What is 'BELIEF ON REASONABLE GROUNDS'?

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Mandatory reporting of child abuse in Victoria.

On 5 December 1997 the Magistrates Court sitting at Ringwood, Victoria dismissed a charge brought under Victoria's mandatory reporting legislation against a school principal for failing to report suspected child abuse in relation to a local primary school pupil. The principal concerned had become aware of the allegations, had investigated the matter but was unsure if the child was telling the truth. As a result, the allegations were not reported (*Age*, 10.12.97). Subsequently, the concerns came to the attention of child protection authorities, and the father of the child was later convicted of multiple charges of incest and sexual penetration of a minor. He was sentenced to nine years imprisonment. In the action brought against the principal in respect of the failure to report, the magistrate noted (as reported in the *Age,* 10.12.97, p.17) that, although concerned about the alleged abuse, the principal had not formed the necessary belief that the child had been abused, and so had concluded that there was no obligation to report.

What do the Victorian provisions require?

The mandatory reporting legislation in Victoria is contained in s.64(1A) of the *Children and Young Persons Act 1989* (Vic.) (the Act) which provides:

> A person referred to in any of the paragraphs of sub-section (1C) ... who, in the course of practising his or her profession or carrying out the duties of his or her office, position or employment ... forms the belief on reasonable grounds that a child is in need of protection on a ground referred to in paragraph (c) or (d) of Section 63 must notify [the Victorian Department of Human Services] ... as soon as practicable ... after forming the belief ...

Sub-section (1C) then sets out those required to report. The several professions include: police; teachers and school principals; doctors and nurses; social, youth and welfare workers; registered psychologists and child care workers. However, as at mid-1998 only doctors and nurses, teachers and principals, and police, had been brought within the operation of s.64(1A). The timetable for extension of the legislation to cover the other professional categories referred to in s.64(1C) remains uncertain — a situation Turner has described as 'scandalous'.[1] Victorian teachers and school principals were brought under the umbrella of the legislation as of July 1994.

The six grounds in Victoria under which a child can be said to be in need of protection by virtue of alleged abuse are set out in s.63 of the Act, and incorporate concern that the child is being or is likely to be significantly harmed due to physical, sexual or emotional abuse. However, the Victorian mandatory reporting obligations apply only to matters of physical and sexual abuse (sub-paragraphs (c) and (d) of s.63), and even then only when the mandated professional in the course of his or her professional activity or employment '... forms the belief on reasonable grounds that a child is in need of protection'.

The decision of the Magistrates Court, noted above, raises important legal and practice dilemmas. These arise both for those professional persons currently mandated to report in Victoria, or who will be when

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the legislation is extended to the remaining professional categories referred to in s.64(1C), and for the courts in assessing whether, in any particular situation, the obligation to report had arisen.

Mandatory reporting continues to be a topic generating mixed reactions within the legal and welfare professions, and across the wider community. There are a series of arguments which can be mounted in its favour. These include the need to demonstrate a commitment to children and their protection from harm; the need to encourage reporting of behaviours between parent and child that are deemed unacceptable; the need to ensure that children do not fall through 'the gaps' between a series of professional agencies or services, each of whom assumes another to be responsible for ensuring the safety of the child; and the need to indicate to the community that some treatment of children by their parents or carers will not be tolerated.[2] Mandatory reporting legislation also allows those required to report to minimise or avoid the dilemmas imposed by confidentiality or other ethical requirements of practice.[3] Such legislation requires the disclosure, to the appropriate authorities, of information which might otherwise be seen as confidential. If reports are made in good faith, the Victorian legislation, by s.64(3A), protects the reporter from any charge of unprofessional conduct or breach of professional ethics. In essence, then, the primary purpose of mandatory reporting is the protection of the child from the risk of abuse, and the provision of a legislative framework and suitable protections for those persons deemed likely to become aware of children at risk. Criminal prosecution of those who fail to report when required to do so is an adjunct to this primary objective.

On the other hand, mandatory reporting has considerable limitations. There is evidence that it leads to over-reporting of suspected abuse,[4] and consequent use of scarce child protection resources in the investigation of reports which prove groundless. When reporting of suspected abuse is voluntary, citizens (professional or otherwise) are encouraged to report and are protected from prosecution if they do so on reasonable grounds. Such an approach arguably encourages families to seek support from agencies or professionals without the fear that their difficulties will be reported to state authorities against their wishes, and so aids in the development of trust between families and support agencies. This is a critical issue as, whether brought to attention through mandatory reporting or not, it is the network of support services and professionals who will frequently work alongside the family before, during and after any legal intervention. Perhaps of greatest importance, voluntary reporting places the focus of community attention (and, at least in theory, of resources) on the prevention and supportive measures available to families in need, rather than the prosecution of those whose care is said to have fallen below acceptable standards.[5]

