

# SCHOOL BULLYING AND NEW SOUTH WALES TEACHERS' DUTIES TO REPORT CHILD ABUSE UNDER MANDATORY REPORTING LEGISLATION: A REPLY TO HEALEY

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*A recent article advanced the argument that New South Wales mandatory reporting legislation requiring teachers to report suspected child abuse operates to require harm caused to children by school bullying to be reported by teachers to government child protection agencies. The article raises important issues concerning the nature and scope of mandatory reporting legislation in New South Wales and throughout Australia. In this article, we explore the argument's strengths and weaknesses. We conclude that, due to the nature and context of mandatory reporting laws, the nature of child protection systems, the differences between abuse perpetrated by parents or caregivers as opposed to bullying inflicted by children, and the presence of school-based responses to bullying, the more persuasive view is that the laws do not and should not require harm caused by school bullying to be reported by teachers to government child protection agencies.*

## I INTRODUCTION

In an article published in this journal in 2005, Healey argued that mandatory reporting legislation requiring teachers to report suspected child abuse requires teachers to report not just suspected abuse inflicted by the child's parents or other adults, but also to report known school bullying of a student by a peer when that bullying results in a 'risk of harm' as defined by the legislation.<sup>1</sup> A key element of the reasoning behind this claim was that peer abuse at school (school bullying) is conceptually indistinguishable from abuse of a child by a parent, caregiver or other adult, in the context of the operation of mandatory reporting laws. As well, Healey referred to the New South Wales legislative mandatory reporting provisions to inform this interpretation. Healey argued that the legislation requires reports by teachers when they have 'knowledge of systematic, frequent and harmful abusive behaviour by peers'.<sup>2</sup> Another expression of her argument was that the legislative reporting duty 'cannot be ignored in the case of severe peer abuse when the criteria for risk and harm are met and documented'.<sup>3</sup> It was also pointed out that comparable legislation in other Australian jurisdictions might have the same effect.

Healey's article raises some important issues about the protection of children from harm caused by school bullying, the expressions used in mandatory reporting legislation, the operation of the provisions in practice, and the consequences for child protection systems. Since Healey's thesis concerns the scope and application of the New South Wales legislative provisions concerning mandatory reporting of child abuse, the question is primarily one of statutory interpretation. The key issue is: do the provisions require teachers to report 'abuse' caused by school bullying?

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There is no doubt that school bullying can be very serious and can cause grave consequences for victims. It is beyond reasonable dispute that in cases of bullying having significant effects, action should be taken to address the problem. Fortunately, it is now widely accepted that for legal and pedagogical reasons, and in the interests of protecting children from harm, schools and educational authorities should create strategies to combat and respond to bullying. It can also be observed that the mandatory reporting provisions in the *Children and Young Persons (Care and Protection) Act 1998* (NSW), at least regarding physical abuse, and some of the directions in associated policy documents, appear to include physical abuse by a peer as a type of abuse that teachers should report to government authorities under the legislative child abuse reporting duty. In large part, this interpretation is produced by the duty to report suspected physical abuse, produced by the combined operation of ss 27 and 23(c), not being expressly confined to abuse by parents or caregivers or other adults.

As well as the breadth of expression used in s 23(c), our research has disclosed some other grounds supporting Healey's interpretation and argument. First, the New South Wales Department of Education and Training policy document entitled *Protecting and Supporting Children and Young People: Revised Procedures* states that 'Where concerns about risk of harm relate to an alleged perpetrator who is a student ... the same procedures for reporting to DoCS [Department of Community Services] are followed'; although it is somewhat confusingly then stated that 'If a student ... of any age engages in behaviour which could in the view of the principal or executive officer constitute sexual or physical assault, the matter should be reported to the police'.<sup>4</sup> In addition, the glossary of the policy defines 'physical abuse or ill treatment' and refers to perpetration of these acts on a child by an 'older child',<sup>5</sup> although the definition does not mention the specific context of school bullying.

Second, we telephoned the New South Wales Department of Community Services Helpline on Friday 7 September 2007, and were advised that if a teacher knew a child was being bullied at school by another child to the extent that the child was 'at risk of harm' according to the terms of the legislation, then the teacher should report it to DoCS (it was indicated that whether the child was at risk of harm in such a case would depend on the severity and frequency of the bullying). We were also advised that if the child who was perpetrating the bullying was perceived as being at risk of harm, the teacher should report that to DoCS also. However, we received advice that the teacher should also follow the school's bullying policy and procedures. As well, when we asked what DoCS could do in response to a report of bullying (given that the remedies in the *Children and Young Persons (Care and Protection) Act 1998* are for abuse and neglect in family situations), it was indicated that for physical abuse, DoCS could involve the police, and if it was emotional or psychological abuse, DoCS could refer the case to mental health services.

We agree that if a teacher suspects a child is suffering harm or is at risk of harm (for example, by perceiving physical injuries that appear non-accidental, or by perceiving significant psychological harm), but neither knows nor suspects the harm to the child is being caused by bullying by a peer, the teacher's duty to report would be activated. This is because the teacher suspects harm, does not know the identity of the person who is inflicting the harm, and thus the duty is to make a report and not to embark on any further investigation. Then, if DoCS chooses to investigate, appropriate action can be taken whether it is found that the child is being bullied, or is being abused by an adult, or is not suffering either from bullying or from abuse.

