



Universiteit
Leiden
The Netherlands

From concept to application: a critical reflection on child safeguarding from a children's rights perspective

Kaviani Johnson, A.

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4 | All care, no responsibility

Legislation for mandatory reporting of child abuse in the 'developing world'¹

4.1 INTRODUCTION

In line with the United Nations (UN) Convention on the Rights of the Child and the regional child rights treaty, the African Charter on the Rights and Welfare of the Child, many African states have strengthened legislation to protect children from violence, abuse, exploitation, and neglect. Whilst legislation is only one means to support a movement towards ending violence against children, it can challenge and contribute towards shifting the status quo by providing legitimacy to new behaviours. Legislation must be accompanied by other measures to shift social and cultural norms that perpetuate violence, prevent people from speaking up about child abuse, and leave children in abusive environments.

This article focuses on the duties imposed by international law and domestic legislation to facilitate the reporting of child abuse by persons in contact with children. Commonly referred to as mandatory reporting legislation, such legislation has its origins in the seminal 1962 work of United States' (US) paediatrician C. Henry Kempe and his colleagues. Kempe et al. drew attention to cases of severe physical abuse inflicted upon children by their parents or caregivers and conceptualised this as 'the battered-child syndrome'. They highlighted the reluctance and apparent inability of many medical practitioners to recognise child abuse and deal with it appropriately by reporting it to authorities.² Their work was followed by intensive lobbying that resulted in mandatory reporting legislation being enacted in almost every US state between 1962 and 1967.³

1 This chapter was originally published as Afroz Kaviani Johnson, 'All Care, No Responsibility: Legislation for Mandatory Reporting of Child Abuse in the "Developing World"' (2022) 30 *The International Journal of Children's Rights* 818. This chapter has had minor edits since publication.

2 C Henry Kempe and others, 'The Battered-Child Syndrome' (1985) 9 *Child Abuse & Neglect* 143; Ben Mathews, 'Mandatory Reporting Laws: Their Origin, Nature, and Development over Time' in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect*, vol 4 (Springer Netherlands 2015) <http://link.springer.com/10.1007/978-94-017-9685-9_1>.

3 Mathews, 'Mandatory Reporting Laws' (n 2).

Today, there is a spectrum of approaches for mandatory reporting legislation across the world. The laws are based on the fact that many cases of child abuse occur in the private sphere and are unlikely to be brought to the attention of authorities, leaving children in situations of harm.⁴ Mandatory reporting legislation primarily relies on professionals who are most likely to encounter children and families. This includes healthcare personnel, teachers, social workers, and more recently, officers in organisations serving children and young people.⁵ With the confidentiality ethics that apply to many professions, the right to report sometimes serves as the first step before mandatory reporting to authorities in many jurisdictions.

Existing literature on mandatory reporting largely focuses on the US, Canada, and Australia – so-called ‘early adopters’ of mandatory reporting. This article fills a gap in existing literature and seeks to examine mandatory reporting legislation in four countries in Eastern and Southern Africa. South Africa, Uganda, Namibia, and Malawi were selected because the child protection systems in all four jurisdictions are underpinned, at least in part, by a forensic-legal model. This model establishes statutory child protection services under child protection legislation with authority to investigate and take action to protect children from harm. At the same time, all four countries have mixed legal systems and ‘informal’ systems and structures that play a role in children’s protection. There is a broad range of comparative scope amongst these countries with differences in the maturity of the formal child protection systems and socio-economic contexts. Uganda and Malawi are among the 46 countries currently designated by the UN as ‘Least Developed Countries’.⁶ Namibia and South Africa have upper-middle-income status, but extreme inequalities.⁷

The article aims to answer two main questions: first, what mandatory reporting requirements exist in legislation in South Africa, Uganda, Namibia, and Malawi? Second, in these countries with less developed child protection systems, what needs to be considered to strengthen mandatory reporting legislation and its implementation? To answer these questions, the article employs legal and interdisciplinary research through analysis of international, regional, and domestic legislation and explanatory materials, as well as literature review. To begin, the article analyses international and regional child rights law, as well as commentary and recommendations of respective treaty bodies and mandate holders, on violence against children and specifically the mandatory duty to report child abuse. The article then undertakes a comparative

4 *ibid.*

5 Ben Mathews, ‘A Taxonomy of Duties to Report Child Sexual Abuse: Legal Developments Offer New Ways to Facilitate Disclosure’ (2019) 88 *Child Abuse & Neglect* 337.

6 United Nations Conference on Trade and Development, ‘UN List of Least Developed Countries’ (UNCTAD, 2022) <<https://unctad.org/topic/least-developed-countries/list>>.

7 The World Bank, ‘Gini Index (World Bank Estimate) | Data’ (*The World Bank*, 2019) <<https://data.worldbank.org/indicator/SI.POV.GINI>>.

legal analysis of mandatory reporting duties in the four countries and highlights the similarities and differences between them. This section looks at the key areas of legislative choice in mandatory reporting legislation, namely who should report child abuse and in what circumstances. Other areas include to whom reports should be made; penalties for breach; the extent to which the legislation provides a reporter with confidentiality regarding their identity and with immunity from liability; and the response triggered by a mandatory report. The final part of the article examines the complexities of introducing mandatory reporting in countries where the formal capacity to respond to child abuse is constrained and where child protection legislation may not align with the socio-cultural reality. In concluding, the article posits that mandatory reporting legislation can be useful in contributing towards an enabling environment to end violence against children, but such legislation may be tokenistic and potentially undermine the rule of law if it is not accompanied by strengthening of systems of protection, both formal and informal. The article suggests a potential role for the African Committee of Experts on the Rights and Welfare of the Child to elaborate on guidance for African states and facilitate learning across the region on mandatory reporting legislation.

4.2 PERSPECTIVES OF INTERNATIONAL AND REGIONAL CHILD RIGHTS LAW ON MANDATORY REPORTING

Collective understanding of the extent of violence against children has significantly improved over the last decade due to the increasing availability of data from nationally representative population-based surveys. These data confirm violence as a common occurrence in the lives of children worldwide. In South Africa, 14.6 per cent of girls and 9.9 per cent of boys reported some lifetime sexual victimization,⁸ and child abuse and neglect preceded nearly half of all child homicides.⁹ In Uganda, 35 per cent of females and 17 per cent of males reported experiencing sexual violence during childhood, and 59 per cent of females and 68 per cent of males reported experiencing physical violence.¹⁰ In Namibia, 11.8 per cent of females and 7.3 per cent of males experienced sexual violence before the age of 18, and 32.9 per cent of females

8 Catherine L Ward and others, 'Sexual Violence against Children in South Africa: A Nationally Representative Cross-Sectional Study of Prevalence and Correlates' (2018) 6 *The Lancet Global Health* e460.

9 Shanaaz Mathews and others, 'The Epidemiology of Child Homicides in South Africa' (2013) 91 *Bulletin of the World Health Organization* 562.