The move toward mandatory reporting, now adopted in all Australian States except Western Australia, is testimony to the belief that '... [m]oral, legal and professional accountability have thus far proved to be inadequate ... to effect sufficient reporting'.[6] However, as noted above, the key rationale for mandatory reporting, arguably, is not to provide a mechanism for the criminal prosecution of those who fail to report. The primary objective of mandatory reporting legislation is to encourage reporting by professionals perceived as likely to become aware of children at risk, thus increasing the likelihood that protective arrangements for children will be made. Applying such a purposive interpretation,[7] the criminal sanction ought to be applied only where the obligation to report has been blatantly ignored by a professional who actually formed the necessary belief but who failed to report.

When should mandated professionals report?

The difficulty with the Victorian legislation (and, indeed, mandatory reporting laws generally) is that, of themselves, the provisions give no clear indication to mandated professionals as to when reporting is required. The obligation to report arises only when '... belief on reasonable grounds ...' arises. But what are 'reasonable grounds'? As Mahoney notes, since legislation cannot specify when belief becomes reasonable, nor what exactly constitutes child abuse and neglect, much discretion is left to the professional involved.[8] Against what criteria should belief be assessed, both by the mandated professional in deciding when to report and by the legal system in determining the appropriateness of a decision to report or not to report? A decision to not report (that is, a decision that abuse is not believed to have occurred) may have serious consequences for the child subjected to further abuse; a decision to report (that is, a decision that abuse may have occurred) may mean that some children and families are subjected to unnecessary investigation by child protection staff if the alleged abuse is not substantiated, as occurs in a considerable number of instances.[9] This dilemma, noted by Goddard and Tucci,[10] not only unnecessarily expends limited child protection resources, but discourages further reporting and contributes to community mistrust of the child protection system. Considering the ordinary meaning of the Victorian reporting provisions,[11] it is clear that the provisions do not require that the professional 'form the belief' (to use the terminology of the Victorian legislation) that the child was **not** being abused. But when should a mandated reporter, who personally does not *form the belief* that the child **is** at risk, be subject to prosecution for failing to make a report to appropriate authorities?

Subjective or objective belief?

What, then, ought to be the test of 'belief on reasonable grounds'?

Legal action against mandated reporters for failing to report, whether under criminal law provisions or tort law (for failure to exercise due care and skill as a professional) is rare, as discussed below. Both courses of action raise the question of whether a subjective test of belief (did this reporter actually believe the obligation to report had arisen?) or an objective test (would another 'reasonable' reporter, in the same circumstances, have formed that belief?) should be applied. The former approach raises a further dilemma — should the actual, subjective belief of a reporter ever be subject to a test of reasonableness? Ought there be a situation in which a belief, even sincerely and honestly held, ought not prevent the holder from prosecution, on the basis that it was (for instance) held against the weight of evidence?

There are lessons to be learned here from the criminal law tests applied in property offence matters. Can people charged with theft or misappropriation of property rely on the belief that they had a bona fide claim to the property in question? The criminal law test of belief in these situations contains, arguably, both subjective and objective elements. In *Reg v Ghosh* [1982] QB 1053 the Court of Appeal noted that the subjective test of what the person charged believed does not '... abandon all standards but that of the accused himself ...' (at 1064). Rather the Court held that, to prove a person was acting dishonestly:

> ... a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter ... If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest ... [at 1064]

Extending the *Ghosh* principle, the Victorian Court of Appeal in *R v Lawrence* (1996) 138 ALR 487 concluded:

> ... The common law concept of dishonesty, at least in a criminal context, is subjective. If a person has a belief inconsistent with dishonesty, he cannot be convicted of an offence of which that is an element even if his belief is unreasonable. The unreasonableness of the belief goes only to its plausibility ... a genuine belief that one has a lawful claim is a defence in relation to property offences ... Such a bona fide claim of right may be both unreasonable and unfounded although, if it is, it is less likely to be believed or, more correctly, to engender a reasonable doubt ... [at 494]

In essence, then, this line of reasoning argues that honesty of belief is to be assessed, first, by a subjective approach (did the person honestly believe they had a lawful claim to the property in question?) but then by an objective rider (is such a claim plausible, or unreasonable or unfounded, having regard to the view that would be taken by reasonable and honest people?).

