Mandatory Reporting of Child Abuse and the Public/Private Distinction

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I: INTRODUCTION

The tragedy of child abuse has recently received a great deal of attention in New Zealand, with several high profile cases demonstrating that child abuse is a pressing social problem. In particular, the brutal but preventable deaths of two year old Delcelia Witika[1] and ten year old Craig Manukau[2] have shown that current procedures are inadequate to protect children.

In 1992, the Government proposed an amendment to the Children, Young Persons, and Their Families Act 1989 to make the reporting of child abuse mandatory for a named group of professionals. This was a controversial proposal, with a number of professional groups disagreeing over the effectiveness of mandatory reporting. The disagreement was, at least in part, the result of a deep philosophical division regarding the place of government in society.

The issue of addressing child abuse touches the very roots of liberal government: the public/private distinction. This distinction has defined the limits of governmental intervention in the lives of individuals by asserting that there are certain areas of human existence in which government should not intervene. The family has traditionally been considered one of these areas. Attempts to combat

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1 *R v Witika* [1993] 2 NZLR 424.

2 See, for example, "Welfare in firing line over death", *New Zealand Herald*, 25 November 1993, section 1, 1.

child abuse, a social problem centred in the family, have thus encountered difficulties.

This article examines the issue of mandatory reporting in the light of the public/private distinction. In particular, it sets out the arguments surrounding the mandatory reporting debate and contends that too many of those arguments rely on some form of the public/private distinction as an excuse not to intervene effectively where child abuse most often occurs. It concludes that such an excuse is meaningless, and therefore should not be a consideration when deciding where and how government should regulate.

II: THE HISTORY AND ORIGINS OF CHILD ABUSE REPORTING LEGISLATION

The story of the recognition of child abuse (and family violence in general) as a new social problem:[3]

> [D]oes not conform to the standard pattern of cases such as environmental pollution, artificial reproduction, or drunk driving, where one finds either the development of essentially new patterns of behaviour, often caused by technological developments, or a dramatic increase in behaviour that had existed previously at a lower and less socially disruptive level.

In the case of child abuse, the process of publication which began in the United States was initially overwhelming. In 1962, Dr C. Henry Kempe and his associates published their famous article "The Battered Child" in the Journal of the American Medical Association,[4] and heralded a deluge of debate and information on this previously cloistered topic, "flooding mass-circulation newspapers and magazines and professional journals alike."[5] The impact of this article and its accompanying editorial was so great that the date of the journal's publication has often been cited as the date of the discovery[6] of child abuse. The editorial bluntly stated:[7]

> [I]t is likely that [the battered child syndrome] will be found to be a more frequent cause of death than such well recognized and thoroughly studied diseases as leukemia, cystic fibrosis, and muscular dystrophy.

3 Hagan, Rogerson, and McCarthy, "Family Violence: A Study in Social and Legal Sanctions", in Friedland (ed), *Securing Compliance: Seven Case Studies* (1990) 392, 392.

4 Kempe, "The Battered Child" (1962) 181 J Am Med Assoc 17.

5 Nelson, *Making an Issue of Child Abuse: Political Agenda Setting for Social Problems* (1984) 56.

6 It may be better termed as a "rediscovery" since there was, in the late nineteenth and early twentieth centuries, an awareness of the abuse of children in labour. See, for example, Feshbach & Feshbach, "Toward an Historical, Social, and Developmental Perspective on Children's Rights" [1978] 34(2) J Soc Issues 1; Gibbons, "Mandatory Reporting of Child Abuse. Is it a better option than Voluntary Reporting, and if so, what form should it take?", in *Review of the Children, Young Persons, and Their Families Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare* (1992) 205, 207 (Mason Report).

7 Editorial, (1962) 181 J Am Med Assoc 42.

The legislative response to this was just as phenomenal. Between 1963 and 1967 all fifty states as well as the District of Columbia enacted some form of child abuse reporting legislation. All placed a duty on a named group of professionals to report suspected child abuse. In fact, these laws diffused through the states at a speed *five times faster* than the average for public policy innovations between 1933 and 1966.[8]

The first and most predictable reason for this action was that the nature of the issue allowed legislators to overlook the systemic injustice of the problem, and seize upon "child abuse reporting laws as an opportunity for no-cost rectitude. They were able to condemn violence against children at no cost to the public purse – only one of the original laws carried an appropriation with it."[9]

The second vital clue to the legislation explosion comes from the origins of the research done on child abuse. That is, the legal responses to child abuse reflected the *medicalisation* of the problem. The whole concept of child abuse as a widespread problem was first raised by pædiatricians, not lawyers and legislators. Therefore, the medical profession's interpretation of the causes of child abuse and its prescription of remedies came to dominate society's thinking. As Kempe's article points out, child abuse was seen as a syndrome, or a clinical condition.[10] It was most definitely not a crime, nor was it seen as symptomatic of the treacherous and violent power imbalances existing within the family. It was therefore much easier for government to readily adopt an issue that was constructed as a social illness rather than as one which confronted long-established power arrangements.

