

# THE *GABRIEL FERNANDEZ* CASE: A COMPARATIVE ANALYSIS OF A ‘MANDATED REPORTER’ IN LIGHT OF THE CHILDREN’S ACT

*by Thiavna Subroyen\**



## 1 Introduction

Children's rights are a category of human rights that are required to be afforded care and protection as they are one of the most vulnerable groups in society.<sup>1</sup> Both international law and South African municipal law place rights and duties on parents, families and the State to ensure that the maintenance of a child is of paramount

\* BA Law (University of Pretoria). Final year LLB student, University of Pretoria. ORCID: 0000-0003-1350-5502. I would like to thank my editor, Ms Adelaide Chagopa for your engagement meticulous comments, constructive criticism and words of encouragement. Without your guidance and insight, this publication would have not been possible. I am also grateful to my treasured friend, Marno Swart for providing valuable feedback and support during the writing process. To my parents, Selvan and Sagra Subroyen and my sister Suvania Subroyen, I wholeheartedly dedicate this article to you. I cannot express how much I appreciate your unconditional love and support as I continue with my journey within the legal field All errors and shortcomings contained herein are mine and mine alone.

1 Child Rights International Network 'Children in vulnerable situations' 2018 <https://archive.crin.org/en/home/rights/themes/children-vulnerable-situations.html> (accessed 20 March 2020).

importance.<sup>2</sup> Unfortunately, many individuals fail to comprehend their criminality when they engage in acts of abuse and maltreatment. Child abuse is one that is regarded as an imminent evil of society that seeps into the morality and law of respective jurisdictions. To eradicate such acts, workers known as ‘mandated reporters’ are recognised to ensure that the best interests of the child are justifiably upheld by reporting child abuse to the necessary authorities.

‘Mandated reporters’ are a category of professionals who are required by law, to report any known or suspected cases of child neglect or abuse to governmental authorities.<sup>3</sup> Section 110 of the Children’s Amendment Act recognises this category of professionals as being health practitioners, social workers, correctional officials, educators, legal practitioners and staff of youth and child care centres.<sup>4</sup> Many countries implement mandatory reporting in their general policies and statutes to prevent child maltreatment.<sup>5</sup> The importance of mandated reporting is reflected in Article 19 of the United Nations Convention on the Rights of the Child (1990) which states:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.<sup>6</sup>

The recognition of mandated reporting in international human rights proves that the State and its citizens must ensure that there are mechanisms in place to protect the interests and welfare of a child.<sup>7</sup>

This paper is written in response to the recent decision of the 2nd District Court of Appeal of California in its dismissal of charges against four social workers for failure to report child abuse and for the

2 Constitutional Court of South Africa ‘Children’s Rights’ 2005 <https://www.concourt.org.za/index.php/children-s-rights> (accessed 21 March 2020).

3 D Pollack ‘International legal note: Should social workers be mandated reporters of child maltreatment? An international legal perspective’ (2007) 50 (5) *International Social Work* 700-701.

4 Act 41 of 2007.

5 Pollack (n 3 above) 700.

6 United Nations, Convention on the Rights of the Child, 1989 <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (accessed 3 August 2020).

7 Pollack (n 3 above) 704.

falsification of records.<sup>8</sup> These charges were linked to the notorious torture and murder of Gabriel Fernandez in 2013 by his mother Pearl Fernandez and her partner Isuaro Aguirre.<sup>9</sup> Along with a charge of first-degree murder by the aforementioned parties, the prosecuting authority had charged the four social workers for criminal negligence in their failure to take reasonable steps, as mandated reporters to protect a child from being subjected to abuse.<sup>10</sup>

An analysis of the *Gabriel Fernandez* case will be presented in chronological order from 2012 to 2013 of the periods in which reports of abuse were made by various parties to the Los Angeles County Department of Children and Family Services (DCFS). Further scrutiny will be given to responses of the four social workers in their failure to respond to the reports and failure to take reasonable action to ensure the safety of the child and their intention to falsify records which had resulted in the death of Gabriel Fernandez on 23 May 2013. The social workers were charged with a section 273 Penal Code violation for child endangerment and were faced with a penalty of ten-year imprisonment if they were found guilty. This analysis will examine the final judgment that was handed down in January 2020 in which all charges were dismissed. The discussion of events leading up to Fernandez's death must be considered with the failure of social services in intervening and upholding the paramount interests of a child in an event where their rights may be violated, and where such environments may pose a risk to their health and safety.

This paper then seeks to expand upon the discussion of the Gabriel Fernandez case in illustrating: firstly, the aspects which make up a mandated reporter in the case of child abuse. Secondly, the roles or obligations similar to the mandated report in the context of South African law, primarily, the Children's Act and thirdly, a comparative analysis against South African law, to determine if the Appellate Court was correct in its decision to acquit the social workers involved in the *Gabriel Fernandez* case.<sup>11</sup>

8 *Bom v Superior Court C/W B292846, B292914, & B292944 2-3*; See also Y Villarreal & M Brennan 'Timeline: The horrific story depicted in Netflix doc: 'The Trials of Gabriel Fernandez' *Los Angeles Times* 26 February 2020.

9 *Aguirre v Superior Court of Los Angeles County LASC S244413*; *Bom* (n 8 above) 2; See also H Soen 'The Trials of Gabriel Fernandez: What happened to the four social workers?' February 2020 <https://thetab.com/uk/2020/03/06/gabriel-fernandez-social-workers-146799> (accessed 15 March 2020).

