

## LEGAL DUTIES OF RESEARCHERS TO PROTECT PARTICIPANTS IN CHILD MALTREATMENT SURVEYS: ADVANCING LEGAL EPIDEMIOLOGY

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*Studies of the prevalence of child maltreatment respond to a public policy imperative to better understand and prevent child abuse and neglect. These studies span domains of law, public health, and legal epidemiology. When conducting them, researchers must comply with legal duties to protect research participants. Australia has a complex legal environment, with additional challenges when participants are children, or are in danger. Duties arise in three bodies of law, vary across States and Territories, and require statutory interpretation, conceptual analysis, and operationalisation. This article conducts the first comprehensive analysis of researchers' legal duties to protect participants in child maltreatment surveys. It contributes new understandings of the operation of mandatory reporting duties in child protection law, duties to report child abuse offences in criminal law, and the duty of care in negligence law. The analysis informs conclusions about the applicability of these duties, and indicates a legally compliant, ethically sound, and operationally practicable approach. Findings are relevant to multiple settings.*

### I INTRODUCTION

Studies of the national prevalence of child maltreatment have been conducted for decades in many countries.<sup>1</sup> This burgeoning field has been spurred by a growing

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1 For a systematic review of national studies, see Ben Mathews et al, 'Improving Measurement of Child Abuse and Neglect: A Systematic Review and Analysis of National Prevalence Studies' (2020) 15(1) *PLoS ONE* e0227884:1–22 <<https://doi.org/10.1371/journal.pone.0227884>> ('Improving Measurement'); Franziska Meinck et al, *Measuring and Monitoring National Prevalence of Child Maltreatment: A Practical Handbook* (World Health Organization, 2016).

awareness of child maltreatment as a significant form of interpersonal violence breaching children's human and legal rights, that is associated with lifelong health disorders, behavioural risks, and economic costs. These epidemiological studies continue to proliferate,<sup>2</sup> driven by an international policy agenda expressed through the United Nations Sustainable Development Goals urging all nations to eradicate maltreatment.<sup>3</sup> Nation States are required to report on their efforts at the national level, and this requires governments to measure the national scale of maltreatment and determine whether rates are declining. Australia has recently assumed this responsibility, with the Royal Commission into Institutional Responses to Child Sexual Abuse recommending conduct of the first national prevalence study.<sup>4</sup> Large-scale surveys conducted at the population level to identify the prevalence, nature and associated outcomes of child maltreatment are fundamentally epidemiological studies. However, since they also involve studies of the prevalence of breaches of individuals' legal rights, they are also studies of legal epidemiology. The core concern of legal epidemiology, or of public health law research, is to consider through empirical analysis the relationships between legal mechanisms and practices, and public health. This includes considering how public health law mechanisms and tools can or do have an impact on the health of the public. In this emerging discipline, public health law researchers must lawfully and ethically generate data about whole populations as well as specialised subgroups to enable analysis of social inequality.<sup>5</sup>

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- 2 See generally Susan Hillis et al, 'Global Prevalence of Past-Year Violence Against Children: A Systematic Review and Minimum Estimates' (2016) 137(3) *Pediatrics* e20154079:1–22 <<https://doi.org/10.1542/peds.2015-4079>>. On the Violence Against Children Surveys, see Kimberly H Nguyen et al, 'Coerced and Forced Sexual Initiation and its Association with Negative Health Outcomes Among Youth: Results from the Nigeria, Uganda, and Zambia Violence Against Children Surveys' (2019) 96 *Child Abuse and Neglect* 104074:1–18 <<https://doi.org/10.1016/j.chiabu.2019.104074>>. On the Multiple Indicator Cluster Surveys ('MICS'), see, eg, Manas K Akmatov, 'Child Abuse in 28 Developing and Transitional Countries: Results from the Multiple Indicator Cluster Surveys' (2011) 40(1) *International Journal of Epidemiology* 219 <<https://doi.org/10.1093/ije/dyq168>>; Jorge Cuartas et al, 'Early Childhood Exposure to Non-Violent Discipline and Physical and Psychological Aggression in Low-and Middle-Income Countries: National, Regional, and Global Prevalence Estimates' (2019) 92 *Child Abuse and Neglect* 93 <<https://doi.org/10.1016/j.chiabu.2019.03.021>>. Other large-scale efforts to monitor the prevalence of violence against children include the Student Health Survey: see David W Brown et al, 'Exposure to Physical and Sexual Violence and Adverse Health Behaviours in African Children: Results from the Global School-Based Student Health Survey' (2009) 87(6) *Bulletin of the World Health Organization* 447 <<https://doi.org/10.2471/BLT.07.047423>>. See generally Karen Devries et al, 'Who Perpetrates Violence Against Children? A Systematic Analysis of Age-Specific and Sex-Specific Data' (2017) 2(1) *BMJ Paediatrics Open* e000180:1–15 <<http://dx.doi.org/10.1136/bmjpo-2017-000180>>.
- 3 'Make the SDGs a Reality', *United Nations Department of Economic and Social Affairs* (Web Page) <<https://sustainabledevelopment.un.org/>>. See also Target 16.2, which includes the specific goal of ending maltreatment: '16: Promote Peaceful and Inclusive Societies for Social Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions at All Levels', *United Nations Department of Economic and Social Affairs* (Web Page) <<https://sdgs.un.org/goals/goal16>>.
- 4 See recommendation 2.1 in *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 2, 30–1.
- 5 Michelle M Mello, 'Peering into Hidden Worlds: The Past and Future of Legal Epidemiology Foreword' (2020) 92(4) *Temple Law Review* 837. See also Scott Burris et al, 'A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology' (2016) 37(1) *Annual Review of Public Health* 135 <<https://doi.org/10.1146/annurev-publhealth-032315-021841>>.

Typically, these large-scale studies of the prevalence of child maltreatment ask survey participants to provide retrospective reports about their experiences of various kinds of abuse and neglect.<sup>6</sup> While studies differ in their parameters, questions are often asked about the experience of physical abuse, sexual abuse, emotional or psychological abuse, neglect, and exposure to domestic violence. Studies may be conducted with adult participants, but are also often conducted with children and youth,<sup>7</sup> and survey instruments have been designed for use with children as young as eight years old.<sup>8</sup> Surveys are administered in different ways, with smaller countries more likely to use household or school-based surveys, and larger countries tending to use computer-assisted telephone interviews.<sup>9</sup>

Academic researchers conducting such studies must manage a range of complex legal and ethical questions to ensure legal compliance and ethical responses towards survey participants to ensure their safety, while managing confidentiality. These studies rarely cause participant distress, as shown by United States ('US') studies with children and youth as young as 10,<sup>10</sup> international studies involving children aged 11 and older,<sup>11</sup> and other studies involving children aged 12.<sup>12</sup> Studies with adults show this same trend.<sup>13</sup>

6 See Mathews et al, 'Improving Measurement' (n 1). See also Lisa Amaya-Jackson et al, 'Directly Questioning Children and Adolescents about Maltreatment: A Review of Survey Measures Used' (2000) 15(7) *Journal of Interpersonal Violence* 725 <<https://doi.org/10.1177/088626000015007005>>.

7 Mathews et al, 'Improving Measurement' (n 1).

8 Sherry Hamby et al, 'The Juvenile Victimization Questionnaire (JVQ): Administration and Scoring Manual' (Crimes Against Children Research Center, 26 March 2004) 2–3.

9 See, eg, Mathews et al, 'Improving Measurement' (n 1) 7–8.

10 The National Survey of Children's Exposure to Violence studies in the United States ('US') involve children as young as 10: David Finkelhor et al, 'Upset Among Youth in Response to Questions About Exposure to Violence, Sexual Assault and Family Maltreatment' (2014) 38(2) *Child Abuse and Neglect* 217 <<https://doi.org/10.1016/j.chiabu.2013.07.021>>.

11 Adam J Zolotor et al, 'ISPCAN Child Abuse Screening Tool Children's Version (ICAST-C): Instrument Development and Multi-National Pilot Testing' (2009) 33(11) *Child Abuse and Neglect* 833 <<https://doi.org/10.1016/j.chiabu.2009.09.004>>.

12 See the Longitudinal Studies of Child Abuse and Neglect ('LONGSCAN') studies: Elizabeth Dawes Knight et al, 'Reporting Participants in Research Studies to Child Protective Services: Limited Risk to Attrition' (2006) 11(3) *Child Maltreatment* 257 <<https://doi.org/10.1177/1077559505285786>> ('Limited Risk').

13 A meta-analysis found that although trauma-related research can lead to some immediate psychological distress, its magnitude is not extreme. This distress is greater for individuals with a trauma history or Post-Traumatic Stress Disorder ('PTSD'), but 'individuals generally find research participation to be a positive experience and do not regret participation, regardless of trauma history or PTSD': Anna E Jaffe et al, 'Does it Hurt to Ask? A Meta-Analysis of Participant Reactions to Trauma Research' [2015] (40) *Clinical Psychology Review* 40, 40 <<http://dx.doi.org/10.1016/j.cpr.2015.05.004>>. See generally Ben Mathews et al, 'The Ethics of Child Maltreatment Surveys in Relation to Participant Distress: Implications of Social Science Evidence, Ethical Guidelines, and Law' [2022] (123) *Child Abuse and Neglect* 105424:1–11 <<https://doi.org/10.1016/j.chiabu.2021.105424>>. See also Tracy McClinton Appollis et al, 'Adolescents' and Adults' Experiences of Being Surveyed about Violence and Abuse: A Systematic Review of Harms, Benefits, and Regrets' (2015) 105(2) *American Journal of Public Health* 31 <<https://doi.org/10.2105/AJPH.2014.302293>>; Janique Fortier et al, 'What Type of Survey Research Questions are Identified by Adults as Upsetting? A Focus on Child Maltreatment' [2020] (109) *Child Abuse and Neglect* 104764:1–10 <<https://doi.org/10.1016/j.chiabu.2020.104764>>. Survey participant distress is therefore uncommon, and will infrequently engage responses by research teams. However, research teams need to develop comprehensive, sensitive protocols to respond appropriately to different levels of participant distress. Regarding legal duties, distress alone may automatically activate some but not all legal duties. Distress

However, participant distress is only one situation researchers must manage. Especially when surveying children and youth, studies encounter the possibility that some participants may disclose experiences of abuse or harm by parents or caregivers that are serious or ongoing, or situations of imminent risk of significant harm.<sup>14</sup> Even when conducted with adults, studies may encounter situations of risk of harm involving a participant, and of retrospectively reported instances of serious child abuse offences. Such studies must therefore navigate a complex terrain of ethical and legal requirements. Yet, there are significant gaps in research about what is required in this field, including the nature, scope and application of researchers' legal and ethical duties towards survey participants.

### A A Range of Legal Duties and a Gap in Research

This context raises the complex and fundamental question of the nature and application of legal duties of researchers to report situations of harm or risk reported by survey participants. In Australia, a range of duties to report or otherwise respond to child maltreatment exist in different branches of law, including criminal law, child protection law, and tort law.<sup>15</sup> This multiplicity of legal duties, each of which are complex in nature and application, creates a multi-dimensional and complex legal environment, further complicated by differences in legislation between states and territories. The three domains of legal duty assume critical importance, and researchers must know what the duties are, whether and how they apply when conducting a study of child maltreatment, and what steps must be taken to discharge any applicable duties to achieve legal compliance and ethical practice to protect participants.

These challenges are prominent in Australia and other nations where reporting duties exist,<sup>16</sup> so these questions are of significance to academics and research institutions around the world when conducting nationwide epidemiological studies of child maltreatment.<sup>17</sup> While some studies have detailed their procedures for

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may or may not accompany disclosure of ongoing or past abuse. The presence of distress is of particular significance in potentially engaging a tortious duty to take reasonable steps to prevent further harm, depending on the circumstances.

- 14 In this context, most of the situations engaging these duties to report or respond will involve maltreatment by parents or caregivers, but some may involve sexual abuse by anyone, and duties in tort law may embrace situations of harm or risk beyond maltreatment only by parents or caregivers, such as extreme cases of peer bullying, or drug overdose, threatened self-harm, or threatened harm to others.
- 15 Ben Mathews, 'A Taxonomy of Duties to Report Child Sexual Abuse: Legal Developments Offer New Ways to Facilitate Disclosure' [2019] (88) *Child Abuse and Neglect* 337 <<https://doi.org/10.1016/j.chiabu.2018.12.003>> ('A Taxonomy'). See generally, Ben Mathews, *New International Frontiers in Child Sexual Abuse: Theory, Problems and Progress* (Springer, 2019) <<https://doi.org/10.1007/978-3-319-99043-9>>.
- 16 Such as the US and Canada: see Ben Mathews and Maureen C Kenny, 'Mandatory Reporting Legislation in the United States, Canada, and Australia: A Cross-Jurisdictional Review of Key Features, Differences, and Issues' (2008) 13(1) *Child Maltreatment* 50 <<https://doi.org/10.1177/1077559507310613>>. ('Mandatory Reporting Legislation').
- 17 Duties based in ethical principles may also apply. Forthcoming work will consider these duties in detail, as further analysis of this complex field is beyond the scope of this article: see generally Brian Allen, 'Are Researchers Ethically Obligated to Report Suspected Child Maltreatment? A Critical Analysis of Opposing Perspectives' (2009) 19(1) *Ethics and Behavior* 15 <<https://doi.org/10.1080/10508420802623641>>.

reporting suspected cases of maltreatment or risk of harm, the nature and operation of the law is seldom explained.<sup>18</sup> Moreover, scholarly research to date in this field is extremely limited. Extant analysis is sparse and dated, does not consider multiple sources of legal duties, and lacks comprehensive analysis of primary sources of legal principles and exceptions.<sup>19</sup> There is no published analysis of the nature and application of these duties in the Australian context.

## B Ethical Duties Overlapping with Legal Duties

While the focus of this article is on contributing to knowledge about researchers' legal duties towards survey participants, some brief observations are warranted about researchers' ethical duties in this context, in part because the ethical setting and interests have some significance for selected legal issues. Child maltreatment studies must accommodate a range of operational ethical requirements to ensure survey participants' interests are promoted and that their welfare is appropriately protected by a comprehensively detailed protocol, justified with reference to legal and ethical principles. Studies must comply with ethical principles set down in national policy, and must design protocols to protect participants that are approved by institutional human research ethics committees.

In the design and administration of such a survey, researchers must satisfy three co-existing ethical needs that may be in tension. First, they must protect survey participants' general right to *confidentiality*, ensuring participation is anonymous and non-disclosure of participants' identities and responses. Second, they must promote participants' *welfare*, and protect them from harm. Third, they must

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Judy Cashmore, 'Ethical Issues Concerning Consent in Obtaining Children's Reports on Their Experience of Violence' (2006) 30(9) *Child Abuse and Neglect* 969 <<https://doi.org/10.1016/j.chiabu.2006.05.004>>; David Finkelhor et al, 'Ethical Issues in Surveys about Children's Exposure to Violence and Sexual Abuse' in Carlos A Cuevas and Callie Marie Rennison (eds), *The Wiley Handbook on the Psychology of Violence* (Wiley, 2016) 24 <<https://doi.org/10.1002/9781118303092.ch2>>. Researchers must also comply with national ethics standards, exemplified in Australia in the 'National Statement on Ethical Conduct in Human Research: 2007 (Updated 2018)' (National Health and Medical Research Council, Australian Research Council and Universities Australia, 2018) ('National Statement').

