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Reversing the 'syndrome of secrecy'

Peremptory reporting
obligations in cases of child
abuse and neglect

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Mandatory reporting laws are a controversial mechanism that require members of particular occupations to report cases of serious child maltreatment that they encounter in the course of their work to welfare or law enforcement agencies. In April 2019 a video went viral in which a woman filmed her colleague beating toddlers at a crèche in Gauteng. The crèche was closed, and arrests were made, including of the videographer. Given extent of violence and abuse against South African children, this paper investigates whether South African law adequately provides for the liability of those compelled to report child abuse but who fail to do so, why mandated reporters fail to report abuse, and how South Africa's mandatory reporting rules should be amended to better serve their purpose.

Introduction

Child maltreatment negatively impacts the physical and psychological wellbeing of children.² It is estimated that, globally, up to one billion children endured physical, sexual or emotional violence or neglect in the past year.³

Many South African children suffer severe abuse and neglect.⁴ A 2016 national prevalence study showed that one in every three children had experienced some form of physical or sexual abuse at some point in their lives, while one in eight had been neglected.⁵ Another study

indicated that almost 10% of boys and 15% of girls between the ages of 15 and 17 years have experienced lifetime sexual victimisation, which was also strongly associated with physical abuse, emotional abuse, neglect, family violence and other forms of victimisation.⁶

Many countries have enacted so-called mandatory reporting laws that require designated persons to report known or suspected cases of abuse or neglect to welfare or law enforcement agencies in an effort to detect these cases and allow for early intervention and treatment.⁷ These laws are designed to address the fact that child maltreatment tends to take place in private settings,⁸ enshrouded in what has been called a 'syndrome of secrecy'.⁹ Abuse and neglect are most frequently inflicted on infants, who are pre-verbal, or other young children who are not able to resist, resolve the situation, disclose the experience or free themselves from the abusive environment.¹⁰ Research has shown that children rarely report their own victimisation, while those inflicting the suffering are similarly unlikely to disclose it.¹¹

Through mandatory reporting laws, governments place a duty on members of particular occupations who typically deal with children in the course of their work and who may encounter cases of serious child maltreatment to report these incidents.¹² This complies with the provisions of the United Nations Convention on the Rights of the Child (the CRC),¹³ which stipulates that both protective and preventative measures should be implemented, including *reporting*, *referral*, *investigation*, *treatment* and *follow-up* of instances of child abuse, maltreatment and/or neglect.¹⁴

In line with the CRC, the South African Constitution affords children protection against abuse and maltreatment.¹⁵ Section 28(1)(d) of the Constitution guarantees every child the right 'to be protected from maltreatment, neglect,

abuse or degradation'. Section 110 of the Children's Act,¹⁶ as amended, provides for the mandatory reporting of child maltreatment in that it compels certain designated persons to report any suspected child abuse or deliberate neglect to the relevant authorities.¹⁷ Such reporting, when made in good faith, will endow the reporter with immunity against any claims of liability.¹⁸ In addition, section 54 of the South African Criminal Law (Sexual Offences and Related Matters) Amendment Act¹⁹ (SORMA) compels a person who knows that a sexual offence has been committed against a child to report it to a police official.²⁰ Failure to report such abuse could lead to criminal liability, and if found guilty, the offender could be fined, imprisoned, or both.²¹

The importance of the duty to protect children and to report incidents of abuse was highlighted in April 2019, when a video went viral on social media in which a caregiver at a crèche in Gauteng was seen repeatedly beating three toddlers in three separate incidents.²² The crèche was closed and it was widely reported that the videographer who filmed her colleague abusing the children was among those who were arrested and would appear in court.²³ She was accused of failing to protect the children from the assaults, instead choosing to film them. The abuse may never have been exposed had the videographer not been dismissed for another matter after which she allegedly tried to use the video to bribe the owner of the crèche.²⁴

This is the first case in South Africa of a fellow caregiver being arrested and charged after filming an incident of abuse, as well as the first incident of an owner of a care facility being arrested on the basis of section 110 of the Children's Act for failing to report the abuse against the children at the facility.²⁵ The case raises important considerations about the duty to protect children and to report incidents of

abuse and why mandated reporters fail to report abuse. It also raises questions about whether South African law adequately provides for the liability of those compelled to report child abuse but who fail to do so and how South Africa's mandatory reporting rules can be amended to better serve their purpose.