10 Soen (n 9 above).

11 Act 38 of 2005; Soen (n 9 above).

## 2 The Trials of Gabriel Fernandez: when the law fails a child

In the *Bom et al (Petitioners)*,<sup>12</sup> the Appellate Court in this matter had to determine if the four social workers – namely Kevin Bom, Patricia Clement, Stefanie Rodriguez and Gregory Merritt could be charged for their failure to reasonably protect a minor from ongoing child abuse. In their position as mandated reporters, the trial Court had concluded that due to the negligence of the petitioners, the death of Fernandez was ‘foreseeable’ and had denied the motion to dismiss the child abuse charges against the social workers.<sup>13</sup> On appeal, the Court had to determine if the petitioners had violated section 273 of the Penal Code in the event of child endangerment.<sup>14</sup>

### 2.1 Factual summary

Gabriel Fernandez was a seven-year-old boy who had been in the care of his maternal grandparents from 2005 to 2012. In October of 2012, Fernandez then lived with his mother Pearl Fernandez and her partner Isuaro Aguirre.<sup>15</sup>

The first report of child abuse was made on the 30th of October 2012, when Fernandez’s teacher Jennifer Garcia had contacted the DCFS to notify the services of bruises found on Fernandez’s body after he was allegedly assaulted by his mother.<sup>16</sup> Based on Garcia’s allegations, an investigation into potential child abuse was opened and assigned to Stefanie Rodriguez until January of 2013. In this period, Rodriguez had visited the family on various occasions as Garcia continuously reported more incidences of assault against Gabriel. In the social worker visits, Pearl Fernandez denied allegations of child abuse and stated that his injuries were the result of him playing roughly with his siblings, falling down the stairs or cutting his hair.<sup>17</sup> By 30 January 2013, Rodriguez and her supervisor Kevin Bom signed a case transfer list to the Family Preservation Unit with the findings of their report of physical abuse as being

12 *Bom* (n 8 above).

13 R Winton & C Knoll ‘Charges upheld against L.A. social workers in death of 8-year-old Gabriel Fernandez’ (2018) <https://www.baltimoresun.com/la-me-ln-gabriel-fernandez-social-workers-abuse-20180913-story.html> (accessed 23 March 2020).

14 *Bom* (n 8 above) 2.

15 *Bom* (n 8 above) 3.

16 *Bom* (n 8 above) 2; M Gajanan ‘The Heart-breaking Story Behind Netflix’s Documentary Series: The Trials of Gabriel Fernandez’ 3 March 2020 <https://time.com/5790549/gabriel-fernandez-netflix-documentary/> (accessed 04 August 2020).

17 *Bom* (n 8 above) 3-4; G Therolf ‘Why did no one save Gabriel?’ 3 October 2018 <https://www.theatlantic.com/family/archive/2018/10/la-county-dcfs-failed-protect-gabriel-fernandez/571384/> (accessed 4 August 2020).

'inconclusive', with no cause of endangerment to the minors in the Fernandez household and were rather placed in a 'high-risk' category of 'general neglect' based on Pearl Fernandez's method of corporal punishment.<sup>18</sup>

The case was transferred to the Family Preservation Unit who had assigned the case to Patricia Clement, who was under the supervision of Gregory Merritt.<sup>19</sup> The Unit itself works alongside the DCFS to provide parent training programmes, counselling and child-orientated activities to assist dysfunctional families in meeting their child welfare duties.<sup>20</sup> Before Clement made her visit to the Fernandez family home, a family risk assessment was taken by an in-home counsellor, who had found that the children were exposed to a high-risk environment of abuse. On 27 February 2013, the counsellor had reported the matter to the DCFS and the authorities, but no arrests were made.<sup>21</sup> In March 2013, Clement and the counsellor had visited the family home. According to their findings, the children were healthy and not subjected to any acts of abuse. On 6 March 2013, Clement had presented a recommendation to the DCFS to close its investigation with the Fernandez matter and made observations that Pearl Fernandez was deemed fit as a parent to protect her children from any threat to their wellbeing. She did not suffer from any mental health issues and had created a safe environment for the upbringing of her children.<sup>22</sup> Such findings were contested by the People in the Trial Court and alleged that Clement had falsified her observations and should be charged for violating Government Code 6200.<sup>23</sup> On 7 April 2013, Merritt approved Clement's findings on the reason that there was a reduced risk of neglect and had permitted her recommendation for the case to be closed.

On 23 May 2013, Pearl Fernandez contacted 911 and reported that Gabriel Fernandez had been severely injured after falling in the bathtub. Upon his arrival at the emergency room, the medical officer found that Gabriel had suffered internal injuries, open skull fractures, broken ribs, burns, cuts, lacerations, swelling and bruises on his entire body. Many of the injuries sustained ranged from being hours-days-weeks-months old and due to his worsened condition of neglect and malnutrition, Fernandez had died as a result of blunt force trauma to his head. Pearl Fernandez and Isuaro Aguirre were then charged and convicted of murder.<sup>24</sup>

18 *Bom* (n 8 above) 5-7; Therolf (n 17 above).

19 *Bom* (n 8 above) 8-9.

20 C Lee & C Ayon 'Family preservation: The parents' perceptions' (2007) 10(1) *Journal of Family Strengths* 43-45.

21 *Bom* (n 8 above) 9; Therolf (n 17 above).

22 *Bom* (n 8 above) 10.

23 *Bom* (n 8 above) 30-35; Government Code of 1943 as amended; Gajanan (n 16 above).

24 *Bom* (n 8 above) 11-12.

## 2.2 Majority judgment (Rothschild, P.J; Weingart, J)

The findings of the court in its majority judgment to dismiss the charges was based on three categories:<sup>25</sup>

- I. The standard of review of probable cause.
- II. Child Abuse in terms of the Penal Code section 273(a).<sup>26</sup>
- III. Government Code Section 6200.<sup>27</sup>

In the review of the petitioners' motion to dismiss the charges, the courts held that in terms of section 995 of the Penal Code, a matter may be set aside if it has been found that the charges of the defendants were committed without any 'reasonable or probable cause'.<sup>28</sup> The court then illustrated that probable cause can be determined if a reasonable person can believe that there is a strong suspicion of an accused being found guilty of an alleged crime.<sup>29</sup> The Appellate Division ruled a *de novo* review on the matter, with the reasoning that they would not substitute their opinion to the greater weighing of evidence in the lower court and will primarily rely on the interpretation of statutes in their judgment to uphold or dismiss the motion of the case.<sup>30</sup>

Section 273 (a) of the Penal Code concerning child abuse states the following:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, wilfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, wilfully causes or permits the person or health of that child to be injured, or wilfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.<sup>31</sup>

The Court then relies on the *Sargent* case to illustrate the four categories of conduct to child abuse and must prove that in each category, the crime was 'wilful' and had resulted in 'great bodily harm or death.'<sup>32</sup> The People in the Trial Court case had to prove that the social workers had been categorised as either:

- i. Persons who would cause and permit a child to suffer;

25 *Bom* (n 8 above) 12,14,21,30.

