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Mandatory reporting legislation in the United States, Canada and Australia: A cross-jurisdictional review of key features, differences and issues

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Abstract

Mandatory child abuse reporting laws have developed in particular detail in the US, Canada, and Australia, as a central part of governments' strategy to detect cases of abuse and neglect at an early stage, protect children, and facilitate the provision of services to children and families. Yet, the terms of these laws differ in significant ways, both within and between these nations, with the differences tending to broaden or narrow the scope of cases required to be reported, and by whom. The purpose of this paper is to provide a current and systematic review of mandatory reporting legislation in the three countries which have invested most heavily in them to date. A comparison of key elements of these laws is conducted, disclosing significant differences and illuminating the issues facing legislatures and policymaking bodies in countries already having the laws. These findings will also be instructive to those jurisdictions still developing their laws and to those which may in the future choose to design a system of mandatory reporting.

Mandatory reporting legislation in the United States, Canada and Australia: A cross-jurisdictional review of key features, differences and issues

Governments throughout the world are increasingly engaged with the challenge of detecting cases of maltreatment at an early stage, to protect children and facilitate the provision of services to these families. As a central tactic in this endeavour, many nations have enacted legislation commonly known as “mandatory reporting laws” requiring designated persons to report suspected abuse and neglect. The International Society for Prevention of Child Abuse and Neglect recently sought information from 161 countries about matters including the presence of legislative or policy-based reporting duties (Daro, 2007). Of the 72 countries responding, 49 indicated the presence of such duties in law or policy, and 12 respondents indicated the presence of voluntary reporting by professionals (see Table 1).

Some jurisdictions (e.g., the United Kingdom, New Zealand) have chosen not to enact mandatory reporting laws for reasons including the perceived danger of overreporting of innocent cases, which is seen as adversely affecting the interests of children and families, and as diverting scarce resources from already known deserving cases. Debate continues about the benefits and disadvantages of having reporting laws (see Drake & Jonson-Reid, 2007; Melton, 2005). Other nations, including Brazil, Denmark, Finland, France, Hungary, Israel, Malaysia, Mexico, Norway, South Africa, and Sweden, have created quite general legislative reporting duties. In contrast, legislatures in states and provinces across the United States (US), Canada and Australia have given detailed attention to the development of these laws over several decades, and the laws in these jurisdictions continue to evolve in response to new phenomena and evidence of successes and failures in child protection systems. The

terms of the laws across jurisdictions in these three nations exhibit many common features but they also differ in significant ways.

These legislative differences exemplify the contested normative terrain in which these laws operate. Law and policy concerning the detection and reporting of, and the responses to, abuse and neglect is theoretically and practically complex, and exists alongside political, economic, social and cultural forces in each society. The purpose of this review is not to argue for or against the presence of mandatory reporting laws, or to make proposals about their appropriate scope. Rather, this review provides a synthesis of the reporting laws in jurisdictions across three countries which have developed them in increasing detail over a long period of time. To date, no such comparison has been conducted, and there has been little analysis of the differences in and issues arising from the laws. This review enables a comparison of key elements of these laws to be made, which discloses some of the most significant differences in the laws, and issues arising from them. This comparison should be instructive for legislatures and policymaking bodies in jurisdictions where the laws are already in place and in those which may choose to further develop them. It will also be informative for jurisdictions currently without reporting laws but which may in future desire to enact them.

Mandatory Reporting Legislation in the US, Canada, and Australia

The first mandatory reporting laws were enacted in the US between 1963 and 1967 (Besharov, 1985; Nelson, 1984). Motivated largely by the recognition of the “battered child syndrome” (Kempe et al., 1962) and by strong lobbying efforts, these laws were initially limited to requiring medical professionals to report suspected physical abuse inflicted by a child’s parent or caregiver (Kalichman, 1999). The scope of this legislation in all states soon expanded in three ways, spurred in part by 1974 federal legislation (CAPTA, Child Abuse

Prevention and Treatment Act) which allocated funds to states based on the parameters of their laws. First, state laws were amended to require members of additional professional groups to report suspicions of abuse (and some states in fact required all citizens to make reports). Second, the types of reportable abuse were expanded to include not only physical abuse but sexual abuse, emotional or psychological abuse, and neglect. Third, the extent of harm required to have been caused or suspected to have been caused to activate the reporting duty was required by CAPTA to be unqualified by expressions such as “serious harm”, and this accompanied most states abandoning such qualifications (Kalichman, 1999).

Incidentally, this can be contrasted with the current version of CAPTA which defines “child abuse and neglect” as meaning “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” (5106g(2)). More recently, some states have required reports of new types of abusive and neglectful acts, as this review will show.

Such legislative development also occurred in jurisdictions in Australia and Canada. In Australia, legislation was first enacted in South Australia in 1972, and ever since, the eight States and Territories have incrementally expanded mandatory reporting requirements. Even now, the legislation continues to develop, exemplified by recent amendments in Queensland in 2004 requiring teachers to report suspected child sexual abuse by school employees only (Mathews, Walsh, Butler & Farrell, 2006), and in 2005 requiring nurses to report all suspected abuse and neglect (Mathews, Walsh & Fraser, 2006). In Western Australia, the only Australian jurisdiction yet to have a comparable legislative system of mandatory reporting (although it does have some policy-based reporting requirements), a bill was established in 2006 to introduce a broad model of reporting for the first time. In Canada, also, provinces introduced reporting legislation from the 1960s (e.g., Alberta in 1966).

