

MEDICINE AND THE LAW

Mandatory reporting of child abuse in South Africa: Legislation explored

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Legislation concerning mandatory reporting of child abuse in South Africa has been in effect since 2010, with the promulgation of amendment 41 of 2007 to the Children's Act of 2005. This article explores mandatory reporting legislation in an attempt to improve the reporting practices of healthcare professionals in South Africa.

S Afr Med J 2014;104(8):550-552. DOI:10.7196/SAMJ.8110



The mandatory reporting of abuse of children was placed under the international spotlight with the sentencing in the UK of the alcoholic mother of Hamzah Khan (aged 4 years), who died in 2009 from starvation, but whose body was only discovered in 2011.^[1] Questions were raised about the silence of officials, including teachers, social workers and policemen, who were involved with Hamzah at some point but did not intervene on his behalf. Hamzah's grandfather is quoted as having said: 'There should be different legislation for social services, schools, doctors, all the agencies, that the moment they suspect anything untoward then the child should be seen.'^[1]

In South Africa (SA), the father of 2-year-old Theopollus Groepies was sentenced to 25 years in prison for throwing his son against a wall and killing him.^[2] Unfortunately, these are not isolated incidents. Violence against children is a universal and all-too-prevalent phenomenon. Despite clear legislation, professionals who have a moral and legal duty to protect children like Hamzah Khan and Theopollus Groepies are not held accountable for non-reporting.

The South African Children's Act No. 38 of 2005^[3] defines a child as a person under the age of 18 years. According to the latest population estimates, there are 15 454 742 children under the age of 14 in SA (from a 2013 mid-year estimate of 52.98 million),^[4] and a further 5 168 797 between the ages of 15 and 19. This means that almost 38% of the SA population are legally defined as children. Thirty per cent of the population is under 15 years of age, with a further 8% between the ages of 15 and 19.^[4]

Despite progressive children's rights legislation in line with international conventions, the official statistics for crimes perpetrated against this vulnerable population in SA remain alarmingly high. For the period 2012 - 2013, 495 540 cases of crimes against children were reported.^[5] The literature indicates that these crimes are usually under-reported, and this statistic is estimated to be at least nine times lower than the actual number.^[6] Research into rape in SA revealed that in 84% of all sexual crimes committed against children, the perpetrator is known to the child.^[6] Children are subjected to a full spectrum of abuse, including verbal, physical, emotional and sexual abuse.^[6]

Barriers to mandatory reporting

The literature indicates that despite a legal duty to report suspected child abuse, healthcare practitioners internationally and nationally fail to comply with reporting legislation. Among the barriers reported in the international literature is misunderstanding of the child abuse reporting legislation.^[7] Other barriers are lack of knowledge regarding child abuse and neglect,^[8] and previous negative experiences with child protection services.^[7] Some doctors believe that it is better to deal directly with the family,^[7] and may even fear potentially harming their professional relationship with the child and family after reporting their suspicion.^[7] In addition, allegiance to the patient and the fact that the patient is well known to the practitioner have influenced decisions not to report suspected abuse.^[7]

There is a paucity of literature concerning mandatory reporting practices in SA. Anecdotally, clinicians have expressed concern about the child's safety after reporting. Given the scarcity of human and financial resources, these concerns may prove to be justified. According to the Minister of Social Development,^[9] 66 329 social workers are needed to fulfil the obligations that arise as a result of implementation of the Children's Act, but at the end of 2012 only 16 164 social workers were registered with the Council of Social Workers, giving a social worker/population ratio of 1:3 187. Not all work for the Department of Social Development – some are employed by non-governmental organisations, the Department of Health and the South African Police Service. Additionally, police statistics indicate that there is one policeman serving every 336 citizens (police/population ratio 1:336).^[5] Given the scale of the child abuse problem and the lack of resources mandated to protect children, it can readily be deduced that children will not be adequately assisted.

Like their international counterparts, SA medical practitioners are anecdotally reported to fear legal reprisal, citing an increasingly litigious society.

This article attempts to analyse the SA legislation in a manner that will eliminate some misunderstandings, enabling healthcare practitioners and other professionals to report abuse of any nature confidently.