26 Penal Code of 1872 as amended.

27 Government Code (n 23 above). This provision refers to 'Crimes relating to public records, documents and certificates'.

28 Penal Code (n 26 above).

29 *Bom* (n 8 above) 19-21. See also *Rideout v Superior Court* (1967) 67 Cal. 2d 471,474.

30 *Bom* (n 8 above) 13. See also *The People v Gonzalez* (2017) 2 Cal.5th 1138, 1141 on a discussion of a *de novo* review.

31 Penal Code (n 26 above).

32 *People v Sargent* (1999) 19 Cal 4th 1206, 1215.

- ii. Persons who would inflict unjustifiable physical/mental suffering of a child;
- iii. Persons who wilfully permit injury to a child while having custody/ care of the child;
- iv. Persons who wilfully places a child in circumstances that could potentially endanger their health and safety.<sup>33</sup>

Due to the People's failure to rely on the second category, the Court had to determine if the social workers could be held criminally liable to allow a child to suffer as envisaged in the first category and if they also had 'care or custody' of Gabriel during the timeframe of abuse, as envisaged in the third and fourth category.<sup>34</sup> With the first category liability, the courts narrowed their interpretation of the Penal Code to the relationship between the defendant and the abuser to determine if the defendant had a legal duty to control and supervise the abuser's conduct. In this case, the Court had to determine if the social workers had a duty to control Pearl Fernandez and Isuaro Aguirre to prevent abuse from taking place. Based on the decision of *People v Heitzman* the Appellate Court overturned the findings of the Trial Court on the basis that the social workers did not have a relationship with Fernandez and Aguirre and were under no legal obligation to supervise and control their conduct.<sup>35</sup> The Court also stated that the People failed to present any case law and legislation in their evidence to prove that the petitioners had an 'affirmative duty' to control Fernandez and Aguirre.<sup>36</sup> The third and fourth categories concerning care and custody shifts from the relationship of the defendant and abuser to the abuser and the victim (child).<sup>37</sup> Physical and legal custody of Gabriel by the petitioners was not the apex of discussion in the Trial Court, rather it was on whether the petitioners had the 'care' of Gabriel when certain conduct had resulted in his health and safety being endangered.<sup>38</sup> The Court broadly interpreted the definition of 'care' to go beyond familial bonds to one which assumes the role and duties of a caregiver of providing basic needs to the child.<sup>39</sup> On this interpretation, the court

33 *Bom* (n 8 above) 13-14. See also *The People v Valdez* (2002) 27 Cal.4th 778, 788. The court asserted that a wilful act that resulted in bodily harm or death had amounted to criminal negligence.

34 *Bom* (n 8 above) 13-16.

35 *The People v Heitzman* (1994) 9 Cal.4th 189, 197, 204

36 In the matter of *Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 893, the court had established that an 'affirmative duty' arises when there is a special relationship between a vulnerable plaintiff and a defendant who has some control over the plaintiff's welfare. Furthermore, this special relationship places a duty on the defendant to protect the plaintiff from 'foreseeable harm.'

37 *Bom* (n 8 above) 20-26.

38 *Bom* (n 8 above) 22. See also *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 for a discussion on the special relationship that is created when there is a duty to control the behaviour of someone who may potentially endanger the lives of other persons.

39 *Bom* (n 8 above) 22-23. See also *The People v Cochran* (1998) 62 Cal.App.4th 826, 832, in which the court held that the concepts of 'custody' and 'care' went beyond one's formal familial relationship.

had ruled that based on the absence of provision of basic needs to Gabriel Fernandez, there was no evidence to prove that any of the social workers had assumed the role of caregivers and cannot be held liable for the care and custody of Fernandez.<sup>40</sup>

In the case of the falsification of records, the People had alleged that there was a violation of section 6200 of Government Code (the Code).<sup>41</sup> The People presented the argument in the Trial Court that social workers were ‘officers’ in terms of the Code and committed a crime intending to knowingly include false information in their entries into the DCFS records.<sup>42</sup> Clement and Merritt contested this allegation by claiming that they were not ‘officers’ as envisaged in the Code and the Court agreed with the defendants on the basis that it is only applicable to those who have governmental functions to serve the public.<sup>43</sup> There is a further reference to the California Constitution in which county ‘officers’ are assessors, sheriffs and district attorneys.<sup>44</sup> Social workers, according to the Court, are not vested with sovereign duties of the State as envisaged in the Code, they are under the control and direction of the DCFS director and fall under the category as ‘professional’ employees.<sup>45</sup> Based on this distinction, the courts concluded that the social workers were not ‘officers’ in terms of the Government Code and charges in terms of section 6200 were dismissed.<sup>46</sup>

### 2.3 Minority judgment (Chaney J)

In the minority judgment, Chaney J discusses the decision of the majority judgment with the Penal Code section 273 violation and the section 6200 Governmental Code violation.<sup>47</sup>

In the analysis of the Penal Code violation, Chaney J believes that the petitioners were the enablers of the abuse that Fernandez had endured. In the falsification of documents, the omission of

40 *Bom* (n 8 above) 24.

41 Government Code (n 23 above) provides:

‘Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment according to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer wilfully does or permits any other person to do any of the following: (a) Steal, remove, or secrete; (b) Destroy, mutilate, or deface; (c) Alter or falsify.’

42 *Bom* (n 8 above) 30-31.

43 *Bom* (n 8 above) 30. See also *Kirk v Flourney* (1974) 36 Cal.App.3d 553, 557.

44 *Bom* (n 8 above) 32-33. See also *People v. Pearson* (1952) 111 Cal.App.2d 9, 17, in which courts have accepted that county officers and their deputies are ‘officers’ for the purposes of the Government Code section 6200.

45 *Bom* (n 8 above) 33-34. See also *Cleland v Superior Court* (1942) 52 Cal.App.2d 530, 537, in which the court held that a superintendent of a county hospital was not an officer in terms of the Government Code.

46 *Bom* (n 8 above) 35.

