



Legal aspects of working with abused and vulnerable children

18 April 2016

Support structures



- VFPMS
- Policies and procedures
- Legal Services



Key intersections of the law & paediatric forensic practice

- **Betrayal of Trust Report – new laws**
- **Consent**
- **Reports**
- **Documentation**
- **Release of information**

Betrayal of Trust Report – new laws



- Vic Govt Parliamentary Inquiry – report tabled 13/11/13
- Royal Commission into Institutional responses to Child Sexual Abuse – 11/1/13 – ongoing
- Vic Govt responses in 3 categories:
 - Criminal law reform – new offences
 - Working towards creating safe organisations
 - Civil law reform



Betrayal of Trust Report – new laws

- Vic govt announced and quickly passed 3 new laws to protect children
 - Grooming – max penalty 10 years imprisonment
 - Failure to protect – max penalty 5 years imprisonment
 - Failure to disclose – max penalty 3 years imprisonment

Betrayal of Trust offences



Grooming offence -

- prohibition of any communications with a child or a child's parents or carers intended to facilitate engaging the child in an indictable sexual offence

Failure to protect offence -

- offence for a person in a position of authority who knows that someone in their organisation poses a risk of committing a sexual offence against a child to fail to remove that risk

Betrayal of Trust – failure to disclose



Failure to disclose offence –

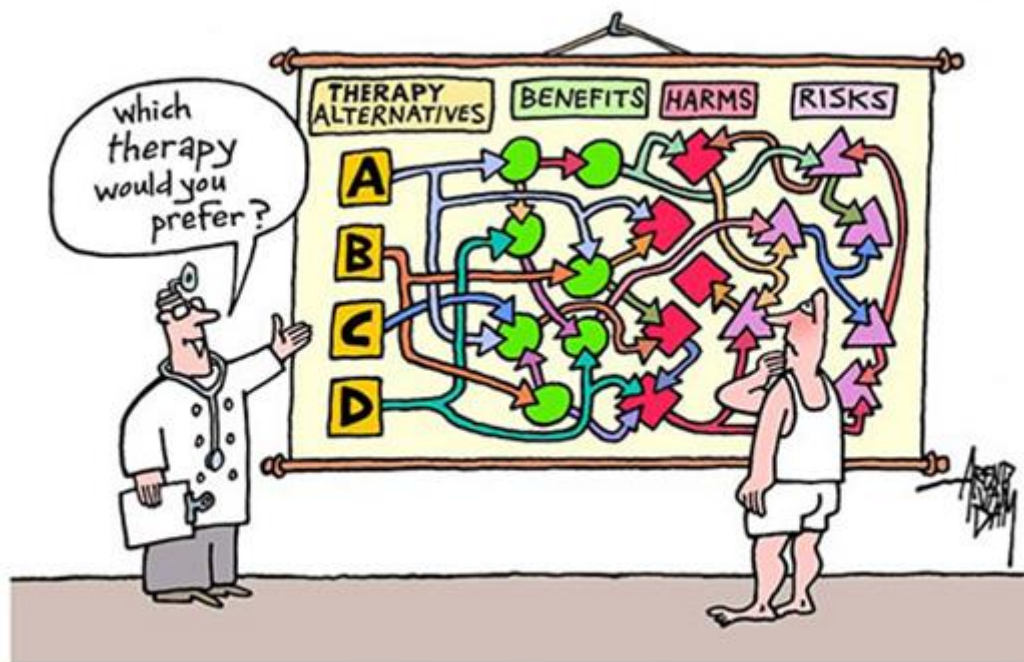
- any adult who forms a reasonable belief that a sexual offence has been committed by an adult against a child under 16 has an obligation to report that information to the police
- unless the person has a reasonable excuse for not disclosing eg
 - fear for safety (their own or another person's)
 - information already disclosed

Failure to disclose – exemptions (contd)



- **Further exemptions to the offence –**
 - victim is 16 or over and requests confidentiality & is sufficiently mature to make that judgment
 - person is a child when they formed the belief
 - information would be privileged
 - information is a confidential communication (mandatory reporting still applies)
 - information in public domain

Consent



informed consent

What is consent?



- **Consent –**

voluntary agreement by a patient/parent/guardian to proposed procedure

- **Valid consent –**

- freely given
- specific (for the procedure)
- informed

Consent - informed



- The person consenting must understand –
 - the nature and inherent risks of the procedure/examination in question vs benefits
 - the alternatives – not going ahead/ not going ahead now
- How do you know what they understand?

– allow them time to ask questions



Your patients

Two extremely challenging aspects of consent in your context –

- you're dealing with children, who are often very distressed and in the company of distressed support people potentially from a complex family dynamic
- the stakes are high



Mature minors

- **Consent by a minor – forensic exam context**

- Gillick competent child

'A minor is ... capable of giving informed consent when he or she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.'

Gillick v West Norfolk AHA [1986] AC 112

- **Rule of thumb**

- under 12, always guardian; 13 be aware of potentially increasing maturity
- over 14 consider assessment for Gillick competence
- if the context allows consent from child and parent – all the better



Consent for a child

- **Consent for a child**

- Parent or guardian

- One parent's consent is often sufficient
- Must have 'parental responsibility' and act in the child's best interests
- Custody irrelevant
- Must be legal guardian

- Child Protection

- s597 *Children Youth and Families Act*
- Permits DHS to consent to examinations and treatment for a child in certain circumstances
- **Not** where children remain in the custody of their parents

- Family or Supreme Court



Documenting consent

- A signed consent form is not conclusive of consent
 - was there adequate discussion? Evidence this by documenting it with precision
 - did the person consenting understand the nature and consequences
- Please note** – you need to get consent for what you are going to do
- follow VFPMS policy and guidelines

Privacy & Confidentiality





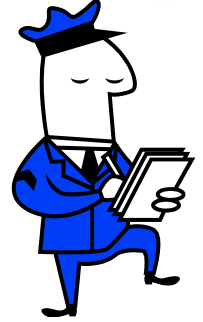
Privacy & confidentiality

- **Ethical basis**
 - Respect for autonomy
- **Public policy reasons**
 - Trust in medical system; breach may discourage people to seek help
- **When in doubt, chicken out!**



Privacy & confidentiality - disclosure

- **Starting point - obligation to maintain confidentiality and not disclose to anyone except with consent or by operation of law**
 - (a) Consent**
 - For child and mature minor, same as consent to treatment – informed and specific
 - (b) Operation of law**
 - Subpoenas; warrants
 - Health Services Act, s141
 - Health Privacy Principles



Privacy and the police

- No general right even where relevant to an investigation
- Usually need **consent** or a **warrant**
- General exception where:

'the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent--

(i) a serious and imminent threat to an individual's life, health, safety or welfare; or

(ii) a serious threat to public health, public safety or public welfare--'

Health Records Act, Health Privacy Principle 2.2(h)

Documentation



He had taken every side street he knew
but the paperwork was still on his tail.



Documentation

- **VERY important both clinically and legally:**
 - to ensure all information available for future analysis/care
 - to evidence what was done and why
 - particularly important if you need to justify your opinion in Court
- **Record all relevant information**
- **Very important that documentation is professional and you will be comfortable explaining the language to the patient or a court or others**

Don't let the tail wag the dog!





Documentation - disclosure

- Patient and/or parents can access records under Freedom of Information legislation
- Exemptions limited
- No 'we really wish we hadn't written that' exemption
- Patient health and safety specifically addressed



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