
by

Andrew Gordon David Flavelle Martin

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Faculty of Law
University of Toronto

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Andrew Gordon David Flavelle Martin
Doctor of Juridical Science
Faculty of Law
University of Toronto
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Abstract

Individuals within a professional-client relationship reveal a range of sensitive information that they might otherwise be reluctant to share with others. Mandatory reporting laws – laws that require professionals to report client information to the state – allow governments to extract this information in order to use it for social goals. These laws are widely used yet poorly understood. There is no apparent rationale for what is reportable and what is not. The existing legal literature largely ignores the interactions of these laws with the common law and other statutes, and particularly their compliance with the Canadian Charter of Rights and Freedoms. The literature also considers individual mandatory reporting laws in isolation.

This thesis provides a legal and policy analysis of mandatory reporting laws as a family of related laws in the Canadian context. The legal analysis considers the impact of these laws on the client’s interests in autonomy, privacy, and access to services, and on religious and conscience interests of the professional. It concludes that existing mandatory reporting laws infringe Charter rights in several ways. Some of these infringements will be justifiable under section 1 of the Charter as reasonable limitations in a free and democratic society. Others likely require
legislative amendments. Overall, however, *Charter* compliance is not a significant restraint on lawmaking in this area, leaving legislators and policymakers vast possibilities to navigate. The policy analysis complements the legal analysis by setting out a four-component framework for evaluating existing laws and new proposals. The first component focuses on the purpose of the law; the second, on the special ability or opportunity of the professional to detect the reportable occurrence; the third, on the connection between the purpose of the law and the purpose of the profession; and the fourth, on the long-term impacts on the client-professional relationship.

Together, the legal and policy analysis should enable legislators and policymakers to improve the coherence and consistency of lawmaking in this area. This thesis demonstrates that mandatory reporting laws are a powerful legal tool, but one that should be employed sparingly and carefully because it comes with real though often intangible harms.
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Introduction

Professionals provide a range of vital services in Canadian society, from health care to spiritual support. In receiving these services, individuals within a professional-client relationship reveal a range of sensitive information that they might otherwise be reluctant to share with others. Mandatory reporting laws – laws that require professionals to report client information to the state – allow governments to extract this information in order to use it for social goals. These laws are powerful tools but have steep costs: they infringe client autonomy and privacy, and can deter clients from revealing relevant information or from seeking professional services entirely. They may also require professionals to violate obligations of confidentiality and other professional values.

Despite the extent of mandatory reporting laws in Canada, they are poorly understood. Every province now has a haphazard assortment of these laws, each adopted as an *ad hoc* response to a specific problem, with no apparent unifying rationale for what is reportable and what is not and no clear articulation of the appropriate scope of mandatory reporting laws. To the extent that mandatory reporting laws are considered in the legal literature, they are each considered in isolation and rarely considered as laws, i.e. how they fit with the broader legal landscape and particularly their constitutionality.

In this thesis, I focus on mandatory reporting laws as laws, i.e. how they clash with other areas of law, especially constitutional law, and how legislators and policymakers should determine what reporting obligations should be imposed on what professionals. I approach individual mandatory reporting laws as many iterations of a single legal tool. My goal is to enable legislators and policymakers to take a consistent approach to existing mandatory reporting laws and future proposals, one that allows for a coherent and principled analysis. I aim to disaggregate visceral or intuitive reactions to existing or proposed mandatory reporting laws, in order to allow legislators and policymakers to identify and articulate specific points of concern and disagreement. Although I consider relevant materials from foreign jurisdictions, I focus on mandatory reporting laws as they exist in the Canadian context.
In this thesis, I use both a legal and policy analysis to identify the considerations that should guide legislators and policymakers in evaluating existing laws and new proposals. In the legal analysis, which spans Chapters 2 through 5, I focus on the constitutionality of these laws under the *Canadian Charter of Rights and Freedoms*. I consider the interests of the client in Chapters 2, 3, and 4, and then turn to the interests of the professional in Chapter 5. I conclude that while mandatory reporting laws infringe *Charter* rights, these infringements will be justifiable under section 1 of the *Charter* as reasonable limitations in a free and democratic society, or may be fixed by minor amendments. That is, *Charter* compliance is not a significant restraint on lawmaking in this area. Thus in Chapter 6 I develop a policy framework that legislators and policymakers may use to navigate the legal space open to them.

In Chapter 1, I set out the approach and goals of this thesis and provide the necessary background for the discussion that follows in the remaining chapters. I begin by explaining what I mean by the term “mandatory reporting laws”: statutory provisions that require professionals to report information disclosed or obtained within the professional-client relationship to the state. I also explain the scope of the concept of the professional, which for my purposes covers self-regulated professions exercising powers delegated by the state where the professional-client relationship is marked by trust and confidentiality beyond mere business confidentiality. I identify a basic structural template which these laws follow, while noting existing modifications to that template. I then set out the historical, current, and potential scopes of these laws in Canada. I consider the purposes these laws are purportedly intended to achieve and the mechanisms by which these laws further those purposes. Against this backdrop, I explain why mandatory reporting laws are extraordinary in the Canadian common law context. I also consider reasons why these laws are nonetheless popular among legislators. I then assess the existing literature on mandatory reporting laws. I conclude by situating this thesis within that literature.

I begin my legal and *Charter* analysis by focusing on the interests of the client. In Chapter 2, I consider the impact of mandatory reporting laws on the client’s autonomy interest, i.e. the ability to make important personal decisions that accord with his or her values through a considered and reflective process. This impact on the autonomy interest is most important where the purpose of reporting is to protect the vulnerable client against abuse or neglect. I begin by arguing that mandatory reporting laws on abuse and neglect appear to clash with autonomy as it is embodied in Canadian law on capacity and consent. I acknowledge the limitations of that embodiment. I
also consider some special contexts where something more is required, and reflect on vulnerability as the unifying concept in these contexts. I identify four possible resolutions of this clash, and argue that the best approach to this clash is to amend these laws by adding an exception to reporting where the client has decision-making capacity and is able to decide voluntarily, with a rebuttable presumption of incapacity and involuntariness. I then turn to a Charter analysis. I argue that mandatory reporting laws in their impact on autonomy infringe section 7. These laws engage the liberty interest, which includes the right to make fundamental personal decisions – such as the decision to seek state assistance or to initiate state involvement. Section 7 is infringed because these laws are overbroad. If this overbreadth is not justifiable under section 1, it can be reduced so as to become justifiable. I also consider, and reject, the argument that mandatory reporting laws are contrary to the principle of fundamental justice against vagueness. I conclude by evaluating how possible modifications to the template of mandatory reporting laws would change the Charter analysis.

In Chapter 3, I turn to the client’s privacy interest. While I briefly consider privacy as it is embodied in statute and case law, I argue that these sources of law are not helpful in identifying which exceptions to privacy are appropriate. I instead focus on privacy as embodied in the right against unreasonable search and seizure under section 8 of the Charter. I demonstrate that most mandatory reporting laws affect the client’s reasonable expectation of privacy, and so section 8 is engaged. I argue that mandatory reporting laws infringe section 8 in two major ways, and that mandatory reporting laws applicable to lawyers may infringe section 8 in three additional ways. I conclude that all of these infringements will either be justifiable under section 1 or addressed by minor amendments.

I conclude my analysis of the client’s interests in Chapter 4, where I consider the deterrence impact on the client’s interest in access to professional services. I begin with a discussion of deterrence. I consider the varying levels of deterrence and how deterrence compares to a prohibition on services. I then argue that the deterrence impact of mandatory reporting laws infringes the client’s Charter interest in access to three kinds of services: legal services, under section 7 and the principles of solicitor-client privilege and commitment to the client’s cause; religious services, under section 2(a); and health services, also under section 7, via the security-of-the-person interest and the principles against overbreadth and arbitrariness (and potentially gross disproportionality). I also note the role of solicitor-client privilege independent of the
Charter. I suggest that the infringements of access to religious and health services, but not to legal services, are likely to be justifiable under section 1. I also note that while the deterrence impact on access to education and veterinary services does not engage Charter rights, it may still be contrary to public goals. As in previous chapters, I conclude by evaluating how possible modifications to the template of mandatory reporting laws would change the Charter analysis.

In Chapter 5, I turn to the interests of the professional. I argue that insofar as mandatory reporting laws require the professional to act contrary to his or her understanding of professional obligations and values, these laws infringe the professional’s Charter rights under section 2(a) – specifically, the freedom of religion of clergy and the freedom of conscience of professionals other than clergy. I argue that these infringements are likely to be justifiable under section 1. I conclude Chapter 5 by evaluating how possible modifications to the template of mandatory reporting laws would change the Charter analysis.

In Chapter 6, I move from a legal analysis to a policy analysis. I begin by acknowledging the limitations of a Charter-based analysis and emphasizing that Charter compliance alone provides insufficient guidance for policymakers and legislators. I then set out a four-component policy framework for the analysis of existing and proposed mandatory reporting laws. First is the purpose of the law; second, the special opportunity or ability of the professional to detect the occurrence; third, the connection between the purpose of the reporting and the purpose of the profession; and fourth, the impact of reporting on the professional-client relationship and the relative value of that relationship. I also consider how the modifications to the template would affect this policy analysis. I then demonstrate how this four-component policy framework would apply to several different proposals for mandatory reporting laws that have not yet been adopted in Canada.
Chapter 1
Mandatory reporting laws in the Canadian context

1 Introduction

Individuals within a professional-client relationship reveal a range of sensitive information that they might otherwise be reluctant to share with others or with the state. They reveal this information in order to receive essential services. Mandatory reporting laws – laws that require professionals to report client information to the state – allow governments to extract this information in order to use it for social goals.

There are many ways that governments can harness professionals in pursuit of social goals. Some of these ways involve removing the professional from the professional-client relationship and instead using their skills in other roles for other purposes. For physicians, for example, such purposes typically include death investigation (as coroners, medical examiners, or forensic pathologists) and public health (as medical officers of health). Similarly, lawyers may be appointed as tribunal members or judges. Governments may also harness the professional within the professional-client relationship. Sometimes this means altering the way in which professionals provide services, and specifically modifying accepted professional practices. For example, several American states require physicians providing abortions to read specific texts to the patient or to perform and narrate an ultrasound.\(^1\) However, mandatory reporting laws represent one of the most pervasive ways in which governments harness the professional – and indeed, the client’s trust within the professional-client relationship – to achieve social goals.

This harnessing of the professional-client relationship, while powerful, is a serious matter. Mandatory reporting laws are useful precisely because they extract information from a relationship of trust – information that the client would otherwise likely not volunteer to the

\(^1\) See e.g. Caroline Mala Corbin, “The First Amendment Right against Compelled Listening” (2009) 89:3 BUL Rev 939 at 1000-1012.
state. In so doing, these laws can damage that relationship by challenging the confidentiality and trust upon which it is based.

While mandatory reporting laws were once adopted sparingly in Canadian jurisdictions, they are steadily increasing. The first mandatory reporting laws were those on the reporting of communicable diseases by physicians. Most provinces now require the reporting of communicable and non-communicable diseases (by physicians and some other health professionals), children in need of protection (by most professionals), conditions affecting the ability to drive safely (by physicians and optometrists), animal abuse (by veterinarians), and gunshot wounds (by health professionals). Some provinces have also extended mandatory reporting to adults in need of protection (by most professionals) and to stab wounds (by health professionals). These laws are typically modeled after American precedents, which go much further and present Canadian legislators with a staggering array of future possibilities. Every province now has a haphazard assortment of these laws, each adopted as an ad hoc response to a specific problem, with no apparent rationale for what is reportable and what is not and no clear articulation of the appropriate scope of mandatory reporting laws. For example, the Supreme Court of Canada has recognized drunk driving as a “menace” and held that “there is no doubt that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective” that justifies significant infringements of rights under the Canadian Charter of Rights and Freedoms. However, health professionals are not required to report impaired drivers to police. Similarly, the Ontario government in 2005 adopted an

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2 As I will explain below, mandatory gunshot wound reporting legislation in Canada formally imposes the reporting obligation on the institution or facility instead of the individual professional. See note 54 and accompanying text.


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extensive ban on pit bull breeds as a threat to public safety, but did not require veterinarians – who are well-positioned to identify and detect these dogs – to report them.\(^5\)

The absence of an underlying rationale is particularly troubling because mandatory reporting laws have the potential not only to damage the trust of the professional-client relationship, but also to infringe important legal interests and, indeed, even constitutionally-protected rights and freedoms. These interests include the client’s autonomy interest, as that concept is embodied in Canadian law, and particularly in the law on capacity and consent; the client’s privacy interest; the client’s interest in access to services; and the professional’s values and obligations. As a practical matter, these potential constitutional issues impose constraints on the scope of mandatory reporting laws. (Mandatory reporting laws may potentially violate the division of powers under the Constitution Act, 1867; however, as federalism determinations largely lack normative implications, I focus instead on the Charter issues.\(^6\)) But even where these rights and freedoms are not infringed, or the infringements are justifiable, the engagement of constitutional interests again demonstrates that mandatory reporting laws are impositions on basic social value judgements. The Charter analysis crystallizes the issues at stake.

Mandatory reporting laws, then, should be far more than just a content-neutral procedural mechanism or legal template that is added as boilerplate or afterthought to legislation that pursues a given social goal. Their adoption is a separate and distinct substantive choice with fundamental implications for individuals and professionals.\(^7\)


\(^6\) Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5. I do note that the nature and success of a federalism challenge will be closely related to the specifics of the law, and particularly its fit into a provincial and/or federal head of power. Mandatory reporting laws tend to be provincial. Renke has argued that gunshot wound reporting laws may not be sufficiently provincial to survive a federalism challenge: Wayne Renke, “The Constitutionality of Mandatory Reporting of Gunshot Wounds Legislation” (2005) 14:1 Health L Rev 3 at 4 [Renke, “Gunshot Wounds”].

\(^7\) This general approach is shared by the work of Coughlan et al, to whom I will refer repeatedly below: Stephen G Coughlan et al, “Mandatory Reporting of Suspected Elder Abuse and Neglect: A Practical and Ethical Evaluation” (1996) 19:1 Dal LJ 45.
In this chapter, I provide the necessary background for the discussion that follows in the remaining chapters. I begin by explaining what I mean by the phrase “mandatory reporting laws”, and identifying basic characteristics and structural features of these laws. I then set out the historical, current, and potential scopes of these laws in Canada. Within this context, I detail the purposes these laws are intended to achieve, according to legislators, and the mechanisms by which these laws further those purposes. I then explain why mandatory reporting laws are extraordinary in the Canadian common law context, and suggest some reasons why they may nonetheless be popular among legislators. Finally, I assess the existing literature on mandatory reporting laws and situate this thesis within that context.

2 Mandatory reporting laws: a definition, terminology, and a template

While the phrases “mandatory reporting” and “mandatory reporting laws” are used fairly widely, they are not quite terms of art and are not often defined. Potentially, the phrase “mandatory reporting laws” could cover any legal requirement for any person to report any information to anyone. For the purposes of this thesis, however, I define mandatory reporting laws more narrowly: as statutory provisions requiring professionals to report information about, or disclosed by, their clients to the state.

I use an open-ended and inclusive scope of professionals, generally covering the self-regulated professions exercising powers delegated by the state where the professional-client relationship is marked by trust and confidentiality that go beyond mere business confidentiality. I focus on health professionals, particularly physicians, and lawyers.\(^8\) I also focus on religious officials,

\(^8\) I will use physicians as the representative archetype of a health professional, although similar considerations apply to other health professionals, and it is somewhat artificial to consider physicians in isolation. Similarly, when I discuss lawyers, similar considerations may apply to other regulated legal professionals, such as paralegals and notaries.
who I will refer to for clarity as clergy. While clergy are not self-regulated and do not exercise delegated state powers (other than the solemnization of marriage), they do hold a position of trust and possibly confidentiality. I also consider, to a lesser extent, veterinarians and teachers. In contrast, I do not consider professionals such as accountants, architects, or engineers, or other actors who could be included in mandatory reporting laws. For example, although the Ontario Highway Traffic Act requires mechanics (among others) to report to police if they find a bullet hole in a car brought for repairs, I do not consider mechanics to be professionals in that senses of self-regulation or trust and confidentiality. Similarly, although the Ontario Child and Family Services Act specifies peace officers as one of the kinds of professionals for whom failure to report a child in need of protection constitutes an offence, I do not consider peace officers to be professionals in this sense.

My focus is on how mandatory reporting laws apply to professionals. Some mandatory reporting laws purport to apply to all persons, including but not limited to professionals. For example, the Ontario Child and Family Services Act imposes the duty to report children in need of protection on all persons, including an open-ended list of professionals. Failure to report, however, is only an offence for professionals. I will consider such laws as they apply to professionals, not to the general public. Mandatory reporting laws typically apply to professionals only when they are providing professional services. For example, the Child and Family Services Act further specifies that the professional’s obligation to report children in need of protection applies only where the

9 Veterinarians have obligations both to the animal (the patient) and the owner (the client), with the obligations to the patient being primary and the obligations to the owner being secondary. See e.g. Phil Arkow, “Child Abuse, Animal Abuse, and the Veterinarian” (1994) 7:4 J American Veterinary Medical Assoc 1004 at 1006; Ruth E Landau, “A Survey of Teaching and Implementation: The Veterinarian’s Role in Recognizing and Reporting Abuse” (1999) 215:3 J American Veterinary Medical Assoc 328.


11 Child and Family Services Act, RSO 1990, c C.11, s 72(5)(c) [CFSA].

12 Ibid, s 72(1) (every person), (5) (professionals).

13 Ibid, ss 72(1) (every person), (4) (offence provision).
information was “obtained in the course of … professional or official duties”. However, the distinction between a professional’s duties and his or her other activities may not be clear in some circumstances.

I will use the terms “professional” and “client” when referring to mandatory reporting laws in general, and the more specific language of “lawyer” and “client” in the context of lawyers and “physician” and “patient” in the context of physicians. Veterinary services do present a wrinkle, as a veterinarian has primary obligations to the animal “patient” and secondary obligations to the owner “client”. Unless I specify otherwise, when I use the general term “client”, I am referring in the veterinary context to the patient animal.

By using the phrase mandatory reporting laws, I am referring to legislation as opposed to common law or professional rules; that is, legal requirements imposed by legislatures instead of those imposed by courts or imposed by professional regulators. (Mandatory reporting laws are mostly located in statutes, but some are in regulations.)

Mandatory reporting provisions are usually included in larger statutes. Unless I indicate otherwise, when I refer to mandatory reporting laws, I am referring to the reporting provision itself and ancillary provisions. Obviously, as a matter of statutory interpretation, these individual provisions operate in the context of the scheme of the statute as a whole.

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14 Ibid, s 72(4)(b).
15 See e.g. Simon Blackstone, “The Duty to Report Suspicions of Abuse: When is a Teacher Not a Teacher?”, Case Comment on R v Kaija, 2006 ONCJ 193, [2006] OJ No 2177 (QL), (2007) 16:3 Educ & LJ 351. As Blackstone explains, the charge of failure to report was dismissed because the accused, a physical education teacher, learned of the allegation of abuse in his capacity as the volunteer coach of a team that was only loosely affiliated with the school at which he taught.
16 See note 9 above.
17 See e.g. Marine Services International Ltd. v Ryan Estate, 2013 SCC 44 at para 77, [2013] 3 SCR 53: “Under the modern approach to statutory interpretation, ‘the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’: E. A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87; Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.”
2.1 The structure of mandatory reporting laws: a standard template

One way mandatory reporting laws are recognizable is that they tend to share a characteristic structure. Under this template, members of specified professions who observe a specified occurrence with a specified degree of certainty must report specified information to a specified state agency within a specified time. Sometimes the provision explicitly states that the reporting obligation overrides confidentiality or privilege, typically with an exception for solicitor-client privilege, and that it applies only to information learned in the course of practice. Ancillary provisions typically provide immunity for the reporting professional and make failure to report an offence.

I have listed the basic features for the Ontario mandatory reporting laws in Table 1, but a few points warrant emphasis. The triggering threshold for most mandatory reporting laws – i.e., the degree of certainty that triggers the duty to report – is deliberately qualified. That is, reporting may be required not only if the client has the reportable occurrence, but if the client may have or appears to have the reportable occurrence. Similarly, reporting may be required not only if the professional knows that the client has the reportable occurrence, but if the professional has an opinion or a reasonable belief or a reasonable suspicion that the client has the reportable occurrence. Such thresholds mean mandatory reporting laws are typically structured as a

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18 Solicitor-client privilege may apply in some situations not only to lawyers, but also to other professionals retained by the lawyer, such as a physician. See e.g. Smith v Jones, [1999] 1 SCR 455, 169 DLR (4th) 385. However, for my purposes, I focus on solicitor-client privilege as it applies to lawyers.

19 In referring here to a degree of certainty, I am not suggesting that certainty or absolute certainty is the appropriate threshold.

20 May have: see e.g. Health Protection and Promotion Act, RSO 1990, c H.7, s 25(1) [HPPA] (“forms the opinion that the person [patient] has or may have a reportable disease”). Appears to have: see e.g. HTA, supra note 10, s 203(1) (any patient “who, in the opinion of the prescribed person, has or appears to have a prescribed [condition]”), as amended by Transportation Statute Law Amendment Act (Making Ontario's Roads Safer), 2015, SO 2015, c 14, s 55. (This amendment is not yet in force at the time of writing.) Before these amendments, s 203(1) referred to a patient “who, in the opinion of the medical practitioner, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle.”

21 Reasonable suspicion: see e.g. CFSA, supra note 11, s 72(1) (“has reasonable grounds to suspect”). Reasonable belief: see e.g. Health Professions Procedural Code [HPPC], being Schedule 2 to the Regulated Health Professions Act, 1991, SO 1991, c 18, s 85.1(1) (“has reasonable grounds… to believe”). Opinion: see e.g. HTA, ibid, s 203(1) (“in the opinion of the prescribed person [professional]”), as amended by Transportation Statute Law Amendment Act (Making Ontario's Roads Safer), ibid, s 55. (This amendment is not yet in force at the time of writing.) Before
screening mechanism weighted towards false positives instead of false negatives. Professionals report possible occurrences, and the state agency receiving the report investigates to confirm and intervene as appropriate. Consider, for example, the comments by counsel for the Ministry of Health during hearings on mandatory reporting of health care eligibility fraud:

On the one hand you've got reasonable grounds to believe, which is of course the standard objective test for reporting, but then on the other it’s that a possibility of something occurred. If we're promoting that position, it would be that we want to err on the side of all possible frauds being reported and then being actively and aggressively investigated to determine whether in fact that happened. If you wanted to do anything more with a greater degree of certainty… one would simply say, “has reason to believe that the act occurred.”

More rarely, mandatory reporting laws may have a triggering threshold that is not qualified. For these amendments, s 203(1) referred to a patient “who, in the opinion of the medical practitioner, is suffering from a condition that may make it dangerous for the person to operate a motor vehicle.”


### Table 1: Mandatory Reporting Laws in Ontario

<table>
<thead>
<tr>
<th>Statute (current)</th>
<th>Reportable occurrence</th>
<th>Professions</th>
<th>Degree of certainty</th>
<th>Recipient of the report</th>
<th>What information is reported</th>
<th>Timing</th>
<th>Overrides Confidentiality or Privilege</th>
<th>Immunity</th>
<th>Offence and penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Health Protection and Promotion Act, RSO 1990, c H.7, s 25</em></td>
<td>Reportable diseases (Defined in O Reg 559/91)</td>
<td>Physicians Chiropractors, Dentists, Nurses, Pharmacists, Optometrists, Drugless Practitioners + prescribed (none) (s 25(2))</td>
<td>“forms the opinion that the person has or may have” (s 25(1))</td>
<td>Medical Officer of Health (s 25(1))</td>
<td>“Name and address in full”; “Date of birth in full”; “Sex”; “Date of onset of symptoms” (RRO 1990, Reg 569, s 1) + disease-specific information (Reg 569, s 5)</td>
<td>“as soon as possible” (s 25(1))</td>
<td>[Not specified]</td>
<td>Good faith (s 95(4))</td>
<td>Yes (s 100(2)); $5000 (s 101)</td>
</tr>
<tr>
<td><em>Health Protection and Promotion Act, RSO 1990, c H.7, s 26</em></td>
<td>Carrier of communicable disease (Defined in O Reg 558/91)</td>
<td>Physicians Nurses (extended)</td>
<td>“forms the opinion that the person is or may be”</td>
<td>Medical Officer of Health (s 26)</td>
<td>“Name and address in full”; “Date of birth in full”; “Sex”; “Date of onset of symptoms” (RRO 1990, Reg 569, s 1) + disease-specific information (Reg 569, s 5)</td>
<td>“as soon as possible”</td>
<td>[Not specified]</td>
<td>Good faith (s 95(4))</td>
<td>Yes (s 100(2)); $5000 (s 101)</td>
</tr>
<tr>
<td><em>Health Protection and Promotion Act, RSO 1990, c H.7, s 28</em></td>
<td>Communicable disease (Defined in O Reg 558/91)</td>
<td>School Principals</td>
<td>“is of the opinion that a pupil in the school has or may have”</td>
<td>Medical Officer of Health</td>
<td>“Name and address in full”; “Date of birth in full”; “Sex”; “Name and address in full of the school” (RRO 1990, Reg 569, s 2)</td>
<td>“as soon as possible”</td>
<td>[Not specified]</td>
<td>Good faith (s 95(4))</td>
<td>Yes (s 100(2)); $5000 (s 101)</td>
</tr>
<tr>
<td><em>Communicable Diseases – General, RRO 1990, Reg 557, s 2 (1) (under HPPA)</em></td>
<td>Animal bites (“any animal bite or other animal contact that may result in rabies in persons”)</td>
<td>Physicians, Nurses (extended), Veterinarians, “any other person”</td>
<td>“information concerning”</td>
<td>Medical Officer of Health</td>
<td>“the information”</td>
<td>“as soon as possible”</td>
<td>[Not specified]</td>
<td>[not specified]</td>
<td>Yes (HPPA s 100(4)); $5000 (HPPA s 101)</td>
</tr>
<tr>
<td>Statute (current)</td>
<td>Reportable occurrence</td>
<td>Professions</td>
<td>Degree of certainty</td>
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<tr>
<td>Health Protection and Promotion Act, RSO 1990, c H.7, s 34</td>
<td>Non-compliance with treatment for communicable disease (s 34(1))</td>
<td>Physicians, Nurses (extended) (s 34(1))</td>
<td>“who refuses or neglects” (s 34(1))</td>
<td>Medical Officer of Health (s 34(1))</td>
<td>“name and residence address” (s 34(1)); prescribed (s 34(4) (none))</td>
<td>[Not specified]</td>
<td>[Not specified]</td>
<td>Good faith (s 95(4))</td>
<td>Yes (s 100(2)); $5000 (s 101)</td>
</tr>
<tr>
<td>Health Protection and Promotion Act, RSO 1990, c H.7, s 38(3)</td>
<td>Reportable events (adverse reactions) after immunization (5-part definition in s 38(1))</td>
<td>Physicians, Nurses, Pharmacists</td>
<td>“recognizes the presence of a reportable event and forms the opinion that it may be related to the administration of an immunizing agent”</td>
<td>Medical Officer of Health</td>
<td>“thereon”</td>
<td>“within seven days”</td>
<td>[Not specified]</td>
<td>[Not specified]</td>
<td>Yes (s 100(2)); $5000 (s 101)</td>
</tr>
<tr>
<td>Child and Family Services Act, RSO 1990, c C.11, s 72</td>
<td>Children in need of protection (13-para definition in s 72(1))</td>
<td>Health Professionals, Teachers, School Principals, Social Workers, Religious Officials, Lawyers (s 74(5)) + Any person (s 74(1))</td>
<td>“reasonable grounds to suspect” (s 72(1))</td>
<td>A Children’s Aid Society (s 72(1))</td>
<td>“the suspicion and the information on which it is based” (s 72(1))</td>
<td>[Not specified]</td>
<td>Confidentiality or privilege except solicitor-client privilege (ss 72(7), (8))</td>
<td>Unless “maliciously or without reasonable grounds for the suspicion” (s 72(7))</td>
<td>Yes for professionals “in the course of his or her professional or official duties” (s 72(4)); $1000 (s 74(6.2))</td>
</tr>
<tr>
<td>Highway Traffic Act, RSO 1990, c H.8, ss 203, 204</td>
<td>Conditions affecting driving, i.e. “conditions that may make it dangerous for the person to operate a motor vehicle”; “an eye condition that may make it dangerous for the person to operate a motor vehicle” (ss 203, 204)</td>
<td>Physicians (s 203) Optometrists (s 204)</td>
<td>“the opinion… is suffering from” (ss 203, 204)</td>
<td>The Registrar of Motor Vehicles (ss 203, 204)</td>
<td>“name, address and clinical condition” (ss 203, 204)</td>
<td>[Not specified]</td>
<td>[Not specified]</td>
<td>Total (“No action shall be brought … for complying with this section”) (ss 203(2), 204(2))</td>
<td>Yes (s 214(1)); $60-$500 (s 214(1))</td>
</tr>
<tr>
<td>Statute (current)</td>
<td>Reportable occurrence</td>
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</tr>
<tr>
<td>Highway Traffic Act, RSO 1990, c H.8, ss 203, 204, as amended by SO 2015, c 14, s 55 (not yet in force at time of writing)</td>
<td>Conditions affecting driving, i.e. “a prescribed medical condition, functional impairment or visual impairment.” (203(1))</td>
<td>Prescribed persons (s 203(1))</td>
<td>“the opinion… has or appears to have”(s 203(1))</td>
<td>The Registrar of Motor Vehicles (ss 203(1))</td>
<td>“name, address and date of birth”, “condition or impairment diagnosed or identified… and a brief description of the condition or impairment”, “any other information requested by the form” (s 204(1))</td>
<td>[Not specified]</td>
<td>Confidentiality or Privilege (for professionals, drugless practitioners, social workers); not solicitor-client privilege (ss 205(1), (7))</td>
<td>Good faith (s 204(2))</td>
<td>Yes (s 214(1)); $60-$500 (s 214(1))</td>
</tr>
<tr>
<td>Long-Term Care Homes Act, 2007, SO 2007, c 8, s 24</td>
<td>Abuse and neglect in long-term care homes (5-para definition in s 24(1))</td>
<td>Anyone; All RHPA professionals; Drugless Practitioners; Social Workers (24(4))</td>
<td>“reasonable grounds to suspect” (s 24(1))</td>
<td>The Director (appointed under the Act) (s 24(1))</td>
<td>“the suspicion and the information upon which it is based” (s 24(1))</td>
<td>Immediately (s 24(1))</td>
<td>Confidentiality or Privilege (for RHPA professionals, drugless practitioners, social workers); not solicitor-client privilege (ss 24(4), (7))</td>
<td>Yes for RHPA professionals, drugless practitioners, social workers (plus operators and staff) (24(5)) $25,000 (1st), $50,000 (subsequent)</td>
<td></td>
</tr>
<tr>
<td>Retirement Homes Act, 2010, SO 2010, c 11, s 75</td>
<td>Abuse and neglect in retirement homes (4-para definition in s 75(1))</td>
<td>Anyone; All RHPA professionals Drugless Practitioners Social Workers (a 75(3))</td>
<td>“reasonable grounds to suspect” (s 75(1))</td>
<td>The Registrar (appointed under the Act) (s 75(1))</td>
<td>“the suspicion and the information upon which it is based” (a 75(1))</td>
<td>Immediately (s 75(1))</td>
<td>Confidentiality or Privilege (for RHPA professionals, drugless practitioners, social workers); not solicitor-client privilege (ss 75(3),(4))</td>
<td>Yes for RHPA professionals, drugless practitioners, social workers (plus operators and staff) (s 98(1)(c)); $25,000 (1st), $50,000 subsequent, corporation $50,000 (1st), $200,000 (subsequent)</td>
<td></td>
</tr>
</tbody>
</table>

**Note:** The information provided is a summary of the provisions related to reportable occurrences and the corresponding reporting requirements, including the professions responsible, the degree of certainty required, the recipient of the report, the information to be reported, the timing, whether confidentiality or privilege overrides, and the immunity and penalties associated with each statute.
<table>
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<th>Statute (current)</th>
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<th>Immunity</th>
<th>Offence and penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Health Insurance Act</strong>, RSO 1990, c H.6, s 43.1</td>
<td>Health insurance eligibility fraud (3 para definition in s 43.1(2))</td>
<td>Prescribed (s 43.1(1), O Reg 173/98 s 1): Physicians Nurses (extended) Podiatrists Chiropractors Midwives Optometrists Dentists</td>
<td>“has knowledge that … has occurred” (s 43.1(1))</td>
<td>The General Manager (appointed under the Act) (s 43.1(1))</td>
<td>“the matter” (s 43.1(1))</td>
<td>“promptly” (s 43.1(1))</td>
<td>Confidentiality or privilege except solicitor-client privilege (ss 43.1(6), (8))</td>
<td>“unless he or she acts maliciously and the information on which the report is based is not true.” (s 43.1(7))</td>
<td>Yes (s 44(1)); $25,000 +/- 12 mos (1st), $50,000 +/- 24 mos (s 44(1)), 50,000 (1st), 200,000 (subsequent) (corporation) (s 44(2))</td>
</tr>
<tr>
<td><strong>Health Professions Procedural Code</strong>, s 85.1 (SO 1991, c 18, Sched 2)</td>
<td>Sexual abuse by health professionals (3-part definition in s 1(3), exceptions in ss 1(4), (5))</td>
<td>All RHPA Professionals (s 85.1(1))</td>
<td>“reasonable grounds… to believe” (s 85.1(1))</td>
<td>The Registrar of the reportee’s College (s 85.3(1))</td>
<td>Name of reporter and reportee; “an explanation of the alleged sexual abuse,”; name of patient only with consent (ss 85.3(3), (4))</td>
<td>“within 30 days” but “forthwith” if “reasonable grounds to believe” future abuse will occur (s 85.3(2))</td>
<td>Not specified, but see RHPA s 36(1)</td>
<td>Good faith (s 85.6)</td>
<td>Yes; $25,000 (1st), $50,000 (subsequent) (s 93(2))</td>
</tr>
<tr>
<td><strong>Legal Aid Services Act, 1998</strong>, SO 1998, c 26, s 43(2)</td>
<td>Legal aid eligibility fraud</td>
<td>Lawyers</td>
<td>“anything which indicates… that the applicant may have”</td>
<td>Legal Aid Ontario or an area director</td>
<td>[Not indicated]</td>
<td>“forthwith”</td>
<td>[not indicated]</td>
<td>[not indicated]</td>
<td>No</td>
</tr>
<tr>
<td><strong>Commitment to the Future of Medicare Act</strong>, 2004, SO 2004, c 5, s 17</td>
<td>Paid queue-jumping (3-part definition in s 17(1))</td>
<td>Prescribed (s 17(2); O Reg 288/04, s 7(1)): Physicians Nurses (extended) Podiatrists Midwives Optometrists Dentists</td>
<td>“reason to believe… has occurred” (s 17(2))</td>
<td>The General Manager (appointed under the Health Insurance Act) (s 17(2))</td>
<td>“the matter” (s 17(2))</td>
<td>“promptly” (s 17(2))</td>
<td>Not solicitor-client privilege (s 17(7))</td>
<td>“unless he or she acts maliciously and the information on which the report is based is not true” (s 17(4))</td>
<td>Yes (s 19(1)); $1,000; $25,000 (corporation) (ss 19(3), (4))</td>
</tr>
<tr>
<td><strong>Mandatory Gunshot Wounds Reporting Act</strong>, 2005, SO 2005, c 9, s 2</td>
<td>Gunshot wounds (s 2(1))</td>
<td>Facility (Hospital (under Public Hospitals Act) + Prescribed (none)) (s 2(1))</td>
<td>“that treats a person for a gunshot wound” (s 2(1))</td>
<td>The local police force (s 2(1))</td>
<td>“the fact that a person is being treated for a gunshot wound, the person’s name, if known, and the name and location of the facility” (s 2(1))</td>
<td>“as soon as it is reasonably practicable to do so without interfering with the person’s treatment or disrupting the regular activities of the facility” (s 2(2))</td>
<td>[not indicated]</td>
<td>Good faith (s 4)</td>
<td>No</td>
</tr>
<tr>
<td>Statute (current)</td>
<td>Reportable occurrence</td>
<td>Professions</td>
<td>Degree of certainty</td>
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<tr>
<td>Ontario Society for the Prevention of Cruelty to Animals Act, RSO 1990, c O.36, s 11.3</td>
<td>Animal abuse and neglect</td>
<td>Veterinarians</td>
<td>“reasonable grounds to believe… has been or is being”</td>
<td>Inspector or agent of the Ontario Society for the Prevention of Cruelty to Animals</td>
<td>“his or her belief” (s 11.3) + Prescribed (none) (s 22(2)(c))</td>
<td>[not specified]</td>
<td>[not specified]</td>
<td>Good faith (s 19); offence for knowingly making a false report (s 18.1(1)(c))</td>
<td>No</td>
</tr>
<tr>
<td>Animal Health Act, SO 2009, c 31, s 9</td>
<td>Animal health events (“any incident or finding… prescribed” (s 9), O Reg 277/12 s 17 multi-part definition)</td>
<td>Veterinarians</td>
<td>“incident or finding” (s 9); “finding” (O Reg 277/12, s 17)</td>
<td>Chief Veterinarian for Ontario or Prescribed (s 9): Ministry’s Agricultural Information Contact Centre (O Reg 277/12, s 18(2))</td>
<td>All relevant information (O Reg 277/12, s 18(1))</td>
<td>Immediately (O Reg 277/12, s 18(1))</td>
<td>[not specified]</td>
<td>Good faith (s 11(1))</td>
<td>Yes (s 48(2)); $1,000-$1,5000 (1st), $2,000-$30,000 +/- 12 mos (subsequent); $1,000-$30,000 (first), $2,000-$60,000 (subsequent) (corporation) (ss 49(1), (2))</td>
</tr>
</tbody>
</table>
example, the *Mandatory Gunshot Wounds Reporting Act* requires a report to be made when the facility “treats a person for a gunshot wound” – and not when the facility treats a person for a wound and there is a reasonable suspicion that the wound is or may be a gunshot wound.24

Aside from the triggering threshold, several other features are important. The agency to which the report is made typically has specialized expertise and is rarely the police,25 although the police may become involved downstream. The timeliness of reporting tends to be immediate, although the precise language varies. The immunity is rarely absolute, and tends to require good faith and sometimes reasonable grounds as well.26 Most importantly, the scope of any mandatory reporting law derives from the definition of the reportable occurrence. For example, how does one define a child in need of protection?27 Ontario’s *Child Welfare Act* initially required reporting of “the abandonment, desertion, physical ill-treatment or need for protection of a child”.28 The current version of the provision encompasses physical harm, emotional harm, sexual abuse, the risk of harm or abuse, and parental refusal to consent to necessary medical treatment.29 The definitions in some US states are broader and more controversial. Some states include prenatal drug use as child abuse.30 In some states, any sexual activity by minors (as indicated, for example, by pregnancy) makes them in need of protection – which can allow

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24 *Mandatory Gunshot Wounds Reporting Act*, 2005, SO 2005, c 9, s 2 [*MGWRA*].

25 Mandatory gunshot wound (and stab wound) reporting laws are unique in this sense, at least in Canada. See e.g. Martin, “Adoption”, *supra* note 10 at 187.

26 See e.g. *CFSA*, *supra* note 11, s 72(7) (unless “maliciously or without reasonable grounds for the suspicion”); *HPPA*, *supra* note 20, s 95(4) (good faith).

27 For a detailed review of the definition in Alberta, see Wayne N Renke, “The Mandatory Reporting of Child Abuse under the *Child Welfare Act*” (1999) 7 Health LJ 91 at 113-115 [Renke, “Child Abuse”]. See also Coughlan et al, *supra* note 7 at 61, though writing in the context of elder abuse: reporting of abuse assumes “that ‘abuse’ is unambiguous: not simply that it is possible to tell what the cause of an injury is, but also that it is generally agreed what type of behaviour constitutes being abusive”. And see also 62: “There is good reason… to dispute the assumption that the definition of abuse is widely agreed upon.”


29 *CFSA*, *supra* note 11, s 72(1).

prosecutions of abortion clinics for failing to report their minor clients.  

Similarly, in states where elder abuse is reportable, there is some question as to whether financial abuse should qualify. These definitional questions go to the heart of any mandatory reporting law.

Mandatory reporting laws, in order to achieve their purpose, may also exclude from the definition certain subcategories of the reportable occurrence. For example, all of the Canadian stab wound reporting laws provide exemptions for self-inflicted wounds, and some provide exemptions for accidental wounds. The absence of such exemptions to the reporting of self-inflicted gunshot wounds has been criticized. Similarly, the Ontario Health Professions Procedural Code, which requires health professionals to report sexual abuse of a patient by another health professional, defines sexual abuse as occurring when a professional engages in “sexual intercourse or other forms of physical sexual relations”, or touching, behaviour, or remarks “of a sexual nature” with a patient. However, the Code clarifies that “‘sexual nature’ does not include touching, behaviour or remarks of a clinical nature appropriate to the service provided”. Because the definition of sexual abuse included sexual relations with a patient, any health professional providing treatment to her or his spouse had sexually abused the spouse; thus,

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33 See Martin, “Adoption”, supra note 10 at 212. See e.g. Gunshot and Stab Wound Reporting Act, SNL 2011, c G-7.1, s 2(d): “In this Act... (d) ’stab wound’ means (i) a wound caused by a knife or other sharp or pointed instrument, or (ii) another type or class of wound prescribed in the regulations but does not include a stab wound reasonably believed to be self-inflicted or unintentionally inflicted.” [Newfoundland Act].


35 HPPC, supra note 21, s 1(3). See Anne L Mactavish, “Mandatory Reporting of Sexual Abuse under the Regulated Health Professions Act” (1994) 14 Health L. Can 89 at 89-90.

36 HPPC, ibid, s 1(4). Mactavish notes that the absence of such a provision from the original bill was problematic: ibid at 89-90.
any other professionals aware of that treatment were required to report the abuse.37 In November 2013, this definition of sexual abuse was amended to allow exemptions for professionals treating their spouses.38 These exceptions reinforce the importance of definitions in mandatory reporting laws.

Ancillary provisions on good-faith immunity are also noteworthy. I have argued elsewhere that good-faith immunity is inappropriate for professionals, and that instead the typical professional standard of care – “that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing” – should apply when professionals are required to perform functions in their professional capacity and applying their professional skills.39 While my focus was on “government physicians”, by which I meant physicians employed by government outside the physician-patient relationship such as coroners and medical officers of health, the point applies similarly to professionals acting pursuant to mandatory reporting laws. I emphasize a passage from a Superior Court decision on the scope of the good-faith immunity provision on the reporting of reportable diseases under the Ontario Health Protection and Promotion Act:

I do not find in these provisions, or in the scheme of HPPA as a whole, any implication of a legislative intention to relieve physicians and hospitals of liability for negligence in the event that, through a want of reasonable care, they fail to diagnose and report a case of TB in a timely manner.40


38 HPPC, supra note 21, ss 85.2(5), (6), as added by Regulated Health Professions Amendment Act (Spousal Exception), 2013, SO 2013, c 9, s 1(1). See Blackwell, ibid. The exemption is up to each regulatory college: HPPC, ss 1(5), 95(1)(a).


As Cullity J indicates here, liability under mandatory reporting laws can particularly become an issue where the dispute is over a failure to report as opposed to the making of a report.\textsuperscript{41} (But there is also literature on liability over unfounded reports.\textsuperscript{42})

There are a few elements that are typically absent from mandatory reporting laws. While there is usually an offence provision for failure to report, and a good-faith or reasonable-grounds requirement for immunity,\textsuperscript{43} rarely do false reports constitute an offence.\textsuperscript{44} Failure to report is typically punishable by fine but not by imprisonment. The legislation tends to be silent on whether professionals may or must inform clients of their reporting obligations in advance (usually termed “forewarning”) or notify clients that they will be making a report or have made a...
report (which I will refer to as “notification”). Where notification is before the report is made, the client may have the opportunity to argue against reporting.

When considered as a whole, these structural features demonstrate a preference for false positives over false negatives. The deliberately qualified triggering threshold, the presence of an offence provision for failure to report but not for false reports, and the good-faith immunity all reinforce the screening model: professionals identify possible occurrences, and a specialized state agency investigates to confirm those occurrences and intervene as appropriate.

2.2 Changing the structure: modifications to the template

There are some existing modifications to this template. I will refer back to these modifications in subsequent chapters.

2.2.1 Discretionary reporting

The most significant modification to the template is to make reporting discretionary instead of mandatory. For example, under 2015 amendments to the Ontario Highway Traffic Act, reporting of prescribed conditions is mandatory and reporting of any other conditions is discretionary.

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45 But see HPPC, supra note 21, s 85.1(3): “If a member is required to file a report because of reasonable grounds obtained from one of the member’s patients, the member shall use his or her best efforts to advise the patient of the requirement to file the report before doing so.” See esp Wesley B Crenshaw & James W Lichtenberg, “Child Abuse and the Limits of Confidentiality: Forewarning Practices” (1993) 11:2 Behavioral Sciences & L 181 at 184: “there are two distinct levels of warning which may be provided to the client: (a) Forewarning, which takes place prior to therapist suspicion or client disclosure of abuse; and (b) Informing, which takes place after therapist suspicion or client disclosure but prior to the filing of a report.”

46 This kind of notification, with the possibility for the professional reconsidering the plan to report, seems possible from Crenshaw & Lichtenberg, ibid at 184, but such reconsideration seems unlikely assuming the professional complies with the law: “It is possible that a warning upon suspicion would prevent clients from making a further disclosure or allow them to offer clarification to alleviate the suspicion. However, if the ‘threshold of suspicion’ is sufficient to inform the client, it is also likely to be sufficient for a report. If the client cannot reduce the MHP’s [mental health provider’s] suspicion after being informed, then a report is legally required and the client can only be informed of an irreversible outcome.”

47 HTA, supra note 10, s 203, as amended by Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer, supra note 20, s 55. (This amendment is not yet in force at the time of writing.) Section 203(1) provides for
Under this modification, the professional who chooses to report still enjoys immunity for reporting. As I will discuss in further chapters,\(^48\) this modification leads to uncertainty for the client – whether or not a report is made in any instance depends on how each individual professional exercises that discretion. At this point, I note that this uncertainty appears unfair to clients, because the impact on the client depends on how the individual professional chooses to apply his or her discretion.

### 2.2.2 Anonymized reporting

Another existing modification is to omit the client’s name from the report – i.e. anonymizing reporting – or to include the name only with the client’s permission.\(^49\) Indeed, the most controversial issue around the content of a report is whether the affected individual must be named. The strongest example of this controversy is HIV-AIDS reporting, particularly during earlier times when the disease was poorly understood and treatments were limited.\(^50\) Ontario, for example, provides some exemptions to named reporting when HIV testing is performed in mandatory reporting: “Every prescribed person shall report to the Registrar every person who is at least 16 years old who, in the opinion of the prescribed person, has or appears to have a prescribed medical condition, functional impairment or visual impairment.” In contrast, s 203(2) provides for discretionary reporting: “A prescribed person may report to the Registrar a person who is at least 16 years old who, in the opinion of the prescribed person, has or appears to have a medical condition, functional impairment or visual impairment that may make it dangerous for the person to operate a motor vehicle.” Prior to the amendments, ss 203 and 204 required physicians and optometrists to report a patient “suffering from a condition that may make it dangerous for the person to operate a motor vehicle” and “suffering from an eye condition that may make it dangerous for the person to operate a motor vehicle”, respectively, without specifying a list of such conditions.

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\(^{48}\) See Chapter 2, under heading 11.1; Chapter 3, under heading 6.1.1; Chapter 4, under heading 9.1.2; Chapter 6, under heading 3.6.

\(^{49}\) *HPPC, supra* note 21, s 85.3(4): “The name of a patient who may have been sexually abused must not be included in a report unless the patient, or if the patient is incapable, the patient’s representative, consents in writing to the inclusion of the patient’s name.”

specified clinics. As I will discuss in the following chapters, anonymization drastically reduces the impact on the privacy interest, but it also reduces the utility of the reports.

2.2.3 Imposing the reporting obligation on the institution instead of the professional

The template may also be modified by placing the reporting obligation not on the professional but on the institution in which the professional practices, such as a hospital. This modification may be intended to reduce the impact on the professional-client relationship of trust. For example, the Ontario legislation on mandatory reporting of gunshot wounds requires the “facility”, not physicians or a larger class of health professionals, to report. When the bill was introduced, the Minister of Community Safety and Correctional Services stated that “the legislation would not make it mandatory for family physicians to report gunshot wound patients to police, thus maintaining the integrity of the doctor-patient relationship.” (This statement, while technically true, is remarkably misleading: while the Act defined “facility” to mean hospitals, it also allowed other places – explicitly including health clinics and “a medical doctor’s office” – to be prescribed as “facilities” by regulation.) This approach was followed by all other provinces and the one territory that adopted mandatory reporting of gunshot and/or stab

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51 Reports, RRO 1990, Reg 569, s 5.1.
52 See Chapter 2, under heading 11.2; Chapter 3, notes 775 to 780 and accompanying text; Chapter 4, note 969 and accompanying text; Chapter 6, under heading 3.6.
53 MGWRA, supra note 24, s 2.
54 Ibid, s 2(1). See Martin, “Adoption”, supra note 10 at 176.
56 MGWRA, supra note 24, ss 1, 5(a)-(c). See in contrast e.g. Gunshot and Stab Wound Disclosure Act, SBC 2010, c 7, s 1, where the definition in the statute itself includes a physician’s office: “‘health care facility’ means (a) a facility operated by a regional health board designated under the Health Authorities Act, (b) an organization or institution that provides health care services, (c) a clinic that provides health care services, (d) the office of a medical practitioner, or (e) a prescribed facility” [BC Act].
wounds, although some differed in their definitions of "facility" or "institution", and some also required paramedics to report.\footnote{See e.g. the submissions of the Ontario College of Family Physicians on mandatory reporting of sexual abuse by health professionals, proposing an exemption for psychotherapists and psychiatrists: “We also strongly believe that there must be a mechanism developed within the legislation to enable psychotherapists and psychiatrists to be exempt from mandatory reporting. To do otherwise might result in those providers of health care who recognize that they do have a very serious problem not to seek treatment. Once again, the need for this exemption recognizes the painful dilemma with which one is faced in attempting to balance compelling but none the less competing interests. The philosophy of zero tolerance tips the scales in favour of the need for this exemption.” (Ontario, Legislative Assembly, Standing Committee on Social Development, Official Report of Debates (Hansard), 35th Parl, 3d Sess, No S-26 (6 December 1993) at S-672 (Cheryl Katz).) See also e.g. David J Agatstein, “Child Abuse Reporting in New York State: The Dilemma of the Mental Health Professional” (1989) 9 J National Assoc Administrative L Judges 122. For a more specific (and bizarre) exemption proposal, i.e. where the patient admits to incest with a}

It seems unlikely that such a modification will indeed protect the professional-client relationship. If all practice locations are included – for example, not only hospitals but also clinics and physicians’ offices – there is no real distinction between the professional and the institution. However, even where reporting is only mandatory for some practice locations – for example, hospitals but not physicians’ offices – it is not clear that the distinction will be meaningful. For clients within a facility, such as the patients in the emergency department of a hospital, there is no meaningful distinction between the facility and the professionals practicing in it. No matter who actually makes the report to the police on behalf of the institution, the reported information comes from the professionals. Fundamentally, this modification is merely a shell game, hanging on an arbitrary distinction between the professional and the institution in which he or she practices.

If the actual intent is to exempt a particular specialty or other subclass of professionals, a more transparent approach would be do so explicitly. For example, psychiatrists, psychologists, and psychotherapists have sometimes argued that the level of trust and honesty necessary to successful treatment justifies exempting them from mandatory reporting laws.\footnote{See e.g. the submissions of the Ontario College of Family Physicians on mandatory reporting of sexual abuse by health professionals, proposing an exemption for psychotherapists and psychiatrists: “We also strongly believe that there must be a mechanism developed within the legislation to enable psychotherapists and psychiatrists to be exempt from mandatory reporting. To do otherwise might result in those providers of health care who recognize that they do have a very serious problem not to seek treatment. Once again, the need for this exemption recognizes the painful dilemma with which one is faced in attempting to balance compelling but none the less competing interests. The philosophy of zero tolerance tips the scales in favour of the need for this exemption.” (Ontario, Legislative Assembly, Standing Committee on Social Development, Official Report of Debates (Hansard), 35th Parl, 3d Sess, No S-26 (6 December 1993) at S-672 (Cheryl Katz).) See also e.g. David J Agatstein, “Child Abuse Reporting in New York State: The Dilemma of the Mental Health Professional” (1989) 9 J National Assoc Administrative L Judges 122. For a more specific (and bizarre) exemption proposal, i.e. where the patient admits to incest with a}
of the spectrum, the relationship formed with emergency physicians may be transient and involve less trust, and thus may be less susceptible to harm.59

2.2.4 No offence provision for non-compliance

Another possible modification to the template is to omit the offence provision for non-compliance.60 Like the modification placing the reporting obligation on the facility instead of the professional, the no-offence modification is a feature of Ontario’s mandatory gunshot wound reporting law and was followed by all other provinces and the Northwest Territories.61 One opposition legislator in Ontario was adamant that the absence of an offence provision for failure to report makes a mandatory reporting law meaningless:

[W]hen you've got a statutory obligation, there has to be a consequence for not complying with it; otherwise, it's merely advisory. Where is the penalty clause for a facility that doesn’t report? There is none…. What kind of silly charade is this?.... You don't have a right if you are given rights that don't have remedies, and you don’t have an obligation if an obligation is imposed upon you without a consequence for not fulfilling the obligation. This is a sham…. there's nothing on

59 See e.g. Coughlan et al, supra note 7 at 48 (footnotes omitted): “it appears that not all professionals face the same dilemma in considering whether to report: reluctance might depend on the nature of the relationship between the patient and the health professional. Physicians report very few cases of abuse, while emergency room staff have a very high rate of reporting neglect. This difference might be because emergency room staff are less likely to have a long term relationship with the patient, and therefore do not feel as great a dilemma due to confidentiality.” See also e.g. Elizabeth Anderson et al, “Consequences and Dilemmas in Therapeutic Relationships with Families Resulting from Mandatory Reporting Legislation” (1992) 14:2-3 Law & Pol’y 241 at 242: “The reporting law was based on the model of the emergency room physician who usually has little continuing relationship with a patient.” [Referring to American child protection reporting statutes of the 1980s.]

60 Note that it is the presence or absence of an offence provision, not a penalty provision, that is meaningful in this context. Where a mandatory reporting law creates an offence for non-compliance, but does not specify the penalty for that offence, a residual penalty in other legislation will typically apply. See e.g. Provincial Offences Act, RSO 1990, c P.33, s 61: “Except where otherwise expressly provided by law, every person who is convicted of an offence is liable to a fine of not more than $5,000.”

61 MGWRA, supra note 24; Martin, “Adoption”, supra note 10 at 177, n 5. Note that the CFSA reporting requirement for children in need of protection has an offence provision applicable only to professionals, not to the general public. That is, in regard to the general public, there is no offence provision for non-compliance.
the bill that makes it mandatory to report one of these gunshot wounds… This bill isn’t worth the paper it’s written on.62

In response, government legislators essentially stated that the government trusts hospitals to comply: “Well, we’re not dealing with rogue facilities here – the medical institutions. We’re dealing with institutions that will follow the rules”;63 “When we set out a law that is aimed at our public sector partners – in this case, primarily aimed at public hospitals – we assume that other public institutions comply with the law and we do not have to set out draconian penalties in law.”64 These responses do not explain why mandatory reporting laws that target individual professionals require offence provisions, but those targeting institutions do not. In contrast, Coughlan et al appear to suggest that the presence of an offence provision for non-compliance serves an expressive function about the importance of reporting (beyond the expressive function of a legal obligation not backed by an offence provision): “the issue is not simply whether reporting suspected abuse is the right thing to do. The question is whether it is so right that the failure to do so should be punishable by the state”.65

2.2.5 Substituting retention for reporting

Another variation is to the template is to require professionals not to report immediately, but instead to record certain information and retain that information for inspection, if requested, by a state agency.66 While it is not a certainty that the agency will demand the information, such a demand is a possibility.


65 Coughlan et al, supra note 7 at 67 [emphasis in original].

66 See e.g. Canada (Attorney General) v Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 SCR 401 [Canada v FLSC], challenging provisions of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17, as they applied to lawyers.
2.2.6 Other modifications to the template

There are several other modifications to the template that I will propose in the following chapters. For clarity, I note them here: restricting reporting to situations where there is a risk of future harm; restricting reporting to clients lacking capacity; increasing the triggering threshold; adding oversight mechanisms; and adding limitations on use.

3 The historical, current, and potential scopes of mandatory reporting laws

There are five core mandatory reporting laws that have been adopted in most provinces: diseases, children in need of protection, conditions affecting the ability to drive, gunshot wounds, and animal abuse. The historical archetype for all mandatory reporting laws is the reporting of infectious diseases to public health authorities by physicians. This provision first appeared in Ontario law in 1884.\(^{67}\) (In some provinces, there is an equivalent obligation on school principals.\(^{68}\)) These provisions now include some non-communicable diseases, such as botulism and tetanus.\(^{69}\) Related provisions require reporting of a patient’s non-compliance with treatment for a communicable disease, dog bites (because of the risk of rabies), and adverse effects of vaccinations.\(^{70}\) Beginning in the 1960s, mandatory reporting laws were adopted for children in need of protection, including neglect and abuse,\(^{71}\) and for persons with conditions affecting the

\(^{67}\) *The Public Health Act, 1884*, SO 47 V, c 38, s 49; now *HPA*, supra note 20, s 25.

\(^{68}\) See e.g. *HPA*, ibid, s 28 (communicable diseases only).

\(^{69}\) See e.g. *HPA*, ibid, ss 1(1) (definition of “reportable disease”), 25; *Specification of Reportable Diseases*, O Reg 559/91, s 1.

\(^{70}\) Noncompliance: See e.g. *HPA*, ibid, s 34. Dog bites: See e.g. *Communicable Diseases – General*, RRO 1990, Reg 557, s 2 (1). Vaccines: See e.g. *HPA*, s 38(3). At the federal level, there is a similar mandatory reporting law on adverse effects of prescription drugs: see *Food and Drugs Act*, RSC 1985, c F-27, s 21.8, as amended by *Protecting Canadians from Unsafe Drugs Act (Vanessa’s Law)*, SC 2014, c 24, s 5: “A prescribed health care institution shall provide the Minister, within the prescribed time and in the prescribed manner, with prescribed information that is in its control about a serious adverse drug reaction that involves a therapeutic product or a medical device incident that involves a therapeutic product.”

