

ARTICLE

'Mind the (Knowledge) Gap': Towards a Criminal Duty to Report Child Sexual Abuse?

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Over the past few decades, child sexual abuse ('CSA') has become recognized as a serious and major problem in modern societies. Consequently, a common denominator in modern government policy is that CSA must be criminalized and pro-actively enforced. However, if national authorities are to be able to enforce, knowledge about the abuse is essential. Yet the disclosing of information to the authorities is hampered by the hidden nature of the offence. According to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote) and EU Directive 2011/93 on combating the sexual abuse and sexual exploitation of children, Member States should 'encourage any person' who knows about or suspects CSA to report this to the relevant authorities. To encourage such disclosure, several European governments have introduced mandatory reporting systems imposing a (non-criminal) duty on designated professionals to report information about or suspicions of CSA to the competent authorities.

This article examines whether introducing a criminal duty to report CSA could be recommendable for the European Union or the Council of Europe in order to improve Member States' knowledge of CSA and thus protect children more effectively against this type of violence. Using the outcomes of our recent study into the possibilities and impossibilities of extending the present Dutch criminal duty (*aangifteplicht*) to report rape, we argue that a criminal duty to report CSA is not recommendable as a means to encourage CSA disclosure by third parties.

Keywords: child sexual abuse; disclosure; (mandatory) duty to report

1. Introduction

Over the past few decades, child sexual abuse ('CSA')¹ has become recognized as a serious and major problem in modern societies.² Today, it is considered one of the most severe forms of violence against children. Consequently, a common denominator in modern government policy is that CSA must be criminalized and pro-actively enforced.³ This view is in line with the European discourse. The EU authorities and the Council of Europe have both devoted intensive political attention to combating CSA. While acknowledging that CSA

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¹ While the political and social concerns transcend the sexual abuse of minors and include other socially vulnerable groups (e.g., the mentally disabled, elderly people and LGBTQIA+), our focus in this article is on the sexual abuse of minors.

² Pratt describes the recognition of sexual abuse as 'a globalized commodity', and one subject to 'successive reformulations of the problem'; J Pratt, 'Child sexual abuse: Purity and danger in an age of anxiety' (2005) 43 *Crime, Law & Social Change* 263, 278 doi: <https://doi.org/10.1007/s10611-005-2030-2>.

³ Pratt (n 2) 266–267; see also M J Lerner, et al., 'Vulnerable victims, monstrous offenders, and unmanageable risk: explaining public opinion on the social control of sex crime' (2013) 51 *Criminology* 729 doi: <https://doi.org/10.1111/1745-9125.12018>; L King, 'Perceptions About Sexual Offences: Misconceptions, Punitiveness, and Public Sentiment' (2019) 2 *Criminal Justice Policy Review* 254, 268 doi: <https://doi.org/10.1111/1745-9125.12018>.

can take multiple forms, policy is currently focused on online CSA, which is closely related to child sexual exploitation (e.g., prostitution and child pornography).⁴

If national authorities are to enforce CSA legislation, being informed about cases of abuse is a prerequisite. Given the hidden nature of the offence, authorities are commonly reliant for their information about abuse, or possible abuse, on disclosure by the victim, by professionals or by third parties, such as the victim's relatives. However, the parties involved – especially victims and third parties – are often reluctant to disclose the necessary information to the authorities. Disclosure is, therefore, hampered.⁵ To encourage disclosure, several European governments have introduced mandatory reporting systems imposing a duty on designated professionals to report suspected CSA to the competent authorities.⁶ In most countries, this obligation entails a duty to report to social support authorities; only a few European countries have introduced a duty to report to the criminal justice authorities. Moreover, these regimes of mandatory reporting often apply only to disclosure by designated professionals; in most cases, disclosure by third parties is recommended, but not mandatory.⁶

The situation in the Netherlands illustrates the complexity of the issue of disclosing and enforcing CSA. Although the Dutch government has been seeking to combat CSA for some decades, only a minority of cases of CSA committed by private individuals are reported to the police.⁸ This is remarkable, given that Dutch law of criminal procedure establishes a duty for rape to be reported to the police (Article 160 Dutch Code of Criminal Procedure [*Wetboek van Strafvordering*: 'DCCP']).⁷ However, non-compliance with this duty to report is not usually punishable under criminal law. Some of the problems involved in CSA disclosures recently became especially clear when the Board of the Community of Jehovah's Witnesses denied the Dutch Minister for Legal Protection's request to conduct an independent investigation into allegations of CSA within the community and subsequently refused to set up an internal hotline to enable victims and ex-victims of CSA committed by community members to come forward and share their stories.⁸ This led to a political debate and, among other things, to a request by parliament for research into the possibilities for extending the above-mentioned duty to report rape, in the hope that this would improve disclosure. This request was complied with as, according to the minister, any effort that can contribute to preventing CSA should be considered.⁹

The authors of this article, together with other legal scholars, conducted research into the possibilities of extending the duty to report as provided for in Article 160 DCCP.¹⁰ This involved conducting a thorough examination of Dutch legislation and practices regarding CSA disclosures, complemented by an explorative study of legislation in other European countries. The importance of our explorative study is that it shows that governments trying to combat CSA face similar issues, especially with regard to gaining knowledge of this abuse. The hidden nature of CSA and the barriers to disclosure that victims and third parties experience make CSA very hard to detect and therefore represent a potential threat to ensuring the standard of adequate legal protection prescribed by the Council of Europe Convention on the Protection of Children against

⁴ See, for example, Council of Europe, 'ONE in FIVE Campaign' <https://www.coe.int/t/dg3/children/1in5/WhatWeKnow/coe_standards_en.asp>. See also Council of Europe, 'End Child Sex Abuse Day', <<https://www.coe.int/en/web/children/2019-edition>>; European Union 'Child sexual abuse', <https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/child-sexual-abuse_en>. With regard to the EU, see European Commission, *EU strategy for a more effective fight against child sexual abuse*, Brussels, 24 July 2020, COM(2020)607, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0607&rid=10>> accessed December 2020.

⁵ R McElvaney, 'Disclosure of Child Sexual Abuse: Delays, Non-Disclosure and Partial Disclosure. What the Research Tells Us and Implications for Practice', *Child Abuse Review* (2015) 24 doi: <https://doi.org/10.1002/car.2280>; R Allagia, 'Many ways of telling: expanding conceptualizations of child sexual abuse disclosure' (2002) 11 *Child Abuse & Neglect* 1213 doi: <https://doi.org/10.1016/j.chiabu.2004.03.016>; K London and others, 'Disclosure of Sexual Child Abuse: What Does the Research Tell Us About the Ways That Children Tell?' (2005) 1 *Psychology, Public Policy & Law* 194 doi: <https://doi.org/10.1037/1076-8971.11.1.194>; Margaret-Ellen Pipe et al. (eds), *Child sexual abuse. Disclosure, Delay and Denial* (1st edn, Routledge 2007); C Townsend, *Child sexual abuse disclosure. What practitioners need to know* (Charleston 2016) <www.D2L.org> accessed December 2020.

