

# The new mandatory reporting requirements

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Mandatory reporting in the simplest of terms is about having information available which can be used to identify children who might need services to care and protect them, to identify what those services might be and finally how best to deliver those services.

To expand on these points, what needs to occur in building any child protection system, the information that you gather should permit the system:

- not to include families who do not require services
- to balance the capacity of the system to respond with the needs of families
- not to exclude families who need services
- to make sure the right type of service is delivered
- to balance family autonomy with child protection.<sup>2</sup>

The importance of these outcomes lies in an assumption that unless these children receive care and protection they are more likely to have problems (both now and later in life) and an increased chance of repeating the cycle with their own children - so that the problems become both self perpetuating and escalating in size.<sup>3</sup>

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<sup>1</sup> The views expressed in this paper are personal to the author and do not necessarily, or at all, express those of the DoCS or the State of NSW.

<sup>2</sup> J Waldfoegel *The future of child protection: how to break the cycle of abuse and neglect* (Harvard University Press, Cambridge, 1998) pp 84-87

<sup>3</sup> D Cicchetti and V Carlson (eds) *Child Maltreatment: Theory and Research on the causes and consequences of child abuse and neglect* (Cambridge University Press, New York, 1989); L Aber & J Allen "Effects of child maltreatment on young children's socioeconomic development: an attachment theory perspective" (1987) 23 *Developmental Psychology* 406; R Starr & D Wolfe (eds) *The effects of child abuse and neglect: issues and research* (Guilford Press, New York, 1991); P Trickett & C McBride-Chang "The developmental impact of child abuse and neglect" (1995) 15 *Developmental Review* 311. For views questioning consequences for adult behaviour: J Kaufman & E Zigler "Do abused children become abused parents?" (1987) 57 *American Journal of Orthopsychiatry* 186; C Widom "Does violence beget violence? A critical examination of the literature" (1989) 106 *Psychological Bulletin* 3

Irrespective of any statutory reporting scheme these outcomes mean that a person may still voluntarily report that a child or young person (or a group of either) is at risk of harm to Community Services, Department of Human Services (DoCS)<sup>4</sup>, or (if a criminal offence may also have been committed) to the police, where that person has reasonable grounds to suspect that this is the case.<sup>5</sup>

But because of the statutory reporting scheme in this State there is an obligation to report where:

- there is a duty (outside of any legislation) of care to do so, or
- the person is a mandatory reporter or
- the abuse is alleged to be caused by certain employees.

To fully appreciate the changes made by the Special Commission it is important to consider this broader context of reporting under each of these obligations in turn. Having said that I won't be considering the scheme of reportable conduct in this paper as it is current subject to a review of the Commission for Children and Young People.

## Duty of care

Where a person or organisation owes a duty of care to take reasonable steps to protect a child or young person from foreseeable injury then a failure to do so will be negligent.<sup>6</sup>

Prior to making any report the taking of reasonable steps will include taking proper steps to verify any professional assessments which may have been undertaken. For example, if there has been a flawed examination of a child, or a flawed diagnosis, by a medical practitioner and this was the basis of a report that a child had been sexually abused then these flaws might amount to a breach of a duty of care. Where this has occurred then these are normally breaches of the duty to conduct the examination in question (or carry out the diagnosis) rather than going to the question of whether the doctor should subsequently have reported the child to be at risk.<sup>7</sup> If a medical practitioner (or for that matters others, such as teachers) report based on flawed tests undertaken by others, but it is reasonable for them to have relied upon these tests, then the practitioner would not be liable.<sup>8</sup>

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<sup>4</sup> While DoCS is designed to receive reports of children being at risk of harm through its centralised call centre, there is no legislative requirement (and so it is not necessary) for information to be received at the call centre for it to be classified as a report.

<sup>5</sup> Section 24 *Children and Young Persons (Care and Protection) Act 1998*.

<sup>6</sup> For discussion on when a duty of care is generally owed see *CCH Australian Torts Reporter*.

<sup>7</sup> For example *Nosbaum ex rel Harding v Martini* (2000) 726 NE2d 84; *Wilkinson v Balsam* (1995) 885 FSupp 651.

<sup>8</sup> *Poulos v Lane* (1995) 659 NE2d 34; *Criswell v Brentwood Hospital* (1989) 551 NE2d 1315.

Reasonable steps to protect a child can sometimes include investigating allegations of abuse. This is particularly relevant where the allegation is received by an employer about staff<sup>9</sup> of the employer who work with children. In that situation the High Court has said:

“in cases where the care of children, or other vulnerable people, is involved it is difficult to see what kind of relationship would not give rise [to this kind of duty]. It is clearly not limited to the relationship between school authority and pupil. A day-care centre for children whose parents work outside the home would be another obvious example. The members or directors of the club, which provided recreational facilities for children, considered by the Supreme Court of Canada in *Jacobi v Griffiths* [1999] 2 SCR 570 presumably owed a non-delegable duty of care to the children who were sexually assaulted by the club’s employee.”<sup>10</sup>

Where such a duty exists then the employer will have obligations that are independent of other statutory obligations that are discussed below.

Where this duty of care exists, and it is known that not only is there a possible injury by way of on-going abuse, but it is possible to report the possible abuse so that others (like CS) might take action to prevent the abuse; then in those circumstances it is arguable that the duty has been breached by taking inadequate (or perhaps no) steps to report and so prevent the injury.

There is an unreported Victorian case in which a school made a financial payment as a result of a teacher failing to report a reasonable suspicion of abuse of a student – at a time when there was no legislative regime in place which made such reporting mandatory. This settled claim was initially commenced as a litigated claim based on an alleged breach of duty by the school in failing to report.<sup>11</sup>

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<sup>9</sup> The liability might extend beyond employees to anyone acting for the employer, such as an independent contractor: see *NSW v Lepore* (2003) 212 CLR 511 at 561 per Gaudron J.