\(^{71}\) See e.g. *The Child Welfare Act, 1965*, SO 1965, c 14, s 41; now *CFSA*, supra note 11, s 72.
ability to drive safely.72 (Equivalent provisions at the federal level apply to persons with conditions that may affect maritime, railroad, and air safety – which raise parallel concerns to driving safety, but are squarely within federal jurisdiction.73) The last two of the five core laws came in the early 2000s: the reporting of gunshot wounds by hospitals,74 and of animal abuse and neglect by veterinarians.75

These “core” mandatory reporting laws, among others, tend to originate in Ontario and then be emulated in other provinces. For example, gunshot wound reporting was adopted by Ontario in 2005, by three other provinces in 2007, by one province in each of the years 2008 through 2011, and in 2013 by one territory.76 Similarly, animal abuse reporting was adopted by both Ontario and Nova Scotia in 2008, and then by another province each year from 2009 through 2011, and by Quebec in 2015.77

Other mandatory reporting laws have been adopted in a smaller number of provinces. Adults in need of protection must be reported in Newfoundland, Nova Scotia, and PEI.78
has adult protection legislation that includes only discretionary, not mandatory, reporting.\(^{79}\) Ontario, in contrast, restricted mandatory reporting to patients in retirement and long-term care facilities.\(^{80}\) Stab wounds must be reported in five of the provinces and the one territory that have adopted mandatory gunshot wound reporting laws – in BC, the prairie provinces, and Newfoundland and Labrador, as well as the Northwest Territories but not in Ontario, Nova Scotia, and Quebec.\(^{81}\) Various specific provisions related to the functioning of the health care and health insurance systems, requiring health professionals to report medicare fraud\(^{82}\) or payment for preferential access to publicly-insured health services,\(^{83}\) and lawyers to report legal aid eligibility fraud.\(^{84}\) Similarly, health professionals may be required to report sexual abuse of a patient by another health professional.\(^{85}\) In addition to animal abuse, veterinarians may be required to report animal “health events”.\(^{86}\)

Mandatory reporting laws may also target dangers such as terrorism. For example, the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* requires financial intermediaries to collect and retain information about the client, and to produce that information on demand to FINTRAC, a federal agency.\(^{87}\) The Supreme Court in *Canada (Attorney General) v Federation Family Services Act*, SNB 1980, c F-2.2, s 35.1. See also discretionary reporting in *Adult Guardianship Act*, RSBC 1996, c 6, s 46.

\(^{79}\) *Family Services Act*, SNB 1980, c F-2.2, s 35.1. See also discretionary reporting in *Adult Guardianship Act*, RSBC 1996, c 6, s 46.

\(^{80}\) See currently *Long-Term Care Homes Act*, 2007, SO 2007, c 8, s 24(4) [*LCHA*]; *Retirement Homes Act*, 2010, SO 2010, c 11, s 75(3) [*RHA*]. See also *Protection for Persons in Care Act*, SA 2009, c P-29.1, s 7; *Protection for Persons in Care Act*, SM 2000, c 12, CCSM c P144, s 3.

\(^{81}\) Saskatchewan *Act*, supra note 57; Manitoba *Act*, supra note 57; Alberta *Act*, supra note 57; BC *Act*, supra note 56; Newfoundland *Act*, supra note 33; NWT *Act*, supra note 57.

\(^{82}\) See e.g. *Health Insurance Act*, RSO 1990, c H.6, s 43.1 [*HIA*], as added by the *Expenditure Control Plan Statute Law, 1993*, SO 1993, c 32, s 2(8). This obligation was originally limited primarily to physicians (and employees and agents of physicians and hospitals): *Mandatory and Voluntary Reporting*, O Reg 590/94, s 1; however, in 1998 it was extended to include other professionals such as chiropractors, midwives, optometrists, and dentists: *Health Fraud*, O Reg 173/98, s 1.

\(^{83}\) See e.g. *Commitment to the Future of Medicare Act*, 2004, SO 2004, c 5, s 17 [*CFMA*]; *General*, O Reg 288/04, s 7.

\(^{84}\) See e.g. *Legal Aid Services Act*, 1998, SO 1998, c 26, s 43(2) [*LASA*].

\(^{85}\) See e.g. *HPPC*, supra note 21, s 85.1. Section 85.1 was added by the *Regulated Health Professions Amendment Act*, 1993, SO 1993, c 37, s 23. See Mactavish, supra note 35.

\(^{86}\) See e.g. *Animal Health Act*, 2009, SO 2009, c 31, s 9 [*AHA*]. At the federal level, see similarly *Health of Animals Act*, SC 1990, c 21, s 5(2) (“an animal is affected or contaminated by a reportable disease or toxic substance”).

\(^{87}\) *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, supra note 66.
of Law Societies of Canada held that this law was unconstitutional insofar as it applied to lawyers.\(^{88}\)

There is substantial growth potential for mandatory reporting laws in the future. American states, after which these Canadian laws are typically modeled, have gone much further – providing plenty of ideas for Canadian legislators. Many states have legislated mandatory reporting of some or all injuries associated with violent crime, i.e. not just gunshot wounds and stab wounds, but burns,\(^{89}\) injuries that may have been “inflicted while the person was making or using a destructive device”,\(^{90}\) or while using fireworks or pyrotechnics,\(^{91}\) or even any “wound or injury of violence which appears to have been received in connection with the commission of a criminal offense”\(^{92}\). Several states have laws specifically requiring the reporting of spousal abuse or elder abuse.\(^{93}\) Others require the reporting of impaired driving.\(^{94}\)

Proposals for new mandatory reporting laws are not uncommon in Canada or the US. For example, John Carlisle noted in 2004 that “there has been a proposal around in Ontario for a number of years put forward by fire prevention authorities to require physicians to report burns so that persons attempting to commit arson could be caught.”\(^{95}\) Mandatory reporting by physicians of impaired driving has also been proposed in Canada.\(^{96}\) American proposals would go further. For example, a 2011 Arizona bill would have required hospitals to report

\(^{88}\) Canada v FLSC, supra note 66.

\(^{89}\) See e.g. Ind Code § 35-47-7-3.

\(^{90}\) See e.g. Ind Code § 35-47-7-5.

\(^{91}\) See e.g. Ind Code § 35-47-7-7.

\(^{92}\) Neb Rev Stat § 28-902. See also NH Rev Stat § 631:6 – “gunshot wound or for any other injury he believes to have been caused by a criminal act”.

\(^{93}\) See e.g. Cal Penal Code § 11160(a)(2), on reporting injuries from “assaultive or abusive conduct”, which under (d)(18) “includes…[a]buse of spouse or cohabitant”.

\(^{94}\) See e.g. Criddle, Bonnono & Shapiro, supra note 4 at 201, Table 1 (including Hawaii, Illinois, Pennsylvania, and Vermont). See e.g. 625 Ill Comp Stat 5/11-501.4-1(a) (2016).

\(^{95}\) John R Carlisle, “Mandatory Reporting of Gunshot Wounds to Police... Not as Simple as it Seems” (2004) 25:1 Health L Can 1 at 5.

\(^{96}\) Belchetz, supra note 4.
undocumented immigrants to immigration authorities or police. More recently, mandatory reporting laws have been suggested as a response to transplant tourism – i.e., physicians or hospitals could be required to report patients who had undergone transplants abroad.

Given the steady, ad hoc growth of mandatory reporting laws, and the absence of any clear underlying rationale as to which occurrences must be reported, there are no obvious limits on future growth of these laws. In this context, it seems reasonable to expect that any new mandatory reporting law may support, or at least make it difficult to oppose, a whole range of others that are superficially similar – that is, that a “slippery slope” may result. Without a clear rationale, the stopping point seems indeterminate.

4 The purposes of mandatory reporting laws

Most mandatory reporting laws are generally understood to fall into two main categories based on their purpose: public health & safety or protection of the vulnerable. All five “core” laws

97 US, SB 1405, An Act Amending Title 36, Chapter 4, Article 1, Arizona Revised Statutes, by Adding Section 36-415; Relating to Health Care Institutions, 50th Leg, 1st Reg Sess, Arz, 2011.


99 See e.g. Pauls & Downie, “Shooting Ourselves”, supra note 34 at 1255, arguing that mandatory gunshot wound reporting could lead to “mandatory reporting of domestic violence, stabbings, assaults and illicit drug use.” See also e.g. Carlisle, supra note 95 at 5. These sources are both cited in Martin, “Adoption”, supra note 10 at 180, n 18.

100 See Coughlan et al, supra note 7 at 56, who divide mandatory reporting laws into two groups, one being about “a threat to the public at large…. some potential ongoing danger to the general public” (e.g. diseases, driving safety, gunshot wounds) and one being about a specific vulnerable person. See also e.g. Carlisle, ibid at 2, describing then-existing mandatory reporting laws as being “to protect society or a vulnerable group”. See also Pauls & Downie, “Shooting Ourselves”, ibid at 1255, describing existing mandatory reporting laws as being for the protection of “a vulnerable group” or aimed at “a clear risk to others”. See also e.g. Bessner, supra note 22 at 280-81: “The fundamental purposes of child-reporting legislation are to halt and to prevent acts of abuse from being perpetrated on children…. The prime objective of the legal duty to report is to ensure that governmental authorities intervene at an early stage to either prevent or at least minimize the damage perpetrated on vulnerable children.” See also e.g. Lorraine E Ferris & Carol J Strike, “Mandatory Duty to Report Spousal Assault Victims: Medico-legal Issues, Women’s Health and Physicians” (1999) 19:3 Health L Can 65 at 69, characterizing the purpose of existing mandatory reporting laws on child abuse, disease, and driving safety as being “to protect the public from harm”. I acknowledge that some of these laws may ostensibly protect the client as well as the public at large. For example, a driver who has health condition affecting the ability to drive may endanger himself or herself, as well as passengers, pedestrians, and people in other vehicles.
fall into one of these categories. Some mandatory reporting laws, however, do not appear to fit within these main categories of purposes.

4.1 Public health & safety

The archetype for the purpose of public health & safety is the mandatory reporting of communicable diseases. The information reported is used to track and intervene to reduce the spread.101 The extension to non-communicable diseases recognizes that even if an affected person is not a source of the disease in themselves, their affliction may indicate a source of danger that may be affecting other persons and require intervention.102 (Non-compliance with treatment for communicable disease raises a similar danger of transmission, and dog bites and side effects of vaccines are similarly evidence of potential danger.) Likewise, mandatory reporting of conditions affecting the ability to drive was part of a larger project aimed at increasing highway safety and reducing injury. When this legislation was introduced in 1967, the Minister of Transport referred to the bill as “representing some significant progress in safety legislation by providing new standards for vehicles and equipment or by correcting some potentially dangerous situations”, and referred to the reporting requirement alongside other safety measures such as temporary speed limits around road construction and brake systems on motorcycles.103 Similarly, mandatory reporting of gunshot wounds was – at least nominally –

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101 See e.g. AC Jost, “The Notification of Communicable Disease” (1925) 15:3 Can Medical Assoc J 278 at 278: “No health department, federal or local, can effectively prevent or control a disease, without knowing when, where, or under what circumstances cases are occurring…. The knowledge sought after is vital to any organization whose duty is the control of disease” [citation omitted].

102 See e.g. Coughlan et al, supra note 7 at 56.

103 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 27th Parl, 5th Sess, No 56 (7 April 1967) at 1882-1883 (Hon Irwin Haskett). See also the debates on the estimates for the Department of Transport later that month, where the Minister cited “the continuing population explosion in vehicles and drivers, the growing volume of traffic, and the corresponding increase in the toll of collisions”, referred to “the continuing challenge to make traffic safer for our citizens” as “one of the most difficult challenges, and one of the most vital, in our society today” and declared that “there is nothing more vital to our modern way of life than an improvement in safety on our highways” (Ontario, Legislative Assembly, House in Committee of Supply, Official Report of Debates (Hansard), 27th Parl, 5th Sess, No 77 (26 April 1967) at 2660-2661, 2671 (Hon Irwin Haskett).)
intended to improve public safety.\textsuperscript{104} Such a purpose is reinforced by the preamble to the corresponding Ontario statute, which states that “gunfire poses serious risks to public safety and that mandatory reporting of gunshot wounds will enable police to take immediate steps to prevent further violence, injury or death.”\textsuperscript{105}

4.2 Protection of the vulnerable

The other core category is the protection of the vulnerable. Whereas public health & safety tend to be limited to physical harm, this category can be much broader. The archetype and historical precedent for this category, the mandatory reporting of children in need of protection,\textsuperscript{106} contemplates not only physical harm, but also sexual and emotional harm, whether from action or inaction (i.e. neglect or “failure to act”).\textsuperscript{107} Another core member of this category is the mandatory reporting by veterinarians of animal abuse or neglect.\textsuperscript{108} This purpose is demonstrated in the preamble of the statute that enacted such a mandatory reporting law in Ontario, which states (among other things), “[t]he people of Ontario and their government… [r]ecognize our responsibility to protect animals in Ontario”.\textsuperscript{109} This category would also include elder abuse and spousal abuse reporting, as well as neglect and abuse of residents of long-term care and retirement homes. For example, in emphasizing the zero-tolerance policy for neglect in the Long-

\textsuperscript{104} I say nominally because, to some extent, legislators intended these laws to be “tough on crime”. See Martin, “Adoption”, supra note 10 at 185-186.

\textsuperscript{105} MGWRA, supra note 24, preamble [emphasis added]. But see Pauls & Downie, “Shooting Ourselves”, supra note 34 at 1255 [emphasis added]: “Impaired drivers represent a clear risk to others, and the removal of their licences should (at least in theory) decrease that risk. Similarly, a patient with a reportable infectious disease poses a direct risk to others, and intervention can mitigate or eliminate the risk. In the case of a gunshot wound, the person being reported may or may not pose a risk to the public. There is no clear intervention that can be undertaken to mitigate or eliminate this undefined, and probably undefinable, risk.” I used this quote in Martin, ibid at 195.

\textsuperscript{106} Coughlan et al, supra note 7, do not explicitly describe child abuse reporting as the archetype for this category of purpose, but they do so implicitly, as at 56-57 they identify it and elder abuse as the only existing members of that category (in Nova Scotia) and argue that any use of this category to protect a vulnerable group analogizes that group to children.

\textsuperscript{107} CFSA, supra note 11, s 72(1).

\textsuperscript{108} OSPCAA, supra note 44, s 11.3.

\textsuperscript{109} PAWA, supra note 75, preamble [emphasis added]. (This is the amending act that added, \textit{inter alia}, s 11.3 to the OSPCAA, ibid.)
Term Care Home Act, 2007, the Minister of Health and Long-Term Care referred to residents as “some of the most vulnerable people in the province”. As with children, abuse in the care-home context goes beyond physical to include sexual and emotional, and indeed even further to verbal and financial. This category also includes mandatory reporting of sexual abuse by health professionals. It is status of the patient within the unequal and fiduciary physician-patient relationship that defines the vulnerability. The term “abuse” implies this vulnerability.

Similarly, in discussing the original bill, the Minister of Health used language of protection and victimization: “the vast majority of health professionals are providing sound, trustworthy and nurturing care, but the government has an obligation to provide protection against the minority who do not. That is why we were here: to look out for the interest of the victims”. Moreover,
the harm contemplated by the definition of “sexual abuse” goes beyond physical to include emotional and psychological.114

4.3 Moral harm

The purposes of some other mandatory reporting laws, as identified by legislators, do not appear to fall into one of these two categories. These other purposes include moral harm or the protection of values, the affordability or “sustainability” of social services, and harm to the economy.

Mandatory reporting of payment for healthcare queue-jumping was explicitly intended to protect fundamental values. The preamble states, among other things, that “Medicare – our system of publicly funded health services – reflects fundamental Canadian values”.115 The Minister of Health and Long-Term Care elaborated on this values premise: “This legislation enshrines into law what Ontarians believe deeply in their hearts: every member of our society has an equal right to quality health care based on need, not income.”116 He further stated that “[t]his bill will preserve the sacred principle that Ontarians should have access to medically necessary health care services based on need, not on ability to pay…. [The bill] must be a living document, but it must also offer enduring protections for our values…. At the end of the day this bill is about values.”117 This values-based approach was reinforced by the characterization of the medicare system in the subsequent decision in Chaoulli v Quebec (Attorney General): “In a public system

114 See HPPC, ibid, s 1(3): “‘sexual abuse’ of a patient by a member means, (a) sexual intercourse or other forms of physical sexual relations between the member and the patient, (b) touching, of a sexual nature, of the patient by the member, or (c) behaviour or remarks of a sexual nature by the member towards the patient.”

115 CFMA, supra note 83, preamble [emphasis added].

116 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 38th Parl, 1st Sess, No 6A (27 November 2003) at 186 (Hon George Smitherman) [emphasis added].

117 Ontario, Legislative Assembly, Standing Committee on Justice and Social Policy, Official Report of Debates (Hansard), 38th Parl, 1st Sess, No J-4 (16 February 2004) at J56, J57, J61 (Hon George Smitherman) [emphasis added].
founded on *the values of equity, solidarity and collective responsibility*, rationing occurs on the basis of clinical need rather than wealth and social status”.

This notion of moral harm should be distinguished from a moral imperative or moral dimension to prevent physical or other concrete harm to vulnerable groups. For example, the adoption of mandatory reporting of animal abuse and neglect was rooted in morality, with the preamble stating (among other things) that “how we treat animals in Ontario helps define our humanity, *morality* and compassion as a society” and the Minister of Community Safety and Correctional Services similarly stating that “[t]he care, love and protection of animals *represents all that is good* about our society.”

### 4.4 Affordability & sustainability of social services

The stated purpose of other mandatory reporting laws is to promote the affordability – sometimes referred to as “sustainability” – of social services. Preventing the unintended use of public funds was the major purpose given for the mandatory reporting of medicare eligibility fraud and legal aid eligibility fraud. (There was also a significant element of morality, with references made to protecting taxpayers from abuse and responding to crime.) Mandatory reporting of medicare eligibility fraud was introduced as part of a larger “expenditure control” plan for the health care system during the recession of the early 1990s. The Minister of Health explained the need to control health care spending by invoking the concept of “sustainability”: “If we keep spending as though the sky were the limit, we will not have a universal health care system to pass on to our children and our children's children, because the system would become unsustainable”.

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118 *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 223, [2005] 1 SCR 791, Binnie and LeBel JJ (dissenting but apparently not on this point) [emphasis added].

119 *PAWA*, supra note 75, preamble (the amending act that added, *inter alia*, s 11.3 to the *OSPCAA*, supra note 44) [emphasis added]; Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 1st Sess, No 39 (5 May 2008) at 1585 (Hon Rick Bartolucci) [emphasis added].

120 *HIA*, supra note 82, s 43.1, as added by the *Expenditure Control Plan Statute Law, 1993*, supra note 82, s 2(8).

121 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl, 3d Sess, No 54A (26 July 1993) at 2755 (Hon Ruth Grier). Similarly, see e.g. comments by a legislator at committee: “In terms of whether or not it's a care issue, perhaps it's not a care qua care issue in the strictest sense, but ultimately, if there is not some effort to reduce what is viewed as a serious problem of fraud, then effectively care will be affected at the end of the day”
committee, when the provisions on health care fraud (including mandatory reporting) were first proposed, the parliamentary assistant explicitly identified the purpose as reducing spending.\(^{122}\) However, he also invoked language of criminality: “Health care fraud is a criminal activity, in my opinion, and I think we have to look at it in that way. To report on criminal activity I think is a public obligation that all of us have together.”\(^{123}\) Similarly, an opposition legislator describing the public perception emphasized the immorality and unfairness of eligibility fraud to “citizens” and “taxpayers”:

> [W]e don't pay our taxes so that Americans or Iranians or anyone else can come to this province and simply get a fraudulent card and bump us out of a lineup for health services and obtain services in this province without ever having contributed or been born in or having been a resident of this province.\(^{124}\)

Similarly, the re-codified mandatory reporting of legal aid eligibility fraud was part of the late 1990s overhaul in the legal aid system, with an emphasis on affordability and taxpayers:\(^{125}\)

> These reforms would ensure that the organization uses its budget to deliver the maximum amount of high-quality service at a cost that taxpayers can afford; in other words, deliver more and better services at costs consistent with its budget.…

\(^{122}\) “We believe these provisions will further assist the government to meet its expenditure control fiscal targets.”: Ontario, Legislative Assembly, Social Development Committee, *Official Report of Debates (Hansard)*, 35th Parl, 3d Sess, No S-16 (19 October 1993) at S-413 (Stephen Owens)).

\(^{123}\) *Ibid* at S-404. As I will discuss below, there is no legal duty to report crime. See notes 155 to 159 and accompanying text, *infra*.


\(^{125}\) *LASA*, *supra* note 84, s 43(2). An equivalent reporting obligation previously existed in regulations. See *General*, O Reg 257/69, s 66, made under *The Legal Aid Act, 1966*, SO 1966, c 80: “Where any circumstance comes to the attention of a solicitor which indicates that his client may not have been entitled to or may no longer be entitled to the certificate under which the solicitor is acting, the solicitor shall forthwith report such circumstance to the area director.” (Continued through *General*, RRO 1990, Reg 710, s 78 (made under the *Legal Aid Act, RSO 1990*, c L.9).)
It ensures that high-quality legal aid services are delivered at a cost that taxpayers can afford.\textsuperscript{126}

Another government legislator specifically invoked sustainability: “People … wanted a system that would have fiscal stability and would be sustainable.”\textsuperscript{127} The same legislator also invoked the concept of abuse of taxpayers, specifically with reference to mandatory reporting: “The taxpayer, I believe, is more than willing to come to the aid of people in our society who need help. Everyone wants to ensure that in our society people who need legal advice have it available to them. But no taxpayer wants to have their support abused”.\textsuperscript{128} Similarly, another legislator invoked criminality and punishment: “Bill 68 recognizes the abuses that have occurred in the past and is being very specific on the offences and consequences.”\textsuperscript{129} This moral dimension fleshes out how costs are to be controlled by identifying the group of persons responsible for inappropriate costs, specifically those who are ineligible due to financial resources (for legal aid) or residency (for medicare).

This concept of affordability and unfairness to citizens was also given as the express purpose of Arizona’s proposed mandatory reporting of immigration status by hospitals:

The reason I wrote this bill everybody is …. [t]he state of Arizona in 2009 spent between seven and eight hundred million dollars, in that one year, on free health care – uncompensated care – for illegals…. \textit{Ladies and gentlemen, the problem is we simply just can’t afford this anymore…. the governor is currently cutting or is proposing to cut approximately 280 thousand people off of our Medicaid system…. Our own citizens cannot get coverage… today.}\textsuperscript{130}

\textsuperscript{126} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 36th Parl, 2d Sess, No 44 (15 October 1998) at 2607 (Gerry Martiniuk) [emphasis added]. See also comments by the Attorney General (Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 36th Parl, 2d Sess, No 69B (14 December 1998) at 4242 (Hon Charles Harnick) [emphasis added]: “Legal aid reform is essential for providing vulnerable Ontarians with access to high-quality legal services. Bill 68 lays the groundwork to meet this need. It would create a new legal aid system well suited to meet the needs of Ontarians into the new millennium; \textit{it would ensure that high-quality legal aid services are delivered at a cost taxpayers can afford}; it would provide the correct model of governance and give a greater role for the public in the management of legal aid services; and it would once again put Ontario at the forefront of the evolution of legal aid systems.”


\textsuperscript{128} \textit{Ibid} at 2612.


\textsuperscript{130} Arizona Senate, Senate Appropriations Committee, 50th Leg, 1st Reg Sess (22 February 2011) (State Senator Steve Smith) [emphasis added]. Note that the Arizona Senate does not publish official transcripts of debates, but
It should be noted, however, that the Arizona proposal was one bill in a larger package of legislative reform targeting undocumented persons, and the debates as a whole emphasized the illegality of illegal immigration and included generalizations about the negative behaviour of illegal immigrants.\footnote{See e.g. US, SB 1309, An Act Amending Title 1, Arizona Revised Statutes, by Adding Chapter 7; Relating to Arizona Citizenship, 50th Leg, 1st Reg Sess, Arz, 2011 [creating Arizona state citizenship, which would not be granted to children of undocumented persons]; US, SB 1407, An Act Amending Title 15, Chapter 2, Article 2, Arizona Revised Statutes, by Adding Section 15-249.02; Relating to the Department of Education, 50th Leg, 1st Reg Sess, Arz, 2011 [requiring the department of education to collect information on undocumented students, and to submit an annual report including “research on the adverse impact of the enrollment of students” who are undocumented, and estimates of the cost for education of non-citizen students and undocumented students]; US, SB 1611, An Act Amending Sections 1-501, 1-502 and 13-2009, Arizona Revised Statutes; Amending Title 13, Chapter 29, Arizona Revised Statutes, by Adding Section 13-2930; Amending Sections 13-3961, 15-828, 15-1445, 15-1626, 23-214, 28-1559, 28-2051, 28-2059, 28-2157, 28-2163 and 28-3304, Arizona Revised Statutes; Amending Title 36, Chapter 12, Article 1, Arizona Revised Statutes, by Adding Section 36-1409.02; Amending Sections 41-1080, 41-1758.01 and 41-1822, Arizona Revised Statutes; Amending Title 41, Arizona Revised Statutes, by Adding Chapter 48; Relating to Unlawfully Present Aliens, 50th Leg, 1st Reg Sess, Arz, 2011 [prohibiting undocumented persons from receiving state services or benefits, or any federal services or benefits administered by the state; prohibiting undocumented persons from enrolling in schools or post-secondary institutions; prohibiting undocumented persons from operating motor vehicles; etc.]; Mark Lacey, “Arizona lawmakers push new round of immigration restrictions” The New York Times (23 Feb 2011), online: <www.nytimes.com/2011/02/24/us/24arizona.html>; Associated Press, “Arizona Senate rejects illegal immigration bills” The Washington Post (17 March 2011), online: <www.washingtonpost.com/wp-dyn/content/article/2011/03/17/AR2011031703443.html>}. It seems doubtful that the costs to government were the sole reason for these proposals. Indeed, the presumptive impact of reporting is incarceration and deportation of the patient, which decreases these costs only indirectly, by preventing future treatment.

4.5 Harm to the economy

Another purpose that legislators give for mandatory reporting laws is to protect the economy, i.e. to prevent damage to sales and prices overall or in a particular industry. Although mandatory reporting of animal diseases and animal health events may appear to be aimed at the risk of physical harm to the general public, whether animal or human, the text of the Animal Health Act, 2009 and the corresponding legislative debates demonstrate that the core purpose of that scheme does post video recordings online. As of the time of writing, the corresponding video is online at <azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=8503>, with the quoted remarks starting at video time 02:53:47 and ending at 02:54:56.

\footnote{See e.g. US, SB 1309, An Act Amending Title 1, Arizona Revised Statutes, by Adding Chapter 7; Relating to Arizona Citizenship, 50th Leg, 1st Reg Sess, Arz, 2011 [creating Arizona state citizenship, which would not be granted to children of undocumented persons]; US, SB 1407, An Act Amending Title 15, Chapter 2, Article 2, Arizona Revised Statutes, by Adding Section 15-249.02; Relating to the Department of Education, 50th Leg, 1st Reg Sess, Arz, 2011 [requiring the department of education to collect information on undocumented students, and to submit an annual report including “research on the adverse impact of the enrollment of students” who are undocumented, and estimates of the cost for education of non-citizen students and undocumented students]; US, SB 1611, An Act Amending Sections 1-501, 1-502 and 13-2009, Arizona Revised Statutes; Amending Title 13, Chapter 29, Arizona Revised Statutes, by Adding Section 13-2930; Amending Sections 13-3961, 15-828, 15-1445, 15-1626, 23-214, 28-1559, 28-2051, 28-2059, 28-2157, 28-2163 and 28-3304, Arizona Revised Statutes; Amending Title 36, Chapter 12, Article 1, Arizona Revised Statutes, by Adding Section 36-1409.02; Amending Sections 41-1080, 41-1758.01 and 41-1822, Arizona Revised Statutes; Amending Title 41, Arizona Revised Statutes, by Adding Chapter 48; Relating to Unlawfully Present Aliens, 50th Leg, 1st Reg Sess, Arz, 2011 [prohibiting undocumented persons from receiving state services or benefits, or any federal services or benefits administered by the state; prohibiting undocumented persons from enrolling in schools or post-secondary institutions; prohibiting undocumented persons from operating motor vehicles; etc.]; Mark Lacey, “Arizona lawmakers push new round of immigration restrictions” The New York Times (23 Feb 2011), online: <www.nytimes.com/2011/02/24/us/24arizona.html>; Associated Press, “Arizona Senate rejects illegal immigration bills” The Washington Post (17 March 2011), online: <www.washingtonpost.com/wp-dyn/content/article/2011/03/17/AR2011031703443.html>.}
is the protection of the agriculture industry and the prevention of harm to the economy. The Act’s purpose section refers to both animal and human health, as well as food safety. On the introduction of the bill, the Minister of Agriculture, Food and Rural Affairs described its purposes similarly, citing a “healthy economy” alongside “healthy animals” and “healthy Ontarians [people]”:

If passed, this bill would improve Ontario’s capacity to protect both animal and human health, address livestock diseases and respond to emergency situations related to animal health.

Ontario’s livestock and poultry sectors generate more than $4.45 billion in farm gate economic activity. These sectors are vital parts of Ontario’s economic prosperity. 

This proposed legislation would help protect our animals against disease, make our agriculture food sector more competitive and also contribute to the good health of all Ontarians. It would provide protections that we need for a healthy economy, healthy animals and healthy Ontarians.

Indeed, the Minister’s later comments not only seemed to emphasize economic protection over the incidental protection of human health, but also explicitly linked the provincial economy with human well-being:

I want to remind you why we have introduced this very important piece of legislation…. the agri-food industry contributes some $30 billion each and every year to the economy in the province of Ontario. In addition to that, this industry employs over 700,000 people…. We have the largest poultry industry, the second-largest swine and dairy industries and the third-largest beef industry in Canada…. The presence of animal disease in any of these sectors can have a very serious consequence on the economic health of the agri-food industry and therefore the economic strength of the province and the very well-being of all Ontarians.

…. We know as well that there is a link between animal health and human health, and protecting our animals can help us better protect the people in our province as well.

132 AHA, supra note 86, s 1.
133 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 39th Parl, 1st Sess, No 170 (5 October 2009) at 7776 (Hon Leona Dombrowsky) [emphasis added].
134 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 39th Parl, 1st Sess, No 174 (19 October 2009) at 7973-7974 (Hon Leona Dombrowsky) [emphasis added].
The Minister’s parliamentary assistant twice put it more plainly: “This bill is about protecting the agriculture industry”;\textsuperscript{135} “The whole purpose of this bill is to confirm that the livestock and poultry industries are vital contributors to Ontario’s economy”.\textsuperscript{136}

5 \hspace{1em} The mechanisms of mandatory reporting laws

Mandatory reporting laws may advance these purposes through several different mechanisms. By mechanism, I mean the manner or means in which the report is used to advance the purpose of the law. The most common and most important mechanism of mandatory reporting laws is intervention. Mandatory reporting laws, particularly those with a purpose of public health & safety or protection of the vulnerable, function primarily by an intervention to decrease the risk.\textsuperscript{137} Thus, where a physician reports to transportation authorities that a patient has a health condition affecting the ability to drive safely, those authorities can investigate and, if necessary, intervene by restricting or revoking the patient’s driver’s license.\textsuperscript{138} Similarly, where a teacher reports that a child is in need of protection, child protection authorities can investigate and, if necessary, intervene by removing the child from the home. There may be criminal charges downstream, but the immediate mechanism is intervention. Likewise, mandatory gunshot wound reporting is ostensibly intended to “enable police to take immediate steps to prevent further violence, injury or death.”\textsuperscript{139} Implicit in these laws, and clearest in the concept of children in

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\item \textsuperscript{135} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 39th Parl, 1st Sess, No 174 (19 October 2009) at 7989 (Rick Johnson).
\item \textsuperscript{136} \textit{Ibid} at 8009. Immediately after this quote, and somewhat confusingly given his “whole purpose” language, Johnson refers to human health: “Protecting livestock and poultry is not just important for the economic well-being of the industry. We know that there’s a link between animal health and human health, and protecting our food animals can help us better protect our people.” (8009).
\item \textsuperscript{137} See e.g. Pauls & Downie, “Shooting Ourselves”, \textit{supra} note 34 at 1255: “Children are a vulnerable group and are usually unable to prevent ongoing abuse without the help of others. Impaired drivers represent a clear risk to others, and the removal of their licences should (at least in theory) decrease that risk. Similarly, a patient with a reportable infectious disease poses a direct risk to others, and intervention can mitigate or eliminate the risk.” See e.g. Coughlan et al, \textit{supra} note 7 at 52: mandatory reporting “only makes sense where some public agency will receive the reports of problems, and then step in to attempt to remedy them.”
\item \textsuperscript{138} Pauls & Downie, “Shooting Ourselves”, \textit{ibid} at 1255 give this revocation as an example of intervention.
\item \textsuperscript{139} \textit{MGWRA}, \textit{supra} note 24, preamble [emphasis added]. Pauls & Downie, “Shooting Ourselves”, \textit{ibid} at 1255, argue that “[i]n the case of a gunshot wound, the person being reported may or may not pose a risk to the public. There is
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need of protection under the Child and Family Services Act, is the legislative determination that past harm indicates a possible risk of future harm and thus the need for state investigation and possibly intervention. I will refer to intervention as the primary mechanism of mandatory reporting laws.

Mandatory reporting laws may also use other mechanisms to advance their purposes, which mechanisms I describe as secondary. Three are particularly important: punishment; punishment with the goal of deterrence; and the collection of information. Punishment in itself, through prosecution and incarceration or fines, may be an intended mechanism. For example, recall from above that in the debates on mandatory reporting of medicare eligibility fraud, there was an emphasis on fraud as “criminal activity”.

Similarly, while the preamble to the Mandatory Gunshot Wounds Reporting Act stated that the purpose was public safety, some legislators emphasized that patients with gunshot wounds were criminals and that the law was intended to be “tough on crime” or to promote “accountability” for criminals. Punishment or the risk of punishment may also be intended not only as an end in itself but also to deter such conduct in the future. For example, during the debates on mandatory reporting of sexual abuse by health professionals, the Minister of Health stated that “[t]he very tough penalties to be written into the law are intended to deter health professionals from abusing their power and breaking the relationship of trust they have with their patients.”

Mandatory reporting laws may also no clear intervention that can be undertaken to mitigate or eliminate this undefined, and probably undefinable, risk.” I used this quote in Martin, “Adoption”, supra note 10 at 195.

140 CFSA, supra note 11, s 72(1).
141 Wessenger (Hansard), supra note 122 at S-404.
143 It is unnecessary for my purposes to consider whether punishment does indeed constitute meaningful deterrence – what matters is that legislators (and other stakeholders) believe that it does.
144 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 35th Parl, 2nd Sess, No 85 (25 November 1992) at 3476 (Hon Frances Lankin). See also HPPC, supra note 21, s 1.1 “The purpose of the provisions of this Code with respect to sexual abuse of patients by members is to encourage the reporting of such abuse, to provide funding for therapy and counselling for patients who have been sexually abused by members and, ultimately, to eradicate the sexual abuse of patients by members.” [Emphasis added.] Similarly, see e.g. Bessner, supra note 22 at 280: “The fundamental purposes of child-reporting legislation are to halt and to prevent acts of abuse from being perpetrated on children” [emphasis added].
advance their purpose through the collection of information. For example, one criticism of mandatory gunshot wound reporting laws was that the laws did not contemplate the reports being used for epidemiology to target gun violence as a public health issue.⁴⁴ These secondary mechanisms – punishment, punishment for deterrence, and the collection of information – may all advance the purpose of a mandatory reporting law.

6 The extraordinary nature of mandatory reporting laws

The legal impact of mandatory reporting laws, and the significance of that impact, is only apparent when viewed in the context of the broader legal landscape in which they operate. Mandatory reporting laws are extraordinary because they are an exception to the general rule that there is no duty to rescue, no duty to report crime, and no clear duty to warn. That is, they “constitut[e] a significant departure from the common law, which regards individuals as independent and self-reliant.”⁴⁶ As Wayne Renke notes, “our legal tradition has, for the most part, set its face against compelling individuals to report others’ misdeeds.”⁴⁷ Indeed, even where such duties may apply to members of the general public, professionals may have obligations that conflict with those duties.

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⁴⁴ See e.g. Martin, “Adoption”, supra note 10 at 200-206. See also e.g. Renke, “Child Abuse”, supra note 27 at 101 [citations omitted]: “mandatory reporting ensures the generation of more complete sets of data concerning child abuse than would be generated without the reporting obligation. The better the data generation, the better the judgment of the effectiveness of responses to abuse, and the better the design of programs countering the incidence of abuse and its effects”.

⁴⁶ Bessner, supra note 22 at 279.

⁴⁷ Renke, “Gunshot Wounds”, supra note 6 at 6. See similarly e.g. Coughlan et al, supra note 7 at 67: “Members of the public are not routinely required to offer assistance to one another, nor to report one another to government agencies.” See also e.g. Coughlan et al at 56: mandatory reporting laws “are not the norm: for the most part, private citizens have no obligation to report one another to government bodies, whether that report will help or hurt the other person.”
6.1 No duty to rescue

In the common-law Canadian jurisdictions, there is no general duty to rescue. As Lewis Klar puts it, “no one doubts the proposition that the modern law of torts imposes no duty to render assistance to those in peril, in the absence of a special relationship, even where assistance can be rendered easily, effectively, and without risk or inconvenience to the rescuer.” (However, in Quebec, there is such a duty.) Similarly, in criminal law, there are no freestanding duties to preserve life. Indeed, professionals may face professional or legal consequences if they provide unwanted aid.

A common statutory alternative to imposing a duty to rescue is adopting “Good Samaritan” laws, which narrow the civil liability of persons providing assistance in emergency situations. These laws are premised on the assumption that potential civil liability is a significant deterrent against providing such assistance. That is, instead of mandating rescue, this legal approach promotes discretionary rescue.

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148 See e.g. Renke, “Child Abuse”, supra note 27 at 112: “Our law of negligence, for example, recognizes no general obligation to ‘rescue’”. See also e.g. Bessner, supra note 22 at 279: “Under the common law, members of society are not obliged to come to the aid of others or to contact the government or the police to protect persons in danger. The sole inducement for individuals to assist others in need of protection is a moral rather than a legal duty.”


150 Charter of Human Rights and Freedoms, CQLR c C-12, s 2; Klar, ibid at 195, n 7.

151 See e.g. Criminal Code, RSC 1985, c C-46, ss 215-217.1, on parents to children and spouses to each other (215), persons undertaking acts dangerous to life or acts where omission is dangerous to life (216, 217), and persons directing work taking reasonable steps to avoid bodily harm (217.1).

152 See e.g. AC v Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 SCR 181 at para 42, citing with approval Malette v Shulman (1990), 72 OR (2d) 417 at 424, 426, 429 and 430, 67 DLR (4th) 321 (CA).


154 McInnes, ibid at 240. McInnes evaluates the accuracy of this assumption against the effects of the legislation.
6.2 No duty to report crime

In Canadian law, there is no general duty to report crime. The failure to report a felony did constitute the offence of “misprision of felony” in English common law, an offence that Lord Denning held in 1962 to have existed for at least 700 years. However, the Canadian Criminal Code of 1953-54 abolished common-law offences other than contempt, and while it codified “all of the common law offences in respect of which charges are currently laid”, or “[t]he common law offences which it was thought advisable to perpetuate”, the offence of misprision of felony was apparently overlooked.

Even if misprision of felony had remained an offence in Canada, its application to professionals might be limited. In recognizing the offence, Lord Denning held that some professionals – and explicitly lawyers, physicians, clergy, and perhaps teachers – would not be liable to conviction for failing to report their clients because of a duty of confidentiality:

I am not dismayed by the suggestion that the offence of misprision is impossibly wide; for I think it is subject to just limitations. Non-disclosure may be due to a claim of right made in good faith. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the master of a college and a student.

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155 Sykes v DPP, [1962] AC 528, [1961] 3 All ER 33 (HL) [Sykes cited to AC]. The law lords were unanimous that misprision of felony was and remained an offence at common law, although each gave separate reasons. See Denning LL at 554-560, Goddard LL at 566-569, Morton LL at 570, Morris LL at 571, and Guest LL at 572.

156 Ibid at 555.


158 Canada, Canada, Royal Commission on the Revision of Criminal Code, Report (Ottawa: Queen’s Printer, 1952) at 6 (Chairman: WM Martin).

159 The Criminal Code of Canada with Annotations and Notes by JC Martin, QC (Toronto: Cartwright & Sons, 1955) at 35, discussing section 8.

160 Sykes, supra note 155 at 564 [emphasis added]. This aspect of Sykes is cited in Clive Walker, Terrorism and the Law (Oxford: Oxford University Press, 2011) at para 3.27: “In the House of Lords, Lord Denning’s view was that a solicitor, doctor, or clergyman who received information in confidence would have a defence but that close personal ties would not suffice.” The other law lords did not address professional confidences.
Indeed, legal and professional rules may preclude professionals from reporting a crime.\(^{161}\)

In this respect, Canadian law is starkly different from American law – and even the common perception of Canadian law or at least of Canadian societal norms. Under American law, misprision of felony is an offence.\(^{162}\) It is not uncommon to hear Canadian politicians speak as if there is some duty, legal or otherwise, to report crime. Recall, as discussed above, one legislator’s assertion during the adoption of mandatory reporting of medicare eligibility fraud: “To report on criminal activity I think is a public obligation that all of us have together.”\(^{163}\)

Indeed, as with Denning’s exceptions to misprision of felony, professionals may face countervailing obligations to such a civic duty.\(^{164}\)

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\(^{161}\) For lawyers, see e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009), last revised 2016, r 3.3-1: “A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless: (a) expressly or impliedly authorized by the client; (b) required by law or a court to do so; (c) required to deliver the information to the Law Society; or (d) otherwise permitted by this rule.” Online: <flsc.ca/national-initiatives/model-code-of-professional-conduct/> [FLSC Model Code]. See also e.g. r 3.3-3: “A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.” For health professionals, see e.g. *Personal Health Information Protection Act, 2004*, SO 2004, c 3, Schedule A, s 29 [PHIPA]: “A health information custodian shall not collect, use or disclose personal health information about an individual unless, (a) it has the individual’s consent under this Act and the collection, use or disclosure, as the case may be, to the best of the custodian’s knowledge, is necessary for a lawful purpose; or (b) the collection, use or disclosure, as the case may be, is permitted or required by this Act.” Section 3(1) defines “health information custodian” as including “health care practitioner[s]”. Section 72 provides that unauthorized disclosure constitutes an offence. (The exceptions contemplated in s 29(b) includes a discretion to warn under s 40(1): “A health information custodian may disclose personal health information about an individual if the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons.”)

\(^{162}\) See e.g. 18 USC § 4: “Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”

\(^{163}\) Wessenger (*Hansard*), *supra* note 122 at S-404. See also e.g. David Langstr, “Terrorism can be fought without racial profiling. Train and marathon cases prove it” *The Globe and Mail* (29 April 2013), online: <www.theglobeandmail.com/opinion/terrorism-can-be-fought-without-racial-profiling-train-and-marathon-cases-prove-it/article11604838/>: “We all have a civic duty to report crime”.

\(^{164}\) See e.g. Bernard M Dickens, “Legal Responses to Child Abuse in Canada” (1978) 1:1 Can J Fam L 87 at 99: “The argument that every person has a civic and moral duty to disclose knowledge of crime is not adequately specific or enforceable to obviate the need for express child abuse reporting laws, and professional persons such as doctors and social workers may invoke ethical requirements of confidentiality to show a duty of non-disclosure.” See also Coughlan et al, *supra* note 7 at 67.
6.3 A limited discretion to warn

To the extent that Canadian statute law, case law, and professional rules recognize an imperative to warn, it tends to be a discretion instead of a duty, and the scope of that discretion is narrow; typically, the potential danger must reach the level of serious bodily harm.\textsuperscript{165} Again, this is in sharp contrast to American law, where a duty to warn has been explicitly recognized.\textsuperscript{166} Similarly, the \textit{Criminal Code} includes an offence of failing to report a person who is “about to commit” a crime, but only where the future crime is treason or high treason.\textsuperscript{167}

6.4 Professionals are special

This common law backdrop – with no duty to rescue, no duty to report crime, and only a limited discretion to warn – may seem to promote a selfish and individualistic society, at least as it applies to the general public. For my purposes, it is not necessary to resolve this question. But in the specific context of professionals, which is central to my purpose, I emphasize that all three of these duties interfere with, or must be balanced against, legal and professional obligations that the professional has to the individual client. That is, professionals are special in comparison to

\textsuperscript{165} See e.g. \textit{PHIPA, supra} note 161, s 40(1): “A health information custodian may disclose personal health information about an individual if the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons.”; Lorraine E Ferris et al, “Defining the Physician's Duty to Warn: Consensus Statement of Ontario's Medical Expert Panel on Duty to Inform” (1998) 158:11 Can Medical Assoc J 1473; Ellen I Picard & Gerald B Robertson, \textit{Legal Liability of Doctors and Hospitals in Canada}, 4th ed (Toronto: Thomson Carswell, 2007) at 34-40. See also e.g. \textit{FLSC Model Code, supra} note 161, r 3.3-3: “A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.” For a discussion, see Adam M Dodek, “Doing Our Duty: The Case for a Duty of Disclosure to Prevent Death or Serious Harm” (2001) 50 UNBLJ 215. See also \textit{Smith v Jones, supra} note 18 at 489, recognizing a discretion where there is “a clear and imminent threat of serious bodily harm to an identifiable group”.

\textsuperscript{166} See e.g. \textit{Tarasoff v Regents of University of California}, 551 P.2d 334, 17 Cal 3d 425 (Cal 1976), discussed e.g. in \textit{Smith v Jones, ibid} at 480.

\textsuperscript{167} \textit{Criminal Code, supra} note 151, s 50(1)(b): “(1) Every one commits an offence who … (b) knowing that a person is about to commit high treason or treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing high treason or treason.”
other members of the public. As I will discuss in the following chapters, lawyers are particularly special, indeed unique, as compared to other professionals.\textsuperscript{168}

7 The popularity of mandatory reporting laws

It is difficult to identify with certainty the reasons why mandatory reporting laws are popular. Most mandatory reporting laws lack purpose provisions. The legislative history on mandatory reporting laws is sparse. This is not particularly surprising, in that mandatory reporting provisions tend to each be adopted alongside many other amendments in a single bill and usually receive relatively little attention.\textsuperscript{169} However, the debate on mandatory gunshot wound reporting legislation, supplemented with debate on other mandatory reporting laws and reasonable supposition, suggests a few key reasons.

One reason is that these laws appear fairly simple: as Renke puts it, they “have a superficial simplicity, yet involve multiple legal complications and policy decisions.”\textsuperscript{170} The text of the provisions themselves is not particularly long or complex. As discussed above,\textsuperscript{171} the most important feature can be the scope of the reportable occurrence, which the law may not define at all.

Alongside the superficial simplicity, the common template for mandatory reporting laws gives them a superficial similarity. Thus, legislators and other stakeholders may assert the analogy that a proposed mandatory reporting law is like existing mandatory reporting laws. This approach is clearest in the debates on mandatory gunshot wound reporting. For example, one government legislator argued that “health care practitioners in Ontario are already required to report contagious diseases, child abuse, violent deaths and medical conditions related to unsafe driving

\begin{itemize}
\item \textsuperscript{168} See Chapter 3, notes 739 to 747 and accompanying text; Chapter 4, notes 812 to 840 and accompanying text; Chapter 6, notes 1118 to 1124 and accompanying text.
\item \textsuperscript{169} The major exception here is mandatory gunshot wound reporting, which outside of Quebec has been adopted as a freestanding (and fairly short) statute. See Martin, “Adoption”, \textit{supra} note 10 at 176, n 2.
\item \textsuperscript{170} Renke, “Child Abuse”, \textit{supra} note 27 at 92.
\item \textsuperscript{171} See above notes 27 to 38 and accompanying text.
\end{itemize}
to protect the public. This is just one other aspect of that”. Indeed, the Minister of Health and other government members justified the gunshot wounds proposal by analogizing it to a law that required mechanics to report bullet holes. In turn, mandatory gunshot wound reporting was used as a precedent to support mandatory reporting of animal abuse by veterinarians:

I think it was a year or two ago that this Legislature passed a measure making it mandatory for the reporting to gunshot wounds…. If we can support the reporting of gunshot wounds to people, I don’t see a problem in reporting what a trained, experienced veterinarian may know to be systematic abuse of an animal.

(Likewise, Brett Belchetz has argued that if mandatory gunshot wound reporting is acceptable, then mandatory reporting of impaired driving should also be acceptable.) Similarly, during the debate on mandatory reporting of health care eligibility fraud, the parliamentary assistant to the Minister of Health argued that such reporting was like mandatory reporting of child abuse, because both occurrences involved criminal activity. This loose similarity provides seeming consistency, regardless of what is being reported.

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172 Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No 126A (11 April 2005) at 6122 (Jim Brownell). See also No 126A (11 April 2005) at 6104 (Shafiq Qaadri): “All of these requirements [child abuse, infectious diseases, unfit to drive, suspicious/violent deaths] protect the public, as will this legislation, if it is passed.” No L129 (14 April 2005) at 6294 (Brad Duguid): “When you think that health care practitioners are mandated to report incidents of child abuse but not gunshot wounds, that doesn’t add up; contagious diseases but not gunshot wounds, that doesn’t add up; violent deaths but not gunshot wounds, again, that doesn’t add up. They have to report medical conditions related to unsafe driving but they don’t have to report gunshot wounds. That just doesn’t make sense.” I used these quotes in Martin, “Adoption”, *supra* note 10 at 187, n 84.

173 Martin, “Adoption”, *ibid* at 187-188; *HTA*, *supra* note 7. See *supra* note 10.


175 Belchetz, *supra* note 4.

176 Wessenger (*Hansard*), *supra* note 122 at S-404: “I think it's really the whole question of, do we have an obligation to in effect correct criminal activity? Health care fraud is a criminal activity, in my opinion, and I think we have to look at it in that way. To report on criminal activity I think is a public obligation that all of us have together. If we take a similar situation [to health care eligibility fraud], there's a legal obligation for a physician, for instance, to report child abuse. That's an obligation that sits on the physician existing right now in law, or other health practitioner or any person.” See also Coughlan et al, *supra* note 7 at 57, writing in the context of elder abuse: “Arguments in favour of mandatory reporting usually stress an analogy to child abuse, where mandatory reporting is routine.” [Citation omitted.]
Another likely reason why mandatory reporting laws are popular is that the expected benefits are immediately apparent and the costs are not obvious. The financial costs, in terms of time and effort required for professional compliance, do not accrue directly to government. The non-financial costs are fairly abstract and intangible – such as effects on autonomy, privacy, and access – as compared to the predicted benefits, such as protecting children. Moreover, health professionals in Canada tend to be perceived as quasi-government employees, insofar as they are paid via medicare or are employees of public institutions such as hospitals, and so it is easy to suggest that they have some corresponding obligation to the state. Moreover, the targets of the law may be unsympathetic. For example, a common assumption in the debate over mandatory gunshot wound reporting legislation was that gunshot wound recipients, or at least those who opposed reporting, were criminals. Likewise, illegal immigrants are unsympathetic – particularly in Arizona. Similarly, any professionals opposed to mandatory reporting can be characterized as special interest groups with misplaced priorities or distorted judgment.

8 The existing and established discourse on mandatory reporting laws

The legal literature on mandatory reporting laws is somewhat limited, especially in the Canadian context. Some themes, however, are very clear.

177 See e.g. Lawrence R Faulkner, “Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults” (1982) 16:1 Fam LQ 69 at 89, as quoted in Dyana Lee, “Mandatory Reporting of Elder Abuse: A Cheap But Ineffective Solution to the Problem” (1986) 14:3 Fordham Urb LJ 723 at 734, n 59: “[M]andatory reporting legislation is a popular target for enactment because it appears to solve the problem of elder abuse while costing very little.”

178 See e.g. Kent Roach, “The Varied Roles of Courts and Legislatures in Rights Protection”, in Murray Hunt, Hayley Hooper & Paul Yowell, eds, Parliaments and Human Rights: Redressing the Democratic Deficit (Oxford: Hart, 2015) 405 at 407: “As the welfare state has shrunk and the economy has lurched from global crisis to global crisis, criminal justice and immigration policies have become the site of symbolic, expressive and at times utterly irrational and cruel politics.” See also 410: “As elected institutions, legislatures will have an incentive to minimise the rights of the truly unpopular, most notably those accused of crime.”


180 See e.g. Martin, “Adoption”, ibid at 200.

181 But see, on HIV reporting, Flanagan, supra note 50; Julie Hamblin & Margaret A Somerville, “Surveillance and Reporting of HIV Infection and AIDS in Canada: Ethics and Law” (1991) 41:2 UTLJ 224. On child abuse reporting,
A major criticism of mandatory reporting laws is that they may change client behaviour: if clients do not want the matter to be reported, these laws may deter them from revealing relevant information to the professional, or even deter them from seeking professional services altogether.\footnote{182}{See e.g. Coughlan et al, \textit{ibid} at 67.} This deterrence may also be indirect; for example, an abuser may restrict an abused child, or spouse or animal, from access to health care or other services to avoid recognition and reporting of the abuse.\footnote{183}{See e.g. Ferris & Strike, \textit{supra} note 100 at 68; David J Agatstein, “Child Abuse Reporting in New York State: The Dilemma of the Mental Health Professional” (1989) 9 J National Assoc Administrative L Judges 122 at 125.} To the extent that mandatory reporting laws decrease trust in professionals, the deterrence may spread beyond the specific condition and individual reported:

If physicians are obliged to report gunshot wounds, the real danger is not that a few people may be deterred from seeking care, but that many others, who see that physicians have become an extension of the police force, will choose not to reveal their drug use, will refuse to say how they received an injury or will not disclose their sexual practices for fear that this information will be used against them.\footnote{184}{See Pauls & Downie, “Shooting Ourselves”, \textit{supra} note 34 at 1256. Note that this passage is also quoted in Renke, “Gunshot Wounds”, \textit{supra} note 6 at 7, and Martin, “Adoption”, \textit{supra} note 10 at 180.}

Deterrence is one respect in which it is critically important to assess the weight of mandatory reporting laws in the aggregate. Consider, for example, the physician who forewarns a new
patient that he or she must breach confidentiality for reportable diseases, child abuse, ability to drive safely, gunshot wounds, and sexual abuse of a patient by a health professional. When the physician asks the patient about illegal drug use and assures that that information will remain confidential, will the patient believe him or her? (What if the physician had also included mandatory reporting laws on stab wounds, elder abuse, spousal abuse, burns, and transplant tourism in the list?) As these individual exceptions to confidentiality increase, they appear and act less like exceptions.

There are many potential reasons why the client may not want the report to be made. Where the client has been the subject of violence, such as child abuse or spousal abuse or gun crime, the client may expect retaliatory violence by the perpetrator.185 The client may be worried about the impact of the report on his or her personal freedom, such as the loss of a driver’s license – which has a significant impact not only on dignity but on daily life.186 The fear of deportation among undocumented immigrants has been raised in the context of spousal abuse reporting in California, as abused spouses may believe that police involvement will expose their status.187 There is also the fear of stigma, both from the intended use of the information – such as contact tracing for communicable diseases – and from potential abuse of the information, including discrimination in employment, particularly around sexually transmitted infections and most of all HIV.188 (Obviously, potential criminal liability for HIV non-disclosure is another reason to fear reporting.189)

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185 See e.g. Ginn, supra note 181 at 126; Ann T Malecha et al, “Mandatory Reporting of Intimate Partner Violence: Safety or Retaliatory Abuse for Women?” (2000) 9:1 J Women’s Health & Gender-Based Medicine 75.
Aside from deterrence and potential harm to clients, mandatory reporting laws are also criticized as violations of client autonomy and of professional-client confidentiality. For example, mandatory reporting of elder abuse has been criticized as disregarding autonomy and treating abused elderly like abused children, i.e. presuming incapacity.\textsuperscript{190} Spousal abuse reporting laws have similarly been criticized for violating the autonomy of abused spouses; however, severe and continuing abuse may indeed affect capacity.\textsuperscript{191} Mandatory reporting laws are also criticized for violating professional-client confidentiality.\textsuperscript{192} In the American context, there has been persistent attention to the conflict between clergy-parishioner confidentiality and mandatory reporting of child abuse. While some of this literature focuses on confidentiality and privilege per se,\textsuperscript{193} some of it focuses on constitutional protections for religion.\textsuperscript{194}


\textsuperscript{191} See e.g. Ferris & Strike, \textit{ibid} at 69; Coughlan et al, \textit{supra} note 7 at 67.

\textsuperscript{192} See e.g. Ferris & Strike, \textit{supra} note 100 at 66-67; Ginn, \textit{supra} note 181 at 114-116.


There is some literature quantifying the deterrence effect of mandatory reporting laws. For example, surveys of American jail inmates have found that 92% and 91% of those that had previously been shot went to a hospital for treatment for the gunshot wound.\textsuperscript{195} Surveys sometimes evaluate perceived deterrence alongside support for these laws, among the target group of clients or among the general public. For example, in one American study 81% of the abused women interviewed supported mandatory spousal abuse reporting laws for health professionals, but 65% said they would “be less likely to tell the nurse or doctor about the abuse” under a mandatory reporting law.\textsuperscript{196} However, in another study, only 12% of women – both abused and non-abused – said such laws would make them less likely to seek treatment.\textsuperscript{197} In a survey of female emergency room patients, mandatory spousal abuse reporting laws were supported by 56% of those who had been abused in the last year and 71% who had not.\textsuperscript{198} Other studies are qualitative.\textsuperscript{199}

Other studies survey professional awareness, support, and compliance with mandatory reporting laws. For example, a survey of British Columbia teachers found that 94% were aware of the province’s child abuse mandatory reporting law,\textsuperscript{200} but only 82% knew that the threshold for

\textsuperscript{195} John P May et al, “Medical Care Solicitation by Criminals with Gunshot Wound Injuries: A Survey of Washington, DC, Jail Detainees” (2000) 48:1 J Trauma 130 [92%; inmates from a jail in Washington, DC]; JP May, D Hemenway & A Hall, “Do Criminals Go to the Hospital When They Are Shot?” (2002) 8:3 Injury Prevention 236 [91%; inmates from one jail in each of Maryland, Nevada, California, Georgia, and Ohio]. More precisely, the Journal of Trauma study found that in 92% of the incidents in which inmates had been shot – with some inmates recounting more than one incident – the inmate had gone to hospital; the Injury Prevention study found that 91% of the inmates who had previously been shot had gone to hospital after their most recent shooting. (I cited both studies in Martin, “Adoption”, supra note 10 at 208-209.)