47 *Bom* (n 8 above) (Chaney J. concurring/dissenting opinion) 3-8.

information on records, failure to disclose to Garcia of the case transfer and making reasonable inferences in risk assessments, the petitioners had failed in their responsibilities and prevented a system from effectively protecting Gabriel Fernandez. Although the minority judgment agrees that the social workers could not control the conduct of the abusers, Chaney relies on the dissenting opinion of *Heitzman* in that ‘bystander liability’ should be included in which certain acts could have prevented endangerment to the health and safety of an individual.<sup>48</sup>

Chaney J agreed with the ruling of the majority judgment in the dismissal of the section 273 Penal Code charges due to the absence of a special relationship and control between the abusers and the social workers.<sup>49</sup>

Chaney J, however, dissents with the majority judgment in its ruling of the dismissal of the Governmental Code charges. The minority judgment expresses that the petitioners are ‘officers’ in the case of the Government Code and should be prosecuted under the statute. The *Vaughn v English* case presents the concept that a public officer acts in the capacity of an agent to perform governmental functions in the best interests of the public.<sup>50</sup> As representatives of child services, social workers have a responsibility to make quick and reasonable decisions to act in the best interests of children to report and follow through with investigations in the cases of abuse. In this case, the minority judgment concludes that social workers are public officers in their provision of services to minors and that they may be prosecuted under the Code. Chaney J then proceeds to criticise the petitioners in their misconduct to undermine their duties as mandated reporters by placing their interests above the interests of a child’s health and safety and concludes the judgment on the basis that their actions have tarnished the integrity of the social welfare as the system had permitted actions with the absence of accountability and honesty.<sup>51</sup>

48 *Bom* (n 47 above) 3. See also the discussion of ‘bystander liability’ in *Thing v. La Chusa*, 48 Cal.3d 644.

49 The court relied on the decision *Megeff v. Doland* (1981) 123 Cal.App.3d 251, to prove that the petitioners did not assume responsibility for Pearl Fernandez and Isuaro Aguirre.

50 *Vaughn v. English* (1857) 8 Cal. 39, 42.

51 *Bom* (n 47 above) 8. See also *Alicia T v County of Los Angeles* (1990) 222 Cal.App.3d 869, 880, in which the court establishes the importance of a social worker to exercise reasonable and independent judgment when they decide to investigate alleged child abuse cases.

### 3 Who are mandated reporters? California v South Africa

#### 3.1 California

The application of mandated reporters to various professions had undergone great development within the Californian jurisdiction. When the law against child abuse was enacted in 1963, the duty of reporting child abuse was only applicable to those working in health services and the scope of application was limited to physical abuse. But, with the expansion of knowledge of child law, it was deemed necessary to broaden the definition of 'abuse' to mistreatment in the cases of neglect and any other conduct that undermined the interests of a child.<sup>52</sup> It was further noted that with the broadening of the concept of 'child abuse', it became a necessity for other professions to be assigned as mandated reporters to identify the various forms of abuse.<sup>53</sup> In 1980, the Child Abuse and Neglect Reporting Act (CANRA) was enacted to set out the broadened definition of child abuse and to statutorily blanket designated groups as reporters.<sup>54</sup>

The Penal Code 11164-11174.3 then sets out a list of who is identified as a mandated reporter and includes groups such as educators, health practitioners, social workers, the clergy and employees of public protection.<sup>55</sup> A mandated reporter must then report any cases of suspected child abuse when they have 'reasonable suspicion' within their professional capacity that a child may be subjected to abuse and maltreatment. The yardstick of 'reasonable suspicion' bases itself upon the standard of probable cause and is defined as being objectively able to draw upon one's skill and experience to believe a suspicion of child abuse.<sup>56</sup> Such an observation must then be reported to any law enforcement departments telephonically and a written report must be made within 36 hours after information about the incident had been provided, which is then added to an SS8572 form. The form, in turn, is submitted to the Department of Justice for further investigation.<sup>57</sup>

52 California Department of Social Services Office of Child Abuse Prevention (2003) *The California Child Abuse and Neglect Reporting Law: Issues and Answers for Mandated Reporters* 1.

53 California Department of Social Services (n 52 above) 1.

54 Los Angeles Community College District Human Resources Division and the Office of General Counsel (2009) *A guide to the Child Abuse and Neglect and Reporting Act* 1-4.

55 Los Angeles Los Angeles Community College District Human Resources Division and the Office of General Counsel (n 54 above) 3.

56 Los Angeles Los Angeles Community College District Human Resources Division and the Office of General Counsel (n 54 above) 4.

57 California Department of Social Services (n 52 above) 21.

To prevent mandated reporters from being targeted for their reportative duty, the CANRA specifically makes provision for the legal protection of these persons. Such provisions include immunity from criminal and civil claims, the confidentiality of the reporting party, prohibition of a superior in interfering with a report and a State Board of Control body to assist a mandated reporter in the event of civil action being brought against them.<sup>58</sup> The penalty for a mandated reporter failing to make a report of suspected child abuse may result in six months imprisonment in county jail or a \$1 000 fine. Should the suspected abuse result in severe bodily injury or death of a minor, the mandated reporter may be found guilty and this could result in one-year imprisonment, a maximum fine of \$5 000 or a combination of the mentioned penalties.<sup>59</sup>

The input of a mandated reporter is imperative to the outcome of a child abuse case. The involvement of the mandated reporter ranges from providing information to social welfare services in their investigation into a report to being required to provide testimony where a matter may be litigated in a court of law. The Penal Code also goes into great depth of indicators to aid a mandated reporter to identify child abuse, types of assessment to determine reasonable suspicion and informs them of their duties and liabilities with having to report any cases of abuse.

### 3.2 South Africa

The protection of children's rights must be viewed against the historical background of South Africa. The 'culture of violence' embeds itself in the strategy of the apartheid government relying on violence to maintain their power which became applicable in social sanctioning to the treatment of detained political prisoners.<sup>60</sup> The struggle for freedom was met with many political insurgents also resorting to violence.<sup>61</sup> The inclusion of the black youth as active participants in the struggles had resulted in the government justifying its use of violence to target them during the 1970s revolts.<sup>62</sup> As a defenceless group, black children had suffered under the regime of apartheid. Many were killed during rebellions such as the Soweto Uprising, were detained without trial, assaulted and tortured by the State police force.<sup>63</sup> In the social environment, violence was further

58 California Department of Social Services (n 52 above) 23.

59 *Landeros v Flood* (1976) 17C.3d 399.

60 Department of Social Development/Department of Women, Children and People with Disabilities/UNICEF *Violence Against Children in South Africa* (2012) 3.