⁶ B Mathews, 'Exploring the Contested Role of Mandatory Reporting Laws in the Identification of Severe Child Abuse and Neglect' in M Freeman (ed), *Law and Childhood Studies. Current Legal Issues* 14 (OUP 2012).

⁷ R. Kool et al., *Verruiming van de aangifteplicht voor ernstige seksuele misdrijven?* (Extending the duty to report in case of serious sexual offences), Boom 2019, ch 4 paras 4.2 and 4.3.8. Note that Art 160 DCCP applies to anyone and is limited to rape (see further para 6).

⁸ *Parliamentary Papers II* 2019/2020, 34843, 39.

⁹ *Parliamentary Papers II* 2019/2020, 29279/33015, 553. A report on practices of CSA disclosure in the Jehovah's Witness community was conducted separately from our study; K van den Bosch and others, *Seksueel misbruik en aangiftbereidheid binnen de gemeenschap van Jehova's getuigen* (Sexual abuse and willingness to report sexual abuse within the Jehovah's Witness community), <<https://www.wodc.nl/onderzoekdatabase/3010-aangiftbereidheid-binnen-de-gemeenschap-van-jehovaes-getuigen.aspx>> accessed March 2020.

¹⁰ Kool (n 7).

Sexual Exploitation and Sexual Abuse ('Lanzarote Convention')¹¹ and EU Directive 2011/93 on combating the sexual abuse and sexual exploitation of children.¹² Article 12(2) Lanzarote Convention is of particular relevance since it obliges Member States to encourage their citizens to disclose signs of possible CSA to the relevant authorities. Article 16(2) Directive 2011/93 contains a similar obligation.

A question that then follows is which measures are most appropriate for promoting such encouragement. We will investigate one of the possibilities, which was recently under debate in the Netherlands and entails establishing a criminal duty to report CSA to the criminal justice authorities ('criminal duty to report'). This leads to the central question of this article:

Is it recommendable to introduce (or extend) a duty to report CSA to the criminal justice authorities in order to improve disclosure by third parties?

Since the difficulties regarding disclosure relate mostly to CSA committed by private persons, as opposed to CSA committed by professionals, the focus in this article is on the former.¹³ Taking the Dutch discourse as our point of reference, we will explore whether an obligation to introduce a common duty to report (to the criminal justice authorities) is recommendable in light of the Lanzarote Convention and/or Directive 2011/93 (section 2). Next, we will allow ourselves a normative detour in which we discuss Ashworth's recent plea to introduce a common duty to report CSA to the social services (section 3).¹⁴ Until now, suggestions to introduce a common duty to report, especially to criminal justice authorities, have raised controversy. As both the Council of Europe and the European Union prefer a system of mandatory reporting for designated professionals, we will elaborate upon our (explorative) comparative findings concerning systems of mandatory reporting within Europe. We will also mention some Australian legislation, given that the rules in the latter country's legislation present a different perspective on the issue (section 4). To illustrate the difficulties accompanying CSA disclosures (both by third parties and professionals), we present an overview of the main findings of our recent study in section 5. We will argue that CSA is a complex phenomenon that needs to be subjected to a multidisciplinary approach in order to improve disclosure as a precondition for guaranteeing legal protection. We end the article with a conclusion.

2. Do the Lanzarote Convention and/or the Directive 2011/93 require states to codify a criminal duty to report information about or suspicion of CSA?

This section highlights the relevant provisions in the Lanzarote Convention and Directive 2011/93. Although both seek to encourage victims and third parties to disclose CSA, neither does so by means of a criminal duty to report.

2.1 Lanzarote Convention

Before the Lanzarote Convention (2007) was adopted, various international and European instruments dealing either directly or indirectly with CSA and sexual exploitation (of children) were already in place. However, an expert assessment of the extent to which Member States had taken the necessary measures to comply with their obligations arising from these instruments showed that, in numerous cases, these commitments had not (or not yet) been fully implemented.¹⁵ New, harmonizing legal standards in this area were therefore seen as necessary. As a result, the Lanzarote Convention, covering sexual exploitation and sexual abuse of children, was drafted with the aim of achieving greater unity in the level of protection provided by Member States of the Council of Europe.¹⁶

¹¹ Council of Europe, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS 201 Lanzarote 2007 <www.coe.int/en/web/children/lanzarote-convention> accessed March 2020.

¹² European Parliament and Council, *Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA*, O.J. L 335/1, <<https://www.europa.eu>> accessed December 2020.

¹³ McElvaney (n 5); Allagia (n 5); London (n 5); Pipe (n 5); Townsend (n 5); EPRS, *Combating sexual abuse of children Directive 2011/93/EU. European Implementation Assessment, Part III* <<https://www.europaparl.europa.eu>> accessed October 2020.

¹⁴ A Ashworth, 'A New Generation of Omissions Offences?' (2018) 5 *Criminal Law Review* 354.

¹⁵ Council of Europe, *Explanatory Report to Lanzarote Convention (2007)* para 28, 5 <<https://rm.coe.int/16800d3832>> accessed December 2020 ('Explanatory Report').

¹⁶ *Council of Europe* (n 11), Preamble. As mentioned earlier, this article focuses on CSA, but CSA and sexual exploitation may intertwine.

The Lanzarote Convention instructs Member States to take appropriate measures to prevent CSA, to protect the rights of child victims and to improve national and international co-operation (Article 1 Lanzarote Convention). The measures to be taken to achieve these goals are a matter of national policy. Member States are called upon, among other things, to take measures to encourage professional and non-professional actors to report suspected CSA to the relevant authorities. The key provision in this regard is Article 12, which reads as follows:

1. Each Party shall take the necessary legislative or other measures to ensure that the confidentiality rules imposed by internal law on certain professionals called upon to work in contact with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse.
2. Each Party shall take the necessary legislative or other measures to encourage any person who knows about or suspects, in good faith, sexual exploitation or sexual abuse of children to report these facts to the competent services.