\textsuperscript{196} See Malecha et al, supra note 185 at 77.

\textsuperscript{197} Debra Houry et al, “Mandatory Reporting Laws Do Not Deter Patients from Seeking Medical Care” (1999) 34:3 Annals of Emergency Medicine 336 at 336 and 339, Table 3.


reporting was “reasonable grounds” and only 66% knew that the law provided good-faith immunity.\textsuperscript{201} Similarly, a survey of Ontario emergency physicians found that 93% were aware of the \textit{Mandatory Gunshot Wounds Reporting Act} and 88% would make the required report.\textsuperscript{202} 
There have also been qualitative studies on compliance.\textsuperscript{203}

8.1 Gaps in the literature

There are significant gaps in the existing literature on mandatory reporting laws. Professional awareness and compliance are poorly quantified, as is the deterrence impact. Little of the literature considers legislative history and the reasons legislators give for supporting (or opposing) these laws – although, as indicated above, the limits of the legislative record are likely a key obstacle.

Most important and perhaps most striking is that little of the literature considers these laws as \textit{laws per se} – that is, how they fit with the broader legal landscape and whether they raise constitutional issues. (The major exception is the American literature on religious guarantees and requiring clergy to report child abuse.) While there is some Canadian literature, it is somewhat limited in comparison to the American equivalents – particularly with regard to constitutional issues.\textsuperscript{204} The exception, where the Canadian literature is more abundant than the American, is gunshot wound reporting – presumably because it is long-established law in the US but relatively new in Canada.\textsuperscript{205}

\textsuperscript{201} Beck, Ogloff & Corbishley, \textit{ibid} at 22, Table 2.


\textsuperscript{204} But see Renke, “Gunshot Wounds”, \textit{supra} note 6. See also e.g. Hamlin & Somerville, \textit{supra} note 181 at 230-233 (although brief, and written at a time (1991) when \textit{Charter} case law was much less developed); Flanagan, \textit{supra} note 50 at 560-602 (although written at a time (1989) when \textit{Charter} case law was much less developed).

\textsuperscript{205} Articles on gunshot wound reporting, \textit{supra} note 181: Pauls & Downie, “Shooting Ourselves”, \textit{supra} note 34; Ovens, \textit{supra} note 181; Pauls & Downie, “Rebuttal”, \textit{supra} note 181; Carlisle, \textit{supra} note 95; Renke, “Gunshot Wounds”, \textit{supra} note 6.
A more fundamental limitation is that virtually all of the existing literature examines individual reporting laws, instead of analyzing them as a set of iterations of one legal tool. Some of the literature on the reporting of elder abuse or spousal abuse makes reference to child abuse reporting, insofar as arguing that reporting is not appropriate because spouses or the elderly are not like children. Some writers compare and contrast a given law or proposal with other existing laws. For example, Merril Pauls & Jocelyn Downie criticize the assertion that gunshot wound reporting is like other reporting by noting that “[c]hildren are a vulnerable group and are usually unable to prevent ongoing abuse without the help of others”, and that unsafe drivers and persons with infectious diseases present a “risk to others” that can be reduced; in contrast, a person who has been shot “may or may not pose a risk to the public. There is no clear intervention that can be undertaken to mitigate or eliminate this undefined, and probably undefinable, risk.” However, to compare one law to others is not the same as analyzing these laws as a group.

Rarely does the literature on mandatory reporting laws take the next step, i.e. attempt to establish a rubric for when mandatory reporting laws are appropriate. For example, Appel has suggested that mandatory reporting is only appropriate when four criteria are met: “(1) the patient is aware that such reporting is probable; (2) the patient is likely to seek medical care, despite the possibility of reporting; (3) no reasonable alternatives exist for achieving the same policy end; and (4) the public need is compelling.” A different approach is taken by Stephen Coughlan et al, who in discussing elder abuse reporting under the Nova Scotia Adult Protection Act argue that there are five assumptions underlying mandatory reporting laws aimed at protection of the vulnerable, which can also be understood as criteria for when such laws are appropriate:

206 See e.g. the sources cited above in notes 190 and 191: Brank, Wiley & Hamm, supra note 190; Daniels, Baumhover & Clark-Daniels, supra note 190; Coughlan et al, supra note 7 at 50; Ferris & Strike, supra note 100 at 66-67; Ginn, supra note 181 at 114-116.

207 See e.g. Pauls & Downie, “Shooting Ourselves”, supra note 34.

208 Ibid at 1255.

1) that “abuse” is unambiguous: not simply that it is possible to tell what the cause of an injury is, but also that it is generally agreed what type of behaviour constitutes being abusive;

2) that elder abuse is best combatted on a case-by-case basis;

3) that the typical victim requires help with his or her situation, but is unable to get it;

4) that the required help will be unwelcome in some way, due either to the abuser or the victim: as a corollary, that the assistance offered can and should, at least sometimes, be mandatorily imposed; and

5) at the most basic, practical level, that once a problem is found, a solution is available: both that the resources exist to provide some type of response to the abuse, and that this response is an improvement over the status quo.\(^{210}\)

Note that the first criterion squarely raises the issue of definition. Note also that this model presumes that reporting is intended to lead to individual intervention, as opposed to merely epidemiology and population-level intervention.

Coughlan et al also argue, at a more general level, that a mere balancing of benefits and costs is inadequate to evaluate mandatory reporting laws because such laws are exceptional and clash with many other legal concepts:

A common approach to considering whether mandatory reporting is justifiable in any given instance is to consider the arguments in favour of and against it, and then weigh them against one another. While that approach is perfectly reasonable, one weakness of it is that it can be equally applied to any situation…. But in fact, our society makes certain assumptions about the degree to which it is appropriate to intervene in other people's lives, and about the extent to which private citizens should be required to report details about one another to government agencies. Simply to look at the pros and cons of reporting in a particular situation is to ignore these inherent assumptions and to miss the place in society that any mandatory reporting law will play.\(^{211}\)

While the five criteria listed above are specific to the category of protection of the vulnerable, this admonition – to recognize mandatory reporting laws as having a particular societal impact that other laws do not – should inform any approach to mandatory reporting laws more generally.

\(^{210}\) Coughlan et al, supra note 7 at 61; APA, supra note 78.

\(^{211}\) Ibid at 53 [footnotes omitted].
The criteria set out by Coughlan et al and by Appel are incomplete – and Appel’s are superficial and conclusory – but they give a hint of what could be done.

9 The scope and structure of this thesis

In this thesis, I aim to fill some of these gaps by approaching mandatory reporting laws as a family of related laws, focusing on how they interact with other laws – and particularly the constitution – and developing a policy framework that will enable legislators and policymakers to evaluate new proposals. By conceptualizing mandatory reporting laws as many iterations of a single legal tool, instead of independent responses to a variety of policy goals, coherence and consistency among these laws become meaningful possibilities.

I begin by considering how mandatory reporting laws impact the interests of the client as recognized elsewhere in law, particularly under the Canadian Charter of Rights and Freedoms. I argue that the engagement of a Charter right should be a signal and caution to legislators. Even if that right is not infringed, or the right is infringed but that infringement is justifiable under section 1, it is the engagement of the right – i.e., a credible argument that the right is infringed – that is normatively meaningful. I start in Chapter 2 with autonomy, as that concept is embodied in Canadian law and especially in the law on capacity and consent. I continue with privacy in Chapter 3. In Chapter 4, I turn to access to services and the deterrence effect of these laws. I change my perspective in Chapter 5, considering how mandatory reporting laws affect the interests of professionals, specifically their understanding of professional values and obligations. In these four chapters, I conclude that mandatory reporting laws will rarely infringe Charter rights, and that such infringements are either likely to be justifiable under section 1 or easily correctible through amendments. I emphasize that any infringement of a Charter right, whether justifiable or not, is significant in itself and should give legislators pause.
Having concluded that there are few constitutional restraints on mandatory reporting laws, the pressing question becomes how legislators should use this relatively unconstrained freedom. In Chapter 6, I propose a four-component policy framework that should guide policymakers and legislators.

I use Ontario as my representative jurisdiction because typically it is the first province to adopt each of these laws, and then serves as a model for other provinces; also, with few exceptions, these laws are within provincial as opposed to federal jurisdiction. I focus on the five most common mandatory reporting laws, which are each in effect in a majority of provinces and territories: on reportable diseases, child abuse, inability to drive safely, gunshot wounds, and animal abuse. But I also consider less common laws that exist in Ontario, including those on legal aid and medicare eligibility fraud, abuse in care homes, sexual abuse by health professionals, and payment for queue-jumping. I also consider laws that have not been adopted in Ontario, such as those on adults in need of protection and those on spousal abuse.

Although I focus primarily on the Charter, constitutionality is important but insufficient in itself. Legislators and policymakers should be conscious of the way in which these laws engage Charter rights, even when those rights are not infringed or those infringements are justifiable under section 1. However, legislators and policymakers should go beyond the question of mere constitutionality. Throughout my Charter analysis, it will be apparent that lawyers and the lawyer-client relationship enjoy unique – and indeed almost absolute – protection as a matter of constitutional law. Other professionals that provide important and even essential services, such as clergy and physicians, do not receive such protection. This Charter analysis does not necessarily settle the issue. Legislators and policymakers may well decide that some professions should be protected, by statute, in a manner similar to lawyers.

My goal in this thesis is to demonstrate that mandatory reporting laws are neither good nor bad, but instead a powerful legal tool that should be employed sparingly and carefully because it comes with real though often intangible harms. The social value of professionals in the professional-client relationship depends on trust. Mandatory reporting laws harness the power of the professional-client relationship but, in so doing, also risk serious harm to that same relationship. These laws should be adopted only with cautious deliberation and should remain an exceptional measure instead of a standard legal and policy tool. Proposals for new mandatory
reporting laws can evoke visceral or intuitive reactions. Those reactions are important, but it is important to go further to identify and articulate specific points of disagreement as well as to flesh out the consequences.

Having set out the approach and goals of this thesis, and provided the necessary background for the remaining chapters, I now turn to how mandatory reporting laws impact the interests of the client, beginning with autonomy.
Chapter 2
Autonomy

1 Introduction

Autonomy is a fundamental value in Canadian law. For my purposes, autonomy is the individual’s ability to make important personal decisions that accord with his or her values through a considered and reflective process. In this chapter, I discuss the ways in which mandatory reporting laws appear to clash with autonomy as embodied elsewhere in law, propose and evaluate potential resolutions of this clash, and assess whether the impact on autonomy violates the Canadian Charter of Rights and Freedoms.

I begin by demonstrating that mandatory reporting laws aimed at protecting vulnerable persons from abuse and neglect appear to be inconsistent with the deference to individual decision-making by statute and common law in many other contexts, particularly medical decision-making but also tort law more generally, contract law, and criminal law. This deference is usually embodied in the concepts of capacity and consent. I identify the limited exceptions to the prominence of consent and capacity as primarily, though not solely, protecting public health & safety. I acknowledge critiques of autonomy as it is embodied in consent and capacity law. I also identify two situations in which the law requires more than capacity and consent, and suggest that vulnerability is a unifying element. I reflect on the meaning of vulnerability. I then consider four ways in which this apparent clash might be resolved. I argue that the best approach to this clash is to add an exception to reporting where the client has capacity, with a rebuttable presumption of incapacity. I also examine the role of forewarning in the impact on autonomy.

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212 See e.g. Bryan A Garner, ed, Black’s Law Dictionary, 10th ed (St Paul: Thomson Reuters, 2014) at 161, where autonomy is defined as “[a]n individual’s capacity for self-determination.” See also below notes 295 to 298 and accompanying text.

I then examine the constitutional role of autonomy as a component of the liberty interest protected by section 7 of the *Charter*, and specifically the right to make fundamental personal decisions – the decision to seek state assistance or to initiate state involvement. I argue that, despite the prevalence of mandatory reporting laws intended to protect vulnerable individuals against abuse and neglect, such laws appear to infringe section 7 by impacting the liberty interest of clients in a manner contrary to the principle of fundamental justice against overbreadth. I identify two kinds of overbreadth. One kind of overbreadth is that mandatory reporting laws ignore capacity, i.e. they apply not only to clients who lack decision-making capacity, but also to those who have decision-making capacity. I argue that this overbreadth will be difficult to justify under section 1, but that the overbreadth can be reduced to a more justifiable level by adding an exception to reporting where the client has capacity, with a rebuttable presumption of incapacity. A second kind of overbreadth is that mandatory reporting laws, through a deliberately qualified triggering threshold, apply to some clients who are not abused. I argue that practicality – that is, the inherent difficulty of accurately identifying those who are vulnerable – is likely to be a successful justification of this second overbreadth under section 1. I also suggest modifications that could decrease this overbreadth and thus make these mandatory reporting laws more easily justifiable under section 1. I then consider, but reject, the argument that mandatory reporting laws are contrary to the principle of fundamental justice against vagueness.

I conclude by assessing how modifications to the mandatory reporting template as described in Chapter 1 might change the impact on autonomy. Of the existing modifications, only anonymization would meaningfully lessen the impact on autonomy and thus eliminate the section 7 infringement – or at least reduce it so as to make it more easily justifiable under section 1. I then emphasize how some of my suggested modifications would similarly reduce this overbreadth and so make section 7 infringement more easily justifiable under section 1.

Autonomy is most relevant in the context of mandatory reporting laws when the client is the subject of the report and the reporting is purportedly for the benefit of the client. The archetype here is mandatory reporting of children in need of protection, but similar considerations apply to the reporting of spousal or elder abuse, abused or neglected residents of care homes, and patients sexually abused by physicians. To the extent that gunshot wound reporting is purportedly meant to assist and protect the patient, parallel considerations apply. Mandatory reports are made to state agencies, such as a children’s aid society, which can investigate and intervene. These laws
may infringe autonomy by removing from these persons the ability to choose whether or not to request assistance from the state, or in other words the choice to initiate state involvement. The professional is required to report regardless of whether the client consents to the report. To the extent that a decision is made, it is made not by the client or the professional and not according to the client’s wishes or individual best interests, but by the legislature in adopting the mandatory reporting law itself. While these laws may also apply where the client disclosing the abuse or neglect is the perpetrator of, or a witness to, the wrongdoing, autonomy is most relevant where the client is the target of the wrongdoing. In these contexts, where reporting is purportedly for the benefit of the client, the report is intended to trigger an intervention that will protect the client if the client is indeed being harmed. But the report and the ensuing intervention occur regardless of the client’s wishes or interests.

Indeed, a common criticism of mandatory reporting laws on spousal abuse and elder abuse and neglect is that they infringe client autonomy, and more specifically that they parallel laws on mandatory reporting of child abuse by treating abused spouses and abused elderly as if they were children instead of adults who are presumed to have capacity.\(^\text{214}\) (As I will discuss further below, some children may have legal capacity. However, for example, Ontario’s law on mandatory

reporting of children in need of protection defines children as those under the age of eighteen.\textsuperscript{215}) To the extent that mandatory gunshot wound reporting laws are purportedly intended to protect victims of gun crime, one might expect such laws to be similarly criticized as infringing the patient’s autonomous choice to seek police assistance; however, autonomy and the capacity for decision-making are not among the issues emphasized in the literature.\textsuperscript{216}

The apparent violation of autonomy, in the making of the report without the client’s consent, is compounded because the agency receiving the report may be able to intervene in the abusive situation without the client’s consent. For example, the state agency may charge the abuser or remove the abused client from the home, with no opportunity for the abused client to make or even affect those decisions. Once the report is made, and state involvement is initiated, there may be no opportunity for the abused client to stop the process. But even if the client can decline intervention, the initial state involvement remains a violation of autonomy that is not undone or rectified by the later opportunity to decline intervention. State action short of intervention may itself be a considerable imposition with significant consequences, even where the investigation ultimately concludes that intervention is unnecessary. However, I acknowledge that where the state agency’s response to the report is solely to confirm autonomy and thus the need for protection, and the intervention is carefully minimized and tailored to that end, one could argue that there is no significant violation of autonomy.

In this category of mandatory reporting laws on abuse or neglect of vulnerable persons, Ontario’s regime for reporting of sexual abuse of patients by health professionals is an outlier. As

\textsuperscript{215} Child and Family Services Act, RSO 1990, c C.11, s 72(1) \textsuperscript{[CFSA]}, ss 3(1) (definition of “child”), 72 (reporting provision).

mentioned in Chapter 1,\textsuperscript{217} that law provides that the report itself is mandatory regardless of consent, but the patient’s name is only included in the report if the patient consents.\textsuperscript{218} Without the patient name, the report has a more limited impact on autonomy because the patient is much less likely to come to the attention of the state – although the report may still result in an investigation that could eventually lead the state agency back to the patient. I focus my analysis on the typical mandatory reporting law on abuse and neglect, where the report includes the client’s name.

Another key variation in this category of mandatory reporting laws on abuse or neglect of vulnerable persons is exemplified in the Nova Scotia \textit{Adult Protection Act}.\textsuperscript{219} This Act is unusual in that it does not apply where the adult has decision-making capacity. It does so by including incapacity in the definition of the reportable occurrence, i.e. in the definition of an adult in need of protection.\textsuperscript{220} I will explain below why this variation is problematic.\textsuperscript{221}

Autonomy is less clearly violated, or that violation is less problematic, under mandatory reporting laws for which the purpose is not the protection of the vulnerable. The law, as well as society, generally accepts that interference with an individual’s choices is acceptable where those choices harm others. Recall from Chapter 1 that the purpose of many reporting laws – such as those on communicable diseases, conditions affecting driving safety, and gunshot wounds – is public health \& safety.\textsuperscript{222} Other mandatory reporting laws may have different purposes, such as combating moral harm. These laws include those on legal aid and medicare eligibility fraud, and paid queue-jumping for health services. Reports under these laws are independent of the client’s consent, but these are not situations where autonomy would be considered relevant. That is, there is no illusion or suggestion that those mandatory reporting laws are intended to benefit the client.

\begin{footnotes}
\footnote{\textsuperscript{217} See Chapter 1, note 49.}
\footnote{\textsuperscript{218} \textit{Health Professions Procedural Code [HPPC]}, being Schedule 2 to the \textit{Regulated Health Professions Act, 1991}, SO 1991, c 18, s 85.3(4), as discussed in Anne L Mactavish, “Mandatory Reporting of Sexual Abuse under the \textit{Regulated Health Professions Act”} (1994) 14 Health L Can 89 at 93.}
\footnote{\textsuperscript{219} \textit{Adult Protection Act}, RSNS 1989, c 2 [\textit{APA}].}
\footnote{\textsuperscript{220} \textit{Ibid} at s 3(b), as quoted in Coughlan et al, \textit{supra} note 214 at 50.}
\footnote{\textsuperscript{221} See below note 390 and accompanying text.}
\footnote{\textsuperscript{222} See Chapter 1, notes 101 to 105 and accompanying text.}
\end{footnotes}
The problems with such laws are better considered not under the client’s autonomy but under privacy and deterrence, as well as from the perspective of the reporting professional. These topics are the subjects of Chapter 3, Chapter 4, and Chapter 5.

2 Autonomy in Canadian law: Capacity and consent

In general, and indeed in almost every context other than mandatory reporting of abuse and neglect, Canadian law emphasizes and protects the importance of allowing individuals to make their own decisions unless their decision-making capacity is impaired, their decisions are not voluntary, or their decisions are not in the public interest. That is, capacity and consent are usually the requirements for the state to be reasonably satisfied that an individual has made, or at least had the opportunity to make, an autonomous decision and thus that decision should be determinative. Mandatory reporting laws on abuse and neglect appear anomalous in law because they deprive clients of the choice to request assistance from the state, or to initiate state involvement, despite capacity and consent. In this section, I identify the legal role and extent of autonomy and its protections under common law and statute. My focus here is not to provide a theoretical account of autonomy, but instead to frame autonomy as it is embodied in Canadian law and demonstrate that mandatory reporting laws appear to be fundamentally incompatible with this embodiment.

Absent constitutional issues, there is no legal impediment to mandatory reporting laws being inconsistent with the common law or other statutes, and no legal requirement to justify such inconsistency. Nonetheless, the inconsistency remains important as a matter of policy and would ideally be acknowledged or explained.

223 See e.g. Wayne Renke, “The Constitutionality of Mandatory Reporting of Gunshot Wounds Legislation” (2005) 14:1 Health L Rev 3 at 6 [Renke, “Gunshot Wounds”]: “Mandatory reporting… essentially limits the principle against self-incrimination or the individual’s right to decide whether or not to communicate with the authorities about an offence.”
Canadian law is clear that with few exceptions, each individual has the right to decide what happens to his or her body, particularly in the context of medical decision-making. Similar issues arise in the context of sexual activity. There is also some recognition of the individual’s right to decide what happens to his or her property. This decision-making power is squarely based in the value of autonomy, sometimes joined by dignity. For example, the Supreme Court in *Ciarlariello v Schacter* held:

> Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent. This concept of individual autonomy is fundamental to the common law and is the basis for the requirement that disclosure be made to a patient.\(^{224}\)

Similarly, the majority in *Starson v Swayze* stated that “[t]he right to refuse unwanted medical treatment is fundamental to a person's dignity and autonomy.”\(^{225}\) Justice La Forest, writing for himself and two other judges, noted in *Norberg v Wynrib* that “the concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will.”\(^{226}\) The right to withhold consent to sexual activity has been described in language that similarly emphasizes values including autonomy:

> Our modern understanding of sexual assault is based on the preservation of the right to refuse sexual intercourse: sexual assault is wrong because it denies the victim's dignity as a human being…. In keeping with the Charter values of equality and autonomy, we now see sexual assault not only as a crime associated with emotional and physical harm to the victim, but as the wrongful exploitation

\(^{224}\) *Ciarlariello v Schacter*, [1993] 2 SCR 119 at 135, 100 DLR (4th) 609. See also *Malette v Shulman* (1990), 72 OR (2d) 417 at 432, 67 DLR (4th) 321 (CA): “The right to determine what shall be done with one's own body is a fundamental right in our society. The concepts inherent in this right are the bedrock upon which the principles of self-determination and individual autonomy are based.”

\(^{225}\) *Starson v Swayze*, 2003 SCC 32 at para 75, [2003] 1 SCR 722. Chief Justice McLachlin, dissenting, did not disagree on this point; indeed, at para 6, she described autonomy as “the ability of each person to control his or her body and consequently, to decide what medical treatment he or she will receive”; and at para 7 stated, “Ordinarily at law, the value of autonomy prevails over the value of effective medical treatment. No matter how ill a person, no matter how likely deterioration or death, it is for that person and that person alone to decide whether to accept a proposed medical treatment.” See also *Fleming v Reid* (1991), 4 OR (3d) 74 at 88, 82 DLR (4th) 298 (CA): “the common law right to determine what shall be done with one's own body… [is] founded on the belief in the dignity and autonomy of each individual”.

\(^{226}\) *Norberg v Wynrib*, [1992] 2 SCR 226 at 247, 92 DLR (4th) 449. See also *Norberg* at 247: “An assumption of individual autonomy and free will is not confined to tort law. It is also the underlying premise of contract law.”
of another human being. To engage in sexual acts without the consent of another person is to treat him or her as an object and negate his or her human dignity.  

Assault itself, i.e. a nonsexual assault, can similarly be described as an imposition on autonomy. Similarly, in the context of research involving human subjects, an informed and voluntary “decision to participate is generally seen as an expression of autonomy.” Autonomy is also emphasized in the right of each person to manage his or her own property. For example, “an important aspect of individual autonomy… is the right to make bargains according to what they think is in their best interests.”

2.1 Capacity

Autonomy is embodied in Canadian law through two more narrow concepts: capacity and consent. The core requirement for an individual’s decisions to be legally determinative is capacity. That is, capacity is the legal criterion by which the state can be reasonably satisfied that an individual has made, or at least had the opportunity to make, an autonomous decision and thus that decision should be determinative. Capacity for health-care decisions is generally accepted as meaning the ability to understand relevant information and appreciate the

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227 R v Mabior, 2012 SCC 47 at paras 45 and 48, [2012] 2 SCR 584. See also para 43: “Charter values of equality, autonomy, liberty, privacy and human dignity require full recognition of the right to consent or to withhold consent to sexual relations.”

228 See e.g. Bernard M Dickens, “Legal Responses to Child Abuse in Canada” (1978) 1:1 Can J Fam L 87 at 88: “Assault of a child is, in principle, simply an assault; that is, a violation of an individual's right to be left alone, to enjoy bodily integrity and appropriate autonomy.” [Emphasis added.] (Dickens goes on to explain why child abuse is not just an assault.)


230 Piscitelli v Dinelle, [1999] OJ No 4396 (SC) at para 78, aff’d [2001] OJ No 1743 (CA). See also e.g. Lazaroff v Lazaroff, 23 ETR (3d) 75 at para 19, [2005] OJ No 5197 (SC): “[a] declaration of incapability, and appointment of a guardian, is a profound derogation of personal autonomy”. See also e.g. Abrams v Abrams, 247 OAC 380 at para 56, [2009] OJ No 1223 (Div Ct, single judge): “[a]n application for a declaration of incapacity under the SDA is an attack on the citizen's autonomy and, in the event of a finding of incapacity… results in the abrogation of one or more of the most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.” (Substitute Decisions Act, 1992, SO 1992, c 30 [SDA].)
consequences of the decision, and is presumed. Similar principles apply with relation to a person’s management of his or her property and personal care: capacity is presumed, and that presumption is only rebutted where the person cannot understand the relevant information or appreciate the consequences of the decision. The common law test for testamentary capacity is essentially the same, emphasizing the ability to understand the relevant information and appreciate the reasonable consequences, although it is more specific:

[A] testator must have “a sound disposing mind” to make a valid will… In order to have a sound disposing mind, a testator:

-- must understand the nature and effect of a will;
-- must recollect the nature and extent of his or her property;
-- must understand the extent of what he or she is giving under the will;
-- must remember the persons that he or she might be expected to benefit under his or her will; and
-- where applicable, must understand the nature of the claims that may be made by persons he or she is excluding from the will.

Similarly, the Criminal Code provides that there is no consent to sexual activity “if the complainant is incapable of consenting”. Thus, although the specifics vary, the concept of capacity plays a role across several areas of law.

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231 See e.g. Health Care Consent Act, 1996, SO 1996, c 2, Schedule A, s 4(1) [HCCA]: “A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”

232 See e.g. AC v Manitoba (Director of Child and Family Services), 2009 SCC 30 at para 40, [2009] 2 SCR 181; HCCA, ibid, s 4(2).

233 See e.g. SDA, supra note 230, ss 2(1) (“A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care”) & 2(2) (“A person who is eighteen years of age or more is presumed to be capable of entering into a contract.”) See also Neill v Pellolio (2001), 151 OAC 343, 43 ETR (2d) 99 (CA): “It is a basic principle of the SDA that, absent reasonable grounds to believe the contrary, persons are presumed to be capable of giving or refusing consent in connection with their own personal care (see s. 2(2) of the SDA).”

234 See SDA, ibid, ss 6 (“A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”) & 45 (“A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”)

235 Hall v Bennett Estate (2003), 64 OR (3d) 191 at 195-196, 227 DLR (4th) 263 (CA), Charron JA, as she then was, for the panel.
Tests for capacity must be read alongside the factors that do not affect capacity. Capacity for medical decision-making is not affected by the objective correctness or rationality of a decision: “For this freedom [of individuals to make choices concerning their medical care] to be meaningful, people must have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others.” Mental illness does not in itself preclude capacity, although it may affect it.

It follows from the importance of capacity that physicians and other health professionals offering treatment are considered able to evaluate capacity – whether or not they are skilled or accurate in doing so. Similarly, it follows from the importance of testamentary capacity that lawyers are able – or at least considered able – to determine such capacity. That is, to the extent that the

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236 *Criminal Code*, RSC 1985, c C-46, s 273.1(2)(b). (More specifically, that “consent is not a defence”.) As Don Stuart explains, consent is not a “defence” in the typical sense: “Where consent of a victim does absolve an accused the defence is conceptually different from justifications or excuses since the latter operate to exonerate otherwise illegal conduct. If there was consent the conduct was always lawful.” (Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Thomson Reuters Canada, 2014) at 611-612.)

237 Malette, supra note 224 at 424. See also e.g. Starson, supra note 225 at para 76: “In this case, the only issue before the Board [the Consent and Capacity Board] was whether Professor Starson was capable of making a decision on the suggested medical treatment. The wisdom of his decision has no bearing on this determination.” See also Fleming v Reid, supra note 225 at 85: “The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination.”

238 See e.g. Starson, ibid at para 77: “The Board [the Consent and Capacity Board] must avoid the error of equating the presence of a mental disorder with incapacity.” See also Starson, McLachlin CJ dissenting but not on this point, at para 10: “At the same time, the HCCA preserves the value of individual autonomy. Mental illness is not conflated with incapacity. Mental illness without more does not remove capacity and autonomy.” See also Fleming v Reid, ibid at 85: “Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as persons of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments.” Testamentary law is similar, insofar as mental illness per se does not determine capacity: see e.g. John ES Poyser, *Capacity and Undue Influence* (Toronto: Thomson Reuters Canada, 2014) at 83-86. For an analysis of how mental illness may affect capacity, see e.g. Louis C Charland, Trudo Lemmens & Kyoko Wada, “Decision-Making Capacity to Consent to Medical Assistance in Dying for Persons with Mental Disorders” (2016) [Open Volume] J Ethics Mental Health VI.ii.

239 See e.g. *HCCA*, supra note 231, ss 1 (definition of “health practitioner”), 10 (requirement for health practitioner to obtain consent before treatment).

240 See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009), last revised 2016, r 3.2-9 and commentary, online: <flsc.ca/national-initiatives/model-code-of-professional-conduct/>. 
ability of health professionals and lawyers to evaluate capacity may be a fiction, it is a necessary
fiction, without which the legal regimes for which capacity is determinative can no longer
function.

2.2 Consent: Informed and voluntary

To be legally determinative, consent to treatment has to be informed and voluntary.\textsuperscript{241} Informed
consent to treatment “requires physicians to ensure the patient understands the nature of the
procedure, its risks and benefits, and the availability of alternative treatments”\textsuperscript{242} and may be
more detailed in statute.\textsuperscript{243} Informed consent is critical to the concepts of capacity and autonomy
in the medical context: “The doctrine of informed consent has developed in the law as the
primary means of protecting a patient's right to control his or her medical treatment.”\textsuperscript{244}

Consent must also be voluntary. Like capacity, voluntariness is a requirement for the state to be
reasonably satisfied that an individual has made, or at least had the opportunity to make, an

\textsuperscript{241} See e.g. \textit{HCCA, supra} note 231, s 11(1): “The following are the elements required for consent to treatment: … 2.
The consent must be informed.” See also e.g. \textit{Norberg v Wynrib, supra} note 226, La Forest J for himself and two
others: “for consent to be genuine, it must be voluntary.”

\textsuperscript{242} \textit{Cuthbertson v Rasouli}, 2013 SCC 53 at para 18, [2013] 3 SCR 341 [\textit{Rasouli}]. See also \textit{Malette, supra} note 224 at
423: “sufficient information to evaluate the risks and benefits of the proposed treatment and other available options.”

\textsuperscript{243} See e.g. \textit{HCCA, supra} note 231, ss 11(2)-(3):

\begin{enumerate}
\item A consent to treatment is informed if, before giving it,
    \begin{enumerate}
    \item the person received the information about the matters set out in subsection (3) that a
        reasonable person in the same circumstances would require in order to make a decision about
        the treatment; and
    \item the person received responses to his or her requests for additional information about those
        matters.
    \end{enumerate}
\item The matters referred to in subsection (2) are:
    \begin{enumerate}
    \item The nature of the treatment.
    \item The expected benefits of the treatment.
    \item The material risks of the treatment.
    \item The material side effects of the treatment.
    \item Alternative courses of action.
    \item The likely consequences of not having the treatment.
\end{enumerate}
\end{enumerate}

\textsuperscript{244} \textit{Malette, supra} note 224 at 423. See also \textit{Ciarlariello v Schacter, supra} note 224 at para 39: “Everyone has the
right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to
which the individual does not consent. This concept of individual autonomy is fundamental to the common law and
is the basis for the requirement that disclosure be made to a patient.” [Emphasis added.]
autonomous decision and thus that decision should be determinative. Voluntariness goes directly to autonomy in the making of self-directed choices. For example, as stated in the *Tri-Council Policy Statement on Ethical Conduct for Research Involving Humans*, “the voluntariness of consent is important because it respects human dignity and means that individuals have chosen to participate in research according to their own values, preferences, and wishes.”245 Consent is not voluntary where there is coercion or undue influence, or misrepresentation or fraud.246 This concept of voluntariness appears across several areas of law, including medical decision-making,247 tort law more generally and contract law,248 criminal law, and testamentary law.249 Whereas coercion is strong and overt, and may be described for example as “the intentional use of psychological pressure, physical force, or threat”,250 undue influence “impact[s] more subtly.”251 For example, parents may exert so much influence on their children – even adult

245 *TCPS2*, supra note 229 at 26.

246 See e.g. *HCCA*, supra note 231, s 11(1): “The following are the elements required for consent to treatment: …4. The consent must not be obtained through misrepresentation or fraud.”

247 See e.g. *HCCA*, ibid, s 11(1): “The following are the elements required for consent to treatment: … 3. The consent must be given voluntarily.” More recently, both the Provincial-Territorial Expert Advisory Group and the Joint Special Committee explicitly considered voluntariness in the context of assisted dying. House of Commons and Senate, Special Joint Committee on Physician-Assisted Dying, *Medical Assistance in Dying: A Patient-Centred Approach* (February 2016) (Joint Chairs: Hon. Kelvin Kenneth Ogilvie and Robert Oliphant) at 15 and 17, online: <www.parl.gc.ca/content/hoc/Committee/421/PDAM/Reports/RP8120006/pdamrpm01/pdamrpm01-e.pdf>: “There appeared to be a general consensus in the testimony and briefs that the request for MAID [medical assistance in dying] must come from the patient in a voluntary manner and after he or she has received sufficient information to make an informed choice…. The process of evaluating a request for MAID must include consideration by the relevant health care provider(s) of any factors affecting consent, such as pressure from others”. [Emphasis added.] Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying, *Final Report* (30 November 2015) (Co-Chairs: Dr Jennifer Gibson and Maureen Taylor) at 36, online: Ontario Ministry of Health and Long-Term Care <www.health.gov.on.ca/en/news/bulletin/2015/docs/eagreport_20151214_en.pdf>: “To be valid, consent must be free and informed. To be free, the person making the choice must not be subject to coercion or undue pressure.”

248 On tort and contract law, see e.g. *Norberg v Wynrib*, supra note 226 at para 29, La Forest J for himself and two others: “for consent to be genuine, it must be voluntary.”

249 See e.g. *Poyer*, supra note 238.

250 Trudo Lemmens, “Informed Consent”, in Yann Joly & Bartha M Knoppers, eds, *Routledge Handbook of Medical Law and Ethics* (Abingdon: Routledge, 2015) 27 at 35. See e.g. *Nagy v Canada*, 2006 ABCA 227, 272 DLR (4th) 601, discussed e.g. in Ellen I Picard & Gerald B Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 4th ed (Toronto: Thomson Carswell, 2007) at 62, note 113, where the physician performed invasive body cavity searches at the direction of police: consent was not voluntary, i.e. any consent by the patient was not of “his or her own free will” (CA at para 52).

251 Lemmens, “Informed Consent”, *ibid* at 36.
children – that the child’s consent to treatment is not voluntary. Nonetheless, there is some lesser degree of influence that will not affect voluntariness. For example, in the context of healthcare decision-making, no decision will be completely free: “an anxious, ill person, often with a concerned family hovering and advising, will be unable to make a decision without some degree of fear, constraint or duress.” It is the “extreme cases” that go to voluntariness. Testamentary law similarly distinguishes between “undue influence”, which violates voluntariness, and persuasion, which does not. Similar ideas are recognized in the criminal law. The Criminal Code provides that consent to assault, including sexual assaults, is vitiated by force, threats or fear of force, or fraud, or “the exercise of authority”. For sexual assault specifically, the Code defines consent as “the voluntary agreement of the complainant to engage in the sexual activity in question,” and provides that there is no consent if “the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority”.

Unlike the presumption of capacity, doctrinally there is no general presumption of voluntariness. Neither is there a general presumption against voluntariness. In testamentary law, for example,

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252 See e.g. Dueck (Re) (1999), 171 DLR (4th) 761, 176 Sask R 152 (QB), discussed in AC v Manitoba, supra note 232 at para 60. See also Re T, [1992] 4 All ER 649, [1992] EWCA Civ J0730-8, discussed e.g. in Picard & Robertson, supra note 250 at 62: a pregnant woman aged 21, a lapsed Jehovah’s Witness, declined a blood transfusion after intervention of her mother, a fervent Jehovah’s Witness. The Court in obiter would have held that the refusal was not voluntary.

253 Picard & Robertson, ibid at 62.

254 Ibid at 62.

255 See e.g. Re Kaufman, [1961] OR 289 at 300, 27 DLR (2d) 178 (CA): “It is well settled that to constitute undue influence in the eye of the law there must be coercion…. The influence to vitiate an act must amount to force and coercion, destroying free agency.” [Citation omitted.] A longer excerpt is quoted in Poyser, supra note 238 at 309, sub nom Anderson v Walkey. I acknowledge that the Court, with respect, here appears to conflate coercion and undue influence.

256 See e.g. Poyser, ibid at 317: “Persuasion is the process by which an aspiring heir points to facts, makes arguments, pleads, cajoles, and generally introduces material into the deliberative pot for consideration by the will-maker and, after everything has been weighed together, convinces the will-maker to include or change content in his or her will. Persuasion implies deliberation.”

257 Criminal Code, supra note 236, s 265(3), discussed e.g. in Mabior, supra note 227. See also Norberg v Wynrib, supra note 226 at 251: “Section 265(3) expressly specifies the circumstances in which consent is vitiated on the basis of a coerced or ill-informed will, thereby rendering the consent legally ineffective.” See also Stuart, supra note 236 at 624: “English common law has long accepted the principle that consent induced by fear or force is not genuine consent or, in alternative language, is vitiated.”

258 Criminal Code, ibid, ss 273.1(1), 273.1(2) [emphasis added], as discussed e.g. in R v Audet, [1996] 2 SCR 171, 135 DLR (4th) 20. See also the discussion in Stuart, ibid at 624-627.
the onus of proving undue influence is on the party asserting it.\textsuperscript{259} In contrast, the law on medical decision-making requires voluntariness but does not specify an onus or presumption.

Vulnerability is a common theme in discussions of voluntariness. For example, La Forest J, writing for himself and two other judges in \textit{Norberg v Wynrib}, explicitly connected factors going to voluntariness with vulnerability: “The doctrines of duress, undue influence, and unconscionability have arisen to protect the vulnerable when they are in a relationship of unequal power.”\textsuperscript{260} And, as I will discuss further below, vulnerability and voluntariness were emphasized in the context of assisted suicide. In \textit{Carter v Canada (Attorney General)}, the Supreme Court recognized that the purpose of the prohibition on consent to death and aiding suicide was “preventing vulnerable persons from being \textit{induced} to commit suicide at a time of weakness”.\textsuperscript{261} This idea of inducement includes vulnerability to the influence of other persons – consistent with the \textit{Criminal Code} provision on sexual assault, discussed above, stating there is no consent if “the accused \textit{induces} the complainant to engage in the activity by abusing a position of trust, power, or authority”.\textsuperscript{262}

2.3 Capacity and substitute decision-making

Where a person lacks capacity, autonomy is still honoured to an extent in medical decision-making. Statutes often establish sophisticated regimes for substitute decision-makers, including the hierarchy of alternative decision-makers and the basis on which they are to make those decisions.\textsuperscript{263} Indeed, protection of autonomy is often given as a purpose of statutory schemes for

\textsuperscript{259} See e.g. Poyser, \textit{supra} note 238 at 301-302.

\textsuperscript{260} \textit{Norberg v Wynrib}, \textit{supra} note 226 at 247, as discussed e.g. in Picard & Robertson, \textit{supra} note 250 at 63.

\textsuperscript{261} \textit{Carter v Canada (Attorney General)}, 2015 SCC 5 at paras 74, 78, 90, 101 [emphasis added]. [2015] 1 SCR 331 \textit{[Carter]}, vary’g 2012 BCSC 886, 287 CCC (3d) 1 \textit{[Carter BCSC]}.

\textsuperscript{262} \textit{Criminal Code, supra} note 236, s 273.1(2) [emphasis added].

\textsuperscript{263} See e.g. \textit{HCCA, supra} note 231, ss 20-22. See also \textit{Rasouli, supra} note 242 at para 25: “the \textit{HCCA} goes on to provide a detailed scheme governing consent to treatment for incapable patients. It provides that a substitute decision-maker must consent to treatment of an incapable patient: ss. 10(1)(b) and 20. The statute sets out a clear hierarchy designating who will serve as substitute decision-maker: s. 20(1).”
health care decision-making. For example, Ontario law requires a substitute decision-maker to follow any known prior wishes of the patient; where there are no such wishes, the decision-maker must choose in the patient’s best interests – but best interests is a broad concept that includes the patient’s “values and beliefs”. Thus, where a person lacks capacity, the state cannot be reasonably satisfied that an individual has made, or at least had the opportunity to make, an autonomous decision. However, autonomy is arguably pursued, albeit to a lesser extent and perhaps unsuccessfully, by attempting to identify and implement the decision that the person would have made if that person was autonomous.

3 Exceptions to autonomy as embodied in capacity and consent

There are three major groups of exceptions to these protections of autonomy as embodied in the legal mechanisms of capacity and consent. First, in some cases the law will assume a person’s consent to medical treatment; second, in some cases the law will impose treatment regardless of the person’s capacity or consent; and third, the law will prohibit some conduct despite the person’s consent. While the first exception is consistent with autonomy as embodied in consent and capacity, the second and third exceptions disregard or override consent and capacity.

3.1 Emergency exception

The exception most consistent with autonomy as embodied in capacity and consent is emergency medical treatment. This exception is a response to uncertainty or the absence of information. In an emergency, where a person is unconscious or otherwise lacks capacity, and his or her prior

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264 See e.g. HCCA, ibid, s 1(c): “The purposes of this Act are, … (c) to enhance the autonomy of persons for whom treatment is proposed, persons for whom admission to a care facility is proposed and persons who are to receive personal assistance services.” See also Rasouli, ibid at para 23: “Generally speaking, the statutes [of various provinces on consent to treatment, the HCCA and its counterparts] give effect to the patient’s autonomy interest insofar as possible.”

265 HCCA, ibid, ss 21(1), 21(2).
wishes are not known, and no substitute decision-maker is available, treatment may be given “on the assumption that the patient, as a reasonable person, would want emergency aid to be rendered if she were capable of giving instructions.” That is, the law assumes that the patient would act reasonably. However, that assumption can be overcome, and a health professional must still honour the person’s expressed wishes insofar as they are known. The scope of an “emergency” is fairly narrow: “time must be of the essence, in the sense that it must reasonably appear that delay until such time as an effective consent could be obtained would subject the patient to a risk of a serious bodily injury or death which prompt action would avoid”. Where the criteria for emergency treatment are genuinely met, i.e. this is not a colourable attempt to impose treatment in the person’s best medical interests, this exception does respect autonomy as that value is embodied in capacity and consent. It is a reasoned prediction, based on the information available, as to how the person would likely decide if he or she were able to do so.

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266 Malette, supra note 224 at 424-425, quoted approvingly by the majority in AC v Manitoba, supra note 232 at para 42. Justice Robins notes that this assumption is better understood as “necessity” than as “implied consent”. This position is adopted by others. See e.g. Stuart, supra note 236 at 615: “This fiction of retrospective consent is unsatisfactory. There might well be situations in which the patient, had he been aware, would not have consented. It is vastly preferable to consider the justification for the treatment in such cases as being the defence of necessity” [emphasis in original]. See also the discussion in Picard & Robertson, supra note 250 at 57. This rule is codified e.g. in HCCA, ibid, ss 25(1), 25(2):

(1) For the purpose of this section and section 27, there is an emergency if the person for whom the treatment is proposed is apparently experiencing severe suffering or is at risk, if the treatment is not administered promptly, of sustaining serious bodily harm.

(2) Despite section 10 [requirement for consent], a treatment may be administered without consent to a person who is incapable with respect to the treatment, if, in the opinion of the health practitioner proposing the treatment,

(a) there is an emergency; and

(b) the delay required to obtain a consent or refusal on the person’s behalf will prolong the suffering that the person is apparently experiencing or will put the person at risk of sustaining serious bodily harm.

267 See generally Malette, ibid. See also e.g. HCCA, ibid, s 26: “A health practitioner shall not administer a treatment under section 25 [emergency] if the health practitioner has reasonable grounds to believe that the person, while capable and after attaining 16 years of age, expressed a wish applicable to the circumstances to refuse consent to the treatment.”

268 Malette, ibid, quoting with approval from W Page Keeton, ed, Prosser & Keeton on Torts, 5th ed (St Paul: West, 1984) at 117-118. See also e.g. Picard & Robertson, supra note 250 at 58: “consent is expendable only where the procedure or treatment is immediately necessary in order to save life or health.” [Citation omitted.]
3.2 Treatment imposed in the public interest regardless of consent

The second major exception is where treatment is considered necessary in the public interest, usually to protect public health & safety. The person may have capacity and refuse consent, but that decision is not determinative where the public interest is engaged. Public health authorities have powers to order persons with communicable diseases to be isolated or quarantined, and to order persons with virulent communicable diseases to undergo treatment.\(^{269}\) In some provinces, persons exposed to a bodily substance of another person in certain circumstances may obtain an order for that other person to provide a blood sample to be tested for specified communicable diseases.\(^{270}\) Such an order constitutes both an autonomy infringement – the drawing and testing of blood without consent – and a privacy infringement – the release of that information to the exposed person. This mandatory blood testing is not for the benefit of the general public, but for the benefit of the exposed person. These statutes on mandatory treatment or testing explicitly state that the law on capacity and consent does not apply.\(^{271}\)

Mental health presents a special situation that is treated differently in different provinces. In Ontario, physicians may authorize the detention, for psychiatric examination, of any person likely to harm themselves or others.\(^{272}\) If the examination confirms that hospitalization is required then that person may be involuntarily admitted to a psychiatric facility.\(^{273}\) However, the statutory requirements for informed consent – from the patient or a substitute-decision maker –

\(^{269}\) See e.g. *Health Protection and Promotion Act*, RSO 1990, c H.7 [*HPPA*], ss 22, 1(1) (defining virulent diseases; note that SARS is also prescribed as a virulent disease: *Specification of Virulent Diseases*, O Reg 95/03, s 1). The orders of a medical officer of health regarding persons with virulent disease can also be enforced by court order: s 35. See also e.g. *Malette*, *supra* note 224 at 429: “The state undoubtedly has a strong interest in protecting and preserving the lives and health of its citizens. There clearly are circumstances where this interest may override the individual’s right to self-determination. For example, the state may in certain cases require that citizens submit to medical procedures in order to eliminate a health threat to the community or it may prohibit citizens from engaging in activities which are inherently dangerous to their lives.”

\(^{270}\) See e.g. *Mandatory Blood Testing Act, 2006*, SO 2006, c 26 [*MBTA*]. Note that one condition for an order to be made is that “taking a blood sample from the respondent would not endanger his or her life or health”: s 5(1)(d).

\(^{271}\) Specifically, the *HCCA*, *supra* note 231: see e.g. *HPPA, supra* note 269, ss 22(5.1) (order by MOH), 35(7.1) (court order); *MBTA, ibid*, s 7(3).

\(^{272}\) See e.g. *Mental Health Act*, RSO 1990, c M.7 [*MHA*], s 15(1). Subsection 15(1.1) also allows such detention for examination based on previous mental health treatment and deterioration. See also s 16, allowing persons other than physicians to apply to a Justice of the Peace for a corresponding order.

\(^{273}\) See e.g. *MHA, ibid*, s 20.
still apply to treatments for mental health conditions; i.e. a patient who has been involuntarily admitted can only be treated against his or her wishes if he or she lacks capacity.274 In contrast, the corresponding British Columbia legislation provides that anyone involuntarily admitted to a mental health facility is deemed to consent to treatment.275

The Criminal Code authorizes mandatory treatment for a different purpose than a danger to public health & safety: to make an accused person fit for trial.276 As with the Ontario statutes authorizing mandatory treatment, the Code provides that consent is not required for such treatment.277 The purpose is not public health or safety, but the broader public interest in the administration of justice.

3.3 Conduct prohibited in the public interest regardless of consent

A third major exception to this protection of autonomy, as that value is embodied in capacity and consent, is clearest in criminal law: there are situations where consent to conduct is irrelevant because that conduct is not socially valuable or is contrary to the public interest. Thus no person can consent to death,278 subject to the recent exception for physician-assisted suicide that I will

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274 See Starson, supra note 225, esp para 77, Major J: “The [Consent and Capacity] Board must avoid the error of equating the presence of a mental disorder with incapacity…. The presumption of capacity can be displaced only by evidence that a patient lacks the requisite elements of capacity provided by the [Health Care Consent] Act.” See also para 10, McLachlin CJ: “At the same time, the HCCA preserves the value of individual autonomy. Mental illness is not conflated with incapacity. Mental illness without more does not remove capacity and autonomy. Only where it can be shown that a person is unable to understand relevant factors and appreciate the reasonably foreseeable consequences of a decision or lack of decision can treatment be imposed.”

275 Mental Health Act, RSBC 1996, c 288, s 31.

276 Criminal Code, supra note 236, s 672.58. See R v Conception, 2014 SCC 60 at paras 31 and 33, [2014] 3 SCR 82, Rothstein and Cromwell JJ for the majority: “An order under s. 672.58 is extraordinary in at least two respects. First, it directs that treatment of an accused be carried out without the accused's consent…. Second, by necessary implication, it authorizes medical personnel to carry out that treatment against the accused's wishes. This is a remarkable provision, given that informed consent of the patient is generally the sine qua non of medical treatment.” See also the concurring reasons of Karakatsanis J at paras 98-99.

277 Criminal Code, ibid, s 672.62(2).

278 Ibid, s 14, as discussed e.g. in Stuart, supra note 236 at 623.
return to below. Consent is irrelevant to some offences where the sexual conduct is always wrongful, such as incest. Similarly, no person can consent to some activities involving a risk of serious bodily harm, i.e. the activities that are not considered socially valuable. In *R v Jobidon*, Gonthier J for the majority held that no one could consent to serious bodily harm in “a fist fight or brawl”, but noted in *obiter* that individuals could consent to “rough sporting activities”, “medical treatment”, and surgery. Justice Gonthier cited several factors: “the social uselessness of fist fights”, the fact that “consensual fights may sometimes lead to larger brawls and to serious breaches of the public peace”, the potential to encourage sadism, and “the sanctity of the human body”. Justice Gonthier explicitly acknowledged that in such situations, autonomy is outweighed by the public interest: “Policy-based limits are almost always

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279 *Carter*, supra note 261 at para 67; *Criminal Code*, ibid, ss 227, 241.1-241.4, as added by *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, SC 2016, c 3, ss 1-6 [Carter amendments]. See notes 309 to 319 below.

280 *Criminal Code*, ibid, s 155, as discussed e.g. in *Stuart*, supra note 236 at 624. Hamish Stewart notes that “the historical limits on consent to sexual activity were overwhelmingly driven by moral disapproval of the conduct, not by concerns about the quality of consent.” Hamish Stewart, “The Limits of Consent and the Law of Assault” (2011) 24:1 Can JL & Juris 205 at 206 [Stewart, “Assault and Consent”]. See also *R v RPF* (1996), 149 NSR (2d) 91, 105 CCC (3d) 435 (CA), as discussed e.g. in *Mussani v College of Physicians and Surgeons of Ontario* (2003), 64 OR (3d) 641 at para 101, 226 DLR (4th) 511 (CA). See esp *RPF* at para 25: “In my view, the restrictions imposed by s.155 of the *Criminal Code* are relevant to the societal objective of preserving the integrity of the family, prevention of genetic defects and the protection of vulnerable family members. As was found to be the case with assisted suicide in *Rodriguez*, supra, a blanket prohibition is preferable to a law which, if exceptions were allowed, could lead to other abuses and not adequately attain the societal objectives”. (*Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342.)

281 *R v Jobidon*, [1991] 2 SCR 714, 66 CCC (3d) 454 [*Jobidon* cited to SCR], discussed e.g. in *Stuart*, ibid at 634-638. Justice Gonthier for the majority at 774 used the phrase “social utility” and at 767 used the phrases “significant social value” and “positive social value”. Stewart explains that such limits “seem to be driven by a judgment that the conduct is insufficiently valuable for the parties to be justified in taking the risks associated with it, not by concerns about the quality of consent” [citation omitted]: Stewart, “Assault and Consent”, ibid at 206. See also *R v Paice*, 2005 SCC 22, [2005] 1 SCR 339, where the Supreme Court clarified that consent is vitiated only where seriously bodily harm is intended and occurs. (See e.g. *R v McDonald*, 2012 ONCA 379 at para 28, 284 CCC (3d) 470: “Accordingly, following *Paice and Quashie*, consent is vitiated only when the accused intended to cause serious bodily harm and the accused caused serious bodily harm.”)

282 *Jobidon*, ibid at 767-768.

283 *Ibid* at 767.

284 *Ibid* at 762.

285 *Ibid* at 763.

286 *Ibid* at 763-764.

287 *Ibid* at 764.
the product of a balancing of individual autonomy (the freedom to choose to have force
intentionally applied to oneself) and some larger societal interest.”

The decisions of individuals about disposing of their assets can also sometimes be overridden in
the interests of society generally or the interests of specific others. In particular, otherwise valid
wills can be disregarded to the extent that inadequate resources are given to dependents.
Nonetheless, the Supreme Court has held that this limit on “testamentary autonomy” should be
exercised rarely:

Only where the testator has chosen an option [for the division of assets] which
falls below his or her obligations as defined by reference to legal and moral
norms, should the court make an order which achieves the justice the testator
failed to achieve. In the absence of other evidence a will should be seen as
reflecting the means chosen by the testator to meet his legitimate concerns and
provide for an ordered administration and distribution of his estate in the best
interests of the persons and institutions closest to him. It is the exercise by the
testator of his freedom to dispose of his property and is to be interfered with not
lightly but only in so far as the statute requires.

Similar to the health care context, autonomy is limited only where necessary in the interests of
others, and typically only a narrowly defined group of specific others. One purpose of such
legislation, in addition to promoting the fair treatment of women and children “at a time when
men held most property [1920]”, was to avoid the use of public resources to care for these

288 Ibid at 744. See also e.g. Malette, supra note 224 at 429: “The state undoubtedly has a strong interest in
protecting and preserving the lives and health of its citizens. There clearly are circumstances where this interest may
override the individual's right to self-determination. For example, the state may in certain cases require that citizens
submit to medical procedures in order to eliminate a health threat to the community or it may prohibit citizens from
engaging in activities which are inherently dangerous to their lives.”

289 See e.g. Succession Law Reform Act, RSO 1990, c S.26, Part V, s 57. See generally Part V, esp s 58(1): “Where a
deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or
any of them, the court, on application, may order that such provision as it considers adequate be made out of the
estate of the deceased for the proper support of the dependants or any of them.” See also e.g. Wills, Estates and
Succession Act, SBC 2009, c 13, Part IV, Division 6, esp s 60: “Despite any law or enactment to the contrary, if a
will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper
maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of
the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be
made out of the will-maker's estate for the spouse or children.” For an analysis of the differences between the
Ontario and BC legislation, see Cummings v Cummings (2004), 69 OR (3d) 398 at para 42-47, 235 DLR (4th) 474
(CA), Blair JA for the panel, leave to appeal to SCC refused, [2004] SCCA No 93, holding that Tataryn v Tataryn
Estate, [1994] 2 SCR 807, 116 DLR (4th) 193 [Tataryn Estate cited to SCR], McLachlin J, as she then was, for the
court, a decision interpreting the Wills Variation Act, RSBC 1979, c 435, was applicable in Ontario.

290 Tataryn Estate, ibid at 815 (“testamentary autonomy”) and 824 (“Only where”…).
dependents, i.e. “preventing those left behind from becoming a charge on the state”. Requiring testators to financially protect their surviving dependents was a way of protecting the public at large from a financial burden. In extreme cases, a capable person’s wishes may also be overruled when they are contrary to the public interest more broadly, as in a discriminatory trust instrument.

4 Problems with autonomy as embodied in capacity and consent

This dominant concept of autonomy in healthcare decision-making, particularly as manifested in capacity and consent, has been strongly criticized. One of the core criticisms is that capacity and consent do not protect genuine autonomy, as the law and judges claim it does, but only liberty, i.e. “mere choice”. That is, “the obeisance of autonomy is often lip service”. Truly autonomous decisions derive from and further an individual’s particular values and priorities and goals and personality. These require “reflective choice”, i.e. “they follow from and reflect a

291 Ibid at 815. See 813 for a discussion of the 1920 origins of the provision.
292 See e.g. Re: Leonard Foundation Trust (1990), 74 OR (2d) 481, 69 DLR (4th) 321 (CA), as discussed e.g. in Bruce Ziff, Unforeseen Legacies: Reuben Wells Leonard and the Leonard Foundation Trust (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2000) at 132-135.
293 See e.g. Onora O’Neill, Autonomy and Trust in Bioethics (Cambridge: Cambridge University Press, 2002) at 28. In her use of this phrase, O’Neill is describing – not adopting – what she characterizes as a dominant approach.
294 C Foster, “Autonomy in the Medico-Legal Courtroom: A Principle Fit for Purpose?” (2013) 22:1 Med L Rev 48 at 49 [Foster, “Fit for Purpose?”]. See also e.g. Sheila AM McLean, Autonomy, Consent and the Law (London: Routledge-Cavendish, 2010) at 86: “[A]t a theoretical level the legal doctrine of consent lacks credibility in a number of ways as a protector of autonomy…. it seems that the translation of the ethical concept of autonomy into the law using the vehicle of consent law further highlights the dissonance between the ethical importance of respect for autonomy and the fundamental goals and processes of the law…. This is so even when courts officially pronounce that respecting autonomy is the principle reason for providing information and seeking consent.” [Emphasis added.]
295 See e.g. McLean, ibid at 60: “If the decision as well as the person is to be autonomous it should reflect the individual’s life priorities and values.” See also McLean at 3, describing “an autonomous choice” as “one that reflects his or her own values”. See also Foster, “Fit for Purpose?”, ibid at 52, who uses the phrase “life-plan autonomy” and quotes approvingly Ronald Dworkin, Life’s Dominion: An Argument About Abortion, Euthanasia and Individual Freedom (New York: Knopf, 1993) at 234: “Recognising an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent – but in any case, distinctive – personality.” While McLean’s framing appears to conceive autonomy as binary, i.e. that a person or a decision is or is not autonomous, her work is better understood as characterizing a
greater degree of self-knowledge, or of self-control, or of capacities to review, revise and endorse other desires,”297 or involve “individuality or character, … self-mastery, or reflective endorsement, or self-control, or rational reflection, or second-order desires”.298 Capacity and consent do not consider these elements.299 For example, a decision clearly contrary to a person’s priorities and values is not, for that reason, a legally questionable decision.