61 JA Robinson 'Children's rights in the South African Constitution' (2003) 6(1) *Potchefstroom Electronic Law Journal* 56.

62 D Nina 'Child soldiers in Southern Africa' (1992) *Institute for Security Studies Today* 46-60.

63 Robinson (n 61 above) 56.

exacerbated by discrimination faced in public amenities such as sufficient healthcare, safe school environments, protective police services and access to services.<sup>64</sup> Children were also victims of the discriminatory practices whose human rights were undermined by the repressive dynamics of apartheid.<sup>65</sup> But, in its assent, the adoption of the Constitution of the Republic of South Africa, 1996, the Final Constitution, had intended to eradicate the culture of violence and also bring special protection and status to the rights of children.<sup>66</sup>

In light of its radical constitutional dispensation, South Africa pays homage to the international recognition of child law by being a signatory to the United Nations Convention on the Rights of the Child (the Convention).<sup>67</sup> Article 19 of the Convention specifically mandates signatories to implement legislative measures to protect children from different forms of abuse as well as to ensure that preventive measures are enforced with factors of investigation, reporting and referrals of child abuse cases.<sup>68</sup> In its echo of the Convention obligations, section 28(2) of the South African Constitution specifically sets out the rights of children and their protection to be of 'paramount importance'.<sup>69</sup> This constitutional recognition paved the way for the promulgation of the Children's Act which specifically addresses the prominence of children's rights.<sup>70</sup>

The recognition of 'mandated reporting' of child abuse came into force in 2010 with the Children's Act.<sup>71</sup> Section 110 of the Act, similar to the Penal Code, sets out a list of professional groups who are compelled to officially report any reasonable suspicion of child abuse and maltreatment.<sup>72</sup> Medical practitioners, educators, social workers, legal practitioners, officials and religious leaders are required to report child abuse that has resulted in physical, sexual, emotional abuse and deliberate neglect.<sup>73</sup> The general public does have the discretion to report incidents of child abuse but is not legally required to so do.<sup>74</sup>

64 Robinson (n 61 above) 56-57.

65 Robinson (n 61 above) 2-4.

66 Robinson (n 61 above) 57.

67 United Nations Children's Emergency Fund; Convention on the Rights of the Child (1989) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>. (accessed 20 March 2020).

68 ML Hendricks 'Mandatory reporting of child abuse in South Africa: Legislation explored' (2014) 104 (8) *South African Medical Journal* 550.

69 Section 28(2) of the Constitution of the Republic of South Africa 1996.

70 Preamble of the Children's Act 38 of 2005 as amended; Hendricks (n 68 above) 551.

71 Children's Act (n 4 above).

72 Hendricks (n 68 above) 551.

73 Section 110 (1) of the Children's Act; Department of Social Development *Children's Act Explained: The courts and the protection of children* (2009) 8.

74 Section 110 (2) of the Children's Act; The Sexual Offences and Related Matters Act 32 of 2007 provides an exception to this rule, where all citizens are compelled to report sexual abuse of children to the necessary authorities.

Persons who are legally obligated to report child abuse must refer the matter to the South African Police Service (SAPS), the provincial Department of Social Development or a child welfare organisation.<sup>75</sup> All reports must then be referred to the provincial department to investigate the child abuse allegation and then take reasonable measures to ensure that the safety of the child is not compromised.<sup>76</sup> The response of the SAPS to a report must be referred to the child welfare organisation or the provincial department within 24 hours to enable all relevant parties to commence with an investigation into the allegation.<sup>77</sup> A designated social worker is then tasked to assess the victim's family home. If there has been a finding that the child is in immediate danger, the social worker may fill in a Form 36 to have the child temporarily removed from the family home to a safe care environment.<sup>78</sup> The decision of removal may then be reviewed by the court in the best interests of the child's safety.<sup>79</sup> Once the safety of the child has been confirmed, the social worker may then conduct house visits to the victim's home and conduct interviews with their family members, educators and the alleged perpetrator themselves. If the report from this investigation finds that the child requires care and protection, the social worker may then open a Children's Court inquiry within 90 days and provide alternative care placement or intervention programmes.<sup>80</sup> Should the court agree with the social worker's findings, the child will be placed in alternative care under the supervision of the social worker.<sup>81</sup> All reports of child abuse and neglect will be placed on record in the National Child Protection Register to monitor the cases and ensure that the abuse does not continue and if the children are receiving adequate care and protection.<sup>82</sup>

75 Provincial websites tend to set out a list of registered child protection organisations in terms of section 107 of the Children's Amendment Act.

76 Hendricks (n 68 above) 551.

77 L Jamieson *et al* 'Out of harm's way? Tracking child abuse cases through the child protection system in five selected sites in South Africa: Research Report' (2017) Cape Town: Children Institute, University of Cape Town.

78 Form 36 as prescribed in the Children's Act.

79 Section 151 of the Children's Act; *The C and Others v Department of Health and Social Development, Gauteng and Others* 2012 (2) SA 208 (CC) decision ruled that section 151 and section 152 of the Children's Act are unconstitutional as they had failed to provide an automatic review of the removal of children by state officials. The majority judgment held that the provisions had the objective of promoting the best interests of a child as envisaged in section 28 of the Constitution but failed to provide a safeguard to review the decision of the removal of a child from their family home. These provisions had therefore limited the rights of a child in an unjustifiable manner. An order was then made to read the requirement of 'review' into these relevant provisions.

80 Section 155 (2)-(9) of the Children's Act.

81 The *Hay v B and Others* 2003 3 SA 492 (W) decision ruled that courts are the upper guardians in the decision of the best interests of the child in a court order.