<sup>10</sup> *State of NSW and Lepore* (2003) Aust Torts R 81-684 at 63, 403; (2003) 212 CLR 511 per Gleeson CJ. Similarly at 63,414 per Gaudron J and 63,423 per McHugh J. On liability for failure to protect a child from abuse see: Kearney “Breaking the silence: tort liability for failing to protect children from abuse” (1994) 42 *Buff L Rev* 405; J T R Jones & M L Lupton “Liability in delict for failure to report family violence” (1999) 116 *South African Law Journal* 371; A W McEvoy “Child abuse law and school policy” (1990) 22 *Education and Urban Society* 247; L Fisher, D Schimmel & C Kelly *Teachers and the Law* (New York, 1999)

<sup>11</sup> *AB v State of Victoria* unreported 15 June 2000 <http://www.themis.com.au/Themis>. R Verma “When erratic behaviour of children may be a tell-tale sign of sexual abuse: lessons from *AB v Sate of Victoria*” *Conference papers 11<sup>th</sup> Annual Conference of the Australia and New Zealand Education Law Association* Brisbane 2002 pp315-320. Also see *PD v Harvey* [2003] NSWSC 487 unreported 10 June 2003 per Cripps AJ where a medical practitioner who’s medical practice had given a joint consultation was found to owe

Within the United States, the Supreme Court of Montana found in the context of civil litigation that a social worker should have reported information concerning sexual abuse, notwithstanding that the abuse had occurred 16 years earlier, as there was a present threat of harm to the man's grandchildren.<sup>12</sup>

Apart from the law of negligence a failure to report may also amount to professional misconduct. This has been reported a number of times in connection with the medical profession.<sup>13</sup>

## Mandatory reporting

The use of mandatory reporting now extends over four decades<sup>14</sup>. A model mandatory reporting statute was developed in 1963 by the Children's Bureau of the United States Department of Health Education and Welfare.<sup>15</sup> Since that date mandatory reporting has been introduced into Australia.<sup>16</sup> It does not exist in New Zealand or England.

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a duty to determine if one of the patients had in fact informed the other joint patient of a contagious disease held by the former. By analogy to this duty to see that information had been conveyed there may be a duty to convey information or to report information obtained in a professional context.

<sup>12</sup> *Gross v Myers* (1987) 748 P2d 459; *Landeros v Flood* (1976) 551 P2d 389. R C Royce "Perils and pitfalls of hearing confessions: some ecclesiastical and secular legal concerns" unpublished seminar paper New York 10 November 1994. There is other United States authority to say that there is no common law duty to report information held about a student being abused. See for example *Doe A v Special School District of St Louis County* (1986) 637 F Supp 1138; *Thelma D v Board of Education of the City of St Louis* (1987) 669 F Supp 947; *Fischer v Metcalf* (1989) 543 So2d 785; *Letlow v Evans* (1994) 857 F Supp 676; *Mammo v State* (1983) 784 P2d 1187; *Sorichetti v City of New York* (1985) 482 NE2d 70.

<sup>13</sup> For example, *Medical Board of South Australia v Christpoulos (No 1)* [2000] SADC 47 unreported 14 April 2000. For the contrary that a physician's failure to recognize and report non-accidental harm did not amount to medical negligence: *Varela v St Elizabeth's Hospital of Chicago* unreported 2006 WL 2255751 (Illinois Appeal Court) noted (2006) 25 ABA Child Law Practice 116

<sup>14</sup> For an overview of comparative mandatory reporting laws see: B Mathews & M Kenny "Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features differences & issues" (2008) 13 Child Maltreatment 50

<sup>15</sup> For a historical introduction to mandatory reporting see: M P Thomas "Child abuse and neglect" (1972) 50 *NCL Rev* 293.

<sup>16</sup> It does exist as follows:

ACT	<i>Children and Young People Act 1999</i> sections 151, 151A, 156, 159
NSW	<i>Children and Young Persons (Care and Protection) Act 1998</i> sections 23, 27
NT	<i>Community Welfare Act 1983</i> sections 4, 13, 14
QLD	<i>Public Health Act 2005</i> sections 158,191; <i>Education (General Provisions) Act 2006</i> sections 365,366
SA	<i>Children's Protection Act 1993</i> sections 6,10,11
TAS	<i>Children Young Persons and Their Families Act 1997</i> Sections 3,4,14
VIC	<i>Children Youth and Families Act 2005</i> sections 162, 184
WA	<i>Children and Community Services Act 2004</i> sections 3,28,37,40

Initially, mandatory reporting was underpinned by two assumptions. These were that child abuse was considered to be rare and that where it was identified and highlighted it would be “cured”.<sup>17</sup> Neither of these initial justifications can now be supported.

The current justification for mandatory reporting is that it aims to establish a regime where information is given to independent professionals so that they can assess risk to a child. It sends a clear message that it is important for all information about a child being at risk to be independently assessed. Assessment undertaken solely by a person working closely with the child who considers that their skills alone will assist that child has been found by a number of coronial investigations to be a defective response. The ability of statutory child protection bodies to piece together information from a range of sources will invariably produce a better result – but only if they have received information from as many professionals as possible in the first place. Where the amount of information being received however reaches a crescendo then it may delay services being identified for children and delivered to them. That balance must be determined.

In relation to child sexual abuse there is another specific reason. This is that the general consensus is that for adult child sex offenders there is no proven cure and that the offender can at best be managed.<sup>18</sup> A person who receives information about child sex abuse cannot therefore presume that the offender will not re-offend. Information about such possible offences should therefore be conveyed to assist in avoiding serial abuse of children.

There are a number of reasons why mandatory reporting is not introduced<sup>19</sup> but the primary reason advanced is also the most frequent criticism of mandatory reporting. This is, that it results in such a flood of reports being made that scarce resources are diverted from undertaking care and protection to investigating allegations that are either spurious or do not warrant intervention.<sup>20</sup>

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The NT legislation makes all people mandatory reporters. For a similar example of this universal approach see *Nebraska Revised Statutes 1995* para 28-711. For a general discussion on reporting statutes in the United States see D R Veilleuz “Validity, construction and application of State statutes requiring doctor and other person to report child abuse” (1989) 73 ALR 4<sup>th</sup> 782; Myers “A survey of child abuse and neglect reporting laws” (1986) 10 *J Juv L*.

<sup>17</sup> B Nelson *Making an issue of child abuse* Chicago 1984 cited in G L Zellman & C C Fair “Preventing and reporting abuse” in J E B Myers et al *The APSAC Handbook on Child Maltreatment* Thousand Oaks 2002 p 450.

<sup>18</sup> Final Report of the Royal Commission into the New South Wales Police Service, The Paedophile Inquiry, paras 3.55 and 19.4 n. 1018.