Mandatory versus voluntary reporting laws

Whereas many countries have enacted mandatory reporting laws, others, for example England and New Zealand, have chosen not to do so. There has been controversial debate about the advantages and disadvantages of such laws.²⁶ The arguments against them include the perceived danger of over-reporting of innocent cases, which is seen as adversely affecting the interests of children and families. Mandatory reporting may also divert scarce resources from already known deserving cases, overload the child protection system, and result in children in need of protection losing out.²⁷

The three early adopters of mandatory reporting, namely the USA, Canada and Australia, have given detailed attention to the development of mandatory laws over several decades.²⁸ Other nations, including Brazil, Denmark, Finland, France, Israel and Norway, have created general legislated reporting duties.²⁹ Those supporting mandatory reporting highlight that apart from the immediate protection of children in danger, such laws acknowledge the seriousness of child abuse; prevent the revictimisation of children as well as the victimisation of other children, such as siblings; reinforce the moral and social awareness and responsibility of community members and increase the number of identified child abuse cases, enabling the criminal justice system and regulatory oversight agencies to respond to child abuse.³⁰

There is consensus that mandatory reporting

laws have produced an increase in the number of both substantiated and unsubstantiated reports made to governments.³¹ This may be a positive outcome, if it leads to early notification and intervention. This depends, however, on whether the child protection system functions well and can cope.

South African legal position

Following the pattern set by the USA in 1960, South Africa adopted legislation by way of section 42(1) of the Child Care Act of 1983, making the reporting of child abuse and neglect compulsory, with a failure to do so being a criminal offence for those to whom the obligation applies. This provision was amended in 1991, and again in 1996, to provide for a more extensive system of mandatory reporting.³² The mandatory reporting of child abuse and neglect was also included in the Children's Act of 2005,³³ coming into effect on 1 April 2010. This considerably broadened the pool of obligatory reporters. These are people who might, in the course of their day-to-day employment, encounter child abuse and neglect. The Children's Act determines that:

Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation,

the provincial department of social development or a police official.

Section 89 of the Children's Act also determines that where a child is seriously injured or abused at a partial care facility, the person operating the facility or a person employed at the facility must immediately report such injury or abuse to the head of social development, who must cause an investigation to be conducted.³⁴ This is in line with the general obligation in terms of section 110 placed on employees or volunteers at partial care facilities to report physical or sexual abuse or deliberate neglect of children at the facilities.³⁵

Apart from obligatory reporters, members of the public or so-called 'community reporters' are given discretion in terms of section 110(2) of the Children's Act to report a belief that 'a child is in need of care and protection', but are not compelled to do so.³⁶ This followed recommendations by the South African Law Reform Commission Project Committee on the Review of the Child Care Act.³⁷ The distinction was motivated by South Africa's scarce resources and a fragile and developing child protection system, as well as comparative research pointing to the fact that generalised community reporting has been found to lead to large numbers of unsubstantiated reports, drawing scarce skills into interminable investigations.³⁸ By contrast, section 54 of SORMA follows a blanket approach by placing a mandatory reporting obligation on '[a] person who has knowledge that a sexual offence has been committed against a child must report such knowledge immediately to a police official'.³⁹ In other words, all members of the public who are aware of the sexual exploitation of children are required to report it.⁴⁰