Article 12, however, does not imply introducing a duty to report CSA to the criminal justice authorities. Indeed, the Explanatory Report explicitly states that 'The Convention does not impose an obligation for such professionals to report sexual exploitation or abuse of a child. It only grants these persons the possibility of doing so without a risk of breach of confidence.'¹⁷ The aim of disclosure is 'to ensure the protection of children rather than the initiation of a criminal investigation.' Although the national authorities may determine which professionals are covered by the duty to report, the Convention explicitly mentions professionals whose functions involve regular or occasional contacts with children.¹⁸

In addition to Article 12, Article 9(2) should be mentioned. Similar to Article 12(2), the provision in the latter stresses the importance of involving the general public in improving disclosure. While the private sector is also encouraged to disclose, its involvement relates primarily to information concerning sexual exploitation. Other than the designated professionals in Article 12, the authorities competent to file a report are not limited to the child protection services or relevant social services.¹⁹ Furthermore, reports are justified only in the event of 'good faith' so as to prevent the denunciation of 'purely imaginary or untrue facts carried out with malicious intent.'²⁰

2.2 Directive 2011/93

Like the Lanzarote Convention, Directive 2011/933 calls on Member States to take measures to encourage professional and non-professional actors to report suspicions of CSA to the relevant authorities. It introduces a minimum degree of approximation of criminal law, prescribing that Member States are to criminalize the most serious forms of CSA and exploitation.²¹ Member States are also instructed to provide for penal provisions that are consistent with the provisions of Union law, especially with regard to the consistency of the level of penalties.²² So, too, are Member States required to facilitate investigation and prosecution of CSA, among other offences, taking into account the difficulties child victims face in reporting CSA. Consequently, criminal investigations and prosecutions must not depend on a report or accusation by the victim (or his/her representative); in the event of reasonable cause, the criminal justice authorities must act proactively.²³

In addition, and again like the Lanzarote Convention, Directive 2011/93 acknowledges the importance of disclosure by third parties. However, this does not imply the introduction of a duty for third parties to report a reasonable suspicion of CSA to the criminal justice authorities. The key provision

¹⁷ Ibid para 89.

¹⁸ Ibid para 91.

¹⁹ *European Union* (n 12) para 91.

²⁰ Ibid.

²¹ Ibid; European Commission, *Proposal for a Directive of the European Parliament and the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA*, Brussels, 29 March 2009, 2012/0064 (COD), <[www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2010\)009](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2010)009)> accessed December 2020.

²² *European Union* (n 12) recitals 11 and 15.

²³ *European Union* (n 12) recital 26 and Art 15.

in this regard is Article 16(2) in conjunction with recital 28.²⁴ These provisions read, respectively, as follows:

Member States shall take the necessary measures to encourage any person, who knows about or suspects, in good faith that any of the offences referred to in Articles 3 to 7 have been committed to report this to the competent services.²⁷

Member States should encourage any person who has knowledge or suspicion of the sexual abuse or sexual exploitation of a child to report to the competent services. It is the responsibility of each Member State to determine the competent authorities to which such suspicions may be reported. Those competent authorities should not be limited to child protection services or relevant social services. The requirement of suspicion 'in good faith' should be aimed at preventing the provision being invoked to authorise the denunciation of purely imaginary or untrue facts carried out with malicious intent.

Based on Article 15, Member States have to ensure that confidentiality rules imposed upon professionals do not constitute an obstacle to reporting any situation of CSA.²⁵

The only national parliament in a Member State to raise objections to the Commission's proposal to oblige Member States to take measures to encourage citizens to report any knowledge or suspicion of CSA to the competent authorities in good faith was the Austrian parliament.²⁶ According to the Austrian authorities, introducing a general criminal duty to report would be disproportionate and represent too much of a burden. Instead, the Directive should aim to extend public awareness of signs of CSA.²⁷ The Austrian government's interpretation of Article 15 of the draft Directive would appear, however, to be incorrect. Rather than implying an obligation to introduce a common duty for non-professionals to report CSA to the criminal justice authorities, the Commission's proposal aimed to establish minimum rules, indicating obligations for Member States to take the necessary measures to 'encourage any person' to report CSA to the authorities.

The Commission's assessment of the Directive's implementation was communicated in 2016, followed by publication in July 2020 of the EU strategy for a more effective fight against CSA.²⁸ Given the less than optimal implementation of the Directive, the Commission's strategy called on Member States to amend their national legislations and facilitate the exchange of best practices. The Commission's ultimate goal is to develop a multi-agency strategy. This is intended to lead, among other things, to improved disclosure of CSA, with the Commission once again stressing the importance of disclosure by victims and non-professionals:

Families and carers, professionals and broader society need to understand the seriousness of these crimes and the devastating effect they have on children, and be given the support needed to report these crimes and support child victims. This requires specialised information, media campaigns and training. (...). When abuse occurs, children need to feel secure and empowered to speak up, react and report, even when the abuse comes from within their circle of trust (...), as it is often the case. They also need to have access to safe, accessible and age-appropriate channels to report the abuse without fear.²⁹

In conclusion, both the Lanzarote Convention and Directive 2011/93 are seeking to effectively combat CSA by obliging Member States to take the measures needed to prevent the confidentiality rule from becoming an obstacle, and by emphasizing the need to encourage third parties and victims to exchange information on CSA with the competent authorities. However, a criminal duty to report is not recommended.

²⁴ Note that Art 16 in the Directive is synonymous with Art 15 in the draft proposal (*European Commission* [n 21]). Moreover, the draft proposal did not contain an explanatory note comparable to recital 28 in the final version.

²⁵ The Note to Art 15 was reformulated during the drafting of the Directive, with the result that the circle of designated professionals was extended to those whose 'main duty' is to work with children; <www.consillium.europa.eu/doc/documents-publications-register> ST 111551-INIT NOTE 7 July 2011 accessed December 2020.

²⁶ See section 3 of this article.

²⁷ Austrian National Council, Standing Subcommittee on European Union Affairs, *Application for a Committee Statement*, 9 June 2010 <[http://www.connefop.europarl.europa.eu/connefop/app/exp/COM\(2010/0094\)](http://www.connefop.europarl.europa.eu/connefop/app/exp/COM(2010/0094))> accessed March 2020.

²⁸ European Commission, *COM(2016) 871 final*, Brussels, 16 December 2016, <www.consillium.europa.eu/en/documents-publications> accessed December 2020; *European Commission* (n 4).

²⁹ *European Commission* (n 4) 2.

3. Towards a strategy of responsabilization for CSA?

Given the instructions in the Lanzarote Convention and Directive 2011/93 to encourage third parties to 'break the silence' regarding CSA, a thought experiment is justified. Do these instructions imply that Member States should develop a strategy of responsabilization towards their citizens? Under both the Lanzarote Convention and Directive 2011/93, national governments are to call on their citizens to assume a civil responsibility to prevent gendered violence, especially CSA.³⁰ Contrary to the Australian discourse, this 'obligation' is of a moral nature. Is it then justified to convert this obligation into a legal obligation, especially one entailing the disclosing of information to the authorities? And if the answer is affirmative, which authorities are competent to receive the information?