18 See, eg, Crimes Against Children Research Center, *Third National Survey on Children's Exposure to Violence (NatSCEV III)* (Methodology Report, 30 May 2014) ('*NatSCEV III Methodology*'); Lorraine Radford et al, *Child Abuse and Neglect in the UK Today* (Report, 2011); Elizabeth Dawes Knight et al, 'Methodological and Ethical Challenges Associated with Child Self-Report of Maltreatment' (2000) 15(7) *Journal of Interpersonal Violence* 760 <<https://doi.org/10.1177/088626000015007006>>; Knight et al, 'Limited Risk' (n 12); John E Richters and Pedro Martinez, 'The Nimh Community Violence Project: I Children as Victims of and Witnesses to Violence' (1993) 56(1) *Psychiatry* 7 <<https://doi.org/10.1080/00332747.1993.11024617>>; George Nikolaidis, *Balkan Epidemiological Study on Child Abuse and Neglect* (Final Summary Report, March 2013) <<https://cordis.europa.eu/project/id/223478/reporting>>. The lack of analysis in epidemiological studies to provide a detailed account of not only their approach, but of the legal basis for the approach, is possibly because of the complexity and dynamism of the law, the presence of different duties across states, and the rarity with which such studies include legal expertise.

19 Alan M Steinberg et al, 'Are Researchers Bound by Child Abuse Reporting Laws?' (1999) 23(8) *Child Abuse and Neglect* 771 <[https://doi.org/10.1016/S0145-2134\(99\)00052-6](https://doi.org/10.1016/S0145-2134(99)00052-6)>; Marisha B Liss, 'Child Abuse: Is there a Mandate for Researchers to Report?' (1994) 4(2) *Ethics and Behavior* 133 <[https://doi.org/10.1207/s15327019eb0402\\_6](https://doi.org/10.1207/s15327019eb0402_6)>; Joan E Sieber, 'Issues Presented by Mandatory Reporting Requirements to Researchers of Child Abuse and Neglect' (1994) 4(1) *Ethics and Behavior* 1 <[https://doi.org/10.1207/s15327019eb0402\\_6](https://doi.org/10.1207/s15327019eb0402_6)>; Anthony J Urquiza, 'Retrospective Methodology in Family Violence Research' (1991) 6(1) *Journal of Interpersonal Violence* 119 <<https://doi.org/10.1177/088626091006001012>>.



promote *participation* by the public in research that is designed and conducted for the public good, since it has the aim and potential to reduce the prevalence and effects of maltreatment in the population. Without sufficient participation, the study may be compromised; securing participation requires a strategy to recruit sufficient participants and retain their participation throughout the interview. Participation promotes the public interest through achieving the objectives of research funding agencies and government departments supporting the research. Promoting participation is also a cornerstone of children's agency and human rights to participate in and contribute to research and public policy that concerns them.<sup>20</sup>

Researchers have long grappled with how to balance these co-existing interests, and there remains no consensus on the most justifiable approach.<sup>21</sup> These interests, considered as operational or practical requirements, can be seen to embody the generally recognised higher order or abstract core ethical principles in biomedical ethics: respect for autonomy; non-maleficence; beneficence; and justice.<sup>22</sup>

National research ethics guidelines employ these principles, but leave leeway to reasonably accommodate the nature of the research study, requirements of local ethics committees, and legal obligations in the study location. Moreover, such leeway is essential, since these core bioethical principles of autonomy, non-maleficence, beneficence, and justice, operationalised in maltreatment surveys through derived concerns for participant confidentiality, welfare and participation, are not hierarchical but rather are each important and require implementation according to the circumstances. In addition, these derived concerns and their abstract principles may be in tension. The resolution of such conflicts requires a process of balancing of harms and benefits, and judgment about the respective weight to be ascribed to particular interests in the circumstances. While this process should be based on principles and rigorous reasoning to avoid arbitrariness and partiality, it is inevitable that value judgments are made when determining which interest prevails in situations of conflict. Currently, leading researchers aim to maximise child participation in research wherever possible (hence promoting participant autonomy, and the beneficence of the research), while accommodating an overriding ethical principle of protecting participant welfare in cases of imminent risk of significant danger (hence promoting non-maleficence and positive beneficence towards the participant). Nationwide studies in the US and the United Kingdom have adopted this approach.<sup>23</sup> However, apart from these ethical issues,

20 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12. Note that in *T v L*, the Court endorsed empirical socio-legal research involving child participants and protected the confidentiality of interview data from subpoena on several grounds, including the public policy of conducting such research and of assuring both researchers and participants of confidentiality: Patrick Parkinson, 'Research and Promises of Confidentiality to Children: A Legal Challenge' [2002] (32) *Australian Children's Rights News* 6, discussing *T v L* (Family Court of Australia, Collier J, 12 October 2001).

21 See, eg, Allen (n 17); Cashmore (n 17); Finkelhor et al (n 17); Meinck et al (n 1).

22 Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (Oxford University Press, 8<sup>th</sup> ed, 2019) 13, 17–24.

23 *NatSCEV III Methodology* (n 18); Radford et al (n 18). Similar approaches can be seen in the LONGSCAN research by Knight et al, 'Limited Risk' (n 12), and by the national study of sexual violence in Ireland: Hannah McGee et al, *The SAVI Report: Sexual Abuse and Violence in Ireland* (Liffey Press, 2002) <<https://doi.org/10.25419/rcsi.10770797.v1>>. In forthcoming work, these ethical challenges and

these studies must confront complex legal and operational challenges that hold consequences for researchers, institutions, and ethics committees.<sup>24</sup>

### C Purpose and Structure of Article

Researchers conducting surveys of the prevalence of child maltreatment must be familiar with the nature of relevant legal duties, understand their operation, and employ appropriate protocols to ensure legal compliance. Since these tasks involve highly technical questions of legal research, analysis and statutory interpretation in multiple domains of law, which can be further complicated in the case of national studies where laws differ across multiple states and territories, care must be taken to ensure analysis is carefully conducted using legal research methods. Surveys to identify the prevalence, nature and associated outcomes of child maltreatment are epidemiological studies.<sup>25</sup> This article contributes to the fields of law, epidemiology, and legal epidemiology by conducting a comprehensive doctrinal and comparative analysis of three bodies of law in the Australian setting, applied to researchers conducting studies of the prevalence and health outcomes associated with child maltreatment. In doing so, the article generates an understanding of the nature and application of different legal reporting duties in this research context.

In Part II, this article analyses legal duties in child protection legislation, often referred to as ‘mandatory reporting laws’, which are relevant when considering duties towards survey participants who are minors. Part III considers the nature and application of legislative duties to report designated criminal child abuse offences in criminal laws, which are relevant for survey participants of all ages. In Part IV, negligence law is considered, to ascertain the nature and operation of a tortious duty of care towards survey participants, which is again relevant for survey participants of all ages. The analysis is of direct relevance to the Australian context, but the methodology and its application also contributes to an understanding of these duties and their likely or potential significance in studies of the prevalence of child maltreatment conducted in other countries globally. The analysis conducted here will show that while some duties do not apply to researchers in this setting, with legislative reporting duties having no application, researchers owe a tortious duty of care towards survey participants which can apply in ways that exceed nominal legislative requirements. In Part V, this article outlines an approach which both ensures compliance with legal requirements in this setting, and promotes participants’ safety and welfare.

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conflicts will be examined in more detail to consider when, why and how measures should be adopted to protect and promote these co-existing interests in the context of child maltreatment surveys.

24 Grant funding agencies and institutional review boards alike must not restrict the scope of permissible research based on an inaccurate understanding of legal duties, ethical duties, effects on participants, and therefore of what type of research is both possible, permissible and required.

25 Mello (n 5) 840–1, n 39, citing Scott Burris and Evan D Anderson, ‘Making the Case for Laws that Improve Health: The Work of the Public Health Law Research National Program Office’ (2011) 39(1) *Journal of Law, Medicine and Ethics* 15, 173 <<https://doi.org/10.1111/j.1748-720X.2011.00558.x>>.

## II LEGAL DUTIES IN CHILD PROTECTION LEGISLATION

Each Australian state and territory has enacted legislation about child protection, which contain provisions commonly called ‘mandatory reporting laws’.<sup>26</sup> These laws require designated persons to report known and suspected cases of specified kinds of child maltreatment to child welfare agencies, where the abuse reaches a designated threshold of severity. Child protection falls within the constitutional legislative power of each state and territory, and these reporting laws have existed in various forms since 1969,<sup>27</sup> evolving over time in each state and territory. While sharing a broad common purpose, they continue to vary in multiple ways.<sup>28</sup> Applied here, there are two particularly important dimensions of variance.

### A State and Territory Child Protection Legislation Applies the Reporting Duty to Different Types of Child Maltreatment

First, the laws differ regarding what types of child maltreatment and extents of harm must be reported. While social science and policy alike now recognise five broad categories of child maltreatment – physical abuse, sexual abuse, emotional or psychological abuse, neglect, and exposure to domestic violence – legislative duties to report child maltreatment rarely require reports of all five types. Moreover, typically, the duty to report does not extend to any and all instances of a mandated category of maltreatment; rather, the duty is limited to instances where the extent of the harm caused, or likely to be caused, reaches a certain threshold of severity of harm.

Accordingly, the scope of maltreatment even potentially required to be reported varies significantly across states and territories. At one end of the spectrum is Western Australia (‘WA’), which requires reports only of sexual abuse.<sup>29</sup> Further along this spectrum lie the Australian Capital Territory (‘ACT’), Queensland and Victoria, which require reports only of sexual abuse and physical

26 *Children and Young People Act 2008* (ACT) s 356 (‘ACT Children Act’); *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27 (‘NSW Children Act’); *Care and Protection of Children Act 2007* (NT) ss 15, 16, 26 (‘NT Children Act’); *Child Protection Act 1999* (Qld) ss 13E–13F (‘Old Children Act’); *Children and Young People (Safety) Act 2017* (SA) ss 17–18, 30–1 (‘SA Children Act’); *Children, Young Persons and their Families Act 1997* (Tas) ss 3–4, 14 (‘Tas Children Act’); *Children, Youth and Families Act 2005* (Vic) ss 162(1)(c)–(d), 182, 184 (‘Vic Children Act’); *Children and Community Services Act 2004* (WA) ss 124A–124B (‘WA Children Act’). See also Ben Mathews, *Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, August 2014) (‘A Legislative History’); 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 (‘Origin, Nature and Development’).

27 Mathews, *A Legislative History* (n 26).

28 See, eg, Mathews and Kenny, ‘Mandatory Reporting Legislation’ (n 16); Ben Mathews et al, ‘Developments in Australian Laws Requiring the Reporting of Suspected Child Sexual Abuse’ (2009) 34(3) *Children Australia* 18 (‘Developments’); Mathews, ‘Origin, Nature and Development’ (n 26).

29 In Western Australia, section 124B(1)(b) of the *WA Children Act* (n 26) applies the duty only where a designated person ‘believes on reasonable grounds that a child – (i) has been the subject of sexual abuse that occurred on or after commencement day; or (ii) is the subject of ongoing sexual abuse’. Note that the Act commenced on 1 January 2009: see Mathews et al, ‘Developments’ (n 28) 18.



abuse.<sup>30</sup> Queensland and Victoria apply a further restriction on the scope of the duty, limiting its application to situations where the child does not or may not have a parent or caregiver who is able and willing to protect the child from the abuse and the harm caused.<sup>31</sup> South Australia ('SA') has a broader model, expressly including risk of physical or psychological harm through sexual, physical, mental or emotional abuse or neglect.<sup>32</sup> At the other end of the spectrum lie New South Wales ('NSW'), Tasmania and the Northern Territory ('NT'), which have broader duties requiring reports of all five kinds of child maltreatment, where the abuse or neglect is of sufficient severity or causes significant harm.<sup>33</sup>

## B State and Territory Child Protection Legislation Applies the Duty to Different Categories of Mandated Reporters

Second, and even more significantly for the purpose of this analysis, the laws expressly designate named categories of persons as mandated reporters. Those not falling within the named categories are not mandated reporters, and therefore are not legislatively required to report instances of known or suspected child abuse, no matter how severe or current.

### 1 Expressly Named Categories of Mandated Reporters

The categories of mandated reporters vary by state and territory, although they commonly include persons in occupations most frequently dealing directly

30 *ACT Children Act* (n 26) ss 356(1)(c)(i)–(ii); *Qld Children Act* (n 26) ss 13E(2)–(3); *Vic Children Act* (n 26) ss 162(1)(c)–(d), 184.

31 *Qld Children Act* (n 26) s 13E(2)(b); *Vic Children Act* (n 26) ss 162(1)(c)–(d), 184. The wording in section 162(1)(d) of the *Vic Children Act* for physical abuse, for example, is that 'a child is in need of protection if ... the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type'; and the wording in section 13E(2)(b) of the *Qld Children Act* is that 'a reportable suspicion about a child is a reasonable suspicion that the child – (a) has suffered, is suffering, or is at unacceptable risk of suffering, significant harm caused by physical or sexual abuse; and (b) may not have a parent able and willing to protect the child from the harm' (emphasis omitted).

32 *SA Children Act* (n 26) ss 17–18, 31, using concepts of both risk and harm, as defined in the Act.

33 In New South Wales ('NSW'), see the *NSW Children Act* (n 26) s 27(2)(a) through the concept of 'has reasonable grounds to suspect that a child is at risk of significant harm' together with the definition in section 23(1) of when a child is 'at risk of significant harm', which includes situations involving any of the five types of maltreatment, including neglect (sections 23(1)(a), (b), (b1)); physical abuse and sexual abuse (section 23(1)(c)); psychological abuse (section 23(1)(e)); and exposure to domestic violence (section 23(1)(d)). In the Northern Territory ('NT'), see the *NT Children Act* (n 26) section 15(1) definition of 'harm' as 'any significant detrimental effect caused by any act, omission or circumstance on: (a) the physical, psychological or emotional wellbeing of the child; or (b) the physical, psychological or emotional development of the child'. Section 15(2) of the *NT Children Act* states that:

[w]ithout limiting subsection (1), harm can be caused by the following:

- (a) physical, psychological or emotional abuse or neglect of the child;
- (b) sexual abuse or other exploitation of the child;
- (c) exposure of the child to physical violence;
- (d) exposure of the child to domestic or family violence.

In Tasmania, see the *Tas Children Act* (n 26) section 14(2)(a), read together with definition of 'abuse or neglect' in section 3, and the definition of an 'affected child' within the meaning of the *Family Violence Act 2004* (Tas) section 4 as 'a child whose safety, psychological wellbeing or interests are affected or likely to be affected by family violence'.

with children, such as teachers, early childhood education and care practitioners, doctors, nurses, police, and allied health practitioners.<sup>34</sup> Academic researchers, and non-clinical research partners such as survey interviewers, are not legislated mandated reporters of child maltreatment in any state or territory. In all states and territories, persons who are not named as mandated reporters are empowered by the legislation to refer situations of concern to child welfare agencies, and receive the same protections as mandated reporters should they do so.<sup>35</sup> The parameters of the duties are summarised in Table 1.

Table 1: Parameters of duties in child protection legislation to report child abuse

Jurisdiction	Physical abuse	Sexual abuse	Emotional abuse	Neglect	Exposure to Domestic Violence	Are academic researchers designated as mandated reporters?
ACT	Yes	Yes	No	No	No	No
SA	Yes	Yes	Yes	Yes	No	No
Tasmania	Yes	Yes	Yes	Yes	Yes	No
NSW	Yes	Yes	Yes	Yes	Yes	No
NT	Yes	Yes	Yes	Yes	Yes	Possibly through indirect inclusion, but unlikely
Victoria	Yes*	Yes*	No	No	No	No
Queensland	Yes*	Yes*	No	No	No	No
WA	No	Yes	No	No	No	No

\* Only applies where in addition, there is no parent able and willing to protect the child.