Across jurisdictions in all three countries, the laws typically have common elements. Usually, the legislation will define which persons are required to make reports. The law will identify what state of knowledge, belief or suspicion a reporter must have before the reporting duty is activated, requiring a “reasonable” suspicion or belief of abuse or neglect, or some synonymous variation of this, and therefore not requiring knowledge of abuse or neglect; reporters are not to conduct their own investigation but are simply required to report their suspicions according to the law. The law will define the types of abuse and neglect that attract the duty to report, or state that a child suspected to be “in need of protection” must have their case reported, with key phrases then further defined. Often, the degree of abuse or neglect which requires a report will be defined (hence also attempting to define extents of abuse and neglect that do not require reports). Further definitions of types of abuse and neglect may be detailed, and these may include not only exposure to harm, but exposure to risk of future harm. Penalties for failure to report according to the duty will be stipulated, although these are largely intended to encourage reporting rather than police it. A guarantee of confidentiality is provided concerning the reporter’s identity, and the reporter is endowed with immunity from any legal liability arising from a report made in good faith. Practical requirements will be detailed regarding when and how the report is to be made, and to whom. A final key element of the legislation is to enable any person to make a report in good faith even if not required to do so, and to provide confidentiality and legal immunity for these persons.

Wary of excluding deserving reports, legislatures are generally careful not to be too restrictive when detailing the types of conduct that constitute the various types of abuse and neglect. Consequently, as with the state of belief requirement of “reasonable” suspicion or cause, the laws often are somewhat vague and leave much discretion to the reporter. Indeed,

reporters may be entrusted with too much discretion; empirical studies and critical evaluations of the laws have shown that the vagueness and ambiguity of concepts like “reasonable” cause and “significant” harm cause problems for reporters (Deisz et al., 1996; Levi, Brown & Erb, 2006; Levi & Loeben, 2004; Swain, 2000, 1998), and conceptual uncertainty has prompted challenges to the constitutional validity of the laws in the US (Kalichman, 1999). There is emerging consensus that some of these central concepts in the laws need to be clarified (Besharov, 2005; Brosig & Kalichman, 1992; 1985; Finkelhor, 2005) and this review will point to some other ambiguous elements of the laws that arguably also need refinement. There are other difficulties with the reporting of abuse and neglect pursuant to the laws, such as failure to report motivated by numerous factors including lack of faith in the efficacy of child protection services, but these issues are beyond the scope of this review.

While the laws have a similar schematic approach, differences emerge in their details. Some of these are of particular importance when considering the normative parameters of reporting laws, the goals of child protection, the need for sound reporting practice, and the aim of effective yet feasible government agency intake and response. It is worth noting that expansions in mandatory reporting laws have consistently produced an increase in the number of reports made to government authorities. This produces greater disclosure of substantiated cases of abuse and neglect, but also produces a higher number of reports that are not substantiated (Australian Institute of Health and Welfare, 2007). Both effects place additional strain on government child protection systems. Governments should be conscious of this and must make responsible allocations of funding and resources so that child protection systems can perform their functions. This review will focus on four components of the laws having differences that are highly significant: which persons are made mandated reporters; what types of abuse and neglect they are required to report; what extent of

suspected harm is required to activate the reporting duty; and whether reports are required only of past abuse or neglect, or also of suspected risk of future abuse or neglect that has not yet occurred.

To ensure currency and accuracy of the review of legislation, we accessed child protection legislation in every jurisdiction in each of the three countries via online legislative databases maintained by state, territory and province legislatures. For US jurisdictions, we also cross-checked with summary data produced by the US Department of Health and Human Services Children's Bureau concerning mandated reporting professions, and definitions of abuse and neglect (United States Department of Health and Human Services Children's Bureau 2005a; 2005b). We conducted legal analysis of the legislation which informed the extraction of relevant information from the legislation. (For a complete listing of the legislation, and tables listing relevant parts of the legislation discussed in this paper, go to www.fiu.edu/~kennym).

Which Persons are Mandated Reporters?

Legislation adopts one of two approaches when imposing reporting duties. One approach, adopted by most states in Australia and the US, and the Yukon Territory in Canada, is to designate as mandated reporters members of professions who are likely to come into contact with children in their work, and who are seen as well placed by virtue of their occupation, training and knowledge to detect abuse and neglect. Commonly, this occupation-specific approach includes as reporters those involved in education, law enforcement, welfare and health systems, among others. Such designated reporters are usually required to report suspicions developed during the course of their work, but some jurisdictions compel reports from these people of suspected abuse or neglect regardless of the context in which the suspicion arises. As evidenced by the differences between jurisdictions, a key issue that arises here is which professions are selected as mandated reporters.

A second approach, adopted by all Canadian provinces except the Yukon Territory, a substantial minority of 18 states in the US, and the Australian jurisdiction of the Northern Territory, is to impose reporting duties on all citizens. An important question arising from this approach is whether it produces a higher potential for overreporting, since many reporters will not have expertise or training in detection and reporting of abuse and neglect, nor in the precise scope of the reporting duty. A third approach is not to require any person to make reports; that is, not to have “mandatory reporting” in the true sense of the expression. In these three countries, Western Australia is the sole jurisdiction that is yet to impose a legislative duty on any class of person to report any form of abuse or neglect. Instead, Western Australia has a series of policy-based reporting duties, reporting obligations imposed on Family Court personnel (that are imposed by Australian federal law on all Australian jurisdictions) and limited reporting duties imposed on police and hospital administrators. It can be noted that the Premier of Western Australia indicated in March 2007 that mandatory reporting of child sexual abuse would soon be legislated. A major question arising here is whether this absence of legislative duty (whether or not supplemented by a policy-based approach) produces different reporting outcomes to a legislation-based approach.

What Broad Types of Abuse and Neglect are Required to be Reported?