10 Ministry of Gender, Labour and Social Development, 'Uganda Violence against Children Survey: Findings from a National Survey 2015' (UNICEF 2017) <<https://www.togetherforgirls.org/wp-content/uploads/VACS-REPORT-FINAL-LORES-2-1.pdf>>.

and 41.2 per cent of males experienced physical violence.¹¹ In Malawi, 21.8 per cent of females and 14.8 per cent of males experienced sexual abuse before the age of 18, and 42.4 per cent of females and 64.5 per cent experienced physical violence.¹²

Other forms of violence against children, especially relevant to the continent, include child labour, female genital mutilation (FGM), and societal violence including war and economic deprivation. Of the focus countries for this article, the issue of FGM is most pronounced in Uganda, although the rate is one of the lowest in Eastern Africa at 0.3 per cent among women aged 15 to 49 years of age.¹³ Uganda also hosts almost 1.5 million refugees and asylum-seekers, over sixty per cent of whom are children, fleeing from conflict and persecution in South Sudan, Democratic Republic of Congo, and the Great Lakes Region.¹⁴ Against this background, this section analyses international and regional child rights law, as well as commentary and recommendations of respective treaty bodies and mandate holders, on addressing violence against children and specifically the mandatory duty to report child abuse

4.2.1 United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC is the primary instrument relating to children's right to protection from violence. The core provision covering violence against children is article 19. Other related provisions include article 24 (harmful practices); article 34 (sexual exploitation and abuse); articles 37(a) and 28 (torture or other cruel, inhuman, or degrading treatment or punishment); article 39 (recovery and reintegration of child victims); and article 32 (economic exploitation and hazardous or harmful work). The Optional Protocol to the UNCRC on the Sale of Children, Child Prostitution and Child Pornography is complementary as it relates to some specific forms of child exploitation. Ratification of Optional

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- 11 Ministry of Gender Equality, Poverty Eradication and Social Welfare, Namibia Statistics Agency and International Training and Education Center for Health at the University of Washington, 'Violence against Children and Youth in Namibia: Findings from the Violence against Children and Youth Survey, 2019' (Government of the Republic of Namibia 2020) <<https://www.togetherforgirls.org/wp-content/uploads/2021/09/Namibia-VACS-Report-2020.pdf>>.
 - 12 Ministry of Gender, Children, Disability and Social Welfare of the Republic of Malawi and others, 'Violence against Children and Young Women in Malawi: Findings from a National Survey 2013' (Government of Malawi 2014) <https://www.togetherforgirls.org/wp-content/uploads/2017/10/MLW_resources_violencereport_final.pdf>.
 - 13 Uganda Bureau of Statistics and UNICEF Uganda, 'Female Genital Mutilation in Uganda' (2020) <https://www.unicef.org/uganda/media/7996/file/FGM%20Evidence%20from%20Uganda_Policy%20Brief_29th%20Sept%202020.pdf>.
 - 14 Uganda Child Protection Sub-Working Group, 'Terms of Reference, Child Protection Sub Working Group – National Level, Uganda Refugee Response' <<https://data2.unhcr.org/en/documents/download/85579>>.

Protocol is not as widespread as the UNCRC which has almost universal ratification. The UNCRC, its Optional Protocol on the Sale of Children, and the guidance issued by the Committee on the Rights of the Child provides authoritative direction to state parties to end all forms of violence against children.

The Committee on the Rights of the Child has made increasing reference to mandatory reporting schemes over time. A requirement for institutions to report and review any violent incidents was briefly mentioned in General Comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.¹⁵ In 2011, the Committee issued General Comment No. 13 on the right of the child to freedom from all forms of violence to guide states parties on their obligations under article 19 of the UNCRC. General Comment No. 13 provides a non-exhaustive list of forms of violence including neglect or negligent treatment; mental violence; physical violence; corporal punishment; sexual abuse and exploitation; torture and inhuman or degrading treatment or punishment; violence among children; self-harm; harmful practices; violence in the mass media and through information and communications technologies; and institutional and system violations of child rights. The Committee elaborates on all of the protective measures set out in paragraph 2 of article 19, from prevention to identification, reporting, referral, investigation, treatment, follow-up, and judicial involvement as appropriate.¹⁶ In explaining the various aspects of reporting, the Committee states that:

‘In every country, the reporting of instances, suspicion or risk of violence should, at a minimum, be required by professionals working directly with children. When reports are made in good faith, processes must be in place to ensure the protection of the professional making the report.’¹⁷

The Committee, therefore, endorses some form of mandatory reporting as a link in the chain of protective measures required under article 19. The Committee does not prescribe any limitations on the *types* of cases that should activate the duty and the duty is very broad relating to ‘instances, suspicion or risk of violence’. While the duty is limited to ‘professionals working directly with children’, the Committee implies this could be extended to other members

15 United Nations Committee on the Rights of the Child, ‘General Comment No. 8 (2006), The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, Inter Alia), UN Doc CRC/C/GC/8’ (2007) paras 40, 43.

16 United Nations Committee on the Rights of the Child, ‘General Comment No. 13 (2011), The Right of the Child to Freedom from All Forms of Violence’, UN Doc CRC/C/GC/13 (2011) paras 48–56.

17 *ibid.*, 49.

of the community. The Committee stresses the importance of ensuring the protection of those professionals mandated to report.

More recently, the Committee has recommended a legislative obligation to report as a key element of a holistic strategy for addressing harmful practices in Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices. The Committees observe that:

‘Individuals providing services for women and children, especially medical personnel and teachers, are uniquely placed to identify actual or potential victims of harmful practices. They are, however, often bound by rules of confidentiality that may conflict with their obligation to report the actual occurrence of a harmful practice or the potential for it to occur. This must be overcome with specific regulations that make it mandatory for them to report such incidents.’¹⁸

The obligation to report on the Joint General Recommendation/Comment is limited to ‘professionals and institutions working for and with children and women’ and a reporter must have ‘reasonable grounds’ to believe a harmful practice has or may occur. The Committees emphasise that mandatory reporting responsibilities should ensure the privacy and confidentiality of mandated reporters.¹⁹

The Committee on the Rights of the Child has also recommended the introduction of mandatory reporting obligations in its Concluding Observations to many state parties. In some instances, the recommendation to ensure mandatory reporting relates to all forms of violence, abuse and neglect.²⁰ In others, it is raised in relation to cases of violence against children with disabilities.²¹

18 Committee on the Elimination of Discrimination Against Women and Committee on the Rights of the Child, ‘Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child (2019) on Harmful Practices, CEDAW/C/GC/31/Rev.1–CRC/C/GC/18/Rev.1’ para 49 <<https://undocs.org/en/CRC/C/GC/18/REV.1>>.

19 *ibid.*, 55(j).

20 For example: United Nations Committee on the Rights of the Child, ‘Concluding Observations on the Fifth Periodic Report of the Syrian Arab Republic’ (2019) UN Doc CRC/C/SYR/CO/5 para 28; United Nations Committee on the Rights of the Child, ‘Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Belarus’ (2020) UN Doc CRC/C/BLR/CO/5-6 para 21(g); United Nations Committee on the Rights of the Child, ‘Concluding Observations on the Initial Report of the State of Palestine’ (2020) UN Doc CRC/C/PSE/CO/1 para 39(b); United Nations Committee on the Rights of the Child, ‘Concluding Observations on the Sixth Periodic Report of Hungary’ (2020) UN Doc CRC/C/HUN/CO/6 para 39(d).

21 United Nations Committee on the Rights of the Child, ‘Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Rwanda’ (2020) UN Doc CRC/C/RWA/CO/5-6 para 30(d); United Nations Committee on the Rights of the Child, ‘Concluding Observations on the Combined Second to Fifth Periodic Reports of the Cook Islands’ (2020) UN Doc CRC/C/COK/CO/2-5 para 35(c).

In many instances, the recommendation relates to mandatory reporting of cases of child sexual abuse and exploitation.²² The Committee does not expressly state whether mandatory reporting obligations should be codified in legislation but refers to mechanisms, procedures, guidelines, and protocols.