34 The full lists of mandated reporters are set out in the following provisions: *ACT Children Act* (n 26) s 356(3); *NSW Children Act* (n 26) ss 27(1)(a)–(d); *NT Children Act* (n 26) s 26(1); *Qld Children Act* (n 26) ss 13E(1)(a)–(f) defining ‘relevant persons’; *SA Children Act* (n 26) ss 30(3)–(5); *Tas Children Act* (n 26) s 14(1); *Vic Children Act* (n 26) s 182(1); *WA Children Act* (n 26) s 124B(1)(a). Note that the lists of mandated reporters evolve over time: see, eg, Mathews, *A Legislative History* (n 26); Mathews, ‘Origin, Nature and Development’ (n 26). This means that constant review of legislation, its passage, dates of commencement and associated subordinate legislation such as through government gazettes, is required to enable accurate descriptions. An example of a recent development is in Victoria, where section 182(1)(f) of the *Vic Children Act*, regarding early childhood care and education practitioners, was substituted by section 19 of the *Children’s Services Amendment Act 2019* (Vic), which commenced on 12 May 2020 via proclamation: Victoria, *Gazette: Special*, No S 232, 12 May 2020. Another example can be seen in NSW, where sections 27(1)(c)–(d) of the *NSW Children Act* (n 26) mandate those in religious ministry and activities, and registered psychologists respectively; these amendments were made by the *Children’s Guardian Act 2019* (NSW) schedule 5.8 clause 4, which commenced on 1 March 2020.

35 *ACT Children Act* (n 26) s 354; *NSW Children Act* (n 26) s 24; *Qld Children Act* (n 26) s 13A; *SA Children Act* (n 26) s 30(1); *Tas Children Act* (n 26) s 13(2); *Vic Children Act* (n 26) ss 28, 183; *WA Children Act* (n 26) s 129.

## 2 *Impliedly Named Categories of Mandated Reporters: The NT*

While researchers are not expressly mandated reporters in any state or territory, one jurisdiction's legislative approach raises the question whether they possess this mandated status by implicit inclusion. The *NT Children Act*, section 26, makes all adult persons mandated reporters.<sup>36</sup> Section 24(a) sets out one of the purposes of the Act as being 'to oblige members of the public to report cases of children at risk of harm or exploitation', and the provisions in relation to harm mean that all five types of child maltreatment must be reported, where they reach the required level of significance.<sup>37</sup>

On its surface, this broad provision may seem to impliedly include as a mandated reporter anyone conducting a research study on child maltreatment. However, it is unlikely to capture academic researchers and survey staff as mandated reporters. First, where the researchers are located outside the NT, the provisions are unlikely to apply.<sup>38</sup> While section 26 applies to any 'person', and section 24(a) applies to all members of the public, there is no provision applying the duty to persons outside the NT. If the legislature intended the provision to have broader geographical application, it could have included a provision to this effect.

Second, general principles about the geographical limits of legislation mean the scope of the provision extends to those within the NT, but not beyond. These principles exist in both legislation and common law. In a form equivalent to comparable provisions about statutory construction in each state and territory,

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36 The *NT Children Act* (n 26) section 26 states:

- (1) A person is guilty of an offence if the person:
  - (a) believes, on reasonable grounds, any of the following:
    - (i) a child has suffered or is likely to suffer harm or exploitation;
    - (ii) a child aged less than 14 years has been or is likely to be a victim of a sexual offence;
    - (iii) a child has been or is likely to be a victim of an offence against section 128 of the *Criminal Code*; and
  - (b) does not, as soon as possible after forming that belief, report (orally or in writing) to the CEO or a police officer:
    - (i) that belief; and
    - (ii) any knowledge of the person forming the grounds for that belief; and
    - (iii) any factual circumstances on which that knowledge is based.

37 In the NT, the concept of 'harm' is defined in the *NT Children Act* (n 26) section 15(1) as 'any significant detrimental effect caused by any act, omission or circumstance on: (a) the physical, psychological or emotional wellbeing of the child; or (b) the physical, psychological or emotional development of the child'. Section 15(2) of the *NT Children Act* states that:

- [w]ithout limiting subsection (1), harm can be caused by the following:
- (a) physical, psychological or emotional abuse or neglect of the child;
  - (b) sexual abuse or other exploitation of the child;
  - (c) exposure of the child to physical violence; (d) exposure of the child to domestic or family violence.

The concept of 'exploitation' is defined in section 16 of the *NT Children Act*, and relates to a range of forms of sexual exploitation.

38 Note that if the researchers were physically located in the NT, this may alter the position in relation to research participants who were also in the NT, at least in relation to the first three points made here about the principles of geographical application of legislation. However, the reasonable excuse defence may still be relevant.

the *Interpretation Act 1978* (NT), section 38(1)(b), provides that ‘references to localities, jurisdictions and other matters and things shall be construed as references to such localities, jurisdictions and other matters and things in and of the Territory’. It has long been presumed that legislation does not intend to have extra-territorial effect.<sup>39</sup> In addition, there is a common law presumption of territorial limitation; in a federal system, it is accepted that the constitutional powers of states and territories to legislate across geographical boundaries is subject to limits.<sup>40</sup>

Third, given that no comparable mandatory reporting provision in Australia, or in other federated nations such as Canada and the US – including those states and provinces having ‘universal reporting’ applied to all members of the public – is expressed to have such extraterritorial effect, it is unlikely that the NT’s model could reasonably be understood as having this effect.<sup>41</sup> Fourth, section 26(3) of the *Care and Protection of Children Act 2007* (NT) (*‘NT Children Act’*) provides a defence to prosecution for failure to comply with the reporting duty if the person has ‘a reasonable excuse’. The ‘reasonable excuse’ concept is not defined, but must be interpreted in light of the specific legislative and operational context.<sup>42</sup> It is arguable that in the context of a research study, several factors related to the nature and function of the study suggest grounds for a reasonable excuse; these are explained below.

### C Researchers Are Not Mandated Reporters under Australian Child Protection Law

Accordingly, academic researchers and professionals engaged as interviewers on such studies are not designated mandated reporters of child maltreatment under child protection legislation. They are not required by this legislation to report known or suspected cases of child abuse and neglect to the relevant child welfare authority. However, this does not mean researchers should take no action to protect a child participant in appropriate cases of clear significant harm or clear and imminent risk of significant harm. It is important to distinguish that such other responses are enabled and/or required by other sources of legal or ethical duty.

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39 As exemplified by the statement of O’Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 (*‘Jumbunna’*) that ‘[i]n the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction’: at 363.

40 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) (*‘Union Steamship’*). Under the *Australian Constitution*, there may be an implied territorial limitation which would be necessary to preserve the power of each state Parliament to make laws for its own state. This is analogous to the expectation of comity between nations, whereby a national legislature is presumed not to deal with persons or matters within the more appropriate jurisdiction of another state. Pearce explains that although analogous to the doctrine of comity, the rationale for a similar presumption between states within a federation is arguably weaker, given the existence of common interests and cooperation, and there may be more occasions on which such a presumption should be displaced: Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2019) 218 [5.12] citing *Dempster v National Companies & Securities Commission* (1993) 9 WAR 215, 235 (Malcolm CJ).

41 Mathews and Kenny, ‘Mandatory Reporting Legislation’ (n 16).

42 *Taikato v The Queen* (1996) 186 CLR 454, 464 (Brennan CJ, Toohey, McHugh and Gummow JJ) (*‘Taikato’*). See further the discussion below in the context of criminal law duties and the defence of reasonable excuse.

Researchers as non-mandated reporters would receive protections should they make non-mandated referrals of appropriate cases to child welfare agencies.<sup>43</sup> This article considers these other sources of legal duty, and identifies actions that should be taken in appropriate cases to protect and support research participants.

### III LEGAL DUTIES IN CRIMINAL LAW

Recent inquiries into institutional child abuse animated recommendations for the creation of new reporting duties in criminal law, applied to all adults in the community, to bring cases of designated types of child abuse to the attention of police.<sup>44</sup> These amendments to criminal law reporting duties have expanded some of the obligations from their original narrower scope – directed more towards preventing active concealment of offences for personal gain<sup>45</sup> – to a broader application with more prosocial motivation to assist detection of serious crimes, regardless of any personal gain or vested interest. These provisions aim to create a broader safety net to detect cases of child sexual abuse, which are known to be typically undisclosed to law enforcement agencies,<sup>46</sup> by creating a community-wide obligation to bring known cases to attention.<sup>47</sup> Their temporal scope is wide, normally extending to knowledge or belief about cases of child abuse obtained after commencement of the legislation, but which can relate to abuse occurring before commencement.<sup>48</sup> These new reporting duties are of recent origin, and the laws are continuing to develop.<sup>49</sup>

43 See above n 35. This assumes the application of these protections even where not physically located in the jurisdiction. Note also in this respect that in general, this is another reason favouring the inclusion of older youth participants, such as those aged 16 and above, rather than younger participants. As well as capturing more reliable data about the extent of child maltreatment across childhood compared to younger children, it is likely to reveal fewer instances of current significant harm or risk given the higher age and lower vulnerability of participants.

44 See, eg, recommendation 23.1 in Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non Government Organisations* (November 2013) vol 1, xliii <<http://www.parliament.vic.gov.au/component/content/article/340-inquiry-into-the-handling-of-child-abuse-by-religious-and-other-organisations/1788-report>>. See also recommendation 33 in *Criminal Justice Report: Royal Commission into Institutional Responses to Child Sexual Abuse* (Report, August 2017) 123 <<https://www.childabuseroyalcommission.gov.au/criminal-justice>>.

45 See, eg, the offence of compounding an indictable offence in section 133 of the *Criminal Code Act 1899* (Qld) ('*Qld Criminal Code*):

Any person who asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person, upon any agreement or understanding that the person will compound or conceal an indictable offence, or will abstain from, discontinue, or delay, a prosecution for an indictable offence, or will withhold any evidence thereof, is guilty of an indictable offence.

46 See, eg, Scott D Easton, 'Disclosure of Child Sexual Abuse among Adult Male Survivors' (2013) 41(4) *Clinical Social Work Journal* 344 <<https://doi.org/10.1007/s10615-012-0420-3>>. See generally on non-disclosure and delayed disclosure of child sexual abuse the summary in Mathews, 'A Taxonomy' (n 15) 338.

47 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 26 March 2014, 914 (Robert Clark, Attorney-General).

48 But not always: see the discussion of Victoria's more limited approach below in Part III(B)(2) of this article.

49 Amending legislation was first introduced in 2014 in Victoria, and from 2018 onwards in other states and territories: Royal Commission Criminal Justice Legislation Amendment Bill 2019 (ACT) cls 4–6; Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW) cls 5.12, 58; Criminal Code



## A Nature of the Duty

Five of the eight states and territories have enacted a duty in criminal law requiring adults to report specified significant child abuse offences to police.<sup>50</sup> In Victoria, NSW, Tasmania, the ACT, and Queensland, the duty requires all adults to report knowledge or a reasonable belief about specified sexual offences. Some of these duties extend to specified physical assaults. No duty applies to situations of emotional abuse, neglect, or exposure to domestic violence.

In Victoria, which was the first state to enact this type of provision, this duty requires all adults who have knowledge or belief that child sexual abuse has been committed to report this to the police. The *Crimes Act 1958* (Vic), section 327(2), requires an adult in Victoria or elsewhere ‘who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16’ by an adult aged 18 or over to ‘disclose that information to a police officer . . . unless the person has a reasonable excuse for not doing so’. Unlike the provisions elsewhere, the Victorian provision expressly applies to adults both inside and outside Victoria.<sup>51</sup> The ACT and Queensland similarly apply the duty to child sexual offences.<sup>52</sup>

In NSW, the duty applies to serious sexual offences, and to some physical abuse offences. The *Crimes Act 1900* (NSW) (*‘NSW CA’*), sections 316A(1)(a)–(c), requires an adult who knows, believes, or reasonably ought to know that a child abuse offence has been committed against another person, and who has information that might be of material assistance in securing the apprehension, prosecution or conviction of the offender, to notify the NSW Police Force, unless they have a ‘reasonable excuse’ for not doing so. Tasmania’s duty also applies to serious sexual offences, and designated physical abuse offences.<sup>53</sup> A similar provision exists in the NT, but extends to situations of domestic violence involving serious physical

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(Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 (Qld) cl 25; Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) cl 7; Crimes Amendment (Protection of Children) Bill 2014 (Vic) cls 4, 6.

50 *Crimes Act 1900* (ACT) s 66AA (*‘ACT CA’*) (*‘Failure to report child sexual offence’*, commenced 1 September 2019); *Crimes Act 1900* (NSW) s 316A (*‘NSW CA’*) (*‘Concealing child abuse offence’*, commenced 31 August 2018); *Qld Criminal Code* (n 45) s 229BC (*‘Failure to report belief of child sexual offence committed in relation to child’*, commenced 5 July 2021); *Criminal Code Act 1924* (Tas) s 105A (*‘Tas Criminal Code’*) (*‘Failing to report the abuse of a child’*, commenced 2 October 2019); *Crimes Act 1958* (Vic) s 327 (*‘Vic CA’*) (*‘Failure to disclose sexual offence committed against child under the age of 16 years’*, commenced 27 October 2014).

51 Like other states and territories, Victoria has the power to create legislation with extra-territorial application for the peace, order and good government of the state: *Australia Act 1986* (Cth) s 2(1) (*‘Australia Act’*). A law creating an offence out of a failure to report sexual offences against children is likely within those parameters, and the commission of the sexual offence within Victoria provides the requisite real connection with the jurisdiction. The terms of the provision expressly contradict both the common law presumption of territorial limitations and the provision in the *Interpretation of Legislation Act 1984* (Vic) (*‘Vic Interpretation Act’*) which stipulates that ‘locality, jurisdiction or other matter or thing shall be construed as a reference to such locality, jurisdiction or other matter or thing in and of Victoria’: at s 48(b). On its own terms, this provision only requires the reporting of sexual offences committed in Victoria, and creates no obligation to disclose beliefs about sexual offences committed outside Victoria.

52 *ACT CA* (n 50) s 66AA(1)(b); *Qld Criminal Code* (n 45) s 229BC(1)(a).

53 *Tas Criminal Code* (n 50) s 105A.

harm to either children or adults.<sup>54</sup> The parameters of these duties are summarised in Table 2, and the exceptions are discussed below.

Table 2: Parameters of duties in criminal law to report child abuse to police

Jurisdiction	Victim age	Exclusion if professional researcher	Exclusion by victim request	Exclusion by reasonable excuse	Sexual abuse / physical abuse offences	Applies to people within or beyond state / territory
Victoria	Applies only to victims born on or after 28 October 1998	No	Yes (if victim is aged 16 or over)	Yes	Sexual Abuse only	Both (express)
NSW	Applies to victims of all ages	Yes	Yes (if victim is aged 18 or over)	Yes	Both Sexual Abuse and serious Physical Abuse	Potentially both (via geographical nexus provisions)
ACT	Applies to victims of all ages	No	Yes (if victim is aged 18 or over)	Yes	Sexual Abuse only	Not expressed as applying outside ACT
Tasmania	Applies to victims of all ages	No	Yes (if victim is aged 18 or over)	Yes	Both Sexual Abuse and serious Physical Abuse	Not expressed as applying outside Tasmania
Queensland	Applies to victims of all ages	No	Yes (if victim is aged 18 or over)	Yes	Sexual Abuse only	Not expressed as applying outside Queensland

54 Section 124A of the *Domestic and Family Violence Act 2007* (NT) ('DFVA') requires an adult to report information to police where they believe on reasonable grounds a specified situation of domestic violence exists. Subsection (1)(a) notes the duty applies where the person reasonably believes either or both of the following circumstances exist: '(i) another person has caused, or is likely to cause, harm to someone else (the victim) with whom the other person is in a domestic relationship; (ii) the life or safety of another person (also the victim) is under serious or imminent threat because domestic violence has been, is being or is about to be committed' (emphasis omitted).

Ostensibly, these duties seem to apply to all adults regardless of the circumstances. However, in all jurisdictions, exceptions exist which restrict the operation of the provisions, meaning their application to a research study is likely inapplicable. It should again be emphasised that this inapplicability does not mean a research team should take no steps in response to specified cases of harm or risk; the nature of such steps, and their legal and ethical bases, are considered later in this article.