<sup>19</sup> See for example: Bell and Tooman, (1994) “Mandatory Reporting Laws: A Critical Overview”. 8 *International Journal of Law and the Family* 337.

<sup>20</sup> F Ainsworth & P Hansen “Five tumultuous years in Australian child protection: little progress” (2006) 11 *Child and Family Social Work* 33; F Ainsworth “Mandatory reporting of child abuse and neglect: does it really make a difference?” (2002) 7 *Child and Family Social Work* 57 at 59: “considerably more effort and resources are expended on not

In NSW, the extent of mandatory reporting was clarified, extended and publicised in December 2000 (although the classes of who should be mandatory reporters was not significantly changed) and at the same time technology was introduced to increase the ease with which a report could be made. The Annual Reports of the Department show the following growth in the total number of reports (ie both mandatory and voluntary) received:

1997/1998	64,645
1989/1999	72,762
1999/2000	72,986
2000/2001	107,394
2001/2002	159,643
2002/2003	176,271
2003/2004	185,198
2004/2005	216,386
2005/2006	241,003
2006/2007	286,033
2007/2008	303,121
2008/2009	309,676

It is certainly the case that there was a significant increase in the number of reports being received following the December 2000 changes. This supports the proposal that mandatory reporting does lead to increased levels of reports being made.<sup>21</sup> Indeed, as the creation of an obligation to report is a reason for mandatory reporting, it would be surprising if this planned shift from voluntary to compulsory reporting did not (in fact) result in an increase in the number of reports being received.

It is clear that the rates of self-reporting of families in need of assistance is low. If self-reporting is to be a major source of referral for those who do not frequently or consistently deal with professionals then children in need will

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substantiated cases in New South Wales than in Western Australia"; M R Frteiman "Unequal and inadequate protection under the law: State child abuse statutes" (1982) 50 *Geo Wash L Rev* 243; D J Besharov "Responding to child sexual abuse: the need for a balanced approach" (1994) 4 *The Future of Children* 135; G L Zellman & C C Fair "Preventing and reporting abuse" in J E B Myers et al *The APSAC Handbook on Child Maltreatment* Thousand Oaks 2002.

<sup>21</sup> Also see: B Murray "Failing to report: potential action for breach of the statutory duty to report child abuse in Victoria" (1997) 2 *ANZJLE* 89 at 89. Whether there is a direct and simple correlation has however been questioned: J Wadfogel *The future of child protection – how to break the cycle of abuse and neglect* Harvard University Press Harvard 1998 pp 100-101 where the author considers that increased reporting may also be linked to increased child abuse, more stringent definitions (including, for example, such things as physical punishment) and improved recognition. Also see C Tilbury "Repeated reports to child protection" (2003) 28 *Children Australia* 4 at 6 where she says "that a significant reason for the increase is high notification rates". G L Zellman & C C Fair "Preventing and reporting abuse" in J E B Myers et al *The APSAC Handbook on Child Maltreatment* Thousand Oaks 2002.

not be identified.<sup>22</sup> The rates of substantiation of children per 1000 children in the jurisdiction is lower in non-mandatory reporting jurisdictions than where mandatory reporting exists. Again, while there are significant data issues, this would seem to imply that some children are not receiving services in non-mandatory reporting jurisdictions who should be.<sup>23</sup>

It is also the case that in jurisdictions without equivalent legislative changes that there have been significant increases in child protection reports. Between the 1980s and 1990s in the United States an increase of over 200% has been reported.<sup>24</sup> The number of care orders in the United Kingdom (which does not have mandatory reporting) tripled between 1992 and 2002.<sup>25</sup> This increase in reporting may not be entirely linked to legislative changes.

It is however also interesting to see which sector led in increased reporting following the December 2000 changes. Across this same period the percentage of the number of reports received by some sectors largely remained constant while reports from police increased from 27.4% of all reports in 1999/2000 to 36.1% in 2002/2003 and reports from the health sector increased from 12.7% to 15.3% during this same period. Against this there was a decrease in the percentage reports received from family, school and the friend/neighbour categories.

If this indicates a shift from people reporting any information about risk to children to reports being received instead from professional people skilled in identifying children at risk then this should result in DoCS receiving a better quality of information to assist in its investigations. By contrast if the increase, especially in reporting by police, arises solely from a reaction of reporting all children present at the time of domestic violence (with very little consideration of whether the child was at risk of suffering “serious physical or psychological harm”<sup>26</sup>) then the value of the additional amount of reports may be limited.<sup>27</sup>

There is some evidence that, notwithstanding the mandatory requirements to report, professionals do exercise discretion in reporting. This can result in up to a third of all matters to be reported, not being reported.<sup>28</sup> There is also

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<sup>22</sup> B Matthews & D C Bross “Mandatory reporting is still a policy with reason: empirical evidence and philosophical grounds” (2008) 32 *Child Abuse & Neglect* 511 at 512

<sup>23</sup> B Matthews & D C Bross “Mandatory reporting is still a policy with reason: empirical evidence and philosophical grounds” (2008) 32 *Child Abuse & Neglect* 511 at 512

<sup>24</sup> R L Karski “Key decisions in child protective services: report investigation and referral” (1999) 21 *Children and Youth Services Review* 643 at 643.

<sup>25</sup> M Bollington *Family Justice System Statistical Bulletin 2002* UK Department of Constitutional Affairs December 2003.

<sup>26</sup> Children and Young Persons (Care and Protection) Act 1998 section 23(d).

<sup>27</sup> F Ainsworth “Mandatory reporting of child abuse and neglect: does it really make a difference?” (2002) 7 *Child and Family Social Work* 57 at 61.

<sup>28</sup> S W Webster, R O’Toole, A W O’Toole and B Lucal “Overreporting and underreporting of child abuse: teachers use of professional discretion” (2005) 29 *Child Abuse & Neglect* 1281. Also see R O’Toole, S Webster, A O’Toole & B Lucal “Teachers

evidence that there is a relationship between poverty and children being at risk of harm<sup>29</sup> and between reported child abuse and low socioeconomic status.<sup>30</sup>

It is this context which formed the background to the Special Commission. In addition to this background to the nature of reporting the Special Commission also identified a difficulty with the current system in that there was felt to be impediments to sharing information.