In most but not all jurisdictions in these three countries, the legislation requires reports concerning three major categories of abuse: physical abuse, sexual abuse, and psychological abuse (sometimes termed emotional or mental abuse), and neglect (see Table 2). As well, the statutes either expressly or implicitly include abandonment of a child as a circumstance requiring a report. There are other non-maltreatment circumstances either requiring reports, authorizing government agency intervention, or both, such as the absence of parents able or willing to care for the child (e.g., through death, imprisonment, or

incapacity), but these are not further considered here since this review focuses on abuse and neglect.

As will be seen later in this review, most legislative differences surround the extent of harm required to activate the reporting duty. Yet, there are some differences between jurisdictions even at the broader level of the types of abuse required to be reported. Such differences arise in large part due to the contested normative context of these laws, and from their placement within a jurisdiction's broader child protection system which has its parameters determined by theoretical preferences and practical concerns. In Australia, Victoria and the Australian Capital Territory do not require reports of psychological abuse, or of neglect. In the US, Illinois and Idaho do not expressly require reports of psychological abuse, although Idaho does require reports of mental injury as a result of sexual abuse. Washington does not expressly require reports of psychological abuse, although its definition of "child abuse" and related terms are arguably broad enough to include this class of abuse. The choice whether or not to include psychological harm as a reportable class of abuse is one of the difficult normative choices facing legislatures. Some eminent commentators, such as Melton and Davidson (1987), have questioned the appropriateness of requiring reports of this class of abuse.

The source of abuse required to be reported

A major issue arises concerning the source of abuse that the laws are intended to respond to. Reporting of neglect inherently involves only the parent/child relationship and so this issue does not arise there. Yet, for physical, sexual and psychological abuse, legislatures need to decide if the reporting duty only applies to abuse inflicted by selected perpetrators like parents and other adult caregivers, or whether it applies regardless of who the perpetrator is, thus including, for example, harm or abuse inflicted by other children and nonfamilial

adults provided it satisfies the relevant definition of “harm” or “abuse”. This review has revealed different approaches to this issue.

Confining the Reporting Duty to Abuse by Selected Perpetrators

Motivated by normative preference and practical considerations, a legislature may confine the reporting duty concerning selected types of abuse to abuse inflicted by a particular class of perpetrator. It is arguable that, in all three countries, the laws are *most* concerned with abuse perpetrated by the child’s parent or adult caregiver (in this article we use the term “parent” for conciseness but intend to also denote other relationships of legal guardianship). This is consistent with the content of, and context informing, the first reporting laws, with the fact that reports are made to child protection agencies rather than to police (enabling assistance to the child and his or her family and more serious intervention such as removal of the child from the family if warranted), and it accords with the fact that parents are responsible for most abuse. As well, even now, the definition of “child abuse and neglect” in CAPTA refers to “at a minimum, any recent act or failure to act on the part of a parent or caretaker”. So, for example, New South Wales requires reports of psychological harm only where the source of that harm is the child’s “parent or caregiver”, and South Australia and Tasmania require reports of suspected risk of future harm only where that future harm is anticipated to be inflicted by “a person with whom the child resides”. Many jurisdictions in the USA also confine the reporting requirement of certain types of abuse (typically physical and emotional abuse, but in many cases also sexual abuse) to cases where the perpetrator is a specified person, usually a parent, caregiver or other individual having care, custody or control of the child, or a person who is responsible for the care of the child (AZ, DE, GA, IN, IA, KY, ME, MN, MS, MO, MT, NV, NJ, NM, NY, NC, ND, OH, OK, RI, SC, SD, VT, VA,

WV), sometimes also including other adults residing with the child (AR, HI, IL, MD, PA), any relative of the child (HI, IL, MD, TN), or a paramour of the child's parent (IL, PA), and Michigan includes "a teacher, a teacher's aide, or a member of the clergy". In Canada, Saskatchewan limits the reporting duty to abuse by the child's parent.

Such an approach clearly limits the class of cases requiring a report, although whether this limit affects actual reporting practice is another question. For example, if a reporter in New South Wales is aware of a child's severe psychological harm, but not of its exact source, there would be no good reason not to report since the source could be one stipulated by the statute and the reporter is not meant to investigate their suspicion to identify the perpetrator. Yet, the purpose of the limit can be discerned, in attempting to encourage only those reports to child protection agencies deemed appropriate or necessary, and amenable to intervention by child protection departments. These limits would, for example, be intended to prevent reports of abuse perpetrated through known or suspected school bullying. A legislature may want to exclude a circumstance of abuse from the mandatory reporting duty if its child protection department is not legislatively empowered to intervene in that type of case; often, the legislative bases for child protection intervention are different from the grounds requiring reports from mandated reporters (Bromfield & Higgins, 2005). An issue facing legislatures adopting this strategy is the extent to which it produces failure to report cases of abuse by nonparents which may be just as harmful to the child, and which the child's parents may be unaware of.

Applying the Reporting Duty to Abuse by any Person

Different normative preferences motivate other legislatures to require reports of suspected physical, psychological and sexual abuse or harm inflicted on children by any person, thus including abuse by siblings, other children, or other familial or nonfamilial

adults, where such abuse is of sufficient severity to satisfy its statutory definition. This review and analysis has disclosed that legislatures impose this broader reporting duty in different ways.