However, we argue that cases where a teacher is aware that a child is being bullied, even if the bullying is causing or is suspected to be likely to cause 'harm', are not appropriate subjects of reports to government agencies under mandatory reporting legislation. Our argument has two

main bases. First, the terms of the legislation clearly indicate that the intended operation of the reporting duty for psychological abuse does not extend to psychological harm caused by school bullying. Second, the provenance, context and purposes of mandatory reporting laws, and the presence of mechanisms in schools to deal with bullying, mean that it is generally neither necessary nor appropriate to report bullying to government agencies but rather to use the school-based processes devised to respond to bullying. The second point, in particular, involves an argument that Healey's conflation of school bullying with child abuse perpetrated by parents or caregivers, and the consequent claim that teachers should report bullying-related 'abuse' under the legislative duty to report child abuse, is not justified for two reasons. First, there are differences in the characteristics of peer abuse, and abuse by parents or caregivers, on each of the three dimensions Healey mentions (the relationship of power, the behaviours endured and the psychological impact, and the availability of support structures and helping professionals). Second, even if the current expectation of DoCS is to the contrary, the nature of mandatory reporting laws and child protection systems should mean that reports of school bullying to government agencies are not appropriate. Concomitantly, the presence of school-based mechanisms to deal with bullying means teachers should use these processes.

We therefore argue that although there are reasons supporting Healey's argument, and indeed, the current DoCS policy appears to support it, there are better reasons sustaining a contrary view. Our argument also suggests the current DoCS policy is unnecessary and likely to cause more problems than it solves. While the purpose of this article is not to give comprehensive coverage of the contexts of these three reasons, it is appropriate to explain each reason in some more detail.

## II TERMS OF THE LEGISLATION

Regarding psychological abuse, the legislation in New South Wales expressly states that mandated reporters are required to report when it is suspected that '*a parent or other caregiver has behaved in such a way towards the child ... that the child ... has suffered or is at risk of suffering serious psychological harm*': s 23(e) (authors' emphasis). This express demarcation of the scope of the duty to report psychological harm defeats any argument that psychological abuse by school bullying is within the intended operation of the reporting law. It also indicates that the DoCS should not be expecting or requiring teachers to report this type of abuse by a child's peers in a bullying context. Much school bullying (including cyber-bullying) is psychological in nature, and even where bullying is physical, it may produce psychological rather than physical injuries. These types of bullying-related injuries are clearly not intended by the legislation to be reported by teachers.

It can also be noted at this point that there are six subsections in s 23 which define the circumstances under which a child may be 'at risk of harm', and which may activate the duty to report in s 27. The terms of these provisions help to indicate their intended scope and operation. We have just seen that s 23(e) is the psychological abuse provision, and is limited to acts by the child's parent or other caregiver. The provisions in s 23(a) and (b) concern the reporting of suspected neglect; both inherently relate only to the relationship between child and parent/caregiver, and so clearly have no application to peers. The provision regarding reports of domestic violence (s 23(d)) concerns only events occurring in the child's household, thus also confining that reporting context to one not involving the behaviour of school peers. Section 23(f) relates to prenatal reports and the mother's subsequent conduct, and so is also only relevant to a context unrelated to peers' conduct.

This leaves s 23(c), which effectively states that a child ‘is at risk of harm if current concerns exist for the safety, welfare or well-being of the child ... because ... the child ... has been, or is at risk of being, physically ... abused or ill-treated’. This provision also refers to sexual abuse or ill-treatment but because the context we are concerned with is school bullying, a concept which is generally understood to denote acts of a physical and psychological nature,<sup>6</sup> we will deal only with the physical abuse element. Read on its own, this provision appears to require reports of physical abuse or ill-treatment of a child, whoever has perpetrated that abuse or ill-treatment, thus appearing to require reports of physical abuse by bullying peers in a school context. However, as we will argue, this is not a sound interpretation of the provision.

### III DIFFERENCES IN CHARACTERISTICS OF PEER ABUSE AND ABUSE BY PARENTS AND CAREGIVERS

One pillar of Healey’s argument is the equating of peer abuse with child abuse inflicted by a child’s parent or caregiver or another adult. Major characteristics of peer bullying (types of behaviours endured, types of psychological impact, the power relationship that exists, and the availability of support structures and access to helping professionals), are argued as also being the characteristics of abuse by a parent/caregiver or other known and trusted adult: ‘Certain characteristics of abuse are common to both bullying (peer abuse) and child abuse which is often perpetrated by known and trusted adults’.<sup>7</sup> Without a detailed discussion of the nature of child abuse in its different forms, or the nature of the consequences, in its usual context of being perpetrated by adults, and without exploring key differences between peer abuse and that inflicted by adults, it is concluded that ‘On each of these dimensions peer abuse can be seen to correlate with child abuse ... peer abuse or bullying unquestionably fits the definitions and parameters of child abuse’.<sup>8</sup>

Healey’s analytical and argumentative purpose regarding the proper scope of the legislative reporting duty for teachers depends in large part on the ‘correlation’ of peer abuse with child abuse. If this characterisation is flawed, then the analysis and argument will be weakened. The conflation of peer abuse with child abuse perpetrated by parents, caregivers or other adults will not be justified if it can be shown that usually (if not in all cases) there are significant differences in the dimensions discussed: behaviours endured, psychological impact, relationship of power, and availability of support structures. We suggest that when these dimensions are considered, there are significant differences which preclude the conflation of the two types of ‘abuse’.

