

A Comparative Analysis

The laws and procedures dealing with sexual offences against children in common law countries.

November 2015

A joint initiative between Macquarie University & HAQ: Centre for Child Rights in India



Authors

This report is the accumulated work of four undergraduate students at Macquarie University, Sydney, Australia:

Amelia Reinthal: amelia.reinthal@students.mq.edu.au

Caitlin Comensoli: caitlin.comensoli@students.mq.edu.au

Gabriel Joseph: gabriel.joseph@mq.edu.au

Katrina Dade: katrina.dade@mq.edu.au

Acknowledgements

The authors of this report greatly appreciate the time, information, insights and assistance provided by the following people and organisations:

- Bharti Ali and all her team at HAQ: Centre for Child Rights- B-1/2, Ground Floor, Malviya Nagar, New Delhi – 110017
- Samantha Gilchrist: PACE International Program Officer
- Debra Ronan: Director for PACE
- Macquarie University Law School NSW

Table of Contents

Foreword.....	4
Chapter 1: Age of Consent.....	7
Chapter 2: Mandatory and Non-Mandatory Reporting.....	26
Chapter 3: Child Sexual Assault Trials.....	63
Chapter 4: Victims Compensation & Counselling.....	82
Concluding Remarks.....	108

Foreword

Child sexual abuse is an abhorrent phenomenon which occurs globally. Of focus in this report, are the legislative and procedural responses of four common law countries (namely India, Australia, New Zealand and the United Kingdom) in the face of these heinous crimes. The protection of child rights takes a number of different forms across these common law countries and this reports aims to provide a summary of the current laws in operation dealing with child sex offences, by comparing and contrasting the position of India with those of Australia, New Zealand and the United Kingdom. By outlining the current legal mechanisms in operation across these nations we hope to provide our partner organisation (HAQ) with a substantive understanding of areas in which law reform could be considered by India and its Parliament. In our discussion we aim not only to provide information on laws and legal procedures currently operating in the specified nations, but also deliver an analysis of these mechanisms including their strengths and weaknesses. It is through this that we hope to inform discussions on law reform in India.

Laws surrounding the Age of Consent are in operation across the four countries ranging from 16-18 years old. India stands out in this particular study as being the only country to have such high restrictions on consensual sex between adolescents. While this reflects the social and cultural makeup of society, there lies a number of questions as to what other issues it creates. Arguments that are explored include its failure to modernise at the same rate of the rest of world and that it has the potential to prosecute consensual parties of similar ages, especially adolescents who are engaging in sexual experimentations. While this paper acknowledges the reluctance and difficulty in changing the age of consent in India, it goes on to argue that the implementation of legal defences may be an alternative direction. The similar- age and mistake of age defence provides avenues for which the accused can prove that he or she was of similar age to the other party, or believed they were of an age able to consent. The operations of these defences in Australia, the UK and particularly NZ highlight the importance to focus sexual offence protection measures where there is a lack of consent involving more dangerous perpetrators.

Reporting of incidents of child sexual abuse (whether legally mandated or voluntary) is clearly a vital element in the pursuit of child protection. Mandatory reporting is in place in many jurisdictions globally, including the Indian and Australian jurisdictions. Whilst mandatory reporting legislation is not in place in New Zealand or the United Kingdom, citizens still have the ability to report cases of child sexual abuse in these jurisdictions. Chapter 3 of this report analyses the legislative provisions in place in India and Australia which mandate the reporting of child sexual abuse by certain groups of individuals. The chapter then focuses on the significant barriers to reporting which are faced by individuals who are faced with a child sexual abuse situation, most especially the barriers faced by the survivors themselves. The role of helplines and other services in facilitating reporting is then noted, followed by an analysis of the practical experiences of the Indian and Australian mandatory reporting systems, and the debates for and against mandatory reporting laws. Chapter 3 aims to provide a holistic understanding of the many competing and interacting elements which influence the reporting process, not only for mandated reporters, but for those who may consider reporting child sexual abuse voluntarily. The chapter accordingly, aims to highlight the reasons why jurisdictions may or may not enact mandatory reporting laws.

It is common in all jurisdictions, given the vulnerability of children, to provide certain special measures during the trial process. These measures are aimed at protecting children and ensuring that the best quality evidence may be garnered from child witnesses. The introduction of the *POCSO Act* in India brought to the jurisdiction many measures along the same lines as those found in Australia, England and New Zealand. There are still a number of points of difference between the jurisdictions; first, in the tone of the legislation, with other jurisdictions using more victim-orientated language in their provisions. Secondly, in regards to the use of pre-recorded evidence, which whilst used in Australia, England and New Zealand is not in India. Thirdly surrounding the strength of provisions that protect children in the cross-examination process, which might consider proactive approaches such as those used in England. Finally, in respect to the use of professionals to aid communication in court, which currently in India occurs in practice, yet does not have a strong legal foundation. In the closer examination of these issues in Chapter 3, the pros and cons of

the various alternate approaches are discussed in the hopes of being able to inform further investigation into the possibility of reform.

Victims Compensation and Counselling is an essential part of the rehabilitation process.

Compensation is essential in easing the financial burden on the victims and their family during this difficult time. Counselling also plays a role in ensuring the child's mental and emotional needs are evaluated and addressed in the most appropriate way to minimise the trauma felt by the child. Comparing the four nations they all embody the notion of retribution, thus aligning each of the nations with the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. Regarding state compensation, this is available to victims of crime, however compensation amounts vary depending on jurisdiction. With that noted New Zealand is a little different as it has a no fault injury scheme which covers personal injury (which victims of crime are included) whereas NSW, UK and India have a compensation scheme for victims of crime. It is interesting to see the different criteria that the different nations possess in assigning compensation and this will be discussed further in Chapter 4. Finally counselling is part of the scheme in NSW, NZ and India, however the UK does not provide government funded counselling.

Age of Consent: A Global Issue

1. Introduction

In an aim to complete a comparative analysis on laws dealing with sexual offences against children, it seems logical to first analyse the age of consent ('AOC') across our chosen jurisdictions. In comparing such fundamental information, we are able to grasp a clearer understanding of exactly what the law's purpose is within the society it operates.

While this 'age' is an important consideration for policy makers and legal institutions, the contextual environment in making such a law is just as significant. It is through our exploration of the social and cultural environment, and its prevailing factors that we will be able to understand law¹. This discussion will go on to argue that although law may be suited to the traditional culture of the society in which it operates, it may not be simultaneously aligned to global attitudes and standards. In considering the interdependence of the 21st century through phenomena's such as globalisation, these limitations must be deliberated closely.

The AOC across all nations, is the age at which a person's consent to sexual intercourse is valid in law. Consent is a mechanism used ensure that the individual is providing a full, informed decision and is aware of the consequences².

Such information can be found in legislation across Australia, New Zealand, the UK and India, and while it is currently in operation, there are endless debates and discussions as to what this age should be set at. The fundamental issue surrounding AOC is that maturity develops at different stages, and in ignoring this and implementing such a blanket approach there is a failure to recognise individual autonomy³. While there have been talks in some jurisdictions to remove the

¹ Peter Josephson, 'The Law of Nature in the Age of Consent' (2003) 12(3) *The Good Society* 58-63.

² Ibid at 58.

³ The Department of the Attorney General, *Child Sexual Exploitation Laws* (2010) Australian Government <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(966BB47E522E848021A38A20280E2386\)~Fact+Sheet++Child+sexual+exploitation+laws+-+pdf.PDF/\\$file/Fact+Sheet++Child+sexual+exploitation+laws+-+pdf.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~Fact+Sheet++Child+sexual+exploitation+laws+-+pdf.PDF/$file/Fact+Sheet++Child+sexual+exploitation+laws+-+pdf.PDF)>.

AOC all together, a more realistic approach paralleling with competing political agendas is to consider options for reforms⁴.

When we refer to law reform, we aim to explore directions of which are necessary to modernise law and bring it in accordance with current conditions. This process aims to eliminate the defects in the law by adopting new or more effective methods of administration and dispensation of justice⁵. This process is often carried out by law reform bodies or commissions who are set up with this exact purpose and while usually done by Government, it is independent of their control.

1.1 Where does India fit in?

In considering legal reform in India as the subject matter for this discussion, we really do believe that an analysis of laws across other jurisdictions will be insightful to urge future developments. These are necessary for India to move into a 21st century along with the rest of the world. India's AOC was raised to 18 years by virtue of the enactment of the POCSO Act in 2012⁶. Through enacting such a statutory framework India aimed to maintain their duties in regards to the *International Convention of the Rights of Child* which was acceded in 1992. In undertaking all national, bilateral and multilateral measures to prevent exploitation and inducement of children in sexual related offences, India ratified the age of a child being 18 directly into domestic legal frameworks⁷. In 2013, the Indian Penal Code was also amended to recognise rape with a person below the age of 18 years as statutory rape⁸. While at the same time it also made an exception to this rule, stating that sexual acts between husband and wife will not be defined as rape if the wife is aged 15 years and above⁹. Therefore in case of marriage, the age of consent is 15 years. Putting aside the issues that child

⁴ Janine Benedet, 'The Age of Innocence: A Cautious Defence of Raising the Age of Consent in Canadian Sexual Assault Law' (October 2010) 13(4) *New Criminal Law Review: An International and Interdisciplinary Journal* 666.

⁵ Routledge, 'Law Reform' (2007) 33 *Commonwealth Law Bulletin* 3, 489.

⁶ *Protection of Children from Sexual Offences Act 2012* (POCSO Act), s2 (1) (d).

⁷ *United Nations Convention on the Rights of a Child* (1989), art1.

⁸ *The Criminal Law (Amendment) Act 2013*.

⁹ *The Indian Penal Code 1860*, s375.

marriage present to India alone¹⁰, this amendment to lowering AOC in marriage appears to protect the criminalisation of consenting parties. It now appears that there are in fact two AOC standards in India, one for marriage and the other a general rule of 18, the latter of which will be the scope for the rest of this paper¹¹.

India has engaged in endless debates as to what this age should be set in, however in 2013 there was a sense of 'agreeance and satisfaction' with the age of 18 following anti-rape ordinance and the horrific gang-rape case in Delhi 2012¹². In addition to this, there is a belief by the Government that those under the age of 18 are not prepared to handle sexual relations¹³, nor should they be exposed to the legalisation of being placed in such a situation¹⁴. Raising the age of consent has given society a greater control over the lives of young people, in particular young boys in consensual relations with girls¹⁵.

There are also arguments that suggest raising the AOC is a reflection of the interconnectedness of other widespread issues across India including child abuse, teenage pregnancies, human trafficking, rape and poverty. Furthermore there is also the cultural and social make-up of India which plays a major role, in particular the workings of the caste system and traditional religious beliefs¹⁶. The last point that needs to be recognised is that the children of India represent a gross amount of the world's population. The Government through protectionists' policies like the AOC believe that

¹⁰ *The Prohibition of Child Marriage Act 2006*, s3.

¹¹ *Protection of Children from Sexual Offences Act 2012* (POCSO Act), s2 (1) (d).

¹² *State v Ram Singh and another* SC No. 114/2013, Saket Courts, New Delhi.

¹³ Himanshi Dhawan, 'Government panel recommends brining down age of consent to 16 years' *The Times of India*, 11 July 2015, <<http://timesofindia.indiatimes.com/india/Govt-panel-recommends-bringing-down-age-of-consent-to-16-years/articleshow/48027166.cms>>.

¹⁴ Soutik Biswas, 'Should India lower the age of Consent?' *BBC News*, 16 March 2013, <<http://www.bbc.com/news/world-asia-india-21796944>>.

¹⁵ Anon, 'Consensual sex with minor not a crime, Delhi court says', *Times of India*, 26 August 2013, <http://articles.timesofindia.indiatimes.com/2013-08-26/delhi/41454391_1_minor-girl-15-year-old-girl-18-years>.

¹⁶ The Department related Parliamentary Standing Committee on Human Resource Development, *Report on the Protection of Child from Sexual Offences Bill* (2011) Parliament of India. <<http://www.prsindia.org/uploads/media/Protection%20of%20children/SCR%20Protection%20of%20Children%20from%20Sexual%20Offences%20Bill%202011.pdf>>.

setting such a conservative age of 18 as the law, has fulfilled their duties, especially those in relation to international law¹⁷.

While all these factors make it considerably difficult to legalise sexual activity younger than that of 18, a primary concern needs to be whether such a law is effective in truly protecting individuals and not creating flow on effects such as over-criminalisation. The fear that a higher AOC would lead to young men being criminalised in situations of consent is a very real consideration¹⁸. There are an abundance of cases presented to the Courts of India, whereby the parents of the female party are not in support of the consented relationship. As a result they have reported the young male adolescent to authorities whom then have a mandatory obligation to begin prosecution. Such a concern was expressed soon after the legislation was passed by ASJ Bhat, who stated such a move would open the floodgates for prosecution of boys and furthermore is an undemocratic and regressive move considering the stance of the rest of the world¹⁹.

1.2 New Zealand

In New Zealand the AOC is 16 regardless of sexual orientation and gender²⁰. Such a uniform and equal age of consent was brought in under the *Homosexual Law Reform Act* in 1986 and while such a piece of legislation seems far from that of India, it is an important consideration.

There a number of factors underlining the AOC being 16 in NZ, one being that of the cultural and historical importance of families, whanau tribes and communities in the development of a child and their future family²¹. Living together as a 'whanau' means there is a shared social responsibility to support each member particularly when a new member enters. As a result, reproduction is a sacred practice within tribes as it is viewed as a continuance of the family and its tradition. This has close

¹⁷ *United Nations Convention on the Rights of a Child* (1989), art1.

¹⁸ Anon, above n 15.

¹⁹ Ibid.

²⁰ Crimes Act 1961, s134.

²¹ Time Grimwood, 'Gillic and the Consent of Minors; Contraceptive Advice and Treatment in New Zealand' (2010) 40 *Victoria University of Wellington Law Review* 4, 743-769.

connections to the prevalence of teenage pregnancies in NZ, however a cultural and what seems legal acceptance has recognised the ability for adolescents to carry out sexual activity from the age of 16²². In considering the reality of society, the Government believes that it would be senseless to enact such legislation criminalising sexual decisions until the age of 18. In actual fact NZ have had minimal debates in raising the AOC to a position of India, and instead several discussions on lowering the age to that of 14 or 15 years old. Supporters of this move have said that such a proposed change “would bring this law much closer in reality to young people’s sex lives as they stand today²³” In doing this it would make it easier and more accessible for young people to get proper advice and support²⁴.

Although these ideas are still very much in the discussion stage and such a reform would be highly unlikely for some time, another argument coming from NZ is that it is not necessary to change AOC explicitly. Instead all that is needed is reform to education, as adolescents are going to have sex regardless and therefore why not give them an informed decision about their sexual actions²⁵.

1.3 UK

In England, Scotland, Northern Ireland and Wales the AOC under statutory legislation is 16 for both homosexual and heterosexual sex²⁶. Legislative frameworks within the UK do continue to suggest that such an age ultimately protects children, even though up to one third of teenagers are having sex before this²⁷. Similar to NZ, the UK through studies have realised that there has been a

²² Durie-Hall and D. & Metge, J. ‘Ka Tu te Puehu, Kia Mau: Maori Aspirations and Family Law’ (1992) 54 *Family Law Policy in New Zealand* 63.

²³ Jesse Peach, ‘Should the age of consent be lowered?’ *3News*, 21 November 2013 <<http://www.3news.co.nz/nznews/should-the-age-of-consent-be-lowered-2013112122#axzz3sNaHR7zz>>.

²⁴ Ibid.

²⁵ Ibid.

²⁶ *Sexual Offences Act 2003*, s42.

²⁷ Rissel, ‘First Experience of Vaginal Intercourse and Oral Sex Among a Representative Sample of Adults’ (2003) 27 *Australian and New Zealand Journal of Public Health* 133.

significant change in the amount of young people engaging in sexual activity²⁸. It is as a result of this information that the UK are having similar debates as to whether the AOC needs to be lowered in order to reflect the societal attitudes of which it is operating. The Faculty of Public Health said that society had to accept that about a third of all boys and girls were having sex at 14 or 15²⁹. In the legal system recognising this, the Faculty argue that it would be easier for these individuals to get sexual advice from general medical practitioners.

Defenders of not changing the AOC question whether reducing the age is really the most sensible way to deal with it. The current legislation has been enacted with considerations of high levels of teenage pregnancy, although there have been objections to this point as well³⁰. Furthermore by creating a legal avenue lowering the AOC, there are fears it will send a message out to the rest of society that engaging in sex between the age of 14 and 15 is acceptable, and such a message comes with great risk³¹. While there is an acceptance of a more sexualised culture, the most effective way according to the UK to tackle this is through the modernisation of sex education in schools. In the past and continuing to the current day there has been a notable 'lag' for school systems to keep up with the changing themes of society, including the technologically savvy and sexualised era of the present. There are also arguments which suggest that there should be an eradication of the blanket approach of the AOC, in that it is not at the age of 16 that an adolescent 'flicks a sexual switch on', instead research has proven that sexual feelings commence from a very young age³². In recognition of this, the UK have had numerous debates surrounding the implementation of a sliding scale of consent, which reflects that different people mature at different ages. While a similar policy will be

²⁸ Catherin O'sullivan, 'Protecting young people from themselves; reform of the age of consent laws in Ireland' (2009) 31 *Dublin University Law Journal* 386-441.

²⁹ Dr. Robinson, 'Consent to What' (1972) 122 *New Law Journal* 621-622.

³⁰ Anon, 'PM rejects call to lower age of consent to 15' *BBC News*, 17 November 2013 <<http://www.bbc.com/news/health-24976929>>.

³¹ *Ibid.*

³² Miranda Sawyer, 'Sex is not just for grown-ups' *The Guardian*, 2 November 2003 <<http://www.theguardian.com/education/2003/nov/02/schools.uk>> .

addressed in forms of legal defences later on in this discussion, the main point to realise is that criminalising youngsters below the age who are engaging in consensual sex seems inappropriate³³.

1.4 Australia

In Australia the AOC is not so straight forward, varying across the state and territory jurisdictions and depending on factors such as the nature of the sexual intercourse. The very basis of these inconsistencies correlates to the difficulty that all nations face in deciding which objective age will govern individual's actions. Nevertheless across the 6 state and 2 territories making up Australia the age is either 16 or 17, and at least through this there is only a maximum of one year in disparity. The table below can be referred to as a reflection of exactly how the laws differ within Australia, and under what piece of statute it can be found.

Table 1: Age of consent laws³⁴

State	Legislation	Age of consent
ACT	Crimes Act 1900 (Section 55)	The age of consent for sexual interactions is 16 years.
NSW	Crimes Act 1900 (Section 66C)	The age of consent for sexual interactions is 16 years.
NT	Criminal Code Act 1983 (Section 127)	The age of consent for sexual interactions is 16 years.
QLD	Criminal Code Act 1899 (Sections 208 and 215)	The age of consent for anal sex (referred to as sodomy in legislation) is 18 years, and for all other sexual acts (referred to as carnal knowledge in legislation) is 16 years.
SA	Criminal Law Consolidation Act 1935 (Section 49)	The age of consent for sexual interactions is 17 years.
TAS	Criminal Code Act 1924 (Section 124)	The age of consent for sexual interactions is 17 years.
VIC	Crimes Act 1958 (Section 45)	The age of consent for sexual interactions is 16 years.
WA	Criminal Code Act Compilation Act 1913 (Section 321)	The age of consent for sexual interactions is 16 years.

³³ Ibid.

³⁴ Child Family Community Australia, *Age of Consent Laws Resource Sheet*, Australian Government (December 2014) <<https://aifs.gov.au/cfca/publications/age-consent-laws>>.

One of the primary reason why Australia has an AOC in the first place is that it is consistent with other areas of the law which protect the innocence of the child. For example there is a common law presumption of innocence of a child under the age of 10, while there are also similar laws relating to children's evidence in criminal proceedings³⁵. According to these notions the law sees that a child's dependency and innocence make them less able to give rational thought compared to adults³⁶.

Other debates surrounding AOC in Australia, is that whether such mechanism working within the sphere if criminal law truly aims at reserving order, which it is fundamentally supposed to do. Instead does this legal framework intervene in the personal decisions of citizens and thus cross into controlling the morality of both public and private life. It is accepted in Australia that the law should reflect social need rather than moral guidance. As a result of this argument it has been questioned whether the AOC should be dismantled altogether. Nevertheless the legal provisions of AOC remain indented in domestic law and is perhaps in line with other areas of laws such as euthanasia, where it too involves acts done in private without offences to others, however clearly influence society as a whole.

Australia's discussions on changing the AOC are heavily contentious and serve the backdrop for many parliamentary discussions and legal reforms³⁷. It is made clear that there is no objective or scientific method that can be used to determine at what point a person is properly able to use their consent. This belief led to a very strong remark in the discussion surrounding the *Crimes (Amendment) Bill*³⁸, whereby it was stated that "age limits are not determined by any particular logic, but by what is acceptable to the majority at any one time...it can and ought to be varied as

³⁵ *Children (Criminal Proceedings) Act 1987* (NSW).

³⁶ Rachel Simpson and Honor Figgis for NSW Parliamentary Library Research Service, No 21/97, December 1997, *Age of Consent Briefing Paper*, 2.