Level of certainty

A key issue in reporting statutes relates to the level of certainty (level of knowledge, belief or suspicion) that must be reached for a valid

reporting obligation to arise. The reporting obligation in terms of the Children's Act is triggered by a *conclusion* on reasonable grounds that the child has been abused or deliberately neglected.⁴¹ This implies that some minimum investigation must have taken place for the potential reporter weighing up the 'evidence' to come to the required conclusion. A mere suspicion will not suffice.⁴² The regulations of the Children's Act assist obligatory reporters in that they set out some indicators to assess risk factors that would support such a conclusion.⁴³ The regulations also provide guidelines to assist the reporter in assessing 'the total context of the child's situation' before coming to a conclusion that abuse or neglect had taken place.⁴⁴

Community reporters who report child abuse only have to believe on reasonable grounds that the child is in need of care and protection.⁴⁵ Reports made in good faith by both obligatory reporters and the community reporters in terms of section 110 of the Children's Act give rise to an exemption from civil liability.⁴⁶ However, failure to report child abuse or neglect when legally obligated to do so can give rise to such a person being guilty of an offence.⁴⁷ A person convicted of an offence in terms of section 110(1) of the Children's Act is liable for a fine or imprisonment for a period not exceeding ten years, or both.⁴⁸

In contrast, section 54 of SORMA determines that a person who has *knowledge* of sexual offences directed against children must report such knowledge immediately to a police official. A person who fails to report such knowledge is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding five years or both.⁴⁹ SORMA accordingly sets a much higher reporting standard, namely knowledge, than that of the Children's Act, which requires a conclusion on reasonable grounds. Furthermore, section 54 of

SORMA makes no provision for an exemption from criminal or civil liability due to unfounded reporting of sexual offences against a child.⁵⁰ According to Sloth-Nielsen, the high standard, of knowledge, is to be welcomed, given that no exemption from criminal and civil liability has been created for erroneous reporting.⁵¹ This may also contribute to the lesser period of imprisonment in terms of SORMA, namely for a period not exceeding five years, in comparison to the period not exceeding ten years in terms of the Children's Act.

The recent Children's Amendment Bill aims to amend the Children's Act to better promote children's rights and align the Act with SORMA. It proposes to amend section 110 of the Children's Act by further broadening the pool of obligatory reporters to include any officer of the court, any official working for Home Affairs, any person working with children, and ward counsellors.⁵² These proposals have been welcomed,⁵³ but child activists have called for an even broader extension, namely mandatory reporting for anyone who has reasonable suspicion of child abuse or neglect.⁵⁴ The Bill also proposes to amend the level of certainty for a valid reporting obligation to arise, from that of a conclusion on reasonable grounds to that of a suspicion on reasonable grounds that the child has been abused or deliberately neglected.⁵⁵ However, the mandatory reporter will be guided as to what is reasonable and suspicious by a prescribed form which will likely be as detailed as the current Form 22 set out in the regulations to the Children's Act.⁵⁶

Barriers to reporting

Despite the legislation described above, research indicates that under-reporting of child abuse continues to prevail.⁵⁷ A recent study by Jamieson et al of the Cape Town Children's Institute on child abuse cases in the child protection system in five selected sites in South Africa showed that of all the cases evaluated,

only 16% had been reported by obligatory reporters.⁵⁸ The majority had been reported by individuals, or community reporters.⁵⁹ Possible reasons for this, discussed below, include a lack of understanding of the reporting legislation, lack of 'hard' evidence, concerns about the legal consequences of reporting, lack of faith in child protection services and accompanying concern for the safety of the child, as well as a lack of effective and comprehensive training.⁶⁰

Lack of understanding reporting legislation and hard evidence

Section 110(1) of the Children's Act provides three grounds that trigger a reporting duty, namely physical injury, deliberate neglect, or sexual abuse. All forms of sexual abuse are regarded as serious enough to mandate a response, but the other two maltreatment types include a qualification of severity or seriousness of harm caused by the abuse or neglect. They are not targeted at incidents that could be seen as less than ideal.⁶¹ In its report the South African Law Reform Commission Project Committee on the Review of the Child Care Act advised that 'neglect' be confined to *deliberate* neglect, as poverty poses a massive problem in South Africa and aspects such as child maltreatment can more effectively be addressed through other mechanisms.⁶²