If a professional is told something in confidence there is always the perennial question of how can that confidence be broken for the good of another while still maintaining a professional working relationship? The damage to a therapeutic relationship is often cited as a reason not to report.<sup>31</sup> Recognising that personal autonomy must interact with the need to maintain a range of relationships, if the rules of the professional relationship are made clear at the beginning, and it is clear that the professional is obliged to pass on information, then this clarity will assist that professional. Both client and professional will be clear that certain information must be passed on and that this referral of information is a matter extraneous to the professional relationship.

This is supported by case law where it is said that “in neglect proceedings confidentiality must give way to the best interests of the child.”<sup>32</sup> The particular case concerned a medical practitioner involved in a drug rehabilitation program. Part of the program offered confidentiality to mothers who engaged in substance abuse in contravention of criminal laws. Confidentiality concerning the breach of criminal law did not override the obligation to report possible risks to children. Likewise in a Canadian case, the obligation of a police officer to report abuse was held to be paramount notwithstanding competing obligations of confidentiality and privilege<sup>33</sup> and

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recognition and reporting of child abuse: a factorial survey” (1999) 23 *Child Abuse and Neglect* 1083; K Walsh, A Farrell, R Schweitzer & R Bridgstock *Critical factors in teachers detecting and reporting child abuse and neglect: implications for practice* (QUT Brisbane 2005)

<sup>29</sup> L H Pelton “Child abuse and neglect: the myth of classlessness” (1978) *American Journal of Orthopsychiatry* 608; L H Pelton “Introduction” in L H Pelton (ed) *The social context of child abuse and neglect* (1981, New York); K Walsh, A Farrell, R Schweitzer & R Bridgstock *Critical factors in teachers detecting and reporting child abuse and neglect: implications for practice* (QUT Brisbane 2005) at 55.

<sup>30</sup> T Vinson, R Bereen & M McArthur “Class surveillance and child abuse” (1989) *Impact* 19; T Vinson, E Baldry and J Hargreaves “Neighbourhoods, networks and child abuse” (1996) 26 *British Journal of Social Work* 523.

<sup>31</sup> For example: R Nayda “Australian nurses and child protection: practices and pitfalls” (2005) 12 *Collegian: Journal of the Royal College of Nursing, Australia* 25

<sup>32</sup> *Matter of Baby X* (1980) 293 NW2d 736 per Court of Appeals Michigan. Similarly in England it has been said that: “The information obtained by social workers in the course of their duties is however confidential and covered by the umbrella of public interest immunity....It can however be disclosed to fellow members of the child protection team engaged in the investigation of possible abuse of the child concerned”: *Re G (A Minor)* [1996] 2 AllER 65 at 68 per Butler-Sloss LJ.

<sup>33</sup> *Ontario (Police Complaints Commissioner) v Dunlop* (1995) 26 OR(3d) 582.

there are a series of longstanding cases about the obligation of lawyers to breach client confidentiality in the context of the safety of a child.<sup>34</sup>

Finally, where on-going abuse is eventually identified and it is clear that this was known quite early in the cycle of abuse to a professional who works with children, that person may personally (that is, put aside any professional obligations) find it difficult to justify a failure to share that information.

The failure to share the information with professionals in other disciplines may say more about current levels of interaction between professionals than it does about the value of mandatory reporting. The sharing of information can lead to respectful interactions. These interactions can build necessary partnerships. The partnerships can result in the best outcome for the child.<sup>35</sup> It will also lead to the development of a differential response which will multiply options for service response.<sup>36</sup>

The response of the Special Commission to this question of information sharing is the subject of another paper and will not be discussed here other than to note the enhanced ability to do so under the provisions set out in Chapter 16A. The argument advanced by the Special Commission for retaining the scheme of mandatory reporting supplemented by these new information sharing powers was expressed as follows:

“The Inquiry believes that mandatory reporting has the useful effect of overcoming privacy and ethical concerns by compelling the timely sharing of information where risk exists and of raising awareness among professionals working with children and young persons. There are other mechanisms by which professionals such as health workers are obliged to report, with the failure to do so sometimes carrying with it disciplinary consequences. To abolish mandatory reporting may leave such people obliged to report, but without the protections in the current Care Act, and could also weaken the opportunity for interagency collaboration which the Inquiry considers essential for an effective child protection system.”<sup>37</sup>

All professionals bring skills and talents to bear in striking balances between competing needs. Balances must be struck in determining when to release or retain information; in dealing with the competing demands of being a professional of high standards while also not impairing investigation by others into a child’s protection needs, and in protecting children while being

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<sup>34</sup> *Ramsbotham v Senior* LR 8 Eq 575; *Re Bell Ex parte Lees* (1980) 30 ALR 489. Also see *Re Georgia and Luke No 2 unreported* [2008] NSWSC 1387; *Re M* (a minor)(disclosure of material) (1990) 2 FLR 36.

<sup>35</sup> A Turnell and S Edwards *Signs of safety: a solution and safety oriented approach to child protection casework*, WW Norton & Co New York 1999 pp 29-83.

<sup>36</sup> J Waldfogel *The future of child protection: how to break the cycle of abuse and neglect* (Harvard University Press, Cambridge, 1998) pp 187, 213

<sup>37</sup> Para 6.65, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Sydney, November 2008)

just to those accused. It is these balances which must be resorted to when there has been a report of child abuse.

## Changes to the collection of information

If reform to the way in which information is collected about a child is to be considered then broadly speaking five areas have been identified where consideration might be given to effecting change depending upon what outcome is desired. These are:

1. severity – targeting the type of information gathered so that you collect more or less information based upon how serious the circumstances of, or consequences to, the child are seen to be
2. risk – targeting the type of information collected based upon risk (which will be more expansive) or proven or likely occurrence (which will include less information)
3. type of maltreatment – collecting information on only particular types of maltreatment which are identified as causing greater concern or having more readily treatable responses
4. perpetrator – collecting information only about harm caused by particular individuals such as parents, carers, relatives, institutional carers, teachers or broader classes
5. burden of proof – collecting information only where there is a particular level of certainty required of whoever reports.<sup>38</sup>

Before the Special Commission the situation in this State was that:

1. the severity was set at the level of current concerns about harm
2. there had to be risk rather than proof of occurrence
3. any form of maltreatment was reportable although this had only been the case for less than a decade with prior to that time certain professionals only had to report, for example, sexual abuse,<sup>39</sup>
4. harm by anyone was reportable
5. the standard of proof was ‘reasonable grounds to suspect.’