However, as is so often the case with quick legislative action, there were problems with the new child abuse reporting laws. It was realised that mandatory reporting could not function effectively without an adequate support system that could deal with each case once the report had been made, so a round of amendments was undertaken. The new abuse laws had changed the whole temperament of legislative involvement. For example, almost every state attached provisions empowering doctors and hospital directors to take suspected child abuse victims into temporary protective custody. This signalled an important transformation in the function of mandatory reporting legislation. No longer was it:[11]

> [A] blend of public-health do-goodism and malpractice insurance for physicians concerned about mistakenly labelling an injury as abuse. Instead, reporting legislation became child welfare legislation, subject to all the tensions over family autonomy, individual rights, and the role of the state that welfare engenders.

8 Walker, "The Diffusion of Innovations Among the American States" (1969) 63 Am Pol Sci Rev 895, cited in Nelson, supra at note 5, at 76. By 1968, mandatory reporting of child abuse was also established in eight Canadian provinces and four Australian states. Gibbons, supra at note 6, at 207.

9 Nelson, ibid. Illinois was the only state to consider that instituting reporting laws might create more work for support services.

10 Supra at note 4, at 17.

11 Ibid, 89.

Despite the confusion in function, mandatory reporting statutes in the United States helped to transform child abuse as a private deviance into a public policy issue.

III: THE SHAPE OF CHILD ABUSE REPORTING LAWS

The form of mandatory reporting proposed for New Zealand is similar to that in place in many other countries. This legislation invariably requires a designated set of professionals to report to appropriate government agencies, where evidence of child maltreatment comes to them in the course of their professional duties.

1. Overseas Mandatory Reporting Laws

(a) Who is to report?

The list of duty-bound professionals is long and ever widening in scope. Most jurisdictions mandate reporting from medical practitioners, dentists, teachers, nurses, social workers, psychologists and mental health professionals, law enforcement officials, and child care personnel.[12] But there are legislative provisions which require commercial film and photo processors, clergy, Christian Science and religious healers and those licensed to practise the healing arts to report suspected abuse.[13] Finally, some jurisdictions have placed a duty on any person to report suspected child abuse. Section 49 (1) of Ontario's Child Welfare Act 1970, for example, states that:[14]

> Every person who has information of the abandonment, desertion or need for protection of a child or the infliction of abuse upon a child shall forthwith report the information to a society.

(b) What triggers a report?

All reporting statutes state that when one of the specified persons has "reason-

12 Myers & Peters, Child Abuse Reporting Legislation in the 1980s (1987) 212-13. See also Review of the Children, Young Persons, and Their Families Act: The Government's Response to the Report of the Ministerial Review Team (May 1992) 2.

13 Some American states even place obligations on fire-fighters and fire inspectors. Myers & Peters, ibid.

14 "Society" is defined in s 2 as a "children's aid society" approved by the Lieutenant Governor in Council.

able grounds" (or some equivalent standard)[15] to believe that abuse has occurred he or she must report it to the appropriate authority (usually the government department responsible for social services or a law enforcement agency). However, there are differing definitions of abuse, and the point of interference varies across different jurisdictions. The standard is generally physical, emotional or sexual harm, ill-treatment, abuse, neglect, or deprivation. The Tasmanian statute includes "cruel treatment", notwithstanding that the treatment was not intended to be cruel or was not intended to result in injury to the child.[16]

(c) Action taken upon receipt of report [17]

In the United States, investigation of a report by the specified agency must occur promptly after that report has been received. The agency involved must then ascertain the validity of the report by investigating the nature, extent and cause of abuse, as well as the identity of the person responsible. The investigation may also involve visits to the child's home and interviews with the care givers and others involved in the domestic environment.

If, during the investigation, it becomes apparent that the injury is so serious that criminal abuse may be involved, the agency must then contact the Justice Department or a law enforcement agency. Some states require law enforcement co-operation right from the beginning.[18] The investigation procedures are to operate alongside the power of officials to take abused children into protective custody, if there is cause to believe that allowing a child to remain in the place of residence would present a danger to the child.

(d) Abrogation of privilege

Mandatory reporting laws can affect the most confidential aspects of our lives. Child abuse reporting statutes have tended to abrogate all recognised privileges and confidences except for that between solicitor and client. Doctor/patient, husband/wife, and clergy/penitent privileges are all impinged upon. The abrogation of the clergy privilege is an interesting development, since most legal systems

15 Such as "reasonable cause to believe". Reasonableness is not always explicit; some jurisdictions mention "suspected" abuse only. But, as with the Ontario statute mentioned above, the basic thrust of the reporting statutes is the same – to require reporting by individuals possessing knowledge that a child may be suffering abuse or neglect.

16 Section 2(3) Child Protection Act 1974 (Tas).

17 See Myers & Peters, supra at note 12. The authors methodically analyse the reporting requirements of each state plus the District of Columbia. This information has been gleaned from their analyses of each jurisdiction.

18 Wisconsin is one such example.

tend to uphold some form of clergy evidentiary privilege,[19] and eliminating it can prove problematic. There is an argument that requiring clergy to breach their privilege infringes upon the freedom of individuals to practise their religion.[20]

Mandatory reporting legislation has not intruded upon communications between solicitor and client because, understandably, failing to uphold this privilege would be detrimental to the proper and effective operation of the justice system.

(e) Immunities

Because so many privileges have been affected by reporting legislation, the immunities attached to reporting and co-operating in the subsequent investigation are wide. He or she who reports in good faith is immune from criminal or civil liability. However, the immunity does not extend to the abuser if he or she self-reports.