82 Section 113 and section 114 of the Children's Act; Department of Social Development (n 73 above) 10.

Persons in South Africa with an obligation to report abuse must act in good faith and as soon as the suspicion of child abuse is concluded on 'reasonable grounds'.<sup>83</sup> A report done in 'good faith' ensures that those who are legally obligated to report act in an honest, impartial, and open manner to ensure that the interests of the child are protected. The principle of 'good faith' is further measured against the public interests and moral convictions of society to determine if the report was made without any malicious intention or falsification of information.<sup>84</sup> In the matter of *LSD v Vachell*, the court had interpreted 'reasonable grounds or suspicion' as the belief in the existence of a current state of affairs.<sup>85</sup> This interpretation was further added to the decision of *Van Heerden* where the 'reasonable grounds' test was objectively determined by the five senses to determine the facts of a matter to draw upon their belief or suspicion.<sup>86</sup> This measure of 'reasonable grounds' then determines if a reasonable person under the similar circumstances of the case would draw up the same conclusion upon the facts of an incident.<sup>87</sup> The Sexual Offences and Related Matters Act also places a legal obligation on specific professions to report incidents of child abuse based on the disclosure of information of the victim.<sup>88</sup>

The duty of mandated reporting in good faith does not result in one incurring liability where there was no abuse or neglect found in a reported case, but rather where an obligated individual fails to report alleged child abuse to relevant authorities.<sup>89</sup> The failure to report sexual abuse constitutes a criminal offence that may be punishable with a fine or imprisonment of five years.<sup>90</sup> The courts have the discretion to apply both remedies if the individual is found guilty of their omission.<sup>91</sup> Medical practitioners who fail comply with their legal obligation as mandated reporters may be fined, suspended or struck off the register by the Health Professions Council of South Africa in the event of a guilty finding.<sup>92</sup> At present, there is no explicit penalty clause in the Children's Act for the failure to report child abuse, but in 2019, the Women and Men Against Child Abuse organisation (WMACA) has proposed an amendment to s 110(2) of the Act for legally obligated persons to be held accountable. The non-profit organisation recommended that the duty to report child abuse should be applicable to professionals and ordinary citizens and that

83 Hendricks (n 68 above) 551.

84 Hendricks (n 68 above) 551.

85 *LSD Limited and Others v Vachell and Others* 1918 WLD 127.

86 *R v Van Heerden* 1958 (3) SA 150 (T) at 152E; See also *Ahmed v Minister of Police and Others* [2019] ZAGPJHC 256 para 16.

87 Hendricks (n 68 above) 552.

88 Hendricks (n 68 above) 552; 32 of 2007.

89 Section 110 (3) (b) of the Children's Act.

90 Section 54 (1) (b) of the Sexual Offences and Related Matters Act.

91 Hendricks (n 68 above) 552.

92 Section 15B of the Health Professions Act 56 of 1974.

any person who fails to fulfil this obligation must be arrested.<sup>93</sup> The Social Service Professions Act 110 of 1978 sets out the repercussions for social workers who fail in their official duties to report child abuse and neglect matters.<sup>94</sup> In the event of unprofessional or improper conduct, the South African Council for Social Service Professions may hold an inquiry into the misconduct of the social worker.<sup>95</sup> Should the alleged individual be found to be guilty of unprofessional or improper, they may be penalised with a warning, a suspension period determined by the council, cancellation of their registration for professional practice or a fine not exceeding more than R 5000.<sup>96</sup>

Certain professions, such as social workers, are legally bound to report child abuse and maltreatment. Due to their age and vulnerability, many children are incapable of being able to complain of abuse and maltreatment to the necessary authorities and seek assistance.<sup>97</sup> Thus the State and Judiciary are bound by the special status of children's rights that is set out in section 28 of the Constitution.<sup>98</sup> Since its constitutional dispensation, the courts have developed the common law to meet the constitutional rights of a child.<sup>99</sup> The decision of *S v M* emphasises the view that the law enforcement system needs to be 'child-sensitive' and that children are also entitled to enjoy their constitutional rights and are also entitled to be protected from any violence and trauma.<sup>100</sup> The judgment also states that while the best interests of a child are paramount, they are not absolute and are also subject to limitation.<sup>101</sup>

The development of the common law by our courts have allowed for the extension of protection of children. In the case of *Christian Education South Africa v Minister of Education*<sup>102</sup> the Court ruled that corporal punishment in schools is unconstitutional as the weighing of a child best interests, human dignity and right to bodily integrity was greater than the freedom of religion. This approach also applied in the recent landmark case of *Freedom of Religion South Africa v Minister of Justice* in which the common law defence of reasonable chastisement was determined to violate the best interests of a child

93 The Citizen 'Bid to amend the Children's Act to ensure the arrest of people who fail to report child abuse' 18 October 2019 <https://citizen.co.za/news/south-africa/crime/2193064/bid-to-amend-childrens-act-to-ensure-the-arrest-of-people-who-fail-to-report-child-abuse/> (accessed 10 April 2020).

94 Act 110 of 1978

95 Section 1 and section 21(1) of the Social Service Professions Act 110 of 1978.

96 Section 22(1)(a)-(d) of the Social Service Professions Act.

97 *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34.

98 *Freedom* (n 98 above) para 56.

99 Section 172 of the Constitution.

100 *S v M* 2007 ZACC 18 para 9.

101 *S v M* (n 100 above) para 46; See also section 36 of the Constitution.

102 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 41.

and enabled past institutionalised violence with parents being able to abuse their children 'under the guise of religion'.<sup>103</sup> The court places emphasis on the fact that chastisement will always be recognised as a criminal act of assault.<sup>104</sup> The outcome of this judgment found the common law defence of reasonable and moderate chastisement to be unconstitutional.<sup>105</sup>

Drawing on my comparative analysis of mandated reporting, I will now critically analyse the outcome of the *Gabriel Fernandez* case in the context of South African law.

#### 4 In the best interests of a child? A South African perspective

The decision of the Appellate Court in the *Petitioner's* case comes with controversy in its decision to dismiss charges of professional negligence and child endangerment. Child advocate Elizabeth Bartholet criticises the system in the regulation of child law. She is of the opinion that the system focuses more on parental rights and family preservation instead of children's rights.<sup>106</sup> This view may provide a reason on why the *Petitioners* had permitted Pearl Fernandez to retain custody over her children. In response to the *Petitioner's* case, the DCFS had released a statement to outline the reformatory measures that will be taken to improve the provision of children's social care services.<sup>107</sup> The Los Angeles County District Attorney Jackie Lacey was of the opinion that the appellate court was erroneous in the rejection of criminal liability of the social workers and referred to it as being a 'disheartening but well-reasoned opinion'.<sup>108</sup> Consequently, Lacey then states that the District Office has decided to not appeal the court's decision to California's Supreme Court and has alternatively decided to work on proposing legislation to improve the duty of care entrusted to mandated reporters.<sup>109</sup>

I acknowledge the differences between Californian and South African jurisdictions and how they have developed their yardsticks in the law to determine cases of child abuse and mandated reporting.