Capacity and consent are necessary, but not sufficient, for autonomous decision-making. As Onora O’Neill notes, “[b]y insisting on the importance of informed consent, we make it possible for individuals to choose autonomously, however that is to be construed. But we in no way guarantee or require that they do so.”300 Capacity and consent are thus incomplete, and can become formalistic and “ritualistic”.301 In some situations, “where options are few, where cognitive and decision-making capacities are limited, procedures of informed consent may become a burden or a ritual.”302 Capacity and informed consent are not contrary to true autonomy, but can obstruct autonomy if they become the sole focus. All else equal, and as a generalization, capacity and consent law constitute a proxy for autonomy; that is, a person or a decision having liberty is able to be autonomous and likely to be autonomous. The concepts of capacity and consent as put forward in law allow the state to be reasonably satisfied that the individual made, or had the opportunity to make, an autonomous decision, and thus that decision should be determinative. However, there may be special circumstances in which liberty is

person or decision as more autonomous or less autonomous. For clarity I refer to autonomy in the same binary way – autonomous or not autonomous – but by that I too mean more or less autonomous.

296 O’Neill, supra note 293 at 26.
297 Ibid at 33.
298 Ibid at 33.
299 See e.g. O’Neill, ibid at 33.
300 Ibid at 37, quoted in McLean, supra note 294 at 60. [Emphasis in O’Neill (make it possible) and in McLean (make it possible).] See also McLean at 55: “The doctrine of consent, when its constituent elements are carefully considered, offers the patient the opportunity to act autonomously” [emphasis added].
301 McLean, ibid at 94.
302 O’Neill, supra note 293 at 27. See also Lemmens, “Informed Consent”, supra note 250 at 48, referring to “informed consent rituals".
contrary to autonomy because certain choices, perhaps tempting or easy choices, do not further autonomy but instead hinder it.

While these critiques are valid, Canadian law does promote or at least facilitate autonomy in its own way through an emphasis on liberty – although this connection could be more explicit. Although consent and capacity law (including voluntariness) does not guarantee autonomy, it is intended to promote autonomy by protecting liberty. Thus, liberty is an incomplete but nonetheless useful means toward the goal of autonomy. This connection is often acknowledged at least implicitly in the case law. The leading cases on capacity and consent accept the wishes of the patient in the case as being autonomous, even while leaving open the possibility that the legal tests they define will recognize some decisions that are not autonomous. In *Malette v Shulman*, the physician administered a blood transfusion to a Jehovah’s Witness who was carrying a signed card that clearly rejected transfusions with reference to her “firm religious convictions”. While the refusal of consent appeared to be based on “the religious values by which she has chosen to live her life”. While it was true that the patient may have been pressured to sign the card, her views may have changed since signing, and the card was not dated, there was no evidence to suggest those possibilities had occurred. That is, the appeal was decided on the basis that the patient’s choice probably was one that accorded with her own values. Justice Robins for the Court was explicit that the purpose or goal of informed consent was to protect “choices that accord with their [patients’] own values regardless of how unwise or foolish those choices may appear to others.” Similarly, the patient’s refusal of antipsychotic medication in *Starson v Swayze* may have been objectively unwise, but the evidence was that it was a choice that accorded with his own values: his most important priority was his intellectual ability, and he believed that medication would impede that ability. Autonomy thus at least purportedly remains the goal of

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303 *Malette, supra* note 224 at 419.
304 *Ibid* at 426.
305 *Ibid* at 419, 420.
306 *Ibid* at 424 [emphasis added].
307 *Starson, supra* note 225 at para 102: “It is apparent from the record that Professor Starson values his ability to work as a physicist above all other factors. It is clear that he views the cure proposed by his physicians as more damaging than his disorder.”
consent and capacity law. And despite their limitations, the concepts and mechanisms of capacity and consent are entrenched in Canadian law.

The law’s readiness to protect decisions made by competent individuals, regardless of the objective wisdom of those decisions, may appear to value or promote foolish or otherwise non-autonomous choices – but it only appears to do so. That is, protecting what appears to be an autonomous decision may require a rule that sometimes protects non-autonomous decisions. Such non-autonomous decisions are tolerated – not celebrated – in the pursuit of autonomy. This tolerance works at two levels to protect and honour all autonomous decisions. First, it protects autonomous decisions that may appear to be non-autonomous – whether to a professional or a hypothetical “reasonable” person – because the information or values on which the decision are based are known only to the individual. Second, extending protection even to non-autonomous decisions ensures that all autonomous decisions are protected. Requiring patients to demonstrate or justify the reasons for their decisions, to demonstrate how the decision is consistent with a person’s values and life goals, or otherwise to demonstrate true autonomy, may well impede some autonomous decisions. Liberty – as protected by informed consent and capacity – may thus be a reasonable proxy for autonomy.

Thus, in the context of mandatory reporting laws, capacity and consent constitute a limited yet reasonable proxy for protecting autonomy itself. To the extent that mandatory reporting laws clash with consent and capacity law, they are likely to clash with autonomy, at least as it is embodied in Canadian law.

5 Autonomy: More than capacity and consent

In some situations, the law does indeed require or appear to require more than capacity and consent, or to impose additional safeguards over and above the standard tests for these elements. That is, the legal concepts of capacity and consent cannot reasonably satisfy the state that an

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308 See e.g. McLean, supra note 294 at 98: “While rejecting treatment may seem in some cases to be irrational, especially when there is hope of palliation or cure, there may be reasons – possibly unknown to healthcare professionals – that lead people to make the decision not to accept it.”
individual has made, or at least had the opportunity to make, an autonomous decision. Thus, additional legal safeguards will be required. These are some, but not all, of the situations where the decision has finality and importance, i.e. the likelihood of death. That is, capacity and consent are usually – but not always – considered to be a sufficient proxy for autonomy. The two best examples are assisted suicide and the refusal of lifesaving treatment by adolescents. One common factor is objectively reasonable concerns about vulnerability.

5.1 More than capacity and voluntariness: Assisted suicide

In the context of assisted suicide, Canadian law requires more than mere capacity and voluntariness: a stable decision and extra certainty in capacity assessment.\footnote{Carter, supra note 261 at para 78; Criminal Code, supra note 236, ss 227, 241.1-241.4, as added by Carter amendments, supra note 279, ss 1-6.} In \textit{Carter}, the Supreme Court recognized that the purpose of the prohibition on consent to death and aiding suicide was “preventing vulnerable persons from being induced to commit suicide \textit{at a time of weakness},”\footnote{Carter, \textit{ibid} at paras 74, 78, 90, 101 [emphasis added].} although the Court also once used the phrase “moment of weakness”.\footnote{Ibid at para 86. The trial judge in \textit{Rodriguez} also used the phrase “moment of weakness”: Rodriguez, supra note 280 at 535 and 558, quoting from the reasons of the trial judge.} Similarly, Sopinka J for the majority in \textit{Rodriguez v British Columbia (Attorney General)} described the purpose of the prohibition on assisted suicide as being to “discourage those who consider that life is unbearable \textit{at a particular moment}, or who perceive themselves to be a burden on others, from committing suicide.”\footnote{Rodriguez, \textit{ibid} at 609, Sopinka J.} Implicit in the idea of “a time of weakness”, and explicit in the phrase “moment of weakness” used by the Court in \textit{Carter} or the phrase “a particular moment” used by Sopinka J in \textit{Rodriguez}, is the idea that consent should be not only voluntary (as usual), but also stable or non-transient. This idea is explicit in the amendments to the \textit{Criminal Code} following \textit{Carter}, which require that the decision be the same at the time of the signed request and the time of the administration of the fatal treatment, which points typically should be ten days apart.\footnote{Criminal Code, supra note 236, ss 241.2(3)(g), (h):}
The stability of a patient’s decision is not itself a criterion for evaluating a patient’s capacity or consent. However, this emphasis on non-transience or stability of the decision reflects a reasonable assumption that autonomous decisions – i.e. reflective and considered decisions in accordance with one’s values – will be stable over time. If a person’s values and priorities are stable, and the relevant information and reasonably foreseeable consequences are unchanged, then the values and priorities as applied to that information and those consequences should give one and only one answer for each individual. A more conservative assumption would be that choices that are stable over time are more likely to be truly autonomous than choices that are not stable over time. Alternately, perhaps the act of reconsidering a decision is different than making the decision itself, and it is this opportunity to reconsider that is valuable, not merely the making of the same decision at two time points. This concept of reconsideration or reflection is demonstrated in the use of the term “reflection” in the reports of the Provincial-Territorial Expert Advisory Group and the Special Joint Committee.\(^\text{314}\)

The post-*Carter* regime also supplements the typical regime for capacity and consent by requiring a second physician (or nurse practitioner) to confirm capacity, voluntariness, and informed consent.\(^\text{315}\) Voluntariness explicitly requires that the decision “was not made as a result

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\(^{315}\) *Criminal Code, supra* note 236, s 241.2(3)(e): “Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must… (e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1).” The criteria in subsection (1) are as follows:
of external pressure”.  

That second practitioner cannot be a mentor or supervisor of, or otherwise connected to, the physician administering the treatment, or a beneficiary or otherwise connected to the patient.  

Among other things, this requirement would appear to reduce the impact of any pressure on the patient from the administering physician and to reduce the risk of error in the capacity and voluntariness determination. Some experts argue that a comprehensive vulnerability assessment should also be performed.

In situations such as assisted suicide, an alternative to requiring more than typical capacity and consent is to prohibit the activity altogether for all persons. Indeed, this was the major change between Rodriguez and Carter: whereas the majority in Rodriguez held that there were no adequate safeguards available to protect the vulnerable short of an absolute prohibition, the Court in Carter (affirming the conclusions of the trial judge) held that there were such adequate safeguards.

A person may receive medical assistance in dying only if they meet all of the following criteria:  

(a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;  
(b) they are at least 18 years of age and capable of making decisions with respect to their health;  
(c) they have a grievous and irremediable medical condition;  
(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and  
(e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Ibid, s 241.2(1)(d).

Ibid, s 241.2(6).

See e.g. Canadian Association for Community Living, Assessing Vulnerability in a System for Physician-Assisted Death in Canada (2016), online: <www.cacl.ca/sites/default/files/uploads/CAACL%20Vulnerability%20Assessment%20Apr%2008%202016%20-%20Final.compressed.pdf>. See also e.g. Vulnerable Persons Standard (2017), requirement 4, online: <www.vps-npv.ca/readthestandard>.

Carter, supra note 261 at paras 103-107. As a matter of Charter analysis, adequacy of safeguards versus a blanket prohibition went to the minimal impairment stage of the section 1 justification of a section 7 infringement.
5.2 More than capacity and voluntariness: Adolescents

Another situation where the law seems to require more than capacity, informed consent, and voluntariness is the refusal or withdrawal of life-saving treatment for adolescents. The “mature minor” doctrine at common law “provides… that the right to make those decisions [affecting young people’s medical treatment] varies in accordance with the young person’s level of maturity, with the degree to which maturity is scrutinized intensifying in accordance with the severity of the potential consequences of the treatment or its refusal.”\(^\text{320}\) It is unclear what maturity is, and what the relationship is between maturity and capacity. Justice Abella, writing for the majority in *AC v Manitoba* in the context of a fourteen-year-old girl’s refusal of blood transfusions, repeatedly uses the term “maturity”,\(^\text{321}\) but sometimes uses the term capacity,\(^\text{322}\) and at one point combines them in the phrase “mature medical decisional capacity”.\(^\text{323}\) She also refers explicitly to “truly autonomous choices” as requiring “maturity and independence of judgment”,\(^\text{324}\) and later states that the issue is “whether his or her decision is a genuinely independent one, reflecting a real understanding and appreciation of the decision and its potential consequences.”\(^\text{325}\) And she distinguishes “cognitive competence alone” from maturity, lifestyle, and degree of parental influence.\(^\text{326}\) She also explicitly considers stability, referring to “the myriad of subtle factors that may affect an adolescent’s ability to make mature, stable and independent choices in the medical treatment context.”\(^\text{327}\) More specifically, she identifies two relevant factors as whether “the adolescent’s views are stable and a true reflection of his or her core values and beliefs”, and “the potential impact of the adolescent’s lifestyle, family relationships and broader social affiliations on his or her ability to exercise intendent

\(^{320}\) *AC v Manitoba*, supra note 232 at para 46.

\(^{321}\) *Ibid*. See esp paras 3-4, 21, 23. See also para 22 on “mature” judgment: “It is a sliding scale of scrutiny, with the adolescent’s views becoming increasingly determinative depending on his or her ability to exercise mature, independent judgment.” See also e.g. Picard & Robertson, *supra* note 250 at 84, using the phrase “maturity and understanding”.

\(^{322}\) *AC v Manitoba*, *ibid* at paras 105, 107.

\(^{323}\) *Ibid* at para 115.

\(^{324}\) *Ibid* at para 71.

\(^{325}\) *Ibid* at para 95.

\(^{326}\) *Ibid* at para 78.

\(^{327}\) *Ibid* at para 70.
Justice Abella explicitly emphasizes the vulnerability of children as a motivating concern.

These elements seem to require more than capacity and voluntariness. The independence, in particular independence from parents, seems to be the same as or similar to the standard concept of voluntariness. However, stability – as mentioned above – goes beyond the standard test for consent. Maturity may too be something more than capacity.

On the other hand, there are several circumstances in which the law makes a blanket determination that adolescents and children below a certain age cannot by definition provide valid consent, or in which the law otherwise provides explicit age cut-offs for consent. Thus, while there is no cut-off age at common law for medical decision-making and the maturity of a minor is determined on the specific facts, there is no disagreement that “infants and very young children” lack capacity. Similarly, some sexual offences provide that, by definition, a child under age sixteen cannot consent to sexual activity with an adult. As Mitchell JA held for the PEI Court of Appeal in *R v RSM*, “Children are simply not capable of giving their informed consent to having sexual relations…. Children are incapable of giving consent in any true sense to such activities.” Justice Mitchell specifically invoked vulnerability, describing children as “this most vulnerable segment of our society.” The close-in-age exceptions for some sexual offences recognize that adolescents of some ages can consent to sexual activity with persons close in age. However, these exceptions explicitly apply voluntariness by specifying that consent is only a defence where the person “is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and

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328 *Ibid* at para 96.
329 *Ibid* at e.g. para 108: “the tension between an adolescent's increasing entitlement to autonomy as he or she matures and society's interest in ensuring that young people who are vulnerable are protected from harm.”
330 *Ibid* at para 82.
331 See e.g. *R v RSM* (1991), 94 Nfld & PEIR 80, 69 CCC (3d) 223 (PEI CA) [*RSM* cited to CCC], discussing *Criminal Code, supra note 236, s 150.1(1).*
332 *RSM, ibid* at 225.
333 *Ibid* at 225.
334 *Criminal Code, supra note 236, ss 150.1(2), (2.1), (3).*
is not in a relationship with the complainant that is exploitative of the complainant.”

As Hamish Stewart explains, there is some unavoidable arbitrariness in the close-in-age cut-offs. But the idea underlying those cut-offs is clear despite that arbitrariness in application.

The law is not necessarily consistent about when capacity and voluntary and informed consent are sufficient, on the one hand, and when something more may be required, on the other. For example, refusal or withdrawal of lifesaving treatment is in some ways similar to assisted suicide, but consent and capacity law applies to refusal or withdrawal while a more extensive scheme applies to assisted suicide. If the law is concerned that a grievously ill person might choose assisted suicide in a moment of despair or so as not to be a burden on his or her family, and so imposes extra safeguards, it is not obvious why the law is not similarly concerned that the same grievously ill person might choose to refuse lifesaving treatment for the same reason, and so does not impose such safeguards.

The real concern may indeed be the patient’s autonomy, but a claim to protect autonomy may hide a different rationale. Dianne Pothier, for example, suggests that assisted suicide is different because “the involvement of third parties, and the sanction of the state, raise issues beyond individual autonomy.” For my purposes, it is sufficient to emphasize that in some circumstances, the law may require something closer to real

335 Ibid, ss 150.1(2), (2.1), (3).
337 The question of whether refusal or withdrawal is truly like or unlike assisted suicide is highly charged, and well beyond the scope of this chapter. See e.g. Carter, supra note 261 at para 23, quoting Carter BCSC, supra note 261 at para 335: “After considering the evidence of physicians and ethicists, she [the application judge] found that the ‘preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death’.” See on the other hand e.g. Charles Foster, Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law (Oxford: Hart Publishing, 2009) at 149: “There is a distinction of colossal importance between the withdrawal of life-sustaining treatment and the performance of an act whose intention is to bring about death.” [Citation omitted.]
338 But for an argument that there is a difference, see e.g. Charland, Lemmens & Wada, supra note 238 at 6: “When patients refuse treatment in standard medical care situations, the decision is most often not immediately final, and further communication with the patient can result in a reversal of the treatment refusal. But by connecting the right to refuse treatment with an option to obtain MAID [medical assistance in dying], a mere temporary loss of hope could lead to the performance of a drastic life-ending action, even if the reason for refusing would by most standards be considered ‘unreasonable’ and even if with adequate and sustained support, hope could be restored over time.”
autonomy than capacity and consent – and that vulnerability appears to be a unifying element for these circumstances. It is thus necessary to consider the meaning of the term vulnerability.

6 Vulnerability

As discussed in Chapter 1, 340 the protection of the vulnerable is commonly given or stated as the purpose of mandatory reporting laws on abuse or neglect, including those applicable to children, care-home residents, and patients. This purpose would also seem to apply to other potential mandatory reporting laws not yet adopted in Ontario, such as those on spousal abuse and elder abuse. This idea of vulnerability raises two related questions: which groups are vulnerable, 341 and what is the unifying or defining factor among those groups, i.e. what is it that makes them vulnerable?

While the concept of vulnerability is somewhat amorphous, there seems to be a general consensus that some groups are vulnerable. These include children, persons with severe mental disabilities, the elderly, persons with physical disabilities or serious illness, adolescents, and perhaps persons living in poverty.

Children are certainly vulnerable as a matter of legal, and likely social, consensus – even if, as acknowledged above, there is some difficulty in defining “children” and the dividing line between children and adults. In AC v Manitoba, Abella J for the majority referred to “vulnerable children”. 342 Similarly, McLachlin CJ for the majority in Canadian Foundation for Children, Youth and the Law v Canada (Attorney General) noted that “children… are vulnerable members of Canadian society.” 343 Justice La Forest for the majority in R v Audet in the context of sexual

340 See Chapter 1, notes 106 to 114 and accompanying text.

341 Because mandatory reporting laws apply to groups, those groups being defined in different ways, for my purposes it is most relevant to ask what groups are vulnerable as opposed to when individuals or people generally are vulnerable.

342 AC v Manitoba, supra note 232 at para 30.

offences referred to “young persons who are in a vulnerable position towards certain persons because of an imbalance inherent in the nature of the relationship between them.”

In some contexts, such as assisted suicide, many groups beyond children may be vulnerable. While the Supreme Court of Canada in Carter referred repeatedly to “the vulnerable” and “vulnerable persons”, it only specified twice in passing who may be vulnerable: once “the elderly and the disabled” and once “adolescents”. The trial judge in Carter considered many descriptions of vulnerable groups, including: age and disability, “the dying” and “the disadvantaged”, “women, the uninsured, people with low educational status”, and “uninsured persons; persons with AIDS”.

What then unifies or defines these different groups as vulnerable? One longstanding notion of vulnerability, although not necessarily using that term, is associated with the parens patriae jurisdiction of the state and the courts. This notion of vulnerability encompasses persons who cannot care for, or protect, themselves. Thus La Forest J for the Court in Re Eve, an appeal concerning sterilization for a person with a severe mental disability, quoted with approval an eighteenth-century English case that “it belongs to the King, as parens patriae, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves”.

Justice La Forest also stated that “[t]he court undoubtedly has the right and duty to protect those

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345 Carter, supra note 261, e.g. at paras 3, 78.
346 Carter, ibid at paras 109 (elderly and disabled) and 116 (adolescents, referring to AC v Manitoba, supra note 232.)
347 Carter BCSC, supra note 261 at para 161. See also Carter BCSC at paras 586: “the elderly and disabled persons”; 621 “including the elderly and persons with disabilities”; 754 “the elderly and people with disabilities”; 1110 “such as people with disabilities”; 1113 “such as the disabled”; 1227 “including grievously ill people”; 1242 “such as the elderly or persons with disabilities”
348 Ibid at para 375.
349 Ibid at para 416, quoting the affidavit of Dr. Linda Ganzini.
350 Ibid at para 624.
351 Re Eve, [1986] 2 SCR 388 at 393, 31 DLR (4th) 1 [Re Eve cited to SCR].
352 Ibid at 410, quoting from approval from Wellesley v Duke of Beaufort (1827), 2 Russ 1, 38 ER 236 (Chancery) at 243.
who are unable to take care of themselves”.

This view of children is reinforced by McLachlin CJ for the majority in *Canadian Foundation*, who noted that “[c]hildren need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm”. Similar characterizations could apply to other vulnerable groups, such as abused spouses. This idea of vulnerability as an inability or a decreased ability to protect oneself, or an inability or decreased ability to implement one’s decisions, might be described as physical or implementational vulnerability.

Another idea of vulnerability is the inability to make the decision to protect oneself, as opposed to merely the inability to implement such a decision. The trial judge in *Carter* acknowledged the concept of “decisional vulnerability”, i.e. the argument that “[t]he availability of physician-assisted death puts at risk patients who are depressed, not truly competent, not fully informed, or subject to coercion or undue influence, including patients who are vulnerable due to age, disability or other similar factors.”

The Supreme Court in *Carter* also mentioned the phrase “decisionally vulnerable”, used by the federal government for groups including “the elderly or people with disabilities”, and “socially vulnerable populations”. Similarly, in *Rodriguez*, Sopinka J for the majority described the vulnerable as “persons who may be vulnerable to the influence of others in deciding whether, when and how to terminate their lives.”

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353 *Re Eve*, *ibid* at 437. See also Faulkner, *supra* note 214 at 79: “Our laws are predicated upon the assumption that adults should have the freedom to live as they choose so long as others are not harmed. The major exception to this generalized rule is the states’ duty to protect those who cannot protect themselves, *parens patriae*. [Citations omitted.]

354 *Canadian Foundation, supra* note 343 at para 58. Recall also the quotes from *R v RSM*, above at note 333.

355 See e.g. Ginn, *supra* note 214 at 111: Advocates of mandatory reporting of spousal abuse “characterize such reporting… as a way of helping women who are unable to help themselves.”

356 *Carter* BCSC, *supra* note 261 at para 314(h). See also para 114, describing the federal government’s arguments: “cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence”.

357 *Carter, supra* note 261 at para 114.


359 *Rodriguez, supra* note 280 at 558.
Vulnerability can also be described in terms of rights. For example, Pothier has argued that “the protection of the vulnerable is the protection of rights of those who, by definition, are not well placed to advance their own rights.”

Vulnerable in these senses appears to be meaningful only as a relative term. That is, while “vulnerability can be assessed on an individual basis”, vulnerability is a characteristic of particular groups or persons with identifiable and objective risk factors. To describe vulnerability as “universal and constant, inherent in the human condition”, or to argue as did the federal government in Carter that “every person is potentially vulnerable”, stretches the meaning of the concept of vulnerability.

Consistent with this range of meanings, and incorporating both decisional vulnerability and physical or implementational vulnerability, for the purpose of my analysis I would define vulnerability as the inability or decreased ability to make a meaningful decision to protect oneself and/or implement that decision. My focus is on decisional vulnerability, but implementational vulnerability also goes to choice by restricting the options from which the person can meaningfully choose. That is, a person who believes a particular choice (e.g. stopping the abuse) cannot be implemented is unlikely to consider that choice to be a realistic option and thus the “choice” is illusory. A meaningful decision requires at least capacity and voluntariness, as in most of the contexts described above, but may require more (e.g. stability) as in the special

360 Pothier, supra note 339 at 2. Pothier does not elaborate, but consistent with her analysis, the primary right being advanced (or not) is presumably the right to life, i.e. the right to be protected against unwanted assisted suicide.

361 Carter, supra note 261 at para 115, describing the conclusions of the trial judge.


363 Carter, supra note 261 at para 87, quoting from Canada’s factum at para 115 [emphasis in factum].

364 This conception of vulnerability is consistent with the definition of “adult in need of protection” in APA, supra note 219, s 3(b), as quoted in Coughlan et al, supra note 214 at 50:

“adult in need of protection” means an adult who, in the premises where he resides,

(i) is a victim of physical abuse, sexual abuse, mental cruelty or a combination thereof, is incapable of protecting himself therefrom by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his protection therefrom, or

(ii) is not receiving adequate care and attention, is incapable of caring adequately for himself by reason of physical disability or mental infirmity, and refuses, delays or is unable to make provision for his adequate care and attention;…
contexts of assisted suicide and adolescent refusal of lifesaving treatment, as discussed above. Thus vulnerability would include situations where capacity is suspect or voluntariness is suspect, but also situations where the person feels they cannot implement a choice, and thus the choice is illusory. In terms of the refusal to report neglect or abuse, the vulnerable would include persons who lack capacity (e.g. those who are unable to recognize that the conduct is neglect or abuse, or that it is wrongful), or who are unable to make a voluntary decision (e.g. those who are constrained by dependency on, or affection for, the abuser; who are in a power imbalance or exploitative relationship with the abuser, and thus are induced; who fear retaliation; or who fear the consequences of state involvement). The vulnerable would also include those who are unable to stop the abuse or defend themselves from the abuse or remove themselves from the situation. In special contexts, such as those of assisted suicide, vulnerable persons may also be those who cannot make a reflective or stable decision.

Given that vulnerability is relative, it may be easy to detect in some instances, but not others. For example, there will be some abused children or abused spouses who are very obviously vulnerable, but some for whom vulnerability is more difficult to determine. That is, it is difficult to accurately identify all vulnerable persons and only vulnerable persons.

Recall, as mentioned above, that a common criticism of mandatory reporting laws is that they treat abused and neglected groups, such as spouses or the elderly, as if they were children. State action through mandatory reporting laws on abuse and neglect may well be paternalistic, but depending on how widely vulnerability is defined, it may be what Joel Feinberg describes as presumptively nonblamable paternalism, which consists of defending relatively helpless or vulnerable persons from external dangers, including harm from other people when the protected parties have not voluntarily consented to the risk, and doing this in a manner analogous in its motivation and vigilance to that in which parents protect their children.

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365 See e.g. Ginn, supra note 214 at 113 (on retaliation), 113-114 (on battered woman syndrome and “learned helplessness”), 114-115 (on cyclical violence and affection), 116 (on post-traumatic stress disorder); see also Ferris & Strike, supra note 214 at 68 (on financial dependence and fears of deportation).

Feinberg identifies *parens patriae* as “[p]erhaps the best example of presumptively nonblamable paternalism”.\(^{367}\) Indeed, Feinberg’s conception of blamable versus nonblamable paternalism is specifically based on some notion of decision-making ability, referring to “the presumptively blamable imposition of government ‘help’ on unwilling persons who are still quite capable of deciding for themselves.”\(^{368}\) Moreover, any such paternalism of mandatory reporting laws on abuse and neglect would apply only where there is actual or potential voluntariness and thus be, in Feinberg’s terms, “soft paternalism”\(^ {369}\) Thus, mandatory reporting laws limited only to those abused or neglected persons who have decisional and/or implementational vulnerability may be softly paternalistic, but not blamably so.

7 Can the apparent clash with autonomy be resolved?

Within this context, mandatory reporting laws on abuse and neglect appear to clash with autonomy as embodied elsewhere in Canadian law. The client is referred for state investigation for his or her own good, regardless of his or her capacity or consent or voluntariness. There are four specific ways that this clashes with other areas of law. First, mandatory reporting occurs regardless of client capacity and consent.\(^ {370}\) Instead of a rebuttable presumption of capacity, the reporting law imposes an absolute and irrebuttable predetermination that the client lacks capacity,

\(^{367}\) *Ibid* at 6.

\(^{368}\) *Ibid* at 6.

\(^{369}\) *Ibid* at 12: “The distinction [between soft and hard paternalism], which is of the first importance, has to do with the weight attached to the voluntariness of a person’s action in the one-party case and the voluntariness of his consent in the two-party case. Hard paternalism will accept as a reason for criminal legislation that it is necessary to protect competent adults, against their will, from the harmful consequences of even their fully voluntary choices and undertakings…. Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct (so far it looks ‘paternalistic’) *when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.” [Emphasis in original.]

\(^{370}\) See e.g. Coughlan et al., *supra* note 214 at 50: “One of the objections to mandatory reporting is that adults are presumed to be competent….. It is hard, perhaps impossible from an ethical standpoint, to justify a mandatory reporting law if it will remove freedom of choice from competent adults.” As discussed above, the exception is in the sexual abuse reporting regime under the *HPPC, supra* note 218, where the report is made regardless of patient consent, but the report only includes the patient’s name if the patient consents. See above note 218 and accompanying text.
or that capacity is irrelevant. Second, instead of the decision being made by the legislatively prescribed substitute decision-maker, as it would be otherwise where the client lacks capacity, or by the professional, as would occur in an emergency, the decision is made by the legislature. Third, the decision is not made based on the client’s values or previously-expressed wishes, or even on the client’s individualized best interests as assessed by the professional, but on a pre-existing blanket determination that necessarily precludes any individual examination of the particular client’s circumstances. Fourth, the absence of a consent requirement is also the absence of the information element in informed consent, i.e. the client is not provided information about the risks and likely outcomes of the reporting and so cannot prepare for the likely results.

The clash with autonomy as embodied elsewhere in Canadian law is clearest where the reporter is a health professional. The reporting is an action taken by the professional based on information arising in the course of diagnosis or treatment with the intended effect of improving the health of the patient. In law, reporting would thus seem to qualify as treatment to which the requirement of informed consent should apply.

This paragraph draws heavily on my previous research on spousal abuse, as do further paragraphs on potential resolutions, i.e. explanations for why the usual presumption of capacity should not apply, or why capacity itself is not determinative.

Note however that reporting likely does not constitute treatment for the purposes of the HCCA, supra note 231. At first glance the very broad interpretation of “treatment” under the HCCA by the majority of the Supreme Court in Rasouli, supra note 242 at paras 37 and 39, would suggest that reporting constitutes treatment under the statutory scheme, even where it is not for the benefit of the patient, so long as it is for a “health-related purpose”:

The concept of “health-related purpose” … is a legal term used in the HCCA to set limits on when actions taken by health practitioners will require consent under the statute. “Treatment” is “anything that is done” for one of the enumerated purposes (therapeutic, preventive, palliative, diagnostic and cosmetic) or “other health-related purpose”. Under the HCCA, only acts undertaken for a health-related purpose constitute treatment, and therefore require consent….

The wording of the HCCA does not limit “health-related purpose” to what the attending physician considers to medically benefit the patient. The HCCA does not use the terms “medical benefit” or “medically indicated”. The legislature could easily have taken this approach but instead chose to define “treatment” more broadly with a wide-ranging and non-exhaustive list of health-related purposes.

However, reporting is arguably removed by the statutory definition of “treatment”, which excludes inter alia “the communication of an assessment or diagnosis” and “a treatment that in the circumstances poses little or no risk of harm to the person”: HCCA, s 2(1), definition of treatment, (d) and (g).
While the clash with autonomy as embodied in capacity and consent is less obvious outside the health care context, it is equally present. Indeed, the reporting of a child in need of protection or an abused or neglected care home resident is essentially a protective health-improving intervention, even where the reporter is not a health professional. Health aside, the client is – at a more fundamental level – deprived of the ability to manage his or her affairs, specifically the decision to request assistance from a state agency. The results of reporting may include the removal of a child from his or her family and placement in foster care, or the transfer of a care home resident to another facility. Indeed, these impacts overlap with decisions falling within the ambit of personal care under statutory regimes, i.e. “a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety”.373

This apparent clash between mandatory reporting laws and other areas of law should prompt further examination, but is not necessarily problematic or irrational. There are several viable resolutions of this apparent clash. All of these are supported by the common element of vulnerability: as a member of a vulnerable group, the client may lack capacity to refuse to report; as a member of a vulnerable group, the refusal to report may not be voluntary; vulnerability makes abuse and neglect a special circumstance where more than the standard elements of capacity and consent (or their standard tests) are necessary to protect autonomy; or abuse or neglect of vulnerable groups is socially useless or harmful and so reporting is justified in the public interest regardless of the client’s wishes, capacity, or voluntariness – or even best interests.

At the outset, note two potential resolutions that cannot succeed. One is that mandatory reporting of abuse or neglect is justified because an abused or neglected person’s refusal to report is the objectively wrong choice. Recall, as discussed above, 374 that the apparent foolishness of a decision is not in itself a reason to override that decision. The second is that abuse or neglect is an emergency such that the emergency exception to consent applies. Abuse or neglect may appear to be an emergency in the broad, general sense of the word. However, recall that in the context of medical decision-making, emergency has a very narrow meaning: where the patient

373 SDA, supra note 230, s 7.
374 See above note 237 and accompanying text.
lacks capacity, no substitute decision-maker is available, and immediate treatment is required to protect life or health.\textsuperscript{375} It would only be in exceptional cases that the abuse or neglect, and thus the potential for immediate future abuse or neglect, is so severe that immediate reporting is necessary.

\section*{7.1 Resolution one: The vulnerable lack capacity}

One way to resolve this apparent clash is if all clients to whom a law applies – all children in need of protection, or all abused spouses, for example – actually and necessarily lack capacity. That is, the context of the abuse and neglect means that they cannot understand the relevant information or appreciate the likely consequences of reporting. For example, they may be unable to recognize that they are being treated inappropriately or unable to understand how reporting could benefit them, or otherwise lack the ability to make a decision.\textsuperscript{376} And if they lack capacity, the usual hierarchy of substitute decision-makers may well be inappropriate, given the possibility that the wrongdoer is a parent, sibling, or other family member. Mandatory reporting laws do not infringe autonomy insofar as they apply to clients who lack capacity. (Although, as I will discuss below, \textit{Charter} compliance may require an opportunity to demonstrate capacity.\textsuperscript{377} There is a consensus in the literature that severe enough abuse does impair capacity.\textsuperscript{378} Furthermore, as abuse tends to escalate,\textsuperscript{379} many abused persons could be expected to eventually lose capacity. However, this does not mean that all persons in the group, such as all abused spouses, lack capacity at the time of reporting. For this reason, this resolution is promising but inadequate.

\textsuperscript{375} See above notes 266 to 268 and accompanying text.

\textsuperscript{376} On impairment of capacity, see e.g. Ferris \& Strike, \textit{supra} note 214 at 66-67 and Ginn, \textit{supra} note 214 at 113-116. See also Renke, “Gunshot Wounds”, \textit{supra} note 223 at 6: “In abuse cases, the victims are powerless, unable to speak for themselves – in large part because of the abuse they have experienced. In these cases, mandatory reporting gives voices to those condemned to silence.”

\textsuperscript{377} See below notes 437 to 440 and 474 and accompanying text.

\textsuperscript{378} See e.g. Ferris \& Strike, \textit{supra} note 214 at 66-67; Ginn, \textit{supra} note 214 at 113-116.

\textsuperscript{379} See e.g. Ferris \& Strike, \textit{ibid} at 67: “The overwhelming evidence concerning the epidemiology of spousal abuse suggests that violence escalates and that incidents of serious violence almost always occur only following earlier physical assault.” [Citation omitted.] See also Ferris et al, \textit{supra} note 214 at 106; as to child abuse, see e.g. Ken Armstrong, “The Duty of Confidentiality and the Child Beating Client: An Ethical Conundrum” (1995) 13:1 Can Fam LQ 49 at 54-55.
This capacity-based resolution becomes more defensible if the claim is that not all but some of the group lack capacity, and mandatory reporting is necessary to protect that subgroup. For example, some children in need of protection, or some abused spouses, certainly lack capacity. Mandatory reporting would be necessary to protect this subgroup if it was impossible or impractical to accurately identify them among the group of children or spouses as a whole. This claim might seem more defensible the larger the subgroup as a proportion of the group – if almost all, or most, or half of the group lacked capacity. This modified resolution recognizes both the reality that some members of the group do indeed have capacity, and the difficulty in distinguishing that group.

7.2 Resolution two: The vulnerable lack voluntariness

A second resolution for the apparent clash could be based on voluntariness, i.e. that all members of the group cannot make a voluntary choice to refuse to report. The refusal to report might be coerced, for example by the implied or express threat of retaliation for reporting. The refusal might be the result of undue influence, such as dependence on the wrongdoer, whether financial, emotional, or otherwise, or affection for the wrongdoer, or the wrongdoer’s position of trust and power. The refusal could also be the result of misinformation or fraud, if the wrongdoer convinces the client that the abuse or neglect will not be repeated so long as no report is made. This resolution is consistent with case law holding that children cannot consent to abuse because of their dependency on their parents. As with capacity, this resolution could be modified to

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380 Ferris et al, ibid at 106 make this point in the context of spousal abuse reporting.

381 See e.g. Ferris & Strike, supra note 214 at 66, on the reluctance of abused women to seek police assistance; Ginn, supra note 214 at 108, on economic and emotional factors and at 115 on other forms of “societal pressure on women to remain in abusive relationships”.

382 See e.g. R v TF, 2016 BCPC 6, 27 CR (7th) 66 at para 45: “The accused parents were clearly in a position of authority to the complainant. She was their daughter and, as a result, she was dependent on their care and support. The complainant was 14 years old and lived at home with her parents. She was also dependent on her parents for her safety and well-being. In these circumstances, it is my view that the defence of consent is not available to the accused. I would go further, and suggest, that only in rare circumstances, if ever, would the defence of consent be available to a parent who has applied force to a child.”
argue that some of the group cannot make a voluntary choice to refuse to report, and the difficulty in identifying that subgroup requires reporting all of them, including those who can make a voluntary choice.

7.3 Resolution three: Abuse and neglect of the vulnerable is special

A third resolution could be that abuse and neglect are special situations, in the same way that assisted suicide or adolescents’ refusal of lifesaving treatment are special, and so more than capacity and voluntariness may legitimately be required to sufficiently protect autonomy. This determination could be based on vulnerability. Recall also Pothier’s suggestion that assisted suicide is different because “the involvement of third parties, and the sanction of the state, raise issues beyond individual autonomy.\textsuperscript{383} A parallel argument would be that mandatory reporting is different because of the involvement of (and, failing mandatory reporting, inaction or the turning of a blind eye by) professionals exercising restricted authority delegated by the state. Similarly, because abuse and neglect may result in death, particularly because abuse tends to escalate, the finality of the decision (i.e. the likelihood of death) is also a common factor.

It is unclear how mandatory reporting laws could be modified to create a meaningful yet realistically feasible exception to reporting based on something more than consent and capacity. As with adolescents’ refusals of lifesaving treatment, one approach could be an exception for reporting where the patient has sufficient maturity – although, as discussed above, it is not clear what “maturity” means, and thus how it is different from capacity and how it is measured or assessed. Stability would be impractical. As with stability in assisted suicide and adolescent refusals of lifesaving treatment, one approach could be that reporting would not occur if the client refused reporting at the time of detection and also refused it at some fixed later time. This would require the professional to follow up with the client – which would not only be resource intensive and impractical, particularly if there is not a long-term professional-client relationship, but seriously problematic if the abuser controls access to professional services. This resolution thus has considerable limitations.

\textsuperscript{383} Pothier, supra note 339 at 2. See above note 339.
7.4  Resolution four: Reporting of abuse or neglect is in the public interest

A fourth resolution could be that reporting is in the public interest, whether or not it is the best interests or wishes of any individual client, and whether or not that client has capacity and voluntariness or autonomy more broadly. Abuse or neglect of vulnerable persons arguably has a special wrongness and so causes harm to society at large as well as the individual. Even where the client consents to abuse or neglect, the abuse or neglect is socially useless or socially harmful. This characterization is supported by case law applying Jobidon to spousal abuse, arguing that consent cannot be a defence to spousal abuse because even consensual (or even mutual) spousal abuse is not in the public interest. A similar but narrower and more concrete claim would be that abuse of one vulnerable person may be a predictor or indicator of abuse of others by the same wrongdoer, and reporting and investigation is necessary to evaluate and intervene to address that risk. For example, where a child is abused by a parent or a sibling, that parent or sibling may also be abusing other children or the spouse or a family pet. This rationale is supported by the literature on cross-reporting of abuse, and particularly the claim that abuse of a child or animal or spouse is predictive or indicative of abuse of a spouse or an animal or a

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384 This fourth resolution of the clash with consent and capacity law could instead be characterized as a justification of that clash. This characterization turns on whether exceptions for the public interest – such as imposed treatment, as discussed above – are understood as being part of consent and capacity law itself or are instead understood as being a justifiable violation of consent and capacity law. For my purposes, nothing turns on this distinction.

385 See e.g. Ginn, supra note 214 at 112-113: “[W]ife assault is a societal problem, not just a personal one, and therefore… society has an obligation to respond…. wife assault is a crime, and any crime is an offence against the state as well as against the individual.”

386 Jobidon, supra note 281. See e.g. Minet v Kossler, 2007 YKSC 30 at para 37, [2007] YJ No 30, var’d on other grounds (contributory negligence), 2008 YKCA 12, 258 BCAC 120: “Moreover, the seriousness and prevalence of domestic violence in our society makes the issue of consent inappropriate for policy reasons. It is quite distinct from fist fights or brawls among friends or strangers.” See also R v Arvaluk, 2002 NUCA 1 at para 13, 2002 CarswellNun 4: “Even if it could be said that the complainant in this case may have consented to the application of force against her person, it was necessary in the circumstances of this case for the trial judge to inquire whether that consent was vitiated in law by the actual level of violence visited upon the complainant by the respondent. For public policy reasons, the law does not always allow the defence of consent in instances of mutual fights resulting in non-trivial injuries…. This is particularly so in cases of domestic violence, a recurrent problem in this jurisdiction.” [Citation omitted.] See e.g. Stuart, supra note 236 at 638, referring to the “determinatio[n]… that public policy may require more stringent limits in cases of domestic assault.” [Citation omitted.]
child. Similarly, an abuser outside the household – such as a teacher, physician, or clergy – may be abusing children from other households. Under this resolution, mandatory reporting may or may not be in the best interests of the client in any specific case, but the client’s interests are secondary to the public interest. This resolution thus folds mandatory reporting laws intended to protect the vulnerable into the larger category of mandatory reporting laws intended to promote public health & safety.

Mandatory reporting of sexual abuse by health professionals provides a clear example of this public interest resolution of the clash. A health professional who has abused one patient presents a future risk both to that patient and potentially all of his or her other patients. Investigation and intervention addresses that risk. Recall that under this regime, the name of the patient is to be included in the report only with the patient’s permission. On the other hand, a report is only made if the reporting professional knows the name of the potentially abusive professional. The mandatory reporting law has the purpose of protecting the vulnerable, but achieves that purpose primarily through investigation of the potentially abusive professional as a threat to the public interest, and not necessarily an investigation specifically about the individual abused patient.

7.5 The problems with eliminating the clash entirely

At this point, a tempting approach would be to eliminate the clash altogether – i.e. to follow the Nova Scotia Adult Protection Act and simply limit the definition of the reportable occurrence to clients lacking capacity. However, this approach is problematic. It does not, on its face, address two problems. The first problem is that some professionals cannot evaluate capacity. While all

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388 HPPC, supra note 218, s 85.3(4), as discussed in Mactavish, supra note 218 at 93.

389 HPPC, ibid, s 85.1(2).

390 See e.g. Coughlan supra note 214 at 51, arguing that the mandatory reporting law in the Nova Scotia APA, supra note 219, is flawed because it requires the prospective reporter to form a legal determination of capacity. While
members of some professions are expected in law to be able to evaluate capacity, such as lawyers or physicians, some may be poor at doing so. Members of other professions, such as teachers and clergy, are not expected in law to be able to evaluate capacity. The second problem with the Nova Scotia approach is that there may be uncertainty over the capacity of some clients. Neither does it acknowledge that abuse and neglect of the vulnerable might be a special situation where capacity itself is insufficient, or the usual legal tests for capacity are insufficient – or that there may be a societal interest in reporting abuse and neglect of the vulnerable regardless of the capacity of the individual client.

7.6 A compromise approach: A presumption of incapacity and involuntariness

The modified versions of the resolutions on capacity and voluntariness – that not all but some of the group lack capacity or voluntariness, and mandatory reporting is necessary to protect that subgroup because they are difficult to identify – support a compromise approach to capacity and voluntariness. Instead of discarding the rebuttable presumption of capacity in favour of an irrebuttable predetermination of incapacity, as mandatory reporting laws currently do, a rebuttable presumption of incapacity could be used. Similarly, there could also be an explicit and rebuttable presumption of involuntariness. Reporting would be mandatory unless the professional was satisfied that the person did not wish to seek assistance and that the person had capacity to make that decision and was making it voluntarily. Where the professional cannot accurately assess capacity and voluntariness, or there is uncertainty over capacity or voluntariness, the presumption would result in a report being made.
This compromise approach acknowledges that there are some clients who can be identified as having capacity, while still requiring reporting where there is uncertainty over capacity. Under this approach, some clients with capacity will still be reported, but that proportion is lower than under an irrebuttable predetermination of incapacity. The rebuttable presumption of incapacity and involuntariness recognizes that this is a special context where vulnerability is heightened and so the standard presumption of incapacity is insufficient. The rebuttable presumption thus more evenly balances the autonomy interest and the protection of the vulnerable than an irrebuttable predetermination of incapacity and involuntariness or a rebuttable presumption of capacity.\footnote{This is similar to balancing under the Charter. See e.g. Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at 877, 120 DLR (4th) 12: “When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.”}

This compromise also avoids affirming the idea that the interests of individual abused and neglected persons should generally be subordinated to the public interest – while acknowledging that, where capacity is unclear, the societal interest in reporting should prevail.

Less essential, but still useful, would be a notification provision that requires the professional to notify the client that he or she is making a report and, perhaps, provide some prescribed information about what the agency does with the report and what the possible outcomes may be. Such a provision recognizes that the client, even if lacking voluntariness or capacity or both, deserves to be provided with relevant information about what is happening.

\section{Autonomy and forewarning}

As mentioned in Chapter 1,\footnote{See Chapter 1, note 45 and accompanying text.} mandatory reporting laws tend to be silent on whether professionals may or must inform clients of their reporting obligations in advance ("forewarning") or notify clients that they will be making a report or have made a report ("notification").\footnote{See esp Wesley B Crenshaw & James W Lichtenberg, “Child Abuse and the Limits of Confidentiality: Forewarning Practices” (1993) 11:2 Behavioral Sciences & L 181 at 184: “there are two distinct levels of warning which may be provided to the client: (a) Forewarning, which takes place prior to therapist suspicion or client} Forewarning appears to respect autonomy, in that it informs the client of the...
applicable law and allows the client to choose whether to disclose a reportable occurrence. That is, the client is made aware in advance of the potential autonomy infringement. Some argue that forewarning is, in this way, necessary for informed consent for any professional services where mandatory reporting laws apply.\textsuperscript{394} Notification before the report is made does allow the client the opportunity to argue to the professional that the report is not mandated in the circumstances (or to argue that the professional should not comply with the law). Notification after reporting does alert the client that a report has been made, but does not give the client an opportunity to dispute the decision to report. Forewarning, as I will come back to in Chapter 4,\textsuperscript{395} would seem to discourage clients from honesty while seeking services. Nonetheless, forewarning seems necessary to facilitate the client’s informed decision to disclose or not disclose the abuse or neglect. Without forewarning, the effectiveness of mandatory reporting laws seems to rely on clients’ ignorance of those laws – a reliance that seems unfair and contrary to the value of autonomy.

9 Do mandatory reporting laws, in their impact on autonomy, infringe section 7 of the \textit{Charter}?\textsuperscript{394}\textsuperscript{Ibid} at 184.

\textsuperscript{395} See Chapter 4, notes 806 to 807 and accompanying text.
imperative for mere policy coherence. Autonomy has been clearly recognized as a Charter value. Moreover, mandatory reporting laws, in their impact on autonomy, constitute a likely infringement of section 7. I will argue that these laws engage the liberty interest and infringe section 7 by contravening the principle of fundamental justice against overbreadth in two ways, one which is likely justifiable and one which is less justifiable and likely requires an amendment. I will also consider a third potential infringement of section 7 related to vagueness that, while almost certain to be unsuccessful, is nonetheless important.

The Supreme Court of Canada has repeatedly recognized autonomy as a Charter value, most often alongside dignity and equality, in several different contexts beyond those I discussed above. These include consideration of specific freedoms, such as freedom of religion and of association. Autonomy is fundamentally intertwined with the dignity of the individual that underpins modern constitutionalism. As Lorraine Weinrib has observed, “[r]espect for inherent human dignity demands acknowledgement of the freedom of each and every individual to make fundamental decisions without state interference.”

9.1 The liberty interest under section 7 of the Charter

Autonomy is not just a Charter value, but is also specifically protected under section 7. The majority of the Supreme Court held in 2000 that “[t]he liberty interest protected by s. 7 of the Charter is no longer restricted to mere freedom from physical restraint…. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference.” This interpretation of the liberty interest overlaps with autonomy,

396 See e.g. Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 88, [2009] 2 SCR 567, McLachlin CJ for the majority [Hutterian Brethren]: “Charter values, such as liberty, human dignity, equality, autonomy, and the enhancement of democracy” [citations omitted].

397 See e.g. Health Services and Support -- Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27 at para 81, [2007] 2 SCR 391 [citations omitted]: “Human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy are among the values that underlie the Charter”.

398 Lorraine E Weinrib, “‘This New Democracy...’: Justice Iacobucci and Canada’s Rights Revolution” (2007) 57:2 UTLJ 399 at 403 [citation omitted].

given autonomy’s focus on important personal decisions. Peter Hogg is dismissive of this interpretation of liberty, characterizing it as part of “a slippery slope that would vastly extend the scope of s 7” and asserting that the majority in the 2000 decision should have shared the dissent’s “caution… in a case that did not call for a ruling about the protection of such vague notions as fundamental personal choices”. 400 Hamish Stewart, while not editorializing on this development as does Hogg, observed in 2012 that no Supreme Court majority had held this component of the section 7 liberty interest to be engaged on the facts of a case. 401 However, Stewart did note that two appellate courts had done so by that time: the Ontario Court of Appeal, where “the state seeks to limit a person's choice of treatment through threat of criminal prosecution” (by the absence of a medical exemption for marijuana use for “life-threatening” health problems); 402 and the BC Court of Appeal, on “the choice to erect shelter to protect oneself from the elements”. 403

400 Peter W Hogg, *Constitutional Law of Canada*, 5th ed supplemented, vol 2 (Toronto: Thomson Reuters Canada, 2007) (loose-leaf revision 2016 release 1), Ch 47 at part 47.7(a) (Liberty: Physical liberty), pp 47-9 and 47-10. See also Peter W Hogg, “The Brilliant Career of Section 7 of the Charter” (2012) 58 SCLR (2d) 195 at 196, note 5, where he refers to the *Blencoe* majority as endorsing “a strand of jurisprudence”: “…‘liberty’ has usually been interpreted as physical liberty, and most of the cases exemplify physical liberty (liability to imprisonment being the most common hook into s. 7), but there is a strand of jurisprudence, starting with Wilson J. in *R. v. Morgentaler*, which expands the concept into the liberty to make ‘fundamental personal choices’, which was accepted by the majority in *Blencoe*” [citation omitted]. (*R v Morgentaler*, [1988] 1 SCR 30 at 52, 44 DLR (4th) 385)

401 Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 69 and 75 [Stewart, *Fundamental Justice*], See similarly Rollie Thompson, “Rounding Up the Usual Criminal Suspects, and a Few More Civil Ones: Section 7 after *Chaoulli*” (2007) 20 NJCL 129 at 143: “This potentially-expansive view of ‘liberty’ [in *Blencoe*] has not been overruled by the Court, but neither had it been elaborated further in any subsequent case.”

402 *R v Parker* (2000), 49 OR (3d) 481 at para 92 (severity of the accused’s health problems at para 84), 188 DLR (4th) 385 (CA), Rosenberg JA for the panel, discussed in Stewart, *Fundamental Justice, ibid* at 74. See also para 102, where Rosenberg JA relates the deprivation of liberty to the non-consensual administration of psychiatric drugs: “[T]he choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance. In my view, it ranks with the right to choose whether to take mind-altering psychotropic drugs for treatment of mental illness, a right that Robins J.A. ranked as ‘fundamental and deserving of the highest order of protection’ in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 at p. 88, 82 D.L.R. (4th) 298 (C.A.).” Note that *Fleming* identifies security of the person not liberty as the engaged interest, although, with the greatest respect to Robins JA (writing for the panel), his reasons appear to slightly blur liberty and security of the person: OR at 88. See also *Bedford, supra* note 336 at para 45, quoting *Morgentaler, supra* note 400 at 52: “The rights protected by s. 7 are ‘independent interests, each of which must be given independent significance by the Court’”.

403 *Victoria (City) v Adams*, 2009 BCCA 563 at para 109, 313 DLR (4th) 29, discussed e.g. in Stewart, *Fundamental Justice, ibid* at 75.
Since 2012, however, the Supreme Court has applied this aspect of the liberty interest, albeit somewhat narrowly. The Court in *Carter*, in concluding that the prohibition on assisted suicide was unconstitutional, held that the liberty interest was engaged by interference “with their [individuals’] ability to make decisions concerning their bodily integrity and medical care”.\(^{404}\) The Court in *R v Smith*, in striking down restrictions on medical marijuana use, held that liberty was engaged “by foreclosing reasonable medical choices through the threat of criminal prosecution”.\(^{405}\) While the Court in *Carter* described the liberty interest as including “the right to make fundamental personal choices free from state interference”,\(^{406}\) the actual application to date has been only to medical care, and specifically the criminal prohibition of some treatment options.

While the Supreme Court has not stated a test for identifying decisions of fundamental personal importance, the reasons of the Court in *Carter* do provide some guidance as to characteristics of such decisions. The Court quoted with approval the language of the application judge about “mak[ing] a choice that may be very important to their sense of dignity and personal integrity” and that is “consistent with their lifelong values and that reflects their life's experience”.\(^{407}\) The Supreme Court also emphasized dignity: “An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy”,\(^{408}\) and “represents their deeply personal response to serious pain and suffering”.\(^{409}\)

The interpretation of the section 7 liberty interest in *Carter* and *Smith* requires only an incremental extension to apply to mandatory reporting laws intended to protect the vulnerable client. That is, the decision to seek state assistance, or to initiate state involvement, for abuse or neglect is a fundamental personal decision with serious consequences, akin to the choice of drug

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\(^{404}\) *Carter*, supra note 261 at para 66.


\(^{406}\) *Carter*, supra note 261 at para 64, citing *Blencoe*, supra note 399 at para 54.

\(^{407}\) *Carter*, ibid at para 65, citing *Carter BCSC*, supra note 261 at para 1326.

\(^{408}\) *Carter*, ibid at para 66.

\(^{409}\) *Ibid* at para 68.
for the treatment of serious illness, and thus a mandatory reporting law that removes that choice engages the liberty interest. Once the state agency is involved, it may impose serious consequences that are against the wishes or interests of the abused client, with little or no opportunity for the client to affect those decisions or stop the process. For example, the state agency may charge and prosecute the abuser against the wishes of the abused client, despite the client’s financial or emotional dependence on the abuser. Such charges may incite retaliatory abuse. The state agency may also remove the abused client from the home against the client’s wishes. Moreover, a response to abuse – especially serious abuse – is, in the language of Carter, “a deeply personal response to serious pain and suffering” that is a matter of dignity. Even where the client can stop the process of state involvement somewhere downstream, involving the state to begin with is in itself a meaningful choice that goes to independence and dignity. Thus, it would be consistent with Carter and Smith to hold that mandatory reporting laws on abuse and neglect engage the section 7 liberty interest of clients.

Under a purposive approach, the liberty interest will usually still be engaged where the client lacks capacity. Recall that even where a person lacks capacity, that person’s autonomy is honoured by incorporating the person’s wishes and beliefs, insofar as they are known, into the substitute decision-making process – indeed, Abella J in AC v Manitoba is explicit that “best interests” must incorporate the person’s wishes. Even in the emergency context, the decision is made based on available information about what decision the person would have made. That is, it is more respecting of autonomy to allow someone else to decide based on the individual’s wishes and interests than imposing or removing the choice entirely. In the same way as I have argued that mandatory reporting laws engage the liberty interest of a client with capacity by imposing a decision, I argue that those laws engage the liberty interest of a client without

410 See also Parker, supra note 402, on the choice of whether or not to take medication.

411 As I acknowledged above, where the state agency’s response to the report is solely to confirm autonomy and thus the need for protection, and the intervention is carefully minimized and tailored to that end, one could argue that there is no significant violation of autonomy. See above note 217. However, these situations will be uncommon.

412 See above note 381 and corresponding text.

413 See e.g. Chapter 1, note 185 and corresponding text.

414 See above under heading 2.3; AC v Manitoba, supra note 232.

415 See above under heading 3.1.
capacity by imposing a decision – a decision that would otherwise have been made, regardless of who made it, with reference to the client’s wishes and interests.\textsuperscript{416} Of course, there will be some contexts, such as infants,\textsuperscript{417} where the abused client cannot express wishes and has never previously been able to express wishes. In those narrow circumstances, the liberty interest will not be engaged.

9.2 The impact on the liberty interest violates the principle of fundamental justice against overbreadth

This impact of mandatory reporting laws on the liberty interest violates the principle of fundamental justice against overbreadth, as that principle has been clarified by the Supreme Court in Canada (Attorney General) v Bedford and applied in Bedford and Carter.\textsuperscript{418} Chief Justice McLachlin discussed overbreadth, in relation to the principle of arbitrariness, at length in Bedford:

Overbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. In this sense, the law is arbitrary in part. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts."

Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose.\textsuperscript{419}

\textsuperscript{416} As I will discuss below (notes 439-440 and accompanying text), the weight which will be give to those wishes and interests will vary depending on age and maturity – that is, it is not a binary question.

\textsuperscript{417} See e.g. AC v Manitoba, supra note 232 at para 82, where Abella J draws a distinction between “infants and very young children” and “adolescents”: “The application of an objective “best interests” standard to infants and very young children is uncontroversial. Mature adolescents, on the other hand, have strong claims to autonomy, but these claims exist in tension with a protective duty on the part of the state that is also justified.”

\textsuperscript{418} Bedford, supra note 336; Carter, supra note 261.

\textsuperscript{419} Bedford, ibid at paras 112-113 [emphasis in original]. Note that elsewhere in Bedford McLachlin CJ prefers the term “object” for section 7 and “purpose” for section 1, which language I follow.
An evaluation of overbreadth (or arbitrariness) first requires a determination of the purpose or object of the law, and then an assessment of the connection between that purpose and the effect on the individual, in this case the client.⁴²⁰

While identifying the object of mandatory reporting laws on abuse and neglect is fairly straightforward, it is unclear how specific that object should be in the context of a section 7 analysis. Note that *Bedford* was explicit that the relevant purpose is that of the specific provision being challenged.⁴²¹ The Supreme Court in *Carter* emphasized that the object should be defined narrowly, and “confined to measures directly targeted by the law”.⁴²² Thus, the object of the prohibition on assisted suicide was not “the preservation of life”, but “preventing vulnerable persons from being induced to commit suicide at a time of weakness”.⁴²³ In contrast, the Court in *Smith* described the object of the challenged law, which prohibited medical marijuana use other than as dried marijuana, as “simply the protection of health and safety”.⁴²⁴ The Court further complicated this characterization by identifying two parts of this object – two parts that are completely unrelated: “the health and safety of the patients who qualify for legal access to marijuana” and “curb[ing] the diversion of marijuana into the illegal market”.⁴²⁵ Justice Cromwell for the Court in *R v Moriarity* later emphasized that the object should not be defined too narrowly:

The appropriate level of generality for the articulation of the law’s purpose is also critically important. If the purpose is articulated in too general terms, it will provide no meaningful check on the means employed to achieve it: almost any challenged provision will likely be rationally connected to a very broadly stated purpose…. On the other hand, if the identified purpose is articulated in too specific terms, then the distinction between ends and means may be lost and the statement of purpose will effectively foreclose any separate inquiry into the connection between them. The appropriate level of generality, therefore, resides between the statement of an “animating social value” — which is too general — and a narrow articulation, which can include a virtual repetition of the challenged

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⁴²⁰ *Carter*, supra note 261 at para 73.
⁴²¹ *Bedford*, supra note 336 at e.g. para 130.
⁴²² *Carter*, supra note 261 at paras 77-78.
⁴²³ *Ibid* at paras 77 and 78.
⁴²⁴ *Smith*, supra note 405 at para 24.
⁴²⁵ *Ibid* at paras 25 and 27.
provision, divorced from its context — which risks being too specific…. An unduly broad statement of purpose will almost always lead to a finding that the provision is not overbroad, while an unduly narrow statement of purpose will almost always lead to a finding of overbreadth.\(^{426}\)

Thus *Carter, Smith*, and *Moriarity* provide weak guidance on the characterization of the object, although they do suggest that it should be defined narrowly instead of broadly.

As discussed in Chapter 1,\(^ {427}\) the purpose of mandatory reporting laws on abuse and neglect can be described generally as the protection of the vulnerable – with the vulnerable being those who may be unable to protect themselves or who lack capacity or voluntariness with respect to the decision to seek state assistance. The primary mechanism to fulfill that purpose is intervention. Thus, the object of these laws can be defined more narrowly as being the detection of abuse and neglect of a specific group of vulnerable persons for investigation and intervention. For example, the object of mandatory reporting in the Ontario *Child and Family Services Act* would be to detect specific children in need of protection in order to investigate and intervene.

These articulations of object are supported by the text of the law themselves. The “paramount purpose” of the Ontario *CFSA*, which includes the mandatory reporting of children in need of protection, “is to promote the best interests, protection and well being of children”.\(^ {428}\) The “fundamental principle” of the Ontario *Long-Term Care Homes Act, 2007*, which includes mandatory reporting of abuse of care home residents, “is that a long-term care home is primarily the home of its residents and is to be operated so that it is a place where they may live with dignity and in security, safety and comfort”.\(^ {429}\) The purpose of mandatory reporting of sexual abuse by health professionals is “to encourage the reporting of such abuse, to provide funding for therapy and counselling for patients who have been sexually abused by members and, ultimately,\(^ {426}\) *R v Moriarity*, 2015 SCC 55 at para 28, [2015] 3 SCR 485 [citations omitted].

\(^{427}\) See Chapter 1, notes 106 to 114 and accompanying text.

\(^{428}\) *CFSA*, *supra* note 215, s 1.

\(^{429}\) *Long-Term Care Homes Act, 2007*, SO 2007, c 8, s 1 [*LCHA*] [emphasis added]. Under previous legislation, reporting was focused on neglect, not abuse. See *Nursing Homes Act*, RSO 1990, c N.7, s 25(1): “A person other than a resident who has reasonable grounds to suspect that a resident has suffered or may suffer harm as a result of unlawful conduct, improper or incompetent treatment or care or neglect shall forthwith report the suspicion and the information upon which it is based to the Director.”
to eradicate the sexual abuse of patients by members”. The purpose of the Nova Scotia Adult Protection Act is “to provide a means whereby adults who lack the ability to care and fend adequately for themselves can be protected from abuse and neglect by providing them with access to services which will enhance their ability to care and fend for themselves or which will protect them from abuse or neglect.” Similarly, the preamble to the Mandatory Gunshot Wounds Reporting Act refers to “enabl[ing] police to take immediate steps to prevent further violence, injury or death”, which presumably may include protecting victims of gunshot wounds. These purpose statements all, explicitly or implicitly, support the object of detecting and intervening in cases of abused or neglected persons.

Recall from Chapter 1 that a secondary mechanism of mandatory reporting laws on abuse and neglect is the general and specific deterrence of such abuse or neglect. The risk or event of detection and punishment may, among other things, deter abuse and neglect – that is, the ultimate goal may include changing behaviour. This is a longer-term and less direct impact than intervention. It seems more consistent with Carter and Smith to restrict the object for the purposes of section 7 to detecting, investigating, and intervening in cases of abuse or neglect.

Given this object, mandatory reporting laws on abuse and neglect are not arbitrary but are overbroad. The deprivation of a fundamental personal choice fulfills the object of protecting vulnerable persons, and specifically those who lack capacity or voluntariness – deciding for those who cannot decide for themselves. However, the overbreadth comes because some individuals – those who are abused or neglected but can decide – are deprived of that choice. Despite the abuse and neglect, they are capable of determining their own best interests and protecting themselves accordingly by reporting themselves to state authorities.

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430 HPPC, supra note 218, s. 1.1. While not specifically stated, it is clear that the law is also intended to stop any further abuse of the same patient by the same professional.

431 APA, supra note 219, s 2.

432 Mandatory Gunshot Wounds Reporting Act, 2005, SO 2005, c 9, preamble [MGWRA]. The corresponding statutes in other provinces and territories do not include a preamble or a purpose provision, but the same point was expressed in the respective legislative debates. See Martin, supra note 216 at 184-185.

433 See Chapter 1, notes 143 to 144 and accompanying text. Note that deterrence in this sense – deterring potential abuse and neglect – is about the impact on the abuser, whereas deterrence as I discuss it in Chapter 4 is about the impact on the abused or neglected client that may be deterred from disclosing the abuse or neglect or from seeking professional services entirely.
This overbreadth is consistent with *Carter*, in which the Court held that the prohibition on assisted suicide, intended to protect the vulnerable, was not arbitrary but was overbroad. The prohibition met its object – “to protect the vulnerable from ending their lives in times of weakness” – in some cases, but also applied to people who were not vulnerable. Specifically, these people were “competent, fully informed, and free from coercion or duress.” Moreover, “vulnerability can be assessed on an individual basis.” In a similar fashion, mandatory reporting laws on abuse and neglect protect some vulnerable persons but also impose reporting on some persons who are not vulnerable. That is, the laws each apply to a broad category of persons – such as children or spouses – only some of whom are actually vulnerable.

This overbreadth of mandatory reporting laws on abuse and neglect is also supported, albeit by analogy, by *AC v Manitoba*. Justice Abella for the majority held that the statutory scheme at issue – court-ordered medical treatment for a child in need of protection, where those 16 and over were presumed to have capacity but for those under 16 the court was to decide in the child’s best interests – was not arbitrary because, properly interpreted, it gave the child the opportunity to demonstrate his or her maturity and decision-making ability. (Note that, as clarified in *Bedford*, the violated principle of fundamental justice in the mature minor situation would appear to be overbreadth, not arbitrariness, as the law is not irrational as applied to children that do lack capacity.) This holding supports the point that an irrebuttable predetermination that all potentially vulnerable persons as classes, whether children, the elderly, spouses, or others, cannot make their own fundamental decisions is overbroad. Moreover, *AC v Manitoba* reinforces that the “best interests” of an individual necessarily include that person’s wishes to some degree: “it is, by definition, in a child’s best interest to respect and promote his or her autonomy to the

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434 *Carter*, supra note 261 at paras 83 and 86.
435 *Ibid* at para 86.
436 *Ibid* at para 115. See also para 116.
437 *AC v Manitoba*, supra note 232.
438 *Ibid* at paras 102-108. While AC argued that the law was unconstitutional without a rebuttable presumption of capacity – and Binnie J concurring agreed – Abella J instead held that the law was constitutional because capacity could sufficiently be incorporated into best interests.
439 See also Stewart’s discussion of the close-in-age exceptions to consent to sexual activity: Stewart, “*Bedford*”, supra note 336 at 590-591.
extent that his or her maturity dictates.” While Abella J was deciding in the context of a statutory scheme that explicitly included wishes in the definition of best interests, her analysis goes beyond that scheme in considering the common law and social science evidence.

In this regard, to the extent that mandatory reporting laws purport to serve a protective function by promoting the best interests of the client, that conception of best interests is a narrow and bare one that does not incorporate the client’s wishes. Justice Abella’s emphasis on the context-specific nature of the exercise, referring to “a sliding scale of scrutiny”, thus highlights the inherent structural limitation of typical mandatory reporting laws: they apply to a defined class, do not use a presumption of capacity or incapacity, and are inconsistent with case-by-case determinations.

Recall from above that the clash of mandatory reporting laws with autonomy may be resolved if some of the group lack capacity or voluntariness, or some measure closer to autonomy such as maturity or stability, and mandatory reporting of all is the only effective way to ensure the detection of those some. If it is impossible or impractical for professionals to evaluate capacity or voluntariness or other measures of autonomy, a legislated generalization is necessary to protect those who are actually vulnerable. Under older cases, this point may have precluded a holding of overbreadth. For example, the majority of the Supreme Court in *R v Clay* rejected the argument that the criminal prohibition on marijuana was overbroad because its applied to all users in order “to prevent harm to a small percentage of chronic users”, in part because “[t]he evidence indicated that a narrower prohibition would not be effective because the members of at least some of the vulnerable groups and chronic users could not be identified in advance”. However, following *Bedford* and *Carter*, issues such as “enforcement practicality” and “evidentiary difficulties” do not affect the overbreadth itself under section 7, but might apply as a justification under section 1.

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440 *AC v Manitoba*, *supra* note 232 at para 88.
441 *Ibid* at para 22.
442 *R v Clay*, 2003 SCC 75 at paras 34, 40, [2003] 3 SCR 735. The other part of the reasoning was that the acute effects of marijuana could also be harmful to the user.
443 *Bedford*, *supra* note 336 at paras 113 and 143-144; *Carter, supra* note 261 at para 85.
A related argument against overbreadth would be that all abused or neglected clients are potentially vulnerable. Under this view, the object would be redefined more broadly as detecting potentially vulnerable persons so that a state agency can investigate and determine whether they are actually vulnerable. That is, mandatory reporting laws are a screening mechanism that is intended to produce some false positives, and so the application to persons who are not actually vulnerable is part of the object. This argument likely fails based on *Carter*. The Supreme Court emphasized that the object should be defined narrowly, as otherwise “it becomes difficult to say that the means used to further it are overbroad…. [t]he outcome is to this extent foreordained”. That is, a broad object “has the potential to short-circuit the analysis”. More specifically, the Court rejected the arguments that “it is difficult to conclusively identify the ‘vulnerable’” and that “every person is potentially vulnerable”. While the “appropriate level of generality” remains less than clear following *Moriarity,* defining the purpose of mandatory reporting laws as screening, i.e. as identifying a group at risk of vulnerability in order for a state agency to investigate in order to confirm actual vulnerability, is likely too broad. Essentially, the argument would be that overbreadth is the purpose of the law. If overbreadth is indeed necessary for the proper functioning of the law, such an argument should be made at section 1 and not at section 7.

Another argument against overbreadth is to explicitly specify deterrence as an additional primary object of the law, alongside detection and intervention of individual abused persons. The lower the triggering threshold, the higher the perceived and actual risk of detection, thus arguably increasing the general deterrence impact. However, this essentially becomes an argument that overbreadth is valuable in itself, which seems to be contrary to the principle of fundamental justice against overbreadth. This deterrence impact is better considered at the proportionality stage of a section 1 justification.

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444 *Carter, ibid* at para 77.


446 *Ibid* at para 87 [quoting from Canada’s factum; emphasis in the factum].


448 This is analogous to the response to *Carter*, in which Parliament specified among the objectives not only the protection of the vulnerable in a time of weakness (“[w]hereas vulnerable persons must be protected from being induced, in moments of weakness, to end their lives”), but also the new objective of “preven[ting] errors and abuse” (“[w]hereas robust safeguards, reflecting the irrevocable nature of ending a life, are essential to prevent errors and abuse in the provision of medical assistance in dying”): *Carter* amendments, *supra* note 279, preamble.
Mandatory reporting laws also involve a second level of overbreadth. As I have explained, these laws apply not only to abused or neglected clients who lack capacity and/or voluntariness to decide whether to seek state assistance, but also abused or neglected clients who have both capacity and voluntariness. However, they also apply to clients who are not actually abused or neglected at all. Recall from Chapter 1 that mandatory reporting laws on abuse and neglect typically use a deliberately qualified triggering threshold, usually a reasonable suspicion or a reasonable belief of “may”.\footnote{See Chapter 1, notes 19 to 21 and accompanying text. Suspicion: see e.g. \textit{CFSA}, \textit{supra} note 215, s 72; \textit{LCHA}, \textit{supra} note 429, s 24; \textit{Retirement Homes Act, 2010}, SO 2010, c 11, s 75. Belief: see e.g. \textit{HPPC}, \textit{supra} note 218, s 85.1.} That is, the professional is required to report based on a belief or suspicion of “may” – beliefs or suspicions that will sometimes in fact be incorrect. For example, consider a physician who reasonably suspects, and thus reports, that a child patient has been abused. An investigation may reveal that the child has not been abused. In such instances, autonomy is violated in the imposition of un-needed assistance. This potential for false positives is inherent to the nature of these laws as a screening tool for state investigation – a deliberate choice to be over-inclusive and incur a greater level of false positives. It is a specialized state agency, not the professional, that makes the ultimate determination. This overbreadth may be justifiable because of evidentiary or enforcement issues, but following \textit{Bedford} that argument is to be considered under section 1.

This qualified-threshold overbreadth would apparently be eliminated by a reformulation of the purpose of these mandatory reporting: not to protect the vulnerable (by identifying harmed vulnerable persons), but to identify a group of vulnerable persons that may need protection for further investigation. However, as discussed above,\footnote{See above notes 444 to 447 and accompanying text.} this reformulated purpose would circumvent the overbreadth analysis by essentially claiming that the overbreadth is intentional in the purpose itself. Such an argument, that overbreadth is intentional and necessary, is better considered at section 1.

I note that all laws have some unavoidable element of imprecision, and it is unclear following \textit{Bedford} if all laws are overbroad because of that imprecision. For example, recall from Chapter 1 that reporting is required under the \textit{Mandatory Gunshot Wounds Reporting Act} when the
facility “treats a person for a gunshot wound” – and not, for example, when the facility treats a person for a wound and there is a reasonable suspicion that the wound is or may be a gunshot wound.\textsuperscript{451} Although this triggering threshold is unqualified, there may still be situations where a wound is mistakenly identified as a gunshot wound. For my purposes, I assume that there may be some level of precision $x$ at which a law is not overbroad, or any overbreadth is necessarily justifiable under section 1 – and that if there is such a level $x$, it is no lower than reasonable professional opinion. (I acknowledge that “reasonable” may seem redundant, because it is implicit that a professional opinion will be reasonable.) Thus, I will consider any triggering threshold lower than reasonable professional opinion to be overbroad. These would include a reasonable professional opinion of “probably” or “may”, a reasonable belief of “probably” or “may”, and a reasonable suspicion of “probably” or “may”.

Mandatory reporting laws on abused and neglected clients thus infringe section 7. They engage liberty by removing the client’s choice to seek state assistance, which is a fundamental personal decision. These laws are not in accordance with the principle of fundamental justice against overbreadth in two ways. First, they apply not only to those abused and neglected clients who lack capacity, but also to those who have capacity. Second, where reporting is triggered by a deliberately qualified triggering threshold, these laws apply to some clients who are not actually abused or neglected. This overbreadth violates section 7.

9.3 Vagueness?

An important argument, though one that will almost certainly be unsuccessful, is that mandatory reporting laws are contrary to the principle of fundamental justice against vagueness. Clients or professionals may argue that a mandatory reporting law is too vague.\textsuperscript{452} If the professional is unsure when reporting is required and when it is not, then the client all the more so will be unsure when reporting is likely and when it is unlikely. The most likely part of the template to

\textsuperscript{451} See Chapter 1, note 24 and accompanying text; \textit{MGWRA, supra} note 432, s 2.

present vagueness problems is the meaning and scope of the reportable occurrence. Consider, for example, that the *OSPCA Act* requires veterinarians to report when they have “reasonable grounds to believe that an animal has been or is being abused or neglected”, but abuse and neglect are undefined. This is in stark contrast to the *Child and Family Services Act*, which includes a thirteen-paragraph list of what constitutes a child in need of protection, some parts of which are quite specific. Similarly, until 2015 the *Highway Traffic Act* required physicians and optometrists to report any person who “is suffering from a condition that may make it dangerous for the person to operate a motor vehicle”, without specifying which conditions qualify. Prescribed persons must now instead report any person who “has or appears to have a prescribed medical condition, functional impairment or visual impairment”. This makes the mandatory reporting law more like the provision on reporting “reportable diseases” under the *Health Protection and Promotion Act*, where the regulations provide a list of all diseases that qualify.

Nonetheless, in the context of mandatory reporting laws, vagueness is not a serious legal issue. Very little is required to satisfy this principle – that is, a law must be remarkably vague in order to violate the principle. Concepts such as reasonable belief or reasonable suspicion are fairly common legal concepts. Moreover, insofar as these laws apply to professionals, those professionals can reasonably be expected to know what such terms mean. For example, it seems reasonable to expect veterinarians to recognize animal abuse or neglect.

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455 *CFSA*, supra note 215, s 72(1).
456 *HTA*, supra note 215, ss 203, 204 [HTA].
457 Ibid, s 203(1), as amended by *Transportation Statute Law Amendment Act (Making Ontario's Roads Safer)*, 2015, SO 2015, c 14, s 55. (This amendment is not yet in force at the time of writing.)
458 *HPPA*, supra note 269, ss 25 and 26; *Specification of Reportable Diseases*, O Reg 559/91, s 1.
459 See e.g. the discussion in Stewart, *Fundamental Justice*, supra note 401 at 127-133.
460 I note that this assumption may be incorrect. See Jennifer A Woolf, “How Can Veterinarians Be Reporters of Animal Abuse When They Are Not Taught to Recognize It?” (2015) 247:12 J American Veterinary Medical Assoc 1363. If this assumption is indeed incorrect, improved training is the appropriate response.
At the same time, the vagueness issue is a helpful reminder to policymakers and legislators. As discussed in Chapter 1, definitions are particularly important in mandatory reporting laws. Mandatory reporting laws should provide both clients and professionals with as much clarity as possible about the reportable occurrence. All else equal, clarity provides predictability, reduces the likelihood of over-reporting or under-reporting, and can be expected to increase compliance.

9.4 An important note about the principles of fundamental justice

In Chapters 3 through 5, I will discuss other ways in which mandatory reporting laws are overbroad and other ways in which these laws are contrary to other principles of fundamental justice. As a matter of law, the engagement of any section 7 interest allows any principle of fundamental justice to be argued. (Similarly, as I will discuss in Chapter 3, the case law on section 8 of the Charter suggests that any principle of fundamental justice could be used to argue that a law is itself unreasonable. However, for the purpose of my analysis, I focus on the principles of fundamental justice that are most relevant to the interest engaged and the manner in which that interest is engaged. That is, I separate out those principles that are most relevant to each chapter: autonomy here in Chapter 2, privacy in Chapter 3 (insofar as section 8 incorporates the principles of fundamental justice), deterrence and access to services in Chapter 4, and the interests of the professional in Chapter 5. Thus, for example, this capacity-based overbreadth relates more directly to autonomy (via the liberty interest) than to privacy, and is best considered here in Chapter 2 but not in Chapter 3. In contrast, the overbreadth of a deliberately qualified triggering threshold will be relevant in each chapter. This separating out promotes clarity but is admittedly somewhat artificial. In a litigation context, these various interests and the corresponding principles of fundamental justice would collapse into a single level, with all of the section 7 interests that are potentially engaged being argued in conjunction with all of the principles of fundamental justice that are potentially relevant.

461 See Chapter 1, notes 27 to 32 and accompanying text.
462 See Chapter 3, notes 651 to 653 and accompanying text.
10 Is the infringement of section 7 justifiable under section 1?

Prior to Bedford, it would have been safe to assume that an infringement of section 7 would be justifiable only in exceptional circumstances. However, McLachlin CJ in Bedford emphasized the difference between section 7 and section 1, recognizing a real possibility of successful justification:

It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the Charter…. The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play…. Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the Charter cannot be discounted.463

Subsequently, the Court in Carter clarified this aspect of Bedford, perhaps retreating slightly:

It is difficult to justify a s. 7 violation…. The rights protected by s. 7 are fundamental, and “not easily overridden by competing social interests”…. And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed…. However, in some situations the state may be able to show that the public good -- a matter not considered under s. 7, which looks only at the impact on the rights claimants -- justifies depriving an individual of life, liberty or security of the person under s. 1 of the Charter.464

Thus McLachlin CJ in Bedford held that considerations such as “enforcement practicality” and “evidentiary difficulties” could justify overbreadth,465 even though Lamer J for the majority in the BC Motor Vehicle Reference held that, at least in relation to “administrative expediency”, a section 7 violation would be justifiable “only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like”.466

463 Bedford, supra note 336 at para 129 [citations omitted].
464 Carter, supra note 261 at para 95 [citations omitted]. See also more recently R v Safarzadeh-Markhaliat, 2016 SCC 14 at para 57, [2016] 1 SCR 180, McLachlin CJ for the court, citing Carter: “It is difficult, but not impossible, to justify a s. 7 violation under s. 1. Laws that deprive individuals of liberty contrary to a principle of fundamental justice are not easily upheld. However, a law may be saved under s. 1 if the state can point to public goods or competing social interests that are themselves protected by the Charter”. [Citation to Carter omitted.]
As Stewart explains, *Bedford* fundamentally changed the connection between section 7 and section 1 by assigning societal concerns to section 1 and restricting section 7 and the principles of fundamental justice to the impact on the individual.  

As the Court put it in *Carter*, “the s. 1 analysis focuses on the furtherance of the public interest and thus differs from the s. 7 analysis, which is focused on the infringement of the individual rights”.  

The Court in *Carter* also specified that “competing moral claims and broad societal benefits” should be considered not under section 7 but under section 1.  

*Bedford* rejected the suggestion that there is an overlap between sections 1 and 7, such that a law violating section 7 via arbitrariness, overbreadth or gross disproportionality would also fail the test for justification under section 1: “An arbitrary law was not rationally connected to its objective; an overbroad law was not a minimal impairment of the section 7 right; and the deleterious effects of a grossly disproportionate law on the section 7 right would necessarily outweigh its salutary effects on the legislative objective”.  

That is, a section 1 justification of a section 7 violation is now a real possibility because the two sections work differently.  

*Bedford* and *Carter* appear to anticipate that section 7 infringements related to overbreadth, arbitrariness, and gross disproportionality could be justified under section 1, although it remains unclear how this new approach to section 7 and section 1 would apply where other principles of fundamental justice are involved.  

This makes section 7 infringements more like infringements of other *Charter* rights, i.e. more easily justifiable under section 1.  

Mandatory reporting laws are overbroad, but that overbreadth is arguably necessary for their effectiveness. Protection of the vulnerable, and specifically the detection of abuse and neglect of

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467 Stewart, “*Bedford*”, *supra* note 336 at 578 and 589.

468 *Carter*, *supra* note 261 at para 29, citing *Bedford*, *supra* note 336 at para 125.

469 *Carter*, *ibid* at para 79.

470 Stewart, “*Bedford*”, *supra* note 336 at 588.

471 *Ibid* at 589. “The argument that a law violating one of these principles could not pass the *Oakes* test must be reconsidered because a different set of considerations come into play under s. 1: not just the effect of the law on one person’s s. 7 interests, but the effect of the s. 7 violation in achieving its policy objectives.”

472 See e.g. Stewart, “*Bedford*”, *ibid* at 594: “If this analysis is correct, *Bedford* has fundamentally altered the structural relationship between section 7 and section 1 of the *Charter*, at least with respect to the norms against overbreadth, arbitrariness, and gross disproportionality, but perhaps more broadly.” [Emphasis added.]

473 This is implied, though not explicitly stated, in Stewart, “*Bedford*”, *ibid*. 
vulnerable persons for investigation and intervention, is clearly a legitimate public concern and thus a pressing and substantial objective.\(^{474}\) I note that Renke addresses rational connection in detail in the context of child abuse reporting.\(^{475}\) In addition to detection of otherwise undetected instances, he argues that mandatory reporting is also rationally connected because these laws are a “reminder” to encourage responsible behaviour and because reporting generates better data.\(^{476}\) These two connections make more sense if a broader mechanism, such as combatting future abuse (or as Renke specifies, “to eliminate and ameliorate child abuse”)\(^{477}\) is substituted for the more specific mechanism of intervening in cases of abuse. He also considers (and rejects) the argument that mandatory reporting is not rationally connected because some people will not comply with the law.\(^{478}\)

This leaves the section 1 determination to proportionality, i.e. “(1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.”\(^{479}\) Imposing state investigation and possibly intervention is clearly rationally connected to the objective of protecting the vulnerable, as was the prohibition on assisted suicide in \textit{Carter}.\(^{480}\) As with \textit{Carter}, the determinative issue is likely minimal impairment. There may be measures that decrease this overbreadth and so impair less the liberty interest. A decrease in the level of overbreadth would

\(^{474}\) \textit{Carter} seems analogous, although the pressing and substantial objective was conceded in that case: \textit{Carter}, supra note 261 at para 96. Similarly, Renke concludes there is a pressing and substantial objective for mandatory reporting of child abuse: Renke, “Child Abuse”, supra note 453 at 100-101: “Child abuse is criminal or virtually criminal behaviour. It has significant detrimental social consequences. Even in the case of lesser crimes (e.g. involving mere property, not persons), privacy interests may be limited in a wide variety of ways, so that offences may be investigated and prosecuted. Hence, the elimination and amelioration of child abuse may warrant the limitation of privacy interests.”

\(^{475}\) Renke, “Child Abuse”, \textit{ibid} at 101-102.

\(^{476}\) \textit{Ibid} at 101. He uses reminded as a verb: “mandatory reporting is a means by which citizens generally, and professionals in particular, may be reminded to perform their duties to ensure the safety and well-being of other persons whether in their legal care or not.” Note that this so-called “duty” is not obviously a legal duty or a moral duty, even for professionals.

\(^{477}\) \textit{Ibid} at 101.

\(^{478}\) \textit{Ibid} at 101-102.


\(^{480}\) \textit{Carter}, \textit{ibid} at para 100. Similarly, Renke concludes there is a rational connection for mandatory reporting of child abuse: Renke, “Child Abuse”, supra note 453 at 102. Note that he also concludes minimal impairment at 140 and balance at 108.
also reduce the negative effects of the law, which would also improve the result at the balancing stage.

The first level of overbreadth – that mandatory reporting includes those who have capacity and voluntariness – could be reduced to be less impairing of the liberty interest, by an exception to reporting as discussed above. This exception to mandatory reporting would apply where the client has capacity and voluntariness, and could include a presumption of incapacity and involuntariness. The more that capacity and voluntariness assessment would be impractical, or the more difficult it is for the professional to assess capacity and voluntariness, the more justifiable would be a mandatory reporting law with a presumption of incapacity or lacking such an exception entirely. In particular, different professions may have different abilities to assess capacity. As discussed above, physicians and other health professionals are expected to be able to assess capacity, as are lawyers. A more fundamental problem is that health professionals (and possibly lawyers too) are in reality typically very bad at assessing capacity;481 however, the appropriate solution is better training to improve the ability to determine capacity, rather than modifying the law to reduce the emphasis on capacity because of this skills deficit. Professionals such as clergy or teachers, in contrast, are not expected to be able to evaluate capacity. Thus, mandatory reporting laws applicable only to one or more of these professions would not require an exception for capacity.

The second overbreadth could be reduced, and thus the law made more minimally impairing, if the triggering threshold were raised from reasonable suspicion or belief of “may” to something higher. Higher thresholds may render the reporting regime ineffective and fundamentally destroy its functionality as a screening scheme with further investigation for confirmation by a state agency. I would suggest that the highest appropriate threshold would be a reasonable

481 See e.g. Laura L Sessums, Hanna Zembrzuska & Jeffrey L Jackson, “Does This Patient Have Medical Decision-Making Capacity?” (2011) 306:4 JAMA 420 at 422; a meta-analysis that showed “Physicians recognized that patients were incapable of medical decisions in 42% (95% CI, 30%-53%) of patients independently judged to lack capacity. While physicians routinely missed the diagnosis of incapacity (negative LR [LR−], 0.61; 95% CI, 0.48-0.74), they were usually correct when they made the diagnosis (positive LR [LR+], 7.9; 95% CI, 2.7-13).” See also e.g. L Seyfried, KA Ryan & SY Kim, “Assessment of Decision-Making Capacity: Views and Experiences of Consultation Psychiatrists” (2013) 54:2 Psychosomatics 115, cited e.g. in Scott YH Kim & Trudo Lemmens, “Should Assisted Dying for Psychiatric Disorders Be Legalized in Canada?” (2016) 10.1503/cmaj.160365 Can Medical Assoc J 1. See also e.g. Charland, Lemmens & Wada, supra note 238 at 3-4.
professional opinion that the client has or probably has the reportable occurrence – where “probably” means on a balance of probabilities or more likely than not. I will refer to this as a reasonable professional opinion of “probably”. On the other hand, while a deliberately qualified reporting threshold should be justifiable, there will be some threshold that is too low – likely anything below a reasonable suspicion of “may”. The appropriate threshold may also vary from profession to profession, depending on how accurately each profession is reasonably expected to be at detecting the occurrence. For example, I assume physicians may be more accurate than clergy at detecting abuse and neglect. If so, then a mandatory reporting law could use a lower threshold for clergy (e.g. reasonable suspicion of “may”) and a higher threshold for physicians (e.g. a reasonable professional opinion of “probably”). As discussed above, if deterrence is a secondary mechanism, then a lower triggering threshold arguably increases the risk of detection and so serves that deterrence mechanism.

These questions about minimal impairment are all value judgments about whether false positives are preferable to false negatives, what degree of false positives are acceptable, and what degree of false negatives constitutes success.482 These judgments will be given deference, although less deference is given where the legislative scheme is a simplistic, not complex, response.483 That is, the government could successfully argue that “overbreadth was reasonably necessary for effective regulation of the problem in question”.484 As I will discuss in Chapter 3,485 the Supreme Court in R v Chehil reviewed the factors that make a lower threshold versus a higher threshold appropriate for a search or seizure.486 While the discussion in Chehil was in the context of reasonableness under section 8, the same factors are relevant to whether a section 7 infringement based on the overbreadth of a qualified triggering threshold will be justifiable under section 1. Justice Karakatsanis for the Court in Chehil held that a lower threshold will be appropriate “where privacy interests are reduced, or where state objectives of public importance

482 See similarly Stewart’s discussion of setting an age of consent to sexual activity: Stewart, “Bedford”, supra note 336 at 590-591.
483 Carter, supra note 261 at paras 97-98.
484 Stewart, “Bedford”, supra note 336 at 590.
485 See Chapter 3, under heading 3.2.
are predominant”, and where the search is relatively less intrusive.⁴⁸⁷ These factors are consistent with the balancing stage of a section 1 justification analysis. Chehil also acknowledges that a lower threshold will result in false positives – “[t]he fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime” – but holds that such false positives do not preclude Charter compliance.⁴⁸⁸

Minimal impairment poses an interesting dilemma when a mandatory reporting law covers several professions, as with children in need of protection. Is any given profession necessary to include, given the other professions that are included? For example, a mandatory reporting law on child abuse and neglect that applies only to physicians will be less impairing of section 7 than a law that applies to health professionals and to lawyers, clergy, and teachers. (Similarly, it has been argued that religious freedoms can be protected by exempting clergy from reporting, given that other professionals will presumably have the opportunity to detect the wrongdoing.⁴⁸⁹)

However, this approach is problematic for two reasons. The first is that any particular profession may be uniquely positioned – whether because of their professional training or the services they provide – to learn of some reportable instances that other professions will not.⁴⁹⁰ That is, the inclusion of multiple professions may provide only partial overlap and redundancy. The second reason is that omitting any particular profession relies on retaining other professions. In the context of child abuse reporting, Renke notes not only that imposing reporting on some professionals and not others would be “inadequate”, but also suggests that if only some professionals are required to report, “they might legitimately complain that they were being singled out, as if they were especially at fault”.⁴⁹¹ Moreover, potential redundancy is a legitimate and defensible policy choice.

⁴⁸⁷ Ibid at paras 23-24.
⁴⁸⁸ Ibid at para 28.
⁴⁹⁰ See e.g. Dalton, ibid at 20: “The state will argue that priests are in an invaluable position to provide tips on cases of abuse because they observe families and attract troubled persons to share their problems.” [Citation omitted.]
⁴⁹¹ Renke, “Child Abuse”, supra note 453 at 111.
At the minimal impairment and balancing stages, the benefits will be the greatest and the costs least where reporting is truly intended to prevent future harm, as opposed merely to detect for the purpose of punishment. Mandatory reporting laws could thus be made more justifiable under section 1 by explicitly requiring a risk of future harm. The triggering threshold and thus the legislated choice between false positives and false negatives will also affect this balancing. Note also that McLachlin CJ for the majority in *Hutterian Brethren* rejected the idea that balancing is redundant to the rest of the *Oakes* test.492

Thus, while mandatory reporting laws on abuse and neglect of the vulnerable infringe section 7 via the overbreadth of ignoring capacity, this infringement may be justifiable under section 1. Such mandatory reporting laws would be more justifiable if they provided an exception where the client has capacity and voluntariness, with a presumption of incapacity and involuntariness. The absence of such an exception is less justifiable as the law applies to professionals who are deemed able to evaluate capacity, such as lawyers and physicians, and more justifiable as the law applies to professions such as clergy and teachers who are not deemed able to evaluate capacity.

Similarly, with regards to the overbreadth from a deliberately qualified triggering threshold, the infringement of section 7 would be more justifiable the higher the threshold. I would argue that the highest appropriate threshold that retains the screening approach is a reasonable professional opinion of “probably”. The more important the occurrence, and the more difficult it is for a professional to identify, the lower the justifiable threshold. But anything lower than reasonable suspicion of “may” would likely be difficult to justify.

An alternative application of the “enforcement practicality” justification would be to position mandatory reporting as a screening tool constituting a minor infringement of autonomy, and refocus the relevant and more important consent as being further downstream: once the agency receiving the report has investigated and determined that intervention or services are appropriate, the client’s capacity is honoured by allowing him or her to decline that intervention or service.

492 *Hutterian Brethren,* supra note 396 at paras 75-78.
However, as discussed above, this diluting of purpose is inconsistent with *Carter* and *Bedford*.\footnote{See notes 444-446 above and accompanying text.} The investigation and assessment is, in itself, an infringement of the autonomy interest.

It is worth emphasizing that in *Bedford*, the Court appeared to change its approach to both section 7 and section 1, with the two sections working in tandem. A provision that is now more likely to infringe section 7 – such as one that is overbroad for “enforcement practicality”\footnote{*Bedford*, supra note 336 at para 144, discussed in Stewart, “*Bedford*”, supra note 336 at 591.} – is also more likely to be justifiable under section 1. That is, the new approach “makes it easier to establish a section 7 violation… But it might also make it easier to save a limitation of a section 7 right under section 1.”\footnote{Stewart, “*Bedford*”, *ibid* at 578.} Recall, as discussed above,\footnote{See above notes 442 to 443 and accompanying text.} that prior to *Bedford* a law that was over-inclusive for enforcement practicalities or evidentiary problems might not offend the principle against overbreadth. After *Bedford*, these practical issues are not omitted entirely, but instead moved along with other societal interests from section 7 to section 1. This move does have an important consequence for parties seeking to establish a *Charter* violation, given that the burden is on the claimant under section 7 and on the government under section 1. Indeed, this differential burden was one of the reasons McLachlin CJ gave in *Bedford* for moving societal concerns from section 7 to section 1.\footnote{*Bedford*, supra note 336 at paras 126-127.} At the same time, the change in *Bedford* does not necessarily change the end result. Some laws that would previously be upheld as not infringing section 7 will likely now be upheld as infringing section 7 in a manner that is justifiable under section 1.

## 11 Modifying the template

As I mentioned in Chapter 1,\footnote{See Chapter 1, notes 47 to 66 and accompanying text.} there are several existing modifications to the standard template of mandatory reporting laws. Of these existing modifications, only anonymization of the reports...
would lessen the impact on autonomy and thus eliminate (or at least reduce) the section 7 infringement.

11.1 Discretionary reporting

Substituting discretionary reporting for mandatory reporting is unlikely to better protect autonomy. Any given professional can exercise that discretion in a myriad of ways. Unless the professional chooses to exercise the discretion solely based on his or her evaluation of the client’s capacity – and his or her evaluation of capacity happens to be accurate – the impact on autonomy is unchanged. Discretionary reporting may decrease the likelihood of a report being made, but it likewise increases uncertainty for the client.

11.2 Anonymization of reports

Anonymization would have a significant effect on the impact on autonomy and thus eliminate (or at least reduce) the section 7 infringement. However, this modification decreases the utility of a mandatory reporting law by precluding intervention to protect the individual client.

An anonymized report cannot lead – at least directly – to a state agency’s investigation and possible intervention, although the state agency may eventually detect the client’s situation indirectly. For example, recall that under the HPPC, mandatory reporting of sexual abuse by a health professional only includes the client’s name with the client’s consent. If the reporting professional knows the name of the abusive professional, that name is included in the report – indeed, if the name is not known, no report is made. An college investigating that abusive professional would likely attempt to identify all patients who may have been abused, and that investigation could potentially lead back to the client who was the anonymous subject of the

499 See above notes 388 to 389.
report and provoke an unwanted intervention. Thus anonymization would reduce, if not eliminate, the impact on autonomy and thus on the liberty interest. Alternately, if the liberty interest is still engaged because of the possibility of imposed state intervention, then the overbreadth is reduced and so more easily justifiable under section 1.

11.3 Imposing the reporting obligation on the institution instead of the professional

Placing the reporting obligation on the institution instead of the professional has no effect on the autonomy impact. The report has the same impact, whether made in the name of the professional who identifies suspected abuse or neglect or in the name of the institution. For example, where an emergency department physician forms a reasonable suspicion of child abuse, the impact on autonomy is the same whether the physician or the institution makes the report. The identity of the reporter does not change the autonomy impact.

11.4 No offence provision for non-compliance

Omitting an offence provision for non-compliance may have an unpredictable impact on autonomy. If indeed the professional or institution decides not to report because there is no offence provision, the impact on autonomy will be eliminated. Otherwise, there is no change.

11.5 Substituting retention for reporting

Modifying a mandatory reporting law to require retention for future request by the state agency would decrease the impact on autonomy only mildly. Investigation and possible intervention by the state agency is delayed until the agency requests the information – which it may never do – but it is difficult to predict whether the agency will use that power. That is, the likelihood of an autonomy violation is reduced from certainty, but not by much.
11.6 New modifications

As discussed above, three modifications that are not among the existing ones would better protect autonomy.

The modification most responsive to autonomy would be to limit mandatory reporting of abuse or neglect to those clients lacking capacity and/or voluntariness. As discussed above, instead of simply excluding clients with capacity from the definition of the reportable occurrence, it would be best to specify a rebuttable presumption of incapacity (and of involuntariness), so that it is clear that a report must be made where there is uncertainty over capacity or where the professional cannot assess decision-making capacity (or voluntariness). While this skill is required of a competent health professional or lawyer, it is not currently required of other professionals such as teachers, social workers, or clergy. This modification would admittedly be imperfect, in that clients incorrectly identified as lacking capacity may still be reported. However, it is still a marked improvement over a mandatory reporting law that ignores capacity entirely. Thus it would reduce the overbreadth and make the section 7 infringement easier to justify under section 1, specifically at minimal impairment and balancing.

The second of my modifications that would address the autonomy issue is to increase the triggering threshold. The higher the threshold, the lower the overbreadth and the easier it would be to justify the section 7 infringement under section 1, again at minimal impairment and balancing. However, a higher threshold reduces the effectiveness of a mandatory reporting law.

As also mentioned above, mandatory reporting laws on abuse and neglect would be easier to justify at the minimal impairment and balancing stages under section 1 if they were narrowed to require reporting only where there is a risk of future harm.

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500 See above notes 390 to 391.
501 See above notes 239 and 240 and accompanying text.
502 See above text after note 492.
503 See above text after note 492.
There are two other modifications that I will propose in Chapter 3: adding oversight mechanisms and adding limitations on use. These modifications would not improve the autonomy problem and so I will not discuss them further here.

12 Conclusion

In this chapter, I have demonstrated that those mandatory reporting laws purporting to protect vulnerable individuals from abuse and neglect appear to clash with the embodiment of autonomy elsewhere in Canadian law through the concepts of capacity and consent – albeit a limited embodiment that aims for autonomy but guarantees only liberty. In general, and most clearly in the context of health-care decision-making, an individual’s decisions are respected so long as the person has capacity and voluntariness, and there is a presumption of capacity. That is, capacity and voluntariness are the usual requirements for the state to be reasonably satisfied that the individual made, or had the opportunity to make, an autonomous decision, and so that decision should be determinative. However, there are some special contexts, namely assisted suicide and adolescents’ refusal of lifesaving treatment, where the law will require something closer to autonomy than merely capacity and voluntariness. These special contexts are united by vulnerability, which is a complex concept.

Mandatory reporting laws on abuse and neglect appear to clash with consent and capacity, imposing reporting regardless of the person’s wishes, capacity, voluntariness, or even best interests.

This apparent clash can be resolved if some or all of the group lack capacity and/or voluntariness, if abuse and neglect are a special context like assisted suicide in which the law legitimately requires something closer to autonomy than merely capacity and consent, or if reporting is in the public interest regardless of a positive or negative impact on the individual client. I suggested that the best application of these resolutions is to amend mandatory reporting laws on abuse and neglect to provide an exception where the client has capacity and voluntariness, with a rebuttable presumption of incapacity and involuntariness. I also noted how forewarning affects autonomy.
Mandatory reporting laws infringe section 7 by engaging the liberty interest – specifically, the interest in making fundamental personal decisions – in a manner that is overbroad. The decision to seek state assistance, or to initiate state involvement, is such a fundamental personal decision. There are two levels of overbreadth. One is that reporting applies to all members of a vulnerable class (e.g. children), even those who are not actually vulnerable – i.e. those who have capacity and voluntariness. Whether this overbreadth infringement of section 7 is justifiable under section 1 depends, as in Rodriguez and Carter, on whether the actually vulnerable subset is sufficiently identifiable. This overbreadth can be reduced, and the section 7 infringement more easily justified under section 1, by adding an exception to mandatory reporting where the client has capacity and voluntariness, most likely with a rebuttable presumption of incapacity. (This modification is not meaningful where the law applies only to professionals who are not expected to be able to assess capacity.) The second level of overbreadth comes from the deliberately qualified triggering threshold, which captures clients who are not actually abused or neglected. This overbreadth may be reduced, and the infringement more easily justified under section 1, by raising the triggering threshold. Alternately, the section 7 infringement may be eliminated, or at least reduced, by anonymizing the reporting – however, such a modification drastically reduces the utility of the mandatory reporting law. The section 7 infringement would also be more justifiable if reporting were limited to future harm. In contrast, mandatory reporting laws in their current form are not contrary to the principle of fundamental justice against vagueness.

It is worth emphasizing that, as I mentioned in Chapter 1,\(^{504}\) it is the engagement of a Charter right that should have normative weight; from a policy perspective, little turns on whether the right is not infringed, or whether the right is infringed but that infringement is justifiable under section 1. Similarly, the mere fact that a law passes Charter scrutiny does not mean that it is a good law. (Obviously, an unjustifiable infringement has serious legal consequences.)

Having completed my analysis of how mandatory reporting laws impact client autonomy, I turn in the next chapter to the way in which mandatory reporting laws impact client privacy.

\(^{504}\) See Chapter 1, note 6 and accompanying text.
Chapter 3
Privacy

1 Introduction

In Chapter 2, I considered how mandatory reporting laws clash with autonomy as that concept is embodied in Canadian law. In this chapter, I turn to the concept of privacy.

Canadian law provides substantial protection for privacy. The strongest protection is provided under the Canadian Charter of Rights and Freedoms, primarily by section 8. Additional protection is provided by elaborate and comprehensive statutory regimes, particularly those concerning the protection of personal information held by the government and of personal health information. Similar regimes apply to the private sector. Privacy can also be protected by civil actions, such as under the tort of “invasion of privacy” or “intrusion upon seclusion”, or violations of the “right to respect for his private life”.

Privacy is a complex concept. Justice Cromwell, writing for the Supreme Court, recently observed that “[p]rivacy is admittedly a ‘broad and somewhat evanescent concept’… Scholars have noted the theoretical disarray of the subject and the lack of consensus apparent about its nature and limits”. Nonetheless, there is a clear consensus that privacy, whatever precisely it means, is essential to human functioning, i.e. “privacy is also necessarily related to many

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506 See e.g. Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31 [FIPPA].
507 See e.g. Personal Health Information Protection Act, 2004, SO 2004, c 3, Schedule A [PHIPA].
508 See e.g. Personal Information Protection and Electronic Documents Act, SC 2000, c 5 [PIPEDA].
509 See e.g. in Ontario Jones v Tsige, 2012 ONCA 32 at paras 70-71, 108 OR (3d) 241 (“intrusion on seclusion”) as cited e.g. in Ludmer v Ludmer, 2014 ONCA 827 at paras 47-48, 52 RFL (7th) 17 (“the tort of invasion of privacy”).
510 See e.g. Charter of Human Rights and Freedoms, CQLR c C‐12, art 5, as discussed e.g. in Aubry v Éditions Vice-Versa inc., [1998] 1 SCR 591 at paras 48-53, 157 DLR (4th) 577.
511 R v Spencer, 2014 SCC 43 at para 34, [2014] 2 SCR 212 [citations omitted].
fundamental human relations”,\textsuperscript{512} and promotes “dignity, integrity and autonomy”.\textsuperscript{513} Indeed, Cromwell J described “the protection of privacy as a prerequisite to individual security, self-fulfillment and autonomy as well as to the maintenance of a thriving democratic society”.\textsuperscript{514} Similarly, Sharpe JA of the Ontario Court of Appeal has noted that “Charter jurisprudence identifies privacy as being worthy of constitutional protection and integral to an individual's relationship with the rest of society and the state.”\textsuperscript{515}

For my purposes, the most important aspect of privacy is the ability of the individual to control the use and disclosure of information about him or her. The Supreme Court has recognized this aspect within “the right to be left alone by the state”, which “includes the ability to control the dissemination of confidential information”.\textsuperscript{516} Indeed, the Court has referred to privacy legislation as being “part of an international movement towards giving individuals better control over their personal information”.\textsuperscript{517} Control of the dissemination of one’s information, particularly as against the state, engages the idea of anonymity – that is, not coming to the attention of the state as a specific and identifiable individual.

Protection of privacy is far from absolute. Both constitutional and statutory regimes recognize an array of situations where the individual’s interest in privacy is outweighed by the interests of the state or a third party in access to and use of the information. The most obvious is the maintenance of public safety and the investigation and prosecution of criminal and regulatory offences – or, as Binnie J framed it in \textit{R v Tessling}, “[s]afety, security and the suppression of

\textsuperscript{512} \textit{R v Mills}, [1999] 3 SCR 668 at 671, 180 DLR (4th) 1.
\textsuperscript{513} \textit{R v Plant}, [1993] 3 SCR 281 at 293, 84 CCC (3d) 203, Sopinka J for the majority, quoted e.g. in \textit{Mills}, \textit{ibid} at 671.
\textsuperscript{514} \textit{Spencer}, supra note 511 at para 15.
\textsuperscript{515} \textit{Jones v Tsige}, supra note 509 at para 39.
\textsuperscript{516} \textit{Mills}, supra note 512 at 671. See also \textit{Spencer}, supra note 511 at paras 34 and 40: “The Court has previously emphasized an understanding of informational privacy as confidentiality and control of the use of intimate information about oneself…. Privacy also includes the related but wider notion of control over, access to and use of information”.
\textsuperscript{517} \textit{Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401}, 2013 SCC 62 at para 13, [2013] 3 SCR 733, Abella & Cromwell JJ for the Court [citation omitted], referring specifically to \textit{PIPEDA}, supra note 508, and \textit{Personal Information Protection Act}, SA 2003, c P-6.5.
crime”. The corresponding interest, that such trials be fair and provide the opportunity for full answer and defence, allows the accused access to third-party records in some circumstances. More pervasive, but perhaps so accepted as to go unnoticed, are the information needs of the modern regulatory state – for the administration of social services, the regulation of commerce, and the collection of taxes. Other exceptions are made for public health & safety, such as mandatory blood testing laws and the duty or discretion to prevent imminent harm.

Indeed, mandatory reporting laws themselves comprise some of the most significant, longstanding, and generally accepted exceptions to privacy. Consider, in particular, the reporting of communicable diseases (to track and control their spread), conditions affecting the ability to drive (to promote road safety), and children in need of protection (to protect the vulnerable). However, such acceptance tends to be superficial and conclusory – i.e., that the privacy infringement is justified, or that the benefits outweigh the harms, or even that this is just the way it is. In this chapter, I consider how mandatory reporting laws fit, or not, with the treatment of privacy in Canadian law, and particularly its protection under the Charter. As I will demonstrate below, despite this general acceptance these laws may not survive constitutional scrutiny in their current form.

Recall, as described in Chapter 1, that the essence of mandatory reporting laws (as I have defined them) is to extract information from a relationship of trust so that the information can be

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520 See e.g. Mandatory Blood Testing Act, 2006, SO 2006, c 26. This Act, and equivalent legislation in several provinces, allow certain persons who are exposed to bodily fluids of another person to apply to have that person tested for certain communicable diseases. As discussed in Chapter 2, these Acts provide for an autonomy exception – the testing of a person’s blood without their consent – and a privacy exception – the release of that information to a third party exposed to that person. See Chapter 2, notes 270 to 271 and accompanying text.
521 See e.g. PHIPA, supra note 507, s 40(1): “A health information custodian may disclose personal health information about an individual if the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons.” See e.g. Wayne Renke, “The Constitutionality of Mandatory Reporting of Gunshot Wounds Legislation” (2005) 14:1 Health L Rev 3 at 3 [Renke, “Gunshot Wounds”], discussing an equivalent provision in Alberta legislation.
522 Or as Renke puts it in “Gunshot Wounds”, ibid at 6, “mandatory reporting obligations are very much the exceptions that prove the rule.”
523 See Chapter 1, under heading 1, and notes 8 to 11 and accompanying text.
used by the state for a different purpose. Mandatory reporting laws are useful precisely because they provide access to information that the client would otherwise likely not volunteer to the state. This extraction implicates the basic principle that information should be used only for the purpose for which it was provided.\(^{524}\) The Supreme Court has recognized this specific aspect of privacy: “Privacy is not an all or nothing right…. Privacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged.”\(^{525}\) Similarly, Steven Penney characterizes the section 8 case law as holding “that if a person imparts confidential information (voluntarily or necessarily) to another for a particular purpose, the state should not be wholly free to conscript that information for other purposes.”\(^{526}\) But that is exactly what mandatory reporting laws do. That is, the imposition on privacy is an essential aspect of these laws. Wayne Renke argues that this is their greatest drawback: “[t]he source for most of the unease with mandatory reporting lies in its conflict with privacy protections.”\(^{527}\) Mandatory reporting laws pose many challenges, and reasonable people can disagree whether privacy is indeed the most serious problem. As I will discuss in Chapter 4, the effect on the client-professional relationship – specifically the deterrence impact on access to services – may be the most serious. But in any case, privacy is one of the key concerns.

\(^{524}\) See e.g. PIPEDA, supra note 508, Schedule 1, principle 5: “Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law.” See also e.g. FIPPA, supra note 506, s 41(1)(b): “An institution shall not use personal information in its custody or under its control except… (b) for the purpose for which it was obtained or compiled or for a consistent purpose”. See also Renke, “Gunshot Wounds”, supra note 521 at 3: “The basic rule is that health information may be used for health purposes only and may not be disclosed to third parties – such as the police – for non-health purposes”.

\(^{525}\) R v Mills, supra note 512 at 735 [citation omitted], as quoted e.g. in Wakeling v United States of America, 2014 SCC 72 at para 122, [2014] 3 SCR 549 [Wakeling]. See also R v Dyment, [1988] 2 SCR 417 at 429-430, 55 DLR (4th) 503, as quoted e.g. in Plant, supra note 513 at 212: “In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected”.

\(^{526}\) Steven Penney, “Unreasonable Search and Seizure and Section 8 of the Charter: Cost-benefit Analysis in Constitutional Interpretation” (2013) 62 SCLR (2d) 101 at 121.

In this chapter, I primarily use a *Charter* analysis to crystallize the ways in which mandatory reporting laws implicate the value of privacy. While privacy is sometimes raised in the context of section 7,528 it is poorly developed there.529 I focus instead on privacy as embodied in section 8, which is much more explicit.530 The intended function of mandatory reporting laws is to extract information from a confidential relationship so that the state can use that information for a purpose that is likely inconsistent with the clients’ interests or wishes. Section 8 explicitly contemplates the state obtaining information about an individual, and so it is a good fit for the analysis of mandatory reporting laws. As I will explain below, these laws certainly engage section 8 and there are a few respects in which these laws will infringe section 8. Some of these infringements can be reduced or eliminated by changes in the legislation, and some infringements may be justifiable under section 1. While section 8 cases often consider the deterrence impact on access to services – i.e., that clients will refuse to provide honest information while seeking professional services, or will decline to seek professional services entirely, if that information will be accessible to the state – I will deal with that impact separately in Chapter 4.

While statutes on personal information do reflect a consensus on basic principles around privacy, they are not helpful in identifying what exceptions are appropriate. This is because they typically recognize a wide range of exceptions, including a catch-all for anything required by law.531 Consider, for example, Ontario’s *Personal Health Information Protection Act*, which provides that “[a] health information custodian may disclose personal health information about an individual… subject to the requirements and restrictions, if any, that are prescribed, if permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of

528 See e.g. *O’Connor, supra* note 519 at para 61, L’Heureux-Dubé J: “This Court has on many occasions recognized the great value of privacy in our society. It has expressed sympathy for the proposition that s. 7 of the *Charter* includes a right to privacy” [citation omitted]. See also e.g. *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 65, 152 DLR (4th) 577, La Forest J on privacy as part of the liberty interest, as quoted e.g. in Michael Power, *The Law of Privacy* (Toronto: LexisNexis, 2013) at para 11.6.

529 See e.g. Power, *ibid* at para 11.1: “While there is greater emphasis on privacy in section 8 … cases, references to the protection of privacy can also be found in section 7”.

530 See e.g. Renke, “Gunshot Wounds”, *supra* note 521 at 4: “Privacy interests are protected by ss. 7 and 8 of the *Charter*. I will focus on s. 8 (the most apt constitutional provision in this context)”.

531 See e.g. *Spencer, supra* note 511 at paras 61-62, where Cromwell J noted the circularity of using *PIPEDA* (*supra* note 508) to ground a reasonable expectation of privacy.
It is for this reason that I focus my analysis instead on section 8 of the Charter. Nonetheless, these statutes do establish an important presumption – that the privacy of personal information will be protected unless there is a compelling reason otherwise, and that such derogation should be authorized by law. These statutes also recognize important principles. Two of these are particularly relevant to my analysis. One is the principle that information should be used only for the purposes for which it was collected. The other is that collection should be limited to the information that is necessary to achieve the purpose for which the collection occurs. Both of these principles will be implicated under section 8.

Like the statutory schemes, civil actions involving privacy recognize and affirm privacy as an important legal concept but do not provide meaningful guidance on what exceptions to privacy are appropriate. Thus, for example, one element of the tort of “intrusion upon seclusion” is that the act was “without lawful justification”. This element seems integral to a tort, but does not help identify what the lawful justifications – including legislated justifications – should be.

As with any situation in which personal information is collected, there is an understandable concern that the reported information will be misused, either by the recipient or by someone else if the recipient fails to properly safeguard the information. This is exemplified in the early controversy over named HIV reporting, especially as to potential discrimination in employment or insurance. This concern is heightened where reports include sensitive information. This concern can never be eliminated, but can be mitigated by strict requirements for data protection and strict enforcement action for any breaches. The general principles of data security, including the principle that “[p]ersonal information shall be protected by security safeguards appropriate to

532 PHIPA, supra note 507, s 43(1)(h).
533 See e.g. PIPEDA, supra note 508, Schedule 1, principle 5: “Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law.” See also e.g. Renke, “Child Abuse”, supra note 527 at 96.
534 See e.g. PIPEDA, ibid, Schedule 1, principle 4: “[t]he collection of personal information shall be limited to that which is necessary for the purposes identified”.
535 Jones v Tsige, supra note 509 at para 71.
the sensitivity of the information**, 537 apply to information collected by mandatory reporting in the same way as other information.