³⁷ New South Wales, Parliamentary Debates, Legislative Council, 7 May 2013, 32 (Mr Robert Debus Attorney General and Minister for the Environment).

³⁸ *Crimes Amendment (Age of Consent) Bill 2007* (NSW).

conditions change....³⁹” This statement clearly sets out to all legal institutions that the AOC is a flexible subject matter, and in contrast to India’s development of AOC it is necessary to reform according to which the society it operates in. It was debated in the Royal Commission on Human Relationships in 1977 that the age should be dropped to that of 15⁴⁰. With this recommendation coming from some nearly 40 years ago, it has been argued that such a change has stronger weighting today. Similar to the discussions of other common law jurisdictions it is recognised that lowering the AOC would be a more realistic reflection. This is especially the case in Australia whereby 15 is the age in which children can leave school, find a job and become a responsible person of society. Considering that it is unrealistic to expect that adolescents will defer sexual activity until some arbitrary age of consent, supporters defend that the age should be lowered to provide the most accurate representation of social and cultural attitudes⁴¹.

2. Reforms to Consider

Amongst considering changing AOC laws directly there is also another avenue to bear in mind, that is the implementation of defences around this legislation. Such defences while slightly varying in operation have already been adopted in NZ, the UK and Australia and therefore stand as a very important consideration for that of India. The first defence is in situations where the parties of sexual engagement or conduct are of the same or similar age, i.e. Similar-age defence. The second is where there has been reasonable mistake as to the knowledge of age between the parties, i.e. reasonable mistake of age defence⁴².

³⁹ Rachel Simpson and Honor Figgis above n 36, 15-6.

⁴⁰ Government of Australia, *Royal Commission on Human Relationships Final Report*, Volume 5, Canberra 1977, 210.

⁴¹ Australian Research Centre in Sex, Health & Society, ‘Sex in Australia: Summary findings of the Australian Study of Health and Relationships’ (2003) *La Trobe University*
<<http://www.latrobe.edu.au/ashr/papers/Sex%20In%20Australia%20Summary.pdf>>.

⁴² Susannah Hodson, ‘CTM v The Queen: A Challenge to the Fundamental Presumption of Mens Rea’ (2010) 34 *Criminal Law Journal* 187, 18.

2.1 Similar Age Defence

This statutory defence as noted relates to situations which the two individuals are close in age. Specifically in Australia, Victoria and the ACT engaging in sexual behaviour under the legal age can be defended if the accused was not more than two years older and, the complainant was at least 12 years old (10 years old in the ACT)⁴³. While there are slightly changing details between each state and territory as noted in the table below, this defence by and large recognises the reality of sexual experimentation between young adolescents. A national study of Australian secondary school students in 2008 found that more than 50 per cent of Year 10 students (15 years old) had engaged in sexual touching, 33 per cent had engaged in oral sex and more than 25 per cent had engaged in sexual intercourse.⁴⁴ Interestingly NSW, Queensland, Western Australia and the Northern Territory do not have a similar-age consent defence.

Table 2: Legal Defences of AOC in Australia

State	Legislation	Legal Defence
ACT	<i>Crimes Act 1900 (s55)</i>	<p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 55(3). It states that:</p> <ul style="list-style-type: none">• It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that -<ul style="list-style-type: none">• (a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or• (b) at the time of the alleged offence - (i) the person on whom the offence is alleged to have been

⁴³ *Crimes Act 1900 (ACT)*, s55.

⁴⁴ Anthony Smith, 'Secondary Students and Sexual Health 2008: Results of the 4th National Survey of Australian Secondary Students, HIV/AIDS and Sexual Health' (July 2009) 70 *Australian Research Centre in Sex, Health & Society, La Trobe University*, 26.

committed was of or above the age of 10 years; and

(ii) the defendant was not more than 2 years older; and
that that person consented to the sexual intercourse

NSW	<i>Crimes Act 1900 (Section 66C)</i>	There is no legal defence in legislation when charges are made to a person charged with engaging in sexual activities with a person under the legal age
NT	<i>Criminal Code Act 1983 (Section 127)</i>	<p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 127(4). It states that:</p> <ul style="list-style-type: none">• It is a defence to a charge of a crime defined by this section to prove:<ul style="list-style-type: none">• (a) the child was of or above the age of 14 years; AND• (b) The accused person believed on reasonable grounds that the child was of or above the age of 16 years.
Queensland	<i>Criminal Code Act 1899 (Sections 208 and 215)</i>	<p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 215(5). It states that:</p> <ul style="list-style-type: none">• If the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years. Note: This defence does not apply to acts of sodomy.

SA	<i>Criminal Law Consolidation Act 1935</i> <i>(Section 49)</i>	<p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 49(4). It states that:</p> <ul style="list-style-type: none"> • It shall be a defence to a charge under subsection (3) to prove that - • (a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years; and • (b) the accused - • (i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or • (ii) Believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of or above the age of seventeen years.
TAS	<i>Criminal Code Act 1924</i> <i>(Section 124)</i>	<p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 124(2). It states:</p> <ul style="list-style-type: none"> • It is a defence to a charge under this section to prove that the accused person believed on reasonable grounds that the other person was of or above the age of 17 years. <p>Subsection (3) describes the defence against this charge:</p> <ul style="list-style-type: none"> • The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed

- (a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or
- (b) That person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

VIC	<u>Crimes Act 1958 (Section 45)</u>	<p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 45(4). It states that:</p> <ul style="list-style-type: none"> • Consent is not a defence to a charge unless at the time of the alleged offence the child was aged 12 or older and - <ul style="list-style-type: none"> • (a) the accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that the child was aged 16 or older; or • (b) the accused was not more than 2 years older than the child; or • (c) The accused satisfies the court on the balance of probabilities that he or she believed on reasonable grounds that he or she was married to the child.
WA	<u>Criminal Code Act Compilation Act 1913</u>	<p>If a person is charged with engaging in sexual activities with a person under the legal age, a legal defence is outlined in section 321(9-10). It states that:</p> <ul style="list-style-type: none"> • It is a defence to a charge under this section to

(Section 321)

prove the accused person -

- (a) believed on reasonable grounds that the child was of or over the age of 16 years; and
- (b) Was not more than 3 years older than the child.
- Note: Under subsection 9(a) it is no defence if the child was under the care or supervision of the accused person. Under subsection 10, it is a defence to a charge to move that the accused was lawfully married to the child.

The advantages of implementing such a defence would be that it ensures young people, in limited situations are free to engage in sexual activity without the risk of criminal prosecution⁴⁵. While contrary to some arguments it does not diminish the protection provided by the law to vulnerable children and adolescents, especially from predatory sexual exploitation and abuse⁴⁶. Furthermore it would underline the statutory provisions which are clearly directed at targeting adults who take advantage of young adolescents as well as those situation which involve an absence of consent. The limitations of this policy must also be a consideration, especially that such a defence can be seen as an encouragement of sexual activity amongst young people. It is an objection to the idea that criminal law should be reflected in substantive law, rather than remedied by prosecutorial discretion or sentencing process.

In considering India, there should be a greater emphasis on prosecutorial discretion where conduct in genuinely consensual, especially those situations which eliminate the ability for a girl's parents to have a young boy criminalised where consent was a factor. While there will also be hard cases in which prosecution appears to be unjust after a consideration of this defence, it appear a relatively liberal similar age consent regime ensure that such cases are kept to a minimum.

⁴⁵ Ibid.

⁴⁶ Hodson above n 42, 20.

2.2 Reasonable Mistake of Age Defence

The workings of this defence in Australia for example, allow an accused to argue that they reasonably and honestly believed the victim was at least 16 years of age if not older⁴⁷. This defence would only apply most obviously if the victim consented and that they were over the age of 14. While this is specifically the case in Australia, such a regime can be adapted to incorporate the current AOC in the country it is operating.

In Australia, this defence was highlighted in the case of *Proudman v Dayman*⁴⁸. The common law stated that the defendant must put forth evidence that they had an honest and reasonable belief 'in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent'⁴⁹. The evidence must be more than mere 'ignorance of the law', and the onus will then shift to the prosecution to prove beyond reasonable doubt that the defendant did not act in such a way that he or she honestly made the mistake⁵⁰. In comparison the UK places this onus primarily on the Crown to prove that the accused did not reasonably believe the child or young person to be 16 or over⁵¹.

The advantages of this defence are significant in considering the workings of *section 66C* of the *Crimes Act* in Australia and a similar provision in the UK⁵², which state that a convicted person becomes a registrable person. A person found guilty of child sexual offences are often likely to become subject to reporting requirements and possibly prohibition orders⁵³. Furthermore it is unlikely they would be able to secure any employment even if it obliquely involved children and while reporting orders are often for a limited term, offenders remain registrable for the rest of their life. Given the gravity of these punishments, while not diminishing their significance in other

⁴⁷ *Crimes Act 1900 (NSW)*, s66C.

⁴⁸ *Proudman v Dayman* (1941) 67 CLR 53.

⁴⁹ *Ibid.*

⁵⁰ Royal Commission, n 40, 1079.

⁵¹ *Sexual Offences Act 2003 (UK)*, s 9(1)(c)(i).

⁵² *Ibid.*

⁵³ *Child Protection (Offenders Prohibition Orders) Act 2004*.

offences, young offenders are going to be deeply affected well into their adulthood for situations where consent was a factor⁵⁴.

Yet another important point to raise in relation to this defence is that it is a common practice amongst adolescents to lie about their age in order to engage in activities that the law prohibits. It has become a cultural and social attitude of teenagers to aspire to be older than what they really are. This is clearly evidence in the context of underage drinking, juvenile prostitution and restricted venues where false identification is not uncommon. Given this reality, there appears substantial grounds for justifying the importance of such a defence. In Western Australia this defence is restricted to perpetrators who are no more than three years older than the complainant of whom must be at least 13 years old⁵⁵. In the UK at common law this was referred to as the 'young man's defence' to the crime of unlawful carnal knowledge where the girl must off been at least 13 years old and the defendant were under the age of 24 being charged for the first time⁵⁶. NZ appears to have the most comprehensive guidelines for the use of this defence. Following an amendment to the NZ Crimes Act in 2005⁵⁷, it is on defence to a charge of sexual conduct with a person under the age of 16 if the accused can prove he or she had taken 'reasonable steps' to ascertain whether the young person was of age. What constitutes 'reasonable steps' will depend on the circumstances. However it would clearly not be enough for the accused to state in a situation of prostitution for example that 'she told me she was 18', or 'she advertised as being 18' or 'she looked older than 16'. In other situations such as meeting in a bar or a nightclub, presence in licensed premises should not be enough to form the basis of this defence given the frequency of which under age teenagers are illegally present. Furthermore another consideration which NZ have recognised is that what are the 'reasonable steps' necessary could also depend on the nature of the sexual conduct, i.e. less may be needed for sexual acts falling short of penetration.⁵⁸

⁵⁴ Rachel Simpson and Honor Figgis above n 36, 27.

⁵⁵ *Criminal Code Act Compilation Act 1913 s321(b)*.

⁵⁶ *Criminal Law Amendment Act 1922, s2*.

⁵⁷ *Crimes Act 1961 (NZ)*.

⁵⁸ Kate Warner, 'Setting the Boundaries of Child Sexual Assault: Consent and Mistake as to Age Defences' (2012) 25 *Melbourne Law Review* 1010.

The limitation of this defence is that it objects to absolute liability and while it appears at times reasoned it is still a direction away from absolute protection by law. Moreover such a mechanism in its current form, is arbitrary at times and has the effect of denying the defence to a person who is a day over the age limit. This can be evidenced in the below case law of Western Australia.

2.3 Case Example

While it cannot be name under child protection law this case was referred to in the Western Australian Law Reform Commission discussion paper on the *Community Protection (Offender Reporting) Act 2004*⁵⁹. The facts of this case involve an offender who pleaded guilty to four offences of indecent dealings of a child under the age of 13 years. The offender was 15 years and 9 months, while the complainant was 12 years and 9 months old. Within the facts it has made clear that the complainant consented to 'hooking up' with the offender for a 'kiss', and other acts of sexual touching. It was accepted before the Court that the Complainant was a willing participant in the hope of making another classmate jealous⁶⁰. Consequently the offender was sentenced to Youth Community orders and due to the facts where the complainant was under 13 years old he was subject to a conviction in which he is required to report for nearly 8 years⁶¹. The commissioner had no discretion to suspend reporting obligations or remove him from the 'sex offender register'⁶².

Such a case like this highlights the importance of creating liberal defences to consented sexual acts of adolescents⁶³. It appears completely 'unjust' that the offender in this position had to bear the brunt of punishment for a completely consensual act of sexual experimentation between two high school students. It recognises the need for defences, as well as the requirement of discretion in applying them. While Australia can too undergo its own law reform on already developed areas, such cases and provisions bring to light valuable considerations for countries such as India to

⁵⁹ The Law Reform Commission of Western Australia, '*Community Protection (Offender Reporting) Act 2004 Discussion Paper*, No 101(February 2011) 25 < <http://www.lrc.justice.wa.gov.au/files/P101-DP.pdf>>.

⁶⁰ Ibid at 25.

⁶¹ *ABW v The State of Western Australia* [2009] WACC 4.

⁶² *Child Protection (Offenders Registry) Act 2000*.

⁶³ J Young, 'Recent Case's (2008) 82 *Australian Law Journal* 693, 695.

ensure that implementations of such a policy are free of these already exposed limitations. It is not to suggest that these AOC defences are not an insightful source of direction, but instead shed light to the difficulties already experienced in its use.

3. Summary

It can be surmised that issues surrounding AOC are not always easy to resolve and often involve many competing factors. In comparing India to other common law countries, it appears its current provisions of the AOC being set at 18, are conservative in nature and sit at the high end of the spectrum compared to the rest of the world. This raises the question as to whether it is a country allowing traditions and historical influences to stop it from moving into a modern context alongside other 21st century nations. While there is no doubting that social and cultural factors such as religion continue to play a major role in Indian life, it also needs to be realised that simultaneously adolescents are becoming more exposed to global themes such as sexualisation. After further analysis it is obvious that changing the AOC in India is compounded by other national issues such as child abuse, human trafficking and poverty.

Nevertheless such a conservative 'age' of legalisation has led to the over-criminalisation of young men which are flooding the Courts, and ultimately denying cases where consent was not a factor legal resources. At this stage a worthy consideration is the implementation of defences to AOC as seen in other jurisdiction such as Australia, NZ and the UK. The operation of both 'similar age' and 'reasonable mistake' defences provide means by which innocent parties can be relieved from absolute liability where consent was a factor. This would alleviate pressures of the court systems and other legal mechanisms, allowing the law to focus on those cases which need it most, which are serious acts of child sexual abuse.

If India were to adopt defence mechanisms of this kind, they would be able to do so in a way that eliminates the short falls of its current operation in other common law jurisdictions. For example by tightening the defence of honest and reasonable mistake as seen in Australia, India would be

able to adopt the 'reasonable steps' requirement set out in NZ legislation. As result of being able to rectify the limitations of AOC defences as they stand today, India would be in a substantially better off situation to tackle child sexual offences, while at the same time emphasize the need to protect both parties, especially where consent is a factor.

Mandatory and non-mandatory reporting

1. Introduction

This report recognises and discusses the various methods for reporting of child sexual abuse incidents, focusing on the experience of India, Australia (concentrating on the New South Wales jurisdiction in particular), New Zealand and the United Kingdom.

Of the four jurisdictions discussed, only India and Australia legally mandate reporting of child sexual abuse, albeit in different ways.

In New Zealand and the United Kingdom, despite the lack of mandatory reporting laws, reporting is still an important area to be discussed in relation to child sexual abuse. As this chapter will demonstrate, reporting, whether mandated or otherwise, provides an important platform for the protection of children from sexual abuse.

2. Aims

This discussion on mandatory reporting and reporting in general aims to highlight efforts to increase the reporting of child sexual abuse, and addresses the reality that many cases of child sexual abuse go unreported. By recognising the level of silence that surrounds child sexual abuse and identifying major barriers to reporting, analysis of the discussions and debates surrounding mandatory reporting becomes salient.

3. Methods and materials

This report introduces the legislative provisions which mandate reporting of child sexual abuse in India and Australia. Following from this analysis of the appropriate legislative requirements for mandatory reporting, this report will discuss the reality of underreporting of child sexual abuse. A look at the barriers which prevent many cases of child sexual abuse from being addressed, is followed by a discussion of support mechanisms in place across the four jurisdictions which may facilitate the reporting of child sexual abuse events.

This chapter will then address some of the debates surrounding mandatory reporting, which explain why such legislation is not in place in all jurisdictions. This will entail identification of the perceived benefits or drawbacks of mandatory reporting, and the practical implications experienced in the implementation of mandatory reporting.

The research methodology employed entailed consultation of relevant laws in relation to mandatory reporting in India and Australia. Government documents, royal commissions, and peer-reviewed journal articles have been analysed to uncover the wide range of perspectives and practical experiences in relation to reporting (both mandated or otherwise) including the trend of underreporting of child sexual abuse. Moreover, relevant government websites, organisation websites and topic-specific services were assessed, given their role in providing support and advice in relation to child sexual abuse. This methodology helped to allow for an holistic understanding of the reporting process in relation to child sexual abuse across the jurisdictions of interest.

4. Mandatory Reporting – a background

Children are especially vulnerable to maltreatment given the imbalance of power that exists between the child and their adult counterparts.¹ The potential dangers of this inherent power imbalance have been manifested in incidents of child sexual abuse. Oftentimes, such abuse is

¹ 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* (Springer, 2015) 3, 3.

hidden beyond the view of intervention, given that the perpetrators are commonly known to the victim, and the abuse often occurs in a private setting. It is in such a context that children are especially vulnerable given that their abuse is so often concealed and oppressed, resulting in a lack of intervention, a lack of justice for the perpetrator, and a lack of rehabilitation for the victims.

Mandatory reporting laws are an attempt to ensure that these crimes are no longer concealed beyond the purview of justice.

First introduced in the USA in the 1960s designating certain people with a duty to report child abuse to the relevant authorities, mandatory reporting laws allowed for socio-legal intervention into child abuse situations, which would have remained concealed otherwise.

The importance of mandatory reporting laws also lies in the fact that they are an overt and unequivocal statement of the unacceptable and abhorrent nature of child abuse and child sexual abuse. Thus, they help to shape societal attitudes towards the elimination of child sexual abuse.²

These laws now exist in many jurisdictions across the world, with many more considering their adoption, or transitioning into their implementation.³

Mandatory reporting laws in the context of child sexual abuse are used as a social policy tool, a public health measure, and as a method for crime prevention. These laws are enacted with the aim of promoting child protection, preventing future abuse by perpetrators and providing for the appropriate care and rehabilitation for survivors.⁴

Considering that mandatory reporting is in place only in Australia and India out of the four countries covered in this report, (but is in place in many other jurisdictions across the globe⁵), much of the following discussion will be focused upon these specific jurisdictions).

² Ibid, 4.

³ Ibid.

⁴ Ben Mathews, 'Mandatory reporting laws for child sexual abuse in Australia: a legislative history, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney' (2014) *Commonwealth of Australia*, available at <http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> 28.

⁵ Ben Mathews, 'Mandatory reporting laws for child sexual abuse in Australia: a legislative history, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney' (2014) *Commonwealth of Australia*, available at

5. Mandatory reporting jurisdictions

Mandatory reporting laws exist in Australia and India, but not in the United Kingdom or New Zealand. Despite both having mandatory reporting laws, the details of this duty differ between the Indian jurisdiction and the Australian jurisdiction. Mandatory reporting of child sexual abuse is legislated across all jurisdictions in Australia. However, for the purposes of this research, the New South Wales jurisdiction was chosen as the jurisdiction of focus for the majority of research, given that it is the largest state in Australia by population, and is the state within which the most child sexual abuse cases and reports have been brought. Thus, in mentions of the Australian jurisdiction, it can be assumed (unless otherwise stated) that the discussion is based upon the New South Wales laws and procedures relating to mandatory reporting. The following discussion will be based on the Indian and New South Wales jurisdictions mentioned in turn, including the legislation that posits this legal duty of reporting, who must report, consequences of failure to report, as well as consequences for false reporting.

6. Mandatory reporting in India

Child sexual abuse is a disturbingly prevalent problem in India, with recent research and surveys confirming that the issue is widely underreported.⁶ In recognition of the problems surrounding child sexual abuse in India, the Government of India introduced a specific piece of legislation called the *Protection of Children from Sexual Offences Act 2012* (hereafter the *POCSO Act*). Relevantly, within this piece of legislation, provisions are made for the mandatory reporting of child sexual abuse.

<http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> 1, 126.

⁶ Sibnath Deb, 'Legislation Concerning Reporting of Child Sexual Abuse and Child Trafficking in India: A Closer Look' in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 541, 542.

6.1 Legislative provision for mandatory reporting

The *POCSO Act* specifically addresses mandatory reporting of any offences covered within the Act. At s 19(1) of the *POCSO Act*, it is stipulated that:

“Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed, or has knowledge that such an offence has been committed”⁷ shall provide this information to the Special Juvenile Police Unit,⁸ or the local police.⁹

Once the report is received by the Special Juvenile Police Unit, or the local police, every report “shall be... ascribed an entry number and recorded in writing”,¹⁰ “be read over to the informant”,¹¹ and “shall be entered in a book to be kept by the Police Unit”.¹²

In this context, as is discussed in another chapter of this report, it is important to note that the definition of a child in India is any person who is under 18 years of age.¹³

Thus, the legislated duty to report child sexual abuse that is a person may know about, or that the person has apprehension of is placed upon every member of society, whether an adult or a child.