What was found by the Special Commission was that the tsunami of information being received by DoCS meant that children in need of a service that was less than full State intervention in their lives were largely being ignored. DoCS was concentrating upon those children where only DoCS had the requisite powers and other agencies were not stepping in where the child did not need State intervention. The Special Commission said:

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<sup>38</sup> J Waldfogel *The future of child protection: how to break the cycle of abuse and neglect* (Harvard University Press, Cambridge, 1998) p 110

<sup>39</sup> For example section 22(3), *Children (Care and Protection) Act 1987*.

“It is clearly a waste of police, health, school/child care and DoCS resources to make and process thousands of reports which DoCS believes do not amount to a risk of harm.”<sup>40</sup>

The existing Act, especially in section 29A, when supported by the Interagency Guidelines sought to draw attention to the on-going need of all agencies to respond but the Special Commission found that for a whole host of reasons, including problems with information sharing, this was not happening.

The response of the Special Commission was to do three major things:

Firstly, to target the information that DoCS received to give a greater focus on information relevant to its function in exercising the State’s powers of intervention. To do this the Special Commission recommended a change to the level of severity of the information required to be reported. The threshold of information was raised to where there are current concerns about a risk of significant harm – rather than just of harm.

Secondly, the process of making the majority of reports which come from the government agencies working with children could be altered. The alteration permitted reports from the government agencies to be initially referred to a Child Wellbeing Unit established for each of the government agencies. The Child Wellbeing unit would then direct those reports not requiring State intervention to a service response. Again, this looks at the question of the severity of the report and re-directs certain reports that are not having the same level of severity into different courses of response.

Thirdly, the Special Commission removed the power to fine a person for failing to make a report while leaving the possibility of other civil and professional consequences.

The Special Commission made no recommended changes to any of the other four ways in which reporting laws might be amended.<sup>41</sup> The one possible exception to this was a change based on the type of maltreatment. Here the Special Commission sought clarity around two areas namely an inability to provide education or a failure to recognise that the neglect of a child can be recognised from a single or a series of acts or omissions. Both of these areas were arguably already covered as elements of how harm was defined but have now been put beyond doubt.

In terms of education, the new provision section 23(b1) was given equivalent wording to the wording of section 23(b) concerning medical neglect. It does not therefore include truancy where a child fails to attend school. Instead what is necessary is that the parents have deliberately not arranged or are unable to arrange for the child or young person to receive

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<sup>40</sup> Para 6.40

<sup>41</sup> Although other areas were considered – see, for example, para 6.80, 6.106

an education. A parent who deliberately keeps a child at home to stop the child from being seen; a parent who is unable to stop a child from constantly truanting, a parent who keeps the child at home for lengthy periods of time to help care for a family member will all fall within the new category.

In an overseas jurisdiction this has been said to occur after 30 consecutive days<sup>42</sup> but it cannot be assumed that this would be automatically followed in this State. It is more likely that the individual circumstances of each child will be examined rather than applying some general rule to each child's situation.

## Who are mandatory reporters

The Special Commission made no changes to who are mandatory reporters. Accordingly three categories of people remain as mandatory reporters.<sup>43</sup> In summary these are those:

- (a) providing particular services to children
- (b) managing those who provide particular services to children, and
- (c) providing residential accommodation.

These people are mandatory reporters only for matters that arise during the course of work that requires them to be a mandatory reporter.<sup>44</sup> A person can therefore be a mandatory reporter in one situation but then receive information in their life outside of this work, or in another workplace, and they are not obliged to report suspicions that might be based on that information.

There is also a constitutional issue as to whether a Commonwealth officer can be a mandatory reporter. This issue gives rise, just for the purposes of this discussion, a fourth category.

## What must be reported

What must be reported, where it is mandated to do so, is the name or description of a child, or children,<sup>45</sup> suspected to be at risk of significant harm and the grounds for suspecting that risk. The description must be adequate to identify the child rather than merely describe the child. For

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<sup>42</sup> *In re Amanda K* [2004] 786 NYS 2d 171

<sup>43</sup> For an example of legislation that specifies by vocational description (rather than category of work type) who should be a mandatory reporter see: *Californian Penal Code* para 11165.7

<sup>44</sup> *Children and Young Persons* (Care and Protection) Act 1998 section 27(2)(b).

<sup>45</sup> *Interpretation Act 1987* section 8. The reference to a child also means that the child has been alive and has not subsequently died. Information about children who have died can be received and collected but will not be subject to the obligations and protections relating to reports.

example, a description of a boy who is approximately 3 years old has black hair, brown eyes and was seen wearing a pink t shirt in the frozen goods aisle of the local supermarket at a particular time and date is not adequately identified.

Similarly, where the report concerns a class of children or young people the report must be sufficient to enable the identification of members of the class.

For the residential accommodation provider, the situation of a child living away from home without parental permission is sufficient to justify reporting.

Where it is not mandatory to report, the reporter is to have reasonable grounds to suspect the risk of harm. In this instance, the child need not as yet be born<sup>46</sup>. A voluntary report about a child likely to be at risk if born may carry with it an obligation to subsequently report where risks associated with maternal behaviour have not been subsequently reduced.<sup>47</sup>

## When is it mandatory to report

It is mandatory to report when the reporter (who provides services or manages the provision) has reasonable grounds to suspect the risk.<sup>48</sup> By comparison where the reporter provides residential accommodation then those reporters must believe on reasonable grounds. A belief requires a greater certainty than a suspicion.<sup>49</sup> A suspicion must have some evidence to support it, whereas a belief requires that the evidence has been tested to some degree.<sup>50</sup>

The suspicion or belief must be reasonable. This requires that it must be based on some evidence.<sup>51</sup> It is however the suspicion or belief of the reporter.<sup>52</sup> The fact that its reasonableness is not immediately apparent to

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<sup>46</sup> *Children and Young Persons (Care and Protection) Act 1998* sections 24, 25.

<sup>47</sup> *Children and Young Persons (Care and Protection) Act 1998* section 23(f)

<sup>48</sup> *Children and Young Persons (Care and Protection) Act 1998* sections 27(2), 122.