To emphasize, section 8 is the best lens with which to analyze the privacy impact of mandatory reporting laws because of the purpose of mandatory reporting laws and the manner in which they function. A mandatory reporting law extracts information from the client-professional relationship specifically for the investigation and potential intervention by a state agency in order to achieve a public purpose that is likely inconsistent with the client’s interests and/or wishes. This extraction of information and the state’s subsequent use of that information for a purpose likely contrary to the client’s interests and/or wishes is not an incidental function or by-product, but the intended function of these laws. That is, while fair information practices go largely to the unintended or secondary impacts of data collection on privacy, it is the intended function of mandatory reporting laws that itself is engaged and evaluated under a section 8 analysis.

Mandatory reporting laws form a spectrum in terms of their potential impact on the client. At one end, some laws require the reporting of an occurrence that constitutes an offence, such as paid queue-jumping or medicare or legal aid eligibility fraud. Some laws require the reporting of an occurrence that may be evidence of an offence, such as children in need of protection or suspected animal abuse or neglect or a gunshot wound, and thus investigation may lead to criminal prosecution or charges of provincial offences. Some laws require the reporting of an occurrence that may have non-criminal yet nonetheless serious life consequences for the client, such as a medical condition affecting the ability to drive that may result in the client losing his or her driver’s license. And at the other end, some laws require the reporting of an occurrence for a use that may be contrary to the client’s wishes. At this end, for example, would be mandatory reporting laws on infectious diseases including sexually transmitted infections, where reporting results in contact tracing from which a person’s sexual partner(s) may be able to make negative inferences, such as infidelity. (As acknowledged in Chapter 1, 538 mandatory reporting of certain communicable diseases, such as HIV, could lead in some circumstances to a criminal prosecution for sexual assault because of non-disclosure of disease status.) Having said that, if

537 PIPEDA, supra note 508, Schedule 1, principle 7.
538 See Chapter 1, note 189 and accompanying text.
the reported information is not protected and regulated in accordance with fair information practices, there may be an additional secondary and unintended impact on the client’s privacy. But it is the intended or primary impact that is my focus in this chapter, and that impact is best captured under section 8.

As I explain below, section 8 is engaged by mandatory reporting laws because clients have a reasonable expectation of privacy in their information, and that section is infringed as the intrusion on that expectation is in some ways unreasonable. However, these infringements appear to be justifiable under section 1 or fixable by straightforward amendments to mandatory reporting laws. As in Chapter 2, I will also consider how modifications to the standard template of mandatory reporting laws may affect the Charter analysis.

1.1 Privacy in the literature on mandatory reporting laws

Privacy is typically not emphasized in the literature on mandatory reporting laws. As discussed in Chapter 1, the primary focus is usually deterrence, and the secondary focus is usually autonomy. Moreover, as also discussed in Chapter 1, the literature tends not to emphasize constitutional considerations. Insofar as privacy is protected under the Charter, it is thus not surprising that it is not emphasized in the existing literature. I will however refer frequently to the work of Wayne Renke, who has most explicitly considered the constitutional issues around mandatory reporting laws on gunshot wounds and child abuse. While Renke’s work is somewhat dated, particularly as to the Charter analysis, it remains the most relevant literature.

539 But see e.g. Renke, “Child Abuse”, supra note 527 at 94.
540 See Chapter 1, notes 182 to 184 and accompanying text.
541 See Chapter 1, notes 190 to 191 and accompanying text.
542 See Chapter 1, notes 194 and 204 and accompanying text.
2 Section 8: A reasonable expectation of privacy?

Section 8 of the *Charter*, which provides that “[e]veryone has the right to be secure against unreasonable search or seizure”, provides the best lens for these privacy issues.\(^{544}\) Section 8 is engaged where there is a reasonable expectation of privacy and infringed where the search or seizure is unreasonable.\(^{545}\) In particular, the courts have recognized three “aspects” of privacy under section 8: “personal”, “territorial”, and “informational”.\(^{546}\) Mandatory reporting laws by definition engage primarily “informational privacy”. However, the nature of the information may also engage “personal privacy” to the extent that the information is about the body of the person, for example health information.\(^{547}\) (Conceivably, “territorial privacy” could also be engaged where the information is about what occurs in the home, such as some cases of child abuse or neglect.) As I will discuss below, Section 8 only protects a reasonable expectation of privacy against intrusion by the state.\(^{548}\)

In *R v Spencer*, Cromwell J for the Court recognized three “understandings” of informational privacy – secrecy, control, and anonymity:

> [P]rivacy in relation to information includes at least three conceptually distinct although overlapping understandings of what privacy is. These are privacy as secrecy, privacy as control and privacy as anonymity. Informational privacy is often equated with secrecy or confidentiality. For example, a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient’s physician…. Privacy also includes the related but wider notion of control over, access to and use of information, that is, “the claim of individuals, groups, or institutions to determine for themselves when, how, and

\(^{544}\) See e.g. Renke, “Gunshot Wounds”, *ibid* at 4, referring to section 8 as “the most apt constitutional provision in this context” [citation omitted].

\(^{545}\) See e.g. *Tessling*, *supra* note 518 at para 18. Note that I cite *Tessling* for these key propositions as a leading, and unanimous, recent case. See e.g. *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 SCR 250, where Karakatsanis J for the majority cites *Tessling* repeatedly. I note that *Tessling* has been criticized. See e.g. Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed (Toronto: Carswell, 2014) at 304: “[T]he ruling in *Tessling* appears to tilt s. 8 principles markedly in favour of the interests of law enforcement rather than protecting privacy.”

\(^{546}\) *Tessling*, *ibid* at para 21.

\(^{547}\) Analogous to *Tessling*, *ibid* at para 24, where the potential for overlap among the three aspects was recognized, and where the technology at issue (obtaining information about heat in the home) involved informational privacy but also territorial insofar as “that is where the activities of interest to them [the police] took place”.

\(^{548}\) See text below under heading 2.5.
to what extent information about them is communicated to others”…. There is also a third conception of informational privacy that is particularly important in the context of Internet usage. This is the understanding of privacy as anonymity.\textsuperscript{549}

Mandatory reporting laws, as a class, engage all three of these aspects. Information that the client discloses in confidence to the professional and expects to be kept confidential (secrecy) is used for a purpose without the client’s consent (control), and reports typically identify the client by name to a state agency (anonymity).\textsuperscript{550}

Before proceeding to the section 8 analysis, I note that Canadian case law has recognized a reasonable expectation of privacy in several circumstances that are directly relevant to mandatory laws, such as “therapeutic records”.\textsuperscript{551} However, for my purposes, it is more helpful to go behind these precedents to the underlying principles of the section 8 analysis.

The applicable tests for whether section 8 is engaged and infringed are set out in \textit{R v Plant} and \textit{Tessling}.\textsuperscript{552} Justice Sopinka, writing for the majority in \textit{Plant}, noted a range of factors relevant to informational privacy, including “the nature of the information itself, the nature of the relationship between the party releasing the information and the party claiming its confidentiality, the place where the information was obtained, the manner in which it was obtained and the seriousness of the crime being investigated”.\textsuperscript{553} He also introduced the concept of a “biographical core”:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the \textit{Charter} should seek to protect a \textit{biographical core of personal information} which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would \textit{include

\textsuperscript{549} \textit{Spencer, supra} note 511 at paras 38-41 [citations omitted].

\textsuperscript{550} As discussed in Chapter 2, the main exception is mandatory reporting of sexual abuse by health professionals, where the name of the patient is to be included only with the patient’s permission. See Chapter 2, note 218 and accompanying text. See also Chapter 1, note 49 and accompanying text.

\textsuperscript{551} \textit{Mills, supra} note 512 at 723. See also Penney, \textit{supra} note 526 at 120-121.

\textsuperscript{552} \textit{Plant, supra} note 513; \textit{Tessling, supra} note 518.

\textsuperscript{553} \textit{Plant, ibid} at 294, Sopinka J for the majority.
information which tends to reveal intimate details of the lifestyle and personal choices of the individual.\(^{554}\)

Justice Binnie, writing for the Court in Tessling, noted Sopinka J’s use of the word “include”, meaning that “intimate details” were not the only content of the core.\(^{555}\) As I will discuss further below, this “core” idea plays a significant role in the Supreme Court’s current approach to informational privacy under section 8.\(^{556}\)

Tessling sets out four questions for determining whether there is a reasonable expectation of privacy: the subject matter, the person’s direct interest in that subject matter, the subjective expectation of privacy, and the objective reasonableness of that expectation. I will address these in turn. While Tessling separates this inquiry into four separate parts, the Supreme Court has been clear that these parts “are often interrelated… and that they must be looked at as a whole.”\(^{557}\) Based on the Tessling analysis, and particularly because of the nature of the reported information and the professional-client relationship from which the information is extracted, mandatory reporting laws likely involve a reasonable expectation of privacy and so will engage section 8.

\(^{554}\) Ibid at 293, as quoted e.g. in Tessling, supra note 518 at para 25 [emphasis from Tessling]. Quoted also e.g. in James A Fontana & David Keeshan, The Law of Search and Seizure in Canada, 9th ed (Toronto: LexisNexis, 2015) at 33.

\(^{555}\) Tessling, ibid at para 26.

\(^{556}\) I note that Binnie J, writing for himself and McLachlin CJ in R v AM, suggested that section 8 covers not only the core, but also “specific and meaningful information, intended to be private”: R v AM, [2008] 1 SCR 569 at para 67 (see also para 68), 293 DLR (4th) 187, as discussed e.g. in Stuart Hargreaves, “R v Gomboc: Considering the Proper Role of the ‘Biographic Core’ in a Section 8 Informational Privacy Analysis”, Case Comment on 2010 SCC 55, [2010] 3 SCR 211, (2012) 59:1 Crim LQ 87. See also Power, supra note 528 at para 11.28. However, this extension has not yet been recognized in a majority decision. Some lower courts seem to have applied the reasons of Binnie J as if it was a majority decision. See e.g. R v Chehill, 2009 NSCA 111 at paras 12, 23, 50, 284 NSR (2d) 130, as discussed e.g. in Power at paras 11.29 to 11.33 and in Fontana & Keeshan, supra note 554 at 13. Note: the Court of Appeal in 2009 NSCA 111 ordered a new trial. The subsequent decision of the Court of Appeal in 2011 NSCA 82 (sub nom R v Chehil) was an appeal from the exclusion of evidence in the new trial, and that decision was upheld by the Supreme Court of Canada in 2013 SCC 49.

\(^{557}\) Spencer, supra note 511 at para 17.
2.1 Reasonable expectation of privacy: Subject matter and direct interest

The first two questions in *Tessling* ask what the “subject matter” of the information was, and whether the person “ha[d] a direct interest in [that] subject matter”. 558 For most mandatory reporting laws, the subject matter is related to the body of the individual client: the person has a particular disease or condition or injury. For mandatory reporting laws on abuse or neglect, the subject matter may similarly be the individual, specifically an injury or pattern of injuries or other conditions. But it may also be the client’s disclosure that he or she has suffered, inflicted, or witnessed abuse or neglect. Where the client has suffered abuse, the subject matter relates to the client. Where the client has inflicted the abuse, the subject matter is the client’s actions. Where the client has witnessed the abuse, the subject matter relates to the third party inflicting the abuse and the third party suffering the abuse. For mandatory reporting laws on medicare or legal aid eligibility fraud, the subject matter is again the client, specifically the client’s residency or financial status and his or her wrongful actions.

Where the subject matter is the client, and specifically the client’s physical or mental condition or actions, the client clearly has a direct interest. However, where the subject matter is the condition of a third party, the client would appear not to have a direct interest. 559 (In special circumstances, the information may implicate the client’s wrongful inaction, such as where the client is a parent that has failed to protect a child from another parent.) Thus, for the purposes of this analysis, I proceed on the assumption that the subject matter relates directly to the client.

2.2 Reasonable expectation of privacy: Subjective expectation

The third *Tessling* question is whether the person “ha[d] a subjective expectation of privacy in the subject matter”. 560 While the answer must to some degree depend on the particular

558 *Tessling, supra* note 518 at para 32.
559 See below note 625 and accompanying text, where I consider a person controlling the client’s access to treatment.
560 *Tessling, supra* note 518 at para 32 [emphasis omitted].
circumstances and evidence, the Supreme Court has been clear that in some situations a subjective expectation of privacy may be presumed. In *Tessling*, Binnie held that such a presumption applied to “information about what happens inside the home”.

It seems fair, given concerns about bodily integrity and the connection of the body to the essence of the individual, to extend such a presumption at least so far as information about what happens inside or to the body of the individual. (I consider further below that some injuries may be visible to the public and identifiable by laypersons, for example a gunshot wound.) In addition to this presumption of a subjective expectation of privacy, I assume that a person would at least assert that he or she had an expectation of privacy.

This subjective expectation of privacy is complicated by forewarning, i.e. where the professional warns the client that he or she will not treat certain information as confidential and will transmit this information to others. As mentioned in Chapter 1, mandatory reporting laws are typically silent on this point. Forewarning would tend to short-circuit the section 8 analysis by determining that any mandatory reporting law cannot infringe section 8 so long as the client was told ahead of time, because after such warning there could be no reasonable subjective expectation of privacy. Here I emphasize the comments of Binnie J in *Tessling* that the reasonable expectation “is a normative rather than a descriptive standard”, and so the subjective expectation is not determinative: “[t]he subjective expectation of privacy is important but its absence should not be used too quickly to undermine the protection afforded by s. 8 to the values of a free and democratic society…. Suggestions that a diminished subjective expectation of privacy should automatically result in a lowering of constitutional protection should therefore be opposed.”


562 See below note 597 and accompanying text.

563 See Chapter 1, note 45 and accompanying text.

564 *Tessling, supra* note 518 at para 42.

565 *Ibid* at para 42 [emphasis omitted].
2.3 Reasonable expectation of privacy: Objectively reasonable expectation

The final and most complex Tessling question is whether the expectation of privacy was “objectively reasonable”. Justice Binnie set out seven underlying subquestions, which I will address in turn. Three of the subquestions strongly support the objective reasonableness of the expectation of privacy: the relationship between the professional reporting the information and the client; the place where reporting occurs; and the reported information being part of the client’s “biographical core”. Two of these subquestions – whether the information is in public view or had been abandoned – arguably support the objective expectation of privacy if interpreted in a nuanced way. The two remaining subquestions – the intrusiveness of the search and the reasonableness of the technique or technology used – seem unclear in their application to mandatory reporting laws. On balance, I conclude that mandatory reporting laws generally involve an objectively reasonable expectation of privacy.

2.3.1 Objectively reasonable expectation: The relationship between the individual and the person releasing the information

One subquestion is most characteristic of mandatory reporting laws as a class: “whether the information was already in the hands of third parties; if so, was it subject to an obligation of confidentiality?”. In Plant, Sopinka J referred to this factor as “the nature of the relationship between the party releasing the information and the party claiming its confidentiality”. For mandatory reporting laws, the “third party” or “party releasing the information” is almost always the professional, although sometimes the obligation may be on the institution instead of the individual professional. Professionals are subject to confidentiality obligations from many sources, obligations to which mandatory reporting laws are contrary or exceptional. While I

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566 Ibid at para 32.
567 Tessling, ibid at para 32.
568 Plant, supra note 513 at 294, Sopinka J for the majority.
569 As discussed in Chapter 1. See Chapter 1, notes 53 to 54 and accompanying text. See e.g. Mandatory Gunshot Wounds Reporting Act, 2005, SO 2005, c 9 [MGWRA].
discuss professional obligations of confidentiality in Chapter 5,\footnote{See Chapter 5, notes 984 to 998 and 1021 and accompanying text.} for present purposes I note that such obligations apply to most professions (as I have defined professions, being the self-regulated professions in which there is a relationship of trust) and stem from professional rules, statute, and common law.\footnote{See e.g. Renke, “Child Abuse”, supra note 527 at 96: “expectations may be supported by ethical rules governing professions, by contract, by other common law rules, by statute or even by institutional policies…. [and] protection of privacy statutes.” See also e.g. Renke, “Gunshot Wounds”, supra note 521 at 4: “This expectation is supported by obligations imposed on health services providers by ethical rules, the common law, and statute” [citation omitted]. See also e.g. Erika Chamberlain & Robert Solomon, “Enforcing Impaired Driving Laws Against Hospitalized Drivers: The Intersection of Healthcare, Patient Confidentiality, and Law Enforcement” (2010) 29 Windsor Rev Legal Soc Issues 45 at 50: “However, a health professional who releases such information [health information about the client] to the police, in the absence of the suspect’s consent or legal compulsion (e.g. a subpoena or warrant), would be in breach of his or her common law, professional, and statutory obligations to maintain the confidentiality of patient information”. See also 71-72, where the authors give the example of an Ontario physician under the Public Hospitals Act, RSO 1990, c P.40, PHIPA, supra note 507, the Regulated Health Professions Act, 1991, SO 1991, c 18 [RHPA], and the Code of Ethics of the Canadian Medical Association. (Canadian Medical Association, CMA Code of Ethics (Ottawa: CMA, 2004), last reviewed 2015, online: <www.the-cma.org/regulatory/code-of-ethics>.)} Indeed, in his analysis in Spencer, Cromwell J cited physicians and patients as an example of informational privacy, noting that “a patient has a reasonable expectation that his or her medical information will be held in trust and confidence by the patient’s physician”.\footnote{Spencer, supra note 511 at para 39 [citation omitted].} Where the reporting obligation is on the institution, the information would nonetheless have to come from a professional within the institution. I note that courts sometimes hold that, so long as the professional is not acting as a state agent, any violation of professional confidentiality does not affect the section 8 analysis and should only be of interest for the professional’s regulator.\footnote{See e.g. R v Daly, 2014 ONSC 115 at para 16(d), 60 MVR (6th) 156, TP O’Connor J sitting as a summary conviction appeal court: “The information, i.e. the observation of an alcohol odour, was made by a third party, Dr. Berliner. He was not a state agent, a fact acknowledged by the trial judge. Thus, no state agent breached or promoted or induced a breach of Ms. Daly’s s. 8 Charter rights. It was argued that the doctor breached a doctor/patient confidentiality relationship when he divulged what he had observed. If so, that is a matter for his profession’s governing body, not this Court.”} Such an approach seems to ignore the purpose of this subquestion, i.e. whether the expectation is objectively reasonable; that is, whether it is reasonable for a client to expect a professional to follow his or her legal and professional obligations. The precise nature and source of these obligations, and of the appropriate remedy where a professional violates these obligations, do not affect whether or not a client reasonably expects the professional to meet these obligations. As I will discuss below, mandatory reporting
laws arguably make the reporting professional a state agent for the purpose of making the report, and so that aspect of the Charter analysis is relatively straightforward.\textsuperscript{574}

2.3.2 Objectively reasonable expectation: The place

Closely related to the relationship is another subquestion, “the place where the alleged ‘search’ occurred”.\textsuperscript{575} This subquestion is most important when the place is the home, which “traditionally has been accorded the highest degree of privacy.”\textsuperscript{576} For mandatory reporting laws, the place will be the office or other place where the professional provides services. While less worthy of protection than the home, this is arguably a special place in which there is some level of inherent or intuitive expectation of privacy, integrally connected with assumptions that professionals will protect and secure the information that they collect.

2.3.3 Objectively reasonable expectation: The biographical core

Another of the seven subquestions is the “biographical core”, i.e. “whether the [search] exposed any intimate details of the respondent’s lifestyle, or information of a biographical nature”.\textsuperscript{577} The concept of the core has an uncertain content. Stuart Hargreaves has criticized the core as being vague and variable.\textsuperscript{578} He also argues that Deschamps J, writing for the plurality in \textit{R v Gomboc}, transformed the core into a necessary element for an informational privacy claim instead of merely one factor that Sopinka J in \textit{Plant} did not appear to treat as determinative.\textsuperscript{579} The courts have provided surprisingly little guidance on what constitutes the core. However, McLachlin and

\textsuperscript{574} See e.g. Daly, \textit{ibid.}. See below under heading 2.5.
\textsuperscript{575} Tessling, supra note 518 at para 32.
\textsuperscript{576} Ibid at para 45.
\textsuperscript{577} Ibid at para 32; “biographical core” from Sopinka in \textit{Plant}, supra note 513 at 293.
\textsuperscript{578} Hargreaves, supra note 556 at 104.
\textsuperscript{579} Ibid at 96-97. But contrast Quigley, who argues that Sopinka in \textit{Plant} “restricted its [informational privacy’s] ambit to” that core: Tim Quigley, “The Impact of the Charter on the Law of Search and Seizure” (2008) 40 SCLR (2d) 117 at 134. See also Penney, supra note 526 at 112, referring to the core as “the most important factor”.

Iacobucci JJ for the majority in *R v Mills* observed that “privacy concerns are at their strongest
where aspects of one's individual identity are at stake, such as in the context of information
‘about one's lifestyle, intimate relations or political or religious opinions’”, and specifically
referred to “therapeutic records”. Indeed, *Mills* can be read as suggesting that there is a
reasonable expectation of privacy in any information disclosed in a confidential relationship of
trust.

Mandatory reporting laws typically engage the core. Recall that most mandatory reporting laws
involve information about the client’s body or health, and presumably this is core information. A
person’s health status can be deeply connected to identity and how they relate to the world
around them. Many diseases and some injuries can also suggest inferences about a person’s
lifestyle and decisions. For example, many reportable diseases are sexually transmitted, and a
diagnosis may support inferences (some justified and some not) about the person’s sexual
practices. Similarly, some legislators felt that incurring a gunshot wound was evidence of
criminality.

For other mandatory reporting laws, the relationship to the core is less clear. Reporting of a child
in need of protection may support some inferences about the home environment and parenting
choices. However, an accusation of reportable wrongdoing – e.g. medicare or legal aid eligibility
fraud – suggests ineligibility, i.e. residence outside the province or a minimal level of financial
means, plus fraudulent conduct or attempted fraudulent conduct. Neither residency outside the
province nor financial status *per se* would seem to engage the core. Fraudulent conduct may
support inferences about the seriousness of the legal or medical situation, but that too would, on
its own, not appear to engage the core.

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580 *Mills*, supra note 512 at 722 [citations omitted]. See also Penney, *ibid* at 112, referring to “sexual, medical, and
financial matters”.

581 *Mills*, *ibid* at 723.

582 *Ibid* at 726: “The values protected by privacy rights will be most directly at stake where the confidential
information contained in a record concerns aspects of one's individual identity or where the maintenance of
confidentiality is crucial to a therapeutic, or other trust-like, relationship.”

583 See Chapter 1, notes 142 and 179 and accompanying text. See Andrew Flavelle Martin, “The Adoption of
Mandatory Gunshot Wound Reporting Legislation in Canada: A Decade of Tension in Lawmaking at the
Intersection of Law Enforcement and Public Health” 9:2 McGill JL & Health 175 at 198-199.
This concept of the biographical core, and its application to mandatory reporting laws, is muddied by *R v Dersch*, in which Major J for the majority introduced the concept of “neutral medical information”, which he contrasted with “specific medical information”. Justice Major held that there was no reasonable expectation of confidentiality in “neutral” information, the example he gave being “the presence of the patient in the hospital”. He contrasted that information with test results, where there would be such an expectation. This idea has been criticized. For example, Erika Chamberlain and Robert Solomon argue that “this distinction between neutral and incriminating medical information is largely illusory, and seems inconsistent with the existing laws governing patient confidentiality.” They also note, correctly, that this concept of “neutral” information was *obiter*.

Nonetheless, this idea of “neutral” information deserves further scrutiny. Neutral information could comprise an exception to this part of the reasonable expectation analysis, as non-core information, or be relevant to the other parts of the analysis on abandoned or publicly visible information (to which I turn next). As to the core, arguably a person’s mere presence as a patient in a health facility, and thus the fact that they are seeking some kind of health services, does not support any inferences. As these services could be diagnostic or preventative, it is not necessarily true – or even likely – that the person is suffering from some disease, injury, or other condition. Even the person’s presence in the emergency department would support almost no inferences about the person’s condition, except that it presumably may be urgent. However, any finer information, including the name or specialty of the treating professionals or the ward or department in which the person is being treated, would seem to be specific enough to be “core”. Similarly, a person’s presence as a patient in a specialized health facility – such as one providing only drug rehabilitation services – would seem to potentially be “core”.

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584 *R v Dersch*, [1993] 3 SCR 768 at 778-779, 85 CCC (3d) 1. Note that L’Heureux-Dubé J and Gonthier J each gave a brief set of concurring reasons that only concerned section 24(2), and did not disagree on this point.

585 *Ibid* at 779.

586 *Ibid* at 779. See also Chamberlain & Solomon, *supra* note 571 at 73.

587 Chamberlain & Solomon, *ibid* at 70.

588 *Ibid* at 73.
This idea of “neutral” information must also be read in conjunction with subsequent cases, specifically *Spencer*, that stress anonymity and the breadth of information that can be derived from seemingly innocuous information. In *Spencer*, Cromwell J rejected the Crown’s submission that the “name, address, and telephone number” of the client of an internet service provider was non-core information. He emphasized that the issue was “not only the nature of the precise information sought, but also… the nature of the information that it reveals”, i.e. “the potential of that information to reveal intimate details” or “the tendency of information sought to support inferences in relation to other personal information”. On the facts of the case, “[t]he subject matter of the search was not simply a name and address…[r]ather, it was the identity of an internet subscriber which corresponded to particular Internet usage”. This is consistent, for example, with the scope of “personal information” in privacy legislation such as *FIPPA*, which includes “the individual’s name…where the disclosure of the name would reveal other personal information about the individual”. Thus, even where mandatory reporting involves very limited and apparently neutral information, the core may nonetheless be engaged depending on what that information may subsequently reveal.

While *Dersch* restricted the concept of “neutral” information to the health context, it is worthwhile to consider its application to other professional services. The mere fact that a person is present as a client in a facility offering religious services supports a strong inference about the person’s beliefs, actual or professed; not only that they have religious beliefs as opposed to being atheistic or agnostic, but also the particular kind of religion. (Religious facilities, being doctrine-specific, are more like specialized health facilities than general health facilities.) Similarly, a person’s presence in a law firm office or clinic may support a varying range of inferences about their legal situation, depending on how specialized that facility is. However, while it may seem trite to assume that, much like health services, most people will require legal services at some point, protections around the confidentiality of legal services are stronger under the

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589 *Spencer*, *supra* note 511 at para 24.
590 *Ibid* at paras 25, 26, and 31.
591 *Ibid* at para 32.
592 *FIPPA*, *supra* note 506, s 2(1).
Charter than are protections around the confidentiality of health services. Even fairly basic information, such as the gross amount of fees charged by a lawyer to a client, is presumptively privileged and cannot be “neutral” information. Indeed, in many circumstances a client’s name, i.e. that fact that a particular person is the client, may itself be covered by solicitor-client privilege. As with other kinds of professional services, the degree of specialization of the firm or the specific professional may support inferences about the nature of the services sought. Thus, the concept of “neutral” information seems not to apply to services other than health services.

2.3.4 Objectively reasonable expectation: Public view and abandonment

Two other subquestions for the reasonable expectation of privacy, “whether the subject matter was in public view” or “had been abandoned”, are complicated in the context of mandatory reporting laws and services provided by professionals.

On the “public view” subquestion, mandatory reporting laws may apply to occurrences that are visible and recognizable to laypeople. That is, while some health conditions can only be detected by a professional or by the patient’s disclosure, others are objectively visible. Consider HIV-positive status versus gunshot wounds or dog bites. Where the injury occurs in public, the event itself may be observable. Similarly, an abused person’s injuries may be inflicted in public and or be easily visible. While the patient is in transit to a health facility, traveling via a public space, he or she and his or her injury may be publicly visible and publicly recognizable. Once the patient reaches a health facility, parts of that facility may be easily accessible to members of the public, particularly waiting areas. Nominally confidential communication, such as between the


595 This is a complex issue that is not necessary for me to resolve here. See Dodek, ibid at paras 5.24 to 5.38.

596 Tessling, supra note 518 at para 32.

597 See for example a 1927 editorial from the Journal of the American Medical Association: “Ordinarily, medical or surgical skill is not required to determine when a person is suffering from a gunshot wound or other injury due to a firearm.” (“Compulsory Reporting of Gunshot Wounds”, Editorial, (1927) 88:6 J Am Med Assn 404 at 404).
patient and a triage nurse or a physician, or among members of the treatment team, may be
overheard all over hospitals. Police may be present in the public areas, and may be invited into,
or ask to enter, treatment areas.598

On the other hand, the mere fact that something is publicly observable does not necessarily
dissolve a reasonable expectation of privacy. In discussing the importance of anonymity,
Cromwell J in Spencer noted that “[t]he mere fact that someone leaves the privacy of their home
and enters a public space does not mean that the person abandons all of his or her privacy rights,
despite the fact that as a practical matter, such a person may not be able to control who observes
him or her in public.”599

The “public view” subquestion may be a better fit than the “core” for Major J’s concept of
“neutral health information”. A person’s presence in a hospital may be revealed by them entering
the facility in public view, or by persons observing them from the publicly accessible areas of the
facility. The fact that the person is a patient may be inferred from the way in which they enter the
facility, such as on a stretcher coming out of an ambulance, or even by them wearing a hospital
gown. However, this criterion of public view does not explain why other easily observable
information – such as an overheard discussion between doctor and patient, including a disclosure
or test results – would not be “neutral”.

The dangers of this approach to “public view”, i.e. interpreting public view broadly, are ably
demonstrated in R v Daly.600 The issue in Daly was whether section 8 was infringed when a
doctor told a police officer that he smelt alcohol on the breath of the accused, who had been a
driver in a collision. The summary conviction appeal court overturned the trial judge and held
that there was no infringement – in part because “[t]he subject matter, her breath, was in the air

598 See e.g. R v Francis, [1995] OJ No 3729 at para 13 (QL) (Gen Div): “As to the presence of police… the evidence
of nurse Feeney was that police officers interested in the particular case were in practice regarded as part of the
emergency team so that they might be of assistance to the medical staff during the emergency treatment to pass on
information requested by the medical staff or to assist in locating relatives, for example. She stated that usually they
remained outside the room but that there was no issue about having them in the room for an appropriate
conversation.”

599 Spencer, supra note 511 at para 44. See similarly, in a different context, Aubry v Éditions Vice-Versa inc., supra
note 510, where a person photographed in a public place retains an expectation of privacy.

600 Daly, supra note 573.
in the treatment room, a location open to public perception.”\textsuperscript{601} But surely the appellant did not have the option of being treated in a fully private space.\textsuperscript{602}

In these circumstances, a principled and purposive approach to an objective expectation of privacy seems appropriate. The public visibility discussed above is largely a function of how society has chosen to organize and deliver health services. For many reasons, these services tend to be provided in central institutions as opposed to patients’ homes, and those institutions value many concerns over privacy, such as efficient use of space and time. A patient does not have other options – such as treatment in the home, or in a sound-proof site with private entrances and exits concealed from public view – and cannot be said to truly be choosing to make his or her condition publicly visible. To some extent, laws and professional rules on health information rely on an agreed fiction of confidentiality. The patient discloses information to the health professional in confidence, and is not intending to disclose it to other persons within earshot, although that may be an unavoidable consequence. Here it is relevant to consider some of the law on solicitor-client privilege, specifically that communications in a public area cannot be privileged because they are not confidential.\textsuperscript{603} An exception may be made where the client and lawyer do not have a private space available to them – such as in the holding area in a courthouse. As Adam Dodek puts it, “the test is one of what is reasonable in the circumstances”.\textsuperscript{604} The mere fact that a third party, such as a member of the public or a police officer, may overhear a communication should not negate a reasonable expectation of privacy, particularly where there is no realistic choice to communicate unheard.

A similar reasonableness approach is appropriate for the subquestion of abandonment. It is clear, for example, that giving up a blood sample for the purpose of medical tests is not abandonment in the sense that the sample, or the test results from that sample, may be used for another...

\textsuperscript{601} Ibid at para 16.

\textsuperscript{602} As I will discuss below, the appellant also did not have any realistic opportunity to retain her breath. See below notes 606 to 608 and accompanying text.

\textsuperscript{603} Dodek, supra note 593 at paras 5.24 to 5.38, and quoting at para 5.123 from \textit{R v Wilson} (1982), 38 OR (2d) 240, [1982] OJ No 3411 (QL) (Prov Ct).

\textsuperscript{604} Dodek, \textit{ibid} at para 5.124.
purpose, such as law enforcement.\textsuperscript{605} Turning back to \textit{Daly} – where the issue was the physician’s observation of the smell of alcohol on the appellant’s breath – the appeal court also held that the appellant “had clearly abandoned her breath”.\textsuperscript{606} Even under a generous application of abandonment, such as that garbage left on the curb for collection has been abandoned,\textsuperscript{607} this holding is extreme. There are no apparent steps that the patient in \textit{Daly} could have taken to keep her breath. The Supreme Court, for example in \textit{Tessling}, has been clear that abandonment must be in “a voluntary sense”.\textsuperscript{608} More specifically, the Supreme Court has recently held that there is a reasonable expectation of privacy in breath, such that a screening device demand constitutes a search.\textsuperscript{609}

2.3.5 Objectively reasonable expectation: Intrusiveness and reasonableness of technique/technology

The remaining two subquestions for the reasonable expectation of privacy – “whether the police technique was intrusive in relation to the privacy interest”, and “whether the use of [the technology] was objectively reasonable” –\textsuperscript{610} are most directly applicable to technology, such as the device at issue in \textit{Tessling}, and it is unclear how they apply in the context of mandatory reporting laws. The technique of mandatory reporting itself is not technologically sophisticated but is certainly intrusive, as it removes what is often very specific information from the professional-client relationship. This removal is essentially automatic: assuming the professionals comply, there is no effort required by the state agency (be it police, children’s aid, or otherwise) to activate the search. Moreover, as a legal requirement, usually with non-compliance constituting an offence, mandatory reporting is a powerful tool.

\begin{flushleft}
\textsuperscript{605} See e.g. Dyment, supra note 525 at 431.
\textsuperscript{606} Daly, supra note 573 at para 16(c).
\textsuperscript{607} See e.g. \textit{R v Patrick}, 2009 SCC 17, [2009] 1 SCR 579.
\textsuperscript{608} Tessling, supra note 518 at para 48.
\textsuperscript{609} Goodwin, supra note 545 at para 51, Karakatsanis J for the majority.
\textsuperscript{610} Tessling, supra note 518 at para 32.
\end{flushleft}
2.3.6 Application: An objectively reasonable expectation

Thus, based on the seven subquestions from *Tessling*, the client should typically have an objectively reasonable expectation of privacy in the information included in a mandatory report. Most importantly, the information is likely to comprise the “biographical core” and is held by the professional – a third party with a general obligation of confidentiality – and the search is intrusive. To the extent that the information is in public view or abandoned, at least when the information is detected in the course of the client-professional interaction, that public visibility or abandonment does not result from a meaningful choice by the client. If there is no reasonable expectation of privacy, it will likely be because the information is outside the “biographical core”. For example, financial status and out-of-province residency, reportable as legal aid or medicare eligibility fraud, do not seem to be “core” information. These few examples are unlike most mandatory reporting laws, which relate to “core” information such as health status.

However, the underlying approach taken to these subquestions can vary significantly. Hamish Stewart has argued that the Supreme Court’s decisions applying section 8 oscillate between two different approaches, such that the issue of public view may become very important. Under the “risk approach”, there is no reasonable expectation of privacy in things observable by a third party – such as an injury identifiable by a layperson or communications between a physician and patient that could potentially be overheard:

> [T]he focus of the inquiry is on the security of the place searched (or information obtained) from intrusion by the world at large. If the place searched is not in fact secure against the world in general, then it is not secure against agents of the state in particular, and so any expectation that the state will not intrude is not reasonable. The accused, by failing to adequately secure his or her interests against intrusions from the world at large, is deemed to have accepted the potential intrusion on his or her privacy interests and so cannot complain if the person who intrudes happens to be an agent of the state.

Thus, information in a client’s file would remain safeguarded, so long as the file was kept secure, but the same information would still be vulnerable in its journey into the file. Similarly, any

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publicly recognizable occurrence, such as a gunshot wound, incurred in any public place would not be protected. In contrast, the “surveillance approach” is about state intrusion, i.e. “whether a reasonable person would anticipate that an agent of the state would be able to intrude on the accused’s privacy interests with no specific legal authority to do so.” As Stewart identifies, this approach is typically applied to technology.

The “surveillance approach” seems more appropriate for evaluating mandatory reporting laws. In particular, it gives more weight to professional obligations and the reasonable expectations that flow from those obligations. The intrusion that has normative weight is not the possible intrusion by a member of the public, but the intrusion of the state into the professional-client relationship.

2.4 Application: A reasonable expectation of privacy

Thus, there should typically be a reasonable expectation of privacy in the information that is subject to mandatory reporting. The reporting itself thus constitutes a search and/or seizure. Renke argues that it is a seizure. However, the selectiveness of mandatory reporting also arguably acts as a search of all of the professionals’ records as a whole and the selective seizure of some information. From the professional’s records, the state selects only that information that meets criteria defined in the statute, and seizes only that information and not other information. For my purposes it is sufficient to note that the report and the act of reporting constitute a search, or a seizure, or both.

It is worth noting, however, that there is a reduced expectation of privacy in certain situations. In the context of mandatory reporting laws, the most relevant is the reduced expectation of privacy when operating a motor vehicle – a highly regulated activity. It follows that there should also

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613 Ibid at 340.
616 See e.g. Goodwin, supra note 545 at para 63: “Driving on highways is, of course, a highly regulated activity, and drivers expect that the rules of the road will be enforced.” See also e.g. R v Belnavis, [1997] 3 SCR 341 at paras 38-39, 151 DLR (4th) 443: driving is a regulated activity with a reduced reasonable expectation of privacy (although this consideration was in the context of s 24(2) of the Charter); see also e.g. R v Nolet, 2010 SCC 24 at paras 30-31,
be a reduced expectation of privacy in a person’s ability to drive safely, whether they happen to actually be driving at any given time. Roadside medical checks, as opposed to roadside alcohol checks, are outside the skills of police and immensely impractical. Moreover, as driving is a privilege and not a right,617 and is highly regulated, the state could require regular assessments by its own physician or optometrist. Implementing a reporting obligation on all physicians and optometrists, instead of requiring regular assessments by a state physician or optometrist, would seem to be a reasonable substitute that would not affect the reduced expectation of privacy.

2.5 A reasonable expectation of privacy is only relevant against the state

Section 8 only protects a reasonable expectation of privacy against intrusion by the state. Thus, section 8 is only engaged where the search or seizure is performed by a government or a person acting as a “state agent”.618 Professionals, generally speaking, are not part of the government or state agents. For example, the Supreme Court of Canada in R v Dersch held that when doctors in a public hospital collect blood samples for medical purposes, they are not government agents.619

617 See e.g. Highway Traffic Act, RSO 1990, c H.8, s 31(a) [HTA]: “The purpose of this Part is to protect the public by ensuring that … the privilege of driving on a highway is granted to, and retained by, only those persons who demonstrate that they are likely to drive safely”.


619 Dersch, ibid at 777.
However, there are at least two explanations for why the making of a mandatory report under a mandatory reporting law engages section 8. One explanation is that these laws, by legislatively requiring professionals to report information to the state that they would otherwise be prohibited by law or professional obligations from disclosing, make those professionals part of government or state agents for the purpose of reporting. They may continue to not be part of government or state agents for other purposes. Thus, a physician providing services in a hospital is not a state agent for the purpose of providing services, but is one for the purpose of submitting a mandatory report based on information obtained in the course of providing those services. This approach is consistent with *Dersch*, in which the Court noted that “a doctor involved in taking a blood sample pursuant to… the *Criminal Code*… would be acting as an agent of government, as mandated by statute, and the doctor’s actions would be subject to *Charter* scrutiny.”

An alternative explanation is that the receipt of the report by the relevant state agency constitutes a seizure. That is, the investigative agency – be it the police, public health authorities, a children’s aid society, or a society for the prevention of cruelty against animals, etc – is the government or state agent for the purposes of section 8. This approach is also consistent with *Dersch*, in which the Court held that where the police obtain patient information (specifically in that case a blood sample) from a physician, and the patient has a reasonable expectation of privacy in that information, the police have performed a search or seizure.

In *Dersch*, the sample was taken by the physician for medical purposes – thus, while the taking of the sample by the physician did not engage section 8 and was not a seizure, the subsequent taking of the sample from the physician by the police was a seizure and did engage section 8. This approach is also consistent with *R v Colaruosso*, where the coroner’s taking of a blood sample was a seizure that did not infringe section 8, but the subsequent taking of that sample from the coroner by the

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620 *Ibid* at 777 [emphasis added].

621 *Ibid* at 778. See also e.g. *Dyment*, supra note 525 at 432: “the protection of the *Charter* extends to prevent a police officer, an agent of the state, from taking a substance as intimately personal as a person’s blood from a person who holds it subject to a duty to respect the dignity and privacy of that person.” In both *Dersch* and *Dyment*, the patient was unconscious when the blood sample was taken by the physician – and in *Dersch*, the patient had previously refused to have a blood sample taken: *Dersch, ibid* at 773; *Dyment, ibid* at 421.

622 *Dersch, ibid* at 777.
police was a separate seizure that did infringe section 8. It would also be problematic to allow an investigative agency to escape Charter scrutiny by doing something indirectly through the professional instead of directly. Renke suggests this when he says that mandatory gunshot wound reporting laws are like the police coming into the hospital and taking the information themselves: “through statutory compulsion, the State would come into possession of personal (health) information, without the subject-individual’s consent. It is as if State agents were entitled to enter medical facilities and seize records without warrant.”

2.6 Reasonable expectation of privacy: An example

To demonstrate how this analysis would apply, I consider a classic example of a mandatory reporting law: a physician reporting a patient’s diagnosis as HIV-positive, a serious communicable disease. The patient clearly has a reasonable expectation of privacy in this information. The first two Tessling questions are easily met. The subject matter is the patient’s body or health status, and the patient clearly has a direct interest in that subject matter. Under the third Tessling question, the patient likely has a subjective expectation of privacy in the matter, i.e. in his own body or health status. I assume here that a typical patient would claim a subjective expectation of privacy, but even without evidence on this point, it seems reasonable to presume a subjective expectation. Even if the patient is aware that reporting will occur if there is a positive diagnosis (whether that awareness is by forewarning or otherwise), that diminished actual expectation is not necessarily determinative. As discussed above, such a step would short-circuit the section 8 analysis.

The fourth Tessling question is whether the expectation is objectively reasonable, which involves the seven subquestions set out above. First, the holder of the information, the physician, is subject to a legal and professional obligation of confidentiality. Second, the place searched, the clinic or hospital where the professional practices, is similarly a place where sensitive information is assumed to be protected. Third, the specific information – the positive diagnosis


of a serious communicable disease – is core information that is deeply personal and may be used to make assumptions about the person’s lifestyle. Fourth, the information is by no means in public view. Consider here that HIV status is not visible to the public in the same way as, for example, an injury such as a gunshot wound or a disease with a very particular presentation such as mumps. To the extent that the diagnosis may be overheard by another person when communicated to the patient or other professionals, it is not in public view in any voluntary sense. Fifth, the information has certainly not been abandoned – in providing a blood sample for testing, the patient is not giving up control or possession to the public at large. Sixth, the search (i.e. the mandatory reporting) is intrusive, at least insofar as it removes information from the professional-client relationship. The final subquestion, whether the use of mandatory reporting (the “technology”) was objectively reasonable, is more difficult but does not outweigh the other six subquestions.

Thus, the patient has a reasonable expectation of privacy in his or her HIV diagnosis. The physician is a state agent, for the purposes of the reporting law, or the medical officer of health to whom the report is made is part of government or is a state agent. Thus, the making of the report is a search and/or seizure.

2.7 Reasonable expectation of privacy: A third party controlling access to services

In this chapter I am focusing on the client’s privacy interest. Nonetheless, it is worth noting here that a person who controls a client’s access to services will not have a reasonable expectation of privacy in the client’s condition. For example, the parent of an abused child or the owner of an abused animal will not have a reasonable expectation of privacy in the evidence of abuse. The subject matter is the child or animal, not the parent or owner, and thus the parent or owner does not have a compelling direct interest. I assume that the parent or owner would assert a subjective expectation of privacy, particularly because the abuse or neglect may well be something that occurred in the home. However, that expectation would not be objectively reasonable, for several reasons. The first and most important reason is the relationship between the parent or owner and the professional. In the case of child abuse or neglect, the professional’s obligations, including the obligation of confidentiality, are to the child client and not to the parent. In the case of animal
abuse or neglect, the veterinarian’s obligations to the owner are secondary to those to the animal patient. The second reason is that the information – the fact and evidence of abuse or neglect – is unlikely to be far within the biographical core of the parent or owner. The third reason is that the evidence of abuse or neglect may well be in public view. For these reasons, a person controlling the client’s access to care does not have a reasonable expectation of privacy. For the remainder of this chapter, I will consider the client’s privacy interest.

3 Section 8: Is the search and seizure unreasonable?

The conclusion that there is a reasonable expectation of privacy is important in itself. However, in terms of a Charter analysis, this reasonable expectation only establishes that section 8 is engaged, not that it is infringed. Section 8 is not infringed if the search and seizure is reasonable, i.e. “if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.” As I will explain below, mandatory reporting laws may infringe section 8 in two main ways at the middle step, the reasonableness of the law itself. The first way is inherent in the design of mandatory reporting laws as a screening tool, with a deliberately qualified triggering threshold. To the extent that this is unreasonable (either as an unreliable search or an overbroad provision), such unreasonableness will likely be justifiable under section 1. The second main way that mandatory reporting laws may infringe section 8 is the absence of oversight mechanisms, including notice to the client that a report is being made. Such an infringement may be addressed by adding oversight mechanisms to the reporting law. I will also mention two other ways in which the law may be overbroad, one related to the definition of the reportable occurrence and one related to the information that is to be included in the report.

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625 See e.g. Phil Arkow, “Child Abuse, Animal Abuse, and the Veterinarian” (1994) 7:4 J American Veterinary Medical Assoc 1004 at 1006.

I note at the outset of the section 8 analysis that a warrantless search is presumed to be unreasonable,\textsuperscript{627} whether in a criminal or regulatory context.\textsuperscript{628} Mandatory reporting laws are, by definition, warrantless.\textsuperscript{629}

### 3.1 Reasonable search: Authorized by law

The first of the three requirements for the reasonableness of a search under \textit{R v Collins} is that the search or seizure be authorized by law. The Supreme Court in \textit{R v Caslake} elaborated on this requirement:

There are three ways in which a search can fail to meet this requirement. First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search.\ldots Second, the search must be carried out in accordance with the procedural and substantive requirements the law provides.\ldots Third, and in the same vein, the scope of the search is limited to the area and to those items for which the law has granted the authority to search. To the extent that a search exceeds these limits, it is not authorized by law.\textsuperscript{630}

Mandatory reporting is not only authorized by a specific statute – i.e., the statute setting out the reporting requirement – but indeed required by law. (Note that discretionary reporting would also meet this requirement by being authorized by law, though not required.) The second \textit{Caslake} criterion will be less relevant for mandatory reporting laws than for other searches, as the laws tend to include few “procedural or substantive requirements”. Reporting is required by law if, and only if, the triggering threshold is met. As discussed in Chapter 1,\textsuperscript{631} this threshold is deliberately qualified and may involve different degrees of suspicion, belief, or certainty. The language used can vary: “reasonable grounds to suspect”,\textsuperscript{632} “reasonable grounds … to

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\textsuperscript{627} See e.g. Renke, “Gunshot Wounds”, \textit{supra} note 521 at 5; Tessling, \textit{supra} note 518 at para 33.

\textsuperscript{628} See e.g. Goodwin, \textit{supra} note 545 at para 56.

\textsuperscript{629} See e.g. Renke, “Gunshot Wounds”, \textit{supra} note 521 at 4; Renke, “Child Abuse”, \textit{supra} note 527 at 97.


\textsuperscript{631} See Chapter 1, notes 19 to 21 and accompanying text.

\textsuperscript{632} \textit{Child and Family Services Act}, RSO 1990, c C.11, s 72(1) [\textit{CFSA}]; \textit{Long-Term Care Homes Act}, 2007, SO 2007, c 8, s 24(1) [\textit{LCHA}]; \textit{Retirement Homes Act}, 2010, SO 2010, c 11, s 75(1) [\textit{RHA}].
believe”, 633 or “reason to believe”, 634 or “forms the opinion”, 635 or “is of the opinion”, 636 or “in the opinion of”. 637 At one extreme, it may be presented as objective fact, e.g. when a “facility … treats a person for a gunshot wound”. 638 At mid-range, the occurrence is of an opinion, e.g. a professional “forms the opinion that the person has or may have a reportable disease”. 639 At the other extreme, the occurrence is a professional’s reasonable suspicion of a risk. 640 If the professional has a degree of certainty less than the threshold, the report is not mandated and not authorized by law. The third Caslake criterion, the scope of the search, is demarcated by the information that the law specifies as comprising the report. If the report includes any other information not specified in the law, the search and seizure will not be authorized by law.

While it is reasonable to assume that, in general, professionals will follow the law, there could be some circumstances in which a report is made that is not authorized by law. An overzealous professional may make a report when he or she has a suspicion or hunch less than the specified triggering threshold. 641 For example, a physician who is particularly vigilant about child abuse might report to children’s aid where there is a possibility, but not a reasonable suspicion, of child abuse. Such a report would be unreasonable, even if the hunch was correct. An overzealous professional might similarly include more information than is required by the law. For example, a physician who is passionate about firearm injuries and gang violence might include in a

633 Health Professions Procedural Code [HPPC], s 85.1(1), being Schedule 2 to the RHPA, supra note 571.
634 Commitment to the Future of Medicare Act, 2004, SO 2004, c 5, s 17(2) [CFMA].
635 Health Protection and Promotion Act, RSO 1990, c H.7, ss 25, 26 [HPPA].
636 HPPA, ibid, s 28.
637 HTA, supra note 617, ss 203, 204. Note that a provision amending ss 203-204 (Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer), 2015, SO 2015, c 14, s 55) does not change this language. The amended s 203 provides, “Every prescribed person shall report to the Registrar every person who is at least 16 years old who, in the opinion of the prescribed person, has or appears to have a prescribed medical condition, functional impairment or visual impairment.” (This amendment is not yet in force.)
638 MGWRA, supra note 569, s 2(1): “Every facility that treats a person for a gunshot wound shall disclose”. But note that some provinces specify that “treats” means treatment being offered: Martin, supra note 583 at 210-211.
639 HPPA, supra note 635, s 25.
640 CFSA, supra note 632, s 72: “reasonable grounds to suspect”. Risk is included in the definition of the reportable occurrence.
641 See e.g. Renke, “Child Abuse”, supra note 527 at 135, noting that where the report requires reasonable and probable grounds, “[r]eports should not be made on the basis on mere speculation, suspicion, or hunches.”
gunshot wound report the identity of the assailant or the gang association of the patient, assailant, or witnesses, or the patient’s past criminal conduct or the suspicion that the patient was in the process of committing a crime when the injury occurred. Such a report, exceeding the scope specified in the law, would be unreasonable, even if the extra information was helpful for the corresponding intervention by the investigating state agency.

3.2 Reasonable search: Law itself is reasonable

The second Collins requirement is that “the law itself is reasonable”. While all three Collins requirements are commonly cited by courts, little guidance has been provided on what precisely makes the law itself reasonable or unreasonable. The Supreme Court in R v Rodgers stated that this reasonableness “by its very nature, must be assessed in context… a flexible and purposive test… [that] requires a balancing of the relevant competing interests… a function of both the importance of the state objective and the degree of impact on the individual’s privacy interest.” Such guidance is not helpful, as it seems to indicate that the second Collins requirement is a microcosm of the overall section 8 analysis. However, while Karakatsanis J for the majority in R v Goodwin observed that “[t]his Court has generally declined to set out a ‘hard and fast’ test of reasonableness”, she did identify four relevant considerations: “[1] the nature and [2] the purpose of the legislative scheme …, [3] the mechanism … employed and the degree of its potential intrusiveness, and [4] the availability of judicial supervision”.

This Goodwin framework should also be read in conjunction with the reasons of Moldaver and Karakatsanis JJ for the Court in R v Tse and the reasons of Moldaver J in Wakeling v United

642 Collins, supra note 626 at 78.
644 Indeed, in setting out the comments in the previous quote, Charron J quotes from the s 8 test itself as set out in Hunter v Southam, [1984] 2 SCR 145, 11 DLR (4th) 641: “Hence any assessment of reasonableness requires a balancing of the relevant competing interests. In the seminal case of Hunter v Southam Inc., [1984] 2 S.C.R. 145, at pp. 159-60, Dickson J. described the s. 8 test as follows: ‘[A]n assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.’”
645 Goodwin, supra note 545 at para 57, Karakatsanis J for the majority [citations omitted]. Justice Karakatsanis at para 55 also quotes the description given by Dickson J in Hunter from the previous note.
Justices Moldaver and Karakatsanis in *Tse* held that the challenged provision (section 184.4 of the *Criminal Code*, on emergency wiretaps) infringed section 8 because it “lacks accountability measures that allow for oversight of police conduct” and other “specific limitations”. This accountability and limitations argument included four components: “(i) The lack of a notice requirement; (ii) The lack of a reporting requirement to Parliament; (iii) The lack of a record-keeping requirement; and (iv) The need to restrict the use that can be made of the interceptions.” The first three components seem to fit under the third *Goodwin* step of judicial oversight, whereas the fourth component – restrictions on use – seems to be separate. *Wakeling* adds two other ways in which the law itself may be unreasonable: overbreadth and vagueness. Whereas Moldaver and Karakatsanis JJ in *Tse* considered vagueness and overbreadth under section 7 while interpreting the scope of the challenged provision, Moldaver J in *Wakeling* included these issues as part of the section 8 analysis of the reasonableness of the law itself. That is, “a law that suffers from overbreadth will necessarily be unreasonable”, and “[a] provision that is unconstitutionally vague will necessarily be unreasonable” (Justice Moldaver wrote not for a majority, but only for himself and two other members of the panel of seven. However, Karakatsanis J, writing for herself and two others, appears to agree with Moldaver J on vagueness and overbreadth.)

*Wakeling* leaves open key questions about the importation of principles of fundamental justice into section 8. It is unclear from *Wakeling* whether principles other than vagueness and overbreadth will be imported into the section 8 analysis of the reasonableness of the law. There

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647 *Tse*, *ibid* at paras 79-93. (The Court in *Tse* held that this section 8 infringement was not justified under section 1.) Note that these same three arguments were considered in *Wakeling*, *ibid*, in two of the three sets of reasons (see paras 49-77, Moldaver J for himself and LeBel and Rothstein JJ; paras 126-143, Karakatsanis J for herself and Abella and Cromwell JJ; but not McLachlin CJ at paras 83-101), with the accountability arguments being fairly similar (paras 63-77 and 135-143).
648 *Tse*, *ibid* at para 80.
649 Overbreadth: *Wakeling*, *supra* note 525 at paras 54-60; Vagueness: *Wakeling* at paras 61-62.
650 *Tse*, *supra* note 646 at paras 9, 29-59.
651 *Wakeling*, *supra* note 525 at paras 54-60 (overbreadth), 61-62 (vagueness).
652 *Ibid* at paras 49 and 50.
653 *Ibid* at para 126.
is no obvious reason why related principles such as arbitrariness and gross disproportionality should not be imported into section 8 as well. It is also unclear whether these principles are only applicable under section 8 if the search engages the section 7 interests of life, liberty, or security of the person. These questions, however, are beyond the scope of this thesis. For present purposes, I assume that vagueness and overbreadth apply wherever there is a reasonable expectation of privacy.

Thus, the combination of Goodwin and Tse and Wakeling provides a six-part framework for whether the law itself is reasonable, which I will refer to as the augmented Goodwin framework: (1) the nature of the legislative scheme, (2) the purpose of the legislative scheme, (3) the intrusiveness of the mechanism employed, (4) oversight (including judicial supervision), (5) restrictions on use of the information, and (6) principles of fundamental justice (including vagueness and overbreadth). The first four elements come from Goodwin, the fifth from Tse and the sixth from Wakeling.

Before proceeding with this augmented Goodwin framework, I note that McLachlin CJ writing for herself alone in Goodwin set out a competing three-part test for the reasonableness of a law: “(1) the state has an important purpose grounded in the broader public interest for doing the search and/or seizure, (2) the intrusion goes no further than reasonably necessary to achieve the state purpose, and (3) the intrusion is subject to judicial supervision to guard against abusive state action.”654 She elaborated that the first part would typically, but not always, require “reasonable grounds to believe the item sought will be found”.655 The second part – the extent of the intrusion – “include[s] the nature of the regime”, i.e. regulatory versus criminal.656 While these three parts of the test overlap with the framework adopted by the majority, it is unclear what the particular differences in the two schemes are. Thus I will use the Goodwin framework, plus the elements in Tse and Wakeling, but with reference to the McLachlin-Goodwin three-part test.

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654 Goodwin, supra note 545 at para 96.
655 Ibid at para 98.
656 Ibid at para 99.
In the context of mandatory reporting laws, and specifically those laws with a deliberately qualified triggering threshold, this augmented *Goodwin* framework should be applied in light of the reasons of Karkatsanis J for the Supreme Court in *R v Chehil*. Justice Karakatsanis discussed when a law authorizing a search on a threshold of reasonable suspicion, as opposed to the higher and more common threshold of reasonable and probable grounds, will be reasonable under *Collins*. She explicitly acknowledged that a lower threshold will result in false positives – “[t]he fact that reasonable suspicion deals with possibilities, rather than probabilities, necessarily means that in some cases the police will reasonably suspect that innocent people are involved in crime” – but held that such false positives do not preclude *Charter* compliance. She observed that reasonable suspicion is appropriate “where privacy interests are reduced, or where state objectives of public importance are predominant”, including searches of “minimal intrusion”. She also emphasized that judicial oversight is particularly important where a search is authorized on reasonable suspicion.