First, as is usually the case in Australian jurisdictions, the laws may be silent about the source of the abuse, and require reports when a reporter has suspicion of the child's injuries or symptoms of the abuse. Legislative drafters need to be aware that if the statute is silent about the source of the abuse requiring reports, there is probably no sound reason justifying a narrow interpretation excluding abuse by nonparents from the reporting duty. A rare court case from Australia (*EM v St Barbara's Parish School* [2006] SAIRComm 1) concerning a teacher's failure to report nonparental abuse supports this interpretation. Counsel for the appellant teacher did not argue that the nonparental status of the abuser meant the duty to report was not activated; as well, the court did not indicate that such an interpretation was preferable or possible. Reporters bound by these laws who are faced with a child exhibiting sufficient symptoms of abuse or injury will therefore have the reporting duty activated regardless of the suspected identity of the perpetrator. For example, where a reporter has symptom-based evidence to suspect an eight year old girl is being sexually abused, or that a one year old boy is being physically abused, the reporting duty will be activated whether or not the reporter has any information or suspicion concerning the perpetrator's identity. Whether the perpetrator in such cases is thought to be the child's parent, parent's partner, other relative, sibling, babysitter, or other person, the activation of the reporting duty would not be affected. This is also the case in the Canadian province of New Brunswick, and in a substantial minority of states in the US, with such states either silent about the perpetrator's identity or expressly providing that the abuse is inflicted by "a person" or "any person" (AL, AK, CA, CO, CT, DC, FL, ID, LA, MA, NE, NH, OR, TX, UT, WA, WI, WY; and, arguably, KS and WA).

Second, as exemplified by some of these states of the US and by several Canadian provinces, legislation may expressly require reports of suspected harm by persons other than parents. Different jurisdictions achieve this object by one of three different methods, some of which are quite ambiguous and raise questions of interpretation. One method is to clearly impose the duty so that it applies to abuse by any person, with no additional reference to the child's parent's ability to protect the child. For example, Nova Scotia has a separate provision requiring reports of "third-party abuse" defined as "a person other than a parent or guardian"; Manitoba expressly defines "abuse" as an act by "any person" resulting in injury, and empowers reporters to make reports of such abuse to the child's parent or a government agency; and many of the states in the US listed above expressly refer to the acts of "a person" or "any person". A second, more ambiguous method is to impose the duty expressly but in more confined circumstances, typically those where the child's parents are also "unable or unwilling to protect the child". British Columbia requires reports of cases where a child "has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child"; Newfoundland and Labrador requires reports where the child is physically, sexually or emotionally harmed (or is at risk of physical or sexual harm) by "a person" and the child's parent "does not protect the child"; and the Yukon Territory requires reports where a parent "fails to take reasonable precautions to prevent any other person" abusing the child. This strategy is probably motivated by the notion that a child who is in the care of a parent able and willing to provide protection will not require further governmental assistance to do so. It is another question whether such a limit affects actual reporting practice. A final method is to refer to the parent's failure to protect the child from injury by others in circumstances where the parent is unwilling or unable to protect the child, or should have known of the injury or of the risk of injury. Ontario requires reports where the child has suffered or is at risk of suffering

physical harm caused by the parent's inadequate protection of the child, or where the child has suffered or is at risk of sexual abuse by "another person" where the parent "knows or should know of the possibility...and fails to protect the child". The Northwest Territories require reports where a child has suffered or is at substantial risk of suffering physical harm "caused by the parent's inability to care and provide for or supervise and protect the child adequately", or has been sexually abused by a person "in circumstances where the child's parent knew or should have known of the possibility...and was unwilling or unable to protect the child", or has shown evidence of emotional harm and the child's parent does not obtain remedial services for that harm. Prince Edward Island requires reports where the child has suffered sexual abuse by another person where the parent knew or ought to have known of the possibility and the parent failed to protect the child, and where the child has suffered emotional harm by another person where the parent knew or ought to have known of the abuse and failed to protect the child. An issue raised by the method adopted by the Northwest Territories and Prince Edward Island regarding sexual abuse is whether it gives sufficient protection to the abused child; it seems illogical to not require a report from a person knowing of the abuse when the parent lacks knowledge of the child's abuse.

Third, the legislation may not explicitly require reports of nonparental abuse, but arguably implicitly requires reports of such cases. This strategy may apply only for specified types of abuse, and typically applies the same additional condition that the child's parents are unable or unwilling to protect the child. Alberta, for example, requires reports where the child's guardian "is unable or unwilling to protect the child from physical injury or sexual abuse...[or] emotional injury" without stating that such injury may be inflicted by another parent or adult. In Australia, Victoria, which is silent about the source of abuse, requires reports of specified harm only if the child's parents also "have not protected, or are unlikely to protect" the child from the harm, and the Northern Territory requires reports of suspected

risk of future sexual abuse from unspecified sources if the child's parents "are unable or unwilling to protect" the child from it.

A fourth approach, while ambiguous, appears to limit the reporting duty to parental abuse, but to also require reports where a parent knowingly allows the infliction of injury. For example, the Northern Territory requires reports of physical injury only where "inflicted or allowed to be inflicted by a parent", and in the US, a significant minority of states use the same terminology (AZ, IL, KY, MS, MT, NV, NJ, NY, NC, ND, RI, SC, VA). West Virginia uses the phrase "knowingly allowed", limiting reports of physical and emotional injury to those inflicted in the home by a child's parent, guardian or custodian or knowingly allowed to be inflicted by such a person. Other states (NM, PA, TN) refer to abuse caused by the parent's actions or "inactions" or "failure to act", and still others refer to abuse caused by the parent's acts "or omissions" (e.g., HI, IN, IA, and Saskatchewan). These ambiguous phrases create an interpretative problem. It is unclear whether they are intended to apply only to abuse by nonparents that the parent "allowed" knowingly and did nothing to prevent, or to abuse by nonparents that the parent was unaware of and unable to prevent. The better legal interpretation may be the former, but if so, this would mean there was no obligation to report a case where a child may be suffering abuse and be unassisted by a parent.

