendments from the Debelle Inquiry 2013**

The Debelle Inquiry recommended that there be a defence to the duty in two situations: first, where the reporter's suspicion is only based on information from a police officer<sup>210</sup>, and second, where the reporter's suspicion is based only on information obtained from another person to whom the duty applies<sup>211</sup>, and the reporter reasonably believes that person has already made a report.<sup>212</sup> These proposed amendments are currently under consideration by Parliament through the *Children's Protection (Notification) Amendment Bill 2013* s 4.

### **Summary of current position**

The duty to report reasonable suspicions of sexual abuse is applied to a very broad range of persons. Uniquely in Australia, the duty applies to a minister of religion and to employees and volunteers in organisations formed for religious or spiritual purposes. There is also a duty to report suspected risk of future sexual abuse where there is a reasonable suspicion of a reasonable likelihood of the child being sexually abused by a person with whom the child resides. South Australia has a substantial penalty for noncompliance of \$10,000.

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<sup>210</sup> Debelle Inquiry (Report of the Independent Education Inquiry 2012–2013), Recommendation 26, p 277.

<sup>211</sup> Debelle Inquiry (Report of the Independent Education Inquiry 2012–2013), Recommendation 27, p 278.

<sup>212</sup> Debelle Inquiry Recommendation 26, p 277.

### 3.5.3 Timeline showing key developments, South Australia

**27 November 1969:**  
first mandatory reporting legislation in Australia: duty on doctors and dentists to report maltreatment by a parent, custodian, or someone having charge of the child (limited to children under **12**)

**2 May 1983:**  
Psychologists, chemists, teacher aides, kindergarten employees added as mandated reporters

**1 January 1994:**  
*Children's Protection Act 1993* clarifies definition of sexual abuse; partial extension to future cases; clarification of reporter groups

**1 July 2000:**  
Pharmacists added as mandated reporters

1969

1972

1977

1983

1988

1994

2000

2006

2011

2012

2013

**1 July 1972:** duty on doctors and dentists to report maltreatment by a parent, custodian, or someone having charge of the child (limited to children under **15**)

**7 April 1977:** more reporter groups mandated; nurses, teachers, police, child welfare employees; duty applies to children under **18**; remains limited to parental maltreatment

**1 September 1988:** duty extended to reasonable suspicions of child sexual abuse by any person; range of reporter groups clarified and extended to social workers, and employees and volunteers in agencies providing health, welfare, educational, childcare or residential services for children

**31 December 2006:** ministers of religion and employees or volunteers in organisations formed for religious or spiritual purposes added as mandated reporters; also sporting or recreational organisations listed as relevant organisations

## 3.6 TASMANIA

### 3.6.1 The first legislation

#### *Child Protection Act 1974*

Tasmania was one of the first jurisdictions to enact mandatory reporting law of any kind. *The Child Protection Act 1974* (No 104) (commencing 29 January 1975)<sup>213</sup> s 8(2) stated that:

The Governor may, by order, declare that persons of specified classes, being persons following professions, callings, or vocations specified in the order or holding offices so specified, **shall** make such report as is referred to in Subsection (1) when, in the course of practice of those professions, callings, or vocations or in exercising the functions of those offices, circumstances come to their notice that warrant such reports being made (author's emphasis).

Section 8(1) stated that 'Any person who suspects upon reasonable grounds that a child who has not apparently attained the age of 12 years **has suffered injury through cruel treatment** is entitled to report the fact to an authorised officer, and the report may be made orally or in writing.'

Hence, like the first provision in South Australia, the duty was initially limited to children aged under 12. 'Cruel treatment' was not defined, but would certainly embrace sexual abuse; however, subsequent developments in 1986 indicate that this concept was not sufficient to enable proper protection of children from sexual abuse.

Like South Australia's, the legislative history in Tasmania is somewhat complicated. The Governor of Tasmania proceeded in 1975 to proclaim selected groups of professionals as mandated reporters, namely<sup>214</sup>:

- probation officers appointed under the *Probation of Offenders Act 1973*
- child welfare officers appointed under the *Child Welfare Act 1960*
- welfare officers appointed under the *Alcohol and Drug Dependency Act 1968*
- persons holding children's boarding home licences or day nursery licences under Section 54 of the *Child Welfare Act 1960*
- persons holding office under the *Education Act 1932* who are principals of primary or infant schools, mistresses in charge of infant schools, teachers in charge of kindergartens, or officers engaged primarily in welfare work
- psychiatrists, social workers, and welfare officers, appointed under the *Mental Health Services Act 1967*, who are primarily engaged in welfare work
- medical practitioners registered under Part III of the *Medical Act 1959*.

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<sup>213</sup> Tasmanian Statutory Rules 1975 (No 21).

<sup>214</sup> Tasmanian Statutory Rules 1975 (No 275): *Child Protection Order (No 2) 1975*, made on 14 October, notified in the Government Gazette on 22 October 1975.

Therefore, on the basis that these provisions became operational when the proclamation was gazetted, these mandated reporter groups had a legislative duty to report child sexual abuse of children aged under 12 from **22 October 1975**.

This initial proclamation was revoked in 1977 and replaced with a fresh list of reporters, as follows (this had the effect of adding principals of district schools, registered nurses and school guidance officers as new groups of reporters)<sup>215</sup>:

- probation officers appointed under the *Probation of Offenders Act 1973*
- child welfare officers appointed under the *Child Welfare Act 1960*
- welfare officers appointed under the *Alcohol and Drug Dependency Act 1968*
- persons holding children's boarding home licences or day nursery licences under Section 54 of the *Child Welfare Act 1960*
- persons holding office under the *Education Act 1932* who are principals of district, primary, or infant schools, mistresses in charge of infant schools, teachers in charge of kindergartens, or officers engaged primarily in welfare work
- psychiatrists, social workers, and welfare officers, appointed under the *Mental Health Services Act 1967*, who are primarily engaged in welfare work
- medical practitioners registered under Part III of the *Medical Act 1959*
- registered nurses employed in the Child Health and School Health Services of the Department of Health Services and appointed under the *Public Service Act 1973*
- Guidance officers appointed under the *Education Act 1932*.

Since the proclamation was gazetted on **23 November 1975**, these additional groups' reporting duties commenced on that date.

#### **Precursors to and influences on the legislative change**

There do not appear to have been any major reports or inquiries influencing these developments. In addition, Hansard was not published in Tasmania until mid-1979 so no further detail is forthcoming on legislative developments before that date.<sup>216</sup>

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<sup>215</sup> Tasmanian Statutory Rules 1977 (No 305): *Child Protection Order 1977*, made on 15 November, notified in the Government Gazette on 23 November 1975.

<sup>216</sup> Tasmanian Parliamentary Library, 'Hansard', <<http://www.parliament.tas.gov.au/tpl/Backg/Hansard.htm>>.

### 3.6.2 Key changes

In 1986, the *Child Protection Amendment Act 1986* (No 29) s 12 (commenced **8 April 1987**)<sup>217</sup> removed the age limit of 12 years, replaced the concept of ‘cruel treatment’ with ‘maltreatment’, and added a duty to report substantial risk of maltreatment as well as maltreatment that had already been experienced. This made the duty read:

‘Any person who suspects upon reasonable grounds that a child has suffered maltreatment, or that there is a substantial risk that a child will suffer maltreatment is entitled to report the fact to an authorised officer, and the report may be made orally or in writing.’

#### **Definition of ‘maltreatment’ explicitly including sexual abuse added by *Child Protection Amendment Act 1986* (No 29)**

This amending legislation also introduced a new definition of ‘maltreatment’. Section 5(j) amended s 2 by adding a new s 2(4) which stated the circumstances under which a child would suffer maltreatment.<sup>218</sup>

As relevant to the context of child sexual abuse, a child would be maltreated if:

- any person (including a parent, guardian, or other person having the custody, care, or control of the child) causes the child to engage in, or be subjected to, sexual activity
- the child is, with or without the consent of the child or of a parent, guardian, or other person having the custody, care, or control of the child, engaged in, or subjected to, sexual activity that:

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<sup>217</sup> Section 2(2) of the Act provided that the Act would commence on proclamation. The Act was proclaimed to commence on 8 April 1987 by Tasmanian Statutory Rules 1987 (No 65), notified in the Government Gazette on 8 April 1987.

<sup>218</sup> The whole provision provided that a child would suffer maltreatment if:

- (a) Whether by act or omission or intentionally or by default, any person (including a parent, guardian, or other person having the custody, care, or control of the child):
  - (i) Inflicts on the child a physical injury causing temporary or permanent disfigurement or serious pain;
  - (ii) By any means (including, in particular, the administration of alcohol or any other drug) subjects the child to an impairment, either temporary or permanent, of a bodily function or of the normal reserve or flexibility of a bodily function;
  - (iii) Neglects, or interferes with, the physical, nutritional, mental, or emotional wellbeing of the child to such an extent that:
    - (A) The child suffers, or is likely to suffer, psychological damage or impairment;
    - (B) The emotional or intellectual development of the child is, or is likely to be, endangered; or
    - (C) The child fails to grow at a rate that would otherwise be regarded as normal for that child;
- (b) Any person (including a parent, guardian, or other person having the custody, care, or control of the child) causes the child to engage in, or be subjected to, sexual activity; or
- (c) The child is, with or without the consent of the child or of a parent, guardian, or other person having the custody, care, or control of the child, engaged in, or subjected to, sexual activity that:
  - (i) Is solely or principally for the purpose of the sexual gratification of any other person;
  - (ii) Is in whole or in part the subject of, or included among the matters portrayed in, any printed matter, photograph, recording, film, video tape, exhibition, or entertainment; or
  - (iii) In any other manner exploits the child.

- Is solely or principally for the purpose of the sexual gratification of any other person;
- Is in whole or in part the subject of, or included among the matters portrayed in, any printed matter, photograph, recording, film, video tape, exhibition, or entertainment
- In any other manner exploits the child.

This provision also defined 'child' as a person who has not attained the age of 17 (s 5(d)).

Accordingly, these amendments substantially broadened the reporting duty by including a detailed explicit definition of sexual abuse in the new concept of 'maltreatment', and by extending the reporting duty to cases of child abuse of all children aged under 17.

### **Precursors to and influences on the legislative change**

There do not appear to have been any major reports or inquiries influencing these developments. However, Hansard indicates that there were **four major influences** on this change<sup>219</sup>:

- a growing understanding that the initial laws as primarily focused on physical abuse needed to develop to keep pace with new knowledge and understanding of other forms of child abuse including sexual abuse and emotional abuse
- a growing understanding of the phenomenon and frequency of sexual abuse
- a realisation that the concept of 'injury through cruel treatment' did not adequately accommodate sexual abuse
- an acceptance that the previous limit of the age of 12 was excluding children from protection who needed it, especially for sexual abuse.

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<sup>219</sup> Tasmania, Parliamentary Debates, House of Assembly, 9 April 1986, p 811–816 generally; p 811ff (Mr Bennett, Denison, Attorney-General).



## ***Children, Young Persons and Their Families Act 1997***

The *Children, Young Persons and Their Families Act 1997* (commenced 1 July 2000)<sup>220</sup>, set out in more detail the reporting duty and reporter groups.<sup>221</sup>

Section 3(1) defined ‘abuse or neglect’ as meaning:

- (a) sexual abuse; or
- (b) physical or emotional injury or other abuse, or neglect, to the extent that:
  - (i) the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person’s wellbeing; or
  - (ii) the injured, abused or neglected person’s physical or psychological development is in jeopardy.

Section 14(2) imposed a mandatory reporting duty for child sexual abuse<sup>222</sup>, imposing the reporting duty on any of these designated persons who ‘believes, or suspects, on reasonable grounds, or knows, (a) that a child has been or is being abused or neglected; or (b) that there is a reasonable likelihood of a child being killed or abused or neglected by a person with whom the child resides’.

The duty was imposed when the suspicion was formed in the course of the person’s work (whether paid or voluntary) or of carrying out official duties. Immunity was conferred by s 15.<sup>223</sup> Confidentiality was conferred by 16. The penalty for noncompliance was 20 penalty units.

The duty was set out in s 14(2) as follows:

- If a prescribed person, in carrying out official duties or in the course of his or her work (whether paid or voluntary), believes, or suspects, on reasonable grounds, or knows:
    - (a) that a child has been or is being abused or neglected; or
    - (b) that there is a reasonable likelihood of a child being killed or abused or neglected by a person with whom the child resides;
- the prescribed person must inform the Secretary of that belief, suspicion or knowledge as soon as practicable after he or she forms the belief or suspicion or gains the knowledge.