(f) Failure to report

Statutes are generally silent on the civil liability attached to a failure to report.[21] But criminal liability is express, with either a fine or a short term of imprisonment (or both) attached to the duty to report. Some statutes, most notably Ontario's (with its duty on everyone to report suspected child abuse), contain no criminal sanctions for the failure to report. Nevertheless, a mandatory reporting provision with no sanctions is, in effect, a voluntary reporting provision. Sanctions are necessary to show the seriousness with which the law views child abuse.

2. Proposed New Zealand Legislation

Current New Zealand legislation provides that:[22]

> Any person who believes that any child or young person has been, or is likely to be, harmed (whether physically, emotionally, or sexually), ill-treated, abused, neglected, or deprived *may* report the matter to a Social Worker or a member of the Police.

19 For example, s 35 of the Evidence Amendment Act (No 2) 1980 allows a court to excuse a witness from giving evidence which would breach a confidence arising from a "special relationship". See also Mitchell, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion" (1987) 71 Minn LR 723.

20 See the discussion on the conflict between legislation abrogating the clergy privilege and freedom of religion, infra at note 54 and accompanying text.

21 There has been one California Supreme Court decision which held that the failure to detect and report child abuse can give rise to liability based on negligence and statutory liability: *Landeros v Flood* 551 P 2d 389 (1976).

22 Section 15, Children, Young Persons, and Their Families Act 1989. Emphasis added.

Following the recommendations of a ministerial review committee headed by retired Judge Mason, a mandatory reporting provision was inserted into the Children, Young Persons, and Their Families Amendment Bill 1993. The Review Team noted that there is an increasing level of child abuse in society as well as growing concern for children's rights. The report described the inter-generational cycle of abuse, and stated that "philosophically the community would not only be registering its abhorrence of child abuse but would also be registering a powerful statement in support of children if it were to adopt the principle of mandatory reporting".[23] The report concluded that "the time for mandatory reporting has arrived".[24]

If the amended provision is adopted, s 15B(2) would state:

> Notwithstanding any enactment or rule of law, every person to whom this section applies who, in the course of carrying out the duties of that person's occupation or profession, has reasonable grounds for believing that any child or young person has been, or is likely to be, abused in a manner that has caused, or is likely to cause, serious harm to that child or young person, shall report the matter to a Social Worker or a member of the Police.

This duty would apply to police, social workers, doctors, nurses, school dental nurses, psychologists, early childhood centre staff, teachers, probation officers and lawyers.

A parliamentary Select Committee has since recommended that the Government drop plans to make the reporting of child abuse mandatory. The matter is now in legislative limbo and will go to a conscience vote by Members of Parliament.[25]

The Select Committee received submissions on the Bill from numerous groups and individuals throughout New Zealand. Most of these submissions commented on the Bill's mandatory reporting clause. Thirteen submissions supported the mandatory reporting clause unconditionally, while nineteen opposed it completely. Twenty-one submissions were opposed to various aspects of the proposed regime. It is arguable that those 21 individuals and groups supported mandatory reporting in principle but could not agree with the amendment as it stood. This highlights the many diverging perspectives on mandatory reporting.

23 Supra at note 6, at 16.

24 Ibid, 14.

25 See, "Professionals, MPs ponder abuse reporting", *New Zealand Herald*, 6 April 1994, section 1, 9.

IV: THE ARGUMENTS OVER MANDATORY REPORTING

1. Arguments Supporting Mandatory Reporting

(a) An increase in the number of genuine child abuse cases handled

It is clear that mandatory reporting does bring to official attention many more genuine cases of child abuse than would otherwise be noticed.[26] Thus, more children will be protected from abuse. This, of course, must be balanced against the number of cases which cannot be substantiated. Many would argue that if we are to show any genuine commitment to the welfare of children, then the increase in genuine cases dealt with must outweigh other considerations.

(b) An aid to professionals

Professionals are often faced with difficult decisions whether to report their awareness of abuse. For example, in a small rural town, professionals may be frightened to report because of pressure from others in the community. Such a feeling emerged at a meeting of nurses and other professionals in one small town:[27]

> [E]veryone [knows] everyone else and it [is] impossible to hide the identity of the person who [reports] the abuse - especially when there [is] no "need" to do so.

There was consensus at that meeting that "mandatory reporting would provide some measure of protection".[28]

(c) The symbolic function of mandatory reporting

Mandatory reporting legislation makes it clear to society that child abuse is a public concern - not a private prerogative. It shows legislative commitment to *action* against child abuse, particularly if the statute is backed up by resources. Thus, it is argued, legislation can help change attitudes. By contrast, the consequences of child abuse reporting losing its high profile:[29]

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26 Gibbons, supra at note 6, at 214.

27 Quoted in the Mason Report, supra at note 6, at 16.

28 Ibid.

29 Nelson, supra at note 5, at 131.

> [C]ould include less public awareness and declining "demand" for public programs. In the long run, reporting of suspected cases to welfare offices might decline as well, the product of citizen apathy and fiscal difficulties in staffing reporting and service systems. A public convinced of bureaucratic unresponsiveness would be further discouraged to report. The great fear of advocates of public policy against abuse is that declining media coverage and declining reporting will be used to assert that the actual incidence of abuse is declining.