See also: P Swain "What is 'belief on reasonable grounds': mandatory reporting of child abuse" (1998) 23 *Alternative Law Journal* 230. On a related question of what is meant by "probable" as in "probable consequences" see: *Darkan v R* (2006) 80 ALJR 1250.

<sup>49</sup> *George v Rockett* (1990) 170 CLR 104 at 115.

<sup>50</sup> In *Queensland Bacon Pty Ltd v Rees* (1966) 155 CLR 266 at 303 per Kitto J a suspicion was described as "a slight opinion, but without sufficient evidence".

<sup>51</sup> The suspicion must be engendered by actual observation, reputation or hearsay: *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 390; *ex parte Ferguson; re Olah Pty Ltd* [1970] 1 NSWLR 713 at 717-8; *ex parte Slocombe; re Konnaris* [1971] 1 NSWLR 342 at 346; *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286. A 'suspicion' need not be well-founded: *Tucs v Manley* (1985) 62 ALR 460 at 461 per Jacobs J.

<sup>52</sup> It can be reasonable to one person while there still being inconsistent information that would not make it reasonable to another: *Loughnan v Magistrates Court of Victoria sitting at Melbourne* [1993] 1 VR 685. There is no common understanding of what will amount to a reasonable suspicion and professionals can be internally inconsistent as to

DoCS is not a reason for DoCS to fail to record it. The reasonableness will go to the question of whether a report has been made<sup>53</sup> and whether confidentiality accrues<sup>54</sup> rather than to its acceptance by DoCS. Sections 27 and 122 are directed to the obligations of reporters and not to the response of DoCS. Section 30(b) allows DoCS to come to a different view about whether a report should have been made. If a different view is held by DoCS this does not alter the fact that a report was made in good faith and that the reporter is entitled to the protections set out in section 29.

In a Canadian decision it has been held that an obligation to report 'suspected abuse' does not oblige or even give rise to an expectation that the professional will conduct a full investigation before making a report.<sup>55</sup> There is certainly no obligation to determine the source of the abuse.<sup>56</sup>

What is reasonable for a particular person<sup>57</sup> to report is determined by what can be expected of the particular profession to which the person belongs. Thus, the information which might lead a paediatrician to suspect abuse will be different from the information which a general practitioner, public health nurse, social worker or teacher might have. "The relevant standard must vary in accordance with the professional capacity of the person or persons involved in the particular case."<sup>58</sup> This view can be contrasted with an "ordinary person" test that was applied in a United States decision in which the court said that a requirement to report a 'reasonable cause to suspect' meant that there had to be a "belief based on evidence, but short of proof, that an ordinary person should reach as to the existence of child abuse."<sup>59</sup>

If the obligation to report is imposed upon particular types of professionals then the obligation to report should not be extended to others merely because those others perform similar functions. For example, because a minister of religion can perform a service similar to a counsellor, this does

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what they mean by this term: B H Levi, G Brown & C Erb "Reasonable suspicion: a pilot study of pediatric residents" (2006) 30 *Child Abuse & Neglect* 345.

<sup>53</sup> *Children and Young Persons (Care and Protection) Act 1998* section 27.

<sup>54</sup> *Children and Young Persons (Care and Protection) Act 1998* section 29

<sup>55</sup> *S(P) v B(SK)* (1997) 40 OTC 236.

<sup>56</sup> *Capaldi v State* (1988) 763 P2d 117.

<sup>57</sup> Care needs to be taken in applying cases from other jurisdictions to domestic law.

For example in Victoria the test is not one of 'reasonable belief' but instead of 'belief on reasonable grounds'. Similar legislative provisions exist in some of the States of the USA for example *ALA Code 26-14-3 (1958)*; *DEL Code Ann tit 16, 903 (1995)*; *Ohio Rev Code Ann 2151.421*. This change in wording can, according to an unreported Victorian decision, make the test a subjective one ie that this particular professional considered that there was abuse: M R Freiman "Unequal and inadequate protection under the law: State child abuse statutes (1982) 50 *Geo Wash L Rev* 243 at 258 fn 5. Evidence of such a subjectively held belief can be established by means other than an admission: *Landeros v Flood* (1976) 551 P 2d 389 at 398.

<sup>58</sup> *R v Strachula* (1984) 40 RFL (2d) 184; *R v Cook* (1983) 37 RFL 2d 93. Both of these cases are quoted in J Wilson & M Tomlinson *Wilson: Children and the Law* (Butterworths, Toronto, 1986) p 69

<sup>59</sup> *State v Hurd* (1986) 400 NW2d 42 per Myse J, Court of Appeals Wisconsin

not mean that the minister assumes a professional responsibility to report child abuse.<sup>60</sup>

It is a question of fact as to when it is reasonable for a person with particular expertise to have sufficient evidence to hold the relevant suspicion. Sexually explicit comments by a child and the use of anatomically correct dolls can provide concerns to a doctor about abuse.<sup>61</sup> Another example is where a doctor examining a child brought by a parent may not initially suspect that the risk is not an illness of the child but that the parent exhibits behaviour described by Munchhausen Syndrome by Proxy. In this example, the relevant suspicion will be formed during the professional relationship even though there may not have been any alteration to the factual situation of how the child was being treated.

To be reasonable, the element of harm must be present. In a decision in Kansas it was held that a policy of zero tolerance on underage sexual activity without any consideration of the harm that activity might cause to the child was not justified by an equivalent mandatory reporting statute. The court noted that such an approach was not justified by the statute and might jeopardize the confidentiality between health care providers and the child or young person that is necessary for them to seek health care services.<sup>62</sup>

While it is not clear, the better view would seem to be that the report can be about a child who, unbeknownst to the reporter, is already dead at the time the report is made. This is because the consideration is about what was a reasonable suspicion of the reporter and DoCS may still be interested in the information when considering the needs of siblings or other children.

The defence of honest and reasonable mistake would be available to a mandatory reporter who failed to report.<sup>63</sup>

## When must a report be made

When reasonable grounds are held, and it is mandatory to report, then the report must be made as soon as practicable.<sup>64</sup>

Where there is an obligation to report “immediately”, then a delay of five weeks will be too long.<sup>65</sup> Immediacy implies a greater imperative of urgency than ‘as soon as possible’.

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<sup>60</sup> *Wilson v Darr* (1996) 553 NW2d 579.