Ashworth has consistently pleaded in favour of introducing a civic duty to report information on CSA to the competent authorities. He welcomes the trend towards responsabilizing professionals and other individuals to report CSA.³¹ The question at stake, according to Ashworth, is 'whether the state alone is responsible for crime prevention (...)'.³² As he sees it, 'to accept that the state should play a major part in crime prevention and related tasks still leaves room for some civic and crime-preventive obligations to be placed on individuals and organisations.'³³ Whereas the moral aspiration to increase the quality of civic life must prevail over the individual's right to liberty, an obligation to assist those who are seriously endangered – as is the case when CSA occurs – is justified.³⁴ Despite some reservations, Ashworth is of the opinion that a common duty to assist those in need should not represent an undue burden for the individual.³⁵ To justify a responsabilization strategy for citizens, he believes the following concerns must be taken into consideration as representing opportunities or threats to the opportunity to report: 1) the seriousness of the harm; 2) the secrecy marking the situation; 3) the presence (or absence) of a professional's involvement, and 4) the proximity of the (intended) reporter to both the victim and the perpetrator. If these standards are applied to CSA, Ashworth regards all four concerns as being covered (in principle). As CSA indicates a moral wrong that justifies criminalization, and where victims are manifestly at risk, a common duty to report symbolizes a token of mutual respect.³⁶

Who then, according to Ashworth, are the competent authorities? The criminal justice authorities are not eligible for consideration, given that enforcement needs to be proportionate and Ashworth views criminalization of non-reporting as inappropriate. Starting, therefore, from the principle of minimal criminalization, with criminalization of non-compliance not being an option, penalization of non-reporting as an omission offence would represent a disproportionate form of enforcement in light of the ethical dilemmas facing non-professionals in deciding whether or not to report.³⁷ Moreover, focusing on the omission could distract attention from the criminal liability of the perpetrator.³⁸ Nevertheless, reinforcement of non-reporting is necessary, given that CSA represents a serious violation of vulnerable individuals' vital interests.³⁹ Ashworth opts for regulation, which he describes as a legal technique to achieve control in order to improve prevention and deterrence in the event of materialized CSA. This would require establishing a regulatory common duty to report CSA by filing a report with hotlines, supported by multi-agency initiatives directed, among other things, at facilitating criminal justice activities.⁴⁰ Thus the common duty to report CSA favoured by Ashworth is of a regulatory nature, where the aim is to facilitate prevention of and protection against CSA. The question of whether the information disclosed by third parties provides a reasonable cause for criminal law enforcement is then up to the state authorities.⁴¹

³⁰ Article 10(3) Lanzarote Convention (n 13); Directive 2011/93 recital 44 (n 14).

³¹ A Ashworth, 'Positive duties, regulations and the Criminal sanction (2017) 133, *Law Quarterly Review*, 630, Note that Ashworth is of the opinion that commercial organizations, too, should fall under the regime to report and supports criminalization in the event of 'corporate failure to prevent'. See *Kool* (n 7) para 6.5.

³² *Ibid* 610.

³³ *Ibid* 609.

³⁴ A Asworth, 'The scope of criminal liability for omissions' (1989) 105, *Law Quarterly Review*, 431.

³⁵ *Ibid* 482.

³⁶ Ashworth n 31 611–612; with reference to C Fabre, *Whose Body is it Anyway? Justice and Integrity of the Person* (OUP 2006).

³⁷ *Ibid* 615; Ashworth (n 14) 360–362.

³⁸ *Ashworth* (2017 n 31) 629, with reference to J Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim', 2007 *Criminal Law Review* 923.

³⁹ *Ibid* 612, 618 and 621. With regard to the criminalization of omission offence in general, Ashworth applies 'the principle of fair warning'. The latter indicates the presence of a requested level of harm and appropriateness in order to justify the criminalization of a moral wrong in terms of an omission offence. See also *Ashworth* 1989 (n 34).

⁴⁰ *Ibid* 621 and 623.

⁴¹ *Ibid* 609–610; with reference to M Matravers, 'Political Theory and the Criminal Law' in R A Duff and S P Green (eds.) *Philosophical Foundations of Criminal Law* (OUP 2011).

To fully comprehend Ashworth's plea, the peculiarity of the English perspective should be noted. Similar to that in Ireland, the English discourse features a strong focus on children's welfare. In the event of a failure to protect, English law prioritises the safety of the child over that of the presumably capable duty-holder.⁴² Section 5 in the UK Domestic Violence, Crime and Victims Act 2004 can serve as an example as this provision establishes the criminal liability of a household member who does not physically intervene to stop CSA (or any other type of child maltreatment). A failure to protect can attract a prison sentence of up to 15 years.⁴³ A similar rule is provided for in Section 3a of the UK Female Genital Mutilation Act 2003, which contains a statutory duty for a person responsible for a girl under 16 to report female genital mutilation (inserted by Section 72 of the Serious Crime Act 2015).⁴⁴ The offence of failure to report is punishable by up to seven years of imprisonment.

The common law perspective underlying Ashworth's argument is also worth mentioning because, in the UK, the police are traditionally seen as related to the social services domain. A regulatory duty to report, as envisaged by Ashworth, could mean the police serving as a competent 'regulative' authority to whom CSA could be reported.⁴⁵ In civil law systems, such as in the Netherlands, the obligation (or an extension of the obligation) to report CSA to the police constitutes an obligation to report to the criminal justice authorities, which can imply prosecution. Although the moral dilemmas regarding whether to report CSA apply to every citizen, regardless of the national legal system, the close relationship between the police and the Public Prosecutor's Office present within the civil law tradition complicates the decision to report CSA.

4. Mandatory reporting (and systems of mandatory reporting)

This section provides an overview of the findings of the explorative comparative part of our study, with a concise methodological report being used to give account of the representativeness of the outcome.

4.1 Approach and method

The aim of the comparative part of the study was to establish whether practices applied elsewhere could provide arguments for use in the Dutch political debate. Since we did not pursue a full legal comparison, the sub-study was of an explorative nature. Based on the initial policy document,⁴⁶ Germany and Australia were selected because both countries are known to be having ongoing political debates on ways to improve CSA disclosures, especially to the criminal justice authorities. Based on a quick scan it was also decided to look at Ireland because of that country's recent extending of the reporting entities. In addition, we opted to examine the positions in Sweden, France, Belgium, and England and Wales.

4.2 Explorative overview

The Lanzarote Convention and Directive 2011/93 oblige Member States to introduce a system for mandatory reporting of CSA. While the services designated for this purpose should not be limited to the traditional child protection services,⁴⁷ no duty to report to criminal justice authorities is prescribed.

By now, the vast majority of the Member States of the Council of Europe have introduced systems of mandatory reporting.⁴⁸ According to our data and based on internal consultations, the majority of these regimes prescribe a duty to report to hotlines located in the social services domain.⁴⁹ There appears to be little political and social support for introducing a common obligation to report CSA to the criminal justice authorities

⁴² Ibid 628.

⁴³ Ibid 628–629.

⁴⁴ Ashworth has some reservations, believing that individuals should not be expected to endanger themselves on behalf of the victim (Ashworth 1989 [n 34] 482).