Section 14(1) set out a broad list of mandated reporters, as follows:

- 14. Informing of concern about abuse or neglect
  - (1) In this section, ‘prescribed person’ means:

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<sup>220</sup> The *Child Protection Act 1974* was repealed by the *Children, Young Persons And Their Families And Youth Justice (Consequential Repeals And Amendments) Act 1998* (No 2). Note that under transitional arrangements in the *Children, Young Persons And Their Families And Youth Justice (Transitional And Savings Provisions) Act 1998* (No. 3) s 46, if a person has informed an authorised officer before the commencement day of a suspicion that a child has suffered maltreatment or that there is a risk of a child suffering maltreatment, that person is taken to have informed the Secretary under Sections 13 or 14 of the *Children, Young Persons and Their Families Act 1997*.

<sup>221</sup> See Second reading presentation speech made in: House of Assembly on 1 October 1997; Legislative Council on 20 August 1997.

<sup>222</sup> ‘Child’ was defined as meaning a person under 18 years of age.

<sup>223</sup> Section 15 was later repealed 28 June 2011; amended by *Children, Young Persons and Their Families Amendment Act 2011* (No 15) comm 28 June 2011; and was replaced by the *Children, Young Persons and Their Families Amendment Act 2011* (No 15) comm inserting s 101A, comm 28 June 2011).

- (a) a registered medical practitioner; and
- (b) a nurse, within the meaning of the *Nursing Act 1995*; and
- (c) a dentist registered under the *Dental Act 1982*; and
- (d) a registered psychologist, within the meaning of the *Psychologists Registration Act 1976*; and
- (e) a police officer; and
- (f) a departmental employee, within the meaning of the *Police Regulation Act 1898*; and
- (g) a probation officer appointed under section 4 of the *Probation of Offenders Act 1973*; and
- (h) a principal and a teacher in any educational institution (including a kindergarten); and
- (i) a person who provides childcare, or a childcare service, for fee or reward; and
- (j) a person concerned in the management of a childcare service licensed under Part 6 of the *Child Welfare Act 1960*; and
- (k) any other person who is employed or engaged as an employee for, of or in, or who is a volunteer in:
  - (i) a Government Agency that provides health, welfare, education, childcare or residential services wholly or partly for children; and
  - (ii) an organisation that receives any funding from the Crown for the provision of such services; and
  - (l) any other person of a class determined by the Minister by notice in the Gazette to be prescribed persons.

### **Precursors to and influences on the legislative change**

There do not appear to have been any major reports or inquiries influencing these developments; nor does Hansard indicate the reasoning behind the changes, other than statements about the provisions' focus on the harm to the child.<sup>224</sup>

## **Minor changes since 1997**

In the context of sexual abuse, the provisions in Tasmania have been very stable since 1997.<sup>225</sup> Some relatively minor changes have occurred to reporter groups. Dental therapists and hygienists were added as reporters in s 14(1)(c)<sup>226</sup>, and departmental employees within the meaning of the *Police Regulation Act 1898* were removed from s 14(1)(f).<sup>227</sup> Midwives were added as a new reporter group in 2010, when the *Health Practitioner Regulation National Law (Tasmania) (Consequential Amendments) Act 2010* (No 3) added a new s 14(1)(ba) (commencing 1 July 2010). At this time also, s 14(1)(ba), (c) and (d) were slightly amended to refer to the health professionals'

<sup>224</sup> Tasmania, Parliamentary Debates, House of Assembly, 1 October 1997.

<sup>225</sup> It can be noted that Tasmania's introduction of a differential response system has likely had a more pronounced effect on reporting of other forms of child abuse in terms of the agency to which reporters submit their reports. *The Children, Young Persons and Their Families Amendment Act 2009* (No. 22 of 2009) s 6 made amendments to s 14(2) concerning the person or agency to whom the report must be made. According to these new provisions, reports could be made either to the Secretary, or to a Community-Based Intake Service. This change was made to facilitate the new emphasis on differential response.

<sup>226</sup> Due to the *Dental Practitioners Registration Act 2001* (No 20) commencing 3 October 2001.

<sup>227</sup> Due to the *Police Service (Consequential Amendments) Act 2003* (No 76) commencing 1 January 2004.

registration. The penalty changed slightly in 2007 from a maximum of \$2000 to \$2400 (see Table 8).

Hence, since 1 July 2010 the relevant provisions in Tasmania have been as follows:

14. Informing of concern about abuse or neglect or certain behaviour

(1) In this section, prescribed person means:

(a) a medical practitioner; and

(b) a registered nurse or enrolled nurse; and

(ba) a person registered under the Health Practitioner Regulation National Law (Tasmania) in the midwifery profession; and

(c) a person registered under the Health Practitioner Regulation National Law (Tasmania) in the dental profession as a dentist, dental therapist, dental hygienist or oral health therapist; and

(d) a person registered under the Health Practitioner Regulation National Law (Tasmania) in the psychology profession; and

(e) a police officer; and

(f) . . . . .

(g) a probation officer appointed or employed under section 5 of the *Corrections Act 1997*; and

(h) a principal and a teacher in any educational institution (including a kindergarten); and

(i) a person who provides childcare, or a childcare service, for fee or reward; and

(j) a person concerned in the management of an approved education and care service, within the meaning of the Education and Care Services National Law (Tasmania), or a childcare service licensed under the *Child Care Act 2001*; and

(k) any other person who is employed or engaged as an employee for, of or in, or who is a volunteer in:

(i) a Government Agency that provides health, welfare, education, childcare or residential services wholly or partly for children; and

(ii) an organisation that receives any funding from the Crown for the provision of such services; and

(l) any other person of a class determined by the Minister by notice in the Gazette to be prescribed persons.

(2) If a prescribed person, in carrying out official duties or in the course of his or her work (whether paid or voluntary), believes, or suspects, on reasonable grounds, or knows:

(a) that a child has been or is being abused or neglected or is an affected child within the meaning of the *Family Violence Act 2004*; or

(b) that there is a reasonable likelihood of a child being killed or abused or neglected by a person with whom the child resides ...

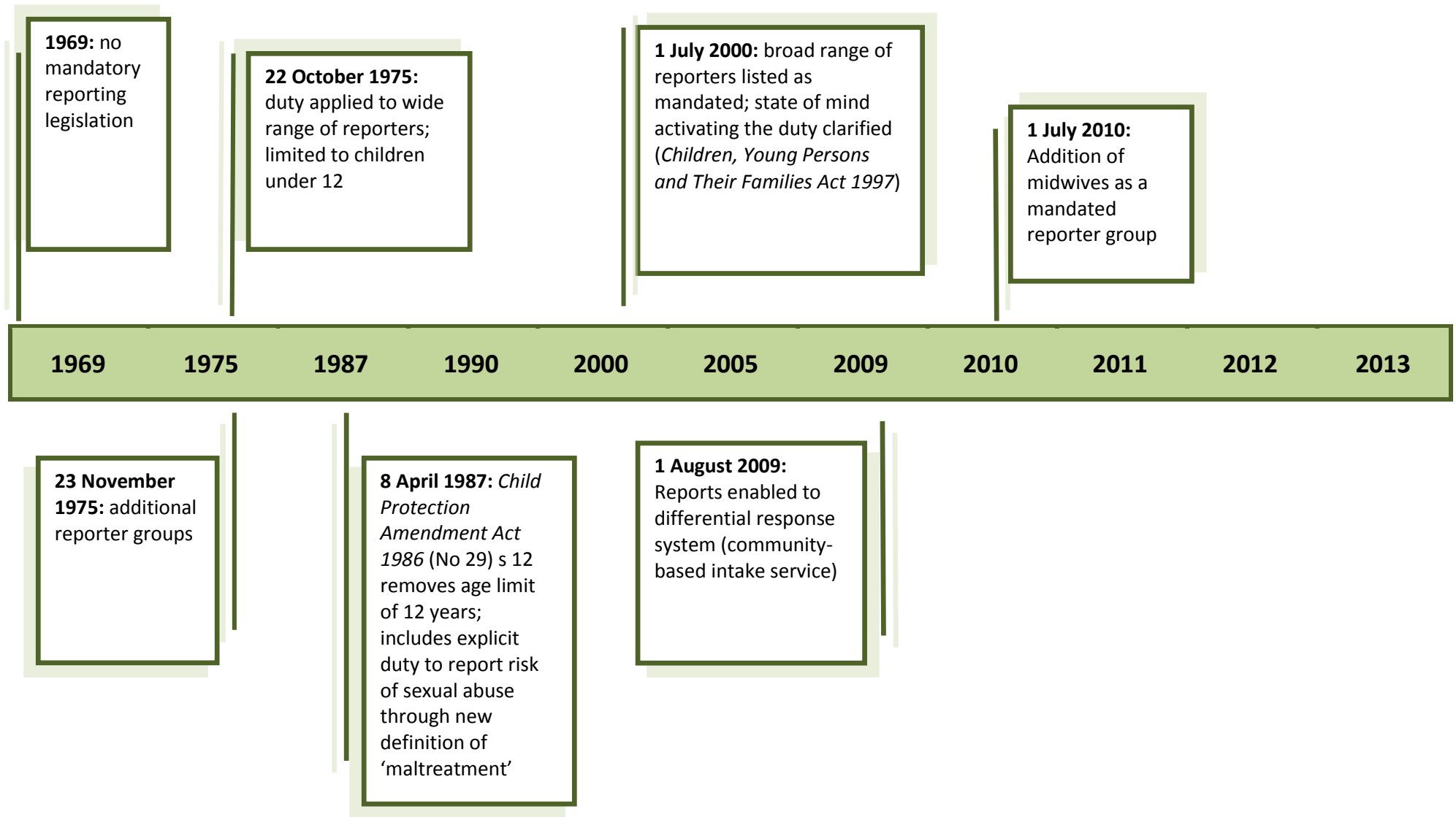
the prescribed person must inform the Secretary or a Community-Based Intake Service of that belief, suspicion or knowledge as soon as practicable after he or she forms the belief or suspicion or gains the knowledge.

Penalty: Fine not exceeding 20 penalty units.

## Current position

Tasmania has a wide duty to report knowledge or reasonable belief or reasonable suspicion of child sexual abuse, applying to past cases and with a limited application to risk of future abuse. It is imposed on a broad range of professionals.

### 3.6.3 Timeline showing key developments, Tasmania



## 3.7 VICTORIA

### 3.7.1 The first legislation

#### *Children and Young Persons Act 1989*

The *Children and Young Persons Act 1989* (Vic) s 64(1A) introduced the first mandatory reporting obligations in Victoria. These mandatory reporting provisions were not included in the original 1989 Act. They were added in 1993 by the *Children and Young Persons (Further Amendment) Act 1993* (No 10), which commenced generally on 11 May 1993.

The obligation was imposed on a wide range of professionals, but only some of these groups had been proclaimed as mandated reporters. Some had commenced on 4 November 1993; and others commenced on 18 July 1994; others remain unproclaimed and hence have never commenced.

These groups had been proclaimed effective **4 November 1993**<sup>228</sup>:

- (a) a registered medical practitioner within the meaning of the *Medical Practice Act 1994*;
- (c) a person registered under the *Nurses Act 1993*;
- (i) a member of the police force.

These groups had been proclaimed effective **18 July 1994**<sup>229</sup>:

- (d) a person registered as a teacher under Part III of the *Education Act 1958* or permitted to teach under that Part (including by virtue of Section 44(4) and (5) of that Act);
- (da) a person appointed to an office in the teaching service under the *Teaching Service Act 1981* or employed under Division 4 of Part II of that Act<sup>230</sup>;
- (db) a person employed under section 15B(1)(a)(i) of the *Education Act 1958*<sup>231</sup>;
- (e) the head teacher or principal of a State school within the meaning of the *Education Act 1958* or of a school registered under Part III of that Act.

To clarify the position as to which groups were mandated, and when, s 64(1C) stated that Subsection (1A) (the duty to report) applies to a person referred to in any of the following paragraphs on and from the relevant date:

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<sup>228</sup> Section 64(1C)(a), (c) and (i): Government Gazette 28 October 1993, page 2932: The Governor in Council ordered that 4 November 1993 be the date fixed for the purposes of paragraphs (a), (c) and (i) of Section 64(1C) of the Act (that is, applying mandatory reporting duty to medical practitioners, nurses, and police officers).

<sup>229</sup> Section 64(1C)(d), (da), (db) and (e): Government Gazette 14 July 1994, page 1977: The Governor in Council ordered that 18 July 1994 be the date fixed for the purposes of paragraphs (d)(da)(db) and (e) (that is, applying mandatory reporting duty to teachers and school principals).

<sup>230</sup> In essence, those appointed to offices in the teaching service, and temporary employees.

<sup>231</sup> Under the *Education Act 1958* s 5, 'non-teaching staff' are defined as teacher aides to assist teachers, teacher assistants to assist teachers in special developmental schools, and rural school aides to assist teachers in rural primary schools. Section 15B(1)(a)(i) states that a council may employ any 'teaching staff' on a part-time or sessional basis. Read together, the provisions and their operation with Subsection (db) of the reporting legislation **would** include as mandated reporters part-time or sessional teachers including assistant teachers, teachers on a special staff, and students in training, but **would not** include teacher aides or teacher assistants.