Legislators and their servants in New Zealand (searching for some reason to dismiss mandatory reporting) have already fallen victim to this kind of attitude. A Department of Social Welfare report failed to see the connection between mandatory reporting and better awareness of child abuse among professionals and the public, stating:[30]

> In the New Zealand context of a small and relatively homogeneous society, the advantages of better reporting can be realised by the promotion of public awareness, and education of professionals, *rather than* mandatory measures.

Although it may be criticised as piecemeal reform, the establishment of a mandatory reporting regime amounts to an important attitudinal shift. Foremost, it is a *position* taken by legislators:[31]

> [It is an] assertion that children are individuals in their own right, they are not the property of their parents. Mandatory Reporting reflects the law's commitment to the protection of children and their right to the preservation of health and life. It is a recognition that the community cares and is serious enough about child abuse to elevate a civic or moral duty of care, that it is a grave matter calling for public scrutiny and perhaps for intervention by agencies of the state. It serves to remind professionals of the seriousness with which our society views abuse of children.

2. Arguments Against Mandatory Reporting

(a) Effectiveness of mandatory reporting

A major concern is that there is no evidence that mandatory reporting has reduced violence and other abuse against children.[32] One commentator has even claimed, rather bluntly, that:[33]

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30 Quoted in the Mason Report, supra at note 6, at 13. Emphasis added.

31 Gibbons, supra at note 6, at 212.

32 See generally Wald, "Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of *Before the Best Interests of the Child*" (1980) 78 Mich L R 645.

33 Gelles, paper given at the National Conference for Family Violence Researchers, quoted in Nelson, supra at note 5, at 15.

> We don't know a *damn* thing about whether child abuse is increasing, decreasing or staying the same.

Indeed, this was a primary concern of New Zealand's then Labour government when it dropped the requirement for professionals to report child abuse from the Children and Young Persons Bill.[34] The government's attitude to mandatory reporting highlighted many predictable fears of meddling in the private realm. The then Member for Manawatu was dissatisfied with mandatory reporting because, he said:[35]

> [I]t tends to prevent those people who may need help from coming forward, because people who do abuse ... often recognise that what they are doing is wrong, and they want to seek help. However, if they know that the professional person they have gone to for help will report them to the police or to some other agency, and instigate some kind of procedure, they will not ask for help.

The Hon Peter Tapsell further raised the spectre of the rescue fantasies suffered by many social workers and health professionals, saying that "there is no one quite so dangerous as a well-meaning but misguided specialist – not anyone."[36]

(b) Lack of Resources

State reluctance to become too involved in the reporting of child abuse also stems from the perceived prohibitive costs of regulating the private realm. The resources set aside for enforcing such legislation are scarce and the actions of the departments that do enforce the statutes are perennially under criticism.[37]

During the original debate on mandatory reporting in the New Zealand Parliament, the Hon Dr Michael Cullen, then Minister of Social Welfare, discussed the New South Wales figures for reporting:[38]

> The New South Wales experience is that, thanks to mandatory reporting, the position is now down to the point at which only 12 percent of reported cases actually produce genuine evidence that requires further action. That means that 88 percent of its resources are in some respects tied up in chasing false reports, and that is an appalling procedure for the State to be involved in.

In the United States, the figure was put somewhere near 60 percent for unfounded reports.[39] Overall, there is a clear concern that this over-reporting

34 D Robinson 497 NZPD 10255 (27 April 1989). This Bill was eventually enacted as the Children, Young Persons, and Their Families Act 1989.

35 Ibid.

36 Ibid, 10260.

37 See, for example, supra at note 2.

38 Supra at note 34, at 10248.

39 Besharov, "Child Protection: Past progress, present problems and future directions" (1983) 17 Fam L Q 151, cited in Oates, *Child Abuse and Neglect* (1987) 47.

places a heavy burden on the staff in child protection agencies, whose limited resources may make it difficult for them to respond promptly and efficiently when children really need protection.

Related to this is the concern that because the legal system does not have the capacity to supervise properly the complex and fragile bond between child and parent, intervention fails to offer the child an opportunity for a psychological relationship with an adult. This deprives the child of an opportunity of being wanted and valued, and may thus be more harmful than abuse.[40]

(c) The risk of unwarranted intervention

Many have criticised the imposition of mandatory reporting regimes as highlighting the dangers of state intervention where it is not actually needed. Critics demand to know how a government can justify reporting based on unsubstantiated or even false statements. The private realm for some is sullied forever, since:[41]

> It can be said that in the case of child sexual abuse, there is no presumption of innocence in the public eye. Whatever the outcome, a reputation is tarnished. The social stigma that attaches to a mere accusation of child sexual abuse lingers long after even a finding of innocence. The accusation may also have devastating effects on the accused parent's relationships with others and on [his or her] personal dignity.

The social stigma of being caught up in a child abuse report, investigation, and eventual exoneration is traumatic. Society has a tendency to see child abuse cases as unsubstantiated, implying that if more evidence were available the case would have ended differently.

(d) Intervention as Classism

Definitions of child abuse usually include neglect and lack of proper care, control or subsistence.[42] These definitions have given rise to the challenge that state intervention, such as reporting legislation, necessarily impacts disproportionately upon those sectors of society which have more contact with social workers and other professionals who find themselves in the duty-bound category. As a consequence, such intervention amounts to control of the poor and is completely

40 Goldstein, Freud & Solnit, *Before the Best Interests of the Child* (1979) 11 cited in Wald, supra at note 32, at 649.