#### *A Differences in the Respective Relationships of Power and Dependence*

Significantly, Healey acknowledged that ‘the power relationships between the victim and the [adult] perpetrator [are] not as obvious between “peers”’,<sup>9</sup> but this qualification was not further explained or analysed. However, this qualification is relevant and does need closer analysis. Typically, there are differences in the relationships between child and peer bully, and child and abusive parent, caregiver or adult, which produce significant differences in the respective relationships of power and dependence.

##### *1 Extent and Character of the Power Imbalance*

While bullying *often* involves some difference in social status or power, and may but does not necessarily involve some difference in physical power, abuse by a parent, caregiver or adult *always* involves a very great imbalance of power, and an imbalance of power having more dimensions. It

is true that in some stages of childhood and adolescence, peers, and a peer group, can exert more influence on a child than their family, and the esteem of peers can be of higher value to a child than that of their family. These attributes can endow a child's peer(s) with enormous social power, and when one or more of these peers bullies a child, the child can feel powerless and unable to respond. This sense of powerlessness can be compounded by the superior physical power held by the bully(ies) over the victim.

But, abuse by a parent, caregiver or adult arguably involves a greater power imbalance, and all the more so with younger children. Abuse by a parent, caregiver or adult has more dimensions than peer abuse. A parent, caregiver or adult is in a superior position in the contexts of age, social power, economic power, psychological power, and physical power. In contrast, a peer bully may possess superior psychological power and physical power, but is unlikely to have any significant element of power through age, social power or economic power. As well, where imbalances do occur in both sets of relationship, the imbalances are arguably of greater magnitude in the child/parent relationship than in the child/peer relationship. The physical imbalance will usually be greater, as will the psychological. Looming over all this is the inherent, deep emotional power possessed by a parent over a child. This relationship has existed for the child's entire life, attachment has occurred, and the child has experienced the normal state of dependence on the parent for survival, which has encouraged obedience to the parent's demands and an absence of resistance or complaint to external authority. None of this exists in the child/peer bully dynamic. In the case of abuse by other adults who are not caregivers, there is still often a psychological influence held by the adult authority figure, which is usually absent in the child/peer relationship.

## *2 Enduring Nature of the Relationship Between Parent/Caregiver and Child*

The child/parent relationship is a continuing one. It is one where the child, even if abused or neglected, nearly always does want and need the relationship to continue. As well, the child depends on the parent/caregiver for the necessities of daily life and sustenance. This means there is a powerful need for the relationship to be preserved and enhanced. In contrast, any 'relationship' existing in a bullying context is not continuing, nor is there any real interest in preserving it or enhancing it. Therefore, one relationship clearly contains a much greater possibility of escape. Bullying at school can often be escaped or terminated (e.g. by resistance, avoidance or other self-help such as seeking assistance from a teacher, by the bully being rehabilitated or expelled, or by the victim moving school). In contrast, a child cannot so easily leave home or have the parent removed, and often cannot seek assistance from a friendly protective adult. While it can be difficult to avoid bullying at school, it can arguably be avoided more easily than abuse at home. This connects with a point that is made shortly about the availability of support structures and access to helping professionals.

### *B Behaviours Endured, and Psychological Impact*

It is difficult to prove the claim that the context of bullying is generally characterised by the same behaviours, and produces the equivalent psychological impact, of abuse suffered by children from the acts of parents and caregivers. Reviews disclose empirical studies where victims of bullying have exhibited depression, anxiety, social maladjustment, loneliness and lack of close peer relationships,<sup>10</sup> adverse effects on academic performance, school avoidance, suicidal ideation and lower self-esteem.<sup>11</sup> However, there is a lack of studies showing that the frequency, duration and severity of damage from bullying equates to or exceeds that caused by abuse inflicted by adults.<sup>12</sup> In contrast, there is a much larger body of methodologically rigorous

evidence showing the adverse physical and psychological consequences of physical abuse inflicted by adults.<sup>13</sup> Regarding the physical impact, while some cases of bullying may produce severe physical injuries, it is arguable that in general the extent of physical damage inflicted on children by adults is more severe than that inflicted by school bullies. In contrast to bullying by a peer, parents and caregivers who physically abuse their children have a greater difference in physical power, commonly use implements to strike or inflict pain on the child, and may inflict abuse over a sustained period of months or years.