There is a further specific duty of mandatory reporting for any personnel of media, studios and photographic facilities (and any such similar locations) who may be aware of evidence of sexual exploitation of a child through any form of media to report this to the Special Juvenile Police Unit or the local police.¹⁴ This can be found at section 20 of the *POCSO Act*. This recognises the need for

⁷ *Protection of Children from Sexual Offences Act* (India) 2012 s 19(1), (Act hereafter referred to as *POCSO Act 2012* (India)).

⁸ *POCSO Act 2012* (India) s 19(1)(a).

⁹ *Ibid*, s 19(1)(b).

¹⁰ *Ibid*, s 19(2)(a).

¹¹ *Ibid*, s 19(2)(b).

¹² *Ibid*, s 19(2)(c).

¹³ *Ibid*, s 2(1)(d).

¹⁴ *Ibid*, s 20.

members of the community to not be complicit in child sexual exploitation, including preventing pornographic, exploitative or obscene representations of a child.¹⁵

Placing the mandatory reporting duty upon all members of society could be seen as an indicator, not only of the widespread prevalence of the issue, but also of the lack of corresponding reporting of the issue. As noted by interview evidence by Arpan of survivors of child sexual abuse, there are opinions that mandatory reporting of child sexual abuse facilitates the exposure of the perpetrator to punishment,¹⁶ protects victims and future victimisation,¹⁷ and further, can shift the onus of seeking justice away from the victim.¹⁸ However, there are also differing implications and considerations surrounding mandatory reporting which will be discussed later in the chapter.

The fact that the law encourages the reporting on ‘apprehension’ that an offence is likely to be committed, suggests that solid certainty of an offence is not needed to make a report. In practice, this has important implications in that it recognises the significance and benefits of prevention and intervention in the context of child sexual abuse.

6.2 Failure to report

The POCSO Act provides for a legislated penalty for failure to fulfil the mandatory reporting duty described in section 19(1) and section 20 of the POCSO Act, as well as penalties for the failure of the police to lodge a report according to the procedure set out in section 19(2) of the Act. This provision for penalties can be found at section 21 of the Act.

The penalties for failure to fulfil mandatory reporting duties correctly differ depending on the circumstances.

¹⁵ Ibid.

¹⁶ Arpan, ‘Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting’ (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> [1](#), [6](#).

¹⁷ Ibid.

¹⁸ Ibid.

Accordingly, for failure to comply with the section 19(1) duty to report, the section 20 duty to report, or the section 19(2) procedure for the lodging of a report, a person “shall be punished with imprisonment of either description which may extend to six months or with fine or with fine or with both”.¹⁹

There exists a heavier punishment for those who are superiors in a company or institution, who have knowledge of a sexual offence being committed against a child, by a person who is a subordinate to that person in their company. The Act so provides:

“Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine”.²⁰

This duty is an important step in protecting children against institutionalised sexual abuse. Further discussion of institutionalised sexual abuse will be discussed later in the chapter.

It is important to note that, whilst the duty to report known sexual abuse of children, or apprehension that abuse will occur is placed on all people, including children, the penalties for failure to report (as mentioned in this section) do not apply to children.²¹ That is, failure of a child to report abuse as stipulated by section 19(1) of the *Act*, does not attract the penalties described in section 21. This is important in avoiding potential criminalisation of children, who may not be adequately cognisant of the situation of child sexual abuse to be fairly placed with such an equal imperative to report as their adult counterparts.

¹⁹ *POCSO Act 2012* (India) s 21(1).

²⁰ *Ibid*, s 21(2).

²¹ *Ibid*, s 21(3).

6.3 False reporting

The *POCSO Act* recognises that reporting of child sexual abuse cases may result in incorrect or unsubstantiated reports.

If a report under section 19(1) of the Act is made in good faith, (under the belief that a child has been sexually abused, or is at risk of sexual abuse) then such a case is exempt from penalty for an incorrect report.²² The act thus provides, that “No person shall incur liability, whether civil or criminal, for giving the information in good faith”.²³ This protects genuine reporters from being penalised in the case that the report is unsubstantiated. Importantly, this allows reporters to feel safe from penalty in pursuing protection of the child from perceived abuse.

However, this can be contrasted with those who provide an intentionally false report, with such people facing penalties.

Section 22 of the Act provides for punishment for the making of a false complaint and the providing of false information. If a person is found to have done so, “solely with the intention to humiliate, extort, threaten or defame” such a person is liable for penalty of imprisonment for up to six months, a fine, or both.²⁴

Again, the law protects children who may present false complaints or false information with protection from any such penalties.²⁵

If an adult brings an intentionally false complaint of child sexual abuse against a child, “knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both”.²⁶

This heavier penalty against providing a false complaint or false information against a child in this context is representative of the underlying motivation of child protection.

²² Ibid, s 19(7).

²³ Ibid.

²⁴ *POCSO Act 2012* (India) s 22(1).

²⁵ Ibid, s 22(2).

²⁶ Ibid, s 22(3).

7. Mandatory reporting in Australia

Mandatory reporting of child sexual abuse is a duty that is legislated across all Australian jurisdictions.²⁷ However, the duty is applicable to different groups of individuals depending on the jurisdiction. Generally, the laws have been implemented with the purpose of “identifying cases of child sexual abuse that would otherwise not be revealed”,²⁸ as well as preventing further abuse of the child from occurring, revealing offenders, and thus preventing the offender from harming other potential victims, and being able to provide the relevant rehabilitation for the victim and the victim’s family.²⁹

The following table (Table 1.), taken from a report for the Royal Commission into child sexual abuse in Australia, details the relevant legislative provisions for mandatory reporting in all Australian jurisdictions, as a point of reference. However, it should be noted that this report will focus on the New South Wales (NSW) jurisdiction in particular, as the state with the highest prevalence of child sexual abuse cases, and the largest population.

²⁷ Ben Mathews, ‘Mandatory reporting laws for child sexual abuse in Australia: a legislative history, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney’ (2014) *Commonwealth of Australia*, available at http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica_1, 2.

²⁸ Ibid.

²⁹ Ibid.

Table 1. Legislation (as at August 2014) containing mandatory reporting duties and key provisions for Australian states and territories³⁰

Jurisdiction	Legislation
ACT	<i>Children and Young People Act 2008 (ACT) s 356</i>
NSW	<i>Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 23, 27</i>
NT	<i>Care and Protection of Children Act (NT) ss 15, 16, 26</i>
Qld	<i>Public Health Act 2005 (Qld) ss 158, 191 (doctors and nurses)</i> <i>Education (General Provisions) Act 2006 (Qld) ss 364–366A (school staff)</i> <i>Child Protection Act 1999 (Qld) ss 22, 186</i>
SA	<i>Children’s Protection Act 1993 (SA) ss 6, 10, 11</i>
Tas	<i>Children, Young Persons and Their Families Act 1997 (Tas) ss 3, 14</i>
Vic	<i>Children, Youth and Families Act 2005 (Vic) ss 162, 182, 184</i>
WA	<i>Children and Community Services Act 2004 (WA) ss 124A–H</i>
Cth	<i>Family Law Act 1975 (Cth) s 67ZA</i>

7.1 Legislative provision for mandatory reporting

The legislative duty mandating reporting of suspected child sexual abuse in the New South Wales jurisdiction is found in the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*.

This is an additional layer to the provision that allows for people to report their suspicions on reasonable grounds that a child may be at risk of, or have been significantly harmed (including sexually abuse³¹).³²

³⁰ Ben Mathews, ‘Mandatory reporting laws for child sexual abuse in Australia: a legislative history, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney’ (2014) *Commonwealth of Australia*, available at http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica_1, 7.

Section 27(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) states that mandatory reporting applies to “a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children”³³ and “a person who holds a management position in an organisation the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children”.³⁴ The law provides that if a mandated reporter (such a person as just described) has “reasonable grounds to suspect that a child is at risk of significant harm”³⁵ and “those grounds arise during the course of or from the person’s work”³⁶ this person has a duty to report this to the Secretary of Community Services, providing the “name, or description of the child and the grounds for suspecting that the child is at risk of significant harm”.³⁷ The mandated reporter must also report two or more children as a class or children, as long as the description allows the children to be identifiable,³⁸ and the grounds for the risk of harm are provided.³⁹

A child for the purposes of this act is a person who is under the age of 16, and a young person is a person aged between 16 and 18 years,⁴⁰ however the mandatory reporting duty applies in relation to a ‘child’.

Thus, the mandatory reporting duty in New South Wales only applies to those people who have contact with children through their profession and thus may be more likely to form a reasonably grounded suspicion of a risk of significant harm (including risk of sexual abuse). The duty applies to

³¹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23.

³² *Ibid*, s 24.

³³ *Ibid*, s 27(1)(a).

³⁴ *Ibid*, s 27(1)(b).

³⁵ *Ibid*, s 27(2)(a).

³⁶ *Ibid*, s 27(2)(b).

³⁷ *Ibid*, s 27(2)(b).

³⁸ *Ibid*, s 27(3)(a).

³⁹ *Ibid*, s 27(3)(b).

⁴⁰ *Ibid*, s 3.

awareness or suspicion on reasonable ground of child sexual abuse whether past, present or potential future child sexual abuse.⁴¹

7.2 Failure to report

In New South Wales, a criminal penalty used to be in place for a mandatory reporter who failed to fulfil their duty by failing to report a relevant suspicion of child sexual abuse. This penalty, however, was removed from section 27 the legislation in 2010,⁴² following recommendations from an inquiry. Nevertheless, there still exists a legal duty for mandated reporters to fulfil their reporting obligation, despite the lack of criminal sanction. Furthermore, in practice, given that mandatory reporters in NSW are those who are in a professional capacity, there are usually profession specific conduct requirements which mean that if the mandatory reporter is found to have not fulfilled their duty, they may face professional misconduct procedural ramifications.

The Royal Commission in May 2015 put forward recommendations that education and training should be provided for mandated reporters (in this case, to medical practitioners) to ensure they understand their obligations under the Act, and thus do not fail to report in a situation in which they are legally obligated to do so.⁴³

⁴¹ Ben Mathews, 'Mandatory reporting laws for child sexual abuse in Australia: a legislative history, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney' (2014) *Commonwealth of Australia*, available at http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica_1, 18.

⁴² *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* No 13, Schedule 1.1 [7], commencing 24 January 2010.

⁴³ Karen Keogh and Amy Regan, 'Health Business Newsletter' *TressCox Lawyers* (2015) November Issue 1,2.

7.3 False reporting

If a report is found to be unsubstantiated, as long as a report is made in good faith, then the reporter is not liable for civil, criminal or administrative proceedings for incorrect reporting. Thus, mandatory reporters have immunity from liability, as long as the report is made in good faith.⁴⁴

8. Barriers to reporting – An issue that is globally underreported

Whilst mandatory reporting is one avenue through which reports of child sexual abuse can be brought, there are obviously other methods of reporting child sexual abuse, which are not legally mandated. This provides for those who are not mandated by law to be able to report to the appropriate authorities as to the occurrence, or apprehension that an occurrence of child sexual abuse has happened. Oftentimes, reporting of such abuse is facilitated by being able to access relevant information and support services. Despite the fact that any person can report child sexual abuse, various studies have indicated that child sexual abuse is a phenomenon that is widely underreported, with the victim and the perpetrator rarely reporting their abuse themselves.⁴⁵

As would be expected, for the perpetrator, reporting their own criminal actions is not a common occurrence. However, the fact that the victim (or survivor as they are often referred) so rarely brings forward allegations or reports of the abuse that has occurred is a worrying reality.

Underreporting of child sexual abuse is a global phenomenon, and thus impacts upon all four jurisdictions discussed in this report. There are a multitude of barriers which may prevent cases of child sexual abuse from being exposed, reported or taken through to conviction. Psychological, cultural, procedural and systemic barriers exist to differing degrees in different jurisdictions, and thus it is vital that any discussion of reporting (including mandatory reporting) of child sexual abuse cases involves an understanding of the significant barriers to child sexual abuse events being

⁴⁴ Ben Mathews and Kerryann Walsh 'Issues in mandatory reporting of child sexual abuse by Australian teachers' (2004) 9(2) *Australia & New Zealand Journal of Law and Education* 3, 7.

⁴⁵ Emma Davies, Ben Mathews and John Read, 'Mandatory reporting? Issues to consider when developing legislation and policy to improve discovery of child abuse' (2014) 2(1) *IALS Student Law Review* 9, 10.

reported to the appropriate authorities. Most especially, the victim not only has endured the abuse event (or events), but has to deal with the psychological aftermath which may plague them for the rest of their lives, and often acts as a barrier preventing them from bringing forward a report about their abuse.

It is in this context that information and services need to be available to victims, potential victims, and those who may become aware of child sexual abuse occurring.

8.1 The situation in India

The situation in India has been demonstrated as being dire. Case studies in India have portrayed a disturbing picture of the many barriers which may prevent a case from being disclosed, officially reported, or from being taken through to a conviction.

In 2007, for example, a government survey found that only 25% of the victims of child sexual abuse surveyed had reported their trauma to anyone, with only 3% of these victims reporting to the police.⁴⁶

The fact that India is the nation-state with the largest child population in the world, with approximately 41% of the 2014 population at less than 18 years of age,⁴⁷ is indicative of the immense need for effective child protection mechanisms in this context.

Studies have suggested that the prevalence of child abuse and child sexual abuse is alarmingly high in India,⁴⁸ with difficulties in controlling the problem being exacerbated by the large population and socio-economic difficulties.⁴⁹ The World Bank Report in 2010 found that 32.7% of the Indian

⁴⁶ Mark Dummett, 'Breaking the silence: Child sexual abuse in India' (2013) *Human Rights Watch* available at <https://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf>, 1, 3.

⁴⁷ Rajeev Seth, 'Child abuse and neglect in India' (2015) 82(8) *Indian Journal of Pediatrics* 707, 707.

⁴⁸ Arpan, 'Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting' (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> [1](#), [6](#).

⁴⁹ Rajeev Seth, 'Child abuse and neglect in India' (2015) 82(8) *Indian Journal of Pediatrics* 707, 708.

population fell below the poverty line,⁵⁰ with 68.72% living on less than US\$2 a day.⁵¹ This is of great concern given that the Census of India found that children from families living in this level of poverty are more vulnerable to becoming victims of sexual abuse.⁵²

8.1.1 Underreporting and societal factors

A nation-wide study in India suggested that the large majority of children who have been sexually abused do not report their abuse to anyone (with 70% of respondents saying that they never told anyone about their abuse).⁵³ Additionally, the survey found that more than half of the respondents to the survey had been victims of child sexual abuse.⁵⁴ Needless to say, these figures are alarmingly and unacceptably high.

Societal factors contribute to the problem. Females are more susceptible to abuse, and India has a majority male population. Added to this, in rural areas there is a 'common misconception' that having sex with a girl child will rid the perpetrator of HIV/AIDS.⁵⁵ The exploitation of children is exacerbated by lack of education opportunities, lack of promotion of the rights of children, overpopulation and poverty.⁵⁶

A research report by Human Rights Watch in 2013 painted a disturbing picture of the reality faced by victims of child sexual abuse in India.⁵⁷ The report discussed some of the many social, cultural and psychological barriers that victims of child sexual abuse (and those who know of the abuse)

⁵⁰ World Bank Report, *Indian – New Global Poverty Estimates* (2010) in Sibnath Deb, 'Legislation Concerning Reporting of Child Sexual Abuse and Child Trafficking in India: A Closer Look' in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 541, 543.

⁵¹ Ibid.

⁵² Office of the Registrar General, *Census of India*, (2011) Government of India, accessed March 8 2010 at http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/popu1.aspx, in Deb, above n 6, 543.

⁵³ Ministry of Women and Child Development, *Report on Child Abuse and Neglect* (2007) in Deb, above n 6, 544.

⁵⁴ Ibid.

⁵⁵ Sibnath Deb, 'Legislation Concerning Reporting of Child Sexual Abuse and Child Trafficking in India: A Closer Look' in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 541, 546.

⁵⁶ Ibid.

⁵⁷ Mark Dummett, 'Breaking the silence: Child sexual abuse in India' (2013) *Human Rights Watch* available at <https://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf>, 1, 3.

face, which often end up forcing these people into practical silence, allowing the perpetrator to be free from facing the force of the law. Important barriers in the Indian context have included power imbalances, exacerbated by the perpetrator often being known to the victim, facing stigma as a victim of sexual abuse, fears of retaliation, community backlash, as well as victim blaming.

Furthermore, police mishandling and mistrust, and inadequate child protection responses exacerbate the difficulties faced by victims, which often prevent perpetrators from being caught.

8.1.2 Power imbalances and perpetrator known to victim

As is also the case in other jurisdictions, the perpetrator of the sexual abuse is often known to the victim, commonly as a family member, or a person whom the victim trusted.

This presents a complicated situation for the victim given that there are complex emotional and social barriers which may heighten the sense of shame, guilt, confusion felt by the victim given that the perpetrator is often in a position of trust. The victim may feel an obligation to stay quiet so as not to upset other family members, or to maintain the status quo.⁵⁸ Often, if the perpetrator is a trusted member of the family, victims perceived that they would not be believed in the event of disclosure.⁵⁹ Many times, the child is not cognisant of the seriousness of the offence committed against them⁶⁰ given that they are often very young, and unaware of sexual conduct.

In other cases, the perpetrator may be in a position of power over the victim in a non-familial context, such as those who work in institutional residential facilities for children. According to Human Rights Watch, sexual abuse of children in these facilities is common.⁶¹ There is a strong

⁵⁸ Arpan, 'Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting' (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> 1, 4.

⁵⁹ Ibid.

⁶⁰ Arpan, 'Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting' (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> 1, 4.

⁶¹ Mark Dummett, 'Breaking the silence: Child sexual abuse in India' (2013) *Human Rights Watch* available at <https://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf> , 1, 47.

culture of silence surrounding such abuse. One previous resident of such a facility opened up about their experience stating that: “A child would dare not complain about the wardens, and those older boys were also so intimidating. It had a bullying culture and there were no safeguards. If a warden molested a boy, that boy would be humiliated, a laughing stock”.⁶² Furthermore, lack of monitoring of the activities of such facilities means that such institutionalised violence goes unabated. Bharti Ali of HAQ Centre for Child Rights, noted that even those who are aware of such abuse happening through working in such institutions are influenced against reporting the abuse, given that subsequent funding to the institution may be jeopardised if the abuse was reported and investigated.⁶³ Thus, there is a lack of incentive in exposing the perpetrators of such abuse to justice, which means a lack of incentive in protecting the rights of the child victims.

The above provides a snapshot into the reality that “the persons in trust and authority are the major abusers”⁶⁴ which presents as a major obstacle for reporting.

8.1.3 Repercussions faced by victim - stigma, retaliation, victim blaming, shame

A survey by Arpan observed the feelings of survivors of child sexual abuse, and discussed some of the social and psychological barriers to reporting. Many respondents highlighted feeling a sense of guilt and shame, which prevented them from wanting to report the abuse.⁶⁵ These factors have also been identified as some of the strongest influences which discourage victims from coming forward and telling anyone about their abuse by the Human Rights Watch study.⁶⁶

⁶² Ibid, 48.

⁶³ Ibid.

⁶⁴ Sibnath Deb, ‘Legislation Concerning Reporting of Child Sexual Abuse and Child Trafficking in India: A Closer Look’ in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 541, 544.

⁶⁵ Arpan, ‘Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting’ (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> 1, 4.

⁶⁶ Mark Dummett, ‘Breaking the silence: Child sexual abuse in India’ (2013) *Human Rights Watch* available at <https://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf>, 1, 3.

Such feelings may be exacerbated by the fact that there exist deep-rooted cultural norms which discourage the discussion of sex, with the topic being 'shrouded in secrecy' resulting in a 'conspiracy of silence'.⁶⁷

Fear of retaliation and negative consequences from reporting child sexual abuse incidents is also a major barrier to reporting.

The Human Rights Watch study provides some insightful case studies, which highlight the need for changing community attitudes towards supporting rather than blaming victims of such heinous crimes. The report details case studies in which the father of a victim reported the sexual abuse that had been committed to his daughter by three unknown men. By notifying the police of the abuse, the community shunned the girl and her family, including breaking off an engagement to an older family member of the victim, due to the shame that was now attached to the family. Furthermore, the police dismissed the report as a lie, and discouraged the father from formally registering the complaint.⁶⁸ Such community values are utterly unacceptable, and highlight the immense problems that need to be addressed to endorse child protection in some areas of India.

8.1.4 Lack of adequate infrastructure for responding to reports

With child sexual abuse occurring at with increasing frequency, domestically in India and internationally, such a context highlights the undeniable importance of reporting of such incidents (whether legally mandated or otherwise) to the appropriate authorities,⁶⁹ and the need for adequate systems to be in place to follow up on these reports, and adequately respond, in the interests of the victim and the community at large.

As the case study mentioned above highlights, police mishandling may be a major impediment to child protection as a barrier to proper reporting. Having a lack of faith in the institutions set up for

⁶⁷ Ibid.