41 Patterson, "The Other Victim: The Falsely Accused Parent in a Sexual Abuse Custody Case" (1991) 30 J Family L 919, 926. While, as the title suggests, Patterson's comments are directed towards the treatment of sexual abuse allegations in custody cases, her observations on the affects of such allegations are pertinent to the mandatory reporting debate.

42 See Butterworths, *Family Law in New Zealand* (5th ed 1992) para 6.608.

unjustified, since the only rationale for intervention is and should be the wholesale eradication of child abuse in society. Critics argue that if it cannot achieve its purpose because of this limitation then there should be no intervention at all. Nevertheless, some commentators have soundly criticised governments' refusal to see "not that poor people were bad people or bad parents, but that the deprivations of poverty were real and encouraged abuse".[43]

(e) Mandatory reporting of child abuse and parental discipline

In most Western legal systems, parents are awarded the right to beat their children through a statutory defence to assault. This creates problems in defining just what child abuse is.[44]

Indeed, it is "one of the paradoxes of current thought, policy and practice relating to children that battering children should cause horror and almost total condemnation whilst corporal punishment of children should remain socially sanctioned".[45] In New Zealand, that sanctioning takes place through the operation of s 59 of the Crimes Act 1961. This provision states that:

> (1) Every parent ... is justified in using force by way of correction towards any child ... if the force used is reasonable in the circumstances.
>
> (2) The reasonableness of the force used is a question of fact.

What kind of conduct does this encompass? If normal parents physically chastise their children within the limits of the law, where does that leave those who have a duty to report what *they* suspect to be evidence of abuse? If resources are as scarce as politicians say they are, surely there is the possibility of an under-trained but duty-bound person reporting domestic discipline as suspected abuse.

There is growing support in New Zealand for the removal of the reasonable force exemption from the Crimes Act. Some even want a provision banning the physical punishment of children inserted in the Children, Young Persons, and Their Families Act.[46] They point to Sweden as the prime example of what outlawing physical punishment of children can do to change society's attitude. A law enacted in 1979 stated that a child "may not be subjected to physical punishment or other injurious or humiliating treatment".[47] Finland, Denmark, Norway, and Austria soon followed suit. Most importantly, commentators noticed a discernible change in attitude:[48]

43 Nelson, supra at note 5, at 15. See also Hagan, Rogerson & McCarthy, supra at note 3, at 407.

44 Gibbons, supra at note 6, at 211.

45 Freeman, *The Rights and Wrongs of Children* (1983) 111.

46 Welch, "Force of Habit" *Listener* (November 13 1993) 16, 18.

47 Ibid.

48 Ibid.

> Smacking is now seen at best as a socially unacceptable activity, and at worst as a form of abuse. It still happens, but "given the now-prevailing cultural norm," writes educational commentator Adrienne Ahlgren Hæuser, "it is easier for the Swedish parent not to use physical punishment than to defend using it".

3. Mandatory Reporting and Fundamental Freedoms

(a) Freedom of expression

Mandatory reporting of child abuse has existed at state and federal level in the United States for 30 years without any argument that such reporting infringes the most highly regarded constitutional freedom in that country – the freedom of speech.

It was thus somewhat surprising to see the argument surface in New Zealand as the basis of the Attorney-General's opinion on the Children, Young Persons, and Their Families Amendment Bill.[49] In that opinion, formulated for the Attorney-General by the Crown Law Office, the mandatory reporting clause of the Bill was found to be an unjustifiable infringement of s 14 of the New Zealand Bill of Rights Act 1990.[50]

Mandatory reporting was considered to be a prima facie breach of s 14 because:[51]

> In this context ... the government would require a person to report his or her belief relating to actual or likely child abuse. In essence this means that a person is required to express himself or herself in circumstances when he or she might otherwise choose not to do so.

The Attorney-General and his advisers then considered whether so abrogating the choice to express oneself was a reasonable limitation under s 5 of the Bill of Rights.

There is a strong argument to be made that mandatory reporting of child abuse symbolised a public interest that was sufficiently pressing to intrude on certain citizens' freedom of expression. But overall, the Crown Law Office concluded that the limitation was not reasonable. Contrary to the findings of the Ministerial Review, the report asserted that there was no connection between the means (mandatory reporting) and the objective (the increased detection and prevention of child abuse).[52] It stated that legislation which impinged upon the most private of

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49 4 August, 1993.

50 Hay & Liddicoat, Crown Law Office opinion to the Attorney-General, 4 August 1993 (unpublished) p1. Section 14 sets out the right to freedom of expression.

51 Ibid, 2-3.

52 Ibid, 6.

decisions, the decision whether or not to speak, was not a function of a democratic state. The appeals to the significance of a duty to report were emphatic:[53]

> Legislative requirements to disclose beliefs or suspicions to public officials is one of the hallmarks of a police state and, taken to extremes, is in conflict with democratic self-government.