The UN Special Representative of the Secretary-General on Violence against Children has unequivocally called for mandatory reporting for professionals working with children as part of legislative frameworks to end violence against children.²³ The Special Representative and the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography have also stated that some form of mandatory reporting, including by professionals who work with children, is appropriate for all societies. Notably, they limit the forms of violence to 'sexual abuse and acts of violence causing physical injury and psychological violence'.²⁴ The Special Representative and the Special Rapporteur highlight that mandatory reporting should be defined as taking into account children's rights, including confidentiality and privacy.²⁵ This contemplates potential tensions that could arise through mandatory reporting obligations, such as the need to balance children's rights to privacy with their rights to protection. This becomes especially relevant with children's access

22 For example: United Nations Committee on the Rights of the Child, 'Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Bahrain' (2019) UN Doc CRC/C/BHR/CO/4-6 para 31(d); United Nations Committee on the Rights of the Child, 'Concluding Observations on the Fifth Periodic Report of the Syrian Arab Republic' (n 20) para 31(a); United Nations Committee on the Rights of the Child, 'Concluding Observations on the Combined Third to Sixth Periodic Reports of Malta, UN Doc CRC/C/MLT/CO/3-6' (2019) para 27(b); United Nations Committee on the Rights of the Child, 'Concluding Observations on the Combined Second and Third Reports of Botswana' (2019) UN Doc CRC/C/BWA/CO/2-3 para 37(a); United Nations Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of Cabo Verde' (2019) UN Doc CRC/C/CPV/CO/2 para 46(c); United Nations Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Italy' (2019) UN Doc CRC/C/ITA/CO/5-6 para 21(g); United Nations Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Rwanda' (n 21) para 26(a); United Nations Committee on the Rights of the Child, 'Concluding Observations on the Combined Second to Fifth Periodic Reports of the Cook Islands' (n 21) para 30(e).

23 Office of the Special Representative of the Secretary-General on Violence against Children, 'Keeping the Promise: Ending Violence against Children by 2030' (United Nations 2019) 30 <https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/keeping_the_promise.pdf>.

24 Office of the Special Representative of the Secretary-General on Violence against Children and Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, 'Safe and Child-Sensitive Counselling, Complaint and Reporting Mechanisms to Address Violence against Children' (United Nations 2016) 11 <https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/publications/9_safe_and_child-sensitive_counselling_complaint_and_reporting_mechanisms_to_address_violence_against_children.pdf>.

25 *ibid.*, 20.

to confidential medical advice and counselling, including reproductive health-care.²⁶

4.2.2 African Charter on the Rights and Welfare of the Child (ACRWC)

The ACRWC has several articles setting out children's rights to protection from violence. The most relevant is article 16 (abuse and torture), with significant parallels to article 19 of the UNCRC. In addition, many dedicated articles of the ACRWC revolve around specific areas of concern for the continent. These include article 21(2) (child marriage); article 21(2) (harmful cultural practices); article 22(2) (armed conflict); article 29(1) (begging); article 27 (sexual exploitation); and article 15 (child labour).

The African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child oblige states parties to protect mandated reporters or any other person who in good faith reports an actual or suspected child marriage in their 2017 Joint General Comment on child marriage.²⁷ In General Comment No. 5 on state party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection, the Committee elaborates on the inclusion of mandatory reporting as part of child protection legislation but does not go as far as to recommend its inclusion.²⁸

4.3 MANDATORY REPORTING LEGISLATION IN FOUR COUNTRIES IN EASTERN AND SOUTHERN AFRICA

Over the last decade or so, many countries in the region have started to professionalise the workforce responsible for child protection and introduced or updated relevant legislation providing detail on investigation, reporting,

26 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (Fully rev 3 ed, UNICEF 2007) 267 <https://www.unicef.org/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf>.

27 African Commission on Human and Peoples' Rights and African Committee of Experts on the Rights and Welfare of the Child, 'Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACRWC) on Ending Child Marriage' para 30 <https://www.acerwc.africa/wp-content/uploads/2018/04/ENGLISH_Joint_GC_ACRWC-ACHPR_Ending_Child_Marriage_14_March_2018.pdf>.

28 African Committee of Experts on the Rights and Welfare of the Child, General Comment No 5 on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and Systems Strengthening for Child Protection' 22.

monitoring, and follow-up of cases of child abuse and neglect.²⁹ Despite high rates of violence against children reported in nationally representative surveys, the number of official reports to authorities is low. This section identifies and critically examines legislation that obligates professionals or community members to disclose child abuse in South Africa, Uganda, Namibia, and Malawi.

South Africa has provided for mandatory reporting since the adoption of the Child Care Act of 1983. The relevant provision was amended in 1991 and again in 1996 to provide for a more extensive system with criminal sanctions for breach.³⁰ Mandatory reporting was also included in the superseding Children's Act of 2005. South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (commonly referred to as the 'Sexual Offences Act') also requires persons to report knowledge of a sexual offence against a child. Malawi introduced mandatory reporting in the Child Care, Protection and Justice Act of 2010. Uganda introduced an express obligation for professional groups in the Children Act of 2016, although a general duty for community members to report infringements of children's rights existed in earlier legislation. Uganda's Prohibition of Female Genital Mutilation (FGM) Act 2010 also mandates reporting. In Namibia, the duty was introduced in the Child Care and Protection Act of 2015, which came into force in January 2019.³¹ See summary in Table 1.

Table 1: Legislation containing reporting duties in South Africa, Uganda, Namibia and Malawi (as of March 2021)

<i>Country</i>	<i>Legislation</i>
<i>South Africa</i>	Children's Act No. 35 of 2005 and its amendment 41 of 2007, section 110 Criminal Law (Sexual Offences and Related Matters) Amendment Act ('Sexual Offences Act') 2007, section 54
<i>Uganda</i>	The Children Act (Chapter 59) 2016, sections 42A, 11 Prohibition of Female Genital Mutilation Act 2010, section 16
<i>Namibia</i>	Child Care and Protection Act 3 of 2015, section 132
<i>Malawi</i>	Child Care, Protection and Justice Act 2010, sections 33-36, 75

29 Afroz Kaviani Johnson and Julia Sloth-Nielsen, 'Child Protection, Safeguarding and the Role of the African Charter on the Rights and Welfare of the Child: Looking Back and Looking Ahead' (2020) 20 African Human Rights Law Journal 643.

30 Julia Sloth-Nielsen, 'Chapter 7 Child Protection' in CJ Davel and A Skelton (eds), *Commentary on the Children's Act* (6th edn, Juta & Company 2013).

31 Republic of Namibia, 'Government Gazette No. 6829' <https://laws.parliament.na/cms_documents/6829-868a18e3f3.pdf>.

4.3.1 Mandated reporter groups

In all four jurisdictions, medical practitioners are prescribed as mandated reporters in child protection legislation. Aside from this similarity, there is significant variation in each country on who must report. South Africa's legislation has followed the US approach of progressively increasing the range of mandated reporters.³² The occupations currently mandated to report constitute:

'... 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 (section 110(1)).'

Proposed amendments expand this list to include any 'officer of the court', 'official working for home affairs', 'ward councillors', 'social service practitioner' (replacing social service professional and social worker) and 'any person working with children'.³³ While South Africa has an expansive list, it appears to be the most restricted compared to the other three countries.