- (a) a registered medical practitioner within the meaning of the *Medical Practice Act 1994*;
- (b) a registered psychologist within the meaning of the *Psychologists Registration Act 2000*;
- (c) a person registered under the *Nurses Act 1993*;
- (d) a person registered as a teacher under Part III of the *Education Act 1958* or permitted to teach under that Part (including by virtue of Section 44(4) and (5) of that Act);
- (da) a person appointed to an office in the teaching service under the *Teaching Service Act 1981* or employed under Division 4 of Part II of that Act;
- (db) a person employed under Section 15B(1)(a)(i) of the *Education Act 1958*;
- (e) the head teacher or principal of a State school within the meaning of the *Education Act 1958* or of a school registered under Part III of that Act;
- (f) the proprietor of, or a person with a postsecondary qualification in the care, education or minding of children who is employed by, a children's service to which the *Children's Services Act 1996* applies or a person nominated under Section 16(2)(b)(iii) of that Act;
- (g) a person with a post-secondary qualification in youth, social or welfare work who works in the health, education or community or welfare services field and who is not referred to in paragraph (h);
- (h) a person employed under Part 3 of the *Public Sector Management and Employment Act 1998* to perform the duties of a youth and child welfare worker;
- (i) a member of the police force;
- (j) a probation officer;
- (k) a youth parole officer;
- (l) a member of a prescribed class of persons.

However, several of these categories had **not** been proclaimed as mandated reporters, and remain nonmandated:

- (a) a registered psychologist within the meaning of the *Psychologists Registration Act 2000*;
- (f) the proprietor of, or a person with a postsecondary qualification in the care, education or minding of children who is employed by, a children's service to which the *Children's Services Act 1996* applies or a person nominated under section 16(2)(b)(iii) of that Act;
- (g) a person with a post-secondary qualification in youth, social or welfare work who works in the health, education or community or welfare services field and who is not referred to in paragraph (h);
- (h) a person employed under Part 3 of the *Public Sector Management and Employment Act 1998* to perform the duties of a youth and child welfare worker;
- (j) a probation officer;
- (k) a youth parole officer.

### **Different nature of the reporting duty**

While it may not affect the actual practice of reporting child sexual abuse, the nature of the reporting duty was, and remains, different to other jurisdictions. The provisions imposed an obligation to report a 'belief on reasonable grounds that a child *is in need of care and protection* on a ground referred to in paragraph (c) or (d) of Section 63' as soon as practicable after forming

the belief (author's emphasis).<sup>232</sup> Section 63 set out grounds on which a child would be defined as being 'in need of protection', with s 63(d) stating:

(d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse *and* the child's parents have not protected, or are unlikely to protect, the child from harm of that type (author's emphasis).

Hence, the duty imposed a threshold of significance of harm to activate the reporting duty. This differed from many jurisdictions, but not all. The element of 'significance' was judicially considered by the Supreme Court of Victoria in *Director-General of Community Services Victoria v Buckley and Others*.<sup>233</sup>

Further, and more importantly, uniquely among Australian mandatory reporting provisions, the Victorian legislation added the requirement that to activate the reporting duty, the reporter must believe 'the child's parents have not protected, or are unlikely to protect, the child from harm of that type'. This unique aspect – seen in similar form previously, but then abolished, in the Northern Territory – remains in operation, is on one view problematic at least in theory, and is discussed further below.

Confidentiality was conferred by s 64(4). Immunity was conferred by s 64(3)(a) (professional ethics) and (b) (other liability). The penalty was 10 penalty units.

### **Vestigial influence of former system on Victoria's mandatory reporting provision**

This historical context can still be seen to have an influence in Victoria's unique mandatory reporting provision.<sup>234</sup> Victoria's current mandatory reporting provision remains premised on reports being made when a child is 'in need of protection'. In this context, the definition of when a child is 'in need of protection' has two limbs: first, that the child has been or is likely to be harmed through sexual abuse; and second, that the child does not have a parent who protected, or is likely to protect, the child from that harm.

In the mandatory reporting context, this approach is unique in Australia and common law jurisdictions. It reflects the former system of voluntary reporting, which was focused more on child neglect (and physical abuse) and the presence of a protective parent, before child sexual abuse and its nature was recognised and modern child protection systems developed.

This approach is probably a consequence of the original provisions being designed with a view to defining the terms upon which statutory child protection responses (for example, care orders) can be made, and not being designed as a 'pure' mandatory reporting provision as enacted in other

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<sup>232</sup> The duty also required a report to be made after each occasion on which the reporter became aware of any further reasonable grounds for the belief.

<sup>233</sup> Unreported, Supreme Court of Victoria, 11 December 1992, O'Bryan J. At first instance in the Magistrate's Court, it was held that the term 'significantly damaged' meant there must have been 'some damage which may have some lasting or permanent effect unless resolved by the intervention of counselling and treatment'. O'Bryan J held on appeal that this construction was too exacting; rather, the term "significantly damaged" for the purpose of s 63(e) (as it was at the time) meant that 'the child's emotional or intellectual development is, or is likely to be, damaged in some respect that is important or of consequence to the child's emotional or intellectual development'; a much wider interpretation.

<sup>234</sup> For further discussion of Victoria's history, see the treatment in the Fogarty Reports; and see also Scott, D, and Swain, S, *Confronting Cruelty: Historical Perspectives on Child Protection in Australia*, (Melbourne University Press, Melbourne, 2002).

jurisdictions in Australian and other countries. The provisions have not been amended to align with the approach and conceptual basis of mandatory reporting provisions. For several reasons, at least on one view, this approach is arguably not suited to mandatory reporting generally, and especially not to the mandatory reporting of suspected child sexual abuse.<sup>235</sup>

**Precursors to and influences on the initial legislative change, and its unique nature: a brief summation of the Victorian historical context**

The background to Victoria's first mandatory reporting law is very detailed and has features somewhat different to other jurisdictions. An overview may be of assistance in both identifying the precursors to the development of the first mandatory reporting law, and in explaining why it has a different nature, focusing on whether the child is 'in need of protection'. This overview is lengthy but focuses on the main aspects of this history.

Despite other jurisdictions introducing mandatory reporting, Victoria decided not to do so, and maintained this position for many years. It was the sixth – and by far the largest jurisdiction in population size – to introduce the laws, 24 years after South Australia, 19

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<sup>235</sup> The introduction of mandatory reporting of child sexual abuse in Victoria marked an advance from its prior voluntary reporting scheme. However, the mechanism for implementing mandatory reporting continued to use the approach adopted by the voluntary reporting scheme. Central to this scheme was the focus on the child being 'in need of protection', the presence of 'harm', and the 'protective parent' clause. Retaining this clause in the mandatory reporting duty means that the mandatory reporting duty regarding child sexual abuse is not activated if the reporter believes the child has a parent who is able to protect the child from harm as a result of sexual abuse. While it may not affect reporting practice, according to the terms of the legislation, the reporter is required to make an assessment about the parents' protective capacity. If the reporter believes the child has a protective parent, the duty is not activated.

This additional clause presents complex issues but on one view it seems ill-suited to a mandatory reporting provision for child sexual abuse for several reasons. First, in most cases it seems redundant because harm will already have occurred, and if the harm has already happened, then clearly the child's parents did not protect the child from that harm. Second, to limit the mandatory reporting duty by requiring the reporter to calculate the child's parent's protective capacity defeats the principles and purposes of a genuine mandatory reporting provision. These are: most importantly, to enable identification of cases of sexual abuse through the making of reports by professionals outside the child's family; to enable expert assessment by government agencies of the child's (and the family's) situation; for these agencies to determine what support the child (and family) needs; to facilitate that support; to detect offenders; and to enable further action against the perpetrator. It is clearly beyond the power and capacity of mandated reporters to engage in such investigative and diagnostic tasks; moreover, it is beyond the power of parents to engage in some of these tasks (eg for some, the provision of therapeutic assistance, and for all, criminal investigation). Third, due to the nature of child sexual abuse, the policy reasons underpinning identification of cases remain intact even if a child's parent is able to protect the child from the relevant harm. The basis of the 'in need of protection' clause was parental acts or omissions towards the child; in contrast, the basis of mandatory reporting of child sexual abuse will usually involve the acts of persons who are not the child's parent. Fourth, the conceptual basis of the protective parent clause differs from that possessed by a mandatory reporting provision. The 'in need of protection' provision focuses on the circumstance required to warrant government agency intervention and hence the justifiable scope of state intervention in family life. It defined the scope of voluntary reports, investigation by protective interveners, and formal court orders relating to child protection. In contrast, a true mandatory reporting provision is aimed merely at a preliminary identification by designated professionals of suspected (not necessarily known) cases of abuse, for the purpose of enabling government agencies to assess the child's situation, to determine what, if anything, needs to be done to help the child and the family (including but not limited to the making of child protection orders), to facilitate the provision of necessary assistance, and to enable police investigations.



years after the Northern Territory, 18 years after Tasmania, 16 years after New South Wales, and 13 years after Queensland.

### **Earlier scheme of voluntary reporting to either non-government community organisation or police**

The system which had existed for some decades prior to mandatory reporting was to enable *voluntary* reporting to either police or a non-government community agency (the Children's Protection Society). Legislative provisions had been enacted to facilitate this voluntary reporting scheme before the mandatory reporting provisions were introduced in 1993. The voluntary reporting provision in force immediately before the mandatory reporting era was the *Children and Young Persons Act 1989* s 64, which enabled reports to these 'protective interveners'; that is, the police or the community agency. Similar provisions existed prior to this: the *Community Welfare Services Act 1978* (No 9248) amended the *Social Welfare Act 1970* (No 8089) by inserting s 31(3) enabling voluntary notification.<sup>236</sup> It can be noted that the original 1978 voluntary reporting provision did not include the protective parent clause; it was only inserted in the 1989 legislation.

### **Overall system, and voluntary reporting, acknowledged as unsuccessful**

As would be acknowledged by inquiries in Victoria, including the Carney Report in 1984 and the Fogarty Report in 1989, the overall approach to child protection in Victoria was unsuccessful. As part of the child protection system, the preference for voluntary rather than mandatory reporting of child sexual abuse was seen by the Victorian Law Reform Commission Report in 1988 as unjustifiable, although the Carney Report had concluded otherwise. As detailed below, a key reason for the Victorian Law Reform Commission Report's conclusion favouring mandatory reporting was the lack of reports in Victoria from a voluntary reporting system compared to others having mandatory reporting: this was also noted by several speeches in Hansard (also further detailed below).

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<sup>236</sup> The *Community Welfare Services Act 1978* (No 9248) s 19 inserted a new s 31(3) into the *Social Welfare Act* as follows: 'Any person who believes on reasonable grounds that a child or young person is in need of care for any of the reasons specified in Subsection (1) may notify the circumstances of the child or young person to a member of the police force or to any person who or children's protection agency which is authorised in that behalf by the Minister'. Section 31(1) stated that 'Every child or young person under 17 years of age **who is in need of care** by reason of any of the following shall be admitted to the care of the Department, namely:

- (a) The **child or young person has been ill-treated or is likely to be ill-treated** or his physical, mental or emotional development is in jeopardy;
  - (b) The guardians of or persons having the custody or responsibility for the child or young person are unable or unwilling to exercise adequate supervision and control over the child or young person;
  - (c) The guardians of the child or young person are dead or incapacitated and no other appropriate persons are available to care for the child or young person;
  - (d) The child or young person has been abandoned and his guardians or persons having the custody of or responsibility for him cannot, after reasonable inquiries, be found.
- (2) A child shall not be admitted to the care of the Department under the provisions of this section unless the Director-General is first satisfied that all reasonable steps have been taken by the Department to provide such services as are necessary to enable the child to remain in the care of his family and that admission to the care of the Department is in the best interests of the child in the circumstances.
- (3) **Any person who believes on reasonable grounds that a child or young person is in need of care for any of the reasons specified in Subsection (1) may notify the circumstances of the child or young person to a member of the police force or to any person who or children's protection agency which is authorised** in that behalf by the Minister (whether generally or in any particular case).

## A series of major government inquiries: the precursors to the 1993 mandatory reporting legislation

Before the introduction of the legislation in 1993, a number of government reports and inquiries explored, to greater and lesser extents, the issue of mandatory reporting. These were, most significantly, the Carney Report in 1984<sup>237</sup>; the Victorian Law Reform Commission Report in 1988<sup>238</sup>; and a report by Justice Fogarty in 1989.<sup>239</sup> Again significantly, apart from the Victorian Law Reform Commission Report, to the extent that they considered mandatory reporting at all, these inquiries tended to consider mandatory reporting of child abuse and neglect as a whole, rather than having a specific focus on child sexual abuse.