⁴⁵ Kool (n 7) ch 5 para 5.6; based on *Working Together to Safeguard Children 2018* and having received a substantial report on CSA, the competent authorities are required to plan a strategic consultation involving, among other parties, the police (Department of Education 2018) <https://consult.education.gov.uk/child-protection-a-safeguarding-and-family-law/working-together-to-safeguard-children-revisions/supporting_documents/Working%20Together%20to%20Safeguard%20Children.pdf> accessed March 2020.

⁴⁶ The initial policy document was drafted by the client, the Dutch Research and Documentation Centre (*Wetenschappelijk Onderzoek en Documentatie Centrum*).

⁴⁷ European Union (n 12).

⁴⁸ European Union Fundamental Rights Agency (FRA), *Mapping child protection systems in the EU* <<https://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu>> pt. 1-2; B Mathews, K Walsh, 'Mandatory reporting laws' in A Hayes, D Higgins (eds), *Families, Policy and the Law. Selected Essays on Contemporary Issues for Australia* (1st edn Australian Institute of Family Studies 2014) 131–142; B Mathews, D C Bross (eds), *Mandatory reporting laws and the identification of severe child abuse and neglect* (1st edn Springer 2015). Mathews points to the broad spectrum of laws in the jurisdictions (*Mathews* [n 6] para 3.3).

⁴⁹ Kool (n 7) ch 5.

as, of the European states in our study, only France and the Netherlands have enacted such a duty.⁵⁰ The French legislation relates to specified serious offences, including sexual offences. The duty to report such offences was first introduced during the German occupation.⁵¹ Although this duty was retained after the liberation, the French changed its purpose from seeking to protect the German forces to seeking to protect the entire French population. In 1971, the country introduced an explicit common duty to report CSA to the criminal justice authorities, with non-compliance being criminalized (Article 434(3) of the Penal Code). An exception applies for those duty-bound to secrecy. As in the Netherlands, the criminal duty to report is limited to the offence of rape, as criminalized in Article 242 DCC.⁵² Non-reporting of other types of CSA does not fall within the ambit of the criminal duty to report stipulated in Article 160(2) DCCP. Accordingly, Article 136 DCC, representing the offence of not reporting a pending rape (i.e., one that materializes later), is also not applicable. As mentioned earlier, this regime is currently under debate.

In Germany, Ireland, and England and Wales, the possibility of introducing a common duty to report CSA to the criminal justice authorities has also been subject to political debate, but has not (or not yet) led to amendment of the criminal law. In Germany, a proposal by the federal government in 2003 to introduce a criminal duty to report CSA triggered political debate,⁵³ with opponents pointing to the potential counter-effects, including the risk of secondary victimization or false accusations. Ultimately, it was decided that introducing a criminal duty to report would hinder a tailor-made approach, and interventions by criminal justice were seen as being of a too intrusive nature. But although the central government withdrew the proposal, the debate continues to this day.⁵⁴ The same applies both for Ireland and for England and Wales, where government intentions to introduce a common, statutory duty to report CSA came in for criticism, especially from practitioners, and objections similar to those in Germany were raised. In both jurisdictions, therefore, it was decided to opt for mandatory reporting by designated persons to the social services.⁵⁵

In Ireland, however, every citizen has a non-statutory duty to report CSA. Moreover, the police are explicitly acknowledged as a hotline for reporting CSA. In general, the Irish discourse traditionally features a strong focus on children's wellbeing, with Section 42a of the country's Constitution entitling children to protection and care by the state. In 2017, Ireland amended its National Guidelines for the Welfare and Protection of Children 1999 by introducing a non-statutory duty to report CSA.⁵⁶ This followed its decision in 2015 to extend the categories of professionals covered by the statutory duty to report. The latter is important because the extended categories include professionals such as clergy, childminders and employees in school care facilities.⁵⁷

Sweden is also known for its strong focus on children's wellbeing. An extended system of mandatory reporting is in operation and applies to a broad range of people and local initiatives comprising part of the Swedish welfare approach.⁵⁸ By contrast, the Belgian Code of Criminal Law stipulates a duty for state officials to report criminal offences – including CSA – to the Public Prosecutor's Office, but only if they became aware of the offence during performance of their duties and if they are not required by law to observe confidentiality.

As mentioned earlier, we also explored the situation in Australia, where proposals to introduce a common duty to report CSA to the criminal justice authorities raised serious debate of a similar nature to that seen in Europe. Despite various objections, Australian states such as Victoria and New South Wales introduced a common duty to disclose suspicions or knowledge of CSA to the police. Indeed, in the case of New South Wales, this duty was established as early as 1900, and the recent debate concerned its possible abolition. The recent debate followed multiple scandals relating to CSA and that had aroused a political outcry, with the New South Wales government being urged to uphold Section 361(1) CA 1900 despite negative advice by the

⁵⁰ Ibid ch 5 paras 5.2-5.6. See also *FRA* (n 48).

⁵¹ Ibid ch 5 para 5.6; R Stretch, 'The duty to report child abuse in France, lessons for England', *Children & Family Law Quarterly* (2003) 2 139–154.

⁵² Note that the Dutch sexual offences legislation is currently in the process of being amended, specifically in light of the limitations set by Art 242 DCC.

⁵³ See, for example, G Prasser, 'Anzeigespflicht bei Kindermissbrauch – Contra (2003)', *Zeitschrift für Rechtspolitik* 220; S Flügge, 'Überlegungen zur geplanten Anzeigespflicht bei sexuellem Missbrauch Änderung der §§ 138 f. StGB (BT-Drs. 15/350 of 28.1.03) 2003 *Kofra* March/April 6–14.

⁵⁴ *Kool* (n 7) ch 5 para 5.5.

⁵⁵ Ibid ch 5 paras 5.2 and 5.6.

⁵⁶ The guidelines are referred to the Children First guidelines <www.gov.ie/en/publication/114c50-children-first-national-guidelines-for-the-protection-and-welfare-of/> accessed March 2020.

⁵⁷ S 2 Children First Act 2015, Schedule 2 <www.irishstatutebook.ie/eli/2015/act/36/schedule2/enacted/en/html> accessed March 2020.

⁵⁸ *Kool* (n 7) ch 5 para 5.6.

Law Reform Commission.⁵⁹ With regard to the main features of the legislation in Victoria and New South Wales, one aspect that should certainly be mentioned is the punishability of non-compliance, with non-reporting qualifying as a criminal offence.⁶⁰ The threshold at which the duty to report knowledge is activated is relatively low, and the report must be done ‘in good faith.’⁶¹ As well as the common duty to report CSA to the police, a system of mandatory reporting (to the social services) is in force. The latter system applies to designated reporters covered by the confidentiality rules and who have to report to a hotline.⁶² It is then up to the state authorities to decide what measures are to be taken (e.g., social support and/or prosecution).