⁶⁸ Ibid, 4.

⁶⁹ Deb, above n 6, 542.

child protection, including the police, presents itself as a major barrier to reporting.⁷⁰ The Arpan report also highlighted the fact that a fear of the police system presents as a barrier to reports being made.⁷¹

There is widespread concern that the child protection systems in place in many parts of India are not adequately developed to appropriately respond to reports of child sexual abuse, and in many places, such systems do not exist.⁷² This is compounded by the fact that adequate resourcing for a competent child-protection system is currently unavailable in many circumstances.

Given that the barriers to reporting in India are often so significant, primary prevention of child sexual abuse is emphasised as of paramount importance.⁷³ As noted by Seth, children who have knowledge about personal safety, and what is acceptable or unacceptable behaviour directed toward them, are 6-7 times more likely to be able to disclose their experiences, and not experience the same degree of self-blame as other children in such situations.⁷⁴

Furthermore, by placing a great deal of focus on the prevention of child abuse in Indian society, this may reduce the financial and procedural burden that large numbers of investigations into reports of child abuse place on the current infrastructure. This is especially pertinent, given that there is already a resource deficit in this area, with the budget allocation to child protection in India being below 0.5% of all money pledged for social development.⁷⁵

⁷⁰ Mark Dummett, 'Breaking the silence: Child sexual abuse in India' (2013) *Human Rights Watch* available at <https://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf>, 1, 3.

⁷¹ Arpan, 'Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting' (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> 1, 9.

⁷² Seth, above n 47, 708.

⁷³ Ibid, 713; Arpan, 'Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting' (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> 1, 9.

⁷⁴ Ibid.

⁷⁵ World Bank Report, *Indian – New Global Poverty Estimates* (2010) in Sibnath Deb, 'Legislation Concerning Reporting of Child Sexual Abuse and Child Trafficking in India: A Closer Look' in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 541, 543.

⁷⁴ Rajeev Seth, 'Child abuse and neglect in India' (2015) 82(8) *Indian Journal of Pediatrics* 707, 713.

⁷⁵ Ibid, 709.

Ways to reduce the incidence of child sexual abuse cases may be through efforts to change community attitudes, promotion of the awareness of the rights of the child, and efforts to strengthen cohesion in the existing child protection infrastructure in India.

8.2 The situation in Australia, New Zealand and the United Kingdom

There are many similarities in the types of barriers to reporting faced in the other three jurisdictions researched.

8.2.1 Non-disclosure and delayed disclosure

Most often, abused children have not reported their abuse. Yet, even in cases where the abuse is discussed with someone, the disclosure of their trauma is often extremely delayed. Studies from New Zealand, for example, have noted a widespread prevalence of delayed-disclosure and non-disclosure. In one such study, of 191 women who were receiving therapy as a result of their childhood sexual abuse, only 4% of these women had reported their abuse to someone immediately. Furthermore, '(M)ore than half (54%) took more than ten years to tell...' and in 'only 15% of cases had the abuse ever been 'reported to the Police or to a child protection worker''.⁷⁶ This demonstrates the startling reality that a huge proportion of child sexual abuse cases are not adequately addressed. With only 15% of cases being brought to the attention of Child Protection authorities, or the Police, this means that the vast majority of perpetrators are not facing any legal consequences for their abhorrent and damaging behaviour.

This is not only a problem for the rehabilitation of the victim, but has detrimental effects on community safety, and a lack of adequate punishment and justice for the perpetrator. Furthermore, such levels of underreporting may in fact perpetuate a culture in which child safety is compromised.

⁷⁶ Ibid.

A similar situation has been noted in Australia. Whilst Australia has a high rate of reporting of child sexual abuse, it is still noted that there is a significant gap between reported cases of child sexual abuse, and the real incidence of abuse (which is much higher).⁷⁷

8.2.2 Abuser known to victim and inherent power imbalance

According to the Royal Commission into child sexual abuse in Australia, child sexual abuse is usually committed by a family member, or an adult who is known to the victim.⁷⁸ Inherent in such abuse is a power imbalance, exacerbated by the fact that the child may have trusted the perpetrator, and may feel an emotional connection to the perpetrator. Often in such cases, the child is not cognisant of the criminality of the situation. These factors combine creating a situation in which the perpetrator often does not go reported. Similarly, a large sample sized random household survey in New Zealand found that the majority of child sexual abuse cases were committed by a male family member.⁷⁹

The NSPCC (National Society for the Prevention of Cruelty to Children, in the United Kingdom) also reports that the majority of victims of child sexual abuse are abused by someone that they know.⁸⁰

Similar to the experience in India, child abuse has been found to occur in institutions such as schools, churches and hospitals. Royal Commission investigations into institutionalised child sexual abuse in Australia have demonstrated the commonness of this abuse of power.

In such cases, the child victims are in a clear position of vulnerability, with perpetrators (usually adults working in these settings) abusing their inherent power in such a context. As noted by the

⁷⁷ Ben Mathews, 'Mandatory reporting laws for child sexual abuse in Australia: a legislative history, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney' (2014) *Commonwealth of Australia*, available at <<http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica>>, 30.

⁷⁸ Ibid, 33.

⁷⁹ Janet L Fanslow, Elizabeth M Robinson, Sue Crengle and Lana Perese, 'Prevalence of child sexual abuse reported by a cross-sectional sample of New Zealand women' (2007) 31 *Child Abuse and Neglect* 935, 943.

⁸⁰ NSPCC, 'What is sexual abuse: Who sexually abuses children' accessible at <<https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/child-sexual-abuse/what-is-csa/>> .

NSPCC in the United Kingdom, in such circumstances, the victims face further barriers from being able to report the abuse that has occurred to them. This is because they are often relatively isolated from other responsible adults or authorities to whom they could report their situation.⁸¹ Additionally, 'willful blindness' is an issue which mars reporting, with research suggesting that people within institutions often are aware of serious problems within their organisation (in which they work), but are afraid to talk about it for fear of repercussions.⁸² In the UK, sexual abuse in settings like hospitals, schools and child detention facilities demonstrate the trend that individuals who were aware of the abuse happening failed to take adequate action to prevent it from continuing.⁸³ Thus, many of these cases of sexual abuse go unreported, and thus do not face the force of the law.

8.3 Barriers to reporting overview

Stigma, cultural issues, blame of victim, procedural inadequacies resulting in lack of justice for victim, trauma of reliving the abuse, shame, fear of repercussions, power imbalances, and the perpetrator being known to the victim are all barriers to reporting.

As seen through the case studies in India, certain barriers are also exacerbated in certain socio-cultural contexts.

⁸¹ NSPCC, 'Exploring the case for mandatory reporting: a summary of a roundtable hosted by the NSPCC' (2014) available at <https://www.nspcc.org.uk/globalassets/documents/information-service/exploring-case-mandatory-reporting-roundtable-summary.pdf> , 3.

⁸² Emma Davies, Ben Mathews and John Read, 'Mandatory reporting? Issues to consider when developing legislation and policy to improve discovery of child abuse' (2014) 2(1) *IALS Student Law Review* 9, 25.

⁸³ NSPCC, 'Exploring the case for mandatory reporting: a summary of a roundtable hosted by the NSPCC' (2014) available at <https://www.nspcc.org.uk/globalassets/documents/information-service/exploring-case-mandatory-reporting-roundtable-summary.pdf> 1, 2.

9. Mechanisms to facilitate reporting – the role of helplines and other services

An important method for facilitating reporting is the provision of helplines and websites which can counsel, inform and educate victims, family of victims, concerned citizens and the general population on ways of responding to child sexual abuse situations. Through the availability of such information and services, some of the barriers to reporting may well be overcome. This is especially useful in the modern era, whereby internet access is increasingly prevalent. Helplines and web based services are available in all four jurisdictions (India, Australia, New Zealand and the United Kingdom). Some examples of such services are listed below.

Access to such services may assist both mandated or non-mandated reporting.

9.1 Helplines and other services in India

The 'CHILDLINE 1098' service is a 24 hour helpline which is a joint initiative of the Ministry of Women & Child Development', the 'Department of Telecommunications' well as non-profit organisations.⁸⁴ Accessible by dialing 1098, CHILDLINE offers a sympathetic ear to callers (whether a vulnerable child, or a concerned adult), and can connect these children to appropriate services, whether it be emergency services, or longer term rehabilitation services.⁸⁵ The aim of CHILDLINE is to assist children in need of care and protection, including such vulnerable children as those who have experienced child sexual abuse. As noted above, the fact that poverty situations increase the chances of experiencing child sexual abuse in India, importantly, CHILDLINE also aims to provide assistance to street children and youth living on the streets. This helpline is in operation 365 days per year.

A helpline will only be useful if it is known about, and as such, one of the aims of CHILDLINE, as noted on the website, is for all children to know that assistance is available to them simply by dialing 1098.

⁸⁴ CHILDLINE 1098, accessible at <http://www.childlineindia.org.in/1098/b1a-telehelpline.htm>.

⁸⁵ Ibid.

The CHILDLINE service is more than simply a counselling service. It aims to facilitate child protection across the whole of India, filling the gaps in the child protection network, and creating a child friendly system for the protection of vulnerable children.⁸⁶

Further information on this service can be found at the website:

<http://www.childlineindia.org.in/1098/b1a-telehelpline.htm> and at
<http://www.childlineindia.org.in/1098/childline-in-action.html> .

9.2 Helplines and other services in Australia

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that any person who has reasonable grounds to suspect that a child or young person is at risk of significant harm (including risk of sexual abuse having occurred or at risk of occurring)⁸⁷ may make a report to Community Services.⁸⁸

Following this legislative provision, the Family and Community Services website (run by the Department of Family and Community Services, New South Wales) encourages ‘anyone who suspects, on reasonable grounds, that a child or young person is at risk of being... sexually... abused’ to report this to Community Services.⁸⁹ Such reporting can be done by calling the ‘*Child Protection Helpline*’ on 132 111 or TTY 1800 212 936. This service is available 24 hours a day, 7 days per week for the cost of a local call.⁹⁰

It should be noted that ‘reasonable grounds’ to suspect a risk of child sexual abuse does not entail a requirement of proof. Reasonable grounds for such a suspicion may include a child telling you that they have suffered from sexual abuse, someone telling you that a child has been sexually abused, or even observations that you have made of the child’s behaviour or physical wellbeing which mean

⁸⁶ CHILDLINE 1098, accessible at <http://www.childlineindia.org.in/1098/childline-in-action.htm>.

⁸⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1)(c).

⁸⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 24.

⁸⁹ Department of Family and Community Services, New South Wales, accessible at <http://www.community.nsw.gov.au/preventing-child-abuse-and-neglect/reporting-suspected-abuse-or-neglect> .

⁹⁰ Ibid.

you reasonably suspect that they have suffered or are suffering sexual abuse.⁹¹ Furthermore, it may be based on a single act or omission, or a series of acts or omissions which may pique the suspicion.

Community services will assess all reports that come in, with the staff asking pertinent questions to assess the risk of harm or abuse to the child. The responses of Community Services to the report may include dismissing the report if it is deemed that there is no risk of significant harm to a child or young person, or Community Services may investigate the report further. This may include immediate visitation to the child or young person and their family if it is deemed that the child is in immediate danger.⁹² Furthermore, upon receiving a report, Community Services may refer the case to New South Wales Police, New South Wales Health care facilities and the Department of Education. The aim of Community Services is to promote child safety, and thus Community Services may relocate the child in order to ensure their safety.

A more child-friendly method of providing similar information to Community Services is through the '*Kids Helpline*' available by calling 1800 55 1800. Furthermore, the Kids Helpline website provides pertinent information to potential victims of child sexual abuse, explained in a child friendly manner, and emphasising the fact that this abuse is not their fault.⁹³ This information is very important for a child to see, given that such victims often feel alone and ashamed.

The *Child Abuse Prevention Service*⁹⁴ also provides information pertinent to recognition of abuse, and how to report it. They also provide a helpline on 1800 688 009 which provides advice and assistance in relation to reporting suspected abuse.

*Lifeline*⁹⁵ is also a service available for people in child abuse situations. It aims to assist people in crisis and can be contacted on 13 11 14.

⁹¹ Childwise, accessible at <https://www.childwise.org.au/page/41/state-legislation-reporting-nsw> .

⁹² Department of Family and Community Services, New South Wales, accessible at <http://www.community.nsw.gov.au/preventing-child-abuse-and-neglect/reporting-suspected-abuse-or-neglect> .
⁹² Ibid.

⁹³ Kids Helpline, accessible at <http://www.kidshelpline.com.au/teens/get-info/hot-topics/sexual-abuse.php> .

⁹⁴ Child Abuse Prevention Service (CAPS), accessible at <http://www.childabuseprevention.com.au/reporting-abuse.html> .

⁹⁵ Lifeline, accessible at <https://www.lifeline.org.au/Get-Help/Facts---Information/Domestic-Abuse---Family-Violence/Domestic-Abuse-and-Family-Violence> .

*The Child Wise National Child Abuse Helpline*⁹⁶ is accessible at 1800 99 10 99 and is toll free. The service is run by Child Wise, a national not-for-profit organisation whose aim is to prevent child abuse in Australia, and mitigate its negative impacts through training, counselling and awareness building. It is part of ECPAT (a global network of organisations whose aims are to prevent child abuse and exploitation).⁹⁷ The helpline allows people to speak to trained counsellors, and to speak up about child abuse situations,⁹⁸ and is accessible 9-5 on weekdays. The service receives calls from a wide range of people including victims, parents of victims, family members, teachers, friends, carers and other professionals. It also provides information and support in relation to the Royal Commission into Institutional Responses to Child Abuse. Obviously, any person can dial 000 in an emergency and be put through to emergency services including police and ambulance.

Given that the calls to these helplines and services are usually taken by those people covered by the description in section 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (that is, these calls are taken by such people who may be deemed as mandatory reporters), having received such a notification of potential abuse may enliven their mandatory reporting duty, ensuring a case is reported to Community Services.

9.3 Helplines and other services for reporting in New Zealand

9.3.1 Reporting of child sexual abuse in New Zealand

Mandatory reporting is not in place in New Zealand, yet reporting of child sexual abuse is still available and in some cases, certain people ‘must take reasonable steps’ to prevent child abuse from occurring and if they do not do so, may face criminal penalties.⁹⁹

⁹⁶ Child Wise National Child Abuse Helpline, accessible at <https://www.childwise.org.au/page/8/child-wise-national-child-abuse-prevention-help-line> .

⁹⁷ Child Wise, accessible at <http://www.childwise.org.au/page/7/about-child-wise>.

⁹⁸ Child Wise National Child Abuse Helpline, accessible at <https://www.childwise.org.au/page/8/child-wise-national-child-abuse-prevention-help-line> .

⁹⁹ See <http://communitylaw.org.nz/community-law-manual/chapter-27-dealing-with-child-youth-and-family/reporting-child-abuse-chapter-27/> for further information.

The *Children, Young Persons, and their Families Act 1989* (NZ) provides that any person who believes that a child or young person has been, or is likely to be harmed (including sexually) may report this to a social worker or constable.¹⁰⁰ The person who reports this belief is immune from criminal, civil or procedural sanctions as long as the report was not made in bad faith.¹⁰¹

The law provides that a duty (evidenced by the use of the word ‘must’ and the accompanying criminal sanction for failure to fulfil the duty) is imparted on any person over 18 years of age who is aware of abuse occurring to a child within their household to take ‘reasonable steps’ to protect this child from the harm, abuse or sexual assault. This, in effect ends up mandating this person to report this to the police. This duty also applies to staff in institutions and hospitals in which a child is residing. The maximum penalty for not complying with this duty for reporting such serious harm is 10 years imprisonment.¹⁰²

9.3.2 Helplines and other services in New Zealand

New Zealand created a report responding to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰³ This report discusses the prevalence of child sexual abuse in New Zealand, stating the 2011/12 figures, noting that incidence of child sexual abuse was at the highest rate in Maori children.¹⁰⁴ The report proposed law and policy reform initiatives, including the introduction of the “Child Protect” line. This was proposed to

¹⁰⁰ *Children, Young Persons, and their Families Act 1989* (NZ) s 15.

¹⁰¹ *Children, Young Persons, and their Families Act 1989* (NZ) s 16.

¹⁰² *Crimes Act 1961* (NZ) ss 150A, 152, 195 and 195A.

¹⁰³ Ministry of Justice, ‘Article 2: 5. Violence Against Children’ *United Nations convention against torture: New Zealand draft periodic report 6*, accessible at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/convention-against-torture/united-nations-convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-new-zealand-periodic-report-6/article-2/5-violence-against-children>.

¹⁰⁴ Ministry of Justice, ‘Article 2: 5. Violence Against Children’ *United Nations convention against torture: New Zealand draft periodic report 6*, arts. 62, 63 and 64.

be launched by 2014 with the aim of allowing the public to report concerns about child abuse by phone, email, text or online.¹⁰⁵

White papers have noted that the Child Protect line should have been in place by the end of 2014, however, research did not locate a website or a number through which this service can be contacted, which may suggest that this reform implementing the Child Protect line has not yet been implemented.

Other options for reporting of child sexual abuse, or seeking relevant information, advice or counselling in New Zealand are as follows.

Child, Youth and Family Services is a government agency in New Zealand which has legal powers to intervene to protect children in abuse situations. They can be contacted on a 24 hour, 7 day per week hotline on 0508 FAMILY (0508 326 459), whereby the caller will speak to a trained counsellor who will assess the situation.¹⁰⁶ This is the recommended contact for people in child abuse situations.

If a person or their child has experienced 'family violence' they can contact the Family Violence Information Line on 0800 456 450, which will provide information on the relevant services available in the victim's local area.¹⁰⁷

The ACC (Accident Compensation Corporation) can also put people in contact with counsellors for children who have been sexually abused, however, such services may incur a fee.¹⁰⁸

For child victims, *KidsLine* may be an invaluable resource. It is accessible 24 hours a day, and is aimed at assisting children aged 5-18 years, by connecting them with a trained counsellor with

¹⁰⁵ Ministry of Justice, 'Article 2: 5. Violence Against Children' United Nations convention against torture: New Zealand draft periodic report 6, art 67.

¹⁰⁶ Child, Youth and Family Services, accessible at <http://www.cyf.govt.nz/about-us/contact-us/>.

¹⁰⁷ Kidshealth, accessible at <http://www.kidshealth.org.nz/child-abuse-worried-about-child>.

¹⁰⁸ ACC, accessible at <http://www.acc.co.nz/>.

whom they can discuss ‘anything that is worrying them’.¹⁰⁹ This is a free services available by calling 0800 KIDSLINE (0800 543 754).¹¹⁰

Parentline is another service, which works with children who have been sexually abused (or physically or emotionally) or who are at risk of abuse, and encourages parents and family members to support the rehabilitation of the child.¹¹¹ This service can be contacted on 64 7 839 453.

Other services which may be indirectly useful in such a situation can be found on the Kidshealth page, by following this link <http://www.kidshealth.org.nz/child-abuse-information-and-support>.

Of course, calling emergency services on 111 is an option to involve police or ambulance services.

9.4 Helplines and other services in the United Kingdom

The National Society for the Prevention of Cruelty to Children encourages people who may be suspicious of child sexual abuse occurring or potentially occurring to call their free helpline, available 24 hours a day, 365 days per year on 0808 800 5000.¹¹² This service provides help and advice from trained counsellors, who can counsel an adult who has concerns about a child, advice parents and carers, consult with professionals who deal with children who have been abused or are at risk of abuse, and provide information on child protection. Importantly, the NSPCC also makes it easy to report concerns online as well,¹¹³ with such a report being assessed within 24 hours as to what action needs to be taken to address the issue. This may assist those who wish to communicate their concerns, but may not have access to a phone-line, or who may have speech difficulties, thus facilitating reporting of concerns. Furthermore, a text message based service is also available.¹¹⁴ Reporters may also remain anonymous, which may encourage more reporting of concerns. The website is very comprehensive at explaining the procedure and what one can expect when

¹⁰⁹ Kidshealth, accessible at <http://www.kidshealth.org.nz/child-abuse-information-and-support> .

¹¹⁰ Kidsline, accessible at www.kidsline.org.nz.

¹¹¹ Parentline, accessible at <http://www.parentline.org.nz/> .

¹¹² NSPCC, accessible at <https://www.nspcc.org.uk/what-you-can-do/report-abuse/> .

¹¹³ NSPCC, accessible at <https://www.nspcc.org.uk/what-you-can-do/report-abuse/report-abuse-online/> .

¹¹⁴ NSPCC, accessible at <https://www.nspcc.org.uk/what-you-can-do/report-abuse/>.

contacting the helpline, and can be accessed at <https://www.nspcc.org.uk/what-you-can-do/report-abuse/>.