<sup>61</sup> *O’Heron v Blaney* (2003) 583 SE2d 834.

<sup>62</sup> *Aid for Women v Foulston* (2006) WL 1008417(Kansas District Court) noted (2006) 25 ABA Child Law Practice 51.

<sup>63</sup> *Proudman v Dayman* (1941) 67 CLR 536 at 540; *He Kaw The v The Queen* (1985) 157 CLR 523 at 590-1 per Dawson J; *R v Wampfler* (1987) 11 NSWLR 541 at 546 per Street CJ.

<sup>64</sup> *Children and Young Persons (Care and Protection) Act 1998* sections 27(2), 122.

## What is a report of risk of significant harm?

A report that a child or young person is at risk of harm need not take any particular form. It need not be made to the DoCS Helpline even though this is the manner in which DoCS says that reports are to be made to it and so from a practical perspective is prescriptive. It might be made for forwarding a copy of a report made for other purposes to DoCS.<sup>66</sup>

Even before the changes recommended by the Special Commission a report made to someone other than DoCS can still generate the protections that exist in section 29.<sup>67</sup>

This is an important definition as presently a report is inadmissible before any court in all bar care proceedings.<sup>68</sup>

## How do you determine if the categories in section 23 do exist for a significant extent?

Firstly, the intent of the changes needs to be remembered. That is, if they exist in a way that is sufficiently serious to warrant intervention by DoCS irrespective of a family's consent – then it will be significant. I could imagine that most forms of sexual abuse by family members would fall into that category.

Secondly, you can discount what is trivial or minor.

Thirdly, the positive side of that is that the impact of the action in question should be substantial and demonstrably adverse to the safety, welfare and wellbeing of the child. This does not mean that the damage has to be lasting or permanent in nature. The abuse can however be significant even after the abuse has ceased to occur.<sup>69</sup>

Fourthly, significance can exist for a single act or omission as well as from an accumulation of acts or omissions.

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<sup>65</sup> *Matter of Schroeder* (1987) 415 NW2d 436.

<sup>66</sup> *Re Sophie* unreported 3 November 2008 per Brereton J NSWSC: [2008] NSWSC 1268.

<sup>67</sup> See below under the heading "Protection of reporters"

<sup>68</sup> See below under the heading "Anonymity of reporters"

<sup>69</sup> *Director-General of CSV v B* unreported 11 December 1992 VICSC

Finally, while not a general point, it is acknowledged that the Act does allow for pre-natal reports but only in a context where the harm is to occur post-birth. The significant extent must also exist post-birth.

While the term “significant” in a child protection context has been discussed in other jurisdictions<sup>70</sup> the broader description which I have just given does attempt to give it some form within a NSW context. To support the position in NSW, a Mandatory Reporter Guide has been created and is publicly available on the *Keep Them Safe* web site. This guide will step people through various decision-making ‘trees’ to determine whether the threshold has been met. The same guide will be applied across all reporters and DoCS. It will both educate and assist develop uniformity in decision-making.

## Breach of mandatory reporting

Where action is mandatory then a breach of this obligation will incur a penalty. The quantum of this penalty need not bear any relationship to any injury suffered and may well be less than moneys paid under a claim for damages. In addition to, or in lieu of, prosecuting DoCS may determine that other action is appropriate. This can include discussing the breach with the alleged offender with the intent to alter future conduct or endeavouring to educate people as to their obligations to report.

Where the penalty imposed is a criminal sentence then a number of cases indicate a trend towards imposing a suspended sentence or order that the conviction not be recorded.<sup>71</sup>

Where a penalty has been imposed there may also be other ancillary consequences for the professional involved. This ancillary action could include disciplinary action<sup>72</sup> or the imposition of restrictions on practising rights. It is also possible that where there is a statutory obligation to report a failure to do so may justify a claim in damages.<sup>73</sup> The claim can be brought

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<sup>70</sup> Re: H (Minors) (sexual abuse: standard of proof) [1996] AC 563

<sup>71</sup> See for example the 3 months suspended sentence of Bishop Pican in France under the *French Criminal Code* Article 434-3: R Stretch “The duty to report child abuse in France, lessons for England” (2003) 15 *Child & Family LQ* 139. A social worker was successfully prosecuted in South Australia for failure to report but no conviction was recorded: *Messenger Standard* 24 July 2002 p. 3.

<sup>72</sup> See cases cited in [fn 7](#)

<sup>73</sup> Cases which have found that there is a claim for private damages for breach of a statutory obligation to take certain action include: *Vesely v Sager* (1971) 486 P2d 152; *Landeros v Flood* (1976) 551 P2d 389; *Cade v Mid-City Hospital Corporation* (1975) 119 CalR 571; *Ham v Hospital of Morristown Inc* (1995) 917 FSupp 531; *Yates v Mansfield Board of Education* (2004) 808 NE2d 861. For the view that any duty does not ground an action in private damages see for example: *Doe A v Special School District of St Louis County* (1986) 637 F Supp 1138; *Borne v NorthWest Allen County School Corporation* (1989) 532 NS2d 1196; *Cuyler v United States* (2004) unreported but noted *American Bar Association Child Law Practice* Vol 23 No 3 p 37. Also see B Murray “Failing to report: potential action for breach of the statutory duty to report child abuse in Victoria” (1997) 2

by not just the child who was subsequently proven to be abused but also by other children whom the reporter (or their employer) should reasonably have been expected to be injured by the failure to report.<sup>74</sup>

What the Special Commission found was that having a criminal penalty in the form of a \$22,000 maximum fine might have been leading to unhelpful risk adverse reporting behaviour. It therefore recommended and the recommendation carried out to abolish the fine while leaving in place actions for:

- professional misconduct
- civil action in negligence
- civil action for breach of statutory duty

## Continuing obligations of reporters

As noted earlier, the responsibility of the reporter to the child may remain following a report. This must not be forgotten by the reporter. For the avoidance of doubt this continuing obligation is expressly stated in the legislation.<sup>75</sup>

The on-going responsibilities of DoCS, or the police, must also be acknowledged and accepted. These roles are not the same. The primary function of a child welfare agency is the care and protection of children. As has been stated by the Court of Appeal in NSW “YACS’ proper concern was the current welfare of the child. YACS was not a detective agency set up to hunt down and prosecute past misconduct. True, the past could be an indicator of the present, but there were matters of degree.”<sup>76</sup> During the investigation phase DoCS and the police will be seeking the best evidence which is available to them. To achieve this they will be seeking to avoid such matters as:

- any implication that the child has given a less than accurate report because of suggestibility<sup>77</sup>, or
- the child having difficulties distinguishing between information held and information received<sup>78</sup>, or

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ANZJLE 89; S J Singley “Failure to report suspected child abuse: civil liability of mandated reporters (1998) 19 *La Verne L Rev* 236; C Richardosn “Physician/hospital liability for negligently reporting child abuse” (2002) 23 *Journal of Legal Medicine* 131. Mandatory reporting does not create a statutory obligation to report any child, unknown to the reporter, who might remotely benefit from a report: *Ward v Greene* (2003) 839 A2d 1259.