## **B Exceptions to the Duty**

### ***1 Specific Express Exemption for Academic and Professional Researchers***

The first exception applies where a legislature expressly exempts researchers from the duty. This exception exists only in NSW. The *NSW CA*, section 316A(6), states that a prosecution for an offence under section 316A(1) is not to be commenced without approval of the Director of Public Prosecutions ('DPP') regarding information obtained by an adult in the course of practising a profession prescribed by the regulations for the purposes of section 316A(6). Section 316A(7) states the regulations may prescribe a profession as referred to in subsection (6). The *Crimes Regulation 2020* (NSW), regulation 4(g), prescribes academics and professional researchers as professions for the purpose of section 316A(7). This exception clearly applies to any research study into child maltreatment through the combined operation of section 316A(7) and regulation 4(g). Accordingly, researchers would be exempt in NSW.<sup>55</sup>

### ***2 Limits on Victim Age***

The second exception applies where a legislature expressly limits the duty to cases of child sexual abuse that have occurred only after a recent point in time. This exception exists only in Victoria. A network of provisions determine the relevant date.<sup>56</sup> As a result, Victoria's duty applies only if the victim was born on or after 28 October 1998, dramatically confining its potential scope, even without considering other exceptions. For example, for a research study conducted in 2021, the duty clearly does not apply to persons born before 28 October 1998, hence not applying to anyone aged over around 22.

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55 The remaining complicating factor in applying this exception is the Director of Public Prosecution's residual discretion to prosecute. While this discretion is discussed below, standard principles of statutory interpretation and prosecutorial guidelines indicate the express exception is intended to exclude these professions from the scope of the law save exceptional circumstances.

56 Section 327(7)(f) of the *Vic CA* (n 50) states that a person does not contravene the duty in section 327(2) if the victim of the alleged offence attained the age of 16 before commencement of section 4 of the *Crimes Amendment (Protection of Children) Act 2014* (Vic). That amendment Act inserted the new section 327, and commenced on 27 October 2014: Victoria, *Gazette: Special*, No S 350, 7 October 2014.

### 3 Reasonable Belief the Person Does Not Wish the Information to Be Reported

A third exception exists where the person with the designated state of mind reasonably believes the person does not want the information reported to police. This exception exists in all five states and territories. In NSW and Queensland, this basis for not reporting is designated as a species of a ‘reasonable excuse’,<sup>57</sup> but elsewhere it is a separate exception.

The exception is similar across jurisdictions, although there are minor differences in scope. In Victoria, it applies to all alleged victims aged 16 or over, whereas elsewhere it applies only to those aged 18 and over. More significantly, Victoria applies this exception only if the information came from the victim *and* the victim requested the information not be disclosed.<sup>58</sup> Elsewhere, this excuse is engaged if the person simply has a reasonable belief that the person does not wish the information to be reported,<sup>59</sup> without requiring a victim’s request.

Applied to a research study, and leaving aside other exceptions, this exception would apply in Victoria where a participant aged 16 or over was given the opportunity to state she or he did not want it reported to police, and did state this preference. The exception would arguably apply in the other states and territories where either a participant aged 18 or over was given the opportunity by the research team to state she or he did not want it reported to police, and did state this preference, or the research participant otherwise made direct or indirect statements capable of supporting a reasonable belief that they did not wish the information to be reported. Such statements could include, for example: that the offender has died or is unlocatable; that the offender was prosecuted; that the victim did not want to engage the legal system; or that the victim did not otherwise want to revisit the matter.

### 4 A ‘Reasonable Excuse’ for Not Reporting

A fourth exception applies where the person with the designated state of mind has a ‘reasonable excuse’ for not reporting it to police. This exception has broader potential application, because all five legislatures have incorporated this exception. In all states and territories, the provisions do not exhaustively define the concept

57 *NSW CA* (n 50) s 316A(2); *Qld Criminal Code* (n 45) s 229BC(4).

58 The *Vic CA* (n 50), section 327(5), states that:

A person does not contravene subsection (2) if –

- (a) the information forming the basis of the person’s belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and
- (b) the victim was of or over the age of 16 years at the time of providing that information to any person; and
- (c) the victim requested that the information not be disclosed.

Note also that the *Evidence Act 2008* (Vic), part 3.10, contains a number of categories of privileged information (eg, lawyer/client, journalists, religious confession), but these do not include research or other public interest categories.

59 In NSW, for example, the *NSW CA* (n 50), section 316A(2)(f), expressly includes situations where ‘the alleged victim was an adult at the time that the information was obtained by the person and the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police’. Similar wording is used in Queensland, the ACT and Tasmania: see *ACT CA* (n 50) s 66AA(2)(a); *Qld Criminal Code* (n 45) s 229BC(4)(c); *Tas Criminal Code* (n 50) s 105A(3)(b).

of ‘reasonable excuse’.<sup>60</sup> In Victoria, for example, section 327(2) provides a non-exhaustive definition,<sup>61</sup> and includes a situation where ‘the person believes on reasonable grounds that the information has already been disclosed to police and the firstmentioned person has no further information’.<sup>62</sup> Other states and territories adopt a similar approach.<sup>63</sup> This general exception acknowledges the duty should not apply in a range of circumstances.

The non-specificity of the concept of a ‘reasonable excuse’ has the advantage of leaving open the categories of case where the duty can be excluded, but has the disadvantage of uncertainty. The concept is regularly used in a range of legislative settings. The High Court acknowledged in *Taikato v The Queen* (‘*Taikato*’) that the term ‘reasonable excuse’ is a common legislative concept.<sup>64</sup> However, it is also clear from High Court jurisprudence that in each legislative instance, its construction is contingent on the provision’s purpose, and the circumstances of the case, and so decisions in other contexts ‘provide no guidance’ for others.<sup>65</sup> The majority in *Taikato* confirmed that when legislatures enact defences such as ‘reasonable excuse’ they intend to give the courts the power to determine their content.<sup>66</sup>

Applied to this setting, and leaving aside other exceptions, it is strongly arguable that for multiple reasons, the ‘reasonable excuse’ exception would apply to exclude operation of the duty. First, within the context of a research study, the connection between researcher and victim is not of sufficient proximity to fall within the types of relational setting in which the duty is intended to apply. This applies especially when a research study of this type is conducted by computer assisted telephone interview, with an interviewer, contractually engaged and instructed by the research team, located in one Australian city administering the interview over the phone with participants in not only other cities, but in other states and territories.

Second, even where a participant responds they have been a victim of child sexual abuse, neither the interviewer nor the researcher would have information

60 *ACT CA* (n 50) s 66AA(2)(g); *NSW CA* (n 50) s 316A(2); *Qld Criminal Code* (n 45) ss 229BC(2), (4); *Tas Criminal Code* (n 50) s 105A(4); *Vic CA* (n 50) s 327(2)–(4). Some statutes state specifically that the scope of the excuse is not limited to the enumerated examples: see, eg, *NSW CA* s 316A(3).

61 *Vic CA* (n 50) s 327(3).

62 *Ibid* s 327(3)(b).

63 *NSW CA* (n 50) s 316A(2)–(3); *DFVA* (n 54) s 124A(3); *Qld Criminal Code* (n 45) ss 229BC(2), (4).

64 *Taikato* (n 42) 464 (Brennan CJ, Toohey, McHugh and Gummow JJ). Dawson J stated, at 470:

A reasonable excuse is no more or less than an excuse which would be accepted by a reasonable person ... Reasonableness provides a test which is well-known in both criminal and civil law and, though it may involve a judgment of degree, has a ready application in widely differing circumstances. The fact that the test of reasonableness frequently involves a question of degree so that minds may differ upon the answer does not relieve a tribunal of the duty to apply the test where that is the test laid down and does not justify confining its scope for the sake of greater precision or certainty.

Gaudron J stated, at 474:

The precise meaning and operation of [reasonable excuse] must be ascertained from [its] context ... And if context provides no sure guide, [it] must be ascertained by application of the other rules of construction which have been developed to determine, in the event of uncertainty, what Parliament intended but failed to make clear.

65 *Ibid* 464 (Brennan CJ, Toohey, McHugh and Gummow JJ).

66 ‘Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence’: *ibid* 466.



about the state or territory in which the offence occurred. This means it would not be clear whether the duty applies. These first two bases for the application of the reasonable excuse exception are grounded in the intended scope of the application of the legal duty.

Third, apart from the participant's statement that they did experience a relevant type of child abuse, the researcher and interviewer will not have any further salient information that could assist law enforcement agencies. The participant is not identifiable since their participation is anonymous; the only information even capable of leading to their identification is their telephone number. The researcher and interviewer would have no other relevant information about the participant, or any direct information about the alleged offender. Accordingly, the content of any report to police would be limited to a statement that a person has reported a certain type of experience as a child, their phone number, and potentially other demographic details, such as age, and current state of residence. Therefore, from a practical perspective there is a further powerful argument that the reasonable excuse exception applies.

Fourth, epidemiological studies must attract and retain sufficient participation. Participants must feel secure in their anonymous and confidential participation to disclose accurate information. If a participant knew that any disclosure of sexual abuse would be reported to police, it would likely decrease participation and affect accuracy of responses. Fifth, such studies are conducted for an important public purpose of research for scientific, public and social benefit in understanding the prevalence and nature of child abuse, and to inform future strategies to better prevent and respond to such experiences. Accordingly, the reasonable excuse concept is compatible with the social policy interest of ensuring such studies are not compromised. This is particularly salient where the study is funded by a competitive external grant from a national research agency, and is further supported and funded by Australian Government agencies. Accordingly, from a public policy perspective, the need to promote and secure the broad nature, purpose and function of such research should attract the protection of the reasonable excuse exception.<sup>67</sup>

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67 This reasoning applies to other similar studies of personal violence in both childhood and adulthood. For example, the Personal Safety Survey administered by the Australian Bureau of Statistics collects a range of information from men and women aged 18 years and over about the nature and extent of violence experienced since the age of 15, and about the experience of physical and sexual abuse before age 15, partner violence from age 15, and witnessing of domestic violence or other violence: Australian Bureau of Statistics, *Directory of Family, Domestic, and Sexual Violence Statistics, 2018* (Catalogue No 4533.0, 19 December 2018). Note also that the *Epidemiological Studies (Confidentiality) Act 1981* (Cth), section 4, imposes a general obligation of secrecy on those conducting epidemiological studies not to divulge any information concerning the affairs of another person acquired through the conduct of that study, and section 11 requires that publications in relation to such studies not identify any individual. Section 3(1) defines 'epidemiological study' as including

a study of:

- (a) the incidence or distribution ... of:
  - (i) a disease;
  - (ii) a physical or mental state; or
  - (iii) a condition, circumstance, occurrence, activity, form of behaviour, course of conduct, or state of affairs, that is or may be disadvantageous to, or result in a disadvantage to, the person concerned or to the community.

## 5 Conclusion on the Criminal Law Reporting Duty

Several conclusions can be made with a strong degree of certainty. First, the duty would not apply in NSW because of the express exemption for academic and professional researchers. This applies even if the researchers were in NSW, and would apply a fortiori if the researchers were not so located, due to the assumption any existing duty would not apply beyond the geographical limits of NSW.<sup>68</sup> Second, in Victoria, the duty does not apply to any persons born before 28 October 1998, even where the researchers were in Victoria. Third, in all five states and territories, where a participant indicates a wish that the information not be reported, the duty will be voided. Fourth, the setting of an epidemiological research study arguably engages the ‘reasonable excuse’ concept in all five locations, rendering the duty inapplicable. These four bases of inapplicability operate singly and in combination to render the criminal law duty inapplicable to researchers conducting an epidemiological study. While little doubt exists about these conclusions, two further matters can be considered.

### D Requirement of the DPP’s Permission to Prosecute

It is well-established in Australian law that not all alleged breaches of the criminal law must be prosecuted. Decisions to prosecute must consider potential effects on an innocent person, disproportionate effects, public confidence in the justice system, and appropriate use of resources. Offices of public prosecutions in each state and territory operate under guidelines about the decision to prosecute.<sup>69</sup> A core principle is that a prosecution may only proceed if there is a reasonable prospect of a conviction, and if a prosecution is in the public interest.<sup>70</sup> If public interest factors tending against prosecution outweigh those favouring prosecution, the prosecutor is entitled to decline to proceed. The list of public interest factors is extensive, and generally include: the seriousness of the offence; the degree of culpability of the alleged offender; whether the offence is serious or merely of a technical nature; and whether the prosecution would be perceived as bringing the law into disrepute.<sup>71</sup>

68 See discussion below, in Part III(D) of this article.

69 Director of Public Prosecutions (ACT), *The Prosecution Policy of the Australian Capital Territory* (1 April 2021); Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (29 March 2021) (‘*NSW Guidelines*’); Director of Public Prosecutions (NT), *Guidelines of the Director of Public Prosecutions* (2016); Department of Justice and Attorney General (Qld), *Director’s Guidelines* (30 June 2016); Director of Public Prosecutions (SA), *Statement of Prosecution Policy and Guidelines* (October 2014); Director of Public Prosecutions (Tas), *Prosecution Policy and Guidelines* (2 May 2022); Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (24 January 2022); Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1 September 2018).

70 Director of Public Prosecutions (ACT) (n 69) 3–5; Office of the Director of Public Prosecutions (NSW) (n 69) 8–10; Director of Public Prosecutions (NT) (n 69) 2–3; Department of Justice and Attorney General (Qld) (n 69) 2–4; Director of Public Prosecutions (SA) (n 69) 5–8; Director of Public Prosecutions (Tas) 7–9; Director of Public Prosecutions (Vic) 3–5; Director of Public Prosecutions (WA) 6–9.

71 See, eg, the 24 factors in the *NSW Guidelines* (n 69) 9–10, substantively reproduced in other states and territories, paraphrased here: offence-related factors (the seriousness or the triviality of the alleged offence; the prevalence of the alleged offence and any need for deterrence; the obscurity of the law; the staleness of the alleged offence); accused-related factors (the accused’s degree of culpability; the accused’s criminal antecedents; the accused’s age and health; whether the offence occurred while serving

While these guidelines are applicable to all prosecutions, a significant additional factor is present here. In NSW, Tasmania and Victoria, an express provision requires permission from the Office of Public Prosecutions to commence a prosecution for breach of the criminal law duty to report.<sup>72</sup> This express legislative requirement, created in addition to guidelines about decisions to prosecute, indicates particular care must be taken in deciding to initiate prosecutions for potential breaches of the criminal law duty to report, and are likely to proceed only in exceptional circumstances. Based on the grounds of inapplicability discussed above, it seems plausible that in an epidemiological survey – especially with its characteristics including physical and temporal distance from the victim, lack of specific information, research study setting and public policy imperatives – approval to prosecute would be declined.

### E The Geographical Limits of the Application of State and Territory Legislation

In each of the five legislative provisions, the reporting duty is imposed on ‘a person’, or a synonymous term. The preceding analysis has concluded these criminal law reporting duties do not apply to ‘persons’ conducting a research survey. However, for completeness, in the unlikely event the provisions are found otherwise *prima facie* applicable, a final question concerns the question of whether the provisions could apply to ‘persons’ who are outside the geographical limits of the state or territory.<sup>73</sup>

This becomes relevant in two situations for a research team and its contracted interviewers (hereafter, ‘the researchers’), who reside in and/or are working in one jurisdiction – for illustrative purposes, Victoria – when interviewing persons who are outside Victoria. The first situation involves the question of whether

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a sentence, on bail, or remand; the accused’s willingness to co-operate in the investigation or prosecution of others); victim-related factors (the victim’s attitude to prosecution; the victim’s age and health, and whether prosecution may have an adverse impact on the victim; the protection of the victim and the victim’s family); sentencing factors (the likely outcome of a finding of guilt; whether a sentence has already been imposed on the accused; whether the accused has already been sentenced for other offences and the likelihood of any additional penalty being imposed); other factors (whether any conviction would be regarded as unreasonable or a miscarriage of justice; any mitigating or aggravating circumstances; the availability and efficacy of any alternatives to prosecution; the availability of compensation, restitution, reparation or forfeiture following a successful prosecution, including any criminal compensation or confiscation; whether the prosecution would be perceived as bringing the law into disrepute; the need to maintain public confidence in Parliament and the courts; special circumstances that would prevent a fair trial; the length and expense of a trial; the age, health or special infirmity of an essential witness). See also Natalie Hodgson et al, ‘The Decision to Prosecute: A Comparative Analysis of Australian Prosecutorial Guidelines’ (2020) 44(3) *Criminal Law Journal* 155.