3.2.1 Purpose of the legislative scheme

The first step in the augmented *Goodwin* framework is “the purpose of the legislative scheme”, including the importance of the provision to the scheme. Justice Karakatsanis held in *Goodwin* that the search provision in issue was “a critical component” of a response to a “compelling purpose” – stopping impaired drivers. She did not specify what threshold was required at this point, just that the purpose of the provision at issue “weighs heavily in favour of the reasonableness”. This purpose step coincides with the first step of McLachlin CJ’s alternate test in *Goodwin*, “a state objective capable of overriding individual privacy interests”.

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661 *Goodwin*, supra note 545 at para 56, 58-59.
663 *Ibid* at para 92.
Recall from Chapter 1 that mandatory reporting laws can be grouped into at least two categories of purpose, public health & safety and the protection of the vulnerable.⁶⁶⁴ These categories of purpose are helpful at this step. Where the purpose legitimately falls into one of these two categories, the state interest is understandably high. Reducing the danger to the general public from communicable diseases or unsafe drivers, for example, would seem compelling and legitimate purposes. Preventing abuse, especially abuse of children, is about as compelling as stopping impaired drivers. Other purposes may be sufficient, but not as obviously or inherently so. Recall from Chapter 1 that these other stated purposes have included moral harm, affordability and sustainability of public services, and harm to the economy.⁶⁶⁵ A mandatory reporting law itself is more likely to be unreasonable when it is not aimed at public health & safety or the protection of the vulnerable. As discussed above, following Chehil a “state objective[e] of public importance” will make a lower triggering threshold reasonable.⁶⁶⁶

The first step of the Goodwin framework considers not only the importance of the purpose itself, but the importance of the search provision in achieving that purpose. The importance of a mandatory reporting law is higher if the profession(s) covered have a unique or unusual ability or opportunity to detect the reportable occurrence,⁶⁶⁷ and if the reportable occurrence is unlikely to come to the attention of the state through other means.

### 3.2.2 Nature of the scheme

The second step of the Goodwin framework is the “nature” of the scheme, i.e. whether the provision and larger scheme are regulatory or criminal. The majority in Goodwin seems to approach this classification as a spectrum instead of a binary distinction. While the provision at issue was regulatory, not criminal, it “has certain criminal-like features” and “serious consequences” – consequences that were a direct result of the search result and the search result

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⁶⁶⁴ See Chapter 1, notes 100 to 114 and accompanying text.
⁶⁶⁵ See Chapter 1, notes 115 to 136 and accompanying text.
⁶⁶⁶ Above, note 659 and accompanying text.
⁶⁶⁷ I elaborate on this point in Chapter 6. See Chapter 6, notes 1181 to 1199 and accompanying text.
alone. While mandatory reporting laws typically do not have a primary criminal purpose and typically do not involve reporting to the police, reporting may lead to criminal charges or other serious consequences downstream.

As discussed above, the potential consequences of mandatory reporting for the client fall on a spectrum. For example, suspicion of child abuse or animal abuse may prompt an investigation that leads to prosecution. Absent prosecution, there may be serious non-criminal consequences, such as removal of a child. Similarly, loss of a driver’s license after reporting of a medical condition affecting driving ability is a serious though non-criminal consequence. However, other reporting laws – such as of a relatively minor and easily treatable STD diagnosis – may have more trivial consequences. Where the potential consequences are more serious, it would seem that “closer scrutiny” is required for mandatory reporting laws, as it was for the provision at issue in Goodwin.

As discussed in Chapter 1, it may be unclear whether the true purpose of some mandatory reporting laws is indeed criminal. Where mandatory reporting is to police, and if the purpose is detecting offences for arrest and prosecution, as opposed to intervening for public safety reasons, the provision is criminal law and the warrantless search will likely be found to be unreasonable. For example, recall from Chapter 1 that mandatory gunshot wound reporting laws involve reporting directly to the police, and appear from the legislative debates to have two purposes, one public safety and one law enforcement. Renke argues that the actual

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668 Goodwin, supra note 545 at paras 63 and 76.
669 See above note 538 and accompanying text.
670 Goodwin, supra note 545 at para 63.
671 See Chapter 1, notes 104 and 142 and accompanying text.
672 See Hunter v Southam, supra note 644, cited e.g. by Renke, “Gunshot Wounds”, supra note 521 at 5.
673 See Chapter 1, notes 25 and 142 and accompanying text. See e.g. Martin, supra note 583 at 187.
674 See also Martin, ibid at 182-186; Chapter 1, note 142 and accompanying text. Renke holds that this reporting “serves prosecution, a criminal law purpose” at 4, and argues that these laws infringe section 8: Renke, “Gunshot Wounds”, supra note 521, quoted in Martin at 182, n 33. However, Renke at 4 specifically does not consider whether that infringement may be justifiable under section 1 and notes that a section 8 infringement is generally unlikely to be justifiable under section 1. As Renke explains at 4, this criminal purpose may make mandatory gunshot wound reporting laws unconstitutional as a matter of federalism, i.e. ultra vires the province. It is unnecessary to resolve this issue for my purposes.
purpose of reporting is “prosecution, a criminal law purpose”.\textsuperscript{675} (In Ontario, where there is a preamble specifying a purpose of public safety,\textsuperscript{676} that purpose likely trumps the prosecution purpose indicated in the debates, at least as a legal question of statutory interpretation.) As Renke argues, a mandatory reporting law with a criminal purpose could be reasonable if the reportable occurrence is evidence of an offence, and there is an urgency that would negate the warrant requirement.\textsuperscript{677} Thus, for example, a gunshot wound is likely evidence of an offence, whether carelessness or something more serious.\textsuperscript{678} Gunshot wounds seem unique in this respect because accidental firearms injuries are themselves usually offences. Recall from Chapter 1 the suggestion that burns be reportable as evidence of arson.\textsuperscript{679} While a burn may result from an offence, such as arson or an assault, it is not necessarily evidence of an offence where the fire is accidental. Where the intended mechanism of a mandatory reporting law is investigation and prosecution, that law is more likely to infringe section 8 as an unreasonable search. I proceed with my analysis on the assumption that the primary mechanism of any given mandatory reporting law is not criminal prosecution.

3.2.3 Mechanism of seizure

The third step in the Goodwin framework is “the mechanism of seizure”, which includes both “the degree of intrusiveness” and “the reliability” of the seizure.\textsuperscript{680} (The intrusiveness component is similar to the second part of McLachlin CJ’s alternate test in Goodwin, “restraint of the incursion on the private interest to what is reasonably necessary to achieve the object”.\textsuperscript{681})

\textsuperscript{675} Renke, “Gunshot Wounds”, \textit{ibid} at 4.
\textsuperscript{676} Martin, \textit{supra} note 583 at 183. See also Chapter 1, note 105 and accompanying text.
\textsuperscript{677} Renke, “Gunshot Wounds”, \textit{supra} note 521 at 5.
\textsuperscript{678} See e.g. Renke, “Gunshot Wounds”, \textit{ibid} at 5: “Gunshot wounds do entail firearms misuse…. a gunshot wound does suggest some criminal conduct.”
\textsuperscript{679} See Chapter 1, note 95 and accompanying text.
\textsuperscript{680} Goodwin, \textit{supra} note 545 at paras 64, 65, 67.
\textsuperscript{681} \textit{Ibid} at para 92.
Mandatory reporting laws are not intrusive in the physical or bodily sense – as would be a blood or breath sample – but are intrusive to informational privacy. Reporting laws extract specific information, disclosed in confidence to receive or in the course of receiving essential services, from a relationship of trust. Moreover, the information may be intimately personal, such as information about a person’s health. This is an inherent feature, indeed a defining feature, of mandatory reporting laws as I have identified them. As discussed above, under *Chehil* the more intrusive a search is, the higher should be the triggering threshold.\(^{682}\)

At the third step of the *Goodwin* framework, it is reliability that is a serious and inherent vulnerability of mandatory reporting laws under section 8. As discussed in Chapter 1,\(^{683}\) mandatory reporting is essentially a screening tool that identifies a pool of potential occurrences for further assessment and investigation. The threshold level of belief or knowledge that triggers reporting is often deliberately qualified. A deliberately qualified triggering threshold reduces false negatives but increases false positives – thus, the search is unreliable because some reports are false positives. I note that both reasonable grounds for suspicion and reasonable grounds for belief tend to be used in laws protecting vulnerable persons,\(^{684}\) whereas opinions tend to be used in laws promoting public health & safety.\(^{685}\) Similarly, the inclusion of “may”, such as “has or may have”\(^{686}\) instead of the more definitive “has”,\(^{687}\) goes to the level of screening and the desired balance between false positives and false negatives. I do acknowledge that, all else equal, a professional’s opinion is inherently more reliable than a layperson’s opinion, at least with respect to a matter within that profession’s competence.

\(^{682}\) Above note 659 and accompanying text.

\(^{683}\) See Chapter 1, notes 19 to 23 and accompanying text.

\(^{684}\) Suspicion: *CFSA*, supra note 632, s 72; *LCHA*, supra note 632, s 24; *RHA*, supra note 632, s 75. Belief: *HPPC*, supra note 633, s 85.1; *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c O.36, s 11.3 [*OSPCA*A].

\(^{685}\) *HPPA*, supra note 635, ss 25, 26, 28; *HTA*, supra note 617, ss 203, 204 (conditions affecting driving). Note that a provision amending ss 203-204 (*Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer), 2015*, supra note 637) retains this language in s 203(1). (This amendment is not yet in force at the time of writing.)

\(^{686}\) *HPPA*, *ibid*, ss 25, 26, 28.

\(^{687}\) *CFMA*, supra note 634, s 17.
The lower the threshold, and thus the lower the reliability, the more likely the law is to infringe section 8. Renke has argued that, at least for criminal conduct, “credibly-based probability” is required.\textsuperscript{688} The more important the purpose, and the more difficult the occurrence is to detect, the lower the threshold could be (although this was not explicitly stated in \textit{Goodwin}). Moreover, a lower threshold of reliability may be appropriate for professions less able to detect the occurrence. Thus child abuse may be so serious, and perhaps so difficult to identify with certainty, that a threshold of a “reasonable suspicion” of “may” is adequate – especially for professionals such as lawyers, who may have less ability to detect child abuse than physicians. However, there must be a floor threshold – where the purpose of the reporting law is not criminal, likely a reasonable suspicion of “may” – below which section 8 will be infringed regardless of the importance or difficulty of detection.\textsuperscript{689}

3.2.4 Oversight

The fourth step in the \textit{Goodwin} framework is “the availability of judicial oversight”.\textsuperscript{690} This step seems identical to the third part of McLachlin CJ’s alternate test in \textit{Goodwin}, “the availability of judicial supervision”.\textsuperscript{691} I include within this step what the Court referred to in \textit{Tse} as “accountability measures”.\textsuperscript{692} Thus in \textit{Goodwin}, the question was whether the decision resulting from the search – a driving prohibition – could be reviewed and the narrow scope of available review, particularly given the unreliability of that search.\textsuperscript{693} The two other cases in which the Supreme Court has considered this point, \textit{Tse} and \textit{Wakeling}, dealt with wiretapping – a context

\textsuperscript{688} Renke, “Child Abuse”, \textit{supra} note 527 at 123, quoting \textit{Hunter v Southam}, \textit{supra} note 644 at 167. Renke at 123 contrasts this with “mere suspicion, whim or ‘gut instinct’.”

\textsuperscript{689} See Chapter 2, notes 449 to 451 and 482 and accompanying text.

\textsuperscript{690} \textit{Goodwin}, \textit{supra} note 545 at para 69. Justice Karakatsanis at para 57 uses the phrase “judicial supervision”. I assume these phrases are interchangeable.

\textsuperscript{691} \textit{Goodwin}, \textit{ibid} at para 92.

\textsuperscript{692} \textit{Tse}, \textit{supra} note 646 at paras 79-93. Note that these same three arguments were considered in \textit{Wakeling}, \textit{supra} note 525, in two of the three sets of reasons (see paras 49-77, Moldaver J for himself and LeBel and Rothstein JJ; paras 126-143, Karakatsanis J for herself and Abella and Cromwell JJ; but not McLachlin CJ at paras 83-101), with the accountability arguments being fairly similar ( paras 63-77 and 135-143).

\textsuperscript{693} \textit{Goodwin}, \textit{supra} note 545 at paras 69-78.
in which the *Criminal Code* provides extensive and context-specific accountability measures and limitations.\(^{694}\) In *Tse*, the Court held that the provision at issue unjustifiably infringed section 8 because of the absence of oversight, and specifically because there was no notice required to the subject of the wiretap.\(^{695}\) The Court also noted that other oversight mechanisms, including reporting to Parliament and record-keeping requirements, would be desirable but not necessary.\(^{696}\) Similar points were argued in *Wakeling*.\(^{697}\) However, one more general measure considered in *Wakeling* was the applicability of a criminal offence for non-compliance. While Moldaver J found this offence provision meaningful, Karakatsanis J expressed doubts.\(^{698}\)

At this fourth *Goodwin* step, mandatory reporting laws typically provide no meaningful oversight or accountability mechanisms. The decision is made by the professional, with no opportunity for the client to argue against the making of the report. Indeed, mandatory reporting laws typically do not require the reporting professional to notify the client that he or she is making a report. The client can dispute the reliability of the report only once the relevant state agency begins investigating. For example, a driver contacted by licensing authorities could argue that he or she does not actually have a condition affecting driving safety, or that the condition is mild enough that it does not warrant a license revocation. Likewise, a parent investigated by a children’s aid society, or an animal owner investigated by animal protection authorities, could argue that the reporting professional’s suspicion was unsupported or that there is another explanation for the injuries. But at this point the client is already within the investigative process; the consequence of the report – an investigation – has already been triggered. A client could seek judicial review of the decision to report, but such review would not be particularly meaningful in undoing the impact of the report on the client. The client could also complain to the professional’s regulatory body, but where the professional has taken reasonable steps to comply

\(^{694}\) See e.g. *Tse*, *supra* note 646 at paras 81-93, and *Wakeling*, *supra* note 525 at e.g. paras 71-72.

\(^{695}\) *Tse*, *ibid* at paras 11, 81-86.

\(^{696}\) *Ibid* at paras 87-92.

\(^{697}\) *Wakeling*, *supra* note 525 at paras 63-77.

\(^{698}\) *Ibid* at paras 72 (Moldaver J) and 137 (Karakatsanis J).
with a legal requirement, discipline would seem unlikely if not effectively impossible.\textsuperscript{699} There is also typically no accountability via an offence for non-compliance, like in \textit{Wakeling}. While mandatory reporting laws typically include offence provisions for failure to report,\textsuperscript{700} they rarely include offence provisions for false or unfounded reports.\textsuperscript{701} There is, however, typically the possibility for civil liability under such circumstances, as the immunity provisions tend to apply only where there is good faith or, in some cases, both good faith and reasonable grounds.\textsuperscript{702} However, good faith is a very low bar and so the prospect of liability is quite limited.

As discussed above, under \textit{Chehil} this absence of judicial oversight and other accountability mechanisms is particularly problematic where there is a lower triggering threshold, such as reasonable suspicion.\textsuperscript{703}

\subsection*{3.2.5 Limitations on use}

The fifth component of the augmented Goodwin framework is limitations on use of the information. Recall that one of the arguments considered in \textit{Tse} was that the challenged law should include provisions “restrict[ing] the use that can be made of the interceptions”.\textsuperscript{704} This is another respect in which it is difficult to generalize about mandatory reporting laws as a class.

\begin{flushright}
\textsuperscript{699} See, for example, the position of the College of Veterinarians of Ontario: once reporting of animal abuse was mandatory, complaints about a veterinarian making a report could be easily dismissed. (See Chapter 5, note 1006 and accompanying text.)

\textsuperscript{700} See Chapter 1, notes 44 and 61 to 65 and accompanying text. Recall that the notable exception is the \textit{MGWRA}, supra note 569.

\textsuperscript{701} See e.g. Renke, “Child Abuse”, \textit{supra} note 527 at 135, noting that Alberta’s mandatory reporting law on child abuse does not make false reporting an offence. See Chapter 1, note 44 and accompanying text. The exceptions include \textit{LCHA}, \textit{supra} note 632, s 24(2) (“Every person is guilty of an offence who includes in a report… information the person knows to be false.”) and \textit{RHA}, \textit{supra} note 632, s 98(1)(b) (equivalent).

\textsuperscript{702} See Chapter 1, notes 18 and 39 and accompanying text. Good faith: see e.g. \textit{MGWRA}, \textit{supra} note 569, s 4; \textit{HPPA}, \textit{supra} note 635, s 25. Good faith and reasonable grounds: see e.g. \textit{CFSA}, \textit{supra} note 632, s 72(7); \textit{LCHA}, \textit{ibid}, s 24(4). The exception is \textit{HTA}, \textit{supra} note 617, ss 203, 204, where the immunity is total and unconditional. Note however that a provision amending ss 203-204 (\textit{Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer), 2015}, \textit{supra} note 637) changes this to a requirement of good faith in s 204(2). (This amendment is not yet in force as of the time of writing.)

\textsuperscript{703} Above, note 660 and accompanying text.

\textsuperscript{704} \textit{Tse}, \textit{supra} note 646 at para 80.
\end{flushright}
Mandatory reporting laws themselves tend not to address the use of the reported information; however, the specific provisions must be read in the context of the statute as a whole, as well as in conjunction with applicable general statutes on information and privacy. In the presumably rare situation where none of these sources provide limitations on use, a credible argument can be made that section 8 is infringed.

3.2.6 Vagueness and overbreadth

The sixth component in the augmented Goodwin framework comes from Wakeling: principles of fundamental justice. For a law authorizing a search or seizure, the relevant principles would appear to be vagueness and overbreadth, which would seem to apply most directly to the circumstances under which the search will be authorized. For example, the terms of the provision challenged in Tse included “‘the urgency of the situation’, ‘reasonable diligence’, ‘unlawful act’, and ‘serious harm’”, and all of these terms affected whether the search was authorized. I emphasize here my comments on vagueness in Chapter 2. As discussed above, mandatory reporting laws use a range of language to describe the triggering occurrence, in which the typical concepts are reasonable grounds to suspect, reasonable grounds to believe, reasonable

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705 But see HTA, supra note 617, ss 203(3), 204(3). Note that a provision amending ss 203-204 (Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer), 2015, supra note 637) retains similar language. (As of the time of writing, this amendment is not yet in force.) See s 204(3): “A report made under section 203, or made to the Registrar in good faith with the intention of reporting under that section, is privileged for the information of the Registrar only and shall not be open to public inspection.”

706 As I acknowledged in Chapter 2, the engagement of any section 7 interest allows any principle of fundamental justice to be argued. (See Chapter 2, note 462 and accompanying text.) However, for the clarity of my analysis, I focus on the principles of fundamental justice that are most relevant to the interest engaged and the manner in which that interest is engaged. That is, I separate out those principles that are most relevant to each chapter, and here in Chapter 3 specifically to privacy. This separating out is admittedly somewhat artificial. In a litigation context, these various interests and the corresponding principles of fundamental justice would collapse into a single level, with all of the section 7 interests that are potentially engaged being argued in conjunction with all of the principles of fundamental justice that are potentially relevant.

707 In discussing mandatory reporting of child abuse, Renke considers overbreadth at a much more general level. See Renke, “Child Abuse”, supra note 527 at 111-112.

708 Tse, supra note 646 at para 29. Similarly, Renke argues, in the context of Alberta’s law on mandatory reporting of child abuse, that the terms “physical injury”, “sexual abuse”, and “emotional abuse” require interpretation but are not vague: Renke “Child Abuse”, ibid at 117.

709 See Chapter 2, notes 452 to 461 and accompanying text.
belief, and opinion. As with the terms in *Tse*, these are fairly typical legal terms, some of which have been clearly defined in case law. These are further narrowed as a matter of professional competence – i.e., insofar as these provisions apply to professionals, a professional’s reasonable suspicion or belief or opinion is more narrow and precise than that of a layperson. These terms easily meet the “meaningful guidance” test for vagueness.

Similar problems of false positives arise under overbreadth as under the reliability of the search. The deliberately qualified thresholds triggering reporting are inherently overbroad, in that some of the clients reported will not actually have the reported occurrence. As with reliability, there is some degree of overbreadth that cannot be reasonable. Reasonable suspicion of “may” is likely the broadest scope that could be compliant with section 8.

For mandatory reporting laws, overbreadth and vagueness could also apply to the scope of the authorized search – i.e. what information is to be part of the report. In this respect, the law would be vague if it was unclear what information was to be included, and overbroad if more information than necessary to the purpose was to be included. However, while mandatory reporting laws vary in how much and what information is to be reported, that information tends to be clearly defined and seemingly relevant to the purpose of the reporting. At the most minimal, a gunshot wound report must include the patient’s name and the name of the facility making the report. The most extensive reports are those for reportable and communicable diseases. Concerns over vagueness will be highest where the law uses open-ended or general terms, such as “[a]ll other information in the veterinarian’s knowledge that is relevant to the finding”. However, terms such as relevance should be interpreted in the context of the provision and statute as a whole and the expected expertise of the reporting professional.

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710 See *Tse, supra* note 646 at paras 30-57.  
711 See e.g. *Tse, ibid* at para 30: “As Gonthier J. held for the Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, enactments are not expected to ‘predict the legal consequences of any given course of conduct in advance’ (p. 639). Rather, they are to provide meaningful guidance about the circumstances in which they can be applied.”  
712 *MGWRA, supra* note 569, s 2(1).  
713 *Reports, RRO 1990, Reg 569, ss 1, 2, 5; HPPA, supra* note 635, ss 25, 26, 28.  
714 *Reporting of Hazards and Findings, O Reg 277/12, s 20; Animal Health Act, SO 2009, c 31, s 9.*
Mandatory reporting laws will be overbroad where the law requires the report to include information that is not relevant or necessary to the purpose of the reporting. Such a law would violate the principle that “[t]he collection of personal information shall be limited to that which is necessary for the purposes identified”. While there are no clear examples of such overbreadth in existing laws, this remains a real possibility. For example, mandatory gunshot wound reporting legislation would likely be overbroad if the report was required to include the patient’s race or immigration status. These factors would seem irrelevant to the purpose of police intervention to protect public safety, would seem to reinforce stereotypes about gang violence, and would seem to be a colourable attempt to enforce immigration laws. Similarly, legislation on mandatory reporting of children in need of protection would be overbroad if the report was to indicate whether the child belonged to a specified religion, such as Islam, or the child’s immigration status. This information would seem irrelevant to the mechanism and purpose, of intervening to protect the child, would seem to reinforce stereotypes about particular religions, and would seem to be a colourable attempt to enforce immigration laws. This overbreadth is another reason for which it is important to clearly identify the purpose of any given mandatory reporting law.

Another kind of possible overbreadth occurs where mandatory reporting laws do not provide exemptions for those subcategories of patients for whom reporting would not further the law’s objective. I will refer to this as definitional overbreadth. This problem relates to the importance of defining the reportable occurrence, as discussed in Chapter 1. The clearest example here is mandatory gunshot wound reporting laws, which have been criticized for failing to exempt self-inflicted and accidental wounds. If reporting of some patients cannot further the objective,

715 PIPEDA, supra note 508, Schedule 1, principle 4.
716 I acknowledge that in jurisdictions with a parallel Catholic children’s aid system, religion may be relevant to the report or to where the report is filed.
717 See Chapter 1, notes 27 to 38 and accompanying text.
718 See Chapter 1, notes 33 to 34 and accompanying text; see e.g. Merrill A Pauls & Jocelyn Downie, “Shooting Ourselves in the Foot: Why Mandatory Reporting of Gunshot Wounds is a Bad Idea” (2004) 170:8 Can Medical Assoc J 1255 at 1255: “Education and safety training would be a better strategy for preventing accidental firearm injuries and deaths than would police notification. Furthermore, patients who attempt suicide with a firearm require psychiatric care, not a police investigation. Victims of accidental and self-inflicted gunshot wounds (the majority of cases) pose little risk to the public at large.” For more detail see Martin, supra note 583 at 212.
these patients have their section 7 interests (or, here, their section 8 privacy interest) infringed for no reason. The effectiveness of such exemptions assumes that physicians are able to distinguish self-inflicted or accidental wounds from wounds that are neither self-inflicted nor accidental.\textsuperscript{719}

\section*{3.2.7 Conclusion on reasonableness of the law itself}

Thus, at the second \textit{Caslake} criterion – that the law itself be reasonable – the augmented \textit{Goodwin} framework demonstrates that mandatory reporting laws have some vulnerabilities. Assuming that the purpose of the law is compelling, and the nature of the law is regulatory and not criminal, the major vulnerabilities are a deliberately qualified triggering threshold (whether considered under overbreadth or the reliability of the report) and the absence of oversight mechanisms, especially notice to the client. Two other kinds of overbreadth are also possible – where the report is to include information not relevant to the purpose of the law, and where the law does not exclude subcategories of the occurrence that cannot advance that purpose. While the overbreadth does not appear to be an issue with existing mandatory reporting laws, legislators should be cautioned about this risk in evaluating future proposals.

The section 8 analysis does suggest that mandatory reporting laws should be amended to include oversight and accountability mechanisms, especially a notice requirement. This idea of notice should be distinguished from forewarning. Forewarning happens before the report and may indeed pre-empt a report by deterring the client from disclosing an occurrence. In contrast, notice occurs after the professional has detected the occurrence and he or she has determined that a report must be made.\textsuperscript{720} Notice allows the client to challenge the decision to report or dispute the report. Current mandatory reporting laws typically neither require nor proscribe notice, and so it is open to any professional to give notice. The possibility of a voluntary notice practice is,

\begin{footnotesize}
\textsuperscript{719} See e.g. Martin, \textit{ibid} at 212, n 148.
\textsuperscript{720} Recall the distinction between notice and forewarning, as discussed in Chapter 1. (See Chapter 1, note 45 and accompanying text.) See esp Wesley B Crenshaw & James W Lichtenberg, “Child Abuse and the Limits of Confidentiality: Forewarning Practices” (1993) 11:2 Behavioral Sciences & L 181 at 184: “there are two distinct levels of warning which may be provided to the client: (a) Forewarning, which takes place prior to therapist suspicion or client disclosure of abuse; and (b) Informing, which takes place after therapist suspicion or client disclosure but prior to the filing of a report.”
\end{footnotesize}
however, no substitute for a legislated notice requirement. Such a notice requirement would greatly improve section 8 compliance. However, there may be circumstances in which notice would be harmful – for example, where a client is reported for abusing a child, notifying the client of the report may prompt further abuse.\textsuperscript{721} An alternative would be a notice requirement some fixed time after the report is made, so that notice is given only after the state agency receiving the report has had an opportunity to investigate and intervene (even if, in the circumstances, the agency declines to do so).

Notice does have some drawbacks. Like forewarning, notice may have negative effects on the client-professional relationship. As discussed in Chapter 2,\textsuperscript{722} forewarning may deter clients from disclosing relevant information. Forewarning alerts clients to, or reminds clients of, the consequences of such disclosure and so discourages that disclosure. Similarly, notice may damage the existing client-professional relationship going forward, by reducing the client’s trust in the particular professional, or even reduce the client’s trust in members of that profession more generally. Nonetheless, notice would make these mandatory reporting laws more consistent with section 8.

While notice would appear to be the most important oversight or accountability mechanism, several others are also possible. Recall from \textit{Tse} that, in the wiretap context, there were four asserted deficiencies: “(i) The lack of a notice requirement; (ii) The lack of a reporting requirement to Parliament; (iii) The lack of a record-keeping requirement; and (iv) The need to restrict the use that can be made of the interceptions”\textsuperscript{723} For example, professionals could be required to report to their regulatory body, on an annual basis, the number of reports made under each mandatory reporting law. The regulator could then include the aggregate statistics in an annual report or other document that could be tabled in the legislature by the responsible minister. The regulator could also require specific records to be kept to document and support each report, and assess those records as part of random spot checks or more structured practice reviews. Another accountability mechanism would be an offence provision for false reports,

\textsuperscript{721} See e.g. Renke, “Child Abuse”, \textit{supra} note 527 at 127.

\textsuperscript{722} See Chapter 2, note 395 and accompanying text; see also Chapter 4, note 808 and accompanying text.

\textsuperscript{723} \textit{Tse}, \textit{supra} note 646 at para 80.
although such an offence may dissuade professionals from reporting. Mandatory reporting laws could also be amended to restrict the use of the reports, although other relevant legislation (such as PHIPA)\(^{724}\) may already do so.\(^{725}\)

### 3.3 Reasonable search: Manner of search

The final *Caslake* criterion, the manner in which the search and seizure is executed, is unlikely to pose a problem. Unlike physical searches, informational search and seizure under mandatory reporting laws tend to present fewer possibilities for an unreasonable manner of search. The main concern seems to be that reporting will interrupt or delay the provision of services, especially in emergency situations. However, where the reportable occurrence is likely to present in such a situation, mandatory reporting laws tend to specify the manner of search in a way that addresses that concern. Thus, for example, the *Mandatory Gunshot Wounds Reporting Act* states that the report “must be made orally and as soon as it is reasonably practicable to do so without interfering with the person’s treatment or disrupting the regular activities of the facility.”\(^{726}\)

Other mandatory reporting laws, though using less explicit terminology such as “as soon as possible”,\(^{727}\) “forthwith”,\(^{728}\) or “promptly”,\(^{729}\) do not suggest that reporting be so immediate as to interfere with the provision of services in an emergency.\(^{730}\)

\(^{724}\) PHIPA, supra note 507.

\(^{725}\) See e.g. *HTA*, supra note 617 at 203(3) and 203(4): “The report referred to in subsection (1) is privileged for the information of the Registrar only and shall not be open for public inspection, and the report is inadmissible in evidence for any purpose in any trial except to prove compliance with subsection (1) [the reporting requirement].” Note that a provision amending ss 203-204 (*Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer), 2015*, supra note 637) retains an equivalent provision. See s 204(3): “A report made under section 203, or made to the Registrar in good faith with the intention of reporting under that section, is privileged for the information of the Registrar only and shall not be open to public inspection.” (This amendment is not yet in force at the time of writing.)

\(^{726}\) MGWRA, supra note 569, s 2(2).

\(^{727}\) HPPA, supra note 635, s 25.

\(^{728}\) CFSA, supra note 632, s 72(1).

\(^{729}\) CFMA, supra note 634, s 17(2).

\(^{730}\) See e.g. Renke, “Child Abuse”, supra note 527 at 124: the provision “does not set any specific timing requirements for the making of the report… for example, that the report be provided within a set number of hours…. It only requires that the report be made ‘forthwith’”.
3.4 Reasonable search: An example

I return to the example of a physician reporting a patient’s HIV-positive diagnosis. Recall, from above, that the patient has a reasonable expectation of privacy, and thus section 8 is engaged. The first Collins criterion is straightforward. The search is clearly authorized by a specific provision of a specific law (in this case section 25 of the Health Protection and Promotion Act).\(^{731}\) It is fair to assume that, in a typical case, the physician is complying with the law, i.e. making a report because he or she forms the opinion that the person has HIV, and basing that opinion on whatever testing is accepted among the profession to support such an opinion. It similarly seems fair to assume that the physician includes in the report only the information required. Thus the first Collins criterion for a reasonable search is easily met, unless the physician includes information beyond that which is required, or makes a report without forming the required opinion.

The second Collins criterion, that the law itself is reasonable, is more complicated. The law will be reasonable under the first two steps of the six-step augmented Goodwin framework. At the first Goodwin step, the law is a critical tool toward the compelling purpose of controlling the spread of serious communicable diseases to protect public health. Physicians have a unique ability to diagnose disease. They also have an unusual, if not unique, opportunity to do so, given that they are the professionals that clients engage for health purposes. At the second Goodwin step, the scheme is quite regulatory and not criminal. As mentioned in Chapter 1,\(^{732}\) a positive HIV diagnosis could eventually lead to criminal charges for assault in particular circumstances. But any criminal consequences are much less direct than, for example, where there is a report of child abuse. Thus the law itself is certainly reasonable under the first two steps of the Goodwin framework.

Some problems do arise, however, at the third and fourth steps of the Goodwin framework. The third Goodwin step is the seizure mechanism, including its intrusiveness and reliability. Like all

\(^{731}\) HPPA, supra note 635.

\(^{732}\) See Chapter 1, note 189 and accompanying text.
mandatory reporting laws, this reporting is intrusive into the professional-client relationship. The reporting is reliable insofar as it is triggered by the professional’s “opinion” – a standard much higher than suspicion. As I noted above, a professional’s opinion is inherently more reliable than a layperson’s opinion, at least with respect to a matter within that profession’s competence. However, the requisite opinion is that the patient “has or may have” HIV. The reliability of the reporting is contingent on the reliability of the testing that supports the opinion. If the test is considered reasonably reliable within the profession, then reporting of an opinion based on that testing would likely be held to be reliable.

The most serious vulnerability is at the fourth Goodwin step, that of oversight. There is no effective mechanism for review, and no penalty for false reporting; although the patient could complain to the professional’s regulatory body, such review would be quite limited. Most of all, there is no requirement that the client be notified that the report has been made. The patient may dispute the report if contacted by public health authorities, but at that late stage such a dispute does little.

Recall that the last two steps of the six-step augmented Goodwin framework are use limitations and the principles of fundamental justice. In this example of the reporting of a patient’s HIV diagnosis, there are no specific limitations on how the information may be used, but the general protections under PHIPA would apply. The reporting provision is not vague – it clearly sets out a specific threshold triggering reporting, and what information must be included in the report. Neither is the provision overbroad in the searches it authorizes. Recall that this step overlaps with the reliability of the search. The threshold that triggers reporting – the professional “forms the opinion that the person has or may have” – involves a reasonable level of professional certainty. Neither is the law overbroad in the information that must be included in the report. While this information is extensive, it is clearly connected to the public health purposes of the reporting law.

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733 See above notes 686 and 714 and accompanying text.
734 HPPA, supra note 635, s 25 [emphasis added].
735 PHIPA, supra note 507.
The third *Collins* criterion, the manner in which the search is carried out, has little relevance to this mandatory reporting law. There is no reason to think that the report will interfere with the patient’s care, or add to the physician’s responsibilities an obligation that will unduly interfere with his or her provision of professional services to other patients. Assuming that the physician makes the report in a discreet manner that respects confidentiality obligations, this criterion raises no issues.

Thus, mandatory reporting of a patient’s HIV-positive status by a physician likely constitutes a reasonable search. The report and its contents are authorized by an explicit statutory provision, and there is no reason to think that physicians would report outside of these circumstances or report more information than required. The absence of oversight is troubling, but not determinative. The search will presumably be executed in a reasonable matter. Although section 8 is certainly engaged, because there is a reasonable expectation of privacy, it is likely not infringed. If section 8 is infringed, that infringement will be due to the lack of oversight and accountability mechanisms, and specifically a notice requirement. Such an infringement can be fixed by amending the law to include a notice requirement. That section 8 infringement may also be justifiable under the section 1 analysis, which I will return to below.\footnote{See below under heading 5.}

4 Section 8: The special constraints of solicitor-client privilege

Additional considerations apply to lawyers. As I discuss in other chapters,\footnote{See Chapter 1, note 168 and accompanying text; Chapter 4, notes 812 to 840 and accompanying text; Chapter 6, notes 1118 to 1124 and accompanying text.} lawyers – or in a more nuanced articulation, their clients and the lawyer-client relationship and legal services – have special protection in law. This special protection is not disputable as a matter of law, i.e. it is clearly recognized in law and that recognition is unlikely to change.\footnote{The fact that lawyers and legal services uniquely must be protected as a matter of constitutional law does not mean that other professionals and services cannot be protected as highly as a matter of statute law. That is,}
4.1 The substantive constraints of solicitor-client privilege

In order to comply with section 8, mandatory reporting laws applicable to lawyers must not only include an exception for solicitor-client privilege, but also apply only where there are no other ways for the state agency to obtain the information. Mandatory reporting laws will infringe section 8 if they do not provide an exception for solicitor-client privilege.\(^\text{739}\) Recall from Chapter 1 that such an exception is a common feature of mandatory reporting laws.\(^\text{740}\) Section 8 is one reason, although not the only reason,\(^\text{741}\) that such an exception is constitutionally required. Mandatory reporting laws will also infringe section 8 if they apply to lawyers where there are reasonable alternative mechanisms to obtain the information, because of the unnecessary risk to solicitor-client privilege. Under section 8, a search or seizure from a law office should be authorized only where there are “no reasonable alternatives”.\(^\text{742}\)

Insofar as mandatory reporting is a search and seizure, to comply with section 8 a mandatory reporting law must implicitly or explicitly apply only where there are no reasonable alternative mechanisms to obtain the information. Where a mandatory reporting law applies only to lawyers and to no other professionals, and appears to target an occurrence that lawyers are uniquely positioned to detect, it may be sufficiently implicit that there are no reasonable alternatives. Consider, for example, legal aid eligibility fraud. A lawyer is likely to be the only professional

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\(^{739}\) See e.g. *R v Lavallee*, 2002 SCC 61 at para 49, [2002] 3 SCR 209: “No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.” As I will discuss in Chapter 4, restricting reporting to future harm is an alternative way to protect solicitor-client privilege, because of the future-harm exception to solicitor-client privilege. See Chapter 4, notes 833, 835 to 836 and accompanying text, and the text under heading 9.2.1.

\(^{740}\) See Chapter 1, note 18 and accompanying text.

\(^{741}\) I discuss other constitutional protections for solicitor-client privilege in Chapter 4. See Chapter 4, notes 817 to 828 and accompanying text.

\(^{742}\) *Canada v FLSC*, supra note 594 at para 54; see also *Chambre des notaires*, supra note 594 at paras 53-61.
who learns of this fraud.\textsuperscript{743} However, a mandatory reporting law that applies to lawyers and other professionals – such as mandatory reporting on child abuse and neglect – will be more problematic. Different professionals may have different abilities and opportunities to detect the reportable occurrence. For example, a lawyer may learn of child abuse and neglect earlier than other professionals, or be able to identify some kinds of likely abuse and neglect that other professionals would not.\textsuperscript{744} However, where a mandatory reporting law applies to lawyers and other professionals, it is unclear how a lawyer should be expected to know whether or not the occurrence may be reported by other professionals. Mandatory reporting laws could be amended to include – or interpreted as including – an exception to reporting where the lawyer is reasonably satisfied that another non-lawyer professional to whom the law applies is already aware of the occurrence.

4.2 The procedural constraint of solicitor-client privilege

A different constraint, and one that would also appear to infringe section 8, is in the process for the protection for solicitor-client privilege. Again, mandatory reporting laws typically provide an exception for solicitor-client privilege. However, it is for the lawyer on whom that reporting obligation lies to determine whether that privilege applies and to decline to report for that reason. Justice Arbour for the majority in \textit{R v Lavallee} held that a search of material that was potentially subject to solicitor-client privilege is unreasonable where it is only the lawyer, and not the client, who may assert privilege.\textsuperscript{745} The Court in \textit{Canada (Attorney General) v Federation of Law Societies of Canada} found the impugned provisions unreasonable for the same reason.\textsuperscript{746}

\textsuperscript{743} As I will discuss in Chapter 4, solicitor-client privilege would not apply to legal aid eligibility fraud because of the criminal communications exception. See Chapter 4, note 831. The concern is, however, that other information that was privileged might inadvertently or erroneously be reported.

\textsuperscript{744} See Chapter 2, note 490 and accompanying text.

\textsuperscript{745} \textit{Lavallee, supra} note 739 at paras 39-42 (striking down s 488.1 of the \textit{Criminal Code, supra} note 519).

\textsuperscript{746} \textit{Canada v FLSC, supra} note 594 at para 50. See similarly \textit{Chambre des notaires, supra} note 594 at paras 45-52.
It would thus appear that section 8 is infringed insofar as these mandatory reporting laws do not require the lawyer to notify the client that he or she intends to make a report and to allow the client to assert privilege to the lawyer. As noted in *Canada v FLSC*, this kind of infringement will not be minimally impairing under section 1, as *Lavallee* clearly set out the necessary features of a search and seizure scheme for potentially privileged material.⁷⁴⁷

5  An unclear role for section 1

If a mandatory reporting law did indeed infringe section 8 of the *Charter*, it is unclear whether that infringement would be justifiable under section 1. The result would depend on the relationship between section 8 and section 1. Like section 7 after *Bedford*, it appears that an infringement of section 8 may now be easier to justify under section 1 than previously thought. The minimal impairment and balancing steps of the justification analysis would seem to be the most difficult. The section 8 infringement of a deliberately qualified triggering threshold is likely to be justifiable under section 1, while the section 8 infringement of the absence of oversight or accountability mechanisms is less likely to be justifiable under section 1. Similarly, the definitional overbreadth may be justifiable, but the overbreadth of unnecessary information being included in the report is less likely to be justifiable. It is very unlikely that the lawyer-specific infringements will be justifiable.

5.1  The relationship between section 8 and section 1

The relationship between section 8 and section 1 may be changing after *Bedford*. Traditionally, as with section 7, the courts have indicated that a section 1 justification of a section 8 infringement would only be possible in unusual situations.⁷⁴⁸ Thus Cromwell J in *Canada v*

²⁴⁷ *Canada v FLSC*, ibid at para 61, Cromwell J for the majority, with the rest of the panel (McLachlin CJ and Moldaver J) concurring on this point.

FLSC, writing for the majority on a point with which the concurrence agreed, noted that “[t]he government has a difficult task in seeking to uphold as reasonable provisions, such as those in issue here, which have been found to authorize unreasonable searches.” More dramatically, Penney has claimed that “[i]t would border on oxymoronic to say that an ‘unreasonable’ search was nonetheless justified as a ‘reasonable’ limit in a free and democratic society.” That is, it seems intuitive that a provision cannot be simultaneously both unreasonable under section 8 and reasonable under section 1. However, this disjunction disappears if the reasonableness is for two different purposes or evaluated by two different measures.

As I discussed in Chapter 2, the Supreme Court seems to moving toward a new approach to section 7, under which a section 7 infringement can be justified under section 1 because the two sections consider different factors. That is, section 1 considers societal concerns while section 7 and the principles of fundamental justice are limited to the impact on the individual. Such a move might also apply to section 8, especially since section 8 has been described as a particularization of section 7 and Moldaver J in Wakeling imported two principles of fundamental justice into section 8.

I note that like section 7 after Canada (Attorney General) v Bedford, considerations in the section 8 analysis mostly focus on the impact of the law on the individual. Recall that the four Tessling questions, which assess a reasonable expectation of privacy, focus on the individual. While the fourth Tessling question asks whether the expectation was objectively reasonable, it

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749 Canada v FLSC, supra note 594 at para 58.
750 Penney, supra note 526 at 102 note 5.
751 See Chapter 2, notes 463 to 471 and accompanying text.
752 Hamish Stewart, “Bedford and the Structure of Section 7”, Case Comment on 2013 SCC 72, [2013] 3 SCR 1101, (2015) 60:3 McGill LJ 575 at 589 [Stewart, “Bedford”]: “The logical claim that a law violating one of these principles [arbitrariness, overbreadth, gross disproportionality] could not pass the Oakes test must be reconsidered because a different set of considerations comes into play under section 1: not just the effect of the law on (at least) one person’s section 7 interests, but the effect of the section 7 violation in achieving the law’s policy objectives.” Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101 [Bedford].
753 Stewart, “Bedford”, ibid.
754 Re B.C. Motor Vehicle Act, [1985] 2 SCR 486 at 502, 24 DLR (4th) 536, Lamer J (as he then was): “sections 8 to 14… address specific… violations of s. 7”
755 Supra note 752. See note 753 and accompanying text.
still focuses on the impact on the individual. So do the *Collins* criteria on whether the search was reasonable. The first and third *Collins* criteria – that the search was authorized by law and executed in a reasonable manner – consider the individual. The second *Collins* criterion – that the law itself is reasonable, following *Goodwin* – likewise focuses on the impact on the individual. Recall that the *Goodwin* framework considers the purpose of the scheme, the nature (criminal versus regulatory) of the scheme, the mechanism of seizure (intrusiveness and reliability), and judicial oversight. Almost all of these considerations are about the impact on the individual affected.

However, there are some aspects in which the section 8 analysis explicitly includes a balancing of individual and societal interests, which balancing would appear to make a section 1 analysis redundant. Balancing language is routinely used to describe section 8.756 For example, the Supreme Court in *Rodgers* noted that “any assessment of reasonableness requires a balancing of the relevant competing interests”757 More specifically, the *Goodwin* framework may overlap with a section 1 analysis to the extent that it assesses the importance of the purpose. In *Bedford*, the section 7 analysis considered the purpose of the challenged laws only to establish accordance with the principles of fundamental justice, i.e. whether the law had an impact unrelated to its purpose (arbitrariness or overbreadth) or grossly disproportionate to its purpose. In contrast, the section 8 analysis following *Goodwin* asks whether the purpose of the law is important and whether the challenged search provision is important to that purpose. The more that the section 8 analysis overlaps with section 1, the less likely a section 8 infringement will be justifiable under section 1.

Recall from Chapter 2 that the Court in *Bedford* appeared to change its approach to both section 7 and section 1, the two sections working in tandem.758 A provision that is now more likely to

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756 See e.g. *Tse*, supra note 646 at para 10: “To that extent, the [challenged] section strikes an appropriate balance between an individual’s s. 8 *Charter* rights and society’s interests in preventing serious harm.” See also *Wakeling*, supra note 525 at paras 110-111: “The question here is whether the wiretap provisions ‘stri[k]e an appropriate balance’ between the state’s interest in the search and the public interest in protecting privacy: R. v. *Tse*, 2012 SCC 16, [2012] 1 S.C.R. 531, at para. 10. The assessment of this balance must be connected to the underlying purposes of s. 8 itself.” (Both *Tse* and *Wakeling* are clear that this “balancing” is within section 8 itself.) See also Renke, “Child Abuse”, *supra* note 527, where Renke refers to section 8 as an “internally-qualified” right.

757 *Rodgers*, supra note 643 at para 27.

758 See Chapter 2, notes 494 to 497 and accompanying text.
infringe section 7 – such as one that is overbroad for “enforcement practicality” – is also more likely to be justifiable under section 1. Similarly, the interpretations of section 8 and section 1 may be modified in tandem. For example, consider a mandatory reporting law that uses a deliberately qualified triggering threshold. Under the pre-Bedford approach, such a provision might not infringe section 8 as a law unreasonable in itself. Under the post-Bedford approach, if indeed that approach is applied to section 8, that provision would be more likely to infringe section 8 as using an unreliable search or as overbroad (similar to how “enforcement practicality” might make a law overbroad), but that infringement would be more likely to be justifiable under section 1. That is, the Bedford change in approach may, in some circumstances, not change the ultimate result, i.e. whether a law violates the Charter.

I also note that the alternate Goodwin test set out by McLachlin CJ seems to closely mirror parts of a section 1 analysis. Recall that the Chief Justice’s test had three parts: “(1) the state has an important purpose grounded in the broader public interest for doing the search and/or seizure, (2) the intrusion goes no further than reasonably necessary to achieve the state purpose, and (3) the intrusion is subject to judicial supervision to guard against abusive state action.” The first part seems essentially to be a pressing and substantial objective, while the second part seems to be minimal impairment. The third part goes to both minimal impairment, in that a regime with judicial oversight is less impairing than one that is not, and proportionality, as oversight will mitigate the impact on the individual.

Thus as with section 7, a section 8 infringement would seem justifiable under section 1 insofar as section 1 considers societal interests that are not considered under section 8. Arguably, a law that is unreasonable under the Goodwin framework, for example as an intrusive and unreliable seizure or overbroad, because of a deliberately qualified triggering threshold, could be reasonable under section 1 if it is nonetheless minimally impairing. In particular, the choice for a low triggering threshold that generates many false positives is analogous to “enforcement practicality”.

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759 Bedford, supra note 752 at para 144, discussed in Stewart, “Bedford”, supra note 752 at 591. See also Stewart, “Bedford” at 578.

760 Goodwin, supra note 545 at para 96.
practicality” that may justify overbreadth.\textsuperscript{761} An unreliable search mechanism causes false positives in the same way as an overbroad law impacts some people in a way disconnected with its objective, but that impact may nonetheless be unavoidable without comprising the effectiveness of the scheme. Combating a truly terrible occurrence, like child abuse or impaired driving, might justify an unreliable search provision, i.e. one with a high level of false positives, especially if there was no more reliable alternative. For example, if the low threshold for reporting children in need of protection did make that reporting law an unreasonable search, that unreasonableness could be justified under section 1 given the compelling societal interest in protecting children.\textsuperscript{762} Similarly, definitional overbreadth – when the definition of the reportable occurrence includes subcategories of instances that cannot further the purpose of the law – will likely be justifiable if the reporting professional may not be able to distinguish that subcategory. For example, a mandatory gunshot wound reporting law is overbroad if self-inflicted wounds do not further the purpose of reporting but must be reported. However, that overbreadth will likely be justifiable if there is difficulty in identifying a gunshot wound as self-inflicted or not self-inflicted.

However, given the near-absolute protection given to solicitor-client privilege, a mandatory reporting law that infringed section 8 in its impact on solicitor-client privilege (in the ways discussed above) would seem very unlikely to be justifiable under section 1.

5.2 Pressing and substantial objective

Most mandatory reporting laws that infringe section 8 will have a pressing and substantial objective. The Supreme Court has cautioned against “broad, symbolic objectives”.\textsuperscript{763} As discussed in Chapter 1,\textsuperscript{764} most mandatory reporting laws come within one of two main

\textsuperscript{761} Bedford, supra note 752 at para 44, as quoted in Stewart, “Bedford”, supra note 752 at 591.

\textsuperscript{762} See e.g. Renke, “Child Abuse”, supra note 527 at 98: “Child abuse is a serious and detestable problem… a particularly odious crime”.

\textsuperscript{763} Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68 at para 22, [2002] 3 SCR 519, McLachlin CJ for the majority.

\textsuperscript{764} See Chapter 1, notes 100 to 114 and accompanying text.
categories of purpose: public health & safety or protection of the vulnerable. Preventing or controlling a specific kind of threat to public health & safety, such as unsafe drivers or communicable diseases, would seem to be a sufficient purpose. Protection of the vulnerable should likewise be sufficient where the vulnerable group is identified with some certainty, and they are vulnerable to specific kinds of abuse or neglect. For example, protecting abused and neglected children is likewise clearly pressing and substantial.

However, some of the other kinds of purposes identified by legislators as mentioned in Chapter 1, especially the prevention of moral harm, would seem problematic. Such objectives are likely to be somewhat broad and symbolic.

5.3 Proportionality

This leaves the section 1 determination to proportionality, i.e. “(1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law”.

The justification of a section 8 infringement would likely turn on minimal impairment and balancing. There is clearly a rational connection for most if not all mandatory reporting laws, particularly for those where the purpose is protection of the vulnerable or public health & safety. For example, extracting information about driving ability from the physician-patient relationship so that a state agency can investigate and intervene by restricting or revoking the driver’s license clearly promotes road safety and thus the protection of public safety.

However, minimal impairment and balancing are more complicated. Recall that the most likely infringements of section 8 come from the lack of accountability or oversight mechanisms and the use of a deliberately qualified triggering threshold. Is mandatory reporting – removing the

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765 See Chapter 2, note 474 and accompanying text.
766 See Chapter 1, notes 115 to 136 and accompanying text. I return to this issue in Chapter 6. See Chapter 6, notes 1161 to 1167 and accompanying text.
information from a professional-client relationship of trust in which there is a reasonable expectation of privacy – the only feasible way for the state agency to obtain this information? And would oversight or accountability mechanisms, the absence of which was a major factor in the section 8 analysis, reduce the functioning of these laws? What about increasing the triggering threshold?

A deliberately qualified triggering threshold is an inherent and potentially justifiable aspect of mandatory reporting laws. At the minimal impairment stage of a section 1 justification, administrative expediency should in itself carry little weight. However, there may well be no realistic alternative, and the deliberately qualified triggering threshold may be justifiable because of the seriousness and nature of the reportable occurrence. As discussed in Chapter 1, mandatory reporting laws are valuable and controversial precisely because they obtain information that the client would otherwise be unlikely to provide to the state. At the balancing stage, the benefit to society – in the form of the protection of public health & safety – may well outweigh the harm to the individual clients’ privacy. Part of the difficulty in this balancing is that the benefits of mandatory reporting tend to be readily apparent, especially in the short term, but the negative impact on privacy is largely intangible and long-term. Similarly, definitional overbreadth may be justifiable insofar as it is difficult to distinguish the subcategory – for example, self-inflicted gunshot wounds – from other occurrences.

In contrast, if mandatory reporting laws infringe section 8 due to the lack of oversight or accountability mechanisms, that infringement is likely unjustifiable under the proportionality stage of section 1 – but easily correctible by amending the laws to include, for example, a notice requirement. Such mechanisms would not appear to interfere with the functioning of the mandatory reporting law. Note, for example, that the Court in Tse held that the section 8 infringement – the absence of oversight mechanisms and specifically a notice requirement – failed proportionality: “The obligation to give notice to intercepted parties would not impact in any way the ability of the police to act in emergencies.”

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768 See Chapter 1, note 1 and accompanying text.
769 Tse, supra note 646 at para 98.
the search, i.e. if the report is required to include information that cannot further the purpose of the law, will be difficult to justify but easy to correct by amendment.

I note that the justification analysis under section 1 may be easier where reporting is restricted to situations where there is a risk of future harm, as mentioned in Chapter 2.\textsuperscript{770} Where there is a risk of future harm, mandatory reporting laws clearly further the primary mechanism of investigation and intervention, as opposed to merely the secondary mechanisms of punishment and deterrence.\textsuperscript{771} With a future harm requirement, reporting would apply in fewer situations, which means any infringement of \textit{Charter} rights (in this case, the privacy interest under section 8) would occur in fewer situations. Thus that infringement would be easier to justify under section 1, especially at minimal impairment and balancing. In particular, a deliberately qualified triggering threshold seems much more justifiable if it applies only where there is a risk of future harm.

As discussed in Chapter 2,\textsuperscript{772} minimal impairment poses an interesting dilemma when a mandatory reporting law covers several professions. Such a law could be less impairing of the \textit{Charter} right involved – in this case, the privacy interest under section 8 – if some professions were exempted from the law. Consider, for example, the privacy of a parent who abuses a child. Under mandatory reporting laws on children in need of protection, both the parent’s psychiatrist and his or her clergy would be required to report if he or she disclosed the abuse to them. The parent’s privacy would be seem to be violated less – once instead of twice – if the clergy, or the psychiatrist, were removed from the law. However, as discussed in Chapter 2, different professionals may be positioned to learn of abuse of different kinds or in different ways.\textsuperscript{773} That is, there may be some overlap between reporting by different professionals, but that overlap is likely only partial. Potential redundancy is a legitimate and defensible policy choice, particularly where the reportable occurrence is something awful like child abuse. Moreover, in real terms, it

\begin{itemize}
\item \textsuperscript{770} See Chapter 2, notes 492 and 501 and accompanying text.
\item \textsuperscript{771} I discussed the interplay among this primary mechanism and these secondary mechanisms in Chapter 1. See Chapter 1, notes 137 to 145 and accompanying text.
\item \textsuperscript{772} See Chapter 2, notes 489 to 491 and accompanying text.
\item \textsuperscript{773} See Chapter 2, note 490 and accompanying text.
\end{itemize}
may be that the first report that has the most significant impact on privacy, with subsequent reports from other professionals having a decreased impact. That is, once the privacy as against the state is lost, it is lost.

6 Modifying the template

As I mentioned in Chapter 1, there are some existing modifications to the standard template of mandatory reporting laws: making reporting discretionary instead of mandatory; anonymizing reporting, i.e. omitting the client’s name from the report; imposing the reporting obligation on the institution instead of the individual professional; omitting the offence provision for non-compliance; and substituting retention for reporting. I will briefly assess the impact of these modifications on privacy, and then assess the impact of the other modifications that I have suggested in this chapter and previous ones.

6.1 Existing modifications

Other than anonymization, the existing modifications will be unlikely to change the impact on privacy.

6.1.1 Discretionary reporting

Discretionary reporting is unlikely to have a significant impact on privacy – unless the professional chooses to exercise the discretion based on what he or she estimates the impact on the client’s privacy to be. The likelihood of reporting may be decreased, but the uncertainty for the client is increased.

774 See Chapter 1, notes 47 to 66 and accompanying text.
6.1.2 Anonymized reporting

If the client’s name is absent from the report, the client’s privacy interest should be dramatically lowered. In effect, the report becomes truly neutral information. Recall that anonymity was one of the three “understandings” of informational privacy recognized by Cromwell J in *Spencer*.\(^\text{775}\)

Anonymized data provides secrecy and reduces the importance of control. It is important to emphasize that anonymity is not effective if the client’s identity can reasonably be determined from the report itself or the report combined with other publicly available information.\(^\text{776}\)

Effective anonymization reduces or eliminates privacy concerns.

However, anonymization drastically reduces the usefulness of the report and thus the reporting law itself. The analysis for this chapter assumes that the primary mechanism of mandatory reporting laws is, as set out in Chapter 1,\(^\text{777}\) investigation and intervention where appropriate. The name of the client is typically one of the facts that must be included in the report.\(^\text{778}\) This information is typically necessary for investigation and intervention. Anonymization would likely impede such investigation and intervention.

Some mandatory reporting laws may meaningfully allow investigation and intervention even with anonymization. For example, recall from Chapter 1 and Chapter 2 that mandatory reporting of sexual abuse by health professionals provides that the patient’s name is included in the report only with the patient’s permission.\(^\text{779}\) Without the patient’s name, the report is still useful to the public interest insofar as it includes the name of the allegedly abusive professional. The state agency receiving the report can investigate the professional and intervene if necessary.

\(^\text{775}\) *Spencer, supra* note 511 at para 38.

\(^\text{776}\) See e.g. *PHIPA, supra* note 507, s 4(2): “identifying information’ means information that identifies an individual or for which it is reasonably foreseeable in the circumstances that it could be utilized, either alone or with other information, to identify an individual.”

\(^\text{777}\) See Chapter 1, notes 137 to 140 and accompanying text.

\(^\text{778}\) The key exception being sexual abuse by health professionals under the *HPPC, supra* note 633, ss 85.1 and 85.3(4), where the report includes the patient’s name only with the patient’s consent.

\(^\text{779}\) See Chapter 1, note 49 and accompanying text; Chapter 2, note 218 and accompanying text.
Recall from Chapter 1 that gathering statistical data may be a secondary mechanism of mandatory reporting laws,\textsuperscript{780} one for which the name of the client is less important. Insofar as gathering data is the purpose, reporting can still be effective if the reporting is anonymized, i.e. if the name of the client is omitted. For example, this suggestion was made during the debates on mandatory gunshot wound reporting.\textsuperscript{781} If a mandatory reporting law that includes the client name did unjustifiably infringe section 8, the law may be salvageable for data-gathering if amended to remove the client’s name.