Applying these tests to the Victorian case in question, noted above, the primary issue for determination appears to be subjective — did the principal concerned actually believe ('form the belief') that the child in question was at risk of abuse? Given the criminal nature of the proceedings, such a belief must be proven beyond reasonable doubt. In the great majority of instances this will be difficult to demonstrate. The media reporting of the evidence in the Victorian case suggests that the principal had carried out some investigation of the allegations, but had *not formed the belief* that the child was being abused. The question then becomes, it is suggested, whether the objective circumstances were such that this belief was reasonable for a principal to entertain — that is, how plausible was that belief in the particular circumstances at the time? From another perspective, applying *Ghosh* and *Lawrence*, the objective arm of the test becomes whether the belief was so implausible that in the circumstances, other reasonable professionals could not have come to the same conclusion? In the absence of transcripts of evidence, it is not possible in this case to know how much detail about the abuse was available to the principal at the time the decision not to report was made, although the media reports suggest that at least one teacher at the school was most concerned about the child's welfare. Once the Victorian Human Services Department was actually notified, then an investigation into the concerns was launched which no doubt was used to later obtain the conviction of the child's father. But were the details which emerged through that investigation available to the principal at the time the decision not to report was made? Applying the plausibility test suggested above, would other reasonable persons — given the information available to the principal at the time — have reached the same conclusion? In the absence of detail as to the information available to the principal — as distinct from that which subsequently came to light through the protective service investigation — this remains uncertain.

Are there parallels in tort principles?

Failure to report suspected abuse can also be said to be a failure to meet the appropriate professional standards of competence and skill. This, in turn, could lead to a challenge to professional competency through civil tort action. Against what standard is the competence of professional practice to be measured?

A key statement of the relevant test is found in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 117, which concluded that the standard of competence required of professional persons is that to be expected of an ordinarily careful and competent practitioner of the discipline to which the actual practitioner belongs. Thus the *Bolam* test is essentially objective — the test of appropriate competence and skill is not what the specific practitioner thought appropriate, but rather what a body of competent fellow professionals would have accepted as competent in the same circumstances. In essence, *Bolam* requires the professional practitioner to meet the standards of behaviour, practice and competence commonly accepted amongst the profession or accepted by others holding the skill, expertise or position concerned.[12]

The professional is required to exercise '... the standard of care exercised by other professionals in his field of expertise who are similarly situated',[13] otherwise stated as '... a fair, reasonable and competent degree of skill' (*Lanphier v Phipos* (1838) 8 C&P 475 at 479). Where negligence is alleged, then the test of the adequacy of care and skill requires consideration as to whether the practitioner has taken '... such measures as are reasonable in the case of a reasonably competent practitioner of the class in question ...'[14] It has been suggested that the duty encapsulated by the *Bolam* test (and, indeed, by its development in relation to the giving of information and advice adopted in *Rogers v Whittaker* (1992) 109 ALR 625) should apply to any professional person '... be it doctor, lawyer, accountant, [or] architect'.[15]

Applying these arguments to the teaching profession leads to the conclusion that a teacher or principal may be said to be negligent if they do not report in circumstances where '... a reasonably prudent teacher, similarly situated, would have ... reported the abuse'.[16] The reference point should be the standard or level of competency which would be demonstrated by a reasonable practitioner in that discipline, similarly experienced and faced with a like situation. The test for the teacher then is what other similarly competent and experienced teachers would have considered appropriate. This test would apply to school principals.[17] Mandatory reporting legislation provides an explicit protection against criminal prosecution when reasonably held concerns are reported which prove, after investigation, to be groundless. Such a situation of honestly and reasonably held belief would seem likewise unlikely to attract tortious liability.

Criminal or civil consequences for failure to report?

As noted above, it is arguable that the ultimate purpose of mandatory reporting legislation is not to prosecute people for the failure to report, but to protect children from harm. If criminal prosecution had been the primary function of the legislation, then the likelihood of successful prosecution would have been increased by incorporation of a reverse onus on the professional to show that their decision to not report was justified.

Are those required to report likely to be prosecuted — whether for breach of standards of competence, or at criminal law — for failure to do so? The experience elsewhere is that both are unlikely. Aaron reported that in 1981 there was

not '... a single case of record charging teachers or other school personnel with statutory non-compliance'.[18] This is a similar conclusion to that drawn by Bell & Tooman,[19] although Mahoney noted instances of successful civil action for damages against a teacher for failure to report suspected abuse.[20] Within Australia, Goddard concluded that criminal prosecutions for failure to report are similarly rare, although he noted that one such suit was commenced against a teacher in New South Wales in 1994.[21] The US experience of prosecution of those mandated to report is similar, notwithstanding the penalties for failure to report which most jurisdictions incorporate into their legislation.