Namibia's list is arguably broader as it is non-exhaustive, making the duty mandatory for:

'... a person who performs professional or official duties with respect to children *inclusive of* school principal, teacher, medical or dental practitioner, pharmacist, school counsellor, dentist, psychologist, psychological counsellor, nurse, physiotherapist, speech therapist, occupational therapist, traditional leader, traditional health practitioner, legal practitioner, religious leader, labour inspector, social worker in private practice or employed by a child protection organisation or a member of staff at a place of safety or a facility.' (*emphasis added*) (section 132(2))

Both South Africa and Namibia's legislation provides for voluntary reporting by so-called 'community reporters' (i.e. members of the general public) (sections 110(2) and 132(3), respectively). During the consultation process for the legislation, the South African Law Commission recommended that mandatory reporting be confined to the categories of persons set out in the former Act and that the emphasis for the general population be on voluntary reporting

32 South African Law Commission, 'Review of the Child Care Act, Discussion Paper 103, Project 110' (South African Law Commission 2001) 427 <<https://www.justice.gov.za/salrc/dpapers/dp103.pdf>>.

33 Department of Social Development, 'Invitation to Comment on the Children's Amendment Bill 2018' <https://www.gov.za/sites/default/files/gcis_document/201810/42005gon1185.pdf>.

based on public education and awareness-raising.³⁴ This was motivated by research from other countries that indicated community reporting had led to large numbers of unsubstantiated reports, which took up resources for investigation and follow up.³⁵ During consultations for Namibia's legislation, public opinion was divided on whether mandatory reporting should apply only to professionals or to the general population. Ultimately, the legislation only included mandatory reporting for professionals and voluntary reporting for other people. The rationale was two-fold: to focus resources on assisting children rather than prosecuting members of the public for failing to report abuse; and that public awareness campaigns would be more effective than criminal sanctions to encourage voluntary reporting.³⁶

In Uganda, mandatory reporting is only applicable to doctors, teachers, social workers and Local Councillors at 'LC I' or village level, the lowest political-administrative unit (section 42A(3)). Malawi mandates only two occupations: medical officer and childcare provider (sections 33(1) and 35(1)). However, the reporting duty is also applied to a family member of a child, as well as a community member (sections 34(1) and 36(1)). With no definition of a 'community member', this arguably makes all residents of Malawi mandated reporters. As well as these specific provisions that appear to focus on cases of child abuse and neglect, Uganda and Malawi have another provision for community members under sections 11 and 75, respectively. Community members are required to report infringements of a child's rights and neglect. This provision is difficult to reconcile with the narrower duty. The motivation or justification for the inclusion of this provision is not discussed in any of the available documentation.

Aside from child protection legislation, South Africa's Sexual Offences Act mandates 'a person' to report sexual offences against children (sections 54(1)(a)). This blanket approach has been critiqued as imposing reporting obligations on persons who cannot have been contemplated by the legislature, such as the child themselves and their parents.³⁷ Uganda's Prohibition of FGM Act similarly mandates reporting of offences or intent to commit offences under the Act by 'a person' (section 16(1)).

34 South African Law Commission (n 32) 449.

35 Julia Sloth-Nielsen, 'Section 54: Obligation to Report Commission of Sexual Offences against Children or Persons Who Are Mentally Disabled', *Sexual Offences Commentary: Revision Service 2* (JUTA 2019) ss 18–5.

36 Legal Assistance Centre, 'Public Participation in Law Reform: Revision of Namibia's Draft Child Care and Protection Bill: Final Report' (Ministry of Gender Equality and Child Welfare, Legal Assistance Centre, UNICEF 2010) 25 <http://www.lac.org.na/projects/grap/Pdf/ccpa-revision_of_draft.pdf>.

37 Sloth-Nielsen (n 35) 18–5.

4.3.2 Circumstances and thresholds for reporting

The types of abuse and neglect (or the harm caused by them) that activates a reporting duty differs in each country. In South Africa, mandatory reporting under the Children's Act focuses on abuse that causes physical injury, any form of sexual abuse, and deliberate neglect (section 110(1)). Any person can report if there is a child 'in need of care and protection' (section 110(2)), but this does not activate a mandatory reporting obligation for professional occupations. In comparison to the other countries, South Africa's legislation has the narrowest scope in this dimension.

Malawi's child protection legislation similarly focuses on injury (physical, psychological, or emotional) because of abuse or neglect (sections 33-36). However, as noted, Malawi has another provision mandating community members to report infringement of a child's rights or a parent or caregiver's refusal or neglect in providing adequate food, shelter, clothing, medical care, or education (section 75(1)). This provision widens the scope of circumstances that activate mandatory reporting for community members. Uganda has extremely wide circumstances activating the reporting duty. Mandated professionals must report 'any matter which affects the wellbeing of a child under their charge' (section 42A(3)). Voluntary reporting is arguably narrower as it relates to a child in need of care and protection or abuse which may result in injury (section 42A(2)). Uganda also has the same provision as Malawi concerning community members having to report an infringement of a child's rights or a parent or caregivers' refusal or neglect (section 11).

Namibia's mandatory reporting obligations have broad application to a child that 'may be or is in need' of care and protection (section 132(1)). A child in need of protective services is defined as inclusive of a child that is abandoned or orphaned; engaged in harmful or likely harmful behaviour; living or working on the streets; neglected, maltreated or physically or mentally abused or likely to be; addicted to alcohol or drugs; in conflict with the law; an unaccompanied foreign child; chronically or terminally ill without a suitable caregiver; or kept in overcrowded, unsanitary or dangerous premises. A child *may* be a child in need of protective services if they are a victim of child labour or trafficking; in a child-headed household; exposed to circumstances that may seriously harm their physical, mental, emotional or social well-being; without a suitable caregiver; below 16 years and pregnant or with any sexually transmitted infection; the victim of a serious crime; subjected to sexual exploitation; living in a violent family environment; below 16 and habitually absent from school; whose parent, guardian or caregiver unreasonably withholds consent to necessary medical or therapeutic intervention; and reasonably suspected of being a child in need of protective services (section 131).

4.3.3 States of mind and temporal situation that activate the reporting duty

There are also differences across the region about the state of mind and temporal situation that activate the reporting duty. South Africa's legislation has a high threshold, with the concept of a 'conclusion on reasonable grounds.' This implies that some investigation must have taken place for a reporter to weigh up "'evidence" to determine whether the required "conclusion" has resulted in his or her (professional) opinion'.³⁸ The concept of 'belief on reasonable grounds' is used for voluntary reporting by community members in South Africa, voluntary reporting by any person in Uganda and Namibia, and professional mandated reporters in Malawi. Other concepts used are 'information that gives rise to a suspicion' (Namibia) and an extremely wide ambit for professional mandated reporters in Uganda with 'any matter that affects child wellbeing'. Malawi and Uganda's provision relating to infringement of a child's rights provision requires 'evidence'. Without dedicated guidance, training and mentoring on these standards, it is questionable whether they would be understood by professional mandated reporters, let alone community reporters.

There are also differences in whether the reporting duty is applied to past, currently occurring, or perceived risk of future abuse. In general, the reporting duty focuses on cases of suspected past abuse. There are two exceptions. First, the infringement of a child's rights provisions in Uganda and Malawi appears only to relate to present circumstances by the use of the present tense (i.e. 'are being'). Second, Namibia extends the duty for professionals for possible future harm as it applies where the reporter has information that gives rise to a suspicion 'is being or likely to be' harmed. Again, mandated reporters would require dedicated guidance, training and mentoring to develop the capacity to assess the probability of future harm.