Regarding the psychological impact, it should again be noted that some cases of bullying may produce severe psychological injuries, as occurred for example in *Cox v New South Wales* [2007] NSWSC 471. Yet, there is no strong evidence indicating that in general, violence inflicted on a child by another child has psychological effects as serious as those where the violence is inflicted on a child by a parent or caregiver. Little rigorous research has been done comparing the short-term and long-term effects of bullying with those of abuse inflicted by adults. One study from the USA explored the effects of different types of violence on children and found that two types of victimization, individual or group peer violence not resulting in physical injury, and sibling violence, were associated with ‘distinctly less symptomatology’ than other forms of violence including abuse by parents; however, aggravated assaults, which were defined as assaults with a weapon or causing injury, were found to have more serious psychological consequences.<sup>14</sup> For some types of injury where the identity of the perpetrator is less relevant, such as post-traumatic stress disorder, there would appear to be a stronger argument that the effects are not so different whether the injury is a result of violence inflicted by a child or an adult.<sup>15</sup> However, for other types of injury, it is arguable that the identity of the perpetrator does influence the type and extent of damage. Violence inflicted by a parent over a sustained period of years, for example, may be more likely to produce injuries such as depression and anxiety (and other subsequent damage in adulthood), and of a greater degree, than a much shorter period of bullying by a child at school.

Lack of evidence makes it difficult to prove this claim. Yet, it also makes the claim difficult to disprove. It is not possible to resolve this question, and there are clearly some gaps in the evidence that are worthy subjects of inquiry. However, the other elements of our argument are sufficient to maintain our case, even if this claim cannot be settled.

### *C Availability of Support Structures and Access to Helping Professionals*

School bullying often occurs during school hours and is far more likely to be observable by other children or teachers. Even bullying that occurs before or after school is likely to occur in public spaces where it can be seen. Therefore, it is more exposed, which means that others may see it and intervene, or see it and seek intervention by authority figures such as school prefects or teachers. As well as these indirect avenues of support and assistance, victims can also seek help directly from teachers or other school staff (although it is accepted that some do not, for different reasons), or their parents. In contrast, abuse by a parent, caregiver or other adult nearly always occurs in private, beyond view of the public or authority figures, meaning that intervention by others is far less likely. As well, children are arguably much less likely to make a direct complaint about abuse by a parent, caregiver or other adult than they are about abuse by a peer. This is again a result of the power dynamic, but it is also because often there is no person from whom the child can seek assistance.<sup>16</sup>

These points also relate to the different responses that are available for the different types of ‘abuse’. The different types of relationship involved, and the different epidemiologies of peer ‘abuse’ and abuse by parents and caregivers or other adults, are reflected by the different social,

educational and legal remedies and response systems available to deal with them. If the types of abuse really were the same, it would be logical for there to be identical response systems. Yet, as will be seen in the next section, the responses systems are quite different.

#### IV THE CONTEXT OF CHILD ABUSE BY PARENTS OR CAREGIVERS DIFFERS FROM THE CONTEXT OF PEER BULLYING

The different social, political, medical and legal context of child abuse by parents or caregivers (or other adults) as opposed to that of peer bullying, and in particular, the different systems of response and intervention that have been created for child abuse as opposed to those created to deal with school bullying, mean that it is neither appropriate, helpful nor necessary to report school bullying to government child protection authorities. There is no evidence that this was Parliament's intent when the law was enacted. It is true that s 23(c) does not expressly limit the reporting of physical abuse to that inflicted by parents, caregivers or other adults. Section 23(c) effectively states that a child is at risk of harm if current concerns exist for the safety, welfare or well-being of the child ... because ... the child has been, or is at risk of being, physically or sexually abused or ill-treated'. Yet, there are two broad arguments against the reporting by teachers of physical harm through bullying to the DoCS under the reporting law. First, the child protection system (including the mandatory reporting laws) were not intended to address school bullying and do not provide remedies for bullying. Second, and in contrast, school policies concerning bullying are intended to address school bullying, and these policies and other legal mechanisms do provide remedies for bullying. Both these arguments have several elements worth exploring.

##### *A Child Protection Systems*

There are four key points to make here. First, mandatory reporting laws were not originally meant to deal with the acts of children who bully other children at school, and it is not at all clear that they are now meant to do so. The original purpose of the first mandatory reporting laws was to protect children who had suffered physical abuse from parents by requiring medical practitioners to report these cases.<sup>17</sup> While the scope of the laws gradually widened to require reports of other forms of abuse, and to require members of more professions to make these reports, the laws have always been focused on protecting children from the acts and omissions of their parents and caregivers and other adults. Consistent with this is the fact that reports under mandatory reporting laws are made to child protection agencies rather than to police, because these agencies are those able to protect the child, provide assistance to the child and his or her family, and remove the child from the family if necessary. It also accords with the fact that parents and other known adults are responsible for the overwhelming majority of abuse; for example, data from the USA shows that of recorded substantiated cases, almost 90% involve parents and other known adults (78.5% parents; 6.5% other adult relatives; 4.1% unmarried partners of parents).<sup>18</sup> The data regarding perpetrators does not list other children as a perpetrator group.