103 *Freedom* (n 97 above) para 9.

104 *Freedom* (n 97 above) para 72.

105 *Freedom* (n 97 above) para 73.

106 E Bartholet 'Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children' (2012) 60 *Buffalo Law Review* 1331-1334.

107 County of Los Angeles Department of Children and Family Services 'Statement from the Department of Children and Family Services on the Trials of Gabriel Fernandez' *Netflix Documentary Series* (2020).

108 Los Angeles County District Attorney's Office 'Statement by Los Angeles County District Attorney Jackie Lacey on the outcome of the *Gabriel Fernandez* case' (2020).

109 As above.

The comparison between these two jurisdictions is important as it highlights the issue that the Californian legal system explicitly facilitates the existence of mandated reporting in legislation such as CANRA and the Penal Code.<sup>110</sup> These forms of legislation set out the rights and duties of mandated reporters and their criminal liability in the event of improper or unprofessional conduct. This evidently provides a wide scope for mandated reports on a legal and ethical basis. Mandated reporting in South Africa does not explicitly exist independently in legislation. Although the Children's Act refers to specific professions who are obligated to report abuse, there is an absence of court cases that address the liability of those who have a legal obligation to report child abuse. The scope for criminal liability of a social worker in a South African court of law is limited. This results in parties having to only rely on the process of the South African Council for Social Service Professions in conducting an inquiry and charging the social worker according to the Act.<sup>111</sup> Persons in the health profession who have acted in an improper or unprofessional manner may be referred to an inquiry in which the professional board or committee may make a finding and impose penalties where necessary.<sup>112</sup> These may be in the form of a warning, suspension, removal from the register, a fine or payment of costs of proceedings or restitution.<sup>113</sup> A person who produces false evidence at this inquiry may be guilty of an offence and liable on conviction on the basis of perjury.<sup>114</sup>

Police officers are also subject to disciplinary action in the event of improper or professional misconduct as set out in the South African Police Service Discipline Regulations.<sup>115</sup> Regulation 12 set out the penalties that may be issued to alleged misconduct of police officers may be in the form of verbal or written warnings, suspension and dismissal.<sup>116</sup> Based on this comparison, it is evident that the failure to report child abuse and mistreatment is generally handled in internal disciplinary hearings and proves that the absence of mandated reporting legislation is a barrier to the protection of children from abuse and neglect. So, one is hopeful with the effluxion of time that the South African legislative system will evolve to a point that will address mandatory reporting of child abuse and take it out of the realm of internal disciplinary hearings.

110 Penal Code (n 26 above).

111 Section 2 of the Social Service Professions Act.

112 *Aguirre* (n 8 above). See also section 41(1) of the Health Professions Act.

113 Section 41(1) (a)-(f) of the Health Professions Act.

114 Section 46 of the Health Professions Act.

115 South Africa (2016) The South African Police Service Discipline Regulations (Proclamation No.R. 1361) *Government Gazette* 40389, November 1.

116 Section 12 of The South African Services Discipline Regulations; See also section 40 of the South African Police Service Act 68 of 1995.

I now wish to explore the majority and minority judgments of the *Petitioner's* case by analysing the decision to acquit the social workers from a South African perspective. Firstly, the issue of 'probable cause' to determine the social worker's liability was not thoroughly discussed in the majority judgment due to the *de novo* review.<sup>117</sup>

A *de novo* review is based on the principle that appellate courts in legal proceedings do not rely on the decisions of lower courts in order to present their findings.<sup>118</sup> Upon review, the court deals with a matter by providing its legal questions and findings without being constrained by lower court decisions.<sup>119</sup> This contrasts the South African system which bases its legal precedent on the *stare decisis* principle.<sup>120</sup> This principle recognises that courts are bound by the judicial decisions of lower courts in line with the rule of law that is upheld in the Constitution.<sup>121</sup> In the *Petitioners* matter, the appellate court standard of review being *de novo* enabled it to approach the liability of the social workers on its own findings based on the evidence provided before it.

In South Africa, legal precedent plays an imperative role in correcting erroneous decisions of lower courts and developing law from the outcome of these findings.<sup>122</sup> Drawing on the comparison of standard of review, it is evident that the principle of *stare decisis* would compel a court to consider the liability of a social worker if it was considered in the *court a quo*. Such review is necessary to promote legal certainty and ensure that legal principles in relation to a matter align with the objectives of the Constitution.

In the case of 'probable cause', the majority judgment in this matter relies on the matter of *Rideout v Superior Court* to illustrate that probable cause is evident when 'a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused'.<sup>123</sup>

In determining the liability of an accused with abuse, the court in *Heitzman* had narrowed the application of Penal Code to refer to persons who had a special relationship with the individual who had inflicted the abuse on the victim and to also determine if they had the ability to control that individual's [abusive] conduct.<sup>124</sup> This decision

117 *Bom* (n 8 above) 13.

118 C Oldfather 'Universal De Novo Review' (2009) 77 (2) *George Washington Law Review* 308.

119 Oldfather (n 119 above) 308-310.

120 B Maswazi 'The doctrine of precedent and the value of s39 (2) of the Constitution' (2017) *De Rebus* 28.

121 Maswazi (n 121 above) 28. See also section 1 of the Constitution.

122 H Campbell-Black 'The Principle of Stare Decisis' (1886) *The American Law Register* 748. See also Section 39 of the Constitution.

123 *Rideout* (n 29 above).

124 *Bom* (n 8 above) 14-15.

was applied in the context of section 273a of the Penal Code in using the relationship between the social workers, Fernandez and Aguirre to illustrate that there was no special relationship between the social worker and the accused. Therefore, the majority had relied on the absence of a special relationship to eliminate probable cause of the death of Gabriel Fernandez. I believe Chaney J was reasonable to consider the aspect of ‘bystander liability’ to determine probable cause. The minority judgement considers this principle to determine if certain acts could have prevented the endangerment of the victim and that the majority should have focused on ‘bystander liability’ rather than the ‘degree of relationship.’<sup>125</sup>

But in the case of probable cause in the alternative, the standard of review in South African criminal cases discharges the onus of proof on the State to prove that the accused is guilty beyond a reasonable doubt.<sup>126</sup> Could the State prove beyond a reasonable doubt in the *Petitioner’s* case that the social workers were found to be negligent in the assessment of Gabriel Fernandez’s report?