The Australian states have generally extended their legislation with regard to the mandatory reporting of CSA.⁶³ As in the case of Ireland, and England and Wales, the Australian case, too, has to be assessed in the context of the common law discourse, where the police feature as a network partner of the social services. As we will argue in section 5, the relatively strict division between the criminal justice authorities and the social support authorities present in a civil law discourse, as applied in countries such as the Netherlands, can adversely affect the disclosure of CSA to the criminal justice authorities.

5. What issues accompany the disclosure of sexual abuse and how are these addressed in Dutch practice?

This section uses the outcomes of our study to illustrate the difficulties accompanying the disclosure of CSA in Dutch practice. The presentation of our findings is preceded by a brief outline of the methodological approach.

5.1 Introduction and methodology of the study

To establish whether it would be recommendable to introduce a criminal duty to report CSA in the Netherlands, we applied a mixed methods approach. Although triangulation of the data provided a consistent image of the difficulties and opportunities accompanying the disclosure of CSA in the country, the study does not claim representativeness.

With regard to the empirical data, we conducted a series of structured and semi-structured interviews (24),⁶⁴ as well as a survey and scenario studies (2).⁶⁵ With a view to the representativeness of the data, we opted for a socio-geographical spread of respondents, covering both rural and non-rural areas.⁶⁶ Two expert meetings were organized: one with three respondents from Safe Home and a second with seven representatives of the police, the Education Inspectorate, the Mental Health Care and Youth Inspectorate, and Safe Home.⁶⁷ Vignettes were applied to discuss the respondents’ opinions on the effect of extending the present duty to report.⁶⁸ The disclosure of CSA was then discussed in relation to the difficulties involved in executing a multi-agency approach.

⁵⁹ New South Wales Reform Commission, *Report 93* (1999) 37–39 <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-93.pdf>> accessed March 2020. The commission was of the opinion that S 316(1) CA 1900 was of no added value to society.

⁶⁰ S 327 CA1958 (Victoria) and S 316(1) CA 1900 (New South Wales), respectively.

⁶¹ *Kool* (n 7) ch 5 paras 5.4.3 and 5.4.5. With regard to Victoria, S 326a Crimes Act 1958 mentions ‘a reasonable belief’, whereas S 326A Crimes Act 1900 New South Wales prescribes a reporting duty for any person who ‘knows, believes or reasonably ought to know’ of the CSA.

⁶² According to Mathews (n 6) and Mathews and Bross, the number of reported cases in Australia has increased due to the introduction of the mandatory reporting legislation. However, the figures presented relate both to mandatory and obligatory reporting. B Mathews, D C Bross, ‘Mandated reporting is still a policy with reason: Empirical evidence and philosophical grounds’ (2008) 32 *Child Abuse & Neglect* 511 doi: <https://doi.org/10.1016/j.chiabu.2007.06.010>. According to Townsend, the disclosure rate results need to be viewed in perspective since the findings are heavily influenced by differences in sampling methods and participants, as well as the definitions and time windows used to define disclosure (*Townsend* [n 5] 3). Mathews also mentions a lack of detailed evidence in this regard, due to the non-conformity of national laws (*Mathews* [n 6] 477).

⁶³ *Mathews et al.* (2015 [n 48]).

⁶⁴ Respondents were recruited from Safe Home; the police; the Public Prosecution Service; the Education Inspectorate; the Mental Health, Care and Youth Inspectorate; the Centre for Sexual Violence; the legal profession and academia. A questionnaire was sent to the respondents beforehand.

⁶⁵ *Kool* (n 7) ch 2.

⁶⁶ There are 17 local Safe Home organisations in the Netherlands. Safe Home was set up in 2015 following the introduction of the Social Support Act 2015 (*Wet maatschappelijke ondersteuning; Wmo 2015*, <<https://wetten.overheid.nl/BWBR0035362/2020-07-01>> accessed March 2020). Because local authorities are in charge of the Safe Home in their area, the manner in which the local Safe Home initiatives are structured and perform their activities can vary. Most of these initiatives were built on existing local child protection services.

⁶⁷ The Public Prosecutor’s Office declined our invitation to participate.

⁶⁸ The vignettes were sent to the respondents beforehand. The scripts of the expert meetings were analysed in NVivo (data software for analysing qualitative data), applying inter-rater reliability.

All the research data, including the desk study, were then combined, with scenarios being drafted to create an overview. Two different but related sets of questions were applied. These addressed: 1) how to promote the reporting of CSA committed by an individual, and 2) the issue of legal persons becoming criminally liable for not-complying with the duty to report CSA committed within private organizations. As mentioned in the introduction, the focus in this article is on the first question. We designed three scenarios, describing several considerations relevant to the parliamentary debate on encouraging the disclosure of CSA to the police and/or the Public Prosecutor's Office. These variables represented 'threats and opportunities' and could be converted into variants by changing the considerations. Each scenario started from a different perspective: 1) the 'no reasonable cause for legal change' scenario (i.e. no reasonable cause to extend Article 160 DCCP or extend the list of those with a duty to report), 2) the 'reasonable cause for legal change' scenario (i.e. implying the legitimacy of extending the duty to report and criminalizing non-compliance) and 3) 'the mixed scenario' (i.e. where the duty to report rape as referred to in Article 160 DDCP and the punishing of non-compliance as referred to in Article 136 DCC would be abolished, but the duty to report as referred to in Article 160 DCCP would remain). In this scenario, the categories of those with a duty to report was extended and measures were taken to improve the multi-agency approach. To avoid the researcher influencing the (political) debate, we did not express any preference for a particular scenario.

5.2 Disclosing CSA information on the basis of criminal law

Since the data the study generated relate to an extension of the present provision (Article 160 DCCP), this section first provides a short overview of relevant Dutch legislation in criminal and administrative law.

The point of departure in Dutch criminal legislation is that citizens must not be under any duty to report to the police.⁶⁹ Although Article 161 DCCP entitles everyone to report information to the police if they have knowledge concerning a committed offence (*aangifterecht*), reporting to the police is not mandatory except in the case of certain serious offences, including rape.⁷⁰ Article 160 DCCP obliges anyone who has knowledge of a rape to report this to the police (*aangifteplicht*). Strictly speaking, however, non-compliance with this obligation to report is not subject to criminal liability. Moreover, the law specifies certain groups of people (e.g. doctors and legal practitioners) who are exempt, in certain circumstances, from the duty to report. Remarkably, victims themselves are not exempt from the duty to report the sexual abuse they have suffered; this is clearly a loophole in the law. For the duty to apply, it is irrelevant whether the rape took place in the past, is taking place at present or is about to take place in the future.⁷¹

As mentioned earlier, and with one exception, non-compliance with the duty does not result in a sanction. The exception to this rule is provided for in Article 136 DCC, which penalizes intentional non-reporting of an intended rape at a stage when the rape could still have been prevented. In this situation, those duty-bound to report can fulfil their duty by filing a report with the police or informing the victim. This penal provision is of a somewhat peculiar nature as it entails an inchoate offence, also qualifying as an omission offence and punishable by up to one year's imprisonment. As the aim is to prevent the rape, holding a person criminally accountable requires the rape to have become reality. Only very few cases involving Article 136 DCC are known.