The Commission also recommended that definitions of the categories be provided. The Children's Act clearly defines sexual abuse, but defines abuse as 'any form of harm or ill-treatment deliberately inflicted on a child', including assault or inflicting any other form of deliberate injury to the child.⁶³ Indicators as to what constitutes physical abuse are only found in the regulations to the Children's Act under the risk assessment guidelines. They include aspects such as bruises on any part of the body; grasp marks on the arms, chest or face; variations in bruising colour; black eyes; belt marks; tears around or behind the ears;

cigarette or other burns; cuts; welts; fractures; head injuries, convulsion etc.⁶⁴

The lack of such clear evidence is a key barrier to reporting child abuse. Research has indicated that where clear definitions are not given, the decision to report depends on the reporter's subjective interpretation of what constitutes physical abuse.⁶⁵ Child physical abuse is severely underreported in South Africa, and even that which is in fact reported is often regarded as 'justifiable' punishment, despite evidence suggesting a pattern of violence.⁶⁶

Corporal punishment has been prohibited in educational settings since 1996, and as a punishment and sentence within the justice system since 1995.⁶⁷ Recently, the Constitutional Court of South Africa ruled that the common law defence of 'reasonable and moderate chastisement' in the home was unconstitutional, effectively banning all corporal punishment of children.⁶⁸ The court referred to sections 12(1)(c) of the Constitution, in terms of which everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. It held that all forms of violence, however moderate or reasonable, meet the threshold requirement of violence prescribed by the section and can thus not escape the reach of section 12(1)(c).⁶⁹ It highlighted that 'violence is not so much about the manner and extent of the application of the force as it is about the mere exertion of some force or threat thereof'.⁷⁰ The court also referred to Section 28(2) of the Constitution, which provides that a child's best interest are of paramount importance in every matter concerning the child and held that not even chastisement that is moderate and reasonable is constitutionally justifiable.⁷¹

A related barrier to reporting is the fact that the interpretation of the concepts 'reasonable grounds to suspect' or 'reasonable grounds to

conclude' is variable and inconsistent.⁷² This can lead to over or under-reporting.⁷³ Research has found that education on reporting laws is key to competence in reporting.⁷⁴ The Form 22 set out in the regulations to the Children's Act must be completed for each child by a mandatory reporter and contains guidance as to what is reasonable and suspicious. However, Jamieson et al's study revealed that only 5% of the reports were recorded on the prescribed form.⁷⁵ This is not unique to South Africa. Studies conducted in the US and other countries suggest that professionals are not adhering to policies, citing a lack of adequate training on the policies regarding mandatory reporting and the indicators of child abuse as the cause.⁷⁶

Concerns regarding legal consequences

No legal action lies against a reporter who complies with the provisions of section 110 of the Children's Act. The only way liability may arise is if there is malice on the part of the reporter or no reasonable grounds for reporting exists. There is very little case law that deals with reporter liability exist either in South Africa or abroad. In the few cases that exist in Canada, the courts have tended to rule in favour of defendant reporters to protect their legal immunity.⁷⁷ Despite this, fear of legal consequences has been cited as barriers to mandatory reporting.⁷⁸

However, as noted above, section 54 of SORMA makes no provision for exemption from criminal or civil liability due to unfounded reporting of sexual offences against a child. Though 'knowledge' is required as prerequisite for reporting, which presupposes reasonable grounds and excludes liability, the lack of immunity may still act as barrier to reporting. Related to this is a concern of involvement in lengthy court cases, with multiple postponements and no guarantees of successful outcomes.⁷⁹