(b) The clergy privilege and freedom of religion

Along with anxieties over state intrusion into the quasi-familial atmosphere between priest and penitent, there is an argument that abolishing the clergy privilege infringes the constitutional right to freedom of religion. Even Bentham, himself no proponent of privileges, justified the clergy privilege on the basis of religious toleration.[54] Furthermore, Mitchell makes it quite clear that "the clergy privilege is not simply a statutory law with various policy rationales, but is also a constitutional right of clergy."[55]

4. The Foundation of Arguments Against Mandatory Reporting

Many of the specific concerns discussed above stem from the general belief that government should be loath to interfere in the family sphere. Those who hold such a belief argue that legislators should approach abuse in the family with caution.

However, there is an underlying misconception in these arguments regarding the extent of governmental influence in our lives. In order to understand the nature of the misconception, it is first necessary to consider the concepts of public and private as they have developed in Western society. It is then essential to examine responses to the existence of this public/private distinction.

53 Ibid, 4.

54 *Rationale of Judicial Evidence* (1827) cited in Mitchell, supra at note 19, at 776.

55 Ibid, 777.

V: THE PUBLIC/PRIVATE DISTINCTION

1. An Overview of the Distinction

Liberal philosophy has developed and cultivated the ideas of public and private as separate spheres of life.[56] The general concept of privacy:[57]

> [R]efers to a sphere that is not of proper concern to others. It implies a negative relation between the individual and some wider "public", including the state – a relation of non-interference with, or non-intrusion into, some range of his thoughts and/or action. This condition may be achieved either by his withdrawal or by the "public's" forbearance.

The family has been defined as part of this private sphere. Western society has, in a variety of ways, continued to articulate the Victorian belief that "to undermine parental responsibility was to undermine family stability and thus the stability of society itself".[58] The role and status of the family in relation to human existence has been considered paramount. Judicial and academic comment on the role of the family has been fraught with emotions and vivid imagery, generally favouring "a view of the family as an island of traditional hierarchy within a swirling sea of capitalism and individualism".[59]

2. Feminist Challenges

The public/private distinction has been examined and criticised from many perspectives.[60] The most detailed criticisms of the distinction have come from feminist theorists.

Feminist concern with the liberal separation of public and private is widespread and multidisciplinary. The general spark for challenging the public/private dis-

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56 See Benn & Gaus, "The Public and the Private: Concepts and Action" in Benn & Gaus (eds), *Public and Private in Social Life* (1983) 3, 17: "Liberalism exhibits strong theoretical pressures towards a bipolar view of social life, tending as it does to assimilate [cases] to one or the other of the two poles."

57 Lukes, *Individualism* (1973) 66 quoted in O'Donovan, *Sexual Divisions in Law* (1985) 2. Another, less impersonal, view of the private is articulated by Gavison: "Privacy is important in those areas in which we want a refuge from pressures to conform, where we seek freedom from inhibition, the freedom to explore, dare, and grope. Invasions of privacy are hurtful because they expose us; they may cause us to lose our self-respect, and thus our capacity to have meaningful relations with others." "Privacy and the Limits of Law" (1980) 89 Yale LJ 421, 459.

58 Pinchbeck & Hewitt, *Children in English Society* (1973) 357, quoted in O'Donovan, ibid, 14.

59 Fox-Genovese, "The Legal Status of Families as Institutions" (1992) 77 Cornell LR 992, 993.

60 See, for example, Kennedy, "The Stages of the Decline of the Public/Private Distinction" (1982) 130 U Penn LR 1349.

tinction has been the undervalue placed on women's existence and contribution to society as a whole. A simple summary is that:[61]

> [T]he public sphere is that sphere in which "history" is made. But the public sphere is the sphere of male activity. Domestic activity becomes relegated to the private sphere and is mediated to the public sphere by men who move between both. Women have a place only in the private sphere.

Injustices towards women, both discreet and discrete (in the sense that they have been seen as one-off, personal mishaps, rather than systemic abuse) have remained undocumented and hence ignored by legislators and other social architects.

(a) Other-regardingness

The feminist critiques also extend to the purported self-regarding nature of the family. That is, the idea that actions in the family sphere affect only the family's immediate members. Attacks directed towards self-regardingness are not exclusively feminist. Critics of liberalism have long lambasted the confusion and distortion created by this notion,[62] arguing that *no* significant activity can ever be self-regarding.

In terms of the privacy of the family, feminists contend that the activities carried out in the family home are other-regarding in many ways:[63]

> Citizens of the state are socialized within the family, and evidence shows that child-rearing arrangements affect children in profound and complex ways. Consequently, the characteristics brought by children into their adult lives will eventually affect the general norms and expectations of their society.

(b) Characterisation

There is also a challenge to the characterisation, evaluation and assessment of the realms. Characterising the family as a haven in a heartless world, a realm of love and harmony of interests whose autonomy needs to be respected is grossly

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61 Smith, "Women, the family and corporate capitalism", in Stephenson (ed), *Women in Canada* (1974) 6, quoted in O'Donovan, supra at note 57, at 3-4.

62 See, for example, Benn's claim that not even private morality can be truly self-regarding: "[A] moral argument must be accessible in principle to anyone: so my morals cannot be private to me, as my emotions or my liking for artichokes might be. Morality is public at least in the rather special sense in which Wittgenstein claimed that a language must be public: the principles, the reasons for saying that you have got it right or wrong, must be open to anyone". Benn, "Private and Public Morality: Clean Living and Dirty Hands", in Benn & Gaus, supra at note 56, at 155, 156.