New Categories of Abuse/Neglect: Substance-Exposed Newborns, Exposure to Drug-Related Activity, Exposure to Domestic Violence

Recent years have seen some jurisdictions require reports of some new specific types of abuse and neglect. Possibly the most significant of these concerns the duty (typically imposed on medical practitioners) to report prenatal substance abuse when substance-exposed newborns are encountered. This new duty is largely a result of a provision inserted in CAPTA by the Keeping Children and Families Safe Act of 2003; CAPTA now includes as a condition of states' eligibility for federal funding the presence of policies and procedures to address the

needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms from prenatal drug exposure (5106(b)(2)(A)(ii)). Jurisdictions with these provisions either include newborn exposure and suffering from drug exposure in the definition of abuse or neglect, or require reports by designated professionals of suspicions of this circumstance (see Table 2). Arizona, for example, states that (Ariz Rev Stat 13-3620 E)

A health care professional...who, after a routine newborn physical assessment of a newborn infant's health status or following notification of positive toxicology screens of a newborn infant, reasonably believes that the newborn infant may be affected by the presence of alcohol or a drug listed in section 13-3401 shall immediately report this information, or cause a report to be made, to child protective services in the department of economic security. For the purposes of this subsection, "newborn infant" means a newborn infant who is under thirty days of age.

Another new category concerns reports of prenatal substance abuse by expectant mothers before a child is born. Three US states (Minnesota, North Dakota, and Wisconsin), require reports of prenatal substance abuse before a child is born, with Wisconsin including alcohol as a named substance. Illinois enables but does not compel such reports. In Australia, New South Wales, Queensland and Victoria have recently enabled, but do not compel, reports to be made of prenatal substance abuse before a child is born, to enable protective action to be taken by government agencies. As with all voluntary reports, these attract protections concerning confidentiality and immunity. This class of conduct raises two major issues: should reports be compelled or merely enabled, and which substances should the reporting provision include?

In the same genre of drug-related activity, child protection legislation in some 18 states of the US now requires reports of the exposure of any child to various types of illegal drug activity (see Table 2). Such acts are sometimes incorporated in definitions of abuse or

neglect, and can include supplying drugs to a child; use of a drug by a caregiver compromising ability to care for the child; manufacture of drugs in a child's presence or in premises occupied by a child; allowing a child to be present where equipment for such manufacture is stored or used; and exposure of a child to drug sale, equipment or activity.

Most of the other states include such matters in criminal statutes as offenses or as circumstances of aggravation, rather than (or in some cases in addition to) reporting obligations within child protection laws (these other states include AK, AZ, CA, GA, ID, IL, IA, KS, LA, ME, MN, MS, MO, MT, NE, NV, NH, NM, NC, ND, OH, OK, OR, PA, UT, VA, WA, WV, WY).

Another new class of abuse requiring reports in some jurisdictions is the exposure of a child to domestic violence. In Australia, New South Wales expressly requires reports of the risk of serious psychological or physical harm to a child as a consequence of exposure to domestic violence. Similarly, Tasmania requires a report where a child's safety, psychological wellbeing or interests are "affected or likely to be affected" by family violence. In Canada, seven jurisdictions include exposure to domestic violence as a circumstance where a child is in need of protection. However, only one (Newfoundland and Labrador) requires a report of exposure to domestic violence even if there is no harm or risk of harm to the child; the other six (Alberta, Manitoba, the Northwest Territories, Nova Scotia, Prince Edward Island, and Saskatchewan) require reports only where the child has been harmed, is "likely to suffer harm" or is at "substantial risk" of harm as a result of the domestic violence. Few states of the US expressly require reports regarding exposure to domestic violence. Montana expressly includes in its definition of "psychological abuse or neglect" severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, including the commission of acts of violence against another person residing in the child's home; and West Virginia also

explicitly includes exposure to domestic violence as constituting abuse to a child. The District of Columbia includes in its definition of ‘neglected child’ one whose parent has failed to make reasonable efforts to file a petition for civil protection from intra-family violence. Interestingly, Washington takes the opposite approach, specifying that exposure to domestic violence does not of itself constitute maltreatment. Other states do not generally expressly include exposure to domestic violence, but many which have more detailed definitions of abuse and neglect may arguably extend to the consequences of domestic violence (AK, AZ, AR, CA, CO, FL, ID, IL, IA, KS, KY, LA, ME, MD, MN, MS, NV, NH, NJ, NM, NY, NC, ND, OH, PA, RI, SC, TN, TX, UT, VT, WI, WY). States with less detailed definitions of types of abuse, too, could be argued to extend to situations of domestic violence.

Finally, it can be noted that some jurisdictions have chosen to expressly require reports of some types of conduct that may not commonly be specified as abuse or neglect (but which may fall within broader expressions of a type of abuse or neglect). The first example of this can be seen in jurisdictions such as the Northern Territory in Australia and Illinois in the US, explicitly including female genital mutilation as a circumstance required to be reported. The second example is of Quebec, which expressly requires reports of a child who is made to beg, do work disproportionate to capacity, or perform for the public in a way unacceptable for his or her age.

Within each jurisdiction, these newer types of abuse may be considered more or less urgent depending on social and cultural context, and practical realities such as resourcing. Nevertheless, the broader conceptual banners under which some of these provisions reside can be seen to raise issues central to reporting laws and child protection systems generally. Jurisdictions in the US may have initially required reports of substance exposed newborns to respond to crack cocaine use by pregnant women, which may be a less common occurrence in other jurisdictions. But, those jurisdictions which have not experienced that particular

phenomenon will probably still have to confront, whether sooner or later, the conceptual question of under what circumstances newborns affected by maternal drug use—whether legal drugs such as alcohol, or illicit drugs such as heroin and amphetamines—should be required to be the subject of a report to enable government assistance and or intervention.