Having said this, however, it is true that most Australian mandatory reporting provisions are silent regarding the source of abuse required to be reported. This can be contrasted with the majority of jurisdictions in the USA which expressly confine the reporting requirement of certain types of abuse (typically physical and emotional abuse, but in many cases also sexual abuse) to cases where the perpetrator is a specified person, usually a parent, caregiver or other individual having care, custody or control of the child, or a person who is responsible for the care of the child. Yet, even if it could be argued that the Australian mandatory reporting laws are

actually and justifiably intended to encourage reports of abuse by children, it would be highly arguable that the type of abuse by children meant to be reported relates only to abuse by siblings or relatives or other children sharing the victimised child's home, not school bullying. It would certainly clarify the position in Australia if the legislation adopted the approach of a significant minority of American States, and some provinces in Canada, which is to expressly require reports of suspected harm by persons other than parents.<sup>19</sup>

Second, the *Children and Young Persons (Care and Protection) Act 1998* was not meant, and is not meant, to address school bullying. Hansard details explanations for the Act by members of Parliament in both the Legislative Assembly and the Legislative Council, and the entire Act is situated firmly in the context of child protection in family-related circumstances. Discussion of the reporting provisions does not mention the reporting of bullying-related incidents or any other incidents of abuse inflicted on children by other children.<sup>20</sup> Other explanatory documents also make it clear that Act relates to a child protection system based around family-related contexts.<sup>21</sup> The substance of the objects and principles of the Act, in ss 8 and 9 respectively, reflect the concern of the Act with abuse and neglect occurring within family contexts and other contexts within which the child is cared for by adults responsible for them. It is worth noting that s 9(d) sets down the principle that in deciding what action to take to protect a child from harm, the least intrusive intervention is promoted; reporting bullying to DoCS is hardly consistent with this.

In addition, the Act does not provide remedies for bullying, begging the question of what would be achieved by reporting something to a body that is neither charged nor empowered to respond to it. Principles for intervention are set out in s 36, actions empowered are set out in s 34, and grounds for intervention by the Department are detailed in s 71 and other provisions.<sup>22</sup> All these provisions and response methods relate to the familial context and family-like contexts where adults are responsible for the care of children, not a context of school bullying. Accordingly, the DoCS *Interagency Guidelines for Child Protection Intervention*, which sets out processes for government agencies to respond to child protection cases, states:<sup>23</sup> 'Physical abuse is harm to a child or young person that is caused by the non-accidental actions of a parent or other person responsible for their care', and when these Guidelines discuss indicators of 'psychological abuse', they refer to the behaviour of a parent or caregiver.<sup>24</sup>

Third, it is widely acknowledged that the child protection system is already overwhelmed by the number of reports (both necessary and unnecessary) and the lack of resources provided to deal with intake, assessment and service delivery to deserving children and families.<sup>25</sup> Encouraging reports of peer bullying is unnecessary and would add further strain to a system already arguably unable to cope. In New South Wales, the number of notifications made to DoCS has increased dramatically in the last five years. In the twelve month period 2000-01, there were 40,937 notifications, 7,501 of which were substantiated after investigation.<sup>26</sup> In comparison, in 2005/06, there were 152,806 notifications, 75,980 of which were investigated, 76,826 which were dealt with by other means (e.g. referral to police, family services or provision of advice), and 29,809 of which were substantiated after investigation.<sup>27</sup>

Fourth, while we have acknowledged that some statements in policy documents indicate that reports by teachers of harm to a child from another child should be reported to DoCS, nowhere in these policy documents is it clearly stated that incidents of bullying involving the requisite degree of risk of harm should be reported to DoCS. The key school policy about child protection, which directs teachers how to deal with suspected abuse, is *Protecting and Supporting Children and Young People: Revised Procedures*.<sup>28</sup> This policy reinforces the legislative duty to report suspected child abuse and neglect. As we have acknowledged, it says that where concerns about

risk of harm relate to an alleged perpetrator who is a student, the same procedures for reporting to DoCS are followed; however, it does not use the term ‘bullying’ and it does not expressly require teachers to report bullying to DoCS. Moreover, as will be shown in the following paragraphs, other policy documents indicate that bullying should be dealt with by teachers in other ways, and are silent about making reports to DoCS. This situation, if not conclusive of the issue either way, is at least unclear and efforts should be made to make policy directions consistent and clear for the benefit of reporters.

## B School Policies

Government schools in New South Wales are required to have methods of dealing with bullying. There is detailed departmental policy guidance regarding responses to bullying, which inform and complement each school’s discipline policy. Regarding bullying—which is also the subject of national policy: the Commonwealth Government Ministerial Council on Education, Employment, Training and Youth Affairs, *National Safe Schools Framework*<sup>29</sup> sets down nationally agreed principles for safe, supportive schools including recommended responses to bullying—the Department of Education and Training has an *Anti-bullying Plan for Schools* (ABPS).<sup>30</sup> Under the ABPS, each school has a responsibility to develop its own Anti-bullying Plan, guided by the ABPS.<sup>31</sup> Teachers are required to respond to incidents of bullying according to the school’s Anti-bullying Plan.<sup>32</sup> Students, teachers, parents, caregivers and members of the school community are declared to have a responsibility to work together to resolve incidents of bullying.<sup>33</sup> Nowhere in this policy framework is it explicit or implicit that reports of bullying to DoCS are required.