63 Gavison, "Feminism and the Public/Private Distinction" (1992) 45 Stanford LR 1, 14.

exaggerated. Simply put, the family is far from being a place of affection and harmony: [64]

> Despite the love and commitment that are central to family associations, the interests of family members often conflict. These conflicts are often resolved by power, rather than a benevolent consideration of everyone's interests.

(c) The myth of non-intervention

Liberal doctrine depends upon the maintenance of separate public and private realms. Liberal theorists assert that this distinction is immanent, "embedded in the seemingly natural",[65] something which is only *reflected* in the law. Critiques of this distinction have sought to reveal how law actually *constructs* and supports the division.

For feminists, the closeness of state coercion and the family has long been disguised by liberals. Feminists challenge:[66]

> [T]he conventional liberal claim that the writ of the state runs out at the gate to the family home. They have shown how the family is a major concern of the state and how, through legislation concerning marriage and sexuality and the policies of the welfare state, the subordinate status of women is presupposed by and maintained by the power of the state.

O'Donovan summarises the feminist challenge to the naturalness and inevitability of the private sphere. She is especially critical of the failure to see the family as regulated by the state, since, after all:[67]

> [I]t is for the state to decide how, where, and in what manner it will regulate individuals' lives. Zones can be mapped out as being inside or outside the state's purview. The placement of an aspect of life inside or outside the law is a form of regulation. Legal acknowledgement of its existence defines and constitutes it. So regulation may take a form within or without the law.

Thus, by deciding when to and when not to pass a law, *legislators* are deciding what is public and what is private. The state, through legislative, executive, and judicial action and inaction, has long been involved in constituting the family.

One of the most influential critics of the culture surrounding the reluctance to

64 Ibid, 23. See also the characterisation of domestic arrangements in the much-documented case of *Balfour v Balfour* [1919] 2 KB 571, 579: "The parties themselves are advocates, judges, Courts, sheriff's officer and reporter". Emphasis added.

65 O'Donovan, supra at note 57, at 19.

66 Pateman, "Feminist Critiques of the Public/Private Dichotomy" in Benn & Gaus, supra at note 56, at 281, 297

67 O'Donovan, supra at note 57, at 7. Note also MacKinnon's cynical statement on the private lives of women; namely that "[n]o law takes away women's privacy. Most women do not have any to take, and no law gives them what they do not already have." *Toward a Feminist Theory of the State* (1989) 239.

interfere in family life has been Frances Olsen.[68] Olsen's writing has centred on the lack of any real meaning in the labelling of what does and does not amount to government intervention in the private sphere. As with other feminist challenges, her claim is that the emphasis on demarcation of public and private, and what it should mean for legislators, obscures the real issues and prevents effective regulation and action on grave human problems.

She illustrates the state's role in constituting the family by supposing that:[69]

> [A] good-natured, intelligent sovereign were to ascend the throne with a commitment to end state intervention in the family. Rather than being obvious, the policies she should pursue would be hopelessly ambiguous. Is she intervening if she makes divorces difficult, or intervening if she makes them easy? Does it constitute intervention or nonintervention to grant divorce at all? If a child runs away from her parents to go live with her aunt, would nonintervention require the sovereign to grant or to deny the parents' request for legal assistance to reclaim their child? Because complete agreement on family roles does not exist, and because these roles undergo change over time, the state cannot be said simply to ratify preexisting family roles. The state is continuously affecting the family by influencing the distribution of power among individuals.

Indeed, she carries the point further, noting that parents are authorised by the state (as well as by custom) to name their children and change their names if they wish. Furthermore, parents are empowered by the state to enrol their children in school and required by the state to buckle them up when they get into a car. Olsen makes us recognise that such mundane and routine family functions do not emanate from the family unit itself. Instead, "[t]hese powers are established by state regulations, regulations that define family roles but are hardly noticed and certainly not considered state intervention."[70]

The point of this challenge to the public/private distinction is that the "rhetoric of nonintervention"[71] clouds real debate and therefore impedes effective solutions. True debate over mandatory reporting is just one example of a policy issue which seems forever mired in this rhetoric.

3. Problems of Definition: What is Public and What is Private?

There are many different definitions of public and private. Gavison[72] discusses a number of different senses in which public and private are treated, based on the context surrounding them. These are "accessible/inaccessible", "freedom/interference", and "individuals/society (groups)". She also identifies the complex meanings of public and private.[73]

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68 See Olsen, "The Myth of State Intervention in the Family" (1985) 18 U Mich J L Ref 835; and Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv L Rev 1497.

69 Olsen, "The Myth of State Intervention in the Family", ibid, 842.

70 Ibid, 850.

71 Ibid, 835.

72 Supra at note 63.

73 Ibid, 6.

(a) Accessible/inaccessible

Accessibility concerns the form of being known or observed. There are differences in the acts of knowing and observing (knowledge, for example, may result from voluntary disclosure), but the term "accessibility" creates a zone of meaning in which to concentrate on knowledge and information, as well as physical access and observability.[74]

(b) Freedom/interference

Here, the private sphere, in which others do not meddle, is free. The public sphere is not clearly defined. Rather it acquires its sense from the source of the interference.[75] The government and the market are thus different publics.