What Extent of Suspected Harm is Required to Activate the Reporting Duty?

Especially for physical abuse, psychological abuse, and neglect, the laws are generally not intended to require reports of any and all abusive or neglectful behavior. Isolated and or trivial incidents of less than ideal parenting practice are not the concern of the laws, nor are accidental injuries. Rather, the laws are generally concerned with acts and omissions that are harmful to the child’s health, safety, wellbeing or development. This raises the contentious issue of what should be deemed sufficient ‘harm’ to require reports, and how this is to be expressed in the legislation; Besharov (1985) has proposed limiting the reporting duty to cases of “seriously harmful” behavior. As could be expected, different jurisdictions have adopted different approaches to this question, for each category of abuse and neglect.

Physical Abuse

While significant differences exist between jurisdictions, a number of general approaches can be discerned. For physical abuse, states in the US generally adopt one of four approaches. A group of 29 States in the US merely refers in broad, vague terms to “harm or threatened harm” through physical abuse or physical injury, without further helpful definitions of what constitutes sufficient injury (AL, AK, AZ, AR, CA, CT, DE, GA, IL, IA, KS, ME, MD, MA, MI, MS, MO, NE, NH, OH, OK, OR, RI, SD, TN, UT, VA, WA, WV). Nearly all Canadian provinces also simply refer to physical harm or injury without further definition. A second group of six states (HI, MN, NV, NM, WI, WY) provide a nonexhaustive list of the types of injuries which can constitute physical injury sufficient to require a report. A third approach, adopted by Colorado, Idaho and Montana, gives an

exhaustive list of the injuries constituting reportable physical abuse, namely “any case in which a child exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft tissue swelling, or death”. Finally, a fourth approach is evident in a group of 13 states, which appear to require a higher degree of harm than that of the first approach, but does so in conceptual terms rather than specifying types of injury; for example, requiring “serious” injury, or “substantial” impairment of health. This conceptual approach is also used in six Australian States, which require “significant” harm or a synonymous variation of this (e.g., South Australia’s and Tasmania’s “detriment to wellbeing”). While elaborating on the first approach, which simply uses the term ‘harm’, these terms are still inherently ambiguous, and so decisions to report will depend on the reporter’s subjective interpretation of what constitutes “serious” or “significant” harm. In contrast, New South Wales and the Australian Capital Territory require reports of all physical abuse without qualifying the extent of harm. Uniquely, Alberta requires “substantial and observable injury” evidenced by any of an enumerated list of injuries.

An observation is warranted concerning the issue of corporal punishment. In the US, 21 states expressly exclude reasonable corporal punishment from cases requiring a report (CO, DC, FL, GA, IL, IN, MN, MS, MO, NJ, NY, ND, OH, OK, OR, RI, SC, TX, WA, WV, WY). A parent’s right to impose reasonable discipline is often also embodied in immunity from criminal prosecution. In Australia, criminal laws in New South Wales, Queensland and the Northern Territory, and common law in all Australian jurisdictions, entitle parents to use such force as is reasonable under the circumstances to impart discipline, management or control (Butler & Mathews, 2007). In Canada, the Yukon Territory also expressly excludes reasonable physical discipline from the classes of reportable abuse. The power to physically discipline children is also present in many other countries and cultures with and without mandatory reporting laws, and the actual employment of that power is more common in some

countries than others (Daro, 2007). Therefore, the scope of “physical abuse” may vary dramatically according to cultural norms.

Sexual Abuse

A minority of legislatures have even taken different approaches to the reporting of sexual abuse, all types of which might intuitively be thought to require detection, report and intervention. This is because, like other categories of abuse and neglect, there are so many different types of acts and consequence and contexts within which this type of abuse can occur, and these acts are, even in this apparently clear cut context, open to different classification and judgment. Therefore, while the overwhelming majority of jurisdictions in the three countries do not require any extent of harm to activate the reporting duty, instead compelling reports of any specified sexual conduct regardless of the presence of harm or otherwise, several states do have such qualifications in the terms of their legislation (it is another question whether in practice these qualifications limit the class of cases actually reported or not). Thus, in Australia, Victoria and Queensland require that ‘significant’ harm be caused or risked to activate the reporting duty, and in the US, Louisiana requires that the abuse ‘seriously endangers’ the child’s health and safety, and Mississippi and New Hampshire require that the circumstances must indicate that the child’s health or welfare is harmed or threatened.

Psychological, Emotional, or Mental Abuse

Many states require a certain extent of harm caused by psychological, emotional or mental injury to qualify it as reportable. In Australia, the qualification is usually in terms such as “significant” or “serious” harm, or significant detriment to development. In the US, jurisdictions generally require an observable and/or substantial impairment in ability to function. There are some variations on this theme; Louisiana requires the child’s health to be seriously endangered, and Pennsylvania requires serious injury. South Carolina is an example

of a state requiring not only the “discernible and substantial impairment of the child’s ability to function” but the evidentiary support of this by medical opinion. Wisconsin has a detailed definition of “emotional damage”, requiring “harm to a child’s psychological or intellectual functioning...evidenced by one or more of the following characteristics exhibited to a severe degree: anxiety; depression; withdrawal; outward aggressive behavior; or a substantial and observable change in behavior, emotional response or cognition that is not within the normal range for the child’s age and stage of development”. A number of Canadian provinces also further define emotional injury requiring reports: some requiring “severe anxiety, depression, withdrawal, or self-destructive or aggressive behaviour” (British Columbia, Nova Scotia), with Ontario adding to this definition “delayed development” and Nunavut adding “any other severe behavior consistent with the child having suffered emotional harm”. Saskatchewan requires “serious impairment of mental or emotional functioning”, and Alberta requires “impairment of the child’s mental or emotional functioning or development” due to any of a long list of specified acts and circumstances. Manitoba refers to “emotional disability of a permanent nature”.