72 *NSW CA* (n 50) s 316A(6); *Tas Criminal Code* (n 50) s 105A(6); *Vic CA* (n 50) s 327(8). While Queensland and the ACT do not have this express legislative provision, hence depriving this conclusion of the same force, the prosecutorial guidelines would still need to be contemplated in any potential prosecution.

73 Distilled to their essence, these can be expressed as: (1) can a criminal law reporting duty in one state apply to situations they encounter in another state, whether or not the other state has a reporting duty, when conducting a child maltreatment survey?; (2) can a criminal law reporting duty in one state that is broader than that in the second state, be applied to a person in the second state who is conducting a survey with a person who is in the first state?

researchers located in Victoria are required to apply the Victorian reporting duty to survey participants *outside* Victoria. The second situation involves the question of whether researchers located in Victoria are required to apply another state's reporting duty, for survey participants *outside* Victoria.<sup>74</sup>

Both questions are of even greater significance if the law is different in the other jurisdiction. In the first instance, it may contemplate application of a legal duty in a state which does not possess any comparable duty, such as WA. In the second instance, it may contemplate application of a broader duty elsewhere, such as in the NT, to persons in Victoria. The question of whether a provision in a state statute can apply to persons outside that state is both a question of constitutional law (about whether state parliaments have the power to legislate extra-territorially) and of statutory interpretation (whether a statutory provision can and does extend extra-territorially).

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74 The NT has broader reporting duties than elsewhere, meaning this is also relevant to the questions of whether a researcher is a 'person' required to comply with the broader NT mandatory reporting duty for child abuse (*NT Children Act* (n 26) section 26), and whether they are an 'adult' required to comply with the duty in section 124A(1) of the *DFVA* (n 54) to report to police a reasonable belief that a person has (i) either caused, or is likely to cause, 'harm' to someone with whom the other person is in a domestic relationship, or (ii) that the life or safety of a person is under serious or imminent threat from domestic violence. The duty does not apply if a person with such a reasonable belief has a reasonable excuse: *DFVA* s 124A(2). 'Harm' is broadly defined in section 1A of the *Criminal Code Act 1983* (NT) ('*NT Criminal Code*'). Accordingly, it is apposite to make some observations about whether the duty in section 124A of the *DFVA* binds adults outside the NT. There is provision in the *NT Criminal Code* for the extra-territorial application of offences. Section 15 of the *NT Criminal Code* says it is immaterial if the conduct proscribed by any offence did not occur in the Territory if the conduct affected the peace, order or good government of the Territory. However, it is not clear this provision would apply to offences under the *DFVA* such as section 124A. Section 15 states that part IIAA of the *NT Criminal Code* applies to offences under the *DFVA*, but this does not include the extra-territorial application provision in section 15 (which states: 'If a person is guilty of the conduct proscribed by any offence it is immaterial that that conduct or some part of it did not occur in the Territory if that conduct affected or was intended to affect the peace, order or good government of the Territory'). There is also nothing in the provision conveying a legislative intention to create extra-territorial effect; this is confirmed in the second reading when the Attorney-General said the new section 124A of the *DFVA* would apply to 'all adults in the Northern Territory' and made repeated other references to the duty applying to 'adults in the Northern Territory': Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2008, 1049–50 (Chris Burns, Attorney-General).

Accordingly, the better view would seem to be that the duty in section 124A does not apply to an academic research team, especially where located outside the NT, as, applying orthodox principles of statutory interpretation: (1) the general assumption that legislative duties apply within territorial limits has not clearly been displaced; (2) the duty in section 124A is not expressly applied to adults outside the NT, and if this was the parliamentary intention it could easily have been expressed as such; (3) extrinsic materials do not indicate it applies to adults outside the NT, and strongly indicate the contrary; (4) if applied beyond the NT there may be perverse results (eg, application to anyone engaging in a phone call with someone in the NT, even internationally); (5) it is arguable that by necessary implication, the duty only applies to those located in the NT, hence overcoming any potential contrary operation of the geographical nexus provisions in the *NT Criminal Code*, part IIAA, division 7; (6) depending on the questions posed by the survey, the interview may not yield sufficient information on which such a belief could be founded; (7) academic researchers and interviewers may otherwise have a reasonable excuse exempting them from the duty under section 124A(2) of the *DFVA*, based on public interest purposes and the need to obtain truthful information from participants in a confidential and safe environment.

## 1 Common Law Presumptions and Legislative Principles about Extra-Territorial Application of Legislation

### (a) Common Law Presumption of Territorial Limitation

In relation to the constitutional powers of states and territories to legislate extra-territorially, as seen above in the discussion of the reasonable excuse concept,<sup>75</sup> there is a common law presumption of territorial limitation.<sup>76</sup> This presumption is grounded in the rule that in a federal system, the constitutional powers of states and territories to legislate across geographical boundaries is limited. Under the *Australian Constitution*, an implied territorial limitation may be necessary to preserve the power of each state Parliament to make laws for its own state.<sup>77</sup> As a common law principle of statutory interpretation it is presumed that legislation does not have extra-territorial effect.<sup>78</sup> This presumption has been enacted in Acts interpretation legislation at the Commonwealth level and in each state and territory.<sup>79</sup>

### (b) Legislative Power to Make Laws with Extra-Territorial Application; Criminal Laws Potentially Extend Geographical Reach

However, other provisions allow this presumption to be rebutted by a contrary legislative intention.<sup>80</sup> This is consistent with each state being invested with legislative power to make laws having extra-territorial operation for the peace, order and good government of the state.<sup>81</sup> Criminal law statutes and codes do

75 See the discussion of the reasonable excuse in Part III(B)(4) of this article.

76 *Jumbunna* (n 39) 363 (O'Connor J).

77 *Union Steamship* (n 40) 14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); Pearce (n 40) 218.

78 As stated by O'Connor J in *Jumbunna* (n 39) 363: 'In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction.'

79 Through provisions typically stating that 'references to localities, jurisdictions and other matters and things' are to be interpreted as referring to those within the enacting jurisdiction: see, eg, *Acts Interpretation Act 1901* (Cth) s 21(1)(b) ('*Cth Interpretation Act*'); *Legislation Act 2001* (ACT) s 122(1)(b) ('*ACT Interpretation Act*'); *Interpretation Act 1987* (NSW) s 12(1)(b) ('*NSW Interpretation Act*'); *Interpretation Act 1978* (NT) s 38(1)(b) ('*NT Interpretation Act*'); *Acts Interpretation Act 1954* (Qld) s 35(1)(b) ('*Qld Interpretation Act*'); *Acts Interpretation Act 1931* (Tas) s 27 ('*Tas Interpretation Act*'); *Vic Interpretation Act* (n 51) s 48. The interpretation of a statute will be subject to a common law presumption regarding extra-territoriality and the provisions of the relevant interpretation Act. As explained by Brereton J in *Re Iskra; Ex parte Mercantile Transport Co Pty Ltd* [1963] 63 SR (NSW) 538, 553:

The first inquiry is whether it is an enactment of such a kind as may legitimately be given the precise extra-territorial operation which is sought to be given to it. The next inquiry is whether from the object or subject-matter or history of the enactment an intention so to do clearly appears so as to rebut the presumption raised by the common law canon of construction ... the third inquiry is whether under s. 17 of the *Interpretation Act* [1897 (NSW)] a 'contrary intention appears'.

80 *Cth Interpretation Act* (n 79) s 2(2); *ACT Interpretation Act* (n 79) s 6; *NSW Interpretation Act* (n 79) s 5(2); *NT Interpretation Act* (n 79) s 3(3); *Qld Interpretation Act* (n 79) s 4; *Tas Interpretation Act* (n 79) s 4(1); *Vic Interpretation Act* (n 51) s 4(1)(a). The rebuttal of the presumption can be through express words, which is commonly done, or by an implication from reading the Act as a whole: see, eg, *University of Birmingham and Epsom College v Federal Commissioner of Taxation* (1938) 60 CLR 572; *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397.

81 The *Australia Act* (n 51) section 2(1) provides that 'the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation'.



contain provisions permitting rebuttal of the presumptions of territorial limitations, potentially extending the geographical reach of offences where the offence is at least partly committed in the jurisdiction, or where the result of the crime occurs in the jurisdiction, or where a sufficient geographical nexus exists.<sup>82</sup> These legislative provisions are consistent with the common law recognition that states and territories have constitutional power to legislate with extra-territorial effect, provided there is a real connection between the subject matter and the enacting state.<sup>83</sup> The common law presumption of intra-territorial application is rebuttable; the power to legislate with extra-territorial operation is wide, albeit limited by the ‘real connection’ test.<sup>84</sup> This test should be liberally applied, and even a ‘remote or general connection’ is sufficient.<sup>85</sup> Contention will often centre around whether the connection is sufficiently proximate or real, and questions may arise about the resolution of conflict if two states have inconsistent laws.<sup>86</sup> Two matters therefore arise for consideration: first, whether the legislature intended the statute to operate extra-territorially; and second, whether it was within the power of the Parliament to enact legislation with extra-territorial application.

(i) *Express Specific Legislative Provisions*

The first question is whether the criminal law reporting duty has extra-territorial application through express specific legislative provisions. As shown above, Victoria is the only one of the five states and territories to specifically apply the duty to *persons within and beyond* Victoria, in relation to offences committed *within*

82 *Criminal Code 2002* (ACT) ss 63–4, 66 (‘ACT Criminal Code’); *NSW CA* (n 50) ss 10A–10E; *NT Criminal Code* (n 74) ss 15–16; *Qld Criminal Code* (n 45) s 12; *Criminal Law Consolidation Act 1935* (SA) ss 5E–I; *Tas Criminal Code* (n 50) s 9; *Criminal Code Act Compilation Act 1913* (WA) s 12. For example, in *Lipohar v The Queen* (1999) 200 CLR 485, the victim of conspiracy to commit fraud was a company incorporated and based in South Australia (‘SA’), which was found to provide a sufficient nexus to give jurisdiction to the South Australian Supreme Court. In *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78, it was held that a NSW court has jurisdiction to try a person with a ‘result offence’ where the result occurs, or is likely to occur, in NSW, even though the acts bringing about the result occurred outside NSW: at 83–4 (Gleeson CJ).

83 *Pearce v Florenca* (1976) 135 CLR 507, 518 (Gibbs J) (‘*Pearce*’); *Union Steamship* (n 40); *Port MacDonnell Professional Fishermen’s Association Inc v South Australia* (1989) 168 CLR 340, 372 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (‘*Port MacDonnell*’); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 22–3 [9] (Gleeson CJ); 34 [48] (Gaudron, Gummow and Hayne JJ) (‘*Mobil Oil*’).

84 See above n 83.

85 See, eg, *Mobil Oil* (n 83) 22–3 [9] (Gleeson CJ); 34 [48] (Gaudron, Gummow and Hayne JJ).

86 *Mobil Oil* (n 83) 34 [48] (Gaudron, Gummow and Hayne JJ), quoting *Pearce* (n 83) 518 (Gibbs J). Note Kirby J in *Mobil Oil*, 51, who made the following observations about the basis for the common law presumption against extra-territoriality:

Inherent in the foregoing implications is the constitutional assumption that each State Parliament, in the exercise of its legislative powers, will avoid what might be described as an impermissible intrusion into the legislative concerns that properly belong to the Parliament of another State. Self-evidently, if the Parliament of one State were to enact laws that purported to impose obligations upon persons resident in other States, by reference to events occurring in such other States, the result could be legislative chaos. Such chaos is denied not by statute or common law but by the federal Constitution itself. It is out of recognition of this fact that, with few exceptions, the legislation enacted by the Parliaments of the several Australian States has generally avoided unwelcome (and constitutionally invalid) intrusions into the legislative concerns of other States.

Victoria.<sup>87</sup> The provision clearly and expressly contradicts both the common law presumption of territorial limitation and the equivalent legislative presumption.<sup>88</sup> The provision only requires the reporting of sexual offences committed within Victoria, and creates no obligation on persons within or beyond Victoria to disclose beliefs about sexual offences committed outside Victoria. This appears within Victoria's power to create legislation with extra-territorial application for the peace, order and good government of the state.<sup>89</sup> A law creating an offence for any person's failure to report a sexual offence against a child in Victoria is likely within this power, and the commission of the sexual offence within Victoria seems to provide the requisite connection.<sup>90</sup> The first conclusion then, is that on this basis of express legislative provisions only Victoria's reporting duty is capable of applying extra-territorially, and even then, only in relation to offences committed *within* Victoria. Researchers in Victoria, or elsewhere, would only potentially<sup>91</sup> have a duty to report the specified sexual offences in relation to specified persons of the required age, where that type of survey participant discloses an offence was committed against them in Victoria.

(ii) *General Criminal Law Provisions about the 'Geographical Nexus'/'Real Connection' Test*

The second question is whether a sufficient geographical nexus exists. As outlined above, criminal legislation enables extra-territorial extension of offence provisions, typically extending their geographical reach where the offence is at least partly committed in the jurisdiction, or where the result of the crime occurs in the jurisdiction, or where a sufficient geographical nexus exists.<sup>92</sup> In NSW, for example, the *NSW CA* section 10A(2) extends the application of offence provisions beyond territorial limits if the required geographical nexus exists;<sup>93</sup> section 10C(1) extends the location of an offence beyond the territorial limits of the State if 'a geographical nexus exists between the State and the offence', regardless of where the offence was committed; and section 10C(2) provides that 'a geographical

87 See above n 51 and accompanying text.

88 The *Vic Interpretation Act* (n 51) section 48(b) stipulates that 'locality, jurisdiction or other matter or thing shall be construed as a reference to such locality, jurisdiction or other matter or thing in and of Victoria'.

89 *Australia Act* (n 51) s 2(1).

90 See below Part III(D)(1)(b)(ii) of this article.

91 And again, to be clear, this would only potentially operate if all the other conclusions about inapplicability were incorrect.

92 See above n 90 and accompanying text. Some provisions are not as specific as others. In Queensland, for example, the *Qld Criminal Code* (n 45), section 12, 'Application of Code as to offences wholly or partially committed in Queensland', does not directly incorporate the geographical nexus concept, but provides, most relevantly in section 12(3):

Where an event occurs in Queensland caused by an act done or omission made out of Queensland which, if done or made in Queensland, would constitute an offence, the person who does the act or makes the omission is guilty of an offence of the same kind and is liable to the same punishment as if the act or omission had occurred in Queensland.

Section 12(3A) provides a defence if it is proven 'the person did not intend that the act or omission should have effect in Queensland'.

93 Generally, the place in which an offence is committed is defined as being the place where 'the physical elements of the offence occur': *NSW CA* (n 50) s 10B(2).

nexus exists between the State and an offence if – (a) the offence is committed wholly or partly in the State ... or (b) the offence is committed wholly outside the State, but ... has an effect in the State'. Significantly, section 10E(1) of the *NSW CA* presumes a geographical nexus exists, but this is rebuttable.<sup>94</sup> Provisions are similar in the ACT<sup>95</sup> and the NT.<sup>96</sup>

Related questions arise as to whether the sufficient geographical nexus exists, or whether a sufficient 'real connection' exists, to engage extra-territorial application of a criminal law duty to report a child abuse offence where the relevant state of mind is generated by a researcher in the course of conducting an epidemiological study across state and territory boundaries. It would appear that the offence would be committed outside the relevant jurisdiction since while the participant is within that jurisdiction, the interviewer is outside it. However, the result of non-reporting arguably has an inchoate effect within the relevant jurisdiction by foreclosing possible responses by the agency designated as the intended receiver of the report. Accordingly, it is arguable that the geographical nexus may exist.