5.3 Disclosing information on sexual abuse via a baseline report

With regard to CSA disclosures, both the private and institutional tracks are subject to the 2013 Mandatory Reporting Code on Domestic Violence and Child Abuse Act (*Wet verplichte meldcode huiselijk geweld en kindermishandeling*).⁷² This code requires certain organizations and professionals to implement a system for reporting CSA and domestic violence. The obligation to implement a reporting system applies to organizations and self-employed professionals, such as psychologists or teachers, whose work consists mainly of daily

⁶⁹ Here 'rape' is regarded as an element of CSA, indicating penetration and implying sexual abuse committed over a period of time. However, Art 160 DCCP also applies to one-off incidents involving one or multiple victims and not implying structural CSA. For an extended overview of the Dutch legal perspective, see *Kool* (n 7) ch 3 para 3.2.

⁷⁰ The other crimes addressed by Art 160 DCCP are crimes against the state, crimes causing danger to life and kidnapping.

⁷¹ *Kool* (n 7) ch 3 para 3.4.

⁷² Mandatory reporting code, *Official Gazette* 2013, 142 <http://www.google.nl/search?hl=nl&source=hp&biw=&bih=&q=wet+ve+rplichte+meldcode+2013&btnG=Google+zoeken&iflsig=AINFcbYAAAAAX_SMQAMGSRI2cRw4DVzMywKmu5kqk8G1&gbv=2> accessed March 2020. The code relates to the Decree on the Mandatory Reporting Code for Domestic Violence and Abuse 2017 (*Besluit meldcode huiselijk geweld en kindermishandeling 2017*), *Official Gazette* 2017, 291, <<https://www.officielebekendmakingen.nl/stb-2017-291.html>> accessed March 2020. In the Dutch policy, both tracks form part of a policy specifically seeking to combat gender-related violence.

(or other) contact with clients, children, or other people considered vulnerable in any way. Their proximity to possible (or actual) victims means these professionals are better able to identify signs of possible (or actual) child abuse or domestic violence.⁷³

Safe Home is competent with regard to CSA in both the private and institutional tracks. With regard to CSA committed by non-professionals, Safe Home derives its competence from the Social Support Act 2015 (*Wmo 2015*), which provides for a broad range of social support activities. It is important to note that, alongside Safe Home, the police have been designated as a competent authority for CSA reporting.⁷⁴ In practice, however, only a minority of the reports by organizations or individuals are addressed directly to the police. By contrast, 75% of the cases registered each year by Safe Home are reported by the police.⁷⁵ These reports contain information derived from official police investigations. A report to Safe Home may be the result of an official report (*aangifte*) by the victim, but that is not a prerequisite. According to our police respondents, only a minority of the cases forwarded to Safe Home by the police result from an official report by the victim (or a legal representative).

The point of departure is that the confidentiality rules applied in cases of CSA within the private track must not obstruct reporting. To this end, the reporting codes provide for feedback consultation, whereby the professional must consult with colleagues, as prescribed in the reporting code ('the five step plan'), before reporting to Safe Home.⁷⁶ The decision to report to Safe Home is then taken by the organization rather than the practitioner.⁷⁷ With regard to CSA in the private track, therefore, the professional has the right (*meldrecht*) and not the duty (*meldplicht*) to report; this right to report came into force on 1 January 2019 (Article 5.2.6 *Wmo 2015*). Exercising the right to report (firstly for internal consultations and subsequently to Safe Home) qualifies as acting in accordance with the professional standards.

In cases of CSA in the private track, Safe Home has some discretionary competence to decide on how to follow up the report. However, it is expected to inform the police or the Child Protection Board with regard to reports it receives (Article 4.1.1 § 2[e] *Wmo 2015*). Since this expectation is framed as a legal competence and not as a legal duty, compliance is not enforceable. If Safe Home decides that social support will be sufficient and abstains from forwarding the report to the police, it must consult the police data in order to ensure fully informed decisions. Whether there is cause for a criminal investigation is subject to multidisciplinary consultations, which may be initiated by Safe Home, but also by the police. Which organizations attend this consultation in addition to the police and the Public Prosecutor's Office depends on the case. Ultimately, the decision on whether to prosecute lies with the Public Prosecutor's Office.

5.4 Results of field work regarding CSA in the private track

Since registration at Safe Home was found to be somewhat problematic and the figures available were of a recent nature, we need to be cautious with regard to the effect of these mandatory codes.⁷⁸ Initially, the (quantitative) data collected were found to point to a steady increase in the number of reports lodged by mandated reporters; in the second half of 2018, however, the number showed a decline.⁷⁹ According to our respondents, difficulties remain both regarding the disclosure and subsequent multi-agency assessments of cases and regarding compliance with the policy rules on engagement.⁸⁰ Differing professional perspectives cause tension, and this tension in turn affects, for example, the disclosure of information to the criminal jus-

⁷³ A recent survey on the effects of introducing the mandatory duty to report shows a difference with regard to the legal basis of the professional's duty to report, as a result of which the willingness to report is adversely affected; C M Ridderbosch-Hoving and others, *Evaluatie Wet verplichte meldcode huiselijk geweld en kindermishandeling* (Survey of the Mandatory Reporting on Domestic Violence and Child Abuse Act) 2020, The Hague, <www.overheid.nl> accessed December 2020.

⁷⁴ *Parliamentary Papers II* 2011/12, 33062, 3, p 10–15; Kool (n 7) ch 4 para 4.3.

⁷⁵ Kool (n 7) ch 4 para 4.2.

⁷⁶ Veilig Thuis, *Handelingsprotocol Veilig Thuis 2019* <https://veiligthuis.nl/wp-content/uploads/2018/12/Veiligthuis-interactief-protocol_v3.pdf> accessed March 2020.

⁷⁷ Self-employed practitioners may submit a report themselves after a professional consultation.

⁷⁸ Since this article focuses on CSA in the private track, we will not elaborate on our data regarding CSA reporting in the institutional track. Suffice to say that, on the whole, no major differences were found.

⁷⁹ Kool (n 7) ch 4 para 4.2. National figures were derived from the official statistics published by the Dutch Central Bureau for Statistics (CBS) and data published by Safe Home. According to the CBS, the police sent 65,770 reports on CSA to Safe Home in 2017 and 66,960 in 2018.