The Anti-bullying Plan complements each school’s policies concerning discipline, and student welfare. The Department of Education and Training policy directive entitled *Student Discipline in Government Schools*<sup>34</sup> requires all schools to have a *School Discipline Policy*. Policies regarding bullying and discipline interact with legislative provisions and policy directives regarding suspension and exclusion. New South Wales has legislative provisions concerning suspension and exclusion of students from government schools.<sup>35</sup> The legislation empowers the Minister to control and regulate discipline in government schools (s 35(1)), and to prepare guidelines of fair discipline codes for adoption by government schools except for suspension or expulsion (s 35(2)). Under s 35(3), the Director-General of School Education may suspend a child, and the Minister may expel a child on the recommendation of the Director-General. The legislative provisions regarding suspension and expulsion are supplemented by extensive policy directions in the policy document *Suspension and Expulsion of School Students - Procedures*.<sup>36</sup> The policy sets out behaviour management strategies to adopt before suspension is ordered, detailed grounds on which suspension and exclusion can be ordered, and methods of suspension and exclusion. Principals are empowered power to suspend and expel students. Short suspensions for up to four days can be imposed for continued disobedience such as breaches of the school discipline code (e.g. refusal to obey staff instructions; defiance; disrupting other students; minor criminal behaviour related to the school), and for aggressive behaviour (such as hostile behaviour directed towards students, members of staff or other persons, including verbal abuse and abuse transmitted electronically such as by email or SMS text messages). Long suspension for up to 20 days can be ordered for more serious misconduct. There are directives to compel suspension of a student in certain circumstances, including if a student is physically violent, resulting in pain or injury, or who seriously interferes with the safety and well being of other students, staff or other persons.

Statistics suggest suspensions and exclusions are used for some cases of more serious bullying.<sup>37</sup> In New South Wales in 2005, there were 243 expulsions for misbehaviour, and there

were 11,216 long suspensions. Roughly half the long suspensions were for physical violence (5388: 48%). Figures from 2006 are similar: there were 217 expulsions for misbehaviour, and there were 12,326 long suspensions. Close to half the long suspensions were for physical violence (5852: 47%). It seems reasonable to assume that some of these cases of physical violence and misbehaviour involved bullying (an example can be seen discussed in the case of *Lopez v Trustees of the Roman Catholic Church* [2006] NSWDC 35).

Therefore, in government schools in NSW, an array of policy directives is (or should be) in place to deal with school bullying, and legislative provisions also exist to deal with bullying. All these response methods and mechanisms involve disciplinary procedures that are an ordinary part of the school's armoury of responses to student misconduct; they do not involve the making of reports to the Department of Community Services. Depending on each school's policies, responses by teachers and schools to student bullying will vary depending on the circumstances. Generally, it is likely that less serious bullying will be managed by the skilled actions of teachers and other school staff. More serious bullying will require appropriate responses according to policy, and these responses may extend to suspension or exclusion. As well, some incidents of very serious bullying may constitute criminal conduct requiring police involvement (as occurred in the circumstances giving rise to proceedings in *Lopez v Trustees of the Roman Catholic Church* [2006] NSWDC 35), and, as is becoming more common, the victims of bullying may also seek compensation in a civil claim for damages (see e.g. *Cox v New South Wales* [2007] NSWSC 471; *Lopez v Trustees of the Roman Catholic Church* [2006] NSWDC 35).

It can be noted that the various types of non-government schools in New South Wales are not covered by the discipline system established by the legislation and Department of Education and Training policy discussed above. In non-government schools, disciplinary responses and procedures are established by the contract made between the school and the student's parents. These schools are therefore entitled to have their own methods of discipline, including their own policies to deal with bullying, and it is likely that they do in fact have such policies. Since these policies differ between types of non-government school, and are not public records, it is not possible to say whether they tend to mirror the policy framework applying to government schools. However, in accordance with our argument outlined in this article, our view would be that these non-government schools' policies regarding known bullying should not promote the making of reports to DoCS, and any policies that do so should be amended.

## V CONCLUSION

The points raised by this analysis, and the interpretation favoured by Healey, suggest that some clarification may be required to assist teachers, whether in legislation and/or policy, and training. If our analysis is correct, and a teacher knows a child is being bullied by a peer and is concerned for the child's 'safety, welfare or well-being' as a result of the bullying, it should be made clear to teachers that the appropriate response is to follow school policy directions and other mechanisms to respond to the bullying, and not to report it to DoCS. This argument would apply equally to teachers in other States and Territories where similar legislative reporting duties are imposed.

If our analysis is not correct, and bullying really does require reports by teachers to DoCS provided the teacher is concerned for the child's 'safety, welfare or well-being' as a result of the bullying, then this also needs to be reflected clearly in legislation and or policy, and training. This conclusion would have implications for other States and Territories which impose legislative

reporting obligations on teachers (effectively, for physical abuse: all except Queensland and Western Australia; and for psychological abuse: all except the Australian Capital Territory, Queensland, Victoria and Western Australia).<sup>38</sup> However, where the duty to report physical and psychological abuse exists in other States and Territories, it does so only if there is 'significant' harm (or a synonymous expression of this), in contrast to New South Wales (and the Australian Capital Territory) which require reports of all physical 'abuse' regardless of the extent of harm. This means teachers would be required to report only those cases thought to involve this extent of harm.