Neglect

Most states in the US and Australia define neglect ambiguously in terms of failure to provide “basic”, “adequate”, “proper” or “necessary” care, without specifying a degree of harm required to activate the reporting duty. Often, abandonment is included in definitions of neglect, or is listed as a separate basis for a report. Some states in the US and Australia expressly require a higher degree of consequence of the neglect to make it reportable, such as “serious impairment” (Indiana), “substantial impairment” (Louisiana, New Hampshire), “endangerment of child’s life or development or impairment of the child’s functioning” (Pennsylvania); or the serious endangerment of the child’s physical health (Wisconsin); “serious physical impairment evidenced by severe bodily malfunctioning” (Northern

Territory), significant detrimental effect (Queensland), “physical or psychological injury detrimental to the child’s wellbeing or jeopardizing the child’s physical or psychological development” (South Australia and Tasmania); these phrases remain ambiguous. In contrast, while some Canadian provinces including Alberta and the Yukon Territory use definitions of neglect similar to the US and Australia, most do not expressly define the term “neglect” and many do not even use the term. Instead, most provinces generally detail in conceptual terms circumstances of parental failure to act that require a report of a child being in need of protection. The most common circumstances, detailed in nearly all provinces, are medical neglect, and a child being in the care of a parent who is unwilling or unable to provide adequate care, supervision or control. Some provinces require physical or emotional harm to have been caused by the neglect, which could be viewed as not including neglect as a separate basis for reporting. Some provinces include within “neglectful” circumstances parental failure to provide responses to a child under 12 who has committed defined criminal offences (Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, and Prince Edward Island), and two include malnutrition (Northwest Territories and Nunavut).

Neglect as a Result of Poverty

Another issue facing legislatures is the presence of neglect as a result of poverty, rather than parents’ intentional acts or grievous omissions. Most jurisdictions in the US expressly exclude poverty-based neglect from the definition of reportable “neglect”. Yet, if one of the primary functions of the child protection system is to enable the provision of assistance to children and their families, does the exclusion of poverty-based “neglect” mean that many neglected children receive no assistance when they otherwise might? A child who experiences neglect out of poverty may suffer the same deprivation as a child neglected in a family of higher means. Should the child in the poor family not have the same opportunity for

his or her case to be brought to the attention of authorities and helping agencies? It may well be that legislatures are cautious to avoid the potential for the child protection system to remove children from families on the basis of poverty alone. Yet, it would appear to defeat one of the major purposes of the child protection system if children who suffer neglect as a result of poverty are excluded from, or are less likely to receive, service provision because their cases have less chance of being brought to the attention of helping agencies. This may point to a conflict within child protection systems, concerning the provision of assistance versus the removal of children. It may also indicate the sheer enormity of the problem of poverty, and a reluctant surrender to the merely practical necessity to exclude these neglect cases from the ambit of mandatory reporting and child protection systems.

Are Reports Required Only of Past Abuse/ Neglect, or also of Risk of Future Abuse/Neglect?

Legislative provisions embody a major conceptual distinction concerning the timing of the suspected abuse or neglect. Arguably, the primary and most common object of the reporting provisions is to disclose cases of abuse or neglect that are presently occurring or have recently occurred. It may well be that cases of more severe abuse that have occurred at some point further in the past is also desirably reported, and it is reasonable to suppose that all suspicions of sexual abuse should be reported, no matter how distant. Certainly, the object of the statutes is not for every possible incident of abuse or neglect to be reported no matter how long ago inflicted, and qualifications about extent of harm support this limit. However, the most significant temporal distinction here lies between the duty to report suspected present or past abuse, and the duty to report suspected likely future abuse or neglect that may not have happened yet.

While largely unexplored by commentators—a rare exception is Besharov (1983)—this is a highly significant dimension of the laws that must be engaged with by legislatures since the issue is central to the nature of each child protection system. Should the reporting

law require reports only of abuse and neglect that has already happened, or should reports also be required of cases of abuse and neglect that, while not having occurred yet, are thought likely to occur in future? It would seem beyond dispute that, especially in cases of child fatalities or severe harm, the most exemplary attainment of child protection would be to prevent the abuse before it happened. Yet, this may be an object that is only attainable in a subset of cases where the likelihood of abuse or neglect (and significant abuse at that) can be seen to be very high, and a realistic and prudent approach should prevent any thought that it is possible to prevent all or even most cases of abuse before they happen. Besharov (1983; 1985) has accepted that a preventive approach should be adopted, but argues that the laws are more justifiably limited to cases of past abuse, with only limited preventive exceptions to this instead of an open-ended, vague and over-ambitious preventive approach. Besharov (1983; 1985) would include three other types of reportable cases: those where the parent did something which may not have actually harmed the child seriously but was capable of doing so; cases where parents are suffering from severe and demonstrable mental disabilities so that the parent is detached from reality and incapable of providing adequate care; and cases where parents of infants or very young children admit that they fear they may hurt or kill their children. In contrast, Finkelhor (2005) has pointed out that a major purpose of a reporting system is to disclose abusive situations before serious injury occurs. Clearly, if reporters are observing the duty to report when it applies to suspected risk of future abuse, this broadens the field of cases warranting a report and would increase the number of reports, and this eventuality would have to be foremost in the minds of legislators considering this strategy. It is not clear whether and to what extent reporting practice, or intervention practice and success, differs in jurisdictions having this requirement.