4.3.4 When, to whom and in what form must the report be made?

South Africa's Children's Act is silent on when a report must be made, although Hendricks suggests section 110 and the reporting Form 22 imply that reporting of the suspicion of abuse must be done as soon as the suspicion is formed on reasonable grounds.³⁹ The Sexual Offences Act provides that reporting of a sexual offence must be done 'immediately'. Likewise, Malawi's Child Care, Protection and Justice Act requires medical officers, family members and community members 'immediately' to report. Curiously, the word 'immediately' is missing from the clause for childcare providers. In the absence

38 Sloth-Nielsen (n 30).

39 Melany Leonie Hendricks, 'Mandatory Reporting of Child Abuse in South Africa: Legislation Explored' (2014) 104 South African Medical Journal 550, 551.

of any documentation to articulate why it would be different for childcare providers, this is assumed to be a typographical error. Uganda and Namibia's child protection legislation do not specify a timeframe. Under Uganda's Prohibition of FGM Act, failure to make a report within 24 hours exposes a person to a penalty.

Across the four countries, reports should generally be made to police or social welfare/child protection authorities. Malawi's legislation also enables community members to make reports to chiefs, in recognition of the important role of traditional leaders. Uganda's and Malawi's provisions on infringement of a child's rights mandate community members to make the report to local government authorities. No detail is specified on the form of reports for Uganda or Malawi. However, South Africa and Namibia refer to a prescribed form in the legislation. South Africa's five-page Form 22 is quite extensive and contains many elements to be provided including the child's details; evidence of the alleged abuse or neglect (bruises, cuts, abrasions, fractures, fatal injuries, welts, head injuries etc); the possible perpetrator and his or her identifying details; any previous history of abuse known to the informant; any prior children's court interventions; details of the circumstances in which the present abuse occurred; medical interventions; previous social work or police interventions; and the capacity in which the informant is making the report. Namibia does not appear to have yet gazetted the form to be used by professional reporters.

4.3.5 Penalties for non-compliance and protection for reporters

Penalties for non-compliance with mandatory reporting obligations are present in all countries, but not necessarily under child protection legislation. In South Africa, failure to report when legally obligated to do so can give rise to a criminal sanction under section 305(c) of the Children's Act. Under the Sexual Offences Act, penalty for non-compliance is a fine or imprisonment for a period not exceeding five years or both. Medical professionals may also be subject to a fine under the Health Professions Council of South Africa guidelines and the Health Professions Act No. 56 of 1974. The guidelines urge members to report any unethical or illegal conduct, and the Act provides that the Council 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.⁴⁰

There is no penalty under Uganda's child protection legislation. Under the Prohibition of FGM Act, the penalty for non-compliance is a fine not exceeding twelve currency points or imprisonment not exceeding six months or both (section 16(2)). In Namibia, the penalty for non-compliance is a fine not exceeding N\$20,000 or imprisonment for a period not exceeding five years

40 *ibid.*, 552.

or both (section 132(6)). In Malawi, the penalty differs according to the reporter – for medical officers, the penalty is a fine of K20,000 and imprisonment for six months (section 33(2)); for members of the family, they shall be released on a binding agreement on conditions to be determined by the court (section 34(2)); for a childcare provider or community members, the penalty is a fine of K10,000 and imprisonment for three months (sections 35(2) and 36(2)). There is no penalty for section 75 of Malawi’s legislation nor section 11 of Uganda’s child protection legislation with respect to infringement of a child’s rights. This suggests the provisions seek to connect vulnerable children and families with the local authorities for assistance rather than pursue punitive action.

Confidentiality and immunity for reporters are not universal features. Only Namibia provides that the reporter is entitled to have their ‘identity kept confidential if the report is made in good faith unless the interests of justice require otherwise and are not subject to civil liability... unless the person makes the report knowing it to be false or misleading’ (section 132(5)). Namibia also directly addresses professional privilege stating the obligation still applies if the belief is based on privileged information under any law except legal professional privilege (section 132(4)). South Africa provides that a person who makes a report in good faith is not liable to civil action (section 110(3)(b)). The protection does not appear to be extended to a person who makes a report concerning a child under the Sexual Offences Act but does apply to a person who makes a report concerning someone with a mental disability (section 54(2)(c)).

Uganda’s Prohibition of FGM Act makes it an offence to threaten, harm or in any way inhibit a person who is reporting or about to report an offence under the Act (section 16(3)). Malawi provides no protections to reporters.

4.3.6 Response triggered by a mandatory report

The legislative provisions relating to the response triggered by a mandatory report differs across the four jurisdictions. South Africa’s Children’s Act sets out clear steps for action on receipt of a report by a police official, provincial department of social development and designated child protection organisation. Under section 110(4), police officials must ensure the safety and immediate well-being of the child and then hand the matter to the department of social development or a designated child protection organisation within 24 hours. Under section 110(5), the department or designated child protection agency should commence an initial assessment followed by an investigation into the truthfulness of the report if the report is not obviously frivolous or unfounded. If substantiated, they must initiate proceedings for the child’s protection. Should a designated child protection agency receive the report, they must report the matter to the provincial department of social development (section 110(6)(a)). The provincial department is responsible for monitoring the progress

of all matters reported to it (section 110(6)(b)). After investigating, section 110(7) sets out the options available to support the child, including counselling, mediation, prevention and early intervention services, and steps contemplated in chapter 9 about a child in need of care. Police must be notified if there is a possible commission of an offence (section 110(8)). The regulations prescribe national standards and codes of good practice to guide designated state and non-state organisations and social workers providing designated child protection services; a risk assessment framework to guide decision-making; criteria for determining suitable persons who may conduct investigations into cases of child abuse or neglect; and the powers and responsibilities of such persons.

Uganda's Children Act closely mirrors South Africa's law with some notable differences. Rather than clearly differentiating the role of police officials and social welfare or designated child protection organisations, section 42A(4) provides that any of those entities who receive the report are responsible for making the initial assessment, carry out the investigation unless the report is frivolous or obviously unfounded, and if substantiated, initiate proceedings for the protection of the child. Likewise, any of the entities can take remedial measures or initiate action for longer-term protection (section 42A(7)). The probation or social welfare officer is responsible for monitoring the progress of all matters reported (section 42A(6)). The 'designated child protection organisation' is defined as including a Local Council, medical practitioner, probation and social worker (section 42A(9)). In Uganda, Local Councils operate according to customary law and the exercise of discretion, but Driscoll notes they have been largely non-existent or inoperable for much of the last two decades.⁴¹ The drafting of these clauses blurs the respective responsibilities of duty-bearers and could constrain effective monitoring and accountability under the Act.

Namibia's scheme is distinct. If a report received 'creates a reasonable suspicion that a crime has been or will be committed' the police officer or social worker must make an initial assessment of the report within 24 hours to establish whether the child's safety or wellbeing appears to be at imminent risk (section 134(2)). If in the best interests of the child, the police officer or social worker can initiate action to remove a child or an alleged offender from the home or place where they reside (section 134(2)(a) and (b)). If the report is made to a member of the police or to a social worker who is not a designated social worker, that member of the police or social worker must, in addition to the initial assessment, submit the report and information on any steps taken to a designated social worker within 48 hours (section 134(3)). The designated social worker must then report the matter and any steps taken to

41 Jennifer J Driscoll, 'The Role of Para Social Workers in Rural Communities in Uganda: Strengthening Community Resilience for the Protection of Children' (2020) 29 *Child Abuse Review* 416, 417.

the Director responsible for child welfare services in the Ministry, and start an investigation as elaborated in section 139 (section 134(4)).

Malawi has no provisions regulating what action must occur because of the report. Worthy of note is the unique provision in Malawi that chiefs can also receive mandatory reports. With no legislative or supplementary guidance, it is not clear if it is intended that chiefs make decisions themselves based on customary law. South Africa's Sexual Offences Act and Uganda's Prohibition of FGM Act do not detail any action that the receiver of the report is required to undertake.