ChildLine is a service also provided by the NSPCC. Their website is child focused, and child friendly and can link children with frequently asked questions and information on sexual abuse situations.¹¹⁵ Furthermore, the ChildLine help-line service can be contacted by calling 0800 1111. This service is a “private and confidential service available to children and young people up to the age of 19.”¹¹⁶ This service is vital in that it provides an ear to listen to the concerns of vulnerable children, and provides them with pertinent issue specific information, which helps to dispel the silence surrounding this area of abuse. Access to advice and support through this service is made more accessible by being able to be contacted live through the not just the helpline, but also online chat on the website, as well as email.¹¹⁷ Furthermore, the website also sensitive to the fact that children accessing their services may not wish other people they know to be aware that they are seeking such assistance. Thus, the website advises on how users can clear their web history to ensure that others (such as family members who may in fact be the abuser themselves) cannot be cognisant of the access to this service.¹¹⁸

Stop it now! is an online and help-line based service, aiming to provide assistance, advice and counselling to a range of actors who may be connected to child abuse situations. This may include adults who are worried about their own inappropriate thoughts in relation to children,¹¹⁹ for people who may be concerned about the thoughts or actions of another person,¹²⁰ a parent or carer who is concerned about the worrying sexual behaviour of a child or teenager,¹²¹ a person who has experienced sexual abuse as a child or a child who is currently experiencing such abuse,¹²² a person

¹¹⁵ ChildLine, accessible at <https://www.childline.org.uk/Explore/AbuseSafety/Pages/Sexualabuse.aspx>.

¹¹⁶ ChildLine, accessible at <https://www.childline.org.uk/pages/about.aspx>.

¹¹⁷ ChildLine, accessible at <https://www.childline.org.uk/pages/about.aspx>.

¹¹⁸ ChildLine, accessible at <https://www.childline.org.uk/explore/online-safety/pages/covertracks.aspx>.

¹¹⁹ Stop it now!, accessible at http://www.stopitnow.org.uk/concerned_about_your_behaviour.htm.

¹²⁰ Stop it now!, accessible at http://www.stopitnow.org.uk/concerned_about_another_adults_behaviour.htm.

¹²¹ Stop it now!, accessible at http://www.stopitnow.org.uk/concerned_about_a_childs_behaviour.htm.

¹²² Stop it now!, accessible at http://www.stopitnow.org.uk/have_you_been_abused.htm.

looking for advice on how to protect children,¹²³ or a professional who works with children or families looking for pertinent advice.¹²⁴

The *Stop it now!* helpline is available to provide confidential advice on 0808 1000 900, or can be contacted by email on help@stopitnow.org.uk.

Alternatively, the police or ambulance can be contacted on 999.

10. Practical experiences and debates surrounding mandatory reporting

The following sections shall provide an exploration of the array of competing concerns that come to the fore in the context of mandatory reporting. The following sections will explore the practical experiences of mandatory reporting in the Indian and Australian jurisdictions, which may work to highlight the array of potential positive and negative effects in the implementation of mandatory reporting laws. By connecting the practical experiences in the implementation of the laws within mandatory reporting jurisdictions, the pros and cons of mandatory reporting can be more deeply understood. This will assist in understanding why a jurisdiction may or may not impose legislation mandating reporting by members of the jurisdiction.

10.1 Practical experiences of mandatory reporting in India

The role of mandatory reporting in India may be most significant in the fact that it is a strong statement of recognition of the seriousness, and detrimental nature of sexual crimes against children.

Mandatory reporting in India, however faces many challenges in actual implementation, with anecdotal evidence suggesting that failure to fulfil reporting duties is not monitored effectively.

¹²³ Stop it now!, accessible at http://www.stopitnow.org.uk/advice_on_how_to_protect_a_child.htm.

¹²⁴ Stop it now!, accessible at http://www.stopitnow.org.uk/professional_looking_for_advice_and_support.htm.

However, given that the duty is placed on all members of society, it is not unexpected that effective monitoring is not taking place.

Organisations such as Arpan offer training and information sessions for those who are most likely to be aware of potential child sexual abuse,¹²⁵ which may assist them in fulfilling a mandatory reporting duty, and thus facilitate child protection from sexual abuse.

Opinion evidence from survivors of child sexual abuse in India (despite being a small sample size) indicated mixed opinions as to whether mandatory reporting is a positive or negative mechanism in India. Some perceived that it protects children from further abuse and exposes the perpetrator to punishment, and further shifts the responsibility for seeking justice away from the vulnerable survivor, and onto someone who may be more empowered to address the situation.¹²⁶ Other survivors, however, had concerns that the victim's autonomy is marred, given that the decision to report an incident is taken out of their hands. For many victims, this was seen as an abuse of trust by the person with whom they confided, an issue also noted by Belur and Singh.¹²⁷ Often, the procedural and psychological repercussions from reporting of an incident of child abuse (including were seen as being a deterrent preventing victims from going to the police.¹²⁸

Furthermore, as mentioned above, Seth has noted that in order to address notifications of child abuse, there must be adequate resourcing to investigate and respond to such reports. Given that there is already a resource deficit in this area, with the budget allocation to child protection in India being below 0.5% of all money pledged for social development,¹²⁹ it becomes clear that infrastructural inadequacies may hinder the effectiveness of mandatory reporting laws in promoting child protection.

¹²⁵ Arpan, accessible at <http://arpan.org.in/>.

¹²⁶ Arpan, Arpan, 'Recounting Abuse, Reporting Abusers – Reflections from Survivors on Mandatory Reporting' (2014) available at <http://arpan.org.in/wp-content/uploads/2014/09/Mandatory-Report.pdf> 1, 6.

¹²⁷ Jyoti Belur and Brijesh Singh, 'Child sexual abuse and the law in India: a commentary' (2015) 4(26) *Crime Science* 1, 4.

¹²⁸ Ibid, 8.

¹²⁹ Rajeev Seth, 'Child abuse and neglect in India' (2015) 82(8) *Indian Journal of Pediatrics* 707, 709.

Another point for consideration is the existence of the criminal sanction for failure to report, found at section 21 of the *POCSO Act*.¹³⁰ Belur and Singh note some specific problems with mandatory reporting in the Indian context. It should be emphasised that the criminal sanction for failure to report has been removed in Australia, given that mandatory reporting laws are in place to 'encourage reporting not police it'.¹³¹ Given that the age of consent is at 18, mandatory reporting (enforced by a criminal sanction) criminalises health professionals and other people working with children and young people who are aware of a consensual sexual relationship occurring between people in this age bracket.¹³² Further, the criminalisation of failure to report is not backed up with consistent legal enforcement, resulting in a lack of accountability and consistency in this area.¹³³

The practical experience of mandatory reporting laws in the Indian context highlights the inadequacies in the procedures which deal with reports. Mandatory reporting laws can only be effective in promoting child protection if there is adequate child protection infrastructure through which cases of child sexual abuse can be handled sensitively and considerately in a survivor-centric manner.

10.2 Practical experiences of mandatory reporting in Australia

Practical experiences of mandatory reporters provide vital insights into the competing concerns that arise in situations that may enliven the mandatory reporting duty placed upon professionals who may work with children.

In relation to the medical profession, interviews with Australian doctors and medical professionals indicated that adequate training is not in place to remind such professionals of their mandatory reporting duties. Thus, especially given the somewhat subjective wording of the legislative

¹³⁰ *POCSO Act 2012* (India) s 21.

¹³¹ Jyoti Belur and Brijesh Singh, 'Child sexual abuse and the law in India: a commentary' (2015) 4(26) *Crime Science* 1, 4.

¹³² Jyoti Belur and Brijesh Singh, 'Child sexual abuse and the law in India: a commentary' (2015) 4(26) *Crime Science* 1, 4.

¹³³ *Ibid.*

provisions providing the for duty, many professionals feel unconfident and confused about what constitutes the threshold at which they should be reporting potential abuse.¹³⁴

A similar need for further training is raised in the context of teachers who are mandated to report.

Other findings from these interviews noted that many medical professionals felt that there was potential for damage to the doctor-patient relationship, in the case that a mandated report was unsubstantiated.¹³⁵ Furthermore, concerns for the child's safety in such a circumstance may be exacerbated given the likelihood that an unsubstantiated report would discourage parents from bringing their child for future treatment in the case of potential abuse in the future.¹³⁶ Similar concerns are raised by New Zealand medical professionals who ardently oppose the consideration of mandatory reporting laws in the medical context, stating that the preservation of the doctor-patient relationship is vital for allowing positive medical intervention for at-risk families.¹³⁷ A survey of New Zealand professionals' attitudes surrounding reporting of child abuse cases indicated that those most ardently opposed to the introduction of mandatory reporting laws were mental health professionals.¹³⁸ This group of professionals is the least likely to report suspected abuse, with concerns about the impact that a report may have on the doctor-patient relationship being the strongest influence on their reluctance.¹³⁹

Other findings in the Australian context have noted that health professionals may fear the consequences of being potentially identified as the reporter. Especially given the criminality of the abuse situation, fear of perpetrator retaliation is not unfounded. Some had even known of cases

¹³⁴ Debbie Scott and Jennifer Fraser, 'Mandatory Reporting of Child Abuse and Neglect by Health Professionals' in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 381, 385.

¹³⁵ Ibid, 386.

¹³⁶ Ibid.

¹³⁷ Felicity Goodyear-Smith, 'Should New Zealand introduce mandatory reporting by general practitioners of suspected child abuse? NO' (2012) 4(1) *Journal of Primary Health Care* 77, 79.

¹³⁸ Christina M Rodriguez, 'Professionals' Attitudes and Accuracy on Child Abuse Reporting Decisions in New Zealand' (2002) 17(3) *Journal of Interpersonal Violence* 320, 323.

¹³⁹ Ibid.

where the reporter wished they had not followed through and carried out their mandatory reporting duty due to the fear of dangerous retaliation by the offender.¹⁴⁰

10.3 Potential implication of overburdening the child protection system with unsubstantiated reports

This is a common argument provided against mandatory reporting. An article by Ainsworth, analysing data from New South Wales, suggested that in the period of 1999-2000, 78.7% of notifications received about child abuse (not specifically child sexual abuse) (mandated or non-mandated) were unsubstantiated, which meant that up to three quarters of the financial resources devoted to mandatory reporting in New South Wales may have been diverted into the investigation and procedures relating to unsubstantiated claims.¹⁴¹ Similar concerns have been raised in India.¹⁴² Also, the NSPCC roundtable discussion highlighted this as an issue, raising concern that mandatory reporting and the subsequent increase in report volume may divert resources from child protection, into investigation of many unsubstantiated reports.¹⁴³ Yet, as noted by Mathews, “mandatory reporting laws have indisputably resulted in the identification of many more cases of severe child maltreatment than would otherwise have been revealed”.¹⁴⁴

¹⁴⁰ Debbie Scott and Jennifer Fraser, ‘Mandatory Reporting of Child Abuse and Neglect by Health Professionals’ in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 381, 387.

¹⁴¹ Frank Ainsworth, ‘Mandatory reporting of child abuse and neglect: does it really make a difference?’ (2002) 7 *Child and Family Social Work* 57, 62.

¹⁴² Rajeev Seth, ‘Child abuse and neglect in India’ (2015) 82(8) *Indian Journal of Pediatrics* 707, 709.

¹⁴³ NSPCC, ‘Exploring the case for mandatory reporting: a summary of a roundtable hosted by the NSPCC’ (2014) available at <https://www.nspcc.org.uk/globalassets/documents/information-service/exploring-case-mandatory-reporting-roundtable-summary.pdf> 1, 19.

¹⁴⁴ 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* (Springer, 2015) 3, 16.

10.4 Potential positive effects of mandatory reporting

Mandatory reporting not only results in an increase in the number of child sexual abuse case being addressed, which is a clear benefit to the promotion of child protection, but it also provides an important statement of community attitudes.

Many commentators note that one of the most beneficial elements in the introduction of mandatory reporting laws is the clear and unequivocal statement that this makes that child sexual abuse is unacceptable and immoral, and is a subject which is highlighted as being imperatively addressed and prevented in that jurisdiction.¹⁴⁵ Within the Australian jurisdiction, this has been acclaimed as a significant benefit of MR laws by workers in sexual assault centres in Australia,¹⁴⁶ as well as the Australian Institute of Family Studies (an institute within the Australian Government). The AIFS states that mandatory reporting is a ‘strategy which acknowledges the prevalence, seriousness and often hidden nature of child abuse’... “and enables early detection of cases” which may often otherwise go undetected by the appropriate authorities.¹⁴⁷ Furthermore, the laws help to “reinforce the moral responsibility of community members” to report when they may suspect child abuse is occurring or has occurred.¹⁴⁸ According to AIFS, ‘mandated reports have made a substantial contribution to child protection and welfare’.¹⁴⁹

In India, since the introduction of mandated reporting in the *POCSO Act*, the number of reports of child sexual abuse has increased rapidly, demonstrating the impact that passing such a law has had in educating the public about the criminality of such offences against children, recognising the need for the justice system to respond to such cases, and encouraging child sexual abuse cases to be exposed.¹⁵⁰

¹⁴⁵ Pamela Budai, ‘Mandatory reporting of child sexual abuse: is it in the best interests of the child?’ (1996) 30 *Australian and New Zealand Journal of Psychiatry* 794, 799.

¹⁴⁶ Ibid.

¹⁴⁷ Australian Institute of Family Studies, ‘Mandatory reporting of child abuse and neglect’ *CFCA Resource Sheet* August 2015, accessible at <https://aifs.gov.au/cfca/publications/mandatory-reporting-child-abuse-and-neglect>.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Jyoti Belur and Brijesh Singh, ‘Child sexual abuse and the law in India: a commentary’ (2015) 4(26) *Crime Science* 1, 5.

Similarly, parliamentarians in the United Kingdom have raised concerns that the current framework relating to reporting of child sexual abuse is not adequate, with suggestions for bringing in legal duties for reporting child abuse.¹⁵¹

11. Concluding remarks

This chapter has highlighted some of the major influences which interact with the reporting of cases of child sexual abuse, and in many cases, contribute to the underreporting of child sexual abuse cases. Clearly, reporting (whether mandated or otherwise) is a complex component within the child protection mechanisms of a jurisdiction, and an area in which much more research could prove prudent.

¹⁵¹ The Guardian, 'Jail those who turn a blind eye to child abuse, says Cameron' 3 March 2015, accessible at <<http://www.theguardian.com/society/2015/mar/03/david-cameron-child-abuse-ignore-jail>>.

Child Sexual Assault Trials**1. Introduction*****1.1 Chapter outline***

This portion of the comparative report focuses on the special measures available for child complainants in sexual assault cases. The chapter will begin with an examination on who has access to the measures and how they are gained. It will then proceed to discuss the elements of the trial itself including how evidence is given and rules surrounding the questioning of a child witness. Following this will be a discussion of the various care elements to the trial process including support persons, communication aids and initiatives to increase comfort. Finally the report will take a brief look at how the privacy of child complainants is protected. Ultimately, in comparison with the other commonwealth nations India seems to have similar protections and initiatives in place, but not identical. There are some particular areas where differences emerge more starkly which lend themselves to discussions on the possibility of reform. These areas include moving towards complainant-orientated wording of legislation, the use of pre-recorded evidence, rules around the questioning of child witnesses and laws on access to communication aids. It is understood that a simple copy of another States' legislation would not be ideal nor culturally appropriate for India, however it is hoped that this research may provide ideas for further enquiry into where Indian legislation could evolve going into the future.

1.2 The legislation

The main pieces of legislation containing measures for child sexual assault complainants referenced in this chapter for each of the jurisdictions is as follows;

- India-*The Protection of Children from Sexual Offences Act 2012*
- Australia-*Criminal Procedure Act 1986* (NSW)
- United Kingdoms-*Youth Justice and Criminal Evidence Act 1999* (UK)
- New Zealand-*Evidence Act 2006; Criminal Justice Act 1985; Crimes Act 1961*

It should be noted that in regards to Australia, most information referred to is in regards to the state of New South Wales and in regards to the United Kingdoms, focus is placed upon England.

2. Protections under the law

2.1 Access to special measures

In each of the jurisdictions, though children will be eligible for special measures due to their age, eligibility does not necessarily mean that the measures will be granted automatically. The laws of all the countries, though having some mandatory requirements each have a number of provisions that apply based on judicial discretion. Compared to England, Australia and New Zealand, there seem to be a higher number of mandatory provisions in India rather than discretionary ones. The wording of the legislation is also quite different. It is highly orientated towards complete judicial control. Thus the provisions will either say that the Special Court *must* do something or that the Special Court *may* do something.¹ In other jurisdictions the wording is far more victim orientated and whilst ultimate access to a measure relies on the court, a complainants views are more readily taken into account. Compare for instances India's provisions for giving video evidence to Australia's –

- **POCSO s36(2):** “...the Special Court may record the statement of a child through video conferencing”
- ***Criminal Procedure Act 1986 (NSW) s306U(1):*** “...a vulnerable person...is entitled to give ... evidence by means of closed-circuit television facilities....”

¹ See *The Protection of Children from Sexual Offences Act 2012* (IND) Ch VIII.

Thus whilst each of the provisions ultimately has the same outcome (particularly as the POSCO Guidelines contain provisions around consulting with the child complainant)², the wording of the Australian legislation reflects a higher focus placed on victim rights and empowerment. England and New Zealand similarly have complainant orientated wording where applications may be made for victims to have certain special measures apply.³ The victim orientated wording may be in part due to the fact that in Australia, England and New Zealand many of the provisions available for children apply due to their classification as vulnerable witnesses or because they are sexual assault complainants. Thus the provisions were written in the context of victim rights and providing judges with a toolbox to get the best evidence from vulnerable witnesses (adult and children alike). In India however, the measures that apply were written specifically for children, lending legislation towards more proscriptive wording. This may be because children have a more limited capacity, thus protection rather than consultation is emphasised. It should be noted however, that regardless of wording, in practice the special measures in each of the jurisdictions tend to be applied in a routine manner. Furthermore, in Australia, New Zealand and England where judicial discretion is more common, judges may make orders without the need for an application if they deem it necessary. The victim-orientated can be beneficial as it allows for greater involvement of the child in decision making about the court. For example the Australian Law Reform Commission noted a case where a 14-year-old girl asked to give evidence in court before the accused. She wanted to see the defendant as she testified and advocated for her right to face him after what was done to her.⁴ It was concluded that apart from making court a more empowering experience, that it also ultimately helped the complainant heal and move forward with her life.⁵ Her choice to face her attacker would not have been possible in India, where legislation states that the court “shall ensure that the child is not exposed in any way to the accused.”⁶ In framing special measures as victim rights rather than court powers as in India, judges in Australia, New Zealand and England have a wider scope to tailor trial experiences to each child’s needs and take into account the large capacity

² *Protection of Children from Sexual Offences Model Guidelines 2012* (IND), 2.2(i)

³ *Youth Justice and Criminal Evidence Act 1999* (UK); *Evidence Act 2006* (NZ).

⁴ Australian Law Reform Commission, *Family Violence-A National Legal Response*, Report 114 (2010) 26.175.

⁵ *Ibid.*

⁶ *POCSO*, s 36(1).

differences between very young children and those nearing adulthood. Thus there is good reasoning for special measures to be treated as rights rather than court imposed initiatives.

Another point of difference between the jurisdictions regarding access to special measures is in regards to age. In India, the protections in POCSO apply to those under 18 years of age.⁷ In New Zealand this age threshold is the same.⁸ In England however, the age used is 17 years old⁹ and Australia has the youngest age limits with a 'vulnerable person' defined to include children under the age of 16 or those under the age of 18 if they were less than 16 years old when the charges against the accused were laid.¹⁰ However, in both Australia and New Zealand special measures discussed in this paper may still apply to those outside the age limits given that equivalent protections are in place for complainants in sexual assault trials. Regarding age limits it is considered that special measures for children should apply to those under the age of 18. This is due to the fact that international standards classify children as persons under 18 years of age, as per the *Covenant on the Rights of the Child*¹¹ to which India, UK, Australia and New Zealand are parties. Thus in this area India is operating under best practice.

3. The trial

3.1 Alternative means of giving evidence

In each of the jurisdictions, provisions are made that allow child complainants to give evidence in court via alternative means. This is to make the process less confronting to children and to protect the child from having to face the accused. The following two measures are available in all jurisdictions:

⁷ POCSO, 2(d).

⁸ Evidence Act 2006 (NZ) s 4.

⁹ Youth Justice and Criminal Evidence Act 1999 (UK) s 16(1)(a).

¹⁰ Criminal Procedure Act 1986 (NSW) ss 306P(1); 306ZB(2).

¹¹ Convention on the Rights of the Child 1989, art 1.

1. The use of CCTV, live-link or other audio-visual means for a child to give evidence in chief, cross-examination and re-examination. This may be done in another room within the court, or in some cases an alternate location.¹²
2. The use of screens, certain seating arrangements, one-way mirrors or other measure so that a child giving testimony in the courtroom cannot see the accused. Such visual blocks may also be used so that the accused cannot view the child on the video feed. This is due to evidence that even when a child cannot see the accused, many remain apprehensive that the accused will be able to see them.¹³

The POSCO Act allows for these special means of receiving child statements in India, however there are further measures available in other nations. In Australia, New Zealand and England the use of pre-recorded evidence in various formats is quite routine and in some cases used very extensively. The various means are outlined below along with some of the advantages and disadvantages of using them;

3.1.1 Use of police interviews

In England and Australia there are provisions that allow for a child's police recorded interview to be used as evidence-in-chief.¹⁴ The child will however still be required to attend court for cross and re examination.

¹² *POCSO*, 36(2); *Youth Justice and Criminal Evidence Act 1999* (UK) s 24; *Evidence Act 2006* (NZ) s 106; *Criminal Procedure Act 1986* (NSW) s 306ZB.