(c) Individuals/society (groups)

Here, the public/private distinction highlights differences between individuals and various groups. Groups which seem private when compared to the larger whole of society become public when compared to distinct individuals. As for the individual as private, Gavison identifies three interrelated contexts in which that privacy has been recognised and upheld by law and society. These are that which is intimate, that which is related to an individual's own self-identity and personhood, and that which is self-regarding, affecting only the individual.[76]

(d) Complex meanings

Our general understanding of society is shaped by the varying usages of the words "public" and "private". For example, "private life" has come to encompass *all* the meanings of self-regardingness, intimacy, freedom, and inaccessibility.

However, the problem with the various meanings that have attached to the words "public" and "private" over the years is that the multitude of definitions defeats the argument that there is a sphere into which government cannot properly intervene. In sum, these meanings comprise a very diverse area of human activity. Given this diversity, it may be both meaningless and confusing to appeal to the private sphere.

74 Ibid.
75 Ibid.
76 Ibid.

VI: THE PUBLIC/PRIVATE DISTINCTION AND THE MANDATORY REPORTING DEBATE

The public/private distinction has influenced the mandatory reporting debate in many ways. Some arguments rely explicitly on the myth of non-intervention. Others are no more than excuses, diverting attention away from the underlying objection to governmental intervention in the family.

1. The Myth of Non-Intervention

The Attorney-General's report on the mandatory reporting provision of the Children, Young Persons, and Their Families Amendment Bill is an example of reliance on the rhetoric of non-intervention. That report appeared to place significant weight on the perceived intrusion by the state into individuals' lives.[77]

However, there is much governmental action which impinges upon a citizen's private decision to speak or express himself or herself in some way. For example, those who receive income must make a true and correct tax return each year, and must also acquiesce to that expression (information about their income) being passed on to other government departments in certain circumstances. If they choose not to make that expression they are liable for a penalty. Furthermore, motor vehicle users who are stopped by a police officer must state their name, address and age, whether they wish to or not.[78]

In light of these examples, the argument based on non-intervention appears to be without foundation. The Attorney-General's report is, in part, based on a questionable premise.

2. Illusory Arguments

When subjected to examination, many of the purported objections to mandatory reporting are inherently weak. In the writer's view, these arguments have served to divert attention from an underlying concern to protect the private.

(a) Lack of resources

There are two threads in the response to the lack of resources argument. First, it is disingenuous to protest the introduction of a mandatory reporting regime on the grounds that there are not enough resources allocated to do the job effectively.

77 See supra at note 49 and accompanying text.

78 Transport Act 1962, s 66(2)(b)(i).

The argument is clearly circular. That is, there are not enough resources because of a belief that government cannot do the job effectively, yet the belief that government cannot do the job effectively exists largely because there are not enough resources. In the final analysis, the allocation of resources is a policy decision.

Second, the high cost of intervention is frequently justified. There are many regulatory activities which are expensive, time-consuming, and which possess few manifest benefits in light of the resources they consume.[79]

(b) Risk of unwarranted intervention

There is a risk of mistake in every regulatory action undertaken by the state. That does not mean that there should be no government action. That society sees child abuse cases as unsubstantiated is not the fault of legislation that attempts to eradicate child abuse. Rather, it is a symptom of a public poorly educated about the processes involved in the campaign against child abuse. Indeed, a mandatory reporting scheme should help eradicate some of the social stigma surrounding the reporting and investigation of abuse, since better public awareness is a necessary consequence of the installation of mandatory reporting procedures.

Civil rights law provides an interesting contrast to the assertion that the increased risk of humiliation and turmoil created by mandatory reporting processes outweigh any possible benefits. To illustrate, imagine a criminal investigation and a child abuse investigation ensuing at the same time. The result of each process is substantially the same: the case against the criminal accused is thrown out because a piece of damning and conclusive evidence was obtained illegally by law enforcement officers, and the investigation of possible child abuse is abandoned because officials have not found enough evidence to substantiate the reporter's concerns. Although exonerated, both parties are looked at by the public as criminals. Government has affected the private lives of two people in the same way. Yet very few people would oppose some kind of enumeration of constitutionally guaranteed rights the way that some oppose a mandatory reporting scheme. Is there really much difference between these two scenarios except that they are separated by the rhetoric of non-intervention?

(c) Effectiveness of mandatory reporting

The charge that mandatory reporting is not effective because social workers will be subject to rescue fantasies ignores that such an allegation could be made

79 See, for example, Appendix B in Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990) 239; Sandford & Haseldine, *The Compliance Costs of Business Taxes in New Zealand* (1992).

with or without the existence of mandatory reporting. Furthermore, concerns that abusers will not seek help if they know that the professional will report the abuse, do not take into account that that same concern applies with voluntary reporting regimes. Whether it is a mandatory requirement or not, there is still a risk that the abuser will be reported.

VII: CONCLUSION

It is unlikely that the mandatory reporting of child abuse will become law in New Zealand. The tragedy of this is that the debate on the introduction of mandatory reporting has been unduly influenced by the concepts of public and private spheres, from the lack of resources excuse, to the interference with freedom of expression excuse. The demise of the mandatory reporting proposal is the direct consequence of the way liberalism has defrauded society. Government makes decisions on and appropriates resources to enter our lives in many unnoticed ways. Why should the safety of children be considered a danger area for government?