4.4 DISCUSSION: CHALLENGES, GAPS, AND OPPORTUNITIES

The above analysis indicates significant variance in mandatory reporting legislation in each country. South Africa has had a mandatory reporting duty for the longest period and legislative amendments to that duty over time that provide for a more extensive system of mandatory reporting. The mandatory reporting provisions in child protection legislation in Uganda, Namibia and Malawi are still in the form as introduced, as part of legislative reform over the last decade to adopt more modern and comprehensive child protection legislation. Setting aside the provision that appears in both Uganda and Malawi's child protection legislation requiring community members to report infringement of a child's rights, Uganda's mandatory duty for professionals applies to the smallest category of persons (doctors, teachers, social workers, and local councillors) but arguably applies in the widest set of circumstances requiring professionals to report 'any matter which affects the wellbeing of a child under their charge'.

The application of the duty in Namibia is very broad applying to 'a person who performs professional or official duties with respect to children'. The non-exhaustive list of persons includes those who would have contact with children in community or religious organisations and institutions, reflective of more recent attention to child abuse in organisational settings. The circumstances in which a professional must report in Namibia are extremely broad. The duty in Malawi extends beyond professions to include community members giving it the widest reach. However, the circumstances in which a person must report are more narrowly defined.

South Africa's child protection legislation is the most specific with a long but definitive list of persons to whom the duty applies. From a safeguarding perspective, it is noteworthy that volunteer workers, as well as staff in institutions, are included in the Act. The duty to report in South Africa is activated when a professional concludes on reasonable grounds that a child has suffered physical injury due to abuse, been sexually abused, or deliberately neglected. These categories are the narrowest of the four countries and do not include psychological or emotional abuse. The current legislation removed 'nutritional

deficiency disease' that was included in previous legislation taking into account the high rates of child malnutrition in the country caused by poverty rather than deliberate neglect.⁴²

In Namibia and Uganda, the mandatory reporting duty for professionals encompasses an extremely wide ambit with no differentiation between different forms of abuse. None of the jurisdictions provides any guidance on the extent of suspected harm that activates the reporting duty, i.e. 'significant' or otherwise. The Committee on the Rights of the Child has not provided any guidance to state parties in this respect. However, one frequent criticism of mandatory reporting in high-income contexts is that mandatory reporting opens the system up for reports of a less serious nature and risks overloading child protection services, potentially compromising timely assistance to children at high risk.⁴³ The value of such broad schemes in countries where the formal child protection systems are still in their relative infancy is even more fraught. This section will elaborate on the key gaps and challenges in the implementation of mandatory reporting schemes in countries with less developed child protection systems and provide some policy recommendations and suggestions for further research.

4.4.1 Responsive capacities do not match legislative ambition

In considering the introduction of mandatory reporting for 'developing countries' where economic resources may be extremely limited, Mathews recommends a nuanced and focused approach. Rather, than tackle all forms of child abuse and neglect, he suggests that a state may consider focusing on one severe problem or a small number of problems in the short term to enable a 'realistic chance of success'.⁴⁴ In fact, the original conception of the duty to reports spurred by the work of Kempe et al focused on reporting cases of suspected significant and serious harm.⁴⁵ The above analysis shows that such an approach has not been taken in these four countries despite the constrained resources for child protection services in all four countries. While the guidance from the Committee on the Rights of the Child is also very broad and does

42 South African Law Commission, 'Review of the Child Care Act Report, Project 110' (2002) 131 <https://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf>.

43 Beverly Chia Chi Liu and Michael S Vaughn, 'Legal and Policy Issues from the United States and Internationally about Mandatory Reporting of Child Abuse' (2019) 64 *International Journal of Law and Psychiatry* 219, 221.

44 Ben Mathews, 'Developing Countries and the Potential of Mandatory Reporting Laws to Identify Severe Child Abuse and Neglect' in Sibnath Deb (ed), *Child Safety, Welfare and Well-being* (Springer India 2016) 9.

45 Ben Mathews, 'Exploring the Contested Role of Mandatory Reporting Laws in the Identification of Severe Child Abuse and Neglect' in Michael Freeman (ed), *Law and Childhood Studies Current Legal Issues Volume 14* (Oxford University Press 2012) 306.

not prescribe any limitations on the types of cases that should activate mandatory reporting, the duty is situated within the national child protection system and multisectoral and comprehensive responsive capacities.⁴⁶

The limitations of national child protection systems and multisectoral capacities in the region are well-documented. Even South Africa, an upper-middle-income country with arguably the most developed child protection system in Eastern and Southern Africa, has low social worker to population ratios,⁴⁷ and struggles to meet the needs of child victims of violence.⁴⁸ Social workers lament inadequate supervision and overburdened caseloads.⁴⁹ A policy brief from the Children's Institute at the University of Cape Town concludes that despite South Africa's comprehensive law and policy, practitioners fail to identify children at risk, and manage cases poorly. Few children and families have access to therapeutic care and support, and different professions do not work together.⁵⁰

Even more untenable social worker to child population ratios are found in Namibia and Malawi, with one state (child) social worker serving 12,277 children in Namibia⁵¹ and one child protection worker serving 10,875 children in Malawi.⁵² In Uganda, there are probation and social welfare officers at the district level but no state social workers at lower levels providing prevention and response services.⁵³ Visible government budget allocation towards child protection services is low and this directly impacts the effective function-

46 United Nations Committee on the Rights of the Child, General Comment No. 13 (2011), The Right of the Child to Freedom from All Forms of Violence (n 16) para 49.

47 Hendricks (n 39) 550.

48 United Nations Committee on the Rights of the Child, Concluding Observations on the Initial Report Submitted by South Africa under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography CRC/C/OPSC/ZAF/CO/1 (2016) para 43.

49 Marianne Strydom, Ulene Schiller and Julie Orme, 'The Current Landscape of Child Protection Services in South Africa: A Systematic Review' (2020) 56 *Social Work/Maatskaplike Werk* 396 <<https://socialwork.journals.ac.za/pub/article/view/881>>.

50 Lucy Jamieson, Shanaaz Mathews and Lizette Berry, 'Strengthening the Child Protection System in South Africa' (Children's Institute, University of Cape Town 2017) <http://childrencount.uct.ac.za/uploads/publications/2017%20Jamieson%20et%20al_Strengthening%20the%20Child%20ProtectionSystem%20brief.pdf>.

51 UNICEF Namibia, 'Children and the Namibian Budget: Social Assistance and Welfare 2017/2018' (2017) 3 <<https://www.unicef.org/esa/media/1006/file/UNICEF-Namibia-2017-Social-Assistance-and-Welfare-Budget-Brief.pdf>>.

52 UNICEF Malawi, '2018/19 Child Protection Budget Brief' (2018) <<https://www.unicef.org/malawi/reports/child-protection-budget-brief>>.

