

## The Children's Amendment Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act: Duty to report child abuse and sexual offences against children and mentally disabled persons

David McQuoid-Mason

The Children's Amendment Act<sup>1</sup> and the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>2</sup> (Sexual Offences Act) impose duties on medical practitioners and others to report child abuse and sexual offences against

*David McQuoid-Mason is Professor of Law at the Centre for Socio-Legal Studies, University of KwaZulu-Natal, Durban, and publishes and teaches in medical law.*

*Corresponding author:* D McQuoid-Mason (mcquoidm@ukzn.ac.za)

December 2008, Vol. 98, No. 12 SAMJ

children and mentally disabled persons that go beyond those in the Child Care Act<sup>3</sup> and the Prevention of Family Violence Act.<sup>4</sup> The latter Acts will be repealed once the relevant provisions of the Children's Amendment Act come into effect.<sup>5</sup> The Sexual Offences Act came into effect on 16 December 2007.<sup>6</sup>

### Ill-treatment of children under the Child Care Act

Until the provisions regarding the duty to report ill-treatment of children in terms of the Child Care Act<sup>7</sup> are repealed, the existing provisions apply.





The Child Care Act provides that every dentist, medical practitioner, nurse, social worker or teacher, or any person employed by or managing a children's home, place of care or shelter, who examines, attends or deals with any child in circumstances giving rise to the suspicion that that child has been ill-treated, or suffers from any injury which probably might have been deliberately caused, or suffers from a nutritional deficiency disease, must immediately notify the Director-General of Social Development or a designated officer of such circumstances.<sup>7</sup> In practice, such cases are often reported to the police or a provincial social development official. Even if they were mistaken, such persons shall not be liable for any notification given in good faith in accordance with the Act.<sup>7</sup> However, it is a criminal offence for such person to fail to report abuse or neglect when required to do so by the Act,<sup>7</sup> and they could be held civilly liable for damages if the child suffers further injury as a result.<sup>8</sup>

## **Ill-treatment of children under the Prevention of Family Violence Act**

As in the Child Care Act, until the duty to report ill-treatment of children in terms of the Prevention of Family Violence Act<sup>9</sup> has been repealed, the existing provision applies.

The Prevention of Family Violence Act provides that any person who examines, treats, attends to, advises, instructs or cares for any child in circumstances that give rise to a reasonable suspicion that such child has been ill-treated, shall immediately report such circumstances to a police officer or a Commissioner of Child Welfare or a social worker.<sup>9</sup> Unlike the Child Care Act, this Act does not specifically provide protection for persons who report in good faith and in terms of the Act. Therefore, medical practitioners and other health care professionals will probably feel more secure when reporting in terms of the Child Care Act than the Prevention of Family Violence Act. However, the common law defences of statutory authority<sup>10</sup> and qualified privilege<sup>11,12</sup> would provide protection for persons who report in good faith in terms of the Prevention of Family Violence Act, which was introduced to include categories of persons wider than those in the Child Care Act to combat family violence.

## **Child abuse and neglect, or children in need of care, under the Children's Amendment Act provisions not yet in force**

When the provisions of the Children's Amendment Act<sup>13</sup> come into effect, they will replace those in the Child Care Act<sup>7</sup> and Prevention of Family Violence Act.<sup>9</sup> A wider list of persons is required to report in terms of the Children's Amendment Act than in the Child Care Act, including members of the health care professions.

The Children's Amendment Act provides that any correctional official, dentist, homoeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report such conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.<sup>13</sup> The Act imposes a mandatory duty on the designated categories of persons to report instances of abuse or neglect to the relevant authorities. Failure to comply is a criminal offence<sup>14</sup> and may also result in civil liability for damages if the child concerned suffers further injury as a result of failure to report.<sup>8</sup>

The Children's Amendment Act also provides for discretionary reporting by anyone who on reasonable grounds believes that a child is in need of care and protection, and may report that belief to the provincial department of social development, a designated child protection organisation or a police official.<sup>13</sup> This provision is wider than that in the Prevention of Family Violence Act,<sup>9</sup> which is restricted to persons who examine, treat, attend, instruct or care for children who are reasonably suspected of having been ill-treated. The reporting duty in the Prevention of Family Violence Act is mandatory, but is discretionary in the Children's Amendment Act. Consequently, there is no criminal liability for exercising discretion not to report that a child is in need of care. However, where such failure to report results in foreseeable harm to the child and there is a common law duty on the person concerned to prevent such harm (e.g. because of a special relationship such as that between doctor and patient), that child may institute a civil action for damages.<sup>8</sup>