Yet, multiple arguments militate against this interpretation in the context of an epidemiological study of child maltreatment. The provisions do not expressly apply outside the state or territory either by directly referring to persons outside the state or by referring to any geographic nexus. A potential offence conducted by telephone survey conducted across geographical boundaries can arguably constitute neither commission within the relevant jurisdiction, nor have an effect within it, because of first, the tenuous physical and personal connection between

94 Ibid s 10E(2).

95 In the ACT, for example, the *ACT Criminal Code* (n 82), part 2.7 extends the application of provisions beyond the territorial limits of the ACT if the required geographical nexus exists. Generally, the place in which an offence is committed is defined as being the place where 'any of the physical elements of the offence happen': at s 63(2). Under section 64, offences are extended beyond the territorial limits of the ACT if 'a geographical nexus exists between the ACT and the offence' (emphasis omitted), regardless of where the offence was committed; and under section 64(2), a geographical nexus exists between the State and an offence if: (a) the offence is committed wholly or partly in the ACT, or (b) the offence is committed wholly outside the State, but has an effect in the ACT. Section 66(1) presumes a geographical nexus exists, but this is rebuttable.

96 The *NT Criminal Code* (n 74), part IIAA, division 7, extends the application of provisions beyond the territorial limits of the NT if the required geographical nexus exists: at ss 43BY, 43CA. Section 43BY(1) of the *NT Criminal Code* 'extends the application of a law of the Territory that creates an offence beyond the territorial limits of the Territory (and Australia) if the required geographical nexus exists for the offence'. Under section 43CA(2),

a geographical nexus exists between the Territory and an offence if:

- (a) the offence is committed completely or partly in the Territory, whether or not the offence has any effect in the Territory; or
- (b) the offence is committed completely outside the Territory (whether or not outside Australia) but has an effect in the Territory.

Section 43BZ defines key concepts as follows:

- (2) For this Division, the place where an offence is committed is the place where any of the physical elements of the offence happen.
- (3) For this Division, the place where an offence has an effect includes:
  - (a) any place whose peace, welfare or good government is threatened by the offence; and
  - (b) any place where the offence would have an effect (or would cause such a threat) if the offence were committed.

interviewer and interviewee, and second, the level of knowledge required to activate the duty cannot reach the threshold required in knowledge of the location of the offence including whether it occurred in the state where the survey participant currently resides, knowledge of the victim's identity, and knowledge of salient circumstances. In addition, these laws prohibit omissions and impose positive obligations in a context of knowledge of wrongdoing, rather than punishing acts of commission of generally understood wrongful acts. Since every state and territory has its own criminal law – some lacking any such positive obligation, and others possessing obligations of different scope – it offends both the rule of law and any sense of practical viability to claim this particular criminal law obligation could apply beyond territorial limits.

Furthermore, despite any ostensible geographical nexus based on the application of either a statutory presumption,<sup>97</sup> or a required liberal application and consideration of the presence of even a remote or general connection,<sup>98</sup> determination of this question of extra-territorial application ultimately must require recourse to general principles of statutory interpretation.

## 2 General Principles of Statutory Interpretation

### (a) Text and Purpose

In considering their intended geographical application, recourse to the express words in the provisions of the statute is a legitimate starting point.<sup>99</sup> On their plain meaning, only Victoria expressly extends the legal duty to report a sexual offence committed in Victoria to both persons who are 'in Victoria *or* elsewhere'.<sup>100</sup> Absence of such express extension elsewhere indicates the intended operation of the duty in other jurisdictions is narrower. If the legislature intended broader application, it would have been straightforward to embed this in the provision, following Victoria's original approach.

However, in seeking to divine the more legitimate construction, express words and plain meaning should be considered, but so must principles of statutory interpretation enacted in Acts interpretation legislation, and judicial authority on the correct approach to interpretation. Legislation in each state and territory establish principles and methods of statutory interpretation.<sup>101</sup> All states' and territories' interpretation legislation have provisions requiring that legislation be interpreted to give effect to the statute's purpose.<sup>102</sup> Consistent with this, courts have

97 In the case of NSW.

98 Pearce (n 40) 218. See also *Union Steamship* (n 40); *Port MacDonnell* (n 83); *Mobil Oil* (n 83).

99 Given the general principle that where the applicable law is expressed in legislation, the starting point for analysis is the text of the legislation rather than judicial statements about either the common law or the meaning of the statute: *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1, 10 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

100 *Vic CA* (n 50) s 327(2) (emphasis added).

101 *ACT Interpretation Act* (n 79); *NSW Interpretation Act* (n 79); *NT Interpretation Act* (n 79); *Qld Interpretation Act* (n 79); *Acts Interpretation Act 1915* (SA) ('SA Interpretation Act'); *Tas Interpretation Act* (n 79); *Vic Interpretation Act* (n 51); *Interpretation Act 1984* (WA) ('WA Interpretation Act').

102 *ACT Interpretation Act* (n 79) s 139; *NSW Interpretation Act* (n 79) s 33; *NT Interpretation Act* (n 79) s 62A; *Qld Interpretation Act* (n 79) s 14A; *SA Interpretation Act* (n 101) s 22; *Tas Interpretation Act* (n 79) s 8A; *Vic Interpretation Act* (n 51) s 35(a); *WA Interpretation Act* (n 101) s 18.

repeatedly acknowledged that an orthodox application of legislative principles of statutory interpretation requires a construction of the provisions that promotes their purpose rather than one that would not.<sup>103</sup> The function of statutory interpretation is to determine and give effect to the intention of Parliament as indicated by the language in the statute, and to use accepted rules of statutory interpretation, both legislative and common law, to do so.<sup>104</sup>

(b) *An Emphasis on Context*

It is now also well-established that statutory interpretation must consider the context of the provisions, given their place and function in the entire statute.<sup>105</sup> Moreover, context should be regarded at the initial stage of interpretation, and ‘should be regarded in its widest sense’.<sup>106</sup> The modern approach to statutory interpretation is generally understood as elevating both the prominence and timing of consideration of the context.<sup>107</sup> More recent High Court jurisprudence has confirmed that the contemporary approach to statutory interpretation must consider the legislative text, context and purpose, and in doing so, the context of the provision must be considered at the outset of the interpretative exercise.<sup>108</sup>

103 See, eg, *Mills v Meeking* (1990) 169 CLR 214. See also regarding this purposive approach *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ) (*‘Project Blue Sky’*), where it was confirmed that the overall objective of statutory interpretation is to give effect to the purpose of Parliament as expressed in the text of the provisions. In this endeavour, the starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) (*‘CIC Insurance’*), which confirmed that interpretation should consider the mischief the legislation is intended to remedy.

104 *Project Blue Sky* (n 103).

105 Regarding context: when interpreting the meaning of words, concepts and phrases, the task is not to construe the word in isolation, but within the context in which it is placed: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 396–7 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ). The Act must be read as a whole: the words of a statute must be read in their context and not in isolation: *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J) (*‘K & S Lake City’*).

106 *CIC Insurance* (n 103) 408 (Brennan CJ, Dawson, Toohey and Gummow JJ):

[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.

As stated by Pearce (n 40) 44, quoting *Commissioner of State Revenue v EHL Burgess Properties Pty Ltd* [2015] VSCA 269:

[C]ontext extends beyond the usual field of relevant documents to include also ‘time, place and any other circumstances that could rationally assist understanding of meaning and may encompass the facts and circumstances which were within the knowledge or contemplation of the legislature. Hence, regard may be had to the matrix of facts in which the statute was enacted ...

107 See generally Pearce (n 40) 38–45.

108 In *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, Kiefel CJ, Nettle and Gordon JJ stated at 368:

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose ... Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense ... This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that,

Here, to interpret the meaning of the word ‘person’,<sup>109</sup> and hence of potential extra-territorial application, the task is to consider context ‘in its widest sense’<sup>110</sup> and to consider the statute as a whole.<sup>111</sup> Adopting this approach leads to a conclusion that a proper construction of the term ‘person’ in each provision refers to persons within the geographical limits of the state or territory, rather than persons anywhere in Australia. In this regard, it is relevant that each state and territory has legislative power to make laws regarding child protection, and does so, and that these laws have substantially different parameters. States and territories are entitled to, and have, adopted different approaches to these criminal law reporting duties. To apply a panoply of multiple different laws about the same subject matter to persons across Australia would result in both exactly the type of ‘chaos’ described by Kirby J in *Mobil Oil Australia Pty Ltd v Victoria*,<sup>112</sup> and is incompatible with rule of law tenets of legal clarity, certainty and predictability.<sup>113</sup> Moreover, Victoria was first to enact a criminal law reporting duty, and used provisions expressly having extra-territorial effect for acts occurring within its borders; subsequent jurisdictions chose not to follow this approach. The child protection legislation in each state and territory embodies a corpus of law and policy promoting their preferred approach to respond to socio-legal problems and policy priorities that may have particular salience in their locality.

## F Conclusion: Duties to Report in Criminal Law

On a proper analysis of the provisions and exceptions, an Australian research team is not under a general, broad or unrestricted duty to report cases of child sexual abuse or other child abuse offences under the criminal law reporting provisions. NSW provides a specific exemption for researchers. The other four jurisdictions, and NSW, provide a general ‘reasonable excuse’ defence which is strongly arguable as applying to epidemiological studies. Victoria provides a further limit on the duty related to date of birth. A requirement of prosecutorial consent to proceed further suggests added delimitation of application, as does the exception provided for the victim’s wish for non-disclosure. Extra-territorial limitations, together with the absence of express wording to the contrary, provide further support for this conclusion. Finally, application of statutory interpretation

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understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

See also *SAS Trustee Corporation v Miles* (2018) 265 CLR 137, 149 [20] (Kiefel CJ, Bell and Nettle JJ).

109 ‘Person’ is the key term used in the ACT, Tasmania and Victoria: see *ACT CA* (n 50) s 66AA(1); *Tas Criminal Code* (n 50) s 105A(2); *Vic CA* (n 50) s 327(2). The synonymous term ‘adult’ is used in NSW (*NSW CA* (n 50) section 316A(1)) and Queensland (*Qld Criminal Code* (n 45) section 229BC(1)). Note that ‘person’ is defined in the Acts interpretation legislation as an individual or body corporate: see, eg, *Cth Interpretation Act* (n 79) s 2C; *Qld Interpretation Act* (n 79) s 32D, sch 1.

110 *CIC Insurance* (n 103).

111 *K & S Lake City* (n 105).

112 *Mobil Oil* (n 83) 51.

113 Lord Bingham, ‘The Rule of Law’ (2007) 66(1) *Cambridge Law Journal* 67, 69–70 <<https://doi.org/10.1017/S0008197307000037>>.



principles suggests the contextual approach to construction results in a conclusion that the distinct state and territory duties, absent express words to the contrary, are not of general application beyond geographical boundaries, especially when considering the context of an epidemiological survey.

As emphasised earlier, this does not mean researchers should take no steps to protect survey participants, and the types of steps that can be taken will be considered in Part V. Before considering that challenge, a third body of law must be considered to discern legal duties towards research participants, which are of more direct relevance to this context.

#### IV LEGAL DUTIES IN NEGLIGENCE LAW

Australian negligence law is based on complex principles whose application is not always clear, especially in novel situations. The essential questions in this setting are threefold: first, whether a duty of care is owed by those conducting a research study about child maltreatment and health to survey participants; second, what is the scope of that duty; and third, what must be done to discharge that duty of care. At the outset, it should be acknowledged that mere embarrassment and distress are not actionable in tort.<sup>114</sup> Rather, potential types of actionable foreseeable harm include the failure to take reasonable steps in appropriate circumstances to prevent further abuse or harm, and failure to take reasonable steps to prevent mental harm. Here, two factual matrices are relevant. The first is where a survey participant discloses their experience of current significant child abuse, or where their responses or behaviour otherwise indicate they are at imminent risk of significant harm. The second is where a survey participant whose recollections of abuse or health outcomes may prompt mental harm.<sup>115</sup>

##### A A Legislative Framework and Common Law Principles

Legislation governing negligence law has been enacted in similar form in states and territories to establish consistent fundamental principles. The legislation sets out key principles about breach of a duty of care, and whether that breach led to the pleaded damage or injury.<sup>116</sup> The High Court confirmed in *Adeels Palace Pty Ltd v Moubarak* (*'Adeels Palace'*) that the civil liability legislation is the required starting point to consider questions related to breach of duty and causation of injury.<sup>117</sup> However, common law continues to play a central role. The central question of whether a duty of care exists will continue to be guided by common

114 *Tame v New South Wales* (2002) 211 CLR 317 (*'Tame'*); *Church of Scientology Inc v Transmedia Productions Pty Ltd* [1987] Aust Torts Reports ¶80-101 (Needham J).

115 Recalling that questions in these studies include questions about the experience of physical abuse, sexual abuse, and other violence, and health outcomes including suicidal ideation.

116 *Civil Law (Wrongs) Act 2002* (ACT) (*'ACT CLA'*); *Civil Liability Act 2002* (NSW) (*'NSW CLA'*); *Civil Liability Act 2003* (Qld) (*'Qld CLA'*); *Civil Liability Act 1936* (SA) (*'SA CLA'*); *Civil Liability Act 2002* (Tas) (*'Tas CLA'*); *Wrongs Act 1958* (Vic) (*'Vic Wrongs Act'*); *Civil Liability Act 2002* (WA) (*'WA CLA'*).

117 (2009) 239 CLR 420 (*'Adeels Palace'*).

law, because this is not determined by the legislative principles. Moreover, the common law remains significant in interpreting and applying the legislation, which gives statutory form to many established common law principles. The legislative principles therefore co-exist with long-established common law requirements about the existence, scope and application of a legal duty of care, which have been further clarified in recent authoritative cases.<sup>118</sup>

## B Common Law Principles: The Existence of a Duty of Care

The first step in establishing potential liability in negligence is to consider whether a duty of care exists, rather than to consider what conduct occurred, what damage apparently followed, and what could or should have been done to prevent that damage. This is because a duty of care may not exist, and even where it does, liability does not necessarily extend to all harm.<sup>119</sup> Some relationships are acknowledged as creating a duty of care, in circumstances where the axiomatic neighbour principle is clearly engaged to require care to be taken to prevent foreseeable harm. These epitomise the circumstances engaging negligence law, conceptually distilled as responding to the ‘assumption that persons are or ought to be aware of the risks that flow from their conduct and can take reasonable steps to avoid the consequences of those risks’.<sup>120</sup> However, in other relationships where no prior decision has determined a duty exists, it can be less clear whether a party owes a duty of care, or whether it is a situation exemplifying negligence law’s concern to protect the individual’s freedom and security in conducting their affairs without unreasonable burdens and constraints.<sup>121</sup>

In general, the question is whether the circumstances possess sufficient salient features typically held to characterise the existence of a duty of care.<sup>122</sup> These features include: the foreseeability of harm; the nature of the harm; the control able to be exercised by the defendant to avoid harm; the vulnerability of the plaintiff to harm from the defendant’s conduct, including the capacity to protect itself; the physical, temporal and relational proximity between plaintiff and defendant; the nature of the defendant’s activity; the nature or degree of the danger liable to be caused by the defendant’s conduct; knowledge by the defendant that the conduct will cause harm to the plaintiff; potential indeterminacy of liability; and the nature and consequences of any action that can be taken to avoid the harm to the plaintiff.