**The Carney Report.** In 1984, the Carney Report found that ‘The history of child welfare in Victoria has been characterised by a demonstrably superficial system of control and oversight. This has resulted in an essentially laissez-faire system of child welfare and protection.’<sup>240</sup> The Carney Report declared that children ‘have a right to protection’ and that the ‘state and the community have a joint and shared role in protecting children in circumstances where they are vulnerable to exploitation or abuse’ (p 9), but that primary responsibility for child protection must rest with the Government and not the voluntary sector. Several recommendations were made connected with reporting<sup>241</sup>:

- A voluntary reporting system should be maintained;
- Mandatory reporting should not be adopted;
- A central reporting register should not be established;
- Responsibility for intervening should be an exclusive State responsibility held by the Department of Community Welfare Services and the police, and the Children’s Protection Society (which previously had this capacity) should no longer be authorised to investigate alleged instances of abuse and neglect. The ‘dual track’ system should continue but effectively be re-established on the basis that the responsibility be held by the Department and the police, not the CPS and the police.

Several of these recommendations would later be the subject of the exact opposite action (most obviously, the introduction of mandatory reporting), and were criticised in other reports.<sup>242</sup>

**The Victorian Law Reform Commission Report.** In 1988, the report of the Victorian Law Reform Commission recommended introducing mandatory reporting for sexual abuse.<sup>243</sup>

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<sup>237</sup> Carney, T, *Equity and Social Justice for Children, Families and Communities (Final Report of the Child Welfare Practice and Legislation Review Committee)*, Volume 2, Melbourne, 1984; supplemented by T Carney, *Executive Summary & Recommendations*, Volume 1, Melbourne, 1984.

<sup>238</sup> Victorian Law Reform Commission, *Sexual Offences Against Children, Report No 18*, Melbourne, 1988.

<sup>239</sup> Justice John Fogarty and Delys Sargeant, *Protective Services For Children In Victoria*, Melbourne, 1989.

<sup>240</sup> Carney, T, *Executive Summary & Recommendations*, Volume 1, Melbourne, 1984, p 2.

<sup>241</sup> Carney, T, *Executive Summary & Recommendations*, Volume 1, p 31, Final Report, Volume 2, p 219–221. The treatment of mandatory reporting was cursory, limited to citation of submissions made without any critical assessment. It did not distinguish between types or extents of abuse, nor did it consult any data or other evidence from Australia or overseas.

<sup>242</sup> For example, a central register of child maltreatment (the Child at Risk Register) was established (the absence of this register was described by Justice Fogarty in his 1989 report as ‘a remarkable circumstance ... [it is] an essential tool ... surprisingly, there was opposition to its establishment: Fogarty, p 20’).

The Victorian Law Reform Commission focused on child sexual abuse, and because of this it included the most detailed treatment of this specific type of abuse and the most nuanced, sophisticated consideration of the justification of mandatory reporting in the context of child sexual abuse. The Commission even went to the lengths of requesting independent statistical advice about comparability of reporting data between states, and the meaning of the data.<sup>244</sup>

**VLRC findings.** In conclusion, the Victorian Law Reform Commission made several significant findings:

- Overall, ‘The evidence indicates that, with appropriate administrative arrangements, [mandatory reporting laws] can be effective in encouraging reporting, without causing an unacceptable increase in the rate of reports which, on investigation, prove to be unfounded’ (p 7).
- ‘No one disputes that many cases are not reported to the relevant authorities, even when they become known to people other than those involved. Yet, prompt intervention may be essential to prevent further abuse to the victim, and to other children’ (p 49).
- While failure to report does occur even when a mandatory reporting law exists, evidence of such failure to report is not sufficient to argue that the law is unjustified because ‘The effectiveness of a law cannot be judged by asking whether *everyone* obeys it. The question is not whether a mandatory reporting law would be obeyed in every case. The question is whether the introduction of such a law would lead to a significantly higher number of reports from the mandated group.’ (p 53).
- Cases which are unsubstantiated may actually involve an incident of child maltreatment, making it extremely misleading to use substantiation statistics as a measure of the ‘true’ amount of reported child abuse and neglect (a cited statement noted by the Commission in the context of discussing substantiation rates and their use in assessing efficacy of mandatory reporting: p 62 n 25).
- The evidence about reporting does not support either of the two main arguments sometimes put in opposition to the laws: that they are relatively ineffective in changing mandated reporters’ reporting practice, and that they have ‘a massive unintended effect on other people’, leading to an ‘explosion in reporting’ which undermines protective agencies’ capacity to work on known cases (p 53).
- *Evidence regarding effect of the law on mandated reporters:* There are three possible sources of evidence to inform an assessment of the effect of mandatory reporting laws on reporting practice of mandated reporters, and in each case there is evidence that a mandatory reporting law produces beneficial reporting behaviour and better outcomes for children subject to sexual abuse (p 54–56):
  - (i) reporting rates of similar professionals under systems both with and without mandatory reporting laws:  
A ‘consistent and striking’ pattern of reports by doctors in Victoria (without

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<sup>243</sup> Victorian Law Reform Commission, *Sexual Offences Against Children*, Report No 18, 1988, paragraphs 106–193, Recommendations 18–22.

<sup>244</sup> See Victorian Law Reform Commission, *Sexual Offences Against Children*, Report No 18, 1988, Appendix 2; De Vaus, D, and Powell, R, *Substantiation and Confirmation of Child Abuse Referrals in Victoria and NSW: A Comparison of Rates*, p 144–162.

mandatory reporting) compared with those in four other Australian jurisdictions (with mandatory reporting) for the year 1987 showed that doctors in Victoria reported between five and nine times fewer cases than their counterparts;

(ii) reporting rates of a professional group before and after introduction of the law:

Reporting data from New South Wales was cited (the same data as analysed in Lamond's study<sup>245</sup>), to show that reports by teachers of child sexual abuse tripled after the introduction of a reporting law and associated education;

(iii) qualitative evidence from professionals who are not subject to a mandatory reporting law about their anticipated future reporting behaviour if the law existed:

Three separate studies showed that significant proportions of members of varied professional groups would alter their decision not to report a suspected case if they knew at the time they had a legal duty to report;

- *Evidence regarding effect of the law on non-mandated reporters:* There is evidence about the effect of mandatory reporting laws on reporting practice of non-mandated reporters (that is, the general population).
- There are several factors other than introduction of mandatory reporting which produce an increase in reports by the general community, including greater public awareness, and appointment of additional child protection staff which increases intake and outcome numbers.
- The rate of unsubstantiated cases under a system of mandatory reporting is not significantly greater than that which eventuates under a system of voluntary reporting; in this regard, the conclusion of the independent study by De Vaus and Powell was that 'The statistics provide no basis for opposing mandatory reporting – at least in the limited form in which it applies in New South Wales (p 60–61, 162).
- 'The data shows that mandatory reporting is compatible with a substantiation rate which is similar to, or even higher than, the voluntary system in Victoria. In short, mandatory reporting can significantly increase the detection of abuse without a massive waste of investigative resources, and without greater unwarranted intrusion into people's lives than a voluntary reporting system' (p 66).
- 'The anticipated superior reliability of reporting in Victoria has not eventuated indicates the importance of the context in which both mandatory and voluntary systems operate ... criticisms [of mandatory reporting] have generally been directed at particular [implementation-related] aspects of the reporting systems, not at the principle of mandatory reporting itself' (p 66).

**VLRC recommendations.** In light of these findings, the VLRC recommended that (p 7):

- Mandatory reporting should be introduced in relation to sexual offences against children, but only if there is a commitment to a review of existing service arrangements and the development and maintenance of adequately resourced services (Recommendation 18).
- The law should not be proclaimed until guidelines about the law have been

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<sup>245</sup> Lamond, (1989).

disseminated to the mandated people and education programs have been conducted (Recommendation 19).

- The proposed mandatory reporting requirement should be limited in the following ways:
  - (a) It should apply only where a mandated person has reasonable grounds to believe that a sexual offence has been committed.
  - (b) It should apply only in relation to a child who is under 14 years at the time the information came to the attention of the mandated person.
  - (c) It should only apply where that person has reasonable grounds to believe that the child or another child remains at risk.
  - (d) The groups to be mandated should be prescribed by regulation. Initially, only medical practitioners, nurses, psychologists, school, kindergarten and pre-school staff, social workers, welfare workers, probation and parole officers and childcare workers should be mandated to report (Recommendation 20).
- A mandated report should be made to either CSV or the Police (Recommendation 21).
- The maximum penalty for breach should be a fine of up to \$5,000 (Recommendation 22).

**The Fogarty Report.** In 1989, the Fogarty Report conducted a detailed review of child protection in Victoria. Because it focused on fundamental issues confronting the child protection system in Victoria and recommended systemic change, the Fogarty Report did not make detailed inquiries into mandatory reporting, and only made several peripheral recommendations in relation to it. Before detailing those, it is useful to note the major features of the Fogarty Report to inform an understanding of Victoria's experience.

The Fogarty Report was established in 1988 as a result of the problems – some of them unique in Australia – facing the child protection system in Victoria. The Fogarty Report condemned major aspects of Victoria's child protection system, and indeed the central premise of the system itself; it was stated that 'Statutory child protection services in Victoria are in an unsatisfactory state. This is the cumulative result of a series of wrong turns over the past twenty years ... almost every mistake which could have been made has now been made' (p 2). Without reproducing the deliberations of the Fogarty Report, this Report will draw attention only to some particularly relevant points.

Key problems with the system were identified as follows:

- The historical approach by government to child protection was laissez-faire and relied to a large extent on a small voluntary non-government organisation (the Children's Protection Society (CPS), which for decades had power to investigate allegations of child abuse and neglect.
- The system involved a (misleadingly named) 'dual track approach' involving both the CPS and the police which each had authority to investigate in this 'protective' capacity; the government department had only a distant supervisory role.
- There was no coherent or systematic approach to child protection, or to management of the child protection system, lacking even such basic information as could be provided by a child protection register (no such register was kept).
- Whereas in the 1970s every other Australian jurisdiction saw child protection as a direct responsibility of the State through its Departments, 'Victoria followed a fundamentally different path – the provision of child protection through a

voluntary agency and also through the Police. This led inexorably to the present and to many of the current problems' (p 18–19).

- Despite the pioneering research published in Australia by Birrell and Birrell, and Bialestock, and the suggestion by the Birrells for specialist teams empowered to remove at-risk children, in the late 1960s after two interdepartmental committee inquiries the Victorian government rejected this idea and the concept of mandatory reporting, referring to the USA mandatory reporting legislation as governed 'by hysteria', and recommended leaving courts as the sole repository of the power to decide when children could be removed from parents (p 19).
- Recommendations in 1975 by the Child Maltreatment Workshop for a redesigned integrated system with child protection made the responsibility of the Health Department were ignored (p 20).
- Recommendations in 1977 by a review commissioned by the CPS (the Monash University Report) for a redesigned integrated system were ignored (p 20).
- In 1978 the Minister for Community Welfare Services announced that intervention protective services were to be contracted to the Children's Protection Society (the opposite of what Monash had suggested – this was placed in the 1978 CWS Act which expanded the definition of a 'child in need of care and protection' and located child protective policy within the family and child welfare services, and continued the policy of voluntary notification (21–22).
- Hence the policy was maintained to implement child protection through the CPS, continuing the role they played alongside police; Fogarty concluded that 'it is clear that this policy was inappropriate. At the most fundamental level, it assumed that the Children's Protection Society, a voluntary organisation, could expand to meet the increasing responsibilities and increasing public expectations in this area of child protection on a State wide basis.' (p 22).
- The 1984 Donovan Report (commissioned by the CPS) reviewed the role of the CPS and recommended that the CPS no longer be involved in child protection; the CPS itself endorsed this position when in 1984 it did not seek reauthorisation from 1985 (p 25).
- The Carney Report made a similar recommendation; that is, that responsibility for intervening in child protection matters should be an exclusive State responsibility held by the Department of Community Welfare Services and the police, and the Children's Protection Society should no longer be authorised to investigate alleged instances of abuse and neglect.
- These recommendations were effectively implemented in 1985 with police having the role of prompt investigative action and the Department's welfare oriented protective service focusing on 'careful assessment' (p 34).
- It became clear in the next several years that this dual track system was dysfunctional due to several factors, many of which flowed from inadequate government resourcing and a lack of priority given to child protection, which were exacerbated by massive administrative challenges presented by: the blurred demarcation of responsibility between the Department and the police; child protection being placed within the responsibilities of a new Department that had many areas of responsibility; the sudden withdrawal of the CPS; infrastructure and systems that were poorly-developed or non-existent; inadequate personnel; and a growing realisation about the extent of demand for child protection (p 37–45).
- As a result of the problems and challenges which were acknowledged to face the child protection system in Victoria, the Fogarty Report was established in 1988.

Even with its frank assessment of child protection, the Fogarty Report did not explore the issue of child sexual abuse in detail, stating that this would not be appropriate (p 82). It did, however, observe that cases of child sexual abuse should be dealt with by efficient and coherent joint use of the Department in its protective role, the police in its investigative role, and health in its medical role (p 82–84).