53 Ministry of Gender, Labour and Social Development, 'Functional Review of the Government Social Service Workforce in Relation to Child Protection' (2019) <https://bettercarenetwork.org/sites/default/files/2020-10/Functional%20Review%20Final%20Report%20_April_2019.pdf>.

ing of the workforce.⁵⁴ In South Africa, non-profit organisations receive some subsidies to provide statutory services nationwide.⁵⁵ Due to limited public funding, community volunteers and civil society organisations play a large role in preventing and responding to violence at the community level in all countries.⁵⁶

Police and justice sectors are similarly constrained, and children's contact with police and the courts can compound their trauma. Research with girls and women who experienced sexual violence in Malawi, for example, found several discouraging factors that including the failure of police to arrest known perpetrators, cases being 'stuck' at various junctures in the criminal justice system, police requesting transport money or fuel from victims to take action, police allowing cases to be 'withdrawn' at the request of family members, poor administration of court case records, and humiliating treatment or disappointing outcomes of court processes.⁵⁷

Given the high rates of child abuse reported through nationally representative surveys and the limited human and financial resources allocated to protect children, it is questionable whether mandatory reporting regimes in Eastern and Southern Africa will achieve their intended aims. Bringing in mandatory reporting without investment and extensive work to improve the child protection system risks, at best, being ineffective. At worst, it could be harmful to children. There is a risk that a child could be further abused or insufficiently protected if a formal report to authorities is made. Some accounts from mandated reporters in high-income and middle-income countries reveal children whose abuse intensified after a report was filed, foster care placements that were perceived to be worse than children's home environment, and the death of children after intervention.⁵⁸ McTavish et al. suggest such concerns may be especially salient in countries where child protection systems are not well developed or do not function properly.⁵⁹ There is a related risk that

54 UNICEF Namibia (n 51); Ministry of Gender, Labour and Social Development (n 53); Strydom, Schiller and Orme (n 49); UNICEF Malawi, '2019/2020 Child Protection Budget Brief' (2020) <<https://www.unicef.org/malawi/reports/child-protection-budget-brief-20192020>>.

55 Strydom, Schiller and Orme (n 49) 384.

56 UNICEF Eastern and Southern Africa, 'Strengthening the Child Protection System to End Violence against Children in Eastern and Southern Africa' (2021) 7 <<https://www.unicef.org/esa/media/9121/file/Strengthening-CP-End-VAC-2021.pdf>>.

57 UNICEF Malawi and Judiciary of Malawi, 'Access to Criminal Justice Services: The Case of Survivors of Sexual Violence in Malawi' (2019) <<https://www.unicef.org/malawi/media/1931/file/The%20case%20of%20survivors%20of%20sexual%20violence%20in%20Malawi.pdf>>.

58 Jill R McTavish and others, 'Mandated Reporters' Experiences with Reporting Child Maltreatment: A Meta-Synthesis of Qualitative Studies' (2017) 7 *BMJ Open* e013942, 11.

59 *ibid.*

parents or caregivers will avoid formal services or avoid disclosing important information to professionals due to fears about reporting.⁶⁰

Parallels may be drawn with ethical dilemmas in the realm of child safeguarding in humanitarian and development contexts where there is a requirement from donors to introduce policies and procedures that require reporting to authorities without consideration of the capacities of the formal system to respond and community practices for dealing with child abuse.⁶¹ The constraints in the formal system have been discussed above including limited human and financial resources, poor capacity in understanding, identifying, and investigating child abuse, and unstable criminal justice processes. While legislation or policies can help frame normative practice, they must be culturally and contextually suitable. There is scope to explore if and how customary law and informal community practices could support the objectives of mandatory reporting legislation.

4.4.2 Lack of administrative data and empirical research to measure impact

With a purported aim of protecting children from harm, the key measure for determining the efficacy of mandatory reporting laws is to assess whether, on balance, they create a better situation for children. At present, there is a lack of administrative data or empirical research to conclude the efficacy of the regimes in South Africa, Uganda, Namibia, or Malawi. There are no evaluations of the effectiveness of mandatory reporting legislation. Further, statistics of reports or notifications to authorities under legislation are not available. This may be due to the under-developed administrative data systems for child protection in the region. The Committee on the Rights of the Child has highlighted gaps and recommended further action to improve data collection in its Concluding Observations for all four countries.⁶² At this stage,

60 Jill R McTavish and others, 'Children's and Caregivers' Perspectives about Mandatory Reporting of Child Maltreatment: A Meta-Synthesis of Qualitative Studies' (2019) 9 *BMJ Open* e025741, 5–6.

61 Afroz Kaviani Johnson and Julia Sloth-Nielsen, 'Safeguarding Children in the Developing World – Beyond Intra-Organisational Policy and Self-Regulation' (2020) 9 *Soc. Sci.* 19, 14.

62 United Nations Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations of the Committee on the Rights of the Child: Uganda CRC/C/UGA/CO/2 (2005) paras 22–23; United Nations Committee on the Rights of the Child, Concluding Observations on the Consolidated Second and Third Periodic Reports of Namibia, Adopted by the Committee at Its Sixty-First Session (17 September–5 October 2012) CRC/C/NAM/CO/2-3 (2012) paras 18–19; United Nations Committee on the Rights of the Child, Concluding Observations on the Initial Report Submitted by South Africa under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (n 48) paras 13–14; United Nations Committee on the Rights of the Child, Concluding Observations on the Combined Third to Fifth Periodic Reports of Malawi CRC/C/MWI/CO/3-5 (2017) para 9.

therefore, assessment of the efficacy of mandatory reporting legislation is speculative and deserves empirical examination.

4.4.3 Guidance, support, and protection for mandated reporters

If the state mandates individuals with a duty to report child abuse, it follows that the state should also ensure those individuals are aware of the duty, provided with adequate guidance and support to discharge the duty effectively, have their identities protected and are provided immunity from legal liability including for torts.

The Committee on the Rights of the Child states that all who come in contact with children should be aware of risk factors and indicators of violence, receive guidance on how to interpret such indicators, and have the necessary 'knowledge, willingness and ability' to take suitable action.⁶³ This is not a simple task, especially with the standards and thresholds laid out in the legislation and the complex challenges that can arise in the context of competing children's rights. Previously in South Africa, for example, when providing children between the ages of 12 and 16 years with sexual and reproductive health services, doctors had to decide whether to provide these confidentially in line with the Children's Act or report the consensual but illegal sexual behaviour to the police in accordance with the Sexual Offences Act. This was largely resolved by amendments to the Sexual Offences Act which decriminalize consensual adolescent sexual activity following the Constitutional Court's decision in *Teddy Bear Clinic for Abused Children, and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) v. Minister Of Justice And Constitutional Development Case* (Case Number 73300/10). There is still scope for conflict, for example, in the case of a consensual sexual relationship between a 14-year old and 17-year old.⁶⁴ Strode et al suggest further debate is required on the issue in South Africa and options could include law reform to limit the nature of mandatory reporting obligations or to give service providers some discretion in determining when reporting consensual but illegal sexual activity would be in the best interests of the child.⁶⁵

In any case, there is limited information available about any educative or supportive interventions for mandated reporters in these countries. Uganda's recent functional review of the social service workforce for child protection found that 79 per cent of interviewed frontline workers had not received any orientation on amendments to the child protection legislation and that police

63 United Nations Committee on the Rights of the Child, General Comment No. 13 (2011), The Right of the Child to Freedom from All Forms of Violence (n 16) para 48.

64 Sloth-Nielsen (n 35) ss 18–6.

65 AE Strode and others, 'Reporting Underage Consensual Sex after the Teddy Bear Case: A Different Perspective' (2013) 6 South African Journal of Bioethics and Law 45, 47.

knowledge was largely limited to the penal code and police regulations.⁶⁶ These are 'professional' mandated reporters, but the legislation in all four countries also includes mandated reporters that are part of the 'informal' system such as religious leaders, traditional leaders, traditional health practitioners, local councillors and community members. This suggests a significant proportion of mandatory reporters may not be aware of their obligations and their role in protecting children from harm.