In the Victorian case, the principal concerned was subject to criminal prosecution. The principal was, according to media coverage of the matter, not sure if the child was telling the truth. It is at least arguable that the mythical 'reasonable principal', confronted by the considerable detail of alleged abuse as related in media commentaries about this case, might have decided to report. However, as noted above, what was actually known by the principal at the time of the decision not to report, is uncertain. The Victorian Magistrates' Court seems, in making its decision, to have adopted the subjective standard envisaged in *Lawrence* — had this *particular principal actually* formed the necessary belief that abuse had occurred? However, whether the plausibility of that belief (applying *Ghosh* and *Lawrence),* or its reasonableness, given what other reasonable principals *would* have believed (adapting the *Bolam* tort principle), was considered is unclear from media reporting of the case.

And for the future?

Studies elsewhere have indicated that the reluctance of principals and teachers to report may arise from several factors. They may lack knowledge of how to detect and report instances of maltreatment; there may be a fear of retaliation or legal action being taken if allegations prove to be unfounded; there may be concern about the impact of notification on all concerned, or a lack of confidence in the support and intervention services that may come into play when a report is made.[22] Similar comments were made by Lord in response to the Victorian decision.[23] Bell & Tooman note that teachers and principals may also doubt that reporting will accomplish anything, or may believe that their professional relationship with parents will be jeopardised if they report[24] — arguments similar to those raised generally in support of voluntary reporting.

One effect of mandatory reporting is to encourage those mandated to err on the side of over-reporting — better to be safe (that is to report, even if the report later proves to be not substantiated) than sorry (if further abuse occurs after non-compliance). The experience elsewhere is that mandated professionals need on-going educational opportunities to ensure that, so far as possible, those required to report are aware of their obligations and understand the implications for themselves and the families concerned.[25]

As Bell and Tooman note '... the process by which cases of suspected child abuse are reported to child protective services is governed by a range of ethical, moral, legal and professional considerations'.[26] Mandatory reporting was introduced in Victoria to ensure that children at risk of abuse were not left unprotected through the reluctance of professionals to report. The recent Victorian decision demonstrates the difficulties involved in assessing subjective belief, particularly in hindsight. It highlights the limitations of mandatory reporting legislation, and seems unlikely to encourage professionals to report — though threat of a criminal prosecution, even if unlikely to succeed, and the resultant publicity, may sway the uncertain reporter. But at the other end of the scale, given that elsewhere civil action has been taken against professionals for over-zealous investigation of child abuse concerns,[27] the 'damned if you do, damned if you don't' feeling will be very real to many potential reporters, school principals included. The same dilemma will confront the legal system as it attempts to unravel the uncertainties of belief, plausibility and reasonableness.

At the end of the day, the experience across many jurisdictions is that the threat of legal action alone is an inadequate prompt to mandated reporters; what is required is not the identification of a scapegoat but rather knowledge of and confidence in the system of response to notified concerns.

References

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2. See Carter, J. et al, *Mandatory Reporting and Child Abuse*, Brotherhood of St Lawrence, Fitzroy, 1988; Goddard, C., *Child Abuse and Child Protection* Churchill, Livingstone, 1996.
3. The AASW *Code of Ethics*, for example, requires social workers to 'respect confidentiality' (Principle 4).
4. See Human Services Victoria, *Annual Reports*.
5. The arguments for and against mandatory reporting are canvassed in Carter, J. above; see also Turner, above, at 43–4.
6. Aaron J., 'Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse', (1981-2) 28 *Wayne Law Review*, 183–213 at 185.
7. Ashworth, A., 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) *107 Law Quarterly Review* 419-49 at 427–33.
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9. Angus reported that in 43.9% of Australia-wide notifications of alleged abuse to child protection authorities, no abuse or neglect concerns were found. Refer Angus, G. et al, *Child Abuse and Neglect Australia 1991–2*, AGPS, Canberra, 1994.
10. Goddard, C. and Tucci, J., 'Learning to Listen to Children in Need' *Age*, 10.12.97, p.17.
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19. Bell, L. and Tooman, P., 'Mandatory Reporting Laws: A Critical Overview' (1994) 8 *International Journal of Law & the Family* 337–56 at 345–46.
20. Mahoney, above, p.231; see also Bell and Tooman, above, pp.339–41.
21. Goddard, above, p.102.
22. Mahoney, above, p.235.
23. Lord, P., 'Too much to do for teachers on the front Line', *Age* 10.12.97 p.17.
24. Bell and Tooman, above, pp.344–45.
25. Mahoney, above, at pp.237–8.
26. Bell and Tooman, above, p.354.
27. Besharov, D. and Besharov, S., 'Teaching about Liability' (1987) *Social Work (NY)* Nov-Dec, 517 at 520; see generally Corey, M. and Corey, G., *Becoming a Helper*, Brooks-Cole Publishing, California, 1989.