Lack of faith in child protection services

Another frequently identified reason for the reluctance of mandatory reporters to report is the fear of mishandling of the case by protection services, which might result in secondary harm to the child.⁸⁰ One of the arguments against mandatory reporting legislation is that it puts strain on already-overburdened child protection authorities, who are unable to meaningfully address the increased reports.⁸¹ South Africa's under-resourced child protection services and weak infrastructure contribute to the ineffective service provision to abused children, thus exposing them to secondary trauma and revictimisation.⁸² Social and health service providers face many work related challenges, including poor infrastructure, staff shortages, long working hours, increasing burden of care, low morale and even a lack of trust between professionals.⁸³ Interagency management is critical for a successful child services protection system.⁸⁴ Although the Children's Act is based on a cooperative implementation model which obliges social workers and police officials to work together, of the cases examined by Jamieson et al, only 8% were cross-referred, while none were jointly managed.⁸⁵

Conclusion

A recent media report indicates that the caregiver in the Gauteng crèche case has been found guilty of two charges of common assault as well as one account of assault with the intention to inflict grievous bodily harm. It is not yet clear what charges the videographer will face, if any, while the case against the owner of the crèche is still proceedings.⁸⁶ As is widely acknowledged and was highlighted by this incident, the system of mandatory reporting of child abuse in South Africa is far from perfect. Mandatory reporting is only effective to the extent that it gives rise to effective services and provides data for planning and

policy development. As the South African Law Commission put it:⁸⁷

With hindsight the wisdom of proceeding with a mandatory reporting system is perhaps open to question. However, the Commission recognised that the reporting system and the national child protection register as currently provided for have protective potential for children as well as being a prospective source of data for planning, policymakers and resource purposes, and that it might be ill-advised to reverse the mandatory provisions which are currently in place in the Child Care Act.

Although the mandatory reporting system may be open to question, it does have the potential to play an important role in protecting children from further maltreatment. It is not the magic wand for child abuse but is part of a broader solution aimed at comprehensively addressing the issue. The challenge thus seems to be how to realise mandatory reporting's protective potential.

A golden thread that runs through research in this field is the importance of understanding and reporting abuse. A lack of knowledge can lead to both under and over-reporting. The training of both mandatory reporters and community reporters is essential. Mandatory reporters should be trained on when they have a legal obligation to report, what the legal burden of certainty entails, as well as their liability for not reporting child abuse. Training should also include information on good faith reporting, thereby addressing concerns about legal consequences. Community reporters should be made aware of the instances where children may be at risk and the important role they can play in reporting child abuse. The fight against women and child abuse is one that government cannot fight alone. Communities' collective assistance in reporting incidents of abuse is needed to curb the violent epidemic.⁸⁸

There need to be improvements in information sharing between agencies working with children. Welfare agencies and protective services need to adopt better case management processes, strategies, administrative practices and leadership. But to do so government needs to invest in a properly resourced and coordinated national child protection system where social services, police and health professionals can share information and jointly manage complex cases. In this regard it is hoped that the recently established Inter-Ministerial Committee on Gender Based Violence and Femicide (GBVF), tasked amongst others with overseeing a national coordinated response to the eradication of GBVF, will make a difference.⁸⁹

A clear definition of physical abuse should be included in the Children's Amendment Bill to prevent uncertainty on the part of the mandatory reporter. In light of Constitutional Court ruling on corporal punishment, a higher threshold may be required of mandatory reporters. A defence of 'moderate or reasonable physical injury' may not suffice. Government should continue in its efforts of assessing the legal framework and evidence to ensure the most effective and adequate approach. Laws that are adapted to provide for co-ordination between relevant stakeholders have proven to be the most successful.