With respect to negative consequences for reporters, if individuals are legally obliged to report, it follows that they should have their identities kept confidential and be protected from adverse consequences. This is a significant gap in Uganda and Malawi's legislation with the potential to undermine its effectiveness. In line with the Committee's guidance, reporters in good faith should be reassured that the law will protect them by keeping their identity confidential and protecting them from legal liability and reprisals. Mandated reporters may also face risks to their personal safety if a report leads to adverse consequences for the child or the family. This is a significant risk in countries where the rule of law is weak and police lack basic equipment, are poorly funded and have untenable police to population ratios.

4.4.4 Improving mandatory reporting schemes in Eastern and Southern Africa

In retrospect, it could be argued that mandatory reporting legislation in the region should have been more thoroughly researched and debated before their introduction. However, the possible political and pragmatic reasons behind their inclusion should be considered. Law reform, especially in low-income countries, can be costly, complex, and infrequent. Especially in relation to children, there is frequently the desire (and pressure from development partners) to incorporate provisions that are 'best practice' and 'aspirational' rather than concerning the economic and human resources available to devote to the system at the time of drafting. Paring down the scope of mandatory reporting to focus on one form of abuse or especially severe forms of abuse on account of a lack of resources, even for the short-term, would be a difficult position to defend. In the face of widespread violence against children, it is understandable that lawmakers would seek to align domestic legislation with guidance from international treaty bodies which make no distinction between forms or thresholds of abuse.

Accordingly, it may be posited that the inclusion of the mandatory reporting obligations is – at this time – largely symbolic. There is a chasm between the system envisaged by the legislation and the practical reality of national child protection systems. Notwithstanding, the introduction of mandatory reporting may be seen as one means of catalysing social change to break the

66 Ministry of Gender, Labour and Social Development (n 53) 53.

silence about violence against children. Various cultural factors can inhibit speaking up about child abuse. In some contexts, the view prevails that child abuse is a private matter, best resolved within the family or community. While there is an important role for traditional or customary mechanisms, these can sometimes inadequately protect children's rights. The vulnerability of a child can increase when their best interests' conflict with those of their parents or family.⁶⁷

Notwithstanding some documented negative experiences of mandated reporters and caregivers in countries where research has been undertaken,⁶⁸ some argue there is not yet a better-proven system of case identification.⁶⁹ This has arguably become more apparent during the COVID-19 pandemic. Some suggest containment measures such as isolation and social distancing has impacted the identification of child abuse because those adults such as healthcare personnel, teachers and social workers who would typically recognize indicators of violence (and are mandated to report) now have more limited contact with children.⁷⁰

The sentiment behind mandatory reporting legislation may thus be viewed as part of the longer-term movement of creating an enabling environment to end violence against children. In moving towards this objective, states must ensure at least a basic level of training and professional support for mandated reporters. At a minimum, the legislation in all countries must provide necessary protections for mandated reporters and elaborate on the actions and accountabilities once a report is received by the authorities. As civil society and faith-based organisations deliver a significant proportion of services to children in the region, there should be consideration to include officers in child-serving organisations and religious ministry as mandated reporters in all jurisdictions.

States must also strengthen administrative data systems and use that data to monitor referral patterns and outcomes and understand the effectiveness and impact of mandatory reporting legislation. As resources allow, this should be complemented with dedicated research with mandated reporters and with children and families in the context of local formal and informal systems to

67 UNDP, UNICEF and UN Women, 'Informal Justice Systems: Creating a Course for Human Rights-Based Engagement' (2013) 122 <<https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2013/1/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf>>.

68 McTavish and others (n 58); McTavish and others (n 60).

69 Ben Mathews and Donald C Bross, 'Mandated Reporting Is Still a Policy with Reason: Empirical Evidence and Philosophical Grounds' (2008) 32 *Child Abuse & Neglect* 511, 513.

70 Mark L Kovler and others, 'Increased Proportion of Physical Child Abuse Injuries at a Level I Pediatric Trauma Center during the Covid-19 Pandemic' [2020] *Child Abuse & Neglect* 104756, 5; United Nations Children's Fund, 'Protecting Children from Violence in the Time of COVID-19: Disruptions in Prevention and Response Services' (UNICEF 2020) 3 <<https://www.unicef.org/media/74146/file/Protecting-children-from-violence-in-the-time-of-covid-19.pdf>>.

address abuse. By building up reliable national evidence, states can develop and refine the policy and legislative responses. Informed by data and research, jurisdictions may then consider the effectiveness of mandatory reporting across abuse types and severity and make necessary amendments or improvements. Genuine and meaningful child participation in future policy development would also support improving the effectiveness of the child protection system and inform the potential focus of training and capacity building for mandated reporters.

There is also arguably scope for the African Committee of Experts on the Rights and Welfare of the Child to elaborate on guidance for African states with more regional specific nuances and to facilitate learning across the region. As of the time of writing there is an interesting example of intergovernmental cooperation with the Council of Europe drafting a recommendation on mandatory reporting containing possible guidelines.⁷¹ Such international and regional guidance and dialogue can be catalytic for domestic legal and policy reform, especially in low-income contexts with limited resources to invest in legal and policy research.

4.5 CONCLUSION

This paper has examined international and regional child rights law as well as commentary and recommendations of respective treaty bodies and mandate holders as they relate to the mandatory obligations to report violence against children. Employing comparative legal analysis, this article scrutinised legislative mandatory reporting duties that exist in four jurisdictions in Eastern and Southern Africa. By and large, the schemes proposed by the legislation do not reflect the resource capacity of the countries and no data exist to indicate whether the laws have achieved their aim in identifying children at risk and protecting children from harm.

Despite these limitations, it is acknowledged that there can be a desire in the legislative drafting process in low- and middle-income countries to articulate aspirational provisions rather than ones that can be feasibly implemented within the country's available resources at the time of drafting. In this respect, this article suggests that mandatory reporting legislation is useful in that it contributes towards building an enabling environment to end violence against children. However, such legislation may be tokenistic and potentially under-

71 Council of Europe, Children's Rights Division, Directorate of Anti-Discrimination, and Directorate General II Democracy, 'Steering Committee for the Rights of the Child (CDENF) Working Group on the Responses to Violence against Children (CDENF-GT-VAE) Meeting by Videoconference, First Meeting (23-24 June 2020, Respectively from 10 to 13 Am)' (2020) Meeting Report 6 <<https://rm.coe.int/meeting-report-of-the-first-online-meeting-cdenf-gt-vae/16809ee5fd>>.

mine the rule of law if it is not accompanied by strengthening systems of protection and addressing any conflict between formal and informal systems.

State parties must continue to invest in child protection systems to build responsive capacities. This includes building the capacity of the formal system and ensuring there are effective links with community members and informal or traditional structures that support the child protection system.⁷² Existing legislation could be strengthened by ensuring that all mandatory reporters are protected from any reprisals or liability for reports made in good faith. There is also a need to elaborate on actions to be taken by relevant duty-bearers after a report is received and to ensure the full range of people with access to children are educated and supported in complying with the legislation. This calls for continued capacity building as well as social norm change and work with communities. Finally, improving administrative data systems and use of that data to understand the effectiveness and impact of the legislation can inform future policy and legislative reform. A further stream of research concerns how customary laws and practices can complement or conflict with child protection legislation and strategies to ensure traditional and community leaders and structures are supportive of children's best interests. This calls for research with children, families, and communities, including traditional leaders, and ensuring meaningful children's participation in future policy development. There is also a potential role for the African Committee of Experts on the Rights and Welfare of the Child to elaborate on guidance for the region and global and regional sharing of experience. During the Decade of Action to deliver the Sustainable Development Goals, including target 16.2 to end all forms of violence against children, this should be a high priority.

72 UNICEF Eastern and Southern Africa (n 56) 7.