<sup>74</sup> *Yates v Mansfield Board of Education* (2004) 808 NE2d 861.

<sup>75</sup> Section 29A, Children and Young Persons (Care and Protection) Act 1998

<sup>76</sup> *TC v State of NSW* [2001] NSWCA 380 unreported 31 October 2001.

<sup>77</sup> Leichtman anor “The effects of stereotypes and suggestions on preschoolers reports” (1995) 31 *Developmental Psychology* 568

<sup>78</sup> M Bruck anor “I hardly cried when I got my shot: influencing children’s reports about a visit to their paediatrician” (1995) 66 *Child Development* 193; Lindsay anor “Aware

- contextual issues of the child wishing to please the adult asking the questions<sup>79</sup>.

These situations will often be exacerbated by a child tending to recall less information than an adult in an equivalent situation<sup>80</sup> and thereby inducing the questioner to cross the line into unacceptable practices.

To achieve these goals there is often an anxiety to avoid questioning of children by those who are not trained in this art and to avoid multiple questioning. These anxieties can (usually wrongly) be considered by reporters as an intent to exclude them from the process rather than as an attempt to merely attain the best possible evidence. Whilst DoCS may still be able to proceed despite the contamination of evidence by a well-meaning, but untrained questioner, for criminal proceedings this is frequently fatal to the prosecution of the case.

## **Within this general context how then do the Child Wellbeing Units fit in?**

The Inquiry accepted the evidence of the then Executive Director of the Helpline, DoCS, when Ms Freeland said:

“We should not underestimate how significant and serious it is to invite the statutory child protection system into people’s lives and that statutory child protection intervention ought to be something that is reserved for those matters that really warrant it. Intervention by the State in private family life is a very serious thing.”<sup>81</sup>

The Special Commission also said:

“The Inquiry believes there is merit in establishing positions or a Unit in each of the key agencies to triage risk of harm reports as well as to take a case management role in relation to those reports which do not reach the increased threshold of a significant risk of harm. ...The approach reflects the view of the Inquiry that child protection is the responsibility of all of the community including every government agency. It is responsive to the reality that DoCS carries out a detailed

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and unaware uses of memories of post event suggestions” in M S Zaragoza anors (eds) *Memory and testimony in the child witness* (Thousand Oaks 1995)

<sup>79</sup> S J Ceci & M Bruck “Suggestibility of the child witness: a historical review and analysis” (1993) 113 *Psychological Bulletin* 403; J M Batterman-Faunce anor “Effects of context on the accuracy and suggestibility of child witnesses” in G S Goodman & B L Bottoms (eds) *Child victims, child witnesses: understanding and improving testimony* (New York 1993).

<sup>80</sup> S Moston & J Taplin *The contamination of children’s testimony* (NSW Child Protection Council Monograph nd)

<sup>81</sup> Para 6.78

investigation including a home visit for only about 13 per cent of reports received. It enables better interagency cooperation to the ultimate benefit of the child and family. Most importantly, it should provide a service to those families who do not belong in the statutory child protection system and need assistance to stay out of that system.”<sup>82</sup>

This is background to establishing units in each of the major ‘reporter’ government agencies. On a trial basis a unit was also established by the Helpline to provide an equivalent service for NGO reporters. Each unit is operated by the respective host agency and so will operate differently. Each has access to information technology to help them identify who else might be working with a common child - but without identifying what work is taking place or the reasons behind the work. To obtain that information existing (including Chapter 16A) powers permitting the disclosure and use of information can be utilised.

Information passed to a Child Wellbeing Unit is still a report to DoCS. The legislation merely sets out a process about how the report is made. The report is still to DoCS and is just referred to the unit for each agency. Those protections available to reporters of information to DoCS continue to apply undiminished (except for criminal investigations)<sup>83</sup> The agency’s unit will be handling a report to DoCS and so will act according to assessment guidelines laid down by DoCS<sup>84</sup> and receive only that information as agreed by DoCS.<sup>85</sup> Where DoCS specifies that information should still go to the Helpline then this is what the agency should do.<sup>86</sup>

If the information remains as a referral to the agencies unit then the unit can pass it on or take necessary action.<sup>87</sup>

For those outside of government agencies, like non-government schools, if the pilot does not continue after the initial period, or does not continue in a manner similar to other Child-Wellbeing Units, this does not negate the obligations which I have described as already existing which means that action to locate services and obligations to assist the child should be met now.

Service directories, referral and information services should all be improved following these reforms and these will have just as big an impact on non-government schools as on government. We are in the process of seeing pilots of the new referral systems commence.

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<sup>82</sup> Para 6.114-6.115

<sup>83</sup> Section 29 (4A)–(4C), *Children and Young Persons (Care and Protection) Act 1998*

<sup>84</sup> Section 27A (3), *Children and Young Persons (Care and Protection) Act 1998*

<sup>85</sup> Section 27A (2), *Children and Young Persons (Care and Protection) Act 1998*

<sup>86</sup> Section 27A (4), *Children and Young Persons (Care and Protection) Act 1998*

<sup>87</sup> Section 27A (5), *Children and Young Persons (Care and Protection) Act 1998*

## **Conclusion**

What we have gone through in some detail is the way in which the Special Commission built upon the existing mandatory reporting scheme to emphasise the need for agencies working with children to respond immediately to those needs. The role of Community Services has been clarified and provided with greater focus on those areas requiring the attention of the State rather than just anyone dealing with the child.

The changes do not shift responsibility that should properly reside with Community Services but do recognise that everyone working with children has an obligation to care for them.