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118 In this regard, earlier relevant cases before the enactments include *Jaensch v Coffey* (1984) 155 CLR 549 (‘*Jaensch*’); *Sullivan v Moody* (2001) 207 CLR 562 (‘*Sullivan*’); *Tame* (n 114). Decisions since the advent of the legislative scheme include *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 (‘*Dederer*’); *Adeels Palace* (n 117); *Wicks v State Rail Authority NSW* (2010) 241 CLR 60 (‘*Wicks*’); and *King v Philcox* (2015) 255 CLR 304 (‘*King*’).

119 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 53 [19] (McHugh, Gummow, Hayne and Heydon JJ), affd *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361, 370 (French CJ and Gummow J) (‘*Kuhl*’).

120 *Tame* (n 114) 358 [111] (McHugh J).

121 *Ibid* 329, 332 (Gleeson CJ).

122 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253ff (Gummow J) (‘*Perre*’); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 597–8 (Gummow and Hayne JJ) (‘*Barclay Oysters*’); *Kuhl* (n 119) 371 (French CJ and Gummow J).

Courts are reluctant to identify a duty of care where it may involve indeterminate liability to a wide range of people or in relation to a wide range of circumstances. In addition, a duty may be held not to exist where a party owes a competing duty or possesses inconsistent obligations under statute or in contract.<sup>123</sup> In *King v Philcox*, Nettle J identified key considerations in determining the existence of a duty of care, especially in novel circumstances, as including legal reasoning by induction and deduction, value judgments, proximity, and examining the features of the relationship between the parties.<sup>124</sup>

There does not appear to be any judicial consideration of whether a duty of care exists between researchers and survey participants. Applying the principles outlined above, and taking a conservative approach to afford the duty broad scope, a duty of care arguably does exist between researchers and survey participants, where the survey includes questions about sensitive issues concerning the experience of violence, including sexual abuse, and health conditions and behaviours. Even where such questions are framed so responses are simply affirmative or negative, or that require only superficial contextual information, the sensitive subject matter distinguishes this from others about innocuous topics. A small number of participants may reasonably be foreseen to be in situations of ongoing significant harm. When survey participants are drawn randomly from the population, their individual characteristics are therefore unknown, but researchers should operate under a reasonable assumption that a not insignificant proportion will have experienced violence and health conditions and behaviours of the types questioned. Public policy considerations militate against recognising a duty of care, given that such studies are conducted for public benefit, and are typically conducted to meet contractual requirements with government funding agencies. Nevertheless, considering the totality of the relationship, the policy need to protect the public and especially those with specific vulnerabilities, and the risks that can be anticipated even if in very rare cases, it is plausible to find a duty of care exists.

### **C Legislative Principles and Their Application**

Assuming a duty of care exists, several questions require consideration of the legislative framework. These questions stem from the fact the assumed presence of a duty of care does not require a research team to prevent all possible injury, nor to take unreasonable steps. The legislative principles indicate the scope and content of the duty of care, and therefore point towards what precautionary acts and responses are required to avoid its breach.

#### **1 Foreseeability of Risk, and of a ‘Significant’ Risk**

The first principle is that a person is not negligent in failing to take precautions against a risk of harm unless the risk of damage or injury was foreseeable. A foreseeable risk is a risk regarding which the person had knowledge, or ought to have had knowledge. In addition, a defendant will not be negligent in failing

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123 *Sullivan* (n 118).

124 *King* (n 118) 336. His Honour approved Deane J’s statement in *Jaensch* (n 118).

to take precautions against a risk of harm if that risk was ‘insignificant’.<sup>125</sup> For example, the *Wrongs Act 1958* (Vic) (‘*Vic Wrongs Act*’) section 48 provides:<sup>126</sup>

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
  - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.

This additional constraint in section 48(1)(b) on liability has been observed to be the most notable distinction introduced by the legislative framework compared with the existing common law. Prior common law had identified that a risk is ‘real’ and ‘foreseeable’ if it is ‘not far-fetched or fanciful’, even if it is ‘extremely unlikely’.<sup>127</sup> The fundamental criterion for whether the risk is of sufficient significance is of ‘reasonable foreseeability’; liability may be incurred for consequences which the defendant ought to have foreseen, judged by the standard of the reasonable man.<sup>128</sup> The test of reasonable foreseeability is whether the risk of injury which eventuated was reasonably foreseeable at the time the breach of duty allegedly occurred, by a reasonable person in the position of the defendant. The legislative scheme further clarifies that when considering if the risk was ‘not insignificant’, insignificant risks include risks that are far-fetched or fanciful.<sup>129</sup>

## 2 Reasonable Person Would Have Taken Precautions against That Risk

The second principle, embedded in section 48(1)(c) of the *Vic Wrongs Act*, is that to be liable for not taking sufficient precautions to prevent specified harm in the circumstances, ‘a reasonable person in the person’s position would have taken those precautions’. Section 48(2) sets out a series of considerations for the court to determine whether a reasonable person would have taken precautions against a risk of harm:

- (a) the probability that the harm would occur if care were not taken;
- (b) the likely seriousness of the harm;
- (c) the burden of taking precautions to avoid the risk of harm; and
- (d) the social utility of the activity that creates the risk of harm.

Moreover, a person will not be liable in negligence arising from provision of a professional service if they acted in a manner widely accepted in Australia

125 *ACT CLA* (n 116) s 43(1)(b); *NSW CLA* (n 116) s 5B(1)(b); *Qld CLA* (n 116) s 9(1)(b); *SA CLA* (n 116) s 32(1)(b); *Tas CLA* (n 116) s 11(1)(b); *Vic Wrongs Act* (n 116) s 48(1)(b); *WA CLA* (n 116) s 5B(1)(b).

126 Comparable provisions are: *NSW CLA* (n 116) s 5B; *Qld CLA* (n 116) s 9.

127 See, eg, *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J).

128 *Perre* (n 122) 249 [186] (Gummow J).

129 See, eg, *Vic Wrongs Act* (n 116) s 48(3).

by peer opinion as competent professional practice.<sup>130</sup> The presence of different opinion does not mean one or more of them cannot be relied on,<sup>131</sup> and ‘widely accepted’ peer professional opinion does not have to be universally accepted.<sup>132</sup> Moreover, the common law is disinclined to establish a rule that would render ordinary business conduct tortious.<sup>133</sup>

### 3 *Causation and Scope*

The third principle for liability, again expressed in common form,<sup>134</sup> is that the breach of duty must have caused the harm (or been a necessary condition of its occurrence), and that it is appropriate for the scope of liability to extend to the harm caused. Regarding scope, the court must also consider ‘whether or not and why responsibility for the harm should be imposed on the negligent party’.<sup>135</sup>

#### (a) *Breach and Causation of Harm*

The duty to take reasonable care is not a duty to prevent all foreseeable harm. In *Roads and Traffic Authority of NSW v Dederer* (‘*Dederer*’), Gummow J distilled core common law principles in relation to breach of the duty of care and the causation of harm, emphasising that

whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct ... [assessing breach demands] a contextual and balanced assessment of the reasonable response to a foreseeable risk. Ultimately, the criterion is reasonableness.<sup>136</sup>

Accordingly, even where a duty of care exists, its scope is not all-encompassing and the party owing the duty is not liable to insure against all possible harm. This is

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130 *NSW CLA* (n 116) s 50; *Qld CLA* (n 116) s 22; *SA CLA* (n 116) s 41; *Tas CLA* (n 116) s 22; *Vic Wrongs Act* (n 116) s 59; *WA CLA* (n 116) s 5PB (health care professionals only).

131 See, eg, *NSW CLA* (n 116) s 50(3).

132 See, eg, *ibid* s 50(4).

133 *Perre* (n 122) 299 (Hayne J); this is for policy reasons.

134 The provisions are worded almost identically: *NSW CLA* (n 116) s 5D; *Qld CLA* (n 116) s 11; *Vic Wrongs Act* (n 116) s 51.

135 See, eg, *Vic Wrongs Act* (n 116) s 51(4).

136 *Dederer* (n 118) 337–8, 354. His Honour stated, echoing the provisions in the *NSW CLA* (n 116) s 5B:

First, the proper resolution of an action in negligence depends on the existence and scope of the relevant duty of care. Secondly, whatever its scope, a duty of care imposes an obligation to exercise reasonable care; it does not impose a duty to prevent potentially harmful conduct. Thirdly, the assessment of breach depends on the correct identification of the relevant risk of injury. Fourthly, breach must be assessed prospectively and not retrospectively. Fifthly, such an assessment of breach must be made in the manner described by Mason J in *Wyong Shire Council v Shirt* ... [namely] a contextual and balanced assessment of the reasonable response to a foreseeable risk. Ultimately, the criterion is reasonableness, not some more stringent requirement of prevention.

consistent with High Court jurisprudence in *Tame v New South Wales* ('*Tame*'),<sup>137</sup> and *Sullivan v Moody*.<sup>138</sup>

(b) *Appropriate Scope of Liability*

In *Kuhl v Zurich Financial Services Australia Ltd* ('*Kuhl*'), French CJ and Gummow J emphasised that the formulated duty must not be so broad as to lack meaningful content.<sup>139</sup> Yet, it must not be conceived so narrowly 'as to obscure the issues required for consideration'.<sup>140</sup> Their Honours acknowledged that '[d]ifferent classes of care may give rise to different problems in determining the nature or scope of a duty of care. In many cases a duty formulated as being one to take "reasonable care" may suffice for the finding of duty in that particular case.'<sup>141</sup> Reference must be had to what is reasonably foreseeable, and the salient features, as referred to above, of the relationship between the plaintiff and defendant.<sup>142</sup>

#### 4 *Application of Legislative Principles*

The analysis above identified the presence of a duty of care. Several conclusions about its nature and scope can be drawn from an application of the legal principles to the setting of an epidemiological survey about the prevalence and associated outcomes of child maltreatment. This analysis adopts a conservative approach in which, practicalities permitting, any margin of error favours the identification of a duty of care and its application to the context, out of a concern to ensure appropriate protection to survey participants who may require it, rather than to deny such protection. Given the nature of the activity, it is arguable that even though small, there is a risk of foreseeable harm that is not 'insignificant', and a reasonable person in the position of a researcher would take reasonable precautions in response to that risk.

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137 *Tame* (n 114) 401, where Hayne J stated that the common law does not enable recovery of damages by all persons who suffer negligently inflicted harm, even if it was foreseeable that the particular kind of harm would occur. Gleeson CJ stated, at 331:

What a person is capable of foreseeing, what is reasonable to require a person to have in contemplation, and what kinds of relationships attract a legal obligation to act with reasonable care for the interests of another, are related aspects of the one problem. The concept of reasonable foreseeability of harm, and the nature of the relationship between the parties, are both relevant as criteria of responsibility.

138 *Sullivan* (n 118) 576 [42] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ), where it was accepted that reasonable foreseeability of risk of injury, in and of itself, does not automatically mean there is a duty to take reasonable care with regard to that risk of injury.

139 *Kuhl* (n 119) 371 [21], citing *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 447 [73] (Gummow J).

140 *Kuhl* (n 119) 371 [21], citing *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 290 [103] (Hayne J), and approving the statement by Gummow and Hayne JJ in *Barclay Oysters* (n 122) 611 [192].

141 *Kuhl* (n 119) 371, citing *Sullivan* (n 118) 579 [50] (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ).

142 *Kuhl* (n 119) 370–1 (French CJ and Gummow J), citing *Barclay Oysters* (n 122) 597–8 [149] (Gummow and Hayne JJ). This statement was cited in *Hevilift Ltd v Towers* [2018] QCA 89, [58] (Fraser JA, Philippides JA and Flanagan J agreeing at [99]–[100]).



(a) *Disclosure by Minor Participant of Ongoing Significant Abuse, or by Any Participant of Imminent Risk of Significant Harm*

Where a minor participant discloses current or very recent significant abuse by a parent or caregiver, that is either ongoing or has a high probability of recurrence, the risk is that if the research team takes no action the participant may experience further harm. Given best practice in the international epidemiological field, a reasonable research team adopting the practices of the professional community may reasonably be expected to adopt appropriate measures to respond to such instances. However, as emphasised in *Dederer*, the touchstone in determining breach is reasonableness; the duty is to take reasonable care, not to take all possible steps to prevent all possible harm in all potential circumstances of harm no matter how remote, nor to prevent all potentially harmful conduct. Contemplation of the nature, probability and likely seriousness of harm are vital considerations. Here, the burden of taking precautions is not high, and the social utility of the act creating the risk of harm, while high, should not be seen to outweigh the duty to take reasonable precautions. Yet, it is crucial to consider the appropriate scope of the duty to ensure the responses required are neither too stringent and all-encompassing, nor drawn so narrowly as to be stripped of utility. Consideration of the context, risks, available precautions, professional practice, and salient features of the relationship between research team and minor participant, should inform the design of a legally and operationally sound strategy. Similar considerations apply to situations where any participant, whether minor or adult, discloses they are at some other kind of imminent risk of significant harm.<sup>143</sup>

(b) *A Duty to Prevent Potential Mental Harm or Psychiatric Injury*

A second category of possible risk is where a participant's responses to survey questions and associated recollections of abuse or health risk behaviours such as suicidal attempts may potentially prompt mental harm. Plaintiffs may be entitled to damages for 'pure mental harm', being impairment of a person's mental condition, rather than mental harm consequential to bodily injury.<sup>144</sup> Here, the existence of a duty of care is on less solid ground, given requirements of foreseeability and consideration of relevant salient features. Even if such a duty exists, its scope may be limited, and requirements of breach and causation may further circumscribe liability.

(i) *The Qualification of Normal Fortitude*

The civil liability legislation limits availability of a remedy for mental harm through the concept of 'normal fortitude'.<sup>145</sup> In NSW, a defendant does not owe a

143 For example, through other forms of severe interpersonal violence or by self-inflicted harm. In this context, most situations engaging the duty will involve maltreatment by parents or caregivers, but some may involve sexual abuse by anyone, and situations of harm or risk beyond maltreatment only by parents or caregivers, such as extreme cases of peer bullying, or threatened self-harm.

144 See, eg, *SA CLA* (n 116) s 3, and its discussion in *King* (n 118) 314 (French CJ, Kiefel and Gageler JJ).

145 *ACT CLA* (n 116) s 34; *NSW CLA* (n 116) s 32; *SA CLA* (n 116) s 33; *Tas CLA* (n 116) s 34; *Vic Wrongs Act* (n 116) s 72; *WA CLA* (n 116) s 5S.

duty of care to not cause ‘mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances ... suffer a recognised psychiatric illness if reasonable care were not taken’.<sup>146</sup> This demands close scrutiny of the circumstances, including the plaintiff’s mental state.<sup>147</sup> The High Court in *Wicks v State Rail Authority NSW* found section 32 reflected the common law identified in *Tame* by placing foreseeability at the crux of determining the existence of a duty, and holding that mental harm can only be compensated if it would have been suffered by a person of normal fortitude.<sup>148</sup> This circumscribes the scope of liability on this ground, given the salient features present and the viable argument that it is not reasonably foreseeable that there would be a causal connection between merely asking questions (by consent through voluntary participation) and mental harm to persons of normal fortitude.