*Keywords:* Child abuse and neglect; mandatory reporting laws; New South Wales; teachers; legislation and policy; school bullying; extent of duty to report.

## ENDNOTES

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1. J Healey, 'Peer Abuse As A Legislated Child Protection Issue For Schools', (2005) 10(1) *ANZJLE* 59-71, 60, 64-65.
2. Healey, above n 1, 64.
3. Healey, above n 1, 65.
4. New South Wales Department of Education and Training, *Protecting and Supporting Children and Young People: Revised Procedures*, <[https://www.det.nsw.edu.au/policies/student\\_serv/child\\_protection/protsupp/](https://www.det.nsw.edu.au/policies/student_serv/child_protection/protsupp/)>, 11.
5. New South Wales Department of Education and Training, *Protecting and Supporting Children and Young People*, above n 4, 30-31.
6. K Rigby, 'What Children tell us about bullying in schools' (1997) 22(2) *Children Australia* 28.
7. Healey, above n 1, 60.
8. Healey, above n 1, 62.
9. Healey, above n 1, 60.
10. R Griffin & A Gross, 'Childhood bullying: Current empirical findings and future directions for research' (2004) 9 *Aggression and Violent Behavior* 379, 380; R Duncan, 'Maltreatment by Parents and Peers: The Relationship Between Child Abuse, Bully Victimization, and Psychological Distress' (1999) 4(1) *Child Maltreatment* 45, 46.
11. M Holt, D Finkelhor & G Kaufman Kantor, 'Multiple victimization experiences of elementary school students: Associations with psychosocial functioning and academic performance' (2007) 31 *Child Abuse & Neglect* 503, 504.
12. One study suggesting the damage is similar is reported in Duncan, above n 10, but this study has limitations (including the narrow bases of psychological harm investigated, and the lack of later followup into adulthood). An interesting possibility is that children who inflict bullying may be in as much or greater need of assistance as some of their victims, in light of some evidence showing correlations between exposure to domestic violence and both bullying behaviour and victimization: A Baldry, 'Bullying in schools and exposure to domestic violence' (2003) 27 *Child Abuse & Neglect* 713.
13. See for example K Springer, J Sheridan, D Kuo & M Carnes, 'Long-term physical and mental health consequences of childhood physical abuse: Results from a large population-based sample of men and women' (2007) 31 *Child Abuse & Neglect* 517; N Sachs-Ericsson, K Kendall-Tackett & A Hernandez, 'Childhood abuse, chronic pain, and depression in the National Comorbidity Survey' (2007) 31 *Child Abuse & Neglect* 531; T Joiner, N Sachs-Ericsson, L Wingate, J Brown, M Anestis & E Selby, 'Childhood physical and sexual abuse and lifetime number of suicide attempts: A persistent and theoretically important relationship' (2007) 45 *Behaviour Research and Therapy* 539; R Colman &