⁸⁰ See, for example, Dutch Government, *Guide on cooperation concerning criminal child abuse 2017 (Handreiking samenwerking bij strafbare kindermishandeling)* <<https://www.rijksoverheid.nl/documenten/publicaties/2017/11/09/handreiking-samenwerken-bij-strafbare-kindermishandeling>> accessed March 2020.

tice authorities. Practitioners see the police as representing a punitive discourse, whereas the focus of social support agencies is on providing adequate support and safety. Social workers find it difficult to engage in a criminal justice discourse because they fear they will be limited in their scope of action. The criminal justice authorities are aware of this 'punitive image' and try to counter this. According to the police, however, there may be no need for a report (official or otherwise) by Safe Home because the police are often already aware of suspected CSA.⁸¹

Practitioners specializing in handling CSA point to the broad range of activities performed by the local Safe Home organizations, with the lack of specialism observed being seen as hindering the detection of CSA.⁸² Care workers and criminal justice authorities alike argue that they are pursuing a policy of safety first. This could be achieved by imposing social support arrangements, possibly backed up by criminal law interventions. Such arrangements would demand co-operation, thus indicating a need for familiarity and mutual trust as a precondition for a multi-agency approach. The extent to which these conditions are present in practice varies, both in the regions and in the organizations involved. On the whole, however, our (quantitative and qualitative) data show Dutch practice to be evolving, in line with official policy, towards a multi-agency approach.⁸³

Among our respondents there was consensus that CSA disclosure should be improved, especially CSA committed by private individuals. However, no support was found for imposing a criminal duty (or an extended criminal duty). Respondents reported their primary interest to be in restoring victims' autonomy, taking into account their needs and wishes with regard, for example, to a criminal investigation. Filing an official report puts the Dutch Public Prosecutor's Office in a formal position, in which a formal assessment has to be made based on the official guideline that prescribes prosecution, whereas prosecution may, in reality, be unnecessary and unhelpful. If victims' autonomy is to be respected, the authorities need room for manoeuvre to enable a situational assessment of the case, applying a multi-agency approach.

Respondents mentioned potential countereffects of extending the duty to report. Confronted with a legal obligation (or its consequences), possible reporters who are neither the victim nor a designated professional may fear accusing innocent people.⁸⁴ Doubts concerning their level of knowledge of possible CSA and whether their suspicions are strong enough could cause them to abstain from disclosing information to the social services and instead to look away. According to those opposing a criminal duty to report CSA, such a legislative amendment is expected to be of only symbolic value.

Only a minority of the respondents were found to be in favour of extending the duty to report ex Article 160 DCCP. In their opinion, this would raise public awareness by clarifying each citizen's responsibility to report information enabling the authorities to effectively combat CSA.⁸⁵ Whether criminal prosecution should then follow would have to be decided by the Public Prosecutor's Office. These proponents do not support penalizing non-compliance with an extended criminal duty to report. Similar to the opponents of such an extension, those in favour of extending the present criminal duty to report are also of the opinion that criminal justice interventions may not be the right way to combat CSA, at least not the type of abuse committed by private individuals.

Although the majority of our respondents argued against extending the present duty to report, almost all of them stressed the need to improve disclosure, given that gaining knowledge of sexual abuse has proved difficult. The hidden nature of CSA complicates disclosure, creating dilemmas for private individuals and professionals alike. Whereas disclosures by professionals are subject to collegial consultations and bound by confidentiality rules, citizens have to rely on their own judgement. Professionals also need to be adequately informed in order to take the appropriate measures to prevent or stop CSA. This calls for arrangements to improve disclosures by the professionals and organizations involved, as well as disclosures by third parties and victims. The primary aim of disclosure is to provide safety; criminal enforcement is a secondary concern and should be decided upon in light of the best interest of the child.

⁸¹ The police respondents and also the Public Prosecutor's Office respondents mentioned this in the interviews; whether this estimation is correct or incorrect was not addressed in our research; *Kool* (n 7), ch 4 para 4.3.6.

⁸² Cf. *Ridderbosch-Hoving* (n 74) 11.

⁸³ *Parliamentary Papers II* 2011/2012, 33062, 3, 57.

⁸⁴ Note that both Art 12(2) Lanzarote Convention and Art 16(2) Directive 2011/93 mention the need for reports by third parties to be 'in good faith'.

⁸⁵ One of the respondents mentioned the term *getuigenplicht* (an obligation to deliver a witness statement); *Kool* (n 7) ch 4 para 4.3.4. Although the arguments resemble those of Ashworth, the outcomes differ since Ashworth is in favour of a regulatory duty to report, albeit rejecting penalization of non-compliance.

6. Conclusion

This article examines whether it is recommendable to introduce or extend a criminal duty to report in order to improve CSA disclosures. The question is of relevance because both Article 12(2) Lanzarote Convention and Article 16(2) Directive 2011/93 require Member States to 'encourage any person' to disclose CSA to the competent authorities. Implementing this requirement, however, is left to the Member States. No recommendations are given in either the Convention or the Directive regarding the nature of the measures to be taken other than the obligation to establish hotlines and to promote a multi-agency approach.

Our recent study examined one of the options for implementation, specifically the option to introduce (or extend) a criminal duty to report CSA. The latter has recently been subject to debate in the Netherlands. While CSA disclosures are of eminent interest to the authorities, our findings show no support for extending the criminal duty to report ex Article 160 DCCP. The prevailing view among our respondents was that, in light of the possible countereffects, criminal justice interventions are not always the best solution for combating CSA.⁸⁶ Similar arguments underly the legal arrangements in other European countries, with France being the only European country to have introduced a common duty to report CSA to the criminal justice authorities. Both the Lanzarote Convention and Directive 2011/93 specify the need to apply a comprehensive approach, including, for example, criminalization of CSA. Whether prosecution is justified, however, needs to be assessed in light of the best interests of the child.⁸⁷

Based on our findings, we see a 'mixed scenario' as the best way to improve CSA reporting by, for example, third parties.⁸⁸ Such a strategy leaves room for encouraging disclosure by third parties, especially those who are professionally involved (albeit sometimes distantly) with minors. Executing such a strategy will, however, demand care. The interests at stake, the need to weigh the specific nature of the case and the ethical dilemmas facing those reporting require room for manoeuvre. A common duty to report CSA (or extension of such a duty), as represented by Article 160 DCCP, is not recommended. Whether introducing a common regulatory duty to report CSA, as favoured by Ashworth, is an appropriate measure to encourage third parties to report CSA to the competent authorities also remains to be seen. As non-compliance can result in an administrative sanction, imposing a common obligation of this nature could be excessively disproportionate.

Competing Interests

The authors have no competing interests to declare.

⁸⁶ Mathews also mentions possible countereffects, e.g., an element of system burden, depending on the differential reporting patterns and efficacy of implementation (*Mathews* [n 6] 467).

⁸⁷ Lanzarote Convention (n 11), Articles 18, 30 and 32; Directive 2011/93 (n 12), recitals 6, 8, 26 and 27, and Articles 3 and 15 and recital 30.

⁸⁸ See *Mathews* (n 6) para 3.4; Mathews favours a 'differential approach', indicating a need for different patterns of CSA reporting within a jurisdiction.

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