Persons who report child abuse or neglect, or that a child is in need of care in accordance with the provisions of the Act, must substantiate their conclusion or belief to the relevant provincial department of social development, a designated child protection organisation or a police official, and will not be liable for civil action on the basis of such report if made in good faith.<sup>15</sup>

## **Sexual abuse against children and mentally disabled persons under the provisions of the Sexual Offences Act now in force**

The Sexual Offences Act<sup>2</sup> provides that a person who has knowledge that a sexual offence has been committed against



a child must report such knowledge immediately to a police official.<sup>16</sup> A person who has knowledge, reasonable belief or suspicion that a sexual offence has been committed against a person who is mentally disabled must report this immediately to a police official.<sup>17</sup> Failure to report in terms of the Act amounts to a criminal offence for which the convicted person may be liable to a fine or imprisonment.<sup>18</sup>

Sexual offences against children in terms of the Act (apart from offences where there is no consent such as rape and sexual assault) include: (i) acts of consensual sexual penetration with certain children (statutory rape); (ii) acts of consensual sexual assault with certain children (statutory sexual assault); (iii) sexual exploitation; (iv) sexual grooming; (v) exposure or display of or causing exposure or display of child pornography or pornography; (vi) using children for or benefiting from child pornography; (vii) compelling or causing children to witness sexual offences, sexual acts or self-masturbation; and (viii) exposure or display of or causing of exposure or display of genitals, anus or female breasts to children ('flashing').<sup>19</sup> Similar sexual offences against mentally disabled persons are provided for in terms of the Act.<sup>20</sup>

In sexual offences against children, the duty to report only arises if the person (e.g. a medical practitioner) has knowledge that such an offence has been committed. The Act does not exempt from legal liability persons who report in good faith and in accordance with the Act, but they will be protected by the common law defences of statutory authority<sup>10</sup> and qualified privilege.<sup>11,12</sup> In any event, failure to report which results in foreseeable harm to a child, where there is a common law duty on the person concerned to prevent such harm, such as resulting from the special relationship between a doctor and patient, may give rise to a civil action for damages.<sup>8</sup>

Regarding mentally disabled persons, the duty to report arises if there is knowledge and also if the person concerned

reasonably believes or suspects that a sexual offence has been committed against such a person. A person who in good faith reports this shall not be liable to any civil or criminal proceedings as a result of it.<sup>15</sup> Furthermore, if the person reports knowledge of such a sexual offence being committed, the report will be protected by the common law defences of statutory authority<sup>10</sup> and qualified privilege.<sup>11,12</sup> Conversely, in the event of failure to report resulting in foreseeable harm to a mentally disabled person, where there is a common law duty on the person concerned to prevent such harm (e.g. because of a special relationship such as that between a psychiatrist and a mentally disabled patient), the mentally disabled person may sue for damages.<sup>8</sup>

1. Children's Amendment Act No. 41 of 2007.
2. Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
3. Child Care Act No. 74 of 1983.
4. Prevention of Family Violence Act No.133 of 1993.
5. See Schedule 4 of the Children's Act No. 38 of 2005.
6. Section 72(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
7. Section 42 of the Child Care Act No. 74 of 1983.
8. Cf. *Minister van Polisie v. Ewels* 1975 (3) SA 590 (A).
9. Section 4 of the Prevention of Family Violence Act No.133 of 1993.
10. *Johannesburg Municipality v. African Realty Trust Ltd* 1927 AD 163.
11. Cf. *Borgin v. De Villiers* 1980 (3) SA 556 (A) at 577.
12. McQuoid-Mason D. Disclosing the health status of public figures: Privacy versus public interest – when may doctors make disclosure? *S Afr Med J* 2007; 97(5): 334-338.
13. Section 110 of the Children's Amendment Act No. 41 of 2007.
14. Section 305(1) of the Children's Act No. 38 of 2005.
15. Section 110(3) of the Children's Amendment Act No. 41 of 2007.
16. Section 54(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
17. Section 54(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
18. Section 54(1) and (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
19. Chapter 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
20. Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.