¹³ *POCSO*, 36(2); *Youth Justice and Criminal Evidence Act 1999* (UK) s 23; *Evidence Act 2006* (NZ) s 116; *Criminal Procedure Act 1986* (NSW) s 306ZH.

¹⁴ *Criminal Procedure Act 1986* (NSW) s 306U; *Youth Justice and Criminal Evidence Act 1999* (UK) s 137.

3.1.2 The pros and cons of police interviews

A 27-month study conducted in England regarding the use of interviews as evidence demonstrated that the main benefit of it was reducing stress to the child.¹⁵ A comparison of live-link evidence and interview evidence showed that children were far less anxious in the latter.¹⁶ Another benefit is that the child is not required to repeat their story on multiple occasions to different audiences.¹⁷ This occurs in India where apart from speaking with police, children must also appear before the court on two additional occasions. There are also arguments that using police interviews as evidence may also be more accurate as interviews are taken soon after events. It may also avoid the re-traumatisation of children by avoiding the necessity that they re-read their statements in order to refresh their memory before giving testimony.¹⁸ The use of police interviews can also be beneficial as they provide a clear picture of the child soon after the abuse. This may reveal non-verbal and emotional responses that might not exist by the time a trial is held, particularly if there is a significant time gap and the child has received professional assistance in overcoming the trauma.¹⁹

The main concern raised over the use of police interviewers was that evidence could be affected by the quality of the interviewer. In some cases the right questions may not be asked to get sufficient details to be adequate for a trial. This could be somewhat counteracted with strict question guidelines and appropriate training for those who conducting the interviews.²⁰ Another concern is that without proper trust or rapport being built, children may often not reveal all details of what has happened in the first instances or even deny that something has occurred.²¹ This may due to cultural barriers, problems of shame or a reluctance to disrupt family units, particularly given that

¹⁵ Diana McConachy, 'Evaluation of the Electronic Recording of Children's Evidence,' (Youth and Child Protection Team NSW Police, May 2002), 8.

¹⁶ Ibid.

¹⁷ Ibid, 10.

¹⁸ Ibid, 35.

¹⁹ Ibid 10.

²⁰ Ibid.

²¹ Lina Leander, 'Police interviews with sexual abuse victims: Patterns of reporting, avoidance and denial,' (2010) 34 *Child Abuse and Neglect* 192, 193.

perpetrators are for the most part known to the child.²² Further difficulties can arise with young children who may simply not have the vocabulary to describe sexual acts or be unsure about what is wrong behaviour given the possibility of having had positive bodily reactions.²³ For each of these reasons some may consider it better for a child to have multiple chances to discuss what has happened, some suggest 2-3 interviews are necessary in order to gain complete information.²⁴ However, it should be kept in mind that the difficulties outlined here that police face are not necessarily remedied by having someone legally trained asking the questions, keeping in mind particularly that the police who conduct the interviews are specially trained. It is noted that in India trust in the police system may not be strong enough for a measure such as this to work. Alterations to the method may however be successful, such as making use of a child's first interview with the Special Court. Ultimately, as is the case with most special measures, it is often good to consider making the option available so that judge's may make an order where they deem it necessary. Each child should be judged on a case-by-case basis and if interview evidence is deemed cogent enough, the option to use it should be there.

3.1.3 Pre-recorded statements

The possibility for a child victim's statement to be pre-recorded prior to the trial is available in Australia, New Zealand and England.²⁵ This will normally involve a separate proceeding or a pre-trial hearing in which the judge, prosecution, accused and their defence are present without a jury.

²² Ibid.

²³ Ibid.

²⁴ Ibid, 192.

²⁵ *Youth Justice and Criminal Evidence Act 1999* (UK) s 27; *Evidence Act 2006* (NZ) s 106; *Criminal Procedure Act 1986* (NSW) s 306U.

3.1.4 All evidence pre-recorded

In some Australian states all evidence of children is pre-recorded.²⁶ In England, they are trialling the pre-recording of cross-examination in three court centres.²⁷ In New Zealand, there are measures to pre-record cross-examination that may be applied for, but these are not used routinely.²⁸

3.1.5 The pros and cons of pre-recording evidence

Pre-recording evidence is useful in counteracting the long delays between committal and trial, which can see the erosion of memories and added stress to a child due to waiting around.²⁹ It also reduces the stress of the examination as it occurs in the absence of the jury and it is easier to give the child multiple breaks where necessary.³⁰ Pre-recording all evidence may also mean that a child can move forward with healing sooner, rather than having to give evidence on multiple, spread out occasions as occurs in India. Another benefit is that there is evidence from Australia that suggests the use of pre-recorded evidence has helped increase the reporting of offences as victims can avoid many of the downsides of a trial.³¹ Additionally, there is the potential for avoiding a full trial. Where evidence is very strong, the accused might settle by way of a plea or if it is weak, there is an opportunity to withdraw charges.³² In both cases, the cost of a full jury trial is avoided. It can also help with limiting prejudice of the jury as rather than directing a jury to discount inadmissible evidence that they have already heard, it can simply be edited out of the video.³³ The creation of the video also means that in the event of a re-trial witnesses are not re-traumatised; the videos are simply reused.

²⁶ For example Victoria, see *Criminal Procedure Act 2009* (Vic) ss 369–370.

²⁷ *Youth Justice and Criminal Evidence Act 1999* (UK) s 28.

²⁸ New Zealand Law Society, 'England Pilots pre-recorded children's cross-examination,' (2013) 822 *LawTalk*, 19, 19.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Australian Law Reform Commission, above n 4, 26.173 .

³² C Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75, 77–78.

³³ New Zealand Ministry of Justice, *Alternative pre-trial and trial processes for child witnesses in New Zealand's criminal justice system*, Issues Paper (2012), Section 2(B).

The Australian Law Reform Commission noted some drawbacks to the recording of all evidence. These include concerns that the defence are rushed in their preparation in cross examining the main prosecution witness, the drawback of video technology lacking the immediacy and persuasiveness of in-trial testimony and the possibility of needing multiple interviews which can be stressful for the witness.³⁴ The NSW Department of Public Prosecution also noted that whilst recorded evidence maintains its forensic quality in the face of delayed proceedings, where a trial is expeditious, requiring the recording of evidence could inadvertently delay matters.³⁵ Another concern noted is that when a defendant changes lawyers, the new counsel for defence may have additional questions that their predecessor did not ask.³⁶ For this reason the Australian Law Reform Commission made the recommendation that whilst having evidence pre-recorded is a valuable option, particularly for child complainants of sexual assault, it should not necessarily be used in every case.³⁷ The use of pre-recorded evidence, as with other special measures, could be an added tool available to judges in order to best assist child witnesses and obtain from them the best quality evidence.

3.2 Questioning child witnesses

There are a number of difficulties that arise when it comes to questioning child witnesses, especially those that are particularly young. Various research efforts into child witnesses has revealed a number of major issues that can arise, particularly with cross-examination. They include the following:³⁸

³⁴ Australian Law Reform Commission, above n 4, 26.169.

³⁵ Ibid, 26.176

³⁶ New Zealand Ministry of Justice, above n 33.

³⁷ Australian Law Reform Commission, above n 4, Recommendations 26-8.

³⁸ Issues listed are discussed in Professor John Spencer, 'Do you ever tell fibs?,' *The Guardian* (England, online), Wednesday 18 July; Kimberly Shannon Burrows and Martine Powell, 'Prosecutors' recommendations for improving child witness statements about sexual abuse,' (2014) 24(2) *Policing and Security* 189.

1. Questions that are put to children in confusing terms/language.
2. When there is no apparent order to questions and they just jump around topic to topic. This can be too difficult for a child to follow and make the questioning process overwhelming.
3. The repetition of questions. This is given that when asked something again by an authority figure, children (younger ones particularly) are prone to giving a different answer thinking that their first response was wrong or unacceptable in some way.
4. The use of leading questions or tag questions to which a child is likely to simply agree to. Tag questions are those where questions such as 'isn't it?' or 'didn't he?' are tagged on the end of statements.
5. Asking a child if he/she ever tells lies/fibs or makes things up. This type of question inevitably discredits a child. Unlike an adult who might say something like 'only white-lies' or 'just when it's necessary,' a child will feel inclined to say yes or no. To say yes makes it seem like the child has admitted to being a liar and open up the possibility that they are lying in their testimony. Saying no is also discrediting as there is no one that never lies and children particularly as they grow up often lie about little things.
6. A child not understanding that they can say when they are confused, if they can't remember something or if they don't know the answer. Before authoritative figures, children can often feel pressured to simply give an answer or guess at what the asker wants to hear. This can lead to them making something up which may discredit them later.
7. Fatigue of child and jury when questioning goes too long.

These problems can be difficult to solve and are by no means an exhaustive list of challenges when questioning children. They can become an even bigger issue where defence council uses these vulnerabilities to their advantage in discrediting a witness. It is because of these issues that there must be strong rules in place around child questioning. This is unfortunately not present in every jurisdiction.

Common to all the jurisdictions are provisions that disallow unrepresented defendants from personally cross-examining child complainants and in some cases any other child witness.³⁹ In most cases the defendant must elect someone to question on their behalf or the court will appoint someone to ask the questions submitted by the defendant. Each jurisdiction also has provisions that restrict the questioning of a witness on past sexual behaviour except in certain circumstances. Whilst not being relevant for younger children, in the past bringing up the sexual history for a teenage complainant was not unusual and could be unfairly used against a complainant.

Australia and New Zealand have the weakest measures on child questioning given that there are no specific rules for children.⁴⁰ In these two jurisdictions, child witnesses are only protected by the basic set of provisions available to all witnesses. This means that the judge can disallow such questions that are considered improper, irrelevant, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.⁴¹ These may seem quite extensive, but studies suggest that judges do not intervene as often as they should and certainly not in proportion to their special vulnerabilities.⁴² Both New Zealand and Australia have a number of reports which note the continued prevalence of the problems mentioned above during child sexual assault trials. Whilst efforts are being made, what seems most necessary in these jurisdictions is child specific provisions such as those provided in India and England.

In India, apart from the rules on questioning that apply to all witnesses, the POCSO act also contains specialist provisions for children which disallows aggressive questioning or any questions that amount to 'character assassination.'⁴³ This can help prevent child witnesses being unfairly

³⁹ *POCSO*, 36(1); *Youth Justice and Criminal Evidence Act 1999* (UK) s 34-6; *Evidence Act 2006* (NZ) s 95; *Criminal Procedure Act 1986* (NSW) s 294A.

⁴⁰ Anne Cossins, 'Prosecuting Child Sexual Assault Cases: Are vulnerable witness protections enough? (Part 1),' in Judicial Commission of NSW, *Sexual Assaults Trial Handbook*, (2011) 835, 839.

⁴¹ New Zealand Ministry of Justice, above n 33, section 1.

⁴² Cossins, Above n 40, 839.

⁴³ *POCSO*, 33(6).

intimidated by the defence. As an added protection, there is a provision within POSCO that requires questions to first be posed to the Special Court who will then put them to the child.⁴⁴ Such a system encourages vigilance from judges to ensure there is no inappropriate questions and allows intervention if necessary. This system in India is certainly more active in protecting children than Australia and New Zealand's.

When it comes to rules for questioning child witnesses, England similarly has general provisions regarding cross examination that apply to all witnesses including the prevention of unnecessary, irrelevant, improper or oppressive questioning. However, unlike the other jurisdictions, they have also developed highly strong case law specifically on the questioning of children. The greatest protections come from *R v Wills [2011]*, which grants the court power to place 'necessary and appropriate' limits on questioning. These limits must be clearly set out and explained to the jury, the judge is then responsible for upholding the limits including giving directions to the jury where limitations are not complied with.⁴⁵ The wording of the power, 'necessary and appropriate,' gives judges a wide scope to step in and also to tailor questioning methods to each child. In *R v B [2010] EWCA Crim 4*, cross-examination is restricted where there is a risk that a child will acquiesce to a leading question, which as discussed above can be common with children who may simply say what they think an adult wishes to hear.⁴⁶ There are also limits where counsel appears to be putting their case to the child, through the use of complicated or tag questions.⁴⁷ These limits provided for in the case law are a good way to combat many of the issues that can arise with child witnesses, but what truly sets England apart is their use of Ground Rules Hearings.

At Ground Rules Hearings, there is an opportunity to pre-emptively put protective measures in place. Measures may include things such as who will question a child, what style of questioning will

⁴⁴ Ibid, 33(2).

⁴⁵ *R v Wills [2011] EWCA Crim 1938*.

⁴⁶ *R v B [2010] EWCA Crim 4*.

⁴⁷ *R v Wills [2011] EWCA Crim 1938; R v E [2011] EWCA Crim 2028*.

be used and how long questioning will go on for. In using them, judges and counsel alike are forced to consider carefully how each individual child may be best assisted through the trial processes and sets the culture of the trial.⁴⁸ The preemptive consideration of needs arguably offers greater protection to children as during trial it is possible that a judge will miss something in the moment. This may even occur in India where the court is responsible for directing the questions to the child. By considering the right way to question children both before and during questioning, there is a better chance that issues may be avoided. Ground Rules Hearings are available upon application, but are compulsory in cases that use an intermediary (discussed in greater detail at 4.2).⁴⁹

4. Support in court

4.1 Support persons

In each of the four jurisdictions explored in this report, a child complainant is permitted a support person. There are some differences regarding their presence in court. Under the Indian and English system, the support person is a trained individual. In India, the District Child Protect Unit and Child Welfare Committee maintain a list of qualified persons.⁵⁰ They may be someone who works in the area of child rights, an official from a children's home/shelter, a counsellor, outreach worker social worker or similar.⁵¹ However, apart from the trained individual, in India there is that added provision that cases be tried "in the presence of the parents of the child or any other person in whom the child has trust or confidence."⁵²

⁴⁸ The Crown Prosecution Service, *Guidelines on Prosecuting Cases of Child Sexual Abuse*, <
http://www.cps.gov.uk/legal/a_to_c/child_sexual_abuse/#a05>, para 92.

⁴⁹ Ibid.

⁵⁰ POCSO Rules, rule 4.

⁵¹ Ibid.

⁵² POCSO, 37..

In England the support person may be anyone with appropriate training as long as they receive approval from the court.⁵³ Most often it would be someone from Victim Support, Witnesses Services, the National Society for the Prevention of Cruelty to Children or an Independent Sexual Violence Advisor.⁵⁴ Family members who are not witnesses in the case may also be with a child during the trial.

In Australia it is more usual for a child's support person to be a family member, but they may be a counsellor or someone from a witness support service. In some cases a child can have more than one support person, for example one person from their family and another professional assistor.⁵⁵ Whomever the child chooses must gain permission from the judge to be in the courtroom and comply with judicial directions surrounding where they should sit.⁵⁶ Even if the support person is a family member, access to trained individuals is still available and they will have an assigned victim liaison officer to help through the trial process.

In New Zealand the system is quite similar to Australia and again the child may choose to have a family member or a professional assistant.⁵⁷ A study into the use of support services for children revealed that most would have a family member or friend, some their counsellor, social worker or Child Youth and Family caregiver.⁵⁸ In cases where no one was arranged for a child they were assigned court personnel to be with them.⁵⁹ Victim Support services are available to help during the

⁵³ Director of Public Prosecutions, *Interim Guidelines on Prosecuting Cases of Child Sexual Abuse* (11 June 2013) <http://www.cps.gov.uk/consultations/csa_consultation.html> 26-7.

⁵⁴ Ibid.

⁵⁵ Office of the Department of Public Prosecutions, *Families, Carers and Support People*, <<http://www.odpp.nsw.gov.au/victims-witnesses/support-people>>

⁵⁶ Ibid.

⁵⁷ Kristen Hanna, et al, *Child Witnesses In The New Zealand Criminal Courts: A Review Of Practice And Implications For Policy*, report from New Zealand Law Foundation (2010), pp 45-6.

⁵⁸ Ibid, 46.

⁵⁹ Ibid, 46.

trial and brief the support person. Ultimately, as in Australia, the Support Person must follow judicial directions.

It is evident from each of the jurisdictions, that despite the slight variations, the need for both familial and professional support is recognised. Indeed in legislation and guidelines surrounding the report of a sexual assault, great care is taken in each of the nations to ensure full support is given to the child and their family.

4.2 Assistance in communication

In all the jurisdictions there are well-established provisions in place to provide witnesses with interpreters where necessary. This may be foreign language interpreters for those who do not speak English well enough, or sign language interpreters for children who are deaf. In addition to simply using translators, in some jurisdictions specially trained experts in communication may also be used. They are known in most jurisdictions as Intermediaries. Intermediaries are a key way in which getting the best information from witnesses is assured and are an important way children may be assisted in giving evidence. Intermediaries are available in England and some Australian states. They have also been recommended in a report from the New Zealand Ministry of Justice.⁶⁰ The use of intermediaries is comparable to provisions in India which allow for the court to use a 'special educator' or someone familiar with a child's communication style to assist with getting evidence from a child.⁶¹ However, unlike the Indian system that is only available to those with physical or mental disabilities, intermediaries are available more broadly to all children.

In England for example, one basis of assigning an intermediary is to consider if someone will have troubles identifying a problematic question, or is unlikely to speak up to someone of authority even

⁶⁰ New Zealand Ministry of Justice, above n 33.

⁶¹ *POCSO*, s 38(2).

if they can recognise such questions.⁶² Almost all children will fall into one of these categories. Though originally concerns were raised about the intermediary affecting a witness's evidence, ultimately it was shown that their assistance could in fact improve evidence quality, as they would ensure children understood questions being put to them and that the court understood their answers.⁶³

Intermediaries are able to interfere in any inappropriate questioning of a witness, requiring that questions be re-phrased or rephrasing it himself or herself. Employed by the court, intermediaries act as unbiased parties: facilitators of communication, but not on any party's side.⁶⁴ In one example from England, an intermediary after several meetings with a child was able to establish with certainty that the 3-year-old was drawing herself and other family members consistently in the same manner. Thus when she started to draw images of herself between uncle's legs, these were able to be used by police as evidence against the uncle.⁶⁵ In the UK Intermediaries are also present during Ground Rules Hearings, which were examined earlier.⁶⁶ Intermediaries attend the meetings and report on the child's specific communication needs thus allowing the judge to set specific parameters on how each particular child will be questioned. Intermediaries can thus play an important role in overcoming difficulties with getting the best evidence out of children.

It should be noted that whilst India's current system only legislates in regards to children with disabilities, in practice assistance is often given to other children as well. Whilst this means that the practice in India is somewhat similar to that in other jurisdictions, it is problematic that communication assistance is not a required consideration for all children. In not legislating that a

⁶² Joyce Plotnikoff and Richard Woolfson, 'Kicking and Screaming – The Slow Road to Best Evidence,' in John Spencer and Michael E Lamb, *Children and Cross Examinations*, (Oxford, 2012).

⁶³ The Crown Prosecution Service, above n 48, 86.

⁶⁴ Crown Prosecution Service, 'Intermediaries,' *Special Measures* <http://www.cps.gov.uk/legal/s_to_u/special_measures/#a06>.

⁶⁵ Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the criminal justice system*, (Bristol, 2015), chap 1.

⁶⁶ Crown Prosecution Service, above n 64.

special educator, intermediary or equivalent be considered in every case, there is a risk that some children will miss out on the opportunity. It means that assistance relies on the forethought and attitude of the judge rather than a legal provision containing a clear objective test. Apart from ensuring that every child is treated equally, legislating on the matter also makes the parameters of the professional's role clear. For example, when special educators are used in India for children with disabilities, it is set out that they must be an expert in the field and hold necessary qualifications. Similarly in England, strict provisions are in place to ensure the independence of intermediaries and their proper accreditation.⁶⁷ Rules such as these are necessary to ensure evidence is not tainted. It seems wise in regards to access and quality that India legislate on the matter rather than it simply being common practice.

4.3 Comfort in Court

There are various initiatives that have been taken to ensure that the trial experience is less scary for children. One of the main ones is the use of witness support teams to help keep children and their families up to date with cases and also explain how the court room process will work. Another way to increase the comfort of children is to allow them to visit the courtroom before their trial and where possible observe part of a case or see how various special measures work. The pre-trial court visit is practiced in all jurisdictions.⁶⁸ The court experience is also made more comfortable for a child by allowing for frequent breaks in order that a child not become fatigued. In India POSCO provides that "The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial."⁶⁹ The idea of time management for the wellbeing of a child is taken further in England with their use of Ground Rules Hearings. Apart from making provisions on the questioning of a child, which was discussed earlier, the hearings are also used to carefully time manages all

⁶⁷ See Ministry of Justice, *The Registered Intermediary Procedure Guidance Manual*, available at <http://www.cps.gov.uk/publications/docs/RI_ProceduralGuidanceManual_2012.pdf> .

⁶⁸ *POCSO* Guidelines; The Crown Prosecution Service, above n 48, 26; New Zealand Ministry of Justice, above n 33, section 1; Office of the Director of Public Prosecution, 'Getting ready for court,' (2013) *Children and Young People* <http://www.odpp.nsw.gov.au/victims-witnesses/children-and-young-people>>.