Similarly, the Fogarty Report stated that its scope did not encompass the ability ‘to deal in a definite way with the vexed question of mandatory reporting’ (p 86). The Fogarty Report concluded that, because of the extremely dysfunctional and stressed system then existing in Victoria, that it would not be able to cope logistically with a system that included mandatory reporting at that time, and accordingly<sup>246</sup>:

- ‘mandatory reporting, whether generally or related to specific classes of persons, should not be considered for Victoria at present’<sup>247</sup>
- The initial focus should be on public and professional education and the encouragement of voluntary reporting
- ‘When the child protection system in Victoria is on a much stronger footing the question whether any form of mandatory reporting should be introduced can be determined in a much more satisfactory atmosphere and in the light of that experience’ (p 87).

It can be noted that a review conducted one year later by Justice Fogarty reiterated this conclusion, again stating that a consideration of whether to introduce mandatory reporting should remain on hold while the system develops greater stability.<sup>248</sup>

**8 September 1990: the killing of Daniel Valerio.** Daniel Valerio was a two-year-old boy who was beaten to death by his mother’s partner after several months of sustained, severe assaults. He died on 8 September 1990 – one month after the release of Justice Fogarty’s *One Year Review* recommended an ongoing moratorium on consideration of mandatory reporting. Daniel Valerio was murdered in circumstances where his death was widely seen as avoidable. Clear indicators of his earlier severe ongoing abuse had been seen by numerous professionals including doctors and teachers, yet none had reported his condition. An earlier notification had been made by an electrician who had visited the household, and an examination was conducted by the Community Policing Service and a police medical officer, but, for unknown reasons, it is not clear why action was not taken at that time. The post mortem examination revealed Daniel had 104 separate bruises, healing fractures to both collarbones, and severe abdominal injuries consistent with trauma caused by a severe motor accident.<sup>249</sup> Daniel Valerio’s killing served as the final catalyst which forced the Victorian government to consider further measures which could

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<sup>246</sup> Fogarty, Justice J, and Sargeant, D, *Protective Services For Children In Victoria*, Victorian Family and Children’s Services Council, Melbourne, 1989, p 86–87.

<sup>247</sup> Note that again, there is no consideration of a system of reporting of a specified type(s) of abuse.

<sup>248</sup> Justice J Fogarty, *One Year Later: Review of the Redevelopment of CSV’s Protective Services for Children in Victoria*, Victorian Family and Children’s Services Council, Melbourne, 1990.

<sup>249</sup> For details of the factual matrix in this case, see *R v Aiton* [1993] Vic SC 528, where the applicant sought leave to appeal both his conviction and sentence. See also *R v Aiton* [1993] Vic SC 78, the sentencing remarks of Justice Cummins, where, among other things, it was stated that: ‘There is no doubt, I consider, that if the law in this state was that child abuse be mandatorily reported, this child’s life would have been saved’ (p 741). Justice Cummins noted that this conclusion was also reached by Justice Fogarty, who chaired an inquiry into the case.

be adopted to improve child protection, including mandatory reporting.

**Hansard, April 1993.** The rationale for introducing a limited form of mandatory reporting in Victoria is not able to be identified in a simple clear-cut way. While it can reasonably be judged to have been influenced to a considerable extent by community and media outrage at Daniel Valerio's murder and the circumstances which led to it, the previous history in Victoria can be seen to have set the circumstances for its introduction. However, in addition, it is notable that the Parliamentary debates are more nuanced and subtle and evince a more principled response, which was also reliant on an emerging evidence base about the positive effects of mandatory reporting, than simply a reaction to community pressure.

***The basis for introducing the law: a response based on principle and evidence.*** This more principled basis for introducing the law can be seen in the Parliamentary debates. Statements in Hansard evince a very strong bipartisan agreement that mandatory reporting of physical and sexual abuse was required. Significantly, the second reading speech by the Minister and contributions by other members of Parliament discussed the fundamental issue of the effect of mandatory reporting laws, and acknowledged the unique qualitative features of child sexual abuse.<sup>250</sup>

Similarly, it is recognised that in contrast to neglect, sexual abuse is concealed and is not visible; furthermore, it is always criminal (Mr John, Minister for Community Services, Legislative Assembly, 21 April 1993, p 1005 ff):

As sexual abuse is a hidden problem and is therefore hard to detect, a legal requirement to report such abuse is essential. Indeed the purpose of the proposed amendment is to uncover hidden but serious abuse and to underline *the criminal nature of sexual abuse and severe physical abuse.*'

***Disparity in reporting of cases and case identification in Victoria, compared with other states.*** It is notable that members of Parliament also identified the disparity in reporting of cases and case identification in Victoria, which lacked mandatory reporting, compared with other states which had mandatory reporting. A fundamental principle underpinning the reporting duty was clearly acknowledged to be the positive effect it had been proved to have on leading to reports of cases of abuse which would otherwise not occur. For example, the Minister stated that (author's emphasis):

'the provisions are considered necessary in view of the extremely low reporting rates of child *sexual abuse* and to a lesser extent child physical abuse in this state in comparison with other states which have mandatory reporting. ... Although in recent years Victoria has coped well with overall increases in child abuse reporting rates comparable to the situations in other states, these reports have largely centred on *emotional abuse and neglect* concerns. By contrast, *sexual abuse* reports, and to a lesser extent physical abuse reports, have not increased under the present voluntary reporting system at the same rate as they have in other states that have mandatory

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<sup>250</sup> Mr John (Liberal Party), Minister for Community Services, Legislative Assembly, 21 April 1993, p 1005 ff.



reporting.

Similarly, in supporting the amendments, it was stated by the Labor Party in opposition that<sup>251</sup>:

In 1989–90 the number of sexual abuse reports in New South Wales was 14 per 10,000 children; in Victoria it was three per 10,000. That is a remarkable difference in reporting rates between basically similar communities. ... That is strong evidence that the situation in Victoria is unsatisfactory and that many cases are not being reported. We can all accept that the same rate of abuse must exist here and that our children are simply suffering and no one is coming to their assistance.

***Other factors: studies of the positive impact of introducing the law; effects on individuals' reporting decisions.*** Parliamentarians also noted the results of studies on the effect of the reporting laws on reporting behaviour. It was observed that data from a New South Wales study had found that the introduction of a law had a positive effect on reporting within a jurisdiction, by comparing reporting practice before and after the reporting duty existed.<sup>252</sup> Finally, qualitative studies were cited, showing that individuals were likely to change their decision not to report, if they knew they were under a legal obligation to report.<sup>253</sup>

***The Second Fogarty Report, July 1993.*** This second Fogarty Report, published in July 1993, was prompted by the death of Daniel Valerio on 8 September 1990, and the circumstances in which he died, involving repeated exposure to persons who could have reported seeing his obvious injuries. Shortly after the commencement of the mandatory reporting law in 1993, this second Fogarty Report, which was established in part to consider how best to implement the mandatory reporting legislation, made several recommendations. Most significantly for this report, it recommended<sup>254</sup>:

- an 'extensive campaign of information and education' should be conducted for mandated reporters so they know their legal responsibilities and can comply with them
- agreements should be completed between organisations such as hospitals and mandated reporter groups so they each understand their responsibilities and expectations
- a public awareness campaign should be conducted to ensure the public knows what is happening
- the Department must ensure it is able to provide 'a fully professional response' by ensuring its staff are trained to deal with notifications, provide accurate advice to mandated reporters, and can respond promptly to notifications

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<sup>251</sup> Parliamentary Debates, Second Reading, Legislative Assembly, p 1384, Mrs Garbutt (Labor Party, Bundoora), 29 April 1993. See also Parliamentary Debates, Second Reading, Legislative Assembly, Mr Leighton (Preston), p 1407–1408, acknowledging data showing substantially higher rates of reports and identified cases from New South Wales compared with Victoria.

<sup>252</sup> Parliamentary Debates, Second Reading, Legislative Assembly, p 1384, Mrs Garbutt (Labor Party, Bundoora), 29 April 1993; D Lamond, 'The impact of mandatory reporting legislation on reporting behaviour' (1989) 13 *Child Abuse & Neglect*, 471.

<sup>253</sup> Parliamentary Debates, Second Reading, Legislative Assembly, Mr Leighton (Preston), p 1408, citing the study referred to by the Victorian Law Reform Commission in 1988.

<sup>254</sup> Justice J Fogarty, *Protective Services For Children In Victoria*, Melbourne, 1993, p 10–12.

- specific funds for education and training must be allocated
- information about the financial costs involved in administration must be provided and the funding required must be supplied: the required funding ‘needs to be available so that no gap develops between the demand and the capacity to service it’ (p 12)
- the resulting extra work for the non-government sector and the Children’s Court must also be funded.

### 3.7.2 Key changes

#### ***Children, Youth and Families Act 2005 (relevant provisions commenced 23 April 2007)***

The *Children and Young Persons Act 1989* (No 56) was repealed on 23 April 2007 by s 601 of the *Children, Youth and Families Act 2005* (No 96). The CYFA 2005 incorporated the mandatory reporting provisions in Chapter 4 (Children in need of protection) and Part 4.4 (Reporting) (ss 162, 182 ff).

The new legislation made no substantive changes to mandatory reporting provisions.<sup>255</sup> There was no change to the types of abuse that must be reported (provisions renumbered – now s 162(1)(d) – or the nature of reporting duty (for example, the state of mind required to activate the duty). The definition of ‘child’ as a person under 17 was not amended (s 3).

There were **no changes to mandated reporter groups** because when enacted, no further groups were gazetted as mandated reporters. The provisions were renumbered as follows in s 182(1)(a)-(l)<sup>256</sup>:

- (a) a registered medical practitioner;
- (b) a person registered under the *Nurses Act 1993*;
- (c) a person who is registered as a teacher under the *Victorian Institute of Teaching Act 2001* or has been granted permission to teach under that Act;
- (d) the head teacher or principal of a state school within the meaning of the *Education Act 1958* or of a school registered under Part III of that Act;
- (e) a member of the police force;
- (f) on and from the relevant date, the proprietor of, or a person with a post-secondary qualification in the care, education or minding of children who is employed by, a children’s service to which the *Children’s Services Act 1996* applies or a person nominated under Section 16(2)(b)(iii) of that Act;
- (g) on and from the relevant date, a person with a post-secondary qualification in youth, social or welfare work who works in the health, education or community or welfare services field and who is not referred to in paragraph (h);
- (h) on and from the relevant date, a person employed under Part 3 of the *Public Administration Act 2004* to perform the duties of a youth and child welfare worker;

<sup>255</sup> However, note that the new s 184(4) specified that ‘For the purposes of this section, a belief is a belief on reasonable grounds if a reasonable person practising the profession or carrying out the duties of the office, position or employment, as the case requires, would have formed the belief on those grounds’.

<sup>256</sup> Section 182(2) was the provision regarding the ‘relevant date’ and gazetting: (2) In paragraph (f), (g), (h), (i), (j), (k) or (l) of Subsection (1) “the relevant date”, in relation to a person or class of persons referred to in that paragraph, means the date fixed for the purposes of that paragraph by an Order made by the Governor in Council and published in the Government Gazette.

- (i) on and from the relevant date, a registered psychologist;
- (j) on and from the relevant date, a youth justice officer;
- (k) on and from the relevant date, a youth parole officer;
- (l) on and from the relevant date, a member of a prescribed class of persons.

Several minor developments have occurred since, as applying to the duty to report sexual abuse.

### **How harm may be constituted (commenced 23 April 2007)**

A new s 162(2) was inserted by *Children, Youth and Families (Consequential and Other Amendments) Act 2006* (No. 48/2006) to clarify that ‘harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances’.

### **Addition of midwives as a new mandated reporter group (commencing 1 July 2010)**

Several statutes have made insubstantial amendments to incorporate changes to professional regulatory mechanisms and definitions.<sup>257</sup> However, the *Statute Law Amendment (National Health Practitioner Regulation) Act 2010* (No. 13 of 2010), in amending the definition of ‘nurse’ to add midwives, clearly adds midwives to the list of mandated reporter groups. This Act made several insubstantial amendments to definitions.<sup>258</sup> The more significant amendment was in Schedule item 12, which inserted a definition of ‘midwife’<sup>259</sup> and added midwives to s 182 as a mandated reporter group as a subset of nurses.<sup>260</sup>

Hence, since 1 July 2010, the reporting duty and the list of mandated reporters in Victoria has been as follows. Under s 184(1):

a mandated reporter who, in the course of practising his or her profession or carrying out the duties of his or her office, position or employment as set out in Section 182, forms the belief on reasonable grounds that a child is in need of protection on a

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<sup>257</sup> The *Justice Legislation Amendment Act 2010* (No 30) made consequential amendments (comm 26 June 2010) as follows:

44 Statute law revision – (1) In Section 184(1) of the *Children, Youth and Families Act 2005*, for “162(c) or 162(d)” substitute “162(1)(c) or 162(1)(d)”.