There are clear legislative differences here between jurisdictions. In Australia, for example, all jurisdictions with reporting statutes apply the obligation to cases of suspected

present and past abuse. One jurisdiction (the Australian Capital Territory) expressly limits the reporting duty to cases of suspected past abuse only. However, four of the eight jurisdictions (New South Wales, Queensland, Victoria and the Northern Territory), expressly extend the reporting obligation to cases where the reporter has a reasonable suspicion that a child who may not yet have been abused or neglected is at risk of being abused in future. In these four jurisdictions, this reporting duty applies no matter who the suspected future perpetrator may be. Another two States, 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. Australian jurisdictions therefore have a strong approach to preventing future abuse. In Canada, different approaches are taken across the provinces, and in several cases the language of the statutes is ambiguous. However, it seems that the majority of provinces generally do require reports of suspected risk of future physical, sexual and emotional abuse, but do not require reports of suspected risk of future neglect.

In many jurisdictions in the USA, reporting obligations are also applied to cases of risk of future abuse or neglect, although, as with the Canadian provinces, this is often difficult to detect due to ambiguity in the language. While there can be subtle differences—for example, a State may require reports of risk of future harm for some but not all types of abuse—it is possible to discern three broad approaches to this question. One approach, most strongly favouring prevention, is to apply the reporting duty to situations where the reporter suspects either past or existing abuse or neglect, or suspects that there is a risk of future abuse or neglect where no abuse or neglect may yet have occurred. Some States use clear language to indicate this: Connecticut, for example, requires reports where a child is suspected to have been abused or neglected, and where a child is suspected to be “placed at imminent risk of serious harm”. Our interpretation of the statutes suggest that other states most clearly adopting this approach (but not always for every type of abuse and neglect) are: DC, FL, HI,

IL, KY, ME, MN, MO, MT, NJ, NM, NY, NC, OH, OK, OR, PA, RI, SC, SD, TN, TX, VT, VA, WI, WY.

At the other extreme, some states clearly apply the reporting duty only to situations where the reporter suspects the abuse or neglect has already happened. Arizona, for example, requires a report by a designated person of a belief that “a minor is or has been the victim of physical injury, abuse, child abuse, a reportable offense or neglect”, and the term “abuse” is limited to “the infliction or allowing of” certain injuries, thus ruling out cases of suspected risk of future abuse that has not yet occurred. Other states that clearly limit the reporting duty to past abuse and neglect are: DE, GA, IN, IA, MS, NV, NH, ND, WA.

Between these two groups lay the other states (AL, AK, AR, CA, CO, ID, KS, LA, MD, MA, MI, NE, UT, WV). Here, the language of the statutes is more ambiguous and open to different interpretations. Our analysis suggests that these states apply the duty to report only where the reporter suspects that acts of abuse or neglect have happened. Yet, the terminology used raises questions about (a) whether the duty applies only to acts thought to have already occurred but where harm from those acts either has already occurred or has not yet occurred but is threatened, and (b) whether the duty applies to suspected threatened harm by suspected future acts. Alaska, for example, requires a designated person to make a report where he or she has “reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect”. Interpreting this provision alone would limit the reporting duty to cases of past abuse or neglect. But, Alaska defines “child abuse or neglect” as “the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby”. Read together, these provisions activate the reporting duty when a designated person has reasonable cause to suspect that a child has suffered harm as a result of injury by a person under circumstances that indicate that the

child's health or welfare is harmed or threatened thereby. Combined, the provisions suggest that an act must be thought to have occurred, but the harm from that act—or possibly from future acts—may be thought either to be already present or threatened to arise at some future time.

Issues for consideration

This review has disclosed a number of broad, major issues that legislatures must engage when designing mandatory reporting legislation. Within these broad issues, others also arise.

The broad issues are:

1. Are mandated reporters limited to selected occupations (and if so, which), or is the reporting duty imposed on all citizens?
2. What types of abuse (physical, emotional, sexual) and neglect are required to be reported?
3. What level of suspicion is required to activate the reporting duty (and how is this expressed)?
4. Within the three major types of abuse, are reports required of suspected abuse from all sources, or from selected perpetrators such as parents and caregivers (and how is this to be clearly expressed)?
5. Are any “new” types of abuse required to be reported, and if so, which?
6. Are the types of abuse that are required to be reported defined to indicate the extent of harm required to be suspected to have been suffered (and if so, how), or does the reporting obligation apply to any occurrence of the abuse?
7. Are reports required only of past or present abuse, or are reports also required of suspected risk of future abuse (and if so, under what circumstances)?

These issues are contentious and different legislatures will undoubtedly take different approaches in an attempt to bring cases of abuse and neglect to light which otherwise would

go undetected and untreated, while maintaining a practically sustainable and fiscally responsible approach to child protection. Whether refining or developing mandatory reporting legislation, governments should be aware of the different approaches adopted to date, and of the need to express the reporting requirements in language that is as clear as possible. This should be supplemented by training for reporters so that they gain knowledge of the indicators of abuse and neglect, know how to deal appropriately with a situation of disclosure or suspicion, know the situations when a report is and is not required, and know how to make a report that both satisfies the legislative reporting requirements and provides useful assistance to child protective services intake. Of course, while legislation and training are two important components of the child protection system, they interact with others, principally the systems of assessment, response and case management. The content of the law therefore must be sensitive and adapted to the entire child protection apparatus in any given jurisdiction, and the most successful approach requires coordinated efforts by the whole of government.

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