⁶⁹ *POCSO*, s 33(3).

stages of proceedings in order to ensure children are not overwhelmed or exhausted.⁷⁰ By setting ground rules early in the trial, all parties are aware of each child's needs and how they are being met. England also has other unique initiatives in order to help children relax including where judges and barristers will remove their traditional attire of wigs and gowns so that they will not appear as intimidating and special court readiness education programs for children.⁷¹

5. Protection of Identity

One area in which there is almost complete uniformity between the various nations is in protecting a child's identity. All have rules providing that child sexual assault matters must be held 'in camera,' that is a closed court.⁷² This means that the public is not permitted into the courtroom to observe as may occur in other types of cases. The press will also have only restricted access or in some instances be excluded completely. All jurisdictions also have provisions against the publication of a child complainant's identity.⁷³ Rules against identity disclosure also disallow the naming of any information which could lead to the identification of a child including such things as a child's school, where they live or the name of a sibling,

6. Conclusion

Since the introduction of POCSO, India is fairly in line with standards found in other jurisdictions namely Australia, New Zealand and England. The major areas where differences are found, in which India may consider reform includes moving towards complainant-orientated wording of legislation, the use of pre-recorded evidence, the provision of stronger rules around the questioning of children and the creation of clear legislation concerning the access of special educators/intermediaries for all children. Ultimately further examination will be required to see if

⁷⁰ The Crown Prosecution Service, above n 48, 86.

⁷¹ *Youth Justice and Criminal Evidence Act 1999* (UK) s 26.

⁷² *POCSO*, 37; *Youth Justice and Criminal Evidence Act 1999* (UK) s 25; *Crimes Act 1961* (NZ) s 144A; *Criminal Procedure Act 1986* (NSW) ss 291, 294D.

⁷³ *POCSO*, 33(7); *Criminal Justice Act 1985* (NZ) s 139; *Crimes Act 1914* (Cth) s 15Y.

changes to Indian law are possible or desirable, it is hoped however that this paper may help inform future research efforts.

Victims Compensation and Counselling

1. NSW Victims Compensation: Introduction

NSW victim's compensation has its authority in the ***Victims Rights and Support Act 2013***. Australia and NSW in particular do not have a specific scheme for children like India and child victims of sexual violence are covered in the same ***Victims Rights and Support Act 2013***.

Here is the link to the ***Victims Rights and Support Act 2013***:

http://www.austlii.edu.au/au/legis/nsw/consol_act/vrasa2013318/

This report will discuss the key aspects of victims compensation in NSW as a representation of Australia. Each of the Australian Jurisdictions have different schemes and compensation amounts, however these vary only slightly between jurisdictions.

1.1 Is the Victim compensated by the convict?

Recognition payments (discussed in **part 1.4.3**) firstly may be recovered from persons found guilty of the crimes.¹ This right to restitution is expressly enabled in Section 57 of the Act. The Commissioner of Victims Rights or the Tribunal has the discretion to make a provisional order for restitution by the offender.² The amount of these orders are not specified and are up to the Commissioner to decide. Now there are means to object to these provisional orders, however if there is no objection or the objection is unsuccessful the Commissioner can enforce these restitution orders.³ These are enforced by the Commissioner in the same way a debt would be pursued in a civil claim.⁴

¹ *Victims Rights and Support Act 2013* (NSW) s 57.

² *Victims Rights and Support Act 2013* (NSW) s 59.

³ *Victims Rights and Support Act 2013* (NSW) ss 62-65, 72.

⁴ *Victims Rights and Support Act 2013* (NSW) s 72.

The court can also order persons it finds guilty of a crime to pay compensation to any victims.⁵ Now compensation payments are available in two main areas being injury⁶ and loss to property.⁷ Injury payments are of more relevance to the *POCSO Act*.

Now regarding injury, the court may direct a sum not exceeding \$50,000 AUD (23.4 Lakhs Approx. as at 9/11/2015) to be paid out of the property of the offender to any aggrieved person.⁸ 'Injury' is defined to include both actual bodily harm and grievous bodily harms as well as psychological or psychiatric harm.⁹ This definition ensures that victims are afforded financial protection for both physical and mental traumas encountered.

Finally a victim may also pursue a civil claim against the offender in order to recover funds. The victim may be able to receive a larger compensation amount, however this dependent on the financial status of the offender. If the offender does not have the financial resources the victim may not be able to net an adequate return; especially considering the costs the victim may encounter in obtaining a lawyer and other aspects of the trial process such as the victim reliving traumatic aspects of their life again.

All in all the provisions in NSW legislation are quite comprehensive in dealing with obtaining compensation from the offender. The only question is whether the maximum of \$50,000 AUD is sufficient to meet the needs of the victim, however it must be noted that other payments by way of state compensation are also available to victims.

1.2 Does the state provide compensation?

In NSW the state does provide financial compensation for the immediate needs of the victim, economic loss incurred by the victim and a recognition payment to acknowledge the wrong done to

⁵ *Victims Rights and Support Act 2013* (NSW) s 91.

⁶ *Victims Rights and Support Act 2013* (NSW) s 93.

⁷ *Victims Rights and Support Act 2013* (NSW) s 96.

⁸ *Victims Rights and Support Act 2013* (NSW) s 94.

⁹ *Victims Rights and Support Act 2013* (NSW) s 18.

the victim.¹⁰ More detail on payments provided to victims will be discussed in the following sections.

The NSW scheme does not require a conviction to be eligible for compensation, it just requires that the injury sustained is due to an 'act of violence'.¹¹ With that said evidence is required of either a police report or a report from a government agency showing the nature of the crime and injury.¹²

1.3 Eligibility Criteria for determining if Victims Compensation is Available

A victim of an **Act of Violence** is eligible for support.¹³ The scope of what 'Act of violence' entails is quite large and includes sexual assault.¹⁴

Sexual assault covers many aspects including:

- i. Sexual intercourse with a person without his or her consent.¹⁵
- ii. Sexual intercourse with a child under the age of 16 years.¹⁶
- iii. The commission of an act of indecency with or towards a child under the age of 16 years.¹⁷
- iv. Participation with a child under the age of 18 years in an act of child prostitution or the use of a child under the age of 18 years for the production of child abuse material.¹⁸

Victims who are eligible for support include the primary victim who is the one injured or killed.¹⁹

Also the parent or guardian of a child who is the primary victim is also eligible for support under the scheme.²⁰

¹⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 29 May 2013 (Hon. Michael Gallacher).

¹¹ *Victims Rights and Support Act 2013* (NSW) s 17.

¹² NSW Government, 'The Victims Support Scheme: A Detailed Guide' (2013), *Victims Services* <http://www.victimsservices.justice.nsw.gov.au/Documents/bk19_vs-guide-details.pdf>.

¹³ *Victims Rights and Support Act 2013* (NSW) s 23.

¹⁴ *Victims Rights and Support Act 2013* (NSW) s 19(3).

¹⁵ *Victims Rights and Support Act 2013* (NSW) s 19(8)(a).

¹⁶ *Victims Rights and Support Act 2013* (NSW) s 19(8)(b).

¹⁷ *Victims Rights and Support Act 2013* (NSW) s 19(8)(d).

¹⁸ *Victims Rights and Support Act 2013* (NSW) s 19(8)(e).

¹⁹ *Victims Rights and Support Act 2013* (NSW) s 23(1).

1.4 Criteria for Determining the Amount of Compensation

As mentioned above financial compensation is available for immediate needs, economic loss and the recognition payment.

1.4.1 Financial Assistance for Immediate Needs

For immediate needs the package is capped at \$5000 AUD (2.3 Lakhs). These immediate needs might include emergency medical or dental treatment, the costs of cleaning up a crime scene, expenses for relocation from a situation of continuing or potential violence and the installation of safety measures in the home.²¹

Primary victims need to present evidence such as a police report or a report from a government agency detailing the injury as well as quotes, invoices or receipts as to the expenses or likely expenses incurred.²² This is used to determine the payment for immediate needs.

Funeral costs are capped separately at \$8000AUD (3.74 Lakhs).²³

Now regarding these claims for immediate needs, the claim has to be initiated within two years.²⁴ If the victim is a child when the incident occurred, the claim has to be initiated within two years of the child turning 18.²⁵

²⁰ *Victims Rights and Support Act 2013* (NSW) s 23(2).

²¹ New South Wales, *Parliamentary Debates*, Legislative Council, 7 May 2013, 32 (Brad Hazzard).

²² NSW Government, 'The Victims Support Scheme: A Detailed Guide' above n 12.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

1.4.2 Financial Assistance for Economic Loss

This is capped at \$30,000 AUD (14 Lakhs).²⁶ Now this assistance is for things like reasonable travel expenses and ongoing medical or dental expenses.²⁷ There is a \$20,000AUD (9.35 Lakhs) limit for loss of actual earnings which can be shown.²⁸ This is unlikely to be of much relevance to the child considering they are not likely to be working, however it may be used by parents or guardians of the child, especially if they have had to take time of work to assist and look after the child.

With regards to evidence required it is the same as what was required for immediate needs.

Finally regarding when a claim is to be made, there is **NO TIME LIMIT for victims of SEXUAL ASSAULT if they were a child when the incident/s occurred.**²⁹ This is the only special treatment afforded to minors explicitly in the act. The other aspects regarding compensation amounts are based on the injury and the 'act of violence.'

1.4.3 Recognition Payment

The purpose of this payment is to acknowledge the trauma suffered by the victim.³⁰ This function is found in all Australian jurisdictions and is a way for the state to apologise for not protecting its citizens.

Now the payments available vary depending on the crime and the injury suffered.

Here are few of the recognition payments available to victims:

- i. \$10,000 AUD (4.68 Lakhs) for Sexual assault involving serious bodily injury, pattern of sexual or indecent assault.³¹

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 7 May 2013, 32 (Brad Hazzard).

³¹ NSW Government, 'The Victims Support Scheme: A Detailed Guide', above n 12.

- ii. \$5,000 AUD (2.34 Lakhs) for sexual assault; attempted sexual assault involving serious bodily injury or grievous bodily harm; for a pattern of physical assault of a child.³²
- iii. \$1,500 AUD (0.7 Lakhs) for indecent assault, or attempted sexual assault involving violence.³³

Therefore the recognition payment is primarily directed at the seriousness of the act of violence. There are additional amounts for example if a child died as a result of the abuse their family would receive a recognition payment of \$7,500AUD (3.5 Lakhs).³⁴

Now as we have seen there is no specific criterion or special treatment afforded to minors regarding compensation amounts. Once again there is no time limit to commence a claim if the victim of sexual assault was a child when the incident occurred.³⁵ This is compared to a two year period for other victims of acts of violence and the 10 year period for sexual assault victims who were over 18 years at the time of the incident.

These recognition payment amounts have decreased as a result of the new legislation (the reasoning behind the new legislative scheme will be discussed briefly in the next section). However with that said, the compensation amount available to victims from the state alone could potentially be around\$20000-45000AUD (\$5000 immediate needs payment + \$30,000 economic loss + \$1,000-\$10,000 recognition payment depending on the act of violence). With that said there is still the aspects of restitution and compensation paid by offenders for injury to consider which could be up to another \$50,000AUD.

1.5 NSW 2013 Amendment to the Victims Compensation Scheme

NSW laws were amended in 2013 to meet some of the short falls of the prior scheme. Though recognition payments were greater in the old scheme (close to \$50,000 AUD), the scheme had long

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

waiting periods to obtain payment.³⁶ This was due to a growth in claims meaning that the average waiting time to receive any money was close to 30 months.³⁷ This meant the funds were not available when victims required them. For example to meet immediate needs such as paying medical bills and funeral expenses.

This old scheme was seen as undermining the objectives the scheme was trying to promote in enabling the rehabilitation and recovery of victims.³⁸

The new scheme was developed to better accommodate these immediate needs, providing victims access to money when they needed it the most.

1.6 Counselling

1.6.1 Does every child receive free counselling?

Each primary victim of an act of violence is eligible to receive 22 hours of free counselling.³⁹ This number can be extended where appropriate.

2. Victims Compensation UK: Introduction

Victims may obtain compensation in a number of ways covered in UK legislation. Firstly there are provisions where the court can order reparation found in the *Powers of Criminal Courts (Sentencing) Act 2000*. There is also a state funded scheme which enables compensation for criminal injuries. This is the *Criminal Injuries Compensation Scheme 2012* and it obtained its authorisation in the *Criminal Injuries Compensation Act 1995*. This is similar to the way in which the *POCSO Act* authorises the *POCSO Rules* and *POCSO Model Guidelines*.

³⁶ New South Wales, *Parliamentary Debates*, Legislative Council, 7 May 2013, 32 (Brad Hazzard).

³⁷ Ibid.

³⁸ Ibid.

³⁹ NSW Government, 'The Victims Support Scheme: A Detailed Guide', above n 12.

2.1 Is the Victim compensated by the convict?

The Court may make compensation order against a convicted offender for any personal injury, loss or damage resulting from that offence.⁴⁰ This may include payments for funeral or bereavement expenses if death results from the crime.⁴¹ The limit on a compensation order is £5,000 (approx. 5 Lakhs as at 15/11/15).⁴²

A victim can also commence a civil claim for damages to obtain greater compensation from the offender, however this does place an additional burden on victims with added costs and stresses. This is only available if the offender is identified; and it is essential to know if the offender has the financial capacity to make a civil pursuit worthwhile.

Finally the *Domestic Violence, Crime and Victims Act 2004* has a prospective provision which seeks to amend the *Criminal Injuries Compensation Act 1995* to add a provision that allows compensation provided by the state to be recovered from the convicted offender who caused the criminal injury.⁴³

2.2 Does the State Provide any Compensation?

The UK government does provide compensation to blameless victims who have obtained criminal injuries through crimes of violence (includes child sexual offences). This is covered in the *Criminal Injuries Compensation Scheme 2012* authorised by the *Criminal Injuries Compensation Act 1995*. The requirements to be eligible for compensation and the amount of payments available will be discussed in the next sections.

⁴⁰ *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 130.

⁴¹ *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 130(1)(b).

⁴² *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 131(1).

⁴³ *Domestic Violence, Crime and Victims Act 2004* (UK) s 57.

The purpose of the scheme was not only to compensate for injuries but also to be "an expression of public sympathy for innocent victims of violent crime."⁴⁴ This recognition aspect is also present in the NSW scheme.

With that said, it is stated in the *Criminal Injuries Compensation Guide* that the *Scheme* is meant to be sought as a last resort; to be used if the offender does not have adequate means to compensate the victim or if the offender is unknown.⁴⁵ Hence the *Scheme* implicitly encourages seeking compensation from the offender before coming to the state.

2.3 Eligibility Criteria

To be eligible for compensation under the scheme an individual must suffer a criminal injury which is directly attributable to them being a direct victim of a crime of violence.⁴⁶ Sexual assault to which the person did not consent is covered in the 'crime of violence' definition.⁴⁷ Injuries can be either physical or mental.

The scheme also provides compensation for person who suffer a criminal injury from witnessing an incident, or in the immediate aftermath of an incident where a 'loved one' sustains a criminal injury.⁴⁸ Therefore parents who have obtained mental injury as a result of seeing their children suffer from sexual abuse may be able to claim compensation.

A conviction is not required, especially as the assailant may be unknown, however it is essential that a complaint is made to police otherwise a claim will not be accepted.⁴⁹

⁴⁴ Leanne Weber, Elaine Fishwick and Marinella Marmo, *Crime, Justice and Human Rights* (Palgrave MacMillan, 2014) 209.

⁴⁵ Criminal Injuries Compensation Authority, *A Guide to the Criminal Injuries Compensation Scheme 2012* (Crown Copyright, 2012) 2.

⁴⁶ *Criminal Injuries Compensation Scheme 2012* (UK) para 4.

⁴⁷ *Criminal Injuries Compensation Scheme 2012* (UK) Annex 2(d).

⁴⁸ *Criminal Injuries Compensation Scheme 2012* (UK) para 6.

⁴⁹ *Criminal Injuries Compensation Scheme 2012* (UK) para 22.

There is also a general requirement to make a claim within two years of the incident.⁵⁰ This is extended for victims of sexual violence if they were under the age of 18 when the incident occurred. They have two years from when they lodge a police report.

2.4 Criteria for Determining the Amount of Compensation

The scheme does provide compensation for various things like injuries, special expenses, loss of earnings and bereavement. The payment for injuries and special expenses are most relevant for children who have been sexually abused.

The maximum lump sum payment available for injuries (physical or mental) is of £250,000 (2.5 Crores as at 15/11/15) however amounts vary depending on injury and its seriousness. Regarding child sexual abuse the maximum payment could be £55,000 (55.4 Lakhs) if there is loss of fertility.

2.4.1 Injury Payments

These are covered in Annex E of the *Scheme*. There are provisions for injuries to specific parts of the body as well as compensation amounts for certain acts of sexual and physical abuse.

Here are extracts from Annex E most relevant to the *POCSO Act*.

<u>Genitalia</u>			
Injury requiring medical treatment			
	- permanent damage		
	- moderate	A5	£ 3,500 (3.5 Lakhs)
	- severe	A8	£ 11,000 (11 Lakhs)
Loss of fertility		A16	£ 55,000 (55.4 Lakhs)

⁵⁰ *Criminal Injuries Compensation Scheme 2012* (UK) para 87.

Sexual offence where victim is a child (under age of 18 at time of, or commencement of, offence) or an adult who by reason of mental incapacity is incapable of giving consent

Note [6] applies where the victim is a child or an adult unable to give consent.

Sexual assault				
	- minor - non-penetrative sexual physical act(s) over clothing	B1	£ 1,000	(1 Lakh)
	- minor - non-penetrative frequent sexual physical act(s) over clothing	B2	£ 1,500	(1.5 Lakh)
	- serious - non-penetrative sexual physical act(s) under clothing	B3	£ 2,000	(2 Lakhs)
	- serious - pattern of repetitive non-penetrative sexual physical acts under clothing	B4	£ 3,300	(3.3 Lakhs)
Sexual assault				
	- one or more of non-penile penetrative or oral genital act(s)			
	- one incident	B4	£ 3,300	(3.3 Lakhs)
	- two or more isolated incidents	B5	£ 4,400	(4.4 Lakhs)
	- pattern of repetitive, frequent incidents			
	- over a period up to 3 years	B7	£ 6,600	(6.6 Lakhs)
	- over a period of 3 years or more	B8	£ 8,200	(8.2 Lakhs)
	- resulting in serious internal bodily injuries	B12	£ 22,000	(22 Lakhs)
	- resulting in permanently disabling mental illness confirmed by psychiatric prognosis			
	- moderate mental illness	B12	£ 22,000	(22 Lakhs)
	- severe mental illness	B13	£ 27,000	(27 Lakhs)

Non-consensual penile penetration of one or more of vagina, anus or mouth

	- one incident	B9	£ 11,000	(11 Lakhs)
	- one incident involving two or more attackers	B10	£ 13,500	(13.5 Lakhs)
	- repeated incidents over a period			
	- up to 3 years	B11	£ 16,500	(16.5 Lakhs)
	- 3 years or more	B12	£ 22,000	(22 Lakhs)
	- resulting in serious internal bodily injuries	B12	£ 22,000	(22 Lakhs)
	- resulting in permanently disabling mental illness confirmed by psychiatric prognosis			
	- moderate mental illness	B12	£ 22,000	(22 Lakhs)
	- severe mental illness	B13	£ 27,000	(27 Lakhs)
	- resulting in serious internal bodily injury with permanent disabling mental illness confirmed by psychiatric prognosis			
	- moderate mental illness	B14	£ 33,000	(33 Lakhs)
	- severe mental illness	B15	£ 44,000	(44 Lakhs)

The categories and requirements to qualify for cover are listed above.

Now for mental illness, there may need to be an assessment by an appointed expert to determine severity of the illness and whether the illness was caused by the crime of violence.⁵¹ There is no cover if it is a pre-existing condition.⁵²

The payments received by minors who have suffered sexual abuse (children under 18 at time of incident) is identical to sexual abuse victims of any age. Therefore it is not age that determines the amount of compensation but the crime or injury.

2.5 Counselling

2.5.1 Does Every Child Receive Free Counselling?

Counselling is not covered in the legislation and therefore may need to be claimed as a special expense payment.⁵³ Now this is available for treatment of an injury where the victim has been incapacitated for more than 28 weeks.⁵⁴ Therefore it is not be an immediate response to deal with the trauma.

Now there are charities and NGOs that provide phone counselling such as RapeCrisis⁵⁵ and Victims Support.⁵⁶ With that said, these are very sensitive matters especially for children and therefore it does seem beneficial to have an established counselling program with trained counsellors that can provide face-to-face assistance.

⁵¹ Criminal Injuries Compensation Authority, above n 45, 16.

⁵² Ibid.

⁵³ Peter Dunn, 'Victim Support in the UK: Victim Support Services in Detail' (2004) *Simon Cornell* 101, 103; *Criminal Injuries Compensation Scheme 2012* (UK) para 52.

⁵⁴ *Criminal Injuries Compensation Scheme 2012* (UK) para 50.

⁵⁵ <<http://rapecrisis.org.uk/>> Link to Rape Crisis Website.

⁵⁶ <<https://www.victimsupport.org/>> Link to Victim Support Website.