The *Children’s Services Amendment Act 2011* (No 80) s 79 (Sch. Item 2) commencing 1 January 2012) inserted a new s 182(fa) as follows:

2.3 In Section 182(1), after paragraph (f) insert:

“(fa) on and from the relevant date, the approved provider or nominated supervisor of, or a person with a post-secondary qualification in the care, education or minding of children who is employed or engaged by an education and care service within the meaning of the *Education and Care Services National Law* (Victoria)”.

Similar insubstantial amendments to s 182 were made by the *Health Professions Registration Act 2005*, No. 97/2005, and the *Education and Training Reform Act 2006*, No. 24/2006.

<sup>258</sup> For example, item 12.2 stated that In Section 3(1) – (a) for the definition of registered medical practitioner substitute – “registered medical practitioner means a person registered under the *Health Practitioner Regulation National Law* to practise in the medical profession (other than as a student)”; (b) for the definition of registered psychologist substitute – “registered psychologist means a person registered under the *Health Practitioner Regulation National Law* to practise in the psychology profession (other than as a student)”.

<sup>259</sup> 12.3 In Section 3(1), insert the following definitions – “midwife means a person registered under the *Health Practitioner Regulation National Law* – to practise in the nursing and midwifery profession as a midwife (other than as a student); and (b) in the register of midwives kept for that profession; “nurse” means a person registered under the *Health Practitioner Regulation National Law* to practise in the nursing and midwifery profession as a nurse (other than as a midwife or as a student)”.

<sup>260</sup> 12.4 For Section 182(1)(b) substitute – “(b) a nurse; (ba) a midwife;”.

ground referred to in Section 162(1)(d) must report to the Secretary that belief and the reasonable grounds for it as soon as practicable.

Section 162(1) For the purposes of this Act, a child is in need of protection if any of the following grounds exist:

(d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.

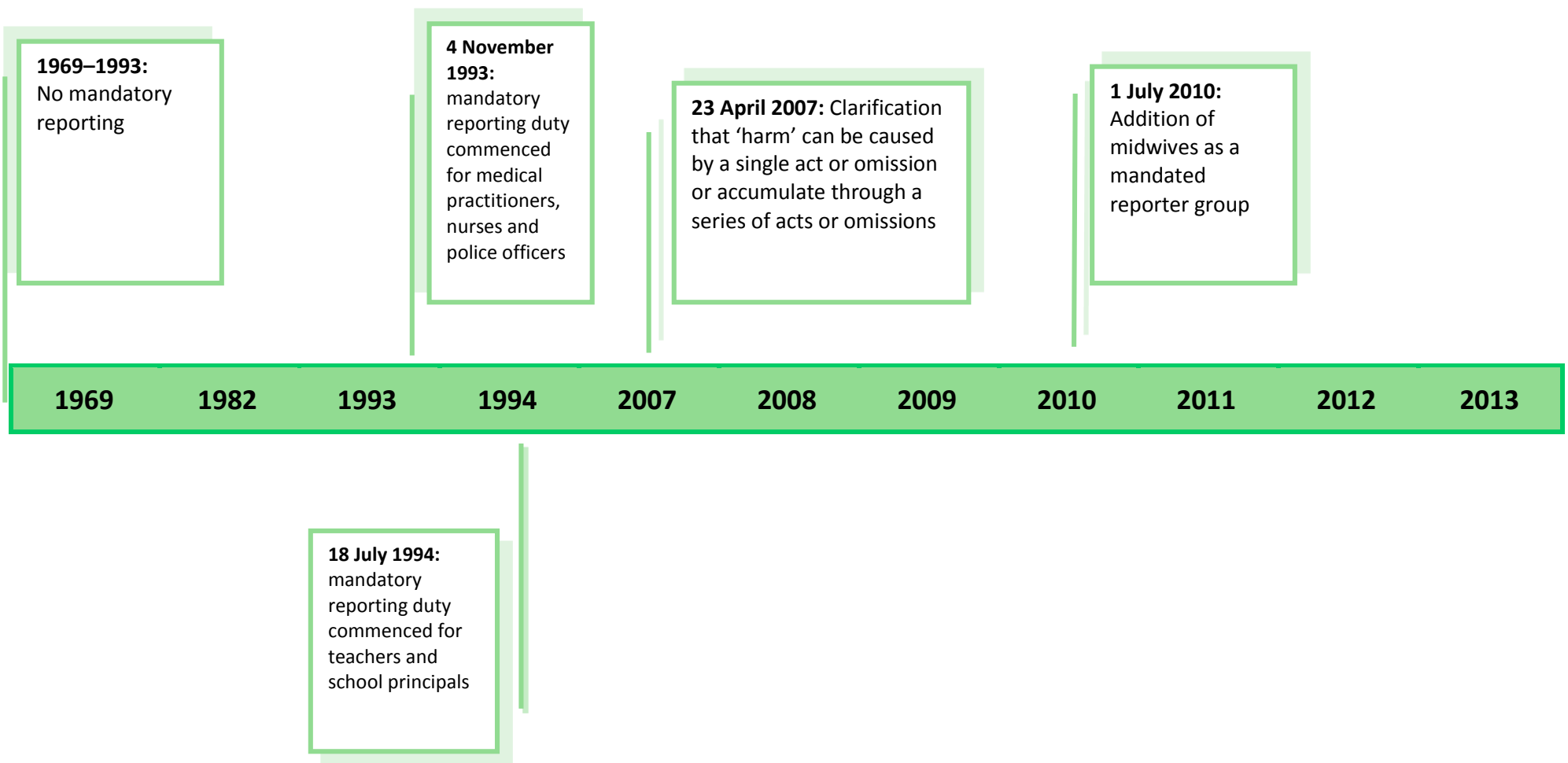
s 182(1): The following persons are mandatory reporters for the purposes of this Act (note that only the shaded categories are mandated reporters):

- (a) a registered medical practitioner;
- (b) a person registered under the *Nurses Act 1993*;
- (ba) a midwife;
- (c) a person who is registered as a teacher under the *Education and Training Reform Act 2006* or has been granted permission to teach under that Act;
- (d) the principal of a Government school or a non-Government school within the meaning of the *Education and Training Reform Act 2006*;
- (e) a member of the police force;
- (f) on and from the relevant date, the proprietor of, or a person with a post-secondary qualification in the care, education or minding of children who is employed by, a children's service to which the *Children's Services Act 1996* applies or a person who is a nominee within the meaning of that Act for the children's service;
- (fa) on and from the relevant date, the approved provider or nominated supervisor of, or a person with a post-secondary qualification in the care, education or minding of children who is employed or engaged by an education and care service within the meaning of the *Education and Care Services National Law (Victoria)*;
- (g) on and from the relevant date, a person with a post-secondary qualification in youth, social or welfare work who works in the health, education or community or welfare services field and who is not referred to in paragraph (h);
- (h) on and from the relevant date, a person employed under Part 3 of the *Public Administration Act 2004* to perform the duties of a youth and child welfare worker;
- (i) on and from the relevant date, a registered psychologist;
- (j) on and from the relevant date, a youth justice officer;
- (k) on and from the relevant date, a youth parole officer;
- (l) on and from the relevant date, a member of a prescribed class of persons.

## Summary of current position

Victoria has a relatively small class of mandated reporters. It has a unique approach to imposing the mandatory reporting duty, characterised by its use of the 'child in need of protection' provision and its concepts of harm and the protective parent.

### 3.7.3 Timeline showing key developments, Victoria



## 3.8 WESTERN AUSTRALIA

### 3.8.1 The first legislation

Western Australia did not have any form of mandatory reporting legislation until 1 January 2009.<sup>261</sup>

#### **New mandatory reporting legislation for child sexual abuse: *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008* (commencing 1 January 2009)**

Western Australia introduced mandatory reporting legislation for child sexual abuse with the *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008* (WA) (No 26 of 2008) commencing on 1 January 2009, inserting provisions into the *Children and Community Services Act 2004* (WA).

The key provisions are in Division 9A (ss 124A-124H). Section 124A defines relevant terms. Section 124B(1) sets out the duty. The key reporter groups are doctors, nurses, midwives, police officers, and teachers (which included members of the teaching staff of a community kindergarten). The state of mind which activates the duty to report is 'belief on reasonable grounds'.

The duty applies to a reasonable belief of past or presently occurring sexual abuse (not extending to suspected future abuse). In addition, unlike other jurisdictions except Queensland, the term 'child sexual abuse' is defined, albeit non-exhaustively.<sup>262</sup> The penalty for failure to report is \$6000. Confidentiality of the reporter's identity is conferred by s 124F. Immunity from civil, criminal and administrative proceedings in relation to a report made in good faith is conferred by s 129.

The legislation has been amended since commencement, but generally only incidentally to specify the provision of further information in reports made, and to harmonise the provisions with new legislation concerning professional registration.<sup>263</sup>

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<sup>261</sup> Apart from the federal legislation applying to court personnel in all states and territories via the *Family Law Act 1975* s 67ZC.

<sup>262</sup> As (s 5): 'sexual behaviour in circumstances where – (a) the child is the subject of bribery, coercion, a threat, exploitation or violence; or (b) the child has less power than another person involved in the behaviour; or (c) there is a significant disparity in the developmental function or maturity of the child and another person involved in the behaviour'.

<sup>263</sup> For example, The *Children and Community Services Amendment Act 2010* (No 49 of 2010) s 72 amended s 124C(3)(c) to delete the words "if known" and insert "if, or to the extent, known", and added the new subsection (ea) as described above, concerning the information to be provided in the report. Section 85 amended the penalty provisions in 124C(1), (2) and (4) to add the words "a fine of". The *Health Practitioner Regulation National Law (WA) Act 2010* (No 35 of 2010) s 39 amends the definitions of "doctor", "nurse" and "midwife" to align those occupational definitions with the new regulatory framework of professional registration. The *Teacher Registration Act 2012* (No 16 of 2012) s 163 amends the definition of "teacher" to align its occupational definition with the new regulatory framework of professional registration.

### Precursors to and influences on the legislative change

The enactment of legislation in Western Australia occurred many years after all other states and territories. While some commentators consistently opposed any form of mandatory reporting<sup>264</sup>, there had been an earlier formal recommendation made by the Gordon Inquiry in 2002 for at least some form of mandatory reporting, but this had not been acted upon. In 2002, the Gordon Inquiry had recommended mandatory reporting by medical practitioners of children under age 13 with sexually transmitted diseases (Recommendation 187, p 458), and indicated that a system of mandatory reporting by medical practitioners of sexual abuse of children under age 13 should not be opposed and should be seriously considered (Recommendation 189, p 458).<sup>265</sup> As well, in 2006 the Liberal Party had presented a bill to enact mandatory reporting, but this was opposed and defeated by the Labor Party.<sup>266</sup>

In addition, the Ford Inquiry (2007) explored the functioning of the Western Australian child protection system, after an inquest into the death of a child known to the child protection department. Organisational restructuring was recommended and the Department of Child Protection was created. Although it was not one of the Ford Report recommendations<sup>267</sup>, the Carpenter Labor government eventually responded to pressure from the Liberal opposition, and to evidence of high rates of child sexual abuse in Indigenous communities, and introduced mandatory reporting of sexual abuse.<sup>268</sup>

### A note on the definition of ‘teacher’: the original 2008 definition

In the *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008*, doctors, nurses, police, midwives and teachers were designated as mandated reporters. The legislation defined ‘teacher’ as (s 5):

- (a) a person who, under the *Western Australian College of Teaching Act 2004*, is registered, provisionally registered or has a limited authority to teach; or
- (b) a person who is appointed under the *School Education Act 1999* s 236(2) as a member of the teaching staff of a community kindergarten; or
- (c) a person who provides instruction in a course that is:

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<sup>264</sup> Based on incorrect representations of what the criminal law required regarding disclosure of suspected or known offences, and on poorly-informed and partial claims about the effect of mandatory reporting: see for example F Ainsworth, cited in the Gordon Inquiry, p 457.

<sup>265</sup> Gordon, S, Hallahan, K, and Henry, D, *Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, 2002, p 449–458.

<sup>266</sup> *Children and Community Services (Mandatory Reporting) Amendment Bill 2006*; see Western Australia Parliamentary Debates, Legislative Assembly, 1 November 2006, p 8049–8050, Paul Omodei, Leader of the Opposition.

<sup>267</sup> Ford, P, *Review of the Department for Community Development* (the Ford Review), 2007, p 119–122, Recommendation 70.

<sup>268</sup> A treatment of the events in Western Australia can be found in B Mathews, C Goddard, B Lonne, S Short & F Briggs, ‘Developments in Australian laws requiring the reporting of suspected child sexual abuse’ (2009) 34(3) *Children Australia* 18–23. Hansard details the longstanding difference on this issue between the two major political parties: Western Australia Parliamentary Debates, Children and Community Services Amendment (Reporting Sexual Abuse of Children) Bill 2007, Legislative Council, 8 April 2008, p 1904–1905; 27 May 2008, p 3265–3278; 29 May 2008, p 3523–3335.