Legislative framework

International conventions

The United Nations (UN) and its signatories acknowledge that children are a vulnerable group and provide some guidelines on how children and their rights should be protected by signatories to the Convention on the Rights of the Child.^[10] Article 19 of the Convention compels signatory states, of which SA is one, to 'take all appropriate social and educational measures to protect the child from all forms of physical or mental violence, injury, neglect or negligent treatment, maltreatment or exploitation including sexual abuse'. Article 19(2) of the Convention makes it clear that measures used to protect children need to be protective and preventive and should encompass the identification, reporting, referral, investigation and treatment of child abuse.

Article 16 of the African Charter on the Rights and Welfare of the Child^[11] echoes the obligations set out in the UN Convention. The Charter obligates the African Union (AU) and its signatories to establish special monitoring units and to provide the necessary support for the abused child and his/her caretakers.

South African legislation

The South African Constitution^[12] explicitly addresses the rights of children and affords them specific protection. Section 28(1)(d) holds that 'every child has the right to be protected from maltreatment, neglect, abuse and/or degradation'. The Children's Act No. 35 of 2005^[3] and its amendment 41 of 2007 (promulgated in 2010)^[13] addresses children's rights in its entirety. Section 110 specifically deals with the protection of children and resonates with the UN Convention and the AU Charter on the protection of children's rights.

Mandatory reporting of child abuse in South Africa

Section 110 of the Children's Amendment Act^[13] provides details of the right to protection that children are afforded in terms of section 28 of the Constitution.^[12] This section compels certain professional sectors to report any child abuse, neglect or maltreatment that is suspected on reasonable grounds to a designated child protection organisation, the provincial department of social development or a police official. If the reporting is done in good faith and substantiated to the relevant authorities, the professionals responsible will not be held liable to civil claims as a result of their reporting. The Act further stipulates that the Department of Social Development must assess and further manage the situation in the best interests of the child.

In addition, section 54 of the Sexual Offences and Related Matters Act^[14] compels '[a] person' who knows or who has a 'reasonable belief or suspicion' of any form of sexual abuse against a child or mentally challenged individual to report it to a police official. If such reporting is done in good faith, in terms of section 54(2)(c), the person reporting cannot be held liable in criminal or civil proceedings.

The following sections of this article aim to elucidate the concepts that appear in section 110 of the Children's Amendment Act^[13] and section 54 of the Sexual Offences and Related Matters Act.^[14]

Who must report?

Section 110 of the Children's Amendment Act^[13] mandates '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' to report when they suspect

that a child has been abused 'in a manner causing physical injury, sexually abused or deliberately neglected'. Ordinary citizens are given the discretion to report abuse but are not compelled to do so in terms of section 110.

The Sexual Offences Act,^[14] however, compels all citizens (i.e. all persons living in SA who are entitled to the rights promised by the Constitution in terms of section 3) who are aware of the sexual exploitation of children to report the offence to the police.

Who must they report to?

Section 110(1) of the Children's Amendment Act^[13] stipulates that suspected child abuse must be reported to child protection organisations, the provincial department of social development or the police. A child protection organisation is defined in the Act as 'any welfare organization designated in terms of section 107, to render child protection services'. Some provincial websites, notably that of the Western Cape, contain lists of organisations registered in terms of section 107.^[13] All reports (even those made to the police) must be referred to the provincial department of social development.^[13] The provincial department is tasked with investigating the allegation of abuse and taking appropriate measures to ensure the safety of the child. The department also needs to follow the legal processes if its investigation reveals that there is cause for legal action.^[14]

When must the reporting be done?

Section 110 of the Children's Amendment Act^[13] (and the reporting form 22) implies that reporting of the suspicion of abuse must be done as soon as the suspicion is formed on reasonable grounds. The purpose of reporting is ultimately to ensure the safety and protection of the child in question. The reporting of a sexual offence must be done 'immediately' according to section 54(1)(a) of the Sexual Offences Act.^[14] 'Immediately' can be interpreted as on becoming aware of the sexual abuse or when there is a reasonable suspicion of abuse of a sexual nature.

The 'good faith' principle

Both acts state that the reporting has to be done in 'good faith'. The 'good faith' principle is an internationally recognised common-law duty to act honestly, openly and with conscientious impartiality.^[15] This principle is intrinsically embedded in, and finds its meaning within, the context of the law of contract. In the context of mandatory reporting legislation, the person reporting must report his/her belief of wrongdoing without any malicious/spiteful intent.