However, the normal fortitude qualification is itself limited where warranted by the defendant’s actual or constructive knowledge in the circumstances. In NSW, section 32(4) of the *Civil Liability Act 2002* (NSW) states that section 32 ‘does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff’. In similar vein, Victoria’s counterpart provision section 72(3) of the *Vic Wrongs Act* states the section 72 provisions on duty of care do not affect the duty ‘if the defendant knows, or ought to know, that the plaintiff is ... of less than normal fortitude’. Accordingly, while mental harm is generally compensable only where it would have been suffered by a person of normal fortitude, it may be actionable where the defendant knew or ought to have known the plaintiff is a person of less than normal fortitude.<sup>149</sup>

Here, a research team should contemplate that the sample of interviewees will include some individuals who may be particularly vulnerable to mental harm, and be of ‘less than normal fortitude’. While such knowledge is constructive rather than actual, this arguably constitutes sufficient notice of heightened vulnerability,

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146 *NSW CLA* (n 116) s 32(1). In section 32(2) the circumstances of the case are stated to include:

- (a) whether or not the mental harm was suffered as the result of a sudden shock,
- (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
- (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,
- (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

147 Courts have held that because it is necessary to assess whether a person of normal fortitude would suffer a recognised psychiatric illness ‘in the circumstances of the case’, it may be necessary to precisely identify the critical event: *Optus Administration Pty Ltd v Wright* [2017] NSWCA 21; *Wicks* (n 118).

148 *Wicks* (n 118) 72 [26].

149 The provisions support these two propositions. In Victoria, section 71 of the *Vic Wrongs Act* (n 116) states ‘[e]xcept as provided by this Part, this Part is not intended to affect the common law.’ Section 72 ‘Mental harm – duty of care’ provides, inter alia:

- (1) A person (the defendant) does not owe a duty to another person (the plaintiff) to take care not to cause the plaintiff pure mental harm unless the defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken ...

- (3) This section does not affect the duty of care of a person (the defendant) to another (the plaintiff) if the defendant knows, or ought to know, that the plaintiff is a person of less than normal fortitude.

and may be considered by a court in determining what is reasonably foreseeable.<sup>150</sup> It seems reasonable to conclude a duty of care exists in this second category of case, despite the relationship between researchers and participants being neither pre-existing nor close, and even if its scope may be circumscribed through the constructive knowledge of a real and not fanciful risk that a participant with special susceptibility to mental harm may experience further mental harm as a result of responding to survey questions about their experiences and behaviours. Despite the social utility of the activity and the low risk of this type of harm, a research team could reasonably be expected to take some reasonable precautions against that risk by taking reasonably practicable steps, considering its potential seriousness, the likely susceptibility of a small number of participants, and the low burden involved. Guidance about what is reasonable may be informed by professional standards, and should follow the principles acknowledged in *Tame*, *Dederer*, and *Kuhl*, recalling that the scope of the duty does not demand prevention of all risk or harm, but a contextual and balanced assessment of a reasonable response to a foreseeable risk in line with the ultimate criterion of reasonableness.<sup>151</sup>

## V A LEGALLY SOUND APPROACH

Informed by the analysis above, it is possible to outline sound practice that is compliant with obligations under negligence law, given that analysis in Parts II and III have shown the duties in child protection law and criminal law respectively are of no direct application. The approach recommended here from a legal standpoint is conservative, giving the duty of care a liberal interpretation, consistent with promoting a strong ethical duty to protect participants' welfare, while protecting their confidentiality. It also aligns with practices in leading overseas studies. Here, two sets of circumstances are relevant in relation to the duty to take reasonable care to take precautions to prevent harm to research participants.

### A Disclosure by Minor Participant of Ongoing Significant Abuse, or by any Participant of Imminent Risk of Significant Harm

First, we can consider situations where a minor participant discloses their experience of current significant child abuse, or where a participant of any age suggests by their responses or behaviour they are at imminent risk of significant harm. In relation to minor participants aged 16 or 17, even a liberal interpretation of the legal duty of care in which it is given broad scope, would not embrace all forms or circumstances of maltreatment as requiring precautionary actions. Because of their conceptual nature and lived manifestations, some types of child maltreatment will not present risk of harm that is of sufficient significance to engage a duty of care, especially in the context of a retrospective study of experiences across

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150 This calculus is engaged by the legislative provisions, exemplified by subsections 32(4) and 72(3) in NSW and Victoria respectively.

151 Recalling again that if reasonable care is taken, the law recognises it may not be reasonable to ascribe responsibility to the defendant, even for technically foreseeable harm.

childhood. So, for example, if a 17-year-old discloses moderate neglect,<sup>152</sup> the duty will have no application, since there is no risk of ongoing significant abuse or harm. Similarly, without other clear indicators of risk, the duty will not be engaged simply by experiencing emotional abuse through verbal hostility,<sup>153</sup> or by being exposed to domestic violence.<sup>154</sup> Even some apparently more serious forms of abuse which inherently present greater risk of imminent and significant harm, namely physical abuse<sup>155</sup> and sexual abuse,<sup>156</sup> may not engage the duty, depending on circumstances including: the child's age when the acts occurred; what specific acts occurred; how often the acts occurred; who inflicted the acts; whether the person who inflicted the acts remains a threat; and whether the child is otherwise protected and safe. Robust approaches used by leading overseas national studies support this interpretation.<sup>157</sup>

## 1 Discharging the Duty of Care

### (a) Identifying Categories and Circumstances of Risk

To discharge this duty of care, a research team should first identify the types of abuse, and the types of circumstance surrounding those forms of abuse as disclosed by the participant, as constituting a sufficiently high level of risk to warrant

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- 152 Neglect is conceptually understood as including parental failure to provide the basic necessities of life as suited to the child's developmental stage and as recognised by the child's cultural context; it includes physical, emotional, medical, supervisory and educational neglect: Howard Dubowitz et al, 'Examination of a Conceptual Model of Child Neglect' (2005) 10(2) *Child Maltreatment* 173 <<https://doi.org/10.1177/1077559505275014>>.
- 153 Emotional or psychological abuse is generally understood as parental behaviour, typically repeated, that conveys to the child they are worthless, unloved, unwanted, or only of value in meeting another's needs. It is exemplified by acts of hostility, terrorising, rejection, isolation, corruption, and denial of emotional responsiveness: Danya Glaser, 'How to Deal with Emotional Abuse and Neglect: Further Development of a Conceptual Framework (FRAMEA)' (2011) 35(10) *Child Abuse and Neglect* 866 <<https://doi.org/10.1016/j.chiabu.2011.08.002>>; Steven W Kairys, Charles F Johnson and the Committee on Child Abuse and Neglect, 'The Psychological Maltreatment of Children: Technical Report' (2002) 109(4) *Pediatrics* e68:1-3 <<https://doi.org/10.1542/peds.109.4.e68>>.
- 154 Exposure to domestic violence includes witnessing a parent or family member subjected to assaults, threats, or property damage, and a range of other forms of inter-parental verbal, physical, psychological, sexual, economic, and relational coercion: Marilyn Ford-Gilboe et al, 'Development of a Brief Measure of Intimate Partner Violence Experiences: The Composite Abuse Scale (Revised)' (2016) 6(12) *BMJ Open* 1 <<https://doi.org/10.1136/bmjopen-2016-012824>>; Sherry Hamby et al, 'The Overlap of Witnessing Partner Violence with Child Maltreatment and Other Victimizations in a Nationally Representative Survey of Youth' (2010) 34(10) *Child Abuse and Neglect* 734.
- 155 Physical abuse of a child is constituted by an intentional act of physical force by a parent or caregiver that is intended to and does cause injury, harm, pain, or breach of dignity, or has a high likelihood of doing so, and is normally seen as excluding lawful corporal punishment: World Health Organization and International Society for Prevention of Child Abuse and Neglect, *Preventing Child Maltreatment: A Guide to Taking Action and Generating Evidence* (World Health Organization, 2006).
- 156 Sexual abuse comprises contact and non-contact sexual acts by any adult or child in a position of power over the victim, to obtain sexual gratification for the person or another person, whether immediately or deferred in time and space, when the child either does not have capacity to provide consent, or has capacity but does not provide consent: Ben Mathews and Delphine Collin-Vézina, 'Child Sexual Abuse: Toward a Conceptual Model and Definition' (2019) 20(2) *Trauma, Violence, and Abuse* 131 <<https://doi.org/10.1177/1524838017738726>>.
- 157 *NatSCEV III Methodology* (n 18); Radford et al (n 18) 175-7. See also Finkelhor et al, 'Ethical Issues in Surveys about Children's Exposure to Violence and Sexual Abuse' (n 17).

precautionary responses. The classes of case requiring precautionary action are those in which one can reasonably conclude there is a sufficiently high degree of risk of harm that is both imminent and significant. Even with a conservative approach, prudent delineation of appropriate cases will mean those not reaching this threshold of risk will fall outside the class of cases requiring the exercise of precautions to take reasonable care. Consistent with practice in overseas studies, in the Australian setting it is reasonable to conclude that minors aged 16 or 17 reporting sexual abuse and physical abuse in the preceding 12 month period should constitute the initial eligible group of cases requiring precautionary action.<sup>158</sup> This group would be supplemented by any other case where a minor or adult participant indicates a sufficiently high degree of risk of harm that is both imminent and significant, and related to other experiences (for example, severe peer violence against a minor, life-threatening medical neglect, exposure to extreme domestic violence, and threatened self-harm).

*(b) Reasonably Practicable Steps to Comply with the Duty and Its Scope*

It is unnecessary to here provide exhaustive detail about the operation of all administrative steps in further discharging the duty, but observations about the general parameters of a sound approach can be noted to demonstrate what reasonably practical steps can be taken to comply with the duty and its scope. In these types of circumstances, the research team should develop a system whereby the participant can be contacted to explore the optimal response, and should create a catalogue of responses to enable appropriate actions to a range of individual participants' circumstances on a case-by-case basis.<sup>159</sup>

To ensure decisions about appropriate responses are informed, while avoiding unnecessary intrusion, the research team may first identify further information about the individual participant's circumstances and levels of risk, and therefore the appropriate precautionary response, based on their other responses to the survey questions. So, for example, an extremely low level of risk may be evident where a participant reported one incident of minor physical abuse by a non-familial caregiver in the prior year, reported no other experience of maltreatment, and displays no evidence of harm. In contrast, where a participant reports repeated serious sexual abuse by a parent, and displays evidence of harm, there is a much higher level of risk. Other relevant factors may be ascertained when re-contacting the participant. The key factors in the participant's situation include: their age; the type, severity and recency of the abuse; the frequency with which the abuse

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158 If a study involved child participants younger than 16, this approach may need to be expanded.

159 Guidance on the re-contact system and response catalogue can be obtained from methods of dealing with such cases shown by robust approaches in this field of research, tailored to the local context and study parameters. The re-contact approach can generally be embedded by the interviewer informing the participant that a member of the survey team may need to contact the participant again to check they are safe, and asking the participant when would be the best time to call. In emergency situations, action should be taken at the time.

occurred; and harm to physical or mental health. In addition, a key factor is the participant's safety and the risk of further abuse or immediate danger.<sup>160</sup>

The catalogue of responses must be sufficiently inclusive to respond sensitively to a range of circumstances and levels of risk. A research team can discharge the duty to take reasonable precautionary steps by adopting a nuanced, graduated approach to accommodate the specific situation and take different steps according to the level of risk.<sup>161</sup>

### **B A Duty to Prevent Potential Mental Harm or Psychiatric Injury**

Second, we can consider the duty to prevent mental harm or psychiatric injury, including where a participant whose recollections of abuse or health behaviours may prompt mental harm. To discharge this duty of care in relation to all survey participants, and especially in relation to those of less than normal fortitude, a research team should take reasonable precautions by embedding survey design principles and an approach to survey administration that minimise the likelihood of harm to any participant, and which will enable appropriate and practicable responses to situations where such harm may appear possible.

In survey design and preparation, precautions should include: the use of a survey instrument shown to be non-aversive; testing of the instrument with a local sample; inclusion of staff with required expertise; documentation of processes to respond to cases of apparent harm; training of interviewers about how to respond to such instances; and design of the sample to avoid unnecessarily including potential participants who may be highly vulnerable. A structured distress protocol should be designed to prevent and manage different levels of distress, from the transient and minor, to the persistent and significant. As with the first category of cases, any participant showing significant distress should receive a follow-up call, and any other participant desiring a follow-up call should receive one.

In administration, precautions should include measures at commencement of the interview, and during it. On commencement, there should be a focus on ensuring the participant provides informed consent, by explaining the nature of the study and clearly communicating the participant may withdraw consent at any time and stop the interview. During the interview, statements by the interviewer should

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160 Here, relevant considerations include: whether the participant is still living with the person who inflicted the abuse; whether the person who inflicted the abuse is the participant's parent or caregiver; whether the person who inflicted the abuse still poses an imminent risk to the participant; and whether the participant is cared for by another person who is able and willing to protect them. While not necessarily determinative, the participant's own preference should also be considered and prioritised where possible.

161 Where the level of risk is non-existent or very low, no further action may be required, other than to remind the participant of the standard sources of counselling support offered to all participants. Where the risk is low, appropriate precautions may involve providing the participant with information about standard counselling support, as well as about other sources of more intensive counselling support. If the risk is moderate, additional information to the counselling options could extend to providing information to the participant about other sources of protection, such as police, or child protection agencies. If the risk is high or very high, the research team may either suggest the option of self-referral to the child protection agency or police, or may itself refer the situation to the agency. If the risk is extreme, such that there is a high risk of imminent significant harm to the participant's life or safety, the situation should be reported to police. In all such cases, follow-up calls should be made.



prepare the participant for highly sensitive parts of the survey, and the participant should be reminded they can choose not to answer specific questions. In addition, at the outset, during the interview, and on closing the interview, there should be a strong focus on providing information about diverse sources of support, through phone numbers and website information.<sup>162</sup>

## VI CONCLUSION

Research into child maltreatment is of high public policy value, and of growing international interest. It is important for researchers to employ rigorous research designs to protect and promote the interests and safety of research participants. This is particularly important when conducting research with participants of higher than normal vulnerability. However, it is equally important to accurately understand the nature and operation of different legal principles in this setting. This understanding can ensure the obligations of researchers – and through them, of their employers – can be discharged, while not unnecessarily constraining research, infringing participants' confidentiality, or reporting survey participants' circumstances to authorities where neither legally required nor ethically justified.

Given the lack of research in this area, this article contributes a new understanding of three domains of legal duties in a dynamic, complex and multilayered sociolegal environment. Interpretation of legal principles has demonstrated that the key applicable legal duty is the tortious duty of care, which requires substantial discernment in its application. The findings of this analysis and the principles in the recommended approach have direct relevance for large-scale quantitative epidemiological studies with random samples of the population. However, they are also applicable to smaller quantitative studies with either random or clinical samples, and to qualitative studies, including studies of children aged under 16 and of adults who may be of less than normal fortitude. The conclusions also have relevance for studies of other sensitive topics which may engage similar issues.<sup>163</sup> While situated in Australian law, the analysis and findings also have implications for studies of child maltreatment in other countries possessing any or all of these three types of legal duty.

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162 The entire approach should be consistent with the general principles set out in the relevant national research ethics guidelines, as exemplified by Australia's 'National Statement' (n 17), and should be detailed and approved by the research institution's human research ethics committee.

163 For example, domestic violence, sexual coercion, bullying, and health: Anita Morris, Kelsey Hegarty and Cathy Humphreys, 'Ethical and Safe: Research with Children about Domestic Violence' (2012) 8(2) *Research Ethics* 125 <<https://doi.org/10.1177/1747016112445420>>; Richard O de Visser et al, 'Experiences of Sexual Coercion in a Representative Sample of Adults: The Second Australian Study of Health and Relationships' (2014) 11(5) *Sexual Health* 472 <<https://doi.org/10.1071/SH14103>>; Hannah J Thomas et al, 'Prevalence and Correlates of Bullying Victimisation and Perpetration in a Nationally Representative Sample of Australian Youth' (2017) 51(9) *Australian and New Zealand Journal of Psychiatry* 909 <<https://doi.org/10.1177/0004867417707819>>; Lane Strathearn et al, 'Long-Term Cognitive, Psychological, and Health Outcomes Associated with Child Abuse and Neglect' (2020) 146(4) *Pediatrics* 389 <<https://doi.org/10.1542/peds.2020-0438>>.