- (i) mentioned in the *School Education Act 1999* s 11B(1)(a), (b) or (e); and
- (ii) prescribed for the purposes of this definition<sup>269</sup> or
- (d) a person who instructs or supervises a student who is participating in an activity that is:
  - (i) part of an educational program of a school under an arrangement mentioned in the *School Education Act 1999* s 24(1); and
  - (ii) prescribed for the purposes of this definition<sup>270</sup> or
  - (e) a person employed by the chief executive officer as defined in the *Young Offenders Act 1994* s 3 to teach detainees at a detention centre.

Therefore, mandated reporters among the teaching profession included registered teachers, those appointed as teaching staff at community kindergartens, instructors in vocational education programs and home schooling programs, and those who teach in youth detention centres. However, under the original legislation, employees of childcare services who do not teach at that centre were not (and still are not) mandated reporters.<sup>271</sup>

Arguably, the original definition would have included as mandated reporters those who were registered teachers working in childcare centres. However, at the time, the Act did not expressly include childcare teachers as mandated reporters, and ambiguity arose because the WACTA regulates teaching in schools, rather than childcare centres. Amendment in 2012 removed any doubt: **those who teach in childcare services are now clearly included as mandated reporters.** Since 2012, there is no doubt that all those who teach in an 'educational venue' must be registered and so fall within the *Children and Community Services Act 2004* definition of 'teacher'; since childcare centres are now defined as educational venues (see below), and are mandated reporters in that capacity. However, in the childcare context, those who simply **provide care** to children are not 'teachers' and so are not mandated reporters.

### 3.8.2 Key changes

#### Change in the definition of 'teacher' (commencing 7 December 2012)

Provisions were enacted in the *Children and Community Services Act 2004* by the *Teacher Registration Act 2012* that clarify which persons registered as teachers are mandated reporters. The *Teacher Registration Act 2012* (No 16 of 2012) amended the definition of 'teacher' to **remove** the original ss (b) which included "a person who is appointed under the *School Education Act 1999* s 236(2) as a member of the teaching staff of a community kindergarten". However, the relevant provisions in the *Teacher Registration Act* (see ss 4, 6, 7 discussed below) clearly still include **kindergarten teachers (and childcare teachers)**, all of whom must be registered to teach in educational venues. Hence, these classes of teachers are still mandated reporters.

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<sup>269</sup> Essentially, options other than school in the last two years of compulsory education, like vocational education.

<sup>270</sup> Essentially, home schooling.

<sup>271</sup> The *Child Care Services Act 2007* at the time also did not mandated childcare staff. It regulated the provision of childcare (rather than education); see also s 4. The *Western Australian College of Teaching Act 2004*, which regulated teaching in schools, did not include childcare staff as 'teachers' and so did not require childcare staff to be registered. See the explanatory memorandum which appears to limit the definition and scope of 'teacher': [http://www.parliament.wa.gov.au/Parliament/bills.nsf/6C1C35600F6FA450C82573A20001DFD7/\\$File/EM%2B-%2BBill%2B257-1.pdf](http://www.parliament.wa.gov.au/Parliament/bills.nsf/6C1C35600F6FA450C82573A20001DFD7/$File/EM%2B-%2BBill%2B257-1.pdf)



## 2012 amendment of 'teacher'

In 2012 the *Teacher Registration Act 2012* amended the *Children and Community Services Act 2004* s 124A definition of 'teacher' by deleting paragraphs (a) and (b), which stated:

'teacher' means:

(a) a person who, under the *Western Australian College of Teaching Act 2004*, is registered, provisionally registered or has a limited authority to teach; or

(b) a person who is appointed under the *School Education Act 1999* s 236(2) as a member of the teaching staff of a community kindergarten;

and inserting a new paragraph (a) so that a 'teacher' is defined as:

a person who is registered under the *Teacher Registration Act 2012*.

This had the effect that any person who 'teaches' at a school, kindergarten, childcare centre, detention centre or any place prescribed as an educational venue, is a mandated reporter.<sup>272</sup>

This is because under the *Teacher Registration Act 2012* s 6, it is an offence to 'teach in an educational venue unless the person is a registered teacher'.<sup>273</sup> Those who had to be 'registered teachers' include those who 'teach' at childcare centres (but does not include those who simply *provide care* at a childcare centre). This is because of the definitions of 'teach', 'educational venue' and 'educational program'.<sup>274</sup>

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<sup>272</sup> Note that under the *Education and Care Services National Law (WA) Act 2012*, 'education and care service' is defined as 'any service providing or intended to provide education and care on a regular basis to children under 13 years of age other than:

(a) a school providing an educational program to school children in accordance with the *School Education Act 1999*; or

(b) a community kindergarten providing an educational program to children in accordance with the *School Education Act 1999*; or

(c) a personal arrangement; or

(d) a service principally conducted to provide instruction in a particular activity; for example, instruction in sport, dance, music, culture or language or religious instruction.

(e) a service providing education and care to patients in a hospital or patients of a medical or therapeutic care service; or

(f) care provided under a child protection law of a participating jurisdiction; or

(g) a prescribed class of disability service; or

(h) a service of a prescribed class;

Example: Education and care services to which this Law applies include long day care services, family day care services and outside school hours services, unless expressly excluded.

<sup>273</sup> Under s 7 it is an offence to employ an unregistered person to teach in an educational venue.

<sup>274</sup> 'Teach' is defined in s 4 as: 'to undertake duties in an educational venue that include:

(a) the delivery of an educational program designed to implement a prescribed curriculum and the assessment of student participation in such an educational program; or

(b) the administration of any such educational program, but does not include duties of the kind undertaken:

(c) by a teacher's aide or a teacher's assistant, or by a student teacher on practicum placement; or

(d) by a person employed or engaged to provide care at a childcare centre but who is not employed or engaged to teach at that centre; or

(e) by an unpaid volunteer, unless the volunteer is undertaking duties of a kind, or to an extent, prescribed for the purposes of this paragraph; or

(f) by such persons, or in such circumstances, if any, as are prescribed.'

'Educational venue' is defined in s 4 as 'any of the following – (a) a school as defined in the *School Education Act 1999* s 4; (b) a kindergarten registered under the *School Education Act 1999* Part 5; (c) a childcare centre; (d) a

In sum, this means that among the teaching profession, mandated reporters in Western Australia are those who are registered under the *Teacher Registration Act 2012* and whose duties include delivery of an educational program in an educational venue. Those who provide care at childcare centres but who do not teach at that centre will not be mandated; nor will teacher's aides, teacher's assistants, and student teachers.

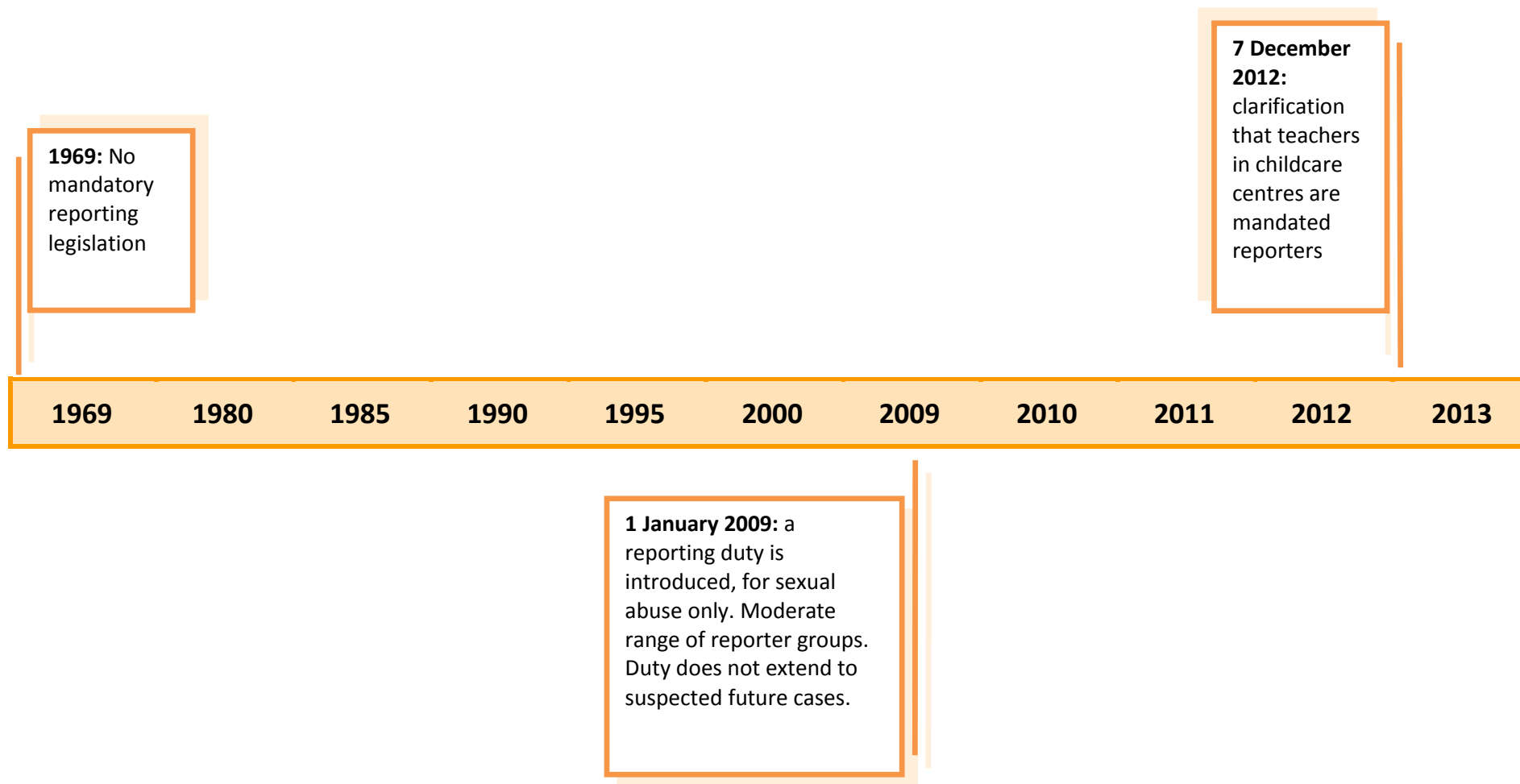
### **Summary of current position**

Since 1 January 2009, Western Australia has had legislative mandatory reporting of a reasonable belief of child sexual abuse imposed on doctors, nurses, midwives, police and teachers (including kindergarten teachers and childcare teachers). The duty applies to cases of past or current sexual abuse, but does not apply to suspicions of likely future abuse.

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detention centre; (e) any other place prescribed as an educational venue'. 'Educational program' is defined in s 4 as 'an organised set of learning activities designed to enable a student to develop knowledge, understanding, skills and attitudes relevant to the student's individual needs'.

### 3.8.3 Timeline showing key developments, Western Australia



## Part 4

### Learnings from overseas

A final, minor aspect of this report is to make some brief observations concerning other jurisdictions' reporting laws.

#### **Many nations have some form of mandatory reporting legislation**

Many countries have mandatory reporting laws. Often these are enacted through federal legislation. In other federated systems, such as Australia, it is a matter for state, territory or provincial legislation.

A study by Mathews and Kenny of the USA and Canada, two nations similar to Australia, found that every jurisdiction had mandatory reporting legislation for child sexual abuse.<sup>275</sup> In general, the major difference between Australian laws and the US and Canadian laws was that groups of mandated reporters were more extensive in the US and Canada. Another difference is that some jurisdictions in the US and Canada limit the reporting duty to suspected cases of sexual abuse inflicted or permitted to be inflicted by a parent or caregiver.<sup>276</sup> It is not clear if this restriction affects reporting practice. In this respect, Australian laws are of broader scope.

It is not uncommon for clergy to be mandated reporters; in the USA, 27 jurisdictions include clergy as mandated reporters.<sup>277</sup> Other nations with legislative mandatory reporting duties include Denmark, Norway, Sweden, France, Hungary, Israel and Brazil.

Usually, legislative mandatory reporting duties are placed in child protection legislation. However, another approach to mandatory reporting is to enshrine the duty in the criminal law. For example, France has a mandatory reporting duty enshrined in its Penal Code<sup>278</sup>, as

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<sup>275</sup> Mathews, B, and Kenny, M, 'Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features, differences and issues', (2008) 13(1) *Child Maltreatment* 50–63.

<sup>276</sup> Mathews, B, and Kenny, M, 'Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features, differences and issues', (2008) 13(1) *Child Maltreatment* 50–63

<sup>277</sup> Children's Bureau, *Clergy as Mandated Reporters of Child Abuse and Neglect*, Child Welfare Information Gateway, Washington, 2012.