3. Victim's Compensation New Zealand: Introduction

New Zealand like NSW and the UK does not have a specific act to deal with child sexual offences. New Zealand is however unique compared with these two nations in that victims compensation (victims of crime) is dealt with in a no-fault personal injury scheme- The *Accident Compensation Act 2001*. The New Zealand Scheme unlike other schemes has five primary responsibilities in community responsibility, complete rehabilitation, comprehensive entitlement, real compensation and administrative efficiency.⁵⁷

This no-fault scheme was established in 1974 and was seen to be in the best interests of the community; by ensuring that injured people were rehabilitated as soon as possible meant that their contribution to society could be maximised in the shortest time possible (i.e. enabling victims to re-join the workforce sooner assisting the nation with its economic growth and output). The old system was more of a loss-shifting model which built up the victim through punishing the wrongdoer.⁵⁸

This scheme does not require the crime to be proved and focuses on ensuring that anyone injured is able to be rehabilitated, thus maximising social utility.⁵⁹ The societal and community focus of the scheme is also emphasised with it being funded by premiums paid by employers, motorists, earners and the government.⁶⁰

3.1 Is the Victim Compensated by the Convict?

There is a strong statutory presumption in favour of reparation contained in the *Sentencing Act 2002*.⁶¹ This is seen in the wording of section 12(3) where it says 'if a court does not impose a

⁵⁷ New Zealand, *Royal Commission of Inquiry: Compensation for Personal Injury in New Zealand 1967* (Woodhouse J); John Miller, 'Compensating Crime Victims within New Zealand's No Fault Accident Compensation Scheme: The Advantages and Disadvantages' (1996) *AIC Conference Proceedings: Australian Institute of Criminology* 255, 256.

⁵⁸ Ibid 4.

⁵⁹ Ibid.

⁶⁰ John Miller, above n 59.

⁶¹ Ibid 11.

*sentence or order of reparation in a case where it is lawfully entitled to do so, it must give reasons for not doing so.*⁶²

Section 12 also authorises reparation unless a sentence would result in undue hardship for the offender or dependants of the offender, or if other special circumstances would make such an order inappropriate.⁶³

The court has the option of imposing a fine, reparation or both, however if it seems unlikely that the offender is able to afford both, the court must sentence the offender to make reparation.⁶⁴ This reiterates NZ stance in favour of reparation and highlights their commitment to the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Annex A paragraph 8 stating that offenders should compensate victims).⁶⁵

Now with the no-fault personal injury scheme, reparation is only available for matters outside personal injury. Section 32 states that reparation can be ordered for loss or damage to property and emotional harm. The emotional harm aspect is more relevant to address when comparing with the *POCSO Act*. This is only available to primary victims (those injured) or the primary victim's family if the primary victim died as a result of the injury.⁶⁶

The *Victims Rights Act 2002* also enables victims to participate in the sentencing process by allowing them to submit a victim impact statement.⁶⁷ This statement allows victims to alert the court and offenders the effect and impact the crime had on them.⁶⁸ These statements can also be used for sentence indication.⁶⁹

⁶² *Sentencing Act 2002* (NZ) s 12(3).

⁶³ *Sentencing Act 2002* (NZ) s 12(1).

⁶⁴ *Sentencing Act 2002* (NZ) s 14(2)

⁶⁵ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA/Res/40/34, 96th plen mtg (29 November 1985) annex A para 8.

⁶⁶ New Zealand, above n 1, 12.

⁶⁷ *Ibid* 14; *Victims Rights Act 2002* (NZ) ss 17, 21AA.

⁶⁸ *Victims Rights Act 2002* (NZ) s 17AB.

⁶⁹ *Victims Rights Act 2002* (NZ) s 21AA.

Now NZ also have a provision to ensure that victims have the best chance to recover funds from offenders ordered to pay restitution. There are extended time periods to pay as well as options to pay on a regular basis opposed to a lump sum payment.⁷⁰ If payments are not made there are options to recover the money owed such as the seizure of the offender's property, taking part of their salary or seizure of a specified amount from the offender's bank account.⁷¹

There is no limit regarding the amount of reparation payable with it being left to the discretion of the courts.

Finally, like Australia and the UK victims may also seek compensation from the offender by pursuing a civil claim.

3.2 Does the State Provide Victims Compensation?

Yes the state provides compensation to persons who have suffered personal injury. This includes victims of crime and is covered in the *Accident Compensation Act 2001*. As mentioned above this is a no-fault scheme focused providing compensation to victims to enable a quicker recovery.⁷² The underlying goal of the scheme is to minimise social, economic and personal costs in the community.⁷³

3.3 Eligibility

To be eligible for cover an individual must suffer a 'personal injury' which is the result of an 'accident'.⁷⁴ 'Personal injury' includes both physical and mental injuries.⁷⁵ 'Mental injury' is defined

⁷⁰ New Zealand, above n 1.

⁷¹ Ibid.

⁷² *Accident Compensation Act 2001* (NZ) s 3.

⁷³ Ibid.

⁷⁴ *Accident Compensation Act 2001* (NZ) s 20(2)(a).

⁷⁵ *Accident Compensation Act 2001* (NZ) ss 26(b)-(d).

as clinically significant behavioural, cognitive, or psychological dysfunction.⁷⁶ There is a specific provision also included for 'mental injuries' caused by certain criminal acts.⁷⁷

Schedule 3 lists all the criminal offences that 'mental injury' cover extends to. Here are a few that relate specifically to the *POCSO Act*⁷⁸:

- i. Indecent communication with young person under 16
- ii. Sexual violation
- iii. Attempted sexual violation
- iv. Incest
- v. Sexual connection with dependent family member
- vi. Indecent act with dependent family member
- vii. Meeting young person following sexual grooming
- viii. Sexual connection with child under 12
- ix. Attempted sexual connection with child under 12
- x. Indecent act on child under 12
- xi. Sexual connection with young person under 16
- xii. Attempted sexual connection with young person under 16
- xiii. Indecent act on young person under 16
- xiv. Indecent assault
- xv. Female genital mutilation

Therefore child victims of sexual assault have the option of recovering compensation for both physical injuries caused by sexual offences as well as for any mental trauma associated with the incident.

⁷⁶ *Accident Compensation Act 2001* (NZ) s 27.

⁷⁷ *Accident Compensation Act 2001* (NZ) s 21.

⁷⁸ *Accident Compensation Act 2001* (NZ) sch 3.

3.4 Criteria for amount of Compensation?

The compensation amounts in NZ are calculated based on overall impairment caused to the individual. For example a loss of a leg may result in a 40% impairment, whereas the loss of an arm would equate to 60%. This is an important difference which is unique to the NZ scheme. Now compensation is available for permanent impairment above 10%. This would result in a minimum lump sum payment of \$2500NZD (Approx. 1 Lakh as at 10/11/2015).⁷⁹ An 80-100% impairment (which is defined as extreme impairment and involves the individual being completely dependent on another person at all times)⁸⁰ would net the maximum lump sum payment of \$100,000NZD (Approx. 43.5 Lakhs).⁸¹

Similarly for mental injury, impairment is assessed to determine the lump sum compensation payable. This assessment is done by specially trained evaluators who consider the activities of daily living, social functioning, concentration, persistence and decompensation in their assessment.⁸² Once again an impairment level is calculated and the payment varies depending on the level.

3.5 Counselling

3.5.1 Does Every Child receive free Counselling Services?

Counselling entitlements are not explicitly stated in the *Accident Compensation Act 2001*. Information is available on the **Accident Compensation Corporation (ACC) Website** indicating that victims of mental injury caused by sexual offences may be eligible for counselling services in which ACC registered counsellors will be provided. 16 free counselling sessions are provided (though more may be provided upon further assessment) by the ACC if the victim is eligible.⁸³

⁷⁹ *Accident Compensation Act 2001* (NZ) s 56(3).

⁸⁰ Accident Compensation Corporation, *The ACC User Handbook to the AMA "Guides to the Evaluation of Permanent Impairment"* (Accident Compensation Corporation, 4th ed, 2002) 37.

⁸¹ *Accident Compensation Act 2001* (NZ) s 56(4).

⁸² Accident Compensation Corporation, above n 81, 33-41.

⁸³ TalkingWorks, *ACC for Sexual Abuse* (2013) <<http://www.talkingworks.co.nz/Funding+Sources/acc.sa.html>>.

The ACC has a specialised team to work with children and adolescents, to provide them and their families the support they need to cope with these issues.⁸⁴

Finally I would like to note that New Zealand does assist Children in re-entering the school environment if their injury is preventing them from doing so. The *Accident Compensation Act 2001* does expressly provide the possibility of education support being available for a child suffering from personal injury⁸⁵ (for example the ACC may fund a teacher's aide to help the child learn).⁸⁶ This assistance is not found explicitly in the Australian or UK Schemes.

4. Victims Compensation India: Introduction

India is unique in that it has an act specifically designed to protect children from sexual offences. *The Protection of Children from Sexual Offences (POCSO) Act 2012* provides the basis for ensuring that children's rights and freedoms are protected. Victims Compensation is covered in this Act, however there is also reference to s 357 of the *Code of Criminal Procedure 1973* which deals with aspects of reparation and payments of fines.

The *POCSO Act* has a general provision in s 33(8) that deals with compensation. It states:

*"In appropriate cases, the Special Court may, in addition to the punishment, direct a payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child"*⁸⁷

The Act also authorises the creation of *POCSO Rules* which contain a specific provision on how compensation is to be managed.

⁸⁴ Accident Compensation Corporation, *Mental Injury from Sexual Abuse or Assault* (28 October 2015) <<http://www.acc.co.nz/making-a-claim/how-do-i-make-a-claim/WPC112692>>.

⁸⁵ *Accident Compensation Act 2001* (NZ) s 16.

⁸⁶ Accident Compensation Corporation, *Education Support* (12 May 2015) <<http://www.acc.co.nz/making-a-claim/what-support-can-i-get/ECI0031>>.

⁸⁷ *The Protection of Children from Sexual Offences Act 2012* (IND) s 33(8).

4.1 Is the Victim compensated by the convict?

Now reading just s 33(8) of the Act it is unclear whether the offender is required to pay, it just states the Special Court may direct a payment of compensation.

The *POCSO Rules* does make a reference s 357 of the *Code of Criminal Procedure 1973*, in that it should be considered when an order for compensation should be granted.

S 357 states that reparation should be paid for injuries or loss suffered by the victim. It does however seem that compensation is limited to the amount of the fine; this just shifts the payment from the state to the victim.⁸⁸

The Parliamentary Committee: Human Resource Development Report recommended the creation of a survivor support fund- with the fine collected as punishment to be added to this fund to compensate victims.⁸⁹ This report also recognised the philosophy underlying victims compensation expressed in the preamble of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted by the United Nations General Assembly in 1985; this included the principle of reparation as well as state schemes to help restore victims of crime.⁹⁰

4.2 Does the State provide victim Compensation?

Now there are provisions that enable the Special Court to award compensation which is to be paid by the state government from either their Victims Compensation Fund or other schemes established for the purpose of rehabilitating victims established under s357A of the *Code of*

⁸⁸ *Code of Criminal Procedure 1973* (IND) s 357.

⁸⁹ Committee on Human Resource Development, *The Protection of Children from Sexual Offences Bill* (2011) 8.

⁹⁰ *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA/Res/40/34, 96th plen mtg (29 November 1985).

Criminal Procedure.⁹¹ This payment shall be made within 30 days of receiving the order from the Special Court.⁹²

With that said compensation amounts in India vary significantly from state to state and there are no provisions in the *POCSO Act* as to how much an injury or crime will get in terms of compensation.

For example a Rape victim in Goa would get 10 Lakhs as opposed to a victim in other jurisdictions that range from 0.5-3 Lakhs. Also many sexual offences that are recognised in the other jurisdictions (NSW, UK and NZ) are not covered in the Indian scheme.

Now regarding Compensation amounts, minors in some states receive more, however in other states this distinction is not apparent. For example a minor who has been raped in Assam receives 25,000 more rupees than a general rape victim, however in Arunachal Pradesh there is only a general category of rape that is assigned compensation (so child victims of rape fall under same category as adult victims).

This large variance between compensation payments makes it hard to determine how much will be received. Payment amounts depend on the state the claim is made.

4.3 Eligibility Criteria for deciding compensation

Crimes that are prohibited against children are covered in chapter I and II of the *POCSO Act*.⁹³ It would appear that victims of these acts would be eligible for some form of compensation and support.

The *POCSO Rules* also provide certain aspects that need to be considered when determining the amount of compensation. This appears to be done on a case by case basis and includes:

⁹¹ *POCSO Rules 2012* (IND) rule 7(4).

⁹² *POCSO Rules 2012* (IND) rule 7(5).

⁹³ *The Protection of Children from Sexual Offences Act 2012* (IND) chs I-II.

- i. Type of abuse, gravity of offence and severity of physical or mental injury suffered by the child⁹⁴
- ii. Expenditure (real or likely) for medical treatment⁹⁵
- iii. Loss of educational opportunity⁹⁶
- iv. Loss of employment⁹⁷
- v. Relationship with offender⁹⁸
- vi. Whether abuse single or isolated.⁹⁹
- vii. Whether child became pregnant¹⁰⁰
- viii. Whether child contracted a STD or HIV¹⁰¹
- ix. Any disability suffered¹⁰²
- x. Financial condition of child to determine need for rehabilitation.¹⁰³***** This is a confusing provision and I am not sure what it is saying. My interpretation is that compensation depends on whether the child comes from a wealthy or poor background. I don't think that financial status should matter when considering whether a child should receive funds to help with rehabilitation; rather the focus should be on protecting and rehabilitating all children in need.
- xi. Any other factors¹⁰⁴

This is a comprehensive list of factors that should be considered when determining what compensation a child receives. However as there is no scope as to the amount of compensation that can be recovered so victims do not know how much they are likely to receive.

⁹⁴POCSO Rules 2012 (IND) rule 7(3)(i).

⁹⁵POCSO Rules 2012 (IND) rule 7(3)(ii).

⁹⁶POCSO Rules 2012 (IND) rule 7(3)(iii).

⁹⁷POCSO Rules 2012 (IND) rule 7(3)(iv).

⁹⁸POCSO Rules 2012 (IND) rule 7(3)(v).

⁹⁹POCSO Rules 2012 (IND) rule 7(3)(vi).

¹⁰⁰POCSO Rules 2012 (IND) rule 7(3)(vii).

¹⁰¹POCSO Rules 2012 (IND) rules 7(3)(viii)-(ix).

¹⁰²POCSO Rules 2012 (IND) rule 7(3)(x).

¹⁰³POCSO Rules 2012 (IND) rule 7(3)(xi).

¹⁰⁴POCSO Rules 2012 (IND) rule 7(3)(xii).

4.4 Counselling

4.4.1 Does Every Child Receive Free Counselling?

Counselling is not explicitly mentioned in the *POCSO Act*, however it is implied in compensation available for mental trauma and immediate rehabilitation.¹⁰⁵

The *Parliamentary Committee HRC* has recommended free and confidential counselling and support services for victims by professionally trained counsellors. There are also provision in the *POCSO Model Guidelines* that have requirements for the training and qualification of counsellors, therefore it would be presumed that this service is provided to victims. However it is not clear as to how much counselling is actually available for victims.

Finally, the *POCSO Guidelines* and the *Parliamentary Report* do acknowledge the importance of counselling families through this tough period. It is unclear as to whether free counselling is available to families however the *POCSO Guidelines* acknowledge the beneficial effect that counselling of family members can have on the primary victim (the child).¹⁰⁶

5. Summary of Findings- Victims Compensation and Counselling

5.1 Victims Compensation NSW- An Overview

NSW is different to India in that it does not contain a specific Act to deal with sexual offences against children. Crimes against children are covered in the *Crimes Act 1900 (s66A-80AA address sexual offences against children)*, however there is the *Children and Young Persons (Care and Protection) Act 1998* that deals with other matters that promote the safety of children. Children in NSW are covered under the general victims compensation scheme. The legislation that governs victims compensation in NSW is the *Victims Rights and Support Act 2013*.

¹⁰⁵ *The Protection of Children from Sexual Offences Act 2012 (IND) s 33(8)*.

¹⁰⁶ *POCSO Model guidelines 2013 (IND) para 8*.

NSW does have provisions in which the offender can be ordered to pay compensation to the victim. This can be for injuries suffered by the victim and is capped at \$50,000 AUD. The amount of these payments are left to the discretion of the Commissioner and Tribunals.

NSW does provide state based compensation. This includes for aspects such as the immediate needs of the victim (capped at \$5,000 AUD), economic loss (capped at \$30,000) and a recognition payment (ranging between \$1,000AUD-10,000AUD depending on 'act of violence').

In NSW to be eligible for compensation the person is to be the victim of an 'act of violence'. This covers many types of sexual assaults which is most relevant to the *POCSO Act*.

Finally each victim of an 'act of violence' is eligible to 22 hours of free counselling.

5.2 Victims Compensation UK- An Overview

The UK has the *Criminal Injuries Compensation Scheme 2012* that provides cover to victims of crime. Sexual abuse to children is covered in this scheme and lump sum payments are available ranging from £1,000 to £55,000 depending on the type of injury and severity of the abuse. There is also cover for physical and mental illness. This scheme does not require a conviction but does need a police report to be filed.

Up to £5,000 in reparation is available from convicted offender. There is also the option to commence civil proceeding to obtain damages from the offender if the offender is known.

Finally, the UK scheme does not provide counselling for victims. The only form of free assistance would require victims to seek out charities and NGOs offering phone counselling.

5.3 Victims Compensation New Zealand- An Overview

New Zealand like Australia and the UK does not have a specific piece of legislation to deal with child sexual offences. Now New Zealand is unique in that it has a no fault compensation scheme in which

victims of crime are included. New Zealand's motives behind its victims compensation scheme is to maximise social utility by ensuring injured civilians are rehabilitated as quickly as possible. Therefore a conviction is not necessary to claim.

There are two specific aspects covered in the personal injury definition; these are physical and mental injury.

The NZ compensation amounts vary depending on the amount of physical impairment to a person which is unique to NZ. Lump sum payments range from \$2,500NZD- \$100,000NZD depending on impairment level.

It must be noted that NZ does have reparation and there is a strong presumption towards it in the *Sentencing Act 2002*. NZ also has provisions that allow the victims to participate in the sentencing process by providing Victim Impact Statements which the court considers.

Finally, counselling though not explicitly stated in the legislation is available free of charge to children who have suffered mental injury as a result of sexual abuse.

5.4 Victims Compensation India- An Overview

India is unique in that it has a specific act to deal with protecting children from sexual offences.

There are provisions that enable reparation to be obtained from offenders however the limits and amounts are not specified.

India also has state funded schemes to provide compensation to victims. The powers to set up such funds are established in s 357A of the *Code of Criminal Procedure*. There are provisions in the general compensation scheme to provide for victims of crime.

There are also provisions in the *POCSO Act* that give the Special Court the power to make orders for compensation. These are to be taken out of the same state fund however it is unclear as to how

much compensation is recoverable under the scheme. It appears to be judged on a case by case basis and seems to vary depending on the state.

Finally regarding counselling, it is not expressly asserted in the *POCSO Act* whether it is freely available to child victims. It does however seem implied through many provisions in the *Act* though it is unclear as to the amount of counselling available.

6. Comparative Table- Victims Compensation and Counselling: Child Sexual Offences

	NSW	UK	NZ	India
Is the victim compensated by the convict?	Yes. Maximum payment for injury caused authorised by legislation \$50,000AUD (23.4 Lakhs). Civil claims also able to be pursued.	Yes. Maximum payment authorised in legislation £5,000(approx. 5 lakhs). Civil claims also able to be pursued.	Yes. There is no maximum amount specified, left to the discretion of the courts. Civil claims also able to be pursued.	Yes. Maximum amounts not specified, not explicit in <i>POCSO Act</i> but available through s357 <i>Code of Criminal Procedure</i> .
Does the state provide compensation?	Yes. This is covered in the <i>Victims Rights and Support Act 2013</i> (NSW).	Yes. This is covered in the <i>Criminal Injuries Compensation Scheme 2012</i> (UK)	Yes. This is covered in the <i>Accident Compensation Act 2001</i> . This unlike NSW, UK and India is a no-fault personal injury scheme.	Yes, though large variance on payment amounts depending on which state the claim is made.
Is a conviction required?	No, just a police report or report from a government agency outlining the crime and injury	No, just requires a police report to be filed.	No, just proof of personal injury caused by an accident (sexual offences included).	No.
State based payments	\$5,000AUD max. for immediate	Ranges depending on type of injury	Ranges from \$2,500- \$100,000NZD (1-43.5	Yes. Payments vary significantly

available	needs, \$30,000AUD max. for economic loss and recognition payment ranging from \$1,000-\$10,000 for sexual assault victims.	or abuse suffered. Loss of fertility has a payment of £55,000 (55 Lakhs). For sexual abuse payments range from £1,000-£44,000 (1-44 Lakhs) depending on severity.	Lakhs). This varies based on impairment level caused by injury.	between states.
Does the child receive free counselling?	Yes, 22 hours of free counselling available.	No. Not provided by the state.	Yes. Though not explicit in legislation 16 free counselling sessions are available to child victims of sexual assault.	Yes, though unclear as to how much counselling is actually available.

Concluding Remarks

We hope this research paper has offered an informative insight into the way in which various common law nations have tackled issues relating to sexual offences against children. We recognise that simple duplication of legislation offered in other States would not be appropriate for India, however we hope it may provide ideas for further lines of enquiry. This paper by no means presents all available research in the area, yet we are thankful for the opportunity to offer some contribution towards legal reform in India.