- C Widom, 'Childhood abuse and neglect and adult intimate relationships: a prospective study' (2004) 28 *Child Abuse & Neglect* 1133; J Briere & D Elliott, 'Prevalence and Psychological Sequelae of Self-reported Childhood Physical and Sexual Abuse in a General Population Sample of Men and Women' (2003) 27 *Child Abuse & Neglect* 1205; D Kolko, 'Child Physical Abuse' in J Myers, L Berliner, J Briere, C Hendrix, T Reid & C Jenny (eds), *The APSAC Handbook on Child Maltreatment* (2nd ed, Sage, 2002); H MacMillan, J Fleming, D Streiner, E Lin, M Boyle, E Jamieson, E Duku, C Walsh, M Wong & W Beardslee, 'Childhood Abuse and Lifetime Psychopathology in a Community Sample' (2001) 158 *Am J Psychiatry* 1878; A Horwitz, C Widom, J McLaughlin & H White, 'The Impact of Childhood Abuse and Neglect on Adult Mental Health: A Prospective Study' (2001) 42 *Journal of Health and Social Behaviour* 184; C Widom, 'Posttraumatic Stress Disorder in Abused and Neglected Children Grown Up' (1999) 156(8) *Am J Psychiatry* 1223; A Silverman, H Reinherz & R Giaconia, 'The Long-term Sequelae of Child and Adolescent Abuse: A Longitudinal Community Study' (1996) 20 *Child Abuse & Neglect* 709; B Luntz & C Widom, 'Antisocial Personality Disorder in Abused and Neglected Children Grown Up' (1994) 151(5) *Am J Psychiatry* 670.
14. S Boney-McCoy & D Finkelhor, 'Psychosocial Sequelae of Violent Victimization in a National Youth Sample' (1995) 63(5) *Journal of Consulting and Clinical Psychology* 726, 734. It should be noted that even this study did not examine 'bullying', but incidents of violence. The traditional perception of researchers has been that violence inflicted on a child by a child is not as serious as that inflicted on an adult by an adult, although it has recently been pointed out that there are reasons to doubt this presumption: D Finkelhor, H Turner & R Ormrod, 'Kid's stuff: The nature and impact of peer and sibling violence on younger and older children' (2006) 30 *Child Abuse & Neglect* 1401.
  15. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4<sup>th</sup> Ed, Text Revision), Washington: DC, American Psychiatric Association, 2000, p 463-8); see also J Herman, *Trauma and Recovery*, Basic Books, New York, 1997.
  16. See for example Boney-McCoy & Finkelhor, above n 14, 729.
  17. S Kalichman, *Mandated Reporting of Suspected Child Abuse: Ethics, Law & Policy* (2nd ed, American Psychological Association, 1999).
  18. US Department of Health and Human Services, *Child Maltreatment 2004*, US Government Printing Office, Washington: DC, 2006, 73.
  19. See B Mathews & M Kenny, 'Mandatory reporting legislation in the USA, Canada and Australia: a cross-jurisdictional review of key features, differences and issues' (2008/in press) *Child Maltreatment*.
  20. Hansard (New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 November 1998, 9758 ff; and New South Wales, *Parliamentary Debates*, Legislative Council, 1 December 1998, 10,899 ff <<http://www.parliament.nsw.gov.au/prod/web/common.nsf/V3HHBHome>>).
  21. P Parkinson, *The Children and Young Persons (Care and Protection) Act 1998: Overview*, 2000, <<http://www.swsahs.nsw.gov.au/areaser/childprotection/resources/backobj.pdf>>.
  22. This point can be made with even more force in five other jurisdictions (Australian Capital Territory, Northern Territory, Queensland, Victoria and Western Australia). In these jurisdictions, the legislative bases for child protection intervention are narrower than those in New South Wales because as well as requiring the maltreatment ground to be fulfilled, the child must be found not to have a parent(s) who is/are willing and able to protect the child.
  23. New South Wales Department of Community Services, *New South Wales Interagency Guidelines for Child Protection Intervention*, New South Wales Government, 2006, <[http://www.community.nsw.gov.au/DOCSWR/\\_assets/main/documents/interagency\\_guidelines.pdf](http://www.community.nsw.gov.au/DOCSWR/_assets/main/documents/interagency_guidelines.pdf)>, 8.
  24. New South Wales Department of Community Services, *New South Wales Interagency Guidelines*, above n 23, 11.
  25. See for example F Ainsworth, 'Mandatory reporting of child abuse and neglect: Does it really make a difference?' (2002) 7(1) *Child and Family Social Work* 57; F Ainsworth and P Hansen, 'Five tumultuous years in Australian child protection: little progress' (2006) 11(1) *Child and Family Social Work* 33.
  26. Australian Institute of Health and Welfare, *Child protection Australia 2005-06*, Canberra: Australian Institute of Health and Welfare, 2007, 21-2.
  27. Australian Institute of Health and Welfare, above n 26, 19-22.

28. New South Wales Department of Education and Training, *Protecting and Supporting Children and Young People: Revised Procedures*, < <https://www.det.nsw.edu.au/policies/>>.
29. Ministerial Council on Education, Employment, Training and Youth Affairs, <[http://www.mceetya.edu.au/verve/\\_resources/natsafeschools\\_file.pdf](http://www.mceetya.edu.au/verve/_resources/natsafeschools_file.pdf)>.
30. New South Wales Department of Education and Training, *Anti-bullying Plan for Schools*, <<https://www.det.nsw.edu.au/policies/>>).
31. New South Wales Department of Education and Training, *Anti-bullying Plan*, above n 30, paragraphs 5.05-5.06, 5.2.10.
32. New South Wales Department of Education and Training, *Anti-bullying Plan*, above n 30, paragraph 5.2.11.
33. New South Wales Department of Education and Training, *Anti-bullying Plan*, above n 30, paragraph 5.2.5.
34. New South Wales Department of Education and Training, *Student Discipline in Government Schools*, <<https://www.det.nsw.edu.au/policies/>>.
35. *Education Act 1990* (NSW) s 35.
36. New South Wales Department of Education and Training, *Suspension and Expulsion of School Students – Procedures*, <[https://www.det.nsw.edu.au/policies/student\\_serv/discipline/susp\\_expul/PD20020014.shtml](https://www.det.nsw.edu.au/policies/student_serv/discipline/susp_expul/PD20020014.shtml)>.
37. See New South Wales Department of Education and Training, *Long Suspension And Expulsion Summary 2006*, and *Long Suspension And Expulsion Summary 2005*, <[https://www.det.nsw.edu.au/reports\\_stats/stats/suspexpul.htm](https://www.det.nsw.edu.au/reports_stats/stats/suspexpul.htm)>.
38. For a summary of legislative mandatory reporting duties imposed on teachers throughout Australia, see B Mathews, K Walsh, D Butler & A Farrell, ‘Mandatory Reporting By Australian Teachers of Suspected Child Abuse and Neglect: Legislative Requirements and Questions for Future Direction’ (2006) 11(2) *Australia & New Zealand Journal of Law & Education* 7.