<sup>278</sup> Penal Code part 434.

does Israel.<sup>279</sup> Other nations, such as Sweden, enshrine the mandatory reporting duty in social services legislation.<sup>280</sup>

### **Developed and developing nations**

A recent survey of 62 nations involved 33 developed nations, and 29 developing nations. The survey found, overall, that<sup>281</sup>:

- 81.8 per cent of the developed nations had some form of mandatory reporting
- 78.6 per cent of the developing nations had some form of mandatory reporting
- Combined, 80.3 per cent of the nations participating had some form of mandatory reporting.

By region, some form of mandatory reporting was present in:

- 90 per cent of the nations in the Americas
- 86.4 per cent of the nations in Europe
- 77.8 per cent of the nations in Africa
- 72.2 per cent of the nations in Asia.

### **Other nations have recently introduced mandatory reporting laws**

Some other nations have recently introduced mandatory reporting laws. An example is Saudi Arabia, where the laws have been judged to produce a positive effect on case identification.<sup>282</sup>

### **Some nations are in the process of introducing mandatory reporting laws**

Other nations are currently in the process of introducing mandatory reporting laws. Ireland is perhaps the most notable example, with this development being influenced by revelations of sexual abuse and concealment of it by others, especially by clergy. Its *Children First Bill* is still in the drafting stages but includes provisions for mandatory reporting, including of child sexual abuse.

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<sup>279</sup> Penal Law s 368D.

<sup>280</sup> Social Services Act Ch 14 s 1.

<sup>281</sup> Daro, D, (ed), *World Perspectives on Child Abuse*, 7th ed, International Society for the Prevention of Child Abuse and Neglect, Chicago, 2006, p 26.

<sup>282</sup> Al Eissa, M, and Almuneef, M, 'Child Abuse and Neglect in Saudi Arabia: Journey of recognition to implementation of national prevention strategies' (2010) 34(1) *Child Abuse & Neglect*, 28–33.

### **Other nations have chosen not to introduce mandatory reporting legislation**

Some other nations, such as the Netherlands, Germany, the UK, and New Zealand, do not have a mandatory reporting law. They have preferred a policy of voluntary reporting, normally embodied in industry policy approaches.

It can be noted that in 2012, New Zealand added s 195A to the *Crimes Act 1961*, which imposes a limited criminal law-based duty on household members, and on staff members of any hospital, institution, or residence where the child (or a vulnerable adult) resides. The duty is to 'take reasonable steps to protect' the child if she or he knows that the child is 'at risk of death, grievous bodily harm, or sexual assault'.

In addition, there have been recent calls for the introduction of a form of mandatory reporting for child sexual abuse in the UK, including by the former Director of Public Prosecutions, Keir Starmer.<sup>283</sup> These debates were reignited after recent cases came to light of serial child sexual offenders whose activities were widely known but remained unreported.

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<sup>283</sup> Dutta, K, ' "Without a change in the law, there'll be another Savile" – Keir Starmer says professionals should be forced to report suspected child abuse', *The Independent*, Monday 4 November 2013.

## Part 5

### The need for evidence

A substantial decline in child sexual abuse in the USA – declared in 2012 as being ‘as well established as crime trends can be in contemporary social science’<sup>284</sup> – has been traced since the early 1990s. This decline has been identified after assiduous analysis of seven different sources of data extending beyond official substantiated reports to include different kinds of national and state community incidence studies and self-report surveys.<sup>285</sup> This decline is a significant advance in child welfare. It has been postulated that several factors may have influenced this decline, one of which is the increased presence of social agents of intervention.<sup>286</sup> There is evidence suggesting there may also have been a decline in sexual abuse in Canada.<sup>287</sup>

On a broad level, Australia lacks even the most basic rigorous evidence about the national prevalence, incidence and characteristics of child sexual abuse. Population-based incidence and prevalence studies, repeated over time, provide jurisdictions with evidence on which to inform sound policy and intervention approaches, and on which conclusions can be drawn about the success of interventions. Such studies are a precondition of an approach claiming to have a public health model as one of its driving constructs.<sup>288</sup> These studies include, in the USA, national incidence studies – which, significantly, are *required* by federal legislation (the *Child Abuse Prevention and Treatment Act 1974*)<sup>289</sup>; other national incidence studies conducted by researchers including Professor David Finkelhor<sup>290</sup>; and studies in Canada<sup>291</sup>,

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<sup>284</sup> Finkelhor, D, and Jones, L, *Have Sexual Abuse and Physical Abuse Declined Since the 1990s?* Durham, NH: Crimes Against Children Research Center, 2012, p 3.

<sup>285</sup> Finkelhor and Jones, (2012).

<sup>286</sup> Finkelhor, D, and Jones, L, ‘Why have child maltreatment and child victimisation declined?’ (2006) 62(4) *Journal of Social Issues* 685–716; Finkelhor, D, *Childhood Victimization*, (Oxford University Press, Oxford, 2008).

<sup>287</sup> Trocme, N, Fallon, B, MacLaurin, B, et al, *Canadian incidence study of reported child abuse and neglect—2003: Major findings*. Ottawa: Minister of Public Works and Government Services, 2005; Trocme, N, et al, *Canadian incidence study of reported child abuse and neglect 2008 (CIS-2008): Major findings*. Ottawa, Public Health Agency of Canada, 2010; and see Collin-Vezina, D, Helie, S and Trocme, N, ‘Is child sexual abuse declining in Canada? An analysis of child welfare data’, (2010) 34 *Child Abuse & Neglect*, 807–812

<sup>288</sup> Turnock, B, *Public Health: What It Is and How It Works*, (4th ed, Jones and Bartlett, Sudbury: MA, 2009).

<sup>289</sup> Sedlak, A., et al, *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*. (Washington, DC: US Department of Health and Human Services, 2010).

<sup>290</sup> Finkelhor, D, Ormrod, R, Turner, H and Hamby, S, ‘The victimisation of children and youth, a comprehensive, national survey’ (2005) 10(1) *Child Maltreatment* 5–25; Finkelhor, D, Turner, H, Ormrod, R, and Hamby, S, ‘Trends in Childhood Violence and Abuse Exposure: Evidence From 2 National Surveys’ (2010) 164(3) *Archives of Pediatric and Adolescent Medicine* 238–242.

<sup>291</sup> Trocme, N., et al. (2005). *Canadian incidence study of reported child abuse and neglect – 2003: Major findings*. Ottawa, ON: Minister of Public Works and Government Services, Canada;

and the UK.<sup>292</sup> The USA also collects by far the most detailed data from every state about child abuse reporting and outcomes. It is self-evident that a society can only demonstrate developments in human welfare, including child welfare, if sound evidence is generated to measure such progress.

Related to this, obvious questions have emerged from this analysis of Australian law, and from a scan of overseas developments, about what are the optimal methods for identifying cases of child sexual abuse at an early stage, both within and beyond institutional contexts. The different approaches taken in Australian states and territories to mandatory reporting of child sexual abuse lead naturally to important questions which must be answered by robust evidence to inform sound social policy.

These questions are many and varied. What are the consequences of each method of mandatory reporting of child sexual abuse in Australia? Is a more limited mandatory reporting duty associated with a jurisdiction identifying fewer cases of child sexual abuse? Does an approach involving a broader representation of mandated reporters result in better detection of child sexual abuse? Does a reporter group that is not required to report by legislation report as effectively as one that is mandated? Even where approaches are similar, what factors influence and impede effective reporting? Within and across jurisdictions, do any particular reporter groups display clearly inappropriate reporting, and if so, what are the factors contributing to this? Are there reporter groups who report very effectively, and if so why? Do different penalties affect reporting, and if so, how? Is there evidence that purely voluntary reporting, or policy-based reporting, is effective? Allied to these questions, are supportive mechanisms for reporters adequate? Are reporters adequately trained to be able to fulfil their reporting role? What educational measures are most effective in preparing reporters for their role? Do child protection systems interact effectively with reporters, and why or why not?

Some questions arise which have particular salience for sexual abuse occurring within institutions, for identification of these cases, and for institutional responses to child sexual abuse generally. Are there impediments – cultural, political, ethical, attitudinal, professional, systemic, and based on reporters’ capacity – to the reporting of suspected cases of sexual abuse occurring within institutions? If so, what are these barriers, how influential are they, and how can they be minimised, overcome or removed?

Detailed, rigorous empirical research, both quantitative and qualitative, is required to answer these questions. Results would be invaluable in developing further insights into the operation of mandatory reporting, its strengths and weaknesses, and best practices, to inform optimal social policy and responses to child sexual abuse in institutional and other contexts.

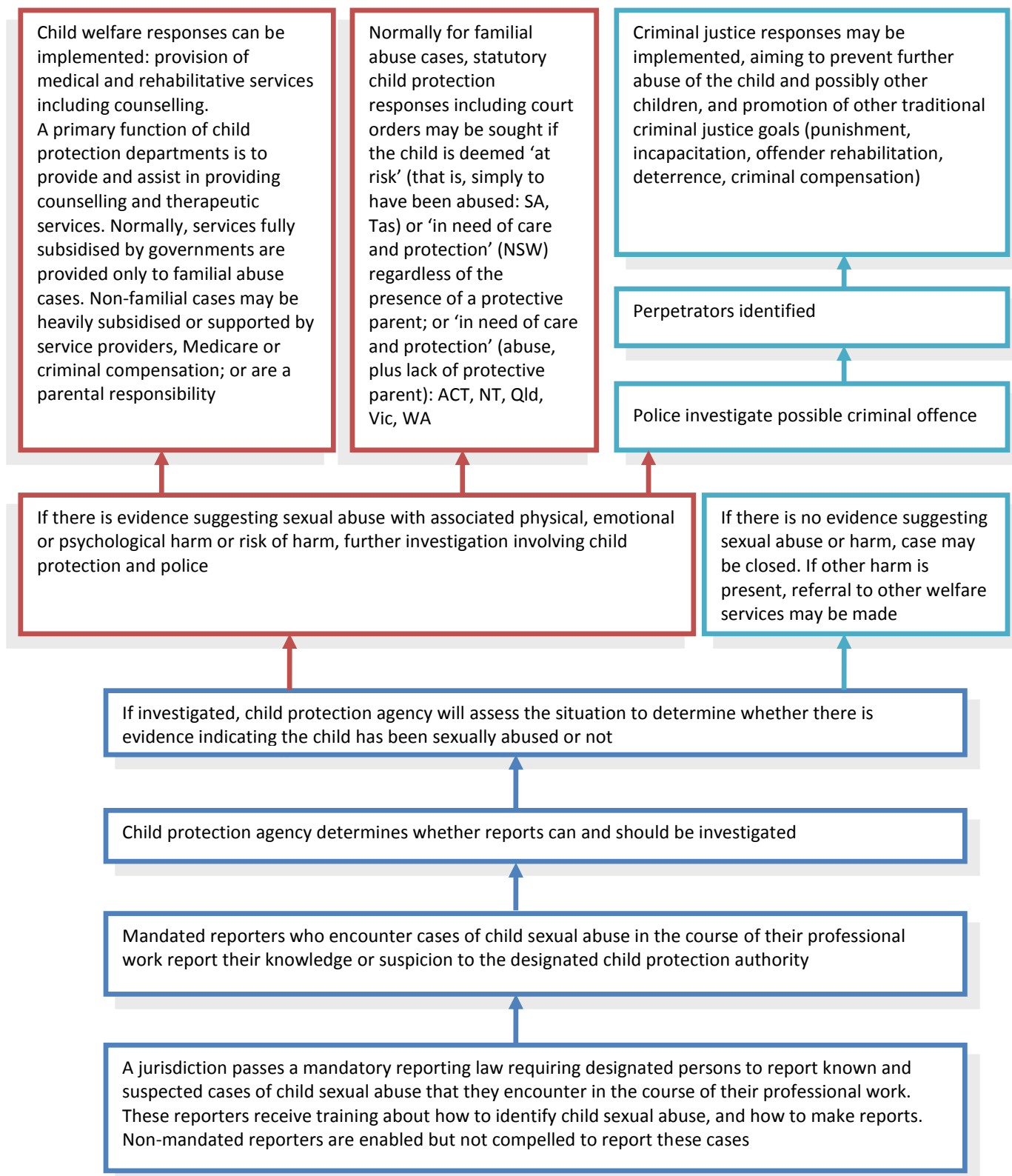
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<sup>292</sup> May-Chahal, C, and Cawson, P, ‘Measuring child maltreatment in the United Kingdom: A study of the prevalence of child abuse and neglect’ (2005) 29 (9) *Child Abuse & Neglect*, 969–984; Radford, L, Corral, S, Bradley, C, Fisher, H, Bassett, C, et al, *Child abuse and neglect in the UK today*. London: NSPCC, 2011.



## Appendix 1

### Process model for mandatory reporting of sexual abuse in child welfare, child protection and criminal justice systems



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