The proposals in the Children's Amendment Bill are a step in the right direction. However, research will have to be conducted to determine whether aspects such as the bigger pool of obligatory reporters and the change in level of certainty required from mandatory reporters, from 'reasonable conclusion' to 'reasonable suspicion', results in an improvement to the reporting of child abuse. The establishment of the Office of the Commission for Children in the Western Cape, tasked with monitoring government services, policy and law as well as the conducting of

research to inform such policy and practice relating to children's rights is much welcomed. It is hoped that this Office will be extended to the other eight provinces of South Africa.⁹⁰

As signatories to the CRC, South Africa must continue in its efforts to ensure that protective and preventative measures, which include the reporting of child abuse, and/or neglect are in place. Hopefully the measures discussed above will lead to enhanced reporting of abused or neglected children. We owe it to our most vulnerable citizens.



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Notes

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- 13 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p.3, www.refworld.org/docid/3ae6b38fO.html. South Africa ratified the CRC on 16 June 1995.
- 14 Own emphasis.
- 15 Constitution of the Republic of South Africa (1996).
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- 17 See the Children's Amendment Act (41 of 2007).
- 18 Children's Act, s110(3)(b).
- 19 Criminal Law (Sexual Offences and Related Matters) Amendment Act [SORMA] (32 of 2007).
- 20 Own emphasis. Note that the definition of child abuse in the Children's Act includes sexual abuse, while not all forms of sexual activity referred to in SORMA will be categorised as child abuse.
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- 35 Prinslean Makery, "Partial Care" in *Commentary on the Children's Act*, ed. Trynie Davel and Ann Skelton, Juta Revision Service 6, 2013, 5-28.
- 36 Sloth-Nielsen, "Protection of Children," 7-22.
- 37 South African Law Review Commission [SALRC], Project 110, *Discussion Paper on the Review of the Child Care Act*, December 2002, www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf.
- 38 SALRC, *Project 110*, par 9.10; Sloth-Nielsen, "Protection of Children," 7-20 – 7-22. The different approaches to mandatory reporting have become increasingly controversial. This will be discussed in more detail later in the analysis.
- 39 SORMA, section 54.
- 40 However, section 56(5) of SORMA provides that a person may not be convicted of an offence in terms of section 54 if that person is a child and, in addition, is not a person contemplated in sections 17 (1) and (2) or 23 (1) and (2) as the case may be. See also Julia Sloth-Nielsen, "Section 54: Obligation to Report Commission of Sexual Offences Against Children or Persons Who Are Mentally Disabled," in *A Commentary on the Sexual Offences Act*, ed. Dee Smythe and Bronwyn Pithey, 18-4 – 18-6 where the author highlights some of the anomalies that may arise due to the blanket approach by the legislature.
- 41 Own emphasis.
- 42 Sloth-Nielsen, "Protection of Children," 7-22.
- 43 General Regulations Regarding the Children's Act, 2010, regulation 33(1).
- 44 General Regulations, regulation 35.
- 45 Children's Act s110(2).
- 46 Children's Act s110(3)(b).
- 47 Children's Act s305(c).
- 48 Children's Act s305(6).
- 49 SORMA, section 54(1)(a).
- 50 Note that an exemption is only given in subsection 54(2) relating to the mandatory reporting of sexual offences committed against a person who is mentally disabled. No similar provision is found in section 54 (1) of SORMA.
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- 60 Jon Hogelin, "To Prevent and to Protect: The Reporting of Child Abuse by Educators." *Brigham Young University Education and Law Journal* (2013): 225–252, 246–249; Gordon, "Good Intentions," 5–11.
- 61 Mathews, "Mandatory Reporting Laws," 463.
- 62 SALRC, *Project 110*, par 10.5.
- 63 Children's Act, section 1.
- 64 General Regulations Regarding the Children's Act, 2010.
- 65 Mathews and Kenny, "Mandatory Reporting Legislation," 50–63, 58.
- 66 Jamieson, *Out of Harm's Way*, 23.
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- 68 *Freedom of Religion SA v Minister of Justice* 2020 1 SA 1 (CC)
- 69 *Freedom of Religion*, para 44, own emphasis added.
- 70 *Freedom of Religion*, para 38.
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