If one had to apply the *Van Heerden*-test based on ‘reasonable grounds or suspicion’ to the reporting child abuse, it is probable that a reasonable person would have concluded that the numerous reports made of the abuse during the 2012 to 2013 period presented an imminent threat to the welfare of the child.<sup>127</sup> A reasonable person would expect in the assessment by a social worker that the child being abused would be interviewed to determine if they require medical attention or to be removed from the family home. Any alleged injuries should have been marked on a body chart in the report of the alleged abuse for evidentiary purposes where a court order would be required to remove a child to temporary safe care.<sup>128</sup> In South African law, emergency removal of a child to temporary safe care could have been used in the event where a child required immediate protection and medical attention.<sup>129</sup> In the alternative, a court order could have been obtained for the removal of the child to ensure their wellbeing.<sup>130</sup> There is no evidence that any of the social workers had taken reasonable steps to remove Fernandez from the endangerment of his family environment. Had the social workers acted timeously to assist Gabriel Fernandez, it would have not resulted in his death, owing to physical assault.<sup>131</sup> Contravention of section 110 and section 152 of the Children’s Act in failure to report or the misuse of power could result in improper/unprofessional conduct of the Social Service Professions Act.<sup>132</sup>

125 *Bom* (n 8 above) 3.

126 *S v T* 2005 (2) SACR 318 (E) para 37.

127 *Van Heerden* (n 86 above).

128 Section 151 of the Children’s Act.

129 Section 152 of the Children’s Act.

130 Section 151(2) of the Children’s Act; Form 38 of the Children’s Act.

I submit that on the reasoning of probable cause, the social workers, in this case, were negligent in their intervention in the case of child abuse. Social workers are clothed with the duty to uphold the special status of children's rights in society and that negligence resulting in the death of a minor should not be taken lightly in a court of law.

Secondly, I refer to the minority judgment of the *Petitioner's* case to prove the duty of social workers as mandated reporters in the case of child abuse.<sup>133</sup> Justice Chaney asserts that social workers have to make reasonable decisions that are in the best interests of a child where abuse and maltreatment arises.<sup>134</sup> The need to place a child's interests above the interests of a mandated reporter is in line with the Constitution in the recognition of children's rights being of 'paramount importance'.<sup>135</sup>

I also agree on the dissenting opinion of the minority judgement for the dismissal of the section 273 Penal Code charges where it was found that there was no 'affirmative duty' on the social workers to control the perpetrators of abuse in the matter as well as providing 'care' to Fernandez. The court, in this case, referred the responsibilities and duties of 'care' to a caregiver who provides basic needs to a child.<sup>136</sup> With the consideration of the common law principle of '*in loco parentis*', social workers, must act in the best interests of society to ensure that a child is protected from foreseeable or imminent harm to their integrity.<sup>137</sup> In the consideration of 'control' of a perpetrator, South African law accommodates this element with a Form 24 to remove the potential perpetrator from the family home where there is no arrest of the perpetrator or they have been released on bail.<sup>138</sup> A court order may then be issued to prevent the perpetrator from contacting the child and/or being prohibited from entering the family home.<sup>139</sup>

I believe that the court should have extended its interpretation of the social worker's duties to the responsibility to ensure that a child's

131 In CR Snyman's *Criminal Law* (2014) 58-59, criminal liability can be established where there a person is legally obligated to actively perform a certain type of conduct. Such an omission is measured against factual and legal causation, unlawfulness and culpability. In this case, the duty to act positively can be envisaged in the duty of mandated reporting set out in S 110 of the Children's Act and absence of such legislation, one may refer to the best interests of a child set out in S 28 of the Constitution as the backdrop for determining the legal convictions of society.

132 L Jamieson *Children's Act Guide for Child and Youth Care Workers* (2013) 44; Social Service Professions Act 110 of 1978.

133 *Bom* (n 8 above).

134 *Bom* (n 8 above) 3-5.

135 Section 28(2) of the Constitution.

136 *Bom* (n 8 above) 17-18.

137 Section 12 of the Constitution.

138 Jamieson (n 77 above) 28.

139 Section 153(6) of the Children's Act.

basic needs were met and to protect them from potential abuse. As mandated reporters, social workers have a statutory duty to act in the best interests of a minor and should take reasonable steps in their official capacity to intervene where there is evidence of abuse and maltreatment.

Finally, the majority judgment had dismissed the charge based on the falsification of records envisaged in section 6200 of the Government Code. I submit that this decision would be in contrast to South African legislation that recognises falsification of information as a criminal offence.<sup>140</sup> The Social Service Professions Act explicitly states that the tendering of false evidence and information may result in an individual being charged on the case of perjury and may be found guilty of improper/unprofessional conduct.<sup>141</sup> The Children's Act also highlights the importance of social workers keeping making professional reports of abuse cases as an aid for authorising investigations, court orders and for admissible evidence in disputes in court.<sup>142</sup> In this case, it is evident that social workers, as mandated reporters have a constitutional duty to uphold the rights of a child who requires protection and care.

## 5 Conclusion

The death of Gabriel Fernandez sent shockwaves around the world. Greater weighting was placed on the failure of the social workers in the matter to take action to ensure that the safety of a child. As a vulnerable group in society, children need the assistance of mandated reporters such as family members, educators, health and legal practitioners, and social services to report abuse and maltreatment.

In this essay, I have demonstrated that South Africa has enforced a statutory duty on various groups to report the necessary authorities of alleged child abuse and have proven that the law is in constant development to ensure that the scope of protection broadens to the rights of a child. I have acknowledged the shortcomings of the decisions made in the *Petitioner's* case to illustrate how alleged negligence could have been interpreted within the South African jurisdiction. Child protection can only holistically be achieved where multifaceted responses are being made in the interests of justice.

140 SAPS 'Common Law Offences – Definitions' 2014 <https://www.saps.gov.za/faqdetail.php?fid=9> (accessed 12 April 2020).

141 South African Council for Social Service Professions 'Policy guidelines for Course of Conduct, Code of Ethics and the Rules for Social Workers' 11.

142 Section 62 and section 63 of the Children's Act.