The common-law responsibility to act in good faith encompasses avoidance of an interruption to the relationship of trust that exists between the parties involved in the relationship.^[15] The difficulty that arises in the context of mandatory reporting is that the relationship often exists between the perpetrator and the professional. Conflict also arises when the victim is a party to the relationship but demands that the wrongdoing is not reported. The legislation is clear, however: the primary objective, which supersedes all other considerations, is the safety and protection of the child involved.

The 'good faith' standard is measured objectively^[15] against standards of decency and fairness set by the community (in this instance represented by professionals and professional organisations) and not against the individual's subjective beliefs of impartiality.

What constitutes reasonable grounds for suspicion/reasonable belief of suspicion?

SA courts have interpreted the phrases 'reasonable grounds for suspicion/reasonable belief of suspicion' in several judgments relating

to the Criminal Procedure Act.^[16] Even though 'grounds' and 'fact' are used interchangeably, 'grounds' refers to the reason one believes a certain set of facts, whereas 'facts' refers to information obtained from one's senses.^[16]

'Grounds'^[16] must be based on the facts obtained from objectively exploring (with one's five senses) a particular situation or set of evidence. Once the facts are established by looking, hearing, smelling and sometimes tasting, the facts are usually evaluated. After considering or evaluating the facts from different objective points of view, a conclusion is drawn. If the conclusion remains the same, even when the facts are viewed from different perspectives, one is said to have grounds that a particular set of facts has merit. Up to this point, only one's subjective interpretation of the facts is contemplated.

The courts, however, apply a measure of objectivity – that of the reasonable person – to ascertain whether the grounds for believing a set of facts are reasonable. The reasonable person refers to a fictional person who is deemed similarly situated to the one reporting. This hypothetical person is given similar characteristics and placed in the same situation as the person in question when the facts were obtained. 'Reasonable grounds' are said to exist if this reasonable person would come to the same conclusion under these similar circumstances.^[16]

In terms of the Sexual Offences Act, reporting can also be based on the 'disclosure' of the victim.^[17] The English courts have ruled that evidence obtained from a secondary source (eye witness) likewise gives rise to the legal obligation to report to the relevant authorities.^[18]

Liability

Reporting, when supported by a set of facts and done without any malicious intent, will not give rise to any claims of liability. The person reporting will not be held liable for damages under these conditions, even if it is ascertained that there is no abuse or neglect of any kind.

Accountability

Professionals, and particularly healthcare professionals, can be held accountable for not reporting abuse of children under the conditions described above. The Health Professions Council of South Africa (HPCSA) guidelines^[19] urge members to report any unethical or illegal conduct. According to the Health Professions Act No. 56 of 1974,^[20] the HPCSA can order a fine or a suspension for a period of time, or remove a member's name from the register in the case of a guilty finding.

Furthermore, in terms of section 54(b) of the Sexual Offences and Related Matters Act,^[14] failure to report sexual abuse or exploitation of children and mentally handicapped persons is deemed an offence and is punishable with a fine or imprisonment of up to 5 years, or both, if the person is found guilty.

Conclusion

Non-compliance with mandatory reporting legislation on the part of professionals is just one of the challenges faced in the quest to protect and safeguard the children of SA. The SA legislation regulating mandatory reporting is progressive and complies with international conventions for the prevention of child abuse and the protection of children. Even though implementation of the acts related to mandatory reporting is handicapped by an acknowledged shortage

of human resources, compliance with legislation could materially change the prospects of some children. However, given the lack of human resources, it is not self-evident that the children at risk of abuse in South Africa will be safer or better protected.

Recommendations

Increasing efforts to prevent child abuse and protect the children of SA may necessitate multiple and diverse interventions. Logically, however, a good starting point would be to enhance existing attempts to ensure the safety of our children. To this end, it is recommended that mandatory reporting practices be studied so that barriers to reporting can be more specifically addressed. Both professionals and the public need to be educated regarding children's rights and their obligation, moral if not legal, to report abuse of any nature. Public health officials, educators and all persons working with children must be trained to identify abused children and those at risk of abuse. The Department of Social Development must ensure that all relevant parties know where to find social workers who specifically deal with child abuse and are trained in the correct reporting procedure. Social workers who are mandated to investigate and manage cases of child abuse should preferably be placed in community health settings and police stations, as these are typically the first point of call for abused children.

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Accepted 4 June 2014.