6.1.3 Imposing the reporting obligation on the institution instead of the professional

Placing the reporting obligation on the institution instead of the professional has no effect on the privacy impact. The report has the same effect, whether made in the name of the professional or in the name of the institution.

6.1.4 No offence provision for non-compliance

Omitting an offence provision for non-compliance may have an unpredictable effect on the privacy impact. If indeed the profession or institution decides not to report because there is no offence provision, the impact on privacy will be eliminated. Otherwise, there is no change to the privacy impact of the law.

6.1.5 Substituting retention for reporting

Modifying a mandatory reporting law to require retention for future request by the state agency would decrease the impact on privacy somewhat. Investigation and possible intervention by the state agency is delayed until the agency requests the information – which it may never do, or

\textsuperscript{780} See Chapter 1, note 145 and accompanying text.

\textsuperscript{781} See e.g. Martin, \textit{supra} note 583 at 203-204.
may do almost immediately. The inherent possibility, though not a certainty, of the request may make little difference to the client.

6.2 My suggested modifications

Modifications other than these existing ones may have an impact on the privacy interest. In Chapter 2 and in this chapter, I have mentioned several: restricting reporting to situations where there is a risk of future harm; restricting reporting, where the reporting is for the benefit of the client, to clients lacking capacity or voluntariness; increasing the triggering threshold; adding oversight mechanisms; and adding limitations on use.

6.2.1 Restricting reporting to situations where there is a risk of future harm

Restricting reporting to situations where there is a risk of future harm would decrease the impact on the privacy interest, as privacy would be infringed in fewer situations – those situations where it would be most effective, i.e. where there is a clear benefit to investigation and intervention. This change would improve the likelihood of a successful justification at section 1, particularly at minimal impairment and balancing.⁷⁸² (As I will discuss in Chapter 4, restricting reporting to future harm is also a way to protect solicitor-client privilege, because of the future-harm exception to solicitor-client privilege.⁷⁸³)

6.2.2 Restricting reporting to clients lacking capacity

Restricting reporting to clients lacking capacity or voluntariness, where the reporting is for the benefit of the client, would decrease the privacy impact. The privacy infringement is more easily justifiable where it is for clients who cannot protect themselves. That is, the privacy infringement

⁷⁸² See above notes 770 to 771 and accompanying text.
⁷⁸³ See Chapter 4, notes 833 to 836 and accompanying text, and text under heading 9.2.1.
would be restricted to a subset of cases where reporting is arguably most necessary. As discussed in Chapter 2, this modification should be done not by merely stating that the law does not apply where the client has capacity, but instead by specifying an onus – thus making clear the intended outcome where evaluating capacity is not feasible, the professional cannot evaluate capacity, or if there is uncertainty or capacity is borderline.

6.2.3 Increasing the triggering threshold

As I discussed above, a deliberately qualified triggering threshold will cause the search to be unreliable and constitute overbreadth. Increasing the threshold would reduce this unreliability and overbreadth.

6.2.4 Adding oversight mechanisms

Accountability and oversight mechanisms would also decrease the impact on privacy. Pre-report notification would allow clients to dispute the need to report i.e. argue that the mandatory reporting law should not apply in their circumstances. This would potentially reduce the privacy impact by eliminating some false positives. Similarly, penalties for false reports may reduce the number of false positives and the potential for malicious reports – however, the prospect of such penalties may weaken the law by discouraging professionals from making any reports. An annual report requirement, including the number of reports made under each mandatory reporting law, would also make the impact on privacy more tangible and measurable.

6.2.5 Adding limitations on use

Explicit limitations on use should reduce the likelihood of secondary or unintended privacy infringements. Such modifications to a mandatory reporting law are consistent with fair

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784 See Chapter 2 under headings 7.5 and 7.6.
information practices and should cause little if any impediment to achieving the purpose of the law. Indeed, professionals may be more likely to comply with a mandatory reporting law where they are satisfied that the information will be used only for the stated purpose of the law and will be adequately protected.

7 Conclusion

In this chapter, I have discussed the impact of mandatory reporting laws on the client’s privacy interest, and specifically on the protection against unreasonable search and seizure under section 8 of the Charter. The privacy impact of these laws is best examined using a section 8 lens because the state is extracting information from a relationship of trust in order to use that information in a way that is contrary to the client’s interests and/or wishes. I argued that section 8 will be engaged by most mandatory reporting laws. However, any infringements of section 8 will likely be justifiable under section 1 or solvable through relatively straightforward amendments that should not impede the purpose of the law.

Section 8 will be engaged by most mandatory reporting laws, because the client has a reasonable expectation of privacy. The subject matter of the report is usually the client or the client’s body, a subject in which the client has a direct interest. The client’s subjective expectation of privacy should be presumed given the personal nature of the information. That expectation is objectively reasonable, particularly because the information likely concerns the client’s biographical core and because of the professional and legal imperatives for professionals to maintain client confidentiality. Moreover, to the extent that the information is or appears to be in public view or abandoned, the client typically has no realistic opportunity to protect the information. Thus, the client has a reasonable expectation of privacy.

Section 8 is only infringed where the intrusion on the reasonable expectation of privacy is unreasonable. Mandatory reporting laws are most likely to infringe section 8 in two ways: first, because they typically lack oversight and accountability measures, and second, because they typically use a deliberately qualified triggering threshold, which makes the reports unreliable and the law overbroad by increasing the likelihood of false positives. (They may also be overbroad if the report is to include information that cannot further the purpose of the law, or if they fail to
exclude subcategories – such as self-inflicted wounds – of the reportable occurrence that cannot further that purpose.) Mandatory reporting laws applicable to lawyers may infringe section 8 in three other ways: if they lack an exception for solicitor-client privilege; if they apply where there are reasonable alternatives for the state agency to obtain the information; and if they do not allow the client to assert privilege to the lawyer before the report is made.

These infringements of section 8 will likely be justifiable under section 1 or solvable through amendments. The Supreme Court in *Bedford* reoriented the relationship between section 7 and section 1, with section 7 being more readily infringed but that infringement being more readily justifiable under section 1. This reorientation should also apply to section 8. The result under section 1 will likely turn on proportionality, and specifically whether any given mandatory reporting law is minimally impairing and the positive effects outweigh the negative effects. An infringement of section 8 will be most justifiable where the purpose of reporting is particularly compelling and the occurrence is difficult to identify with certainty. The first major infringement – absence of accountability and oversight mechanisms – is less likely to be justifiable under section 1, but the infringement can be reduced by amending mandatory reporting laws to add such mechanisms, particularly a notification provision that requires the professional to notify the client that he or she intends to make a report. (Similarly, the overbreadth of the report including unnecessary information can be fixed by amendment.) The second major infringement – the deliberately qualified triggering threshold – is more likely to be justifiable under section 1. While this infringement can be reduced by increasing the triggering threshold, such a change is likely to interfere with the effectiveness of the law. (Similarly, the definitional overbreadth may be justifiable if it is difficult to distinguish the subcategory of the reportable occurrence.) These infringements can also be made more justifiable if reporting is restricted to future harm – and can be eliminated by anonymization.

The three infringements related to solicitor-client privilege are unlikely to be justifiable under section 1, but can be solved by amendment. As discussed in Chapter 1, mandatory reporting laws typically contain exceptions for solicitor-client privilege. The no-reasonable-alternatives

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785 See Chapter 1, note 18 and accompanying text.
requirement can be addressed, as discussed above, by providing an exception to reporting where the lawyer is reasonably satisfied that another non-lawyer professional to whom the law applies is already aware of the occurrence. The procedural requirement can be addressed, as also discussed above, by adding a notice provision requiring the lawyer to inform the client that the lawyer intends to make a report and allowing the client to assert privilege.

Despite the result of the Charter analysis, it is worthwhile to reflect on the normative issues at stake. As I have discussed in previous chapters, the fact that Charter interests are engaged is important even where Charter rights are not infringed or an infringement is justifiable under section 1.

The primary privacy concern around mandatory reporting laws, and one that is clearly demonstrated in the structure of a section 8 analysis, is that mandatory reporting entails the use of personal information for a purpose other than the one for which the client disclosed it. The essence of a mandatory reporting law is that information disclosed to a professional, in confidence and out of necessity to receive essential services, is extracted from the client-professional relationship so that it can be used for a public purpose. This violates the basic principle discussed above – albeit a principle with many exceptions – that information should only be used for the purpose for which it was collected. Even where the purpose of disclosure and the purpose of reporting may be appear to be similar, those purposes typically apply at different levels such that they are not actually consistent. Thus, for example, a patient may disclose an STD to a physician for a health purpose, receiving treatment. The reporting of that STD is also for a health purpose, but not the health of the patient – instead, it is a population-level health purpose that does not benefit the patient. However, this use for a different purpose than the purpose for which the information was disclosed is integral to the design of mandatory reporting laws. It cannot be mitigated without eliminating mandatory reporting laws themselves. From a policy perspective, it becomes important to recognize and appreciate this concern.

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786 See above notes 742 to 743 and accompanying text.
787 See above notes 745 to 747 and accompanying text.
788 See Chapter 1, note 6 and accompanying text; Chapter 2, note 504 and accompanying text.
This integral conflict with privacy is different from the conflict with autonomy discussed in Chapter 2. Recall that mandatory reporting laws most clearly conflict with autonomy, as autonomy is embodied in Canadian law and especially in consent and capacity law, when reporting is ostensibly for the benefit of a vulnerable person such as an abused child. The conflict comes because reporting overrides that person’s wishes or interests and ignores their decision on whether or not to seek state assistance. Instead of a presumption of capacity, or even a rebuttable presumption of incapacity, these laws ignore capacity. In contrast, the privacy conflict is clearest where the reporting is not ostensibly for the client’s benefit but where it is for the benefit of the public, and may indeed severely disadvantage the client. Here one of the starkest examples is health conditions affecting driving ability. The client submits to medical or optometric diagnosis and treatment for his or her own well-being, but reporting is for the different purpose of protecting the public – a purpose that may have serious consequences for the client, particularly the loss of a driver’s license.

Thus, mandatory reporting laws have a significant impact on the client’s privacy. Information that he or she provides in confidence for the purpose of receiving professional services may be revealed to the state and used for other purposes. One tangible and understandable result is that clients may be more reluctant to provide honest and complete information to professionals, or may even avoid seeking professional services entirely. This deterrence impact on access to professional services is the subject of the next chapter.
Chapter 4
Access and Deterrence

1 Introduction

In Chapter 2 and Chapter 3, I discussed how mandatory reporting laws affect the client’s interests. In Chapter 2, I explained how mandatory reporting laws intended to protect the client against abuse or neglect affect the client’s autonomy, as autonomy is embodied in Canadian law generally and as it is incorporated into the liberty interest in section 7 of the Canadian Charter of Rights and Freedoms. \(^{789}\) In Chapter 3, I addressed the client’s privacy interest, primarily in terms of the protection against unreasonable search and seizure under section 8 of the Charter. In this chapter, I turn to the client’s interest in access to professional services.

Clients may be less likely to seek assistance from professionals where, due to a mandatory reporting law, doing so may result in the professional reporting confidential information about the client to the state. This deterrence impact on persons seeking professional services is the most common element and theme in the existing literature on mandatory reporting laws. Indeed, it is mentioned in essentially every piece, although there are different views on its extent and impact. These articles range from discussion-type pieces, which raise the possibility of deterrence, \(^{790}\) to

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survey or interview-based studies, which ask certain populations – such as past or prospective clients, members of a profession, or the public at large – whether they think mandatory reporting laws have influenced or will influence client behaviour in seeking services. Some of these studies attempt to measure actual past deterrence on potential clients, i.e. asking subjects whether they have ever declined to seek professional services because of mandatory reporting.

However, the existing literature rarely examines deterrence as a matter of constitutional law, i.e. whether this deterrence from access to services amounts to a violation of a particular right. The major exception is the surprisingly extensive American literature on whether requiring clergy to report child abuse is a violation of religious guarantees. There appears to be no Canadian literature or case law on this point. The other exception is some literature on

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792 See e.g. John P May et al, “Medical Care Solicitation by Criminals with Gunshot Wound Injuries: A Survey of Washington, DC, Jail Detainees” (2000) 48:1 J Trauma 130 [92% went to hospital; study group was inmates from a jail in Washington, DC]; JP May, D Hemenway & A Hall, “Do Criminals Go to the Hospital When They Are Shot?” (2002) 8:3 Injury Prevention 236 [91%; went to hospital; study group was inmates from one jail in each of Maryland, Nevada, California, Georgia, and Ohio].

793 But see e.g. Renke, “Child Abuse”, supra note 790 at 95-96 (in passing, with more emphasis on privacy and search & seizure); Renke, “Gunshot Wounds”, supra note 790 at 6-7 (similarly analysing the impact on confidentiality in terms of search & seizure). I addressed privacy generally, and search & seizure more specifically, in Chapter 3. See also Hamlin & Sommerville, supra note 790 at 230-233 (although brief, and written at a time (1991) when Charter case law was much less developed); Flanagan, supra note 790 at 560-602 (although written at a time (1989) when Charter case law was much less developed).


795 The closest cases are those on clergy-client privilege. See infra notes 859-877 and corresponding text.
mandatory reporting laws as they interact with solicitor-client privilege, where privilege is not discussed in constitutional terms but is nonetheless recognized as a significant legal right.

In this chapter, I assess deterrence primarily as a constitutional issue. I argue that mandatory reporting laws applicable to lawyers, clergy, and health professionals may violate the *Charter* through their deterrence impacts on the client’s access to legal, religious, and health services. While laws applicable to lawyers and health professionals will necessarily infringe section 7, whether laws applicable to clergy will infringe freedom of religion under section 2(a) depends on the role that confidentiality plays in different religions. Legal services receive the highest protection under the *Charter* and religious services and health services will receive some lesser protection. I then consider whether these infringements are likely to be justifiable under section 1. I next briefly consider those professional services for which deterrence does not appear to constitute a *Charter* violation, specifically education and veterinary services. I argue that the deterrence impact may nonetheless be contrary to societal interests in access to these services. As in previous chapters, I also consider how modifications to the template would change the *Charter* analysis.

As I acknowledged in Chapter 3, the literature and case law often consider the deterrence effect as part of the privacy interest. However, for my purposes, it is clearer to separate out the deterrence effect and consider it separately.

## 2 Kinds and levels of deterrence

Deterrence is often referred to as if it were a single phenomenon, i.e. the reluctance or refusal to seek professional services because the client does not want information covered by a mandatory

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797 As I will discuss below, solicitor-client privilege is relevant even where no section 7 interest, and indeed no *Charter* interest whatsoever, is engaged. See below notes 823 to 824 and accompanying text.

798 See Chapter 3, notes 530 and 540 and accompanying text.
reporting law to be reported to the state. However, deterrence can have several levels and variations. Clients may not be deterred from seeking professional services, but instead from providing full and honest information while seeking such services.\textsuperscript{799} Clients may also be deterred beyond the scope of existing mandatory reporting laws if these legislated exceptions to confidentiality challenge the trust in professionals to keep other sensitive information from the state:

If physicians are obliged to report gunshot wounds, the real danger is not that a few people may be deterred from seeking care, but that many others, who see that physicians have become an extension of the police force, will choose not to reveal their drug use, will refuse to say how they received an injury or will not disclose their sexual practices for fear that this information will be used against them.\textsuperscript{800}

Deterrence may happen via a third party withholding access to services so that his or her wrongdoing is not detected,\textsuperscript{801} which might be termed deterrence by proxy. For example, an abusive parent may prevent an abused child from seeking medical care, or an abusive owner may refrain from seeking veterinary care for an abused animal. In all of these situations, the client (or the person controlling access to services) changes his or her behaviour to avoid or reduce the likelihood of the reportable occurrence being detected.

Deterrence may also happen where the client or a person controlling access to services fears a false positive, i.e. that the professional will form and report an opinion or belief or suspicion that

\textsuperscript{799} See e.g. Renke, “Child Abuse” supra note 790 at 96: “Absent confidentiality, individuals might not disclose information, which would diminish the ability to provide appropriate services.” See also e.g. Ginn, supra note 790 at 106: “Furthermore, since it is necessary for health care professionals to know that abuse is happening in order to provide good health care to battered women, any measure that affects the extent to which women are willing to disclose abuse to health care professionals is also likely to affect the quality of the health care received by battered women.”

\textsuperscript{800} Pauls & Downie, “Shooting”, supra note 790 at 1256. Note that this passage is also quoted in Renke, “Gunshot Wounds”, supra note 790 at 7 and in Andrew Flavelle Martin, “The Adoption of Mandatory Gunshot Wound Reporting Legislation in Canada: A Decade of Tension in Lawmaking at the Intersection of Law Enforcement and Public Health” (2016) 9:2 McGill JL & Health 175 at 180. See also Ginn, ibid at 128: “Obligating health care professionals to report abuse, even over the woman's objections, would seem to undermine two fundamental aspects of the health care relationship: the assumption that information given by the patient will be kept confidential and the assumption that the patient's best interests are of primary concern to the health care professional. Mandatory reporting could cause battered women to lose trust in the health care relationship.”

\textsuperscript{801} See e.g. Renke, “Child Abuse”, supra note 790 at 103: “It is also arguable that the threat of disclosure may cause abusers not to seek professional assistance for their children, for fear of being turned in. Their children will therefore not receive treatment.” See also Bernard M Dickens, “Legal Responses to Child Abuse in Canada” (1978) 1:1 Can J Fam L 87 at 102; Ferris & Strike, supra note 790 at 38; Ferris et al, supra note 790 at 110.
is in fact incorrect. For example, “the very proper anxiety of the public to prevent or remedy ill-treatment of children may sometimes deter a conscientious parent from seeking medical help for a child’s accidental injury”.\(^{802}\) In these situations, deterrence results even where the reportable occurrence is not actually present. The perceived prospect of an incorrect report changes behaviour – whether or not the professional would actually make such an incorrect report.

Deterrence may also result not to hide the occurrence, or even the factually incorrect suspicion of the occurrence, but instead because clients fear coming to the attention of the state in any way. For example, the literature on mandatory reporting of spousal abuse in California suggests that undocumented abused women are deterred from seeking medical treatment because they fear that state involvement will lead to their deportation.\(^{803}\)

Depending on the parameters of a mandatory reporting law, deterrence may apply to several different parties. The client directly affected by the reportable occurrence – e.g. the patient with a reportable disease or gunshot wound or condition affecting driving safety, or the child in need of protection – may be deterred from seeking services. So may the perpetrator of the occurrence, the clearest example being a person who has harmed a child. For example, an abuser may be deterred from confessing the abuse to a priest. But deterrence may also impact a third-party witness, the clearest example again being someone who has witnessed the abuse of a child. For example, the spouse of an abuser may not tell his or her lawyer that the abuser has also harmed their child, or a child may not tell his or her priest that his or her parent has abused a sibling – and in these examples, the spouse or child may also be a victim.

The extent of deterrence will depend on the particular circumstances of each case, and the relative value the client places on the services and on his or her confidentiality as against the state. For example, a patient with an extremely painful or obviously life-threatening gunshot wound or sexually transmitted disease is more likely to seek treatment than one with a less

\(^{802}\) *R v Kirby*, [1994] EWJ No 2205 at para 7, [1994] EWCA Crim J1202-22 (Cts Martial App Ct), as quoted and adopted in *R v Pertab*, 27 CR (6th) 126, [2004] OJ No 5109 (QL) (SC) at para 42. Note however that the Court in *Pertab* goes on at para 42 to hold that this is not a defence to criminal neglect.

serious wound or disease. Similarly, a devout Catholic may value the absolution of confession (and its implications for their salvation) so much that he or she is willing to risk being reported for child abuse. The perceived importance or value of the service may also affect the professional’s compliance with the reporting law. For example, a priest who truly considers confession vital to salvation may be less likely to comply. I consider this issue of the professional’s interests further in Chapter 5.

This deterrence impact will only apply if the potential client is aware of the specific reporting requirement or believes that the professional will generally share information with the state.\textsuperscript{804} While there are some studies that attempt to quantify deterrence, as I mentioned above, there is relatively little literature on awareness of mandatory reporting laws among the client population or the public generally. An important consideration, particularly in the Canadian context, is the deterrence impact of public misperceptions about mandatory reporting laws. That is, the deterrence impact will apply even where no mandatory reporting law has been adopted, but the public nonetheless believes such a law exists. A common argument in favour of mandatory gunshot wound reporting laws in Ontario was that most people falsely believed such a law existed – a belief usually attributed to American film and television.\textsuperscript{805}

The deterrence impact and its dependence on public knowledge of mandatory reporting laws makes forewarning particularly important. As mentioned in Chapter 1,\textsuperscript{806} mandatory reporting laws tend to be silent on whether professionals may or must inform clients of their reporting obligations in advance (“forewarning”) or notify clients that they will be making a report or have made a report (“notification”).\textsuperscript{807} There is concern that forewarning may increase deterrence by

\textsuperscript{804} However, clients may also be ignorant of the professional or legal protection for confidentiality. If the client has no expectation of professional secrecy, then the existence of a mandatory reporting law cannot deter that client from seeking services. See note 816 below.


\textsuperscript{806} See Chapter 1, note 45 and accompanying text.

\textsuperscript{807} See esp Wesley B Crenshaw & James W Lichtenberg, “Child Abuse and the Limits of Confidentiality: Forewarning Practices” (1993) 11:2 Behavioral Sciences & L 181 at 184: “there are two distinct levels of warning which may be provided to the client: (a) Forewarning, which takes place prior to therapist suspicion or client disclosure of abuse; and (b) Informing, which takes place after therapist suspicion or client disclosure but prior to the filing of a report.”
discouraging clients from honesty at the time or from seeking services again in the future.\textsuperscript{808} Similarly, notification may also deter clients from seeking services in the future. Decreasing deterrence by avoiding forewarning or notifying, however, exploits an information asymmetry between the client and the professional. Mandatory reporting laws would be more effective if clients were ignorant of them at the time and in the future. Forewarning undoes ignorance at the time and in the future. Notification undoes ignorance in the future. However, exploiting this ignorance of the law seems a tactic that is inherently unfair and disrespectful of clients.

Thus, deterrence comes in many forms. The client may be deterred from seeking services entirely, or seek services but be deterred from providing complete information while doing so. The decision not to seek services may be made not by the client but by another person with the ability to restrict access. Deterrence may happen because of the prospect of an accurate report or of an inaccurate report. Deterrence will be caused not only by public awareness of existing mandatory reporting laws, but also by the mistaken belief that other mandatory reporting laws exist. Forewarning and notification will increase awareness and thus increase deterrence. In the remainder of this chapter, I refer generally to deterrence as including all of these forms.

3 Deterrence is an indirect impact on rights

This issue of the deterrence effect is unlike much of the existing case law and commentary on the rights to legal services, religious services, or health services. The services are not prohibited and access itself is not being delayed or denied; indeed, the client is still able to obtain services from the professional. Instead, the confidential nature of those services is modified. The client can now only obtain these services by giving up some of the confidentiality she or he would otherwise have as against the state. That is, the laws create the potential consequence of being reported. The deterrence effect is real, and measurable, and has a potentially powerful impact on meaningful and effective access and the quality of services that the professional provides.

\textsuperscript{808} See e.g. Crenshaw & Lichtenberg, \textit{ibid} at 185; JoAnn Carson Lord, MD, “Mandated Reporting of Child Abuse: Conflict Between Individual Privacy Rights and Child Protection” (1999) 46:2 Medical Trial Technique Quarterly 263 at 270; Armstrong, \textit{supra} note 796 at 57.
Nonetheless, this is a more indirect or remote impact on Charter interests than an outright prohibition on professional services.

Chief Justice McLachlin, writing for the majority in *Alberta v Hutterian Brethren of Wilson Colony*, emphasized that while some laws merely impose a cost on individuals, more serious are those that prevent a “meaningful choice”:

> The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice…. Or the government program to which the limit is attached may be compulsory, with the result that the adherent is left with a stark choice between violating his or her religious belief and disobeying the law…. The absence of a meaningful choice in such cases renders the impact of the limit very serious…. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue.\(^{809}\)

While the Chief Justice was writing in the specific context of a section 1 justification of an infringement of freedom of religion under section 2(a) of the Charter, this idea of “meaningful choice” is relevant more broadly. Mandatory reporting laws, by prompting state investigation and potentially further consequences, reduce choice less than an outright prohibition.\(^{810}\) Nonetheless, the choice is somewhat meaningless and illusory: obtain necessary services – whether legal, religious, or health – or maintain confidentiality as against the state.

### 4 Deterrence and access to legal services: Solicitor-client privilege and commitment

I now consider deterrence in the context of three kinds of services that engage Charter rights: legal, religious, and health. In all three of these areas, there is a consensus that professionals can only provide effective services if clients disclose all relevant information, and that the prospect of the professional sharing information with the state – as, for example, pursuant to a mandatory

\(^{809}\) *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 94-95, [2009] 2 SCR 567 [citations omitted] [Hutterian Brethren].

\(^{810}\) For absolute prohibitions, see e.g. the cases cited in note 896 below.
reporting law – will deter such disclosure. This deterrence amounts to an infringement of Charter rights, although the specific right infringed depends on the nature of the services. I begin with legal services, which enjoy the highest level of constitutional protection. As I will explain, mandatory reporting laws applicable to lawyers will infringe section 7 of the Charter insofar as they engage a section 7 interest and are not in accordance with two principles of fundamental justice that are specific to lawyers: solicitor-client privilege and commitment to the client’s cause.811

4.1 Solicitor-client privilege

To what degree can the state interfere with access to legal services and the lawyer-client relationship? It is generally accepted that access to legal services is essential to the administration of justice, that there is a Charter right to counsel in many situations – including but not limited to the criminal context812 – and that confidentiality813 between lawyer and client is, in turn, essential to this access. The highest protection of this confidentiality is solicitor-client privilege. Solicitor-client privilege is, from the client’s perspective and as a matter of access to services, essentially a near-absolute guarantee of professional secrecy.814

811 As I acknowledged in Chapter 2, the engagement of any section 7 interest allows any principle of fundamental justice to be argued. See Chapter 2, note 462 and accompanying text. However, for the clarity of my analysis, I focus on the principles of fundamental justice that are most relevant to the interest engaged and the manner in which that interest is engaged. That is, I separate out those principles that are most relevant to each chapter, and here in Chapter 4 specifically deterrence and access to services. This separating out is admittedly somewhat artificial. In a litigation context, these various interests and the corresponding principles of fundamental justice would collapse into a single level, with all of the section 7 interests that are potentially engaged being argued in conjunction with all of the principles of fundamental justice that are potentially relevant.

812 On detention by police: Charter, s 10(b). Criminal proceedings: see R v B(GD), 2000 SCC 22 at para 24, [2000] 1 SCR 520: “Today the right to effective assistance of counsel extends to all accused persons. In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the Criminal Code of Canada and ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.” Other proceedings engaging security of the person: see New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46, 177 DLR (4th) 124.

813 At this point, I refer to confidentiality in its broad sense, as opposed to a lawyer’s professional duty of confidentiality or the protection of solicitor-client privilege, both of which serve confidentiality.

814 The phrase “professional secrecy” is a term of art in Quebec law, where it may be used synonymously with the phrase “solicitor-client privilege”. See e.g. Canada (Attorney General) v Chambre des notaires du Québec, 2016 SCC 20 at para 2, [2016] 1 SCR 336. Here I use the phrase “professional secrecy” in its colloquial sense, as a more accessible and understandable description than solicitor-client privilege.
The Supreme Court has recognized that in order for clients to receive effective legal advice, they must provide all relevant information to their lawyer, and clients will only do so if that information is protected:

Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent…. The privilege is essential if sound legal advice is to be given in every field…. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.815

If clients are deterred from disclosing everything to a lawyer, the risk is that the lawyer may not be able to give correct advice. Thus, exceptions to confidentiality deter access to legal services: “professional legal advice must be accessible. For accessibility to be meaningful, there can be no material disincentives to the seeking of legal advice. The doctrine of [solicitor-client] privilege serves to remove disincentives which might exist if solicitor-client communications were not kept secret.”816

815 Smith v Jones, [1999] 1 SCR 455 at para 46, 169 DLR (4th) 385, Cory J for the majority [emphasis added]. See also the concurring reasons of Major J at para 6: “If the confidences clients share with counsel were not protected by privilege, it seems apparent that accused persons would hesitate to confide in their legal advisors, who in turn could not adequately represent them.” See also R v McClure, 2001 SCC 14 at para 33, [2001] 1 SCR 445: “Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client’s position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship.” See also Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53 at para 34, 403 DLR (4th) 1, where Côté J for the majority cites Smith v Jones at para 46 for the proposition that “[w]ithout the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive”. To similar effect, see also Federation of Law Societies of Canada, Model Code of Professional Conduct (Ottawa: FLSC, 2009), last revised 2016, online: <flsc.ca/national-initiatives/model-code-of-professional-conduct/> [FLSC Model Code], r 3.3-1, commentary 1: “A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them.” See also e.g. Armstrong, supra note 796 at 53; McCallum, supra note 796 at 264.

816 Ronald D Manes & Michael P Silver, Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993) at 5-6, quoted in Adam M Dodek, Solicitor-Client Privilege (Toronto: LexisNexis Canada, 2014) at para. 1.13. (Dodek quotes a longer passage, part of which I have omitted.) I note that this argument has been questioned. See for example Adam M Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 Queen’s LJ 493 at 509-510 [citations omitted]: “Important to the prevailing orthodoxy [that privilege is essential to the legal system] is the ‘full and frank disclosure’ argument, which maintains that in the absence of the privilege, clients would not make ‘full and frank disclosure’ of all relevant facts to their lawyers. In reality, no empirical basis for this argument has yet been presented in Canada…. The limited data indicates that clients are largely unaware of the privilege, or at best misinformed about it…. [M]any clients may trust and confide in their lawyers simply because they are professionals.”
Solicitor-client privilege has been recognized as a substantive rule, as opposed to a rule of evidence, and as a principle of fundamental justice. Its origins as an exclusionary rule in evidence law make it readily applicable to the context of mandatory reporting laws: both contexts are about whether the recipient of information can be legally required to disclose that information, whether in a report or in testimony. Any mandatory reporting law that requires the lawyer to reveal information covered by privilege and engaged life, liberty, or security of the person would thus constitute an infringement of section 7. The section 7 interests engaged could be those of the lawyer or the client. Thus, any mandatory reporting law with an offence provision for non-compliance punishable by imprisonment would infringe section 7. (Recall from Chapter 1 that under most mandatory reporting laws, non-compliance is an offence punishable only by fine.) Similarly, any law where charges against the client, punishable by imprisonment, were a foreseeable consequence of reporting would also engage and infringe section 7. If the communication occurred in association with a detention or trial, reporting would also infringe sections 10(b) and 11(d).

And as discussed in Chapter 3, solicitor-client privilege also applies under section 8 of the Charter.

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817 See e.g. *McClure*, supra note 815 at para 17: “Solicitor-client privilege is part of and fundamental to the Canadian legal system. While its historical roots are a rule of evidence, it has evolved into a fundamental and substantive rule of law.”

818 See e.g. *McClure*, ibid at para 41, as discussed e.g. in Dodek, *Solicitor-Client Privilege*, supra note 816 at para 2.7. See also *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401 [*Canada v FLSC*]. Chief Justice McLachlin and Moldaver J, concurring in the result, at para 20 hold that solicitor-client privilege is a principle of fundamental justice. Justice Cromwell for the majority at para 8 refers to solicitor-client privilege as a “proposed principle of fundamental justice”. Justice Cromwell’s apparent ambivalence over whether solicitor-client privilege is a principle of fundamental justice is, respectfully, difficult to explain following *McClure*. However, Cromwell J does not appear to actively dispute that solicitor-client privilege is a principle of fundamental justice, only holding that it is unnecessary to consider or apply such a principle given his conclusion that the challenged law violates section 8 through its insufficient protection for solicitor-client privilege. See para 73: “I have already concluded that the search provisions of the Act offend the s. 8 right to be free from unreasonable searches and seizures and that they are unconstitutional and of no force and effect as they apply to records in the possession of lawyers. This conclusion makes it unnecessary to undertake an independent s. 7 analysis based on a principle of fundamental justice in relation to solicitor-client privilege in this case” [citations omitted].

819 See e.g. *Canada v FLSC*, ibid.

820 See Chapter 1, note 44 and accompanying text.

821 See e.g. *Smith v Jones*, supra note 815 at para 7: “In the criminal context principles embodied in the rules of privilege have gained constitutional protection by virtue of the enshrinement of the right to full answer and defence, the right to counsel, the right against self-incrimination and the presumption of innocence in ss. 7, 10(b), 11(c) and 11(d) of the *Canadian Charter of Rights and Freedoms*” [citations omitted].

822 See Chapter 3, notes 737 to 747 and accompanying text.
I note that solicitor-client privilege might also apply where no section 7 interests, or even Charter sections 8, 10(b), or 11(d), are engaged. That is, while solicitor-client privilege is a principle of fundamental justice, it is not only a principle of fundamental justice. The Supreme Court has held that solicitor-client privilege is protected in the absence of any Charter interests, essentially as an interpretive mechanism, such that a violation of that privilege is justifiable only by “absolute necessity” to the purpose of the legislation – a threshold that would seem to be higher than for a section 1 justification. Recall from Chapter 1 that most mandatory reporting laws acknowledge the legal reality of solicitor-client privilege by explicitly stating that they do not affect solicitor-client privilege. This is true even where the potential involvement of a lawyer would seem indirect and fairly unlikely – not only in the reporting of children in need of protection, where lawyers are specifically identified as reporters, or of abuse or neglect in care homes, where the obligation is on all persons and could apply to lawyers, but also in the reporting of medicare eligibility fraud or paid queue-jumping. Moreover, for my purposes, there appears to be no mandatory reporting law for which a violation of solicitor-client privilege is absolutely necessary to the purpose of the law – because solicitor-client privilege has some key exceptions.

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823 See e.g. McClure, supra note 815.
824 This point is complex and beyond the scope of this thesis. But see Dodek, Solicitor-Client Privilege, supra note 816 at paras 2.10 to 2.12 and 8.63 to 8.74. The phrase “absolute necessity” is from Goodis v Ontario (Ministry of Correctional Services), 2006 SCC 31 at para 24, [2006] 2 SCR 32 [Goodis]. See also Goodis at para 15, quoting Descôteaux v Mierzwinski, [1982] 1 SCR 860 at 875, 141 DLR (3d) 590, Lamer J (as he then was) for the Court: “The substantive rule laid down in Descôteaux is that a judge must not interfere with the confidentiality of communications between solicitor and client ‘except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation’.”
825 See Chapter 1, note 18 and accompanying text. See e.g. Child and Family Services Act, RSO 1990, c C.11, s 72(8) [CFSA]: “Nothing in this section abrogates any privilege that may exist between a solicitor and his or her client.” See also Dodek, Solicitor-Client Privilege, ibid at para 8.74, noting that exemptions protecting privilege are commonly inserted into legislation.
826 CFSA, ibid, ss 72(5)(d) (“solicitors”), 72(8) (solicitor-client privilege).
827 Long-Term Care Homes Act, 2007, SO 2007, c 8, ss 24(1) (“a person”), 24(7) (solicitor-client privilege); Retirement Homes Act, 2010, SO 2010, c 11, s 75(1) (“a person”), 74(4) (solicitor-client privilege).
828 Health Insurance Act, RSO 1990, c H.6, s 43.1(8); Commitment to the Future of Medicare Act, 2004, SO 2004, c 5, s 17(7). As I noted in Chapter 1, solicitor-client privilege could also apply to non-lawyer professionals if they were retained by the lawyer. See Chapter 1, note 18.
It is important to note the scope of solicitor-client privilege, and in particular that it does not apply to all communications between a lawyer and client, but only those made confidentially in order to receive legal advice. Arguably, if the disclosure of abuse is not relevant to the matter for which the lawyer is providing advice, it is not privileged. For example, Ken Armstrong suggests that a parent’s disclosure that he or she abuses his or her child would be privileged for a custody retainer, but not in “a matter wholly unrelated to the child’s well-being.” However, this approach seems to take a narrow view of privilege and overlook that the client relies on the lawyer to tell him or her what information is relevant, and should presumably err on the side of sharing more information rather than less. A mandatory reporting law may prompt a client to be overcautious and withhold information that would not in fact trigger reporting – a pragmatic and understandable reaction to uncertainty.

Mandatory reporting laws that coincide with exceptions to solicitor-client privilege would not infringe section 7. For example, the reporting of legal aid eligibility fraud falls into the “criminal communications” exception (“communications that are criminal in themselves… or that are intended to obtain legal advice to facilitate criminal activities”). It would thus be meaningless for that legislation to specify that it does not affect solicitor-client privilege. A more complex issue is the role of the “public safety exception”, i.e. where “an identifiable individual or group is in imminent danger of death or serious bodily harm”. While many reporting laws are based on promoting public safety or protecting vulnerable persons, the public safety exception to privilege applies only to future harm – thus past harm is not reportable per se, unless that past harm is evidence or indication of a risk of future harm.

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829 Descôteaux, supra note 824 at 872-873, quoting from Colin McNaughton, ed, Wigmore on Evidence, revised ed (Boston: Little Brown, 1961), vol 8 at para 2292: “Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.” See e.g. Dodek, Solicitor-Client Privilege, supra note 816 at lil.

830 Armstrong, supra note 796 at 49, 51 (quote is from 49, a hypothetical to which Armstrong refers back at 51).

831 Smith v Jones, supra note 815 at para 55, citing Descôteaux, supra note 824 at 893. See e.g. Dodek, Solicitor-Client Privilege, supra note 816 at paras 3.73-3.116; McCallum, supra note 796 at 264-265.

832 Legal Aid Services Act, 1998, SO 1998, c 26, s 43(2).

833 Smith v Jones, supra note 815 at para 85. For discussion, see e.g. Dodek, Solicitor-Client Privilege, supra note 816 at paras 8.6 to 8.37.
It is these exceptions that explain the apparent oddity of a mandatory reporting law that explicitly applies to lawyers that obtain that information “in the course of his or her professional... duties” while also equally explicitly providing that it does not affect solicitor-client privilege: children in need of protection.834 At first glance, one might assume that any such knowledge a lawyer obtained would necessarily be covered by solicitor-client privilege. The future harm exception to solicitor-client privilege has a large role here. Recall that this reporting law applies where the lawyer “has reasonable grounds to suspect” past harm or “a risk” of future physical, sexual, or emotional harm.835 Thus a lawyer can legitimately be required to report a child in need of protection, based on privileged information, if there is an imminent risk of death or serious bodily harm to a child.836

A major difficulty here is the relationship between past harm and the risk of future harm. A disclosure of past harm, in itself, would not trigger reporting unless that past harm constituted reasonable grounds to suspect a risk of future harm. It is unclear how the lawyer in this situation properly integrates the general knowledge that past abuse is indicative of future abuse with the specific knowledge of the individual circumstances. Armstrong, for example, argues that the social science evidence is sufficient to assume past abuse indicates future abuse.837 However, presumably there are some circumstances where the lawyer would not reasonably suspect continued abuse. For example, the client may disclose that he or she physically abused children from a first marriage when they were infants; but if those children are now adults (thus no longer in need of protection), he or she underwent successful psychiatric treatment, and the children from his or her second marriage are now teenagers who can protect themselves (and are thus not in need of protection), there would arguably be no risk of future harm. As discussed in Chapter

834 CFSA, supra note 825, ss 72(4)(b) (“the information on which it was based was obtained in the course of his or her professional or official duties”), 72(5)(d) (“solicitors”), 72(8) (solicitor-client privilege). See e.g. Armstrong, supra note 796 at 53-55; McCallum, supra note 796 at 266.

835 CFSA, ibid, ss 72(1) (“if a person, including a person who performs professional or official duties with respect to children, has reasonable grounds to suspect one of the following”), paras 2 (“a risk that the child is likely to suffer physical harm inflicted by the person having charge of the child”), 4 (“a risk that the child is likely to be sexually molested or sexually exploited”), and 8 (“a risk that the child is likely to suffer emotional harm”). See e.g. Armstrong, ibid at 53. See also Renke, “Child Abuse”, supra note 790 at 9.

836 See e.g. Armstrong, ibid at 53 (on the corresponding Alberta rule).

837 Armstrong, ibid at 54-56. See also Renke, “Child Abuse”, supra note 790 at 115.
1, the primary mechanism of mandatory reporting laws – detection for investigation and if necessary intervention – implies that a past occurrence suggests a current or future risk of harm. Indeed, the concept of a “child in need of protection” in mandatory reporting under the Ontario Child and Family Services Act, and equivalent legislation in other provinces, is essentially a legislative determination that past abuse or neglect is a sufficient indication of a risk of future harm. Note, however, that the report is to include “the information on which it [the suspicion] is based”. Where the lawyer reasonably suspects a risk of future harm based, in whole or in part on past harm, solicitor-client privilege does not preclude him or her from reporting that risk – however, solicitor-client privilege may preclude him or her from disclosing the past harm that forms the basis for that suspicion.

Mandatory reporting laws that require the reporting of information subject to solicitor-client privilege will infringe section 7 where a section 7 interest is engaged and will still infringe solicitor client privilege – as a freestanding right or interpretive mechanism – if there are no section 7 interests engaged. Thus, mandatory reporting laws applicable to lawyers must include an exception for solicitor-client privilege. (Restricting reporting to situations where there is a risk of future harm – so long as that risk is imminent and of serious bodily harm or death – is an alternative way to protect solicitor-client privilege in a mandatory reporting law.) However, that privilege has a limited scope and thus will not interfere with most mandatory reporting laws.

4.2 Commitment to the client’s cause

This section 7 analysis is complicated because solicitor-client privilege is no longer the only principle of fundamental justice specifically concerned with the role of lawyers and the provision of legal services. In Canada (Attorney General) v Federation of Law Societies of Canada, the Supreme Court held that federal legislation requiring professionals to gather and retain

838 See Chapter 1, notes 137 to 140 and accompanying text.
839 CFSA, supra note 825, s 72(1).
840 Ibid, s 72(1): “the person shall forthwith report the suspicion and the information on which it is based to a society”.

information for government inspection, when paying or receiving funds on behalf of a client, unjustifiably infringed section 7 of the Charter in its application to lawyers.\footnote{841} The concurrence did so by applying solicitor-client privilege.\footnote{842} The majority, however, did so by recognizing a new principle of fundamental justice: “the lawyer's duty of commitment to the client's cause”, i.e. “that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes”.\footnote{843} In recognizing this principle, the majority emphasized the importance of client confidence: “A client must be able to place ‘unrestricted and unbounded confidence’ in his or her lawyer”.\footnote{844} That is, one of the wrongs of mandatory reporting laws applicable to lawyers is that they interfere with the lawyer’s commitment to the client’s cause. If the client knows or suspects that the lawyer is not fully committed to the client’s cause and is instead committed to government aims, the client will be deterred from seeking legal services.

However, the scope of this new principle has yet to be clearly defined.\footnote{845} Justice Cromwell for the majority in Canada v FLSC was explicit that the principle of commitment applied only to the protection of the client’s “legitimate interests”,\footnote{846} and had internal limits – although he was vague as to what precisely those limits are and where they come from:

Of course the duty of commitment to the client's cause must not be confused with being the client's dupe or accomplice. It does not countenance a lawyer's involvement in, or facilitation of, a client's illegal activities. Committed representation does not, for example, permit let alone require a lawyer to assert

\footnote{841} Canada v FLSC, supra note 818; Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17.

\footnote{842} Canada v FLSC, ibid at para 120, McLachlin CJ and Moldaver J concurring.

\footnote{843} Ibid at paras 8 and 84, Cromwell J for the majority.

\footnote{844} Ibid at para 83, quoting Smith v Jones, supra note 815 at para 45 [other citations omitted].

\footnote{845} The new principle has also been criticized for other reasons. Amy Salyzyn has argued that the duty of commitment, which she describes as being equivalent to the recognized duty of zealous advocacy, cannot be used as a principle of fundamental justice to evaluate the constitutionality of laws, because it is itself limited by law: Amy Salyzyn, “A False Start in Constitutionalizing Lawyer Loyalty in Canada (Attorney General) v. Federation of Law Societies of Canada”, Case Comment, (SSRN, July 2016), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2812652>. See also Alice Woolley, “Fundamental Justice (Sort of Maybe) Requires a Lawyer’s Commitment to a Client’s Cause”, Case Comment on Canada (Attorney General) v FLSC, 2015 SCC 7, [2015] 1 SCR 401, (2015) 34:2 NJCL 209, noting at 211 that it is not clear how this principle is actually violated on the facts, i.e. “why the legislation may interfere with a lawyer’s commitment to a client’s cause”.

\footnote{846} Canada v FLSC, supra note 818 at para 1.
claims that he or she knows are unfounded or to present evidence that he or she knows to be false or to help the client to commit a crime. The duty is perfectly consistent with the lawyer taking appropriate steps with a view to ensuring that his or her services are not being used for improper ends.\footnote{Ibid at para 93.}

Thus, like the criminal-communications exception to solicitor-client privilege,\footnote{See e.g. Dodek, Solicitor-Client Privilege, supra note 816 at paras 3.73 to 3.110. Dodek argues that crime-fraud is more properly understood as an “exclusion” than an “exception” (para 3.74), but this distinction is not relevant for my purposes.} commitment does not apply to the client’s illegal conduct. Neither does it override basic duties to the court. Justice Cromwell elaborated that the principle will be violated “only when the state's imposition of duties on lawyers undermines, in fact or in the perception of a reasonable person, the lawyer's ability to comply with his or her duty of commitment to the client's cause”.\footnote{Canada v FLSC, supra note 818 at para 111.} This test, and the corresponding scope of the principle, remains unclear. Consistent with this unclear scope, McLachlin CJ and Moldaver J in their concurring reasons stated that commitment “lacks sufficient certainty to constitute a principle of fundamental justice”.\footnote{Ibid at paras 119 and 120.}

If this new principle of commitment to the client’s cause is broader than solicitor-client privilege, then it could conceivably cover some of the information to which exceptions to privilege apply. Commitment would presumably include not disclosing information that would provoke an investigation by the state, even if that information was not confidential or privileged. An analogy can be drawn here to the lawyer’s professional duty of confidentiality, which applies even to publicly-known information – a duty that commitment would presumably include.\footnote{See e.g. Dodek, Solicitor-Client Privilege, supra note 816 at para 2.16.} It remains to be seen how this new principle of commitment will be applied. Note also that Cromwell J for the majority in FLSC, on a point with which the concurrence agreed, held that the liberty interest of lawyers was engaged, because of the possibility of imprisonment for non-compliance, and did not consider whether the section 7 interests of clients were engaged.\footnote{Canada v FLSC, supra note 818 at paras 71-72.} As with the principle of solicitor-client privilege, prompting police or state intervention would presumably engage the client’s security of the person if not also liberty. However, this too remains to be seen.
As I will explain below in the context of health professionals, mandatory reporting laws in their deterrence impact may also deprive the client’s section 7 interests in a manner inconsistent with other principles of fundamental justice, specifically arbitrariness and overbreadth. Given the wide scope of solicitor-client privilege as a principle of fundamental justice and the apparently even wider scope of the new principle of commitment, I assume that these principles of arbitrariness and overbreadth would not add anything to the section 7 analysis in the context of legal services. However, those principles would still apply and could still be argued. Indeed, given the uncertainty over the scope of commitment, such an argument would be prudent as a matter of litigation strategy.

Thus, the deterrence impact of mandatory reporting laws on access to legal services seems to infringe section 7 of the Charter.

5 Deterrence and access to religious services: Freedom of religion

In contrast to rights to legal or health services, religious rights are not as uniformly dependent on service provision and involvement by religious officials. Thus, much of the case law and literature on section 2(a) of the Charter concerns interference with religious practices that do not involve the participation of clergy. The archetype here is laws or policies directly or indirectly forbidding religious attire or items, such as a school safety policy prohibiting kirpans, or helmet or hard-hat requirements that preclude wearing turbans. Similarly, laws may

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853 See below under heading 6.3.
854 See R v Welsh, 2013 ONCA 190 at para 59, 115 OR (3d) 81, leave to appeal to SCC refused, [2013] SCCA Nos 383, 384, 385: “Most, if not all, decided cases deal with situations where a law or practice either compels an individual to act in a manner contrary to his or her religious beliefs or burdens the individual's ability to act in accordance with those beliefs.”
855 Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 SCR 256. This is one of the examples given in Welsh, ibid at para 62.
856 See e.g. R v Badesha, 2011 ONCJ 284 at paras 74 and 96, 238 CRR (2d) 83, holding that the helmet requirement for motorcyclists did not infringe s 2(a) and, if it did, that the infringement was justifiable under s 1. See also R v Banks, 2007 ONCA 19 at para 96, 84 OR (3d) 1 (though clearly obiter), leave to appeal to SCC refused, [2007] SCCA No 139: “[T]here is a distinction between the discriminatory effects of legislation and discrimination in the
effectively require persons to act contrary to their religious beliefs or forego basic privileges such as driving.\textsuperscript{857} Thus, removing the confidentiality of clergy-client communication is not as immediately obvious a \textit{Charter} violation as in the solicitor-client context.\textsuperscript{858} Instead, it depends on the role of clergy in the practice of the particular religion, and the importance of confidentiality to that role.

Somewhat surprisingly, there are no reported Canadian cases specifically addressing the impact of mandatory reporting laws on freedom of religion. The closest case is \textit{R v Gruenke}, in which the Supreme Court addressed the admissibility of testimony by religious figures about communications with clients.\textsuperscript{859} Chief Justice Lamer for the majority held that any privilege for such communications must be determined on a case-by-case basis using the Wigmore criteria for privilege.\textsuperscript{860} Instead of explicitly analyzing the issue under section 2(a) of the \textit{Charter}, Lamer CJ held that the criteria should “be informed both by the \textit{Charter} guarantee of freedom of religion and by the general interpretative statement in s. 27 of the \textit{Charter}”.\textsuperscript{861} While his analysis is brief, Lamer CJ held that a class privilege interferes with the truth-seeking function and is only appropriate where “the policy reasons [for the proposed privilege] are as compelling as the policy reasons which underlay the class privilege for solicitor-client communications”.\textsuperscript{862} In administration of legislation. An example of the former would be a law that required all persons to wear safety helmets. When enforced evenly against all persons, such a facially neutral law would have the effect of discriminating against Sikh men who must wear turbans. This is different from the selective enforcement of a neutral safety helmet requirement unevenly against only one group.”

\textsuperscript{857} See e.g. \textit{Hutterian Brethren, supra} note 809. In that case, the challenged law – requiring all drivers to have their photos taken for display on their licences and in a central database – essentially prevented some persons, those who believed photographs to be forbidden, from driving.

\textsuperscript{858} Similarly, removing the confidentiality of clergy-client communications is not as immediately obvious a \textit{Charter} violation as in the context of health services – which context I will examine below. See below notes 880 to 894.

\textsuperscript{859} \textit{R v Gruenke}, [1991] 3 SCR 263, 67 CCC (3d) 289 [\textit{Gruenke} cited to SCR].

\textsuperscript{860} \textit{Ibid}. Chief Justice Lamer repeatedly mentions that the “particular circumstances” will be determinative: at 289, 290, 291 (“relevant circumstances”), 293 (“the particular facts of each case”).

\textsuperscript{861} \textit{Ibid} at 290.

\textsuperscript{862} \textit{Ibid} at 288. With great respect to Chief Justice Lamer, the existence of a class privilege for solicitor-client communications does not in itself mean that only communications as worthy of protection will also warrant a the protection of a class privilege. That is, professional-client communications – for example, physician-patient
contrast, L’Heureux-Dubé J in her concurring reasons held that there should be a class privilege for religious communications but that it would only apply to confidential communications (and thus not on the facts of the case).863

The existence of clergy-client privilege as a matter of evidence law may seem unrelated to a Charter right to access to religious services and the extent to which mandatory reporting laws infringe such a right. However, the two issues indeed have significant overlap. Gruenke is thus relevant to my analysis. Whereas privilege is about whether the professional can be legally required to disclose particular information in testimony, the constitutionality of a mandatory reporting law addresses the parallel question of whether the professional can be legally required to disclose analogous information to the state. The Wigmore criteria for case-by-case privilege, as set out in Gruenke, are as follows:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.864

communications – could be less important than solicitor-client communications but still important enough for a class privilege. I will return to this point in Chapter 6. See Chapter 6, notes 1126 to 1130 and accompanying text.

863 Ibid, esp at 311-312 and 315-316.

864 Ibid at 284 [emphasis in original source, citation omitted]; re-stated in M(A) v Ryan, [1997] 1 SCR 157 at para 20, 143 DLR (4th) 1, McLachlin J as she then was for the majority: “First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be ‘sedulously fostered’ in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.”; more recently re-stated, with specific reference to journalist-source privilege, in R v National Post, 2010 SCC 16 at para 53, [2010] 1 SCR 477: “The ‘Wigmore criteria’ consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be ‘sedulously fostered’ in the public good (‘Sedulous[ly]’ being defined in the New Shorter Oxford English Dictionary on Historical Principles (6th ed. 2007), vol. 2, at p. 2755, as
The tests for privilege as applied in *Gruenke*, whether that privilege is case-by-case or a class privilege, are ultimately about the societal value of the clergy-client relationship and the necessity of confidentiality to that relationship. If that relationship is important enough and the confidential necessary enough, the relationship will be protected by the mechanism of privilege. Similarly, the constitutionality of a mandatory reporting law on clergy addresses the parallel question of whether the professional can be legally required to disclose the information to the state. If the clergy-client relationship is necessary to the freedom of religion, and if mandatory reporting laws infringe that access and freedom in a non-trivial manner, then such mandatory reporting laws will infringe section 2(a) of the *Charter*.

While L’Heureux-Dubé J gave several justifications, including the societal value of religious relationships, the religious freedom of both the client and the clergy, privacy, and the likelihood that clergy would refuse to testify, she explicitly identified the deterrence effects that would occur if clergy testimony of confidential communications was admissible:

> If our society truly wishes to encourage the creation and development of spiritual relationships, individuals must have a certain amount of confidence that their religious confessions, given in confidence and for spiritual relief, will not be disclosed. Not knowing in advance whether his or her confession will be afforded any protection, a penitent may not confess, or may not confess as freely as he or she otherwise would. Both the number of confessions and their quality will be affected…

Note that here L’Heureux-Dubé J includes both levels of deterrence: deterrence both from making confessions entirely (“the number of confessions”) and from honesty in confessions (“their quality”). There are at least some services – such as hearing confessions – that clergy can provide effectively only if the client provides full information. For example, a priest may not be able to order appropriate penance and provide absolution where he or she is unaware of

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865 *Gruenke*, *ibid* at 297-399; 300-302; 302-303; 303-304. I consider the religious freedom of clergy, as opposed to clients, in Chapter 5. See Chapter 5, notes 1019 to 1026 and accompanying text.

866 *Ibid* at 311 [citation omitted, emphasis added].
aggravating factors. Thus, without absolute confidentiality, the effectiveness of such religious services provided will decrease. While L’Heureux-Dubé J does reference secondary sources that support deterrence, that deterrence appears sufficiently intuitive to qualify for judicial notice.

While the reasons in *Gruenke* do not address the constitutionality of mandatory reporting laws affecting religious services, they nonetheless provide some guidance for such a determination. The majority and concurrence agree that an official role of the person to whom the communication is made and the recognition of an official and required confessional rite are not prerequisites for privilege. In so doing, both rely on section 27 of the *Charter*. Chief Justice Lamer refers to this as “a ‘non-denominational’ approach”. The distinction between formal confession and more general religious counselling is thus not determinative. Thus, while Roman Catholic confession may be the clearest example of a religious practice that might be infringed by mandatory reporting laws, it is not necessarily unique.

There are very few reported decisions applying *Gruenke* in the context of religious officials – and none have held the communications to be privileged. Two cases hold that the privilege does not apply where Elders of Jehovah’s Witnesses have shared the information with others for the purposes of an internal “Judicial Committee”, since the Committee process means that there is insufficient confidentiality at the first Wigmore step. A third case on Jehovah’s Witnesses Elders holds, somewhat inexplicably, that “[t]he first three criteria are usually easily met in this case-by-case analysis”, and instead rejects the privilege claim on the fourth Wigmore criterion – balancing – because of the seriousness of the offence, sexual abuse of a child by a stepfather.

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867 I acknowledge that the concurring reasons in *Gruenke*, *ibid*, on their own, would strongly suggest that mandatory reporting laws affecting clergy would violate freedom of religion where clergy-client communications were considered confidential as a matter of religious belief and the communications at issue were indeed confidential. If religious freedom justifies a class privilege, then presumably the same considerations would mean that forcing clergy to report confidential information would likewise be problematic.


869 *Ibid* at 291.


A privilege claim concerning an Aboriginal elder was held to fail on all four criteria, but most clearly the second criteria – confidentiality essential to the relationship – because of inadequate evidence on the role of aboriginal elders.872 Similarly, in R v BB, communications with a Jewish rabbi during drop-in counselling also failed all four criteria.873

The BB case is problematic because a key factor at each of the four steps was the rabbi’s view that confidentiality did not apply because of the risk to public safety – essentially, the rabbi recognized a future harm exception to the confidentiality of religious counselling.874 (There was no corresponding evidence about the client’s expectation of confidentiality.875) This holding is problematic in that any privilege presumably belongs to the client, and it seems more appropriate that the outcome on the client’s interests turns on the client’s reasonable expectation of confidentiality rather than that of the rabbi.876 As discussed above, the extent of deterrence depends on the client’s expectation of confidentiality. The emphasis under the Wigmore criteria on the rabbi’s view seems to clash with an analysis under section 2(a) of the Charter, where the Supreme Court has been clear that the claimant’s sincerity of belief is key, not that belief’s official recognition by leaders of established religious communities or other experts:

Since the focus of the inquiry is not on what others view the claimant’s religious obligations as being, but rather what the claimant views these personal religious “obligations” to be, it is inappropriate to require expert opinions to show sincerity of belief. An “expert” or an authority on religious law is not the surrogate for an individual’s affirmation of what his or her religious beliefs are. Religious belief is intensely personal and can easily vary from one individual to another. Requiring

872 R v Bonnell, 2012 NBQB 34, 410 NBR (2d) 210 at paras 41-61.
874 Ibid at paras 10-13.
875 Ibid at para 10.
876 While freedom of religion may in many circumstances have a communal or group dimension, in addition to or as opposed to an individual dimension, it is not necessary for my purposes to explore that group dimension. (Although I will return to this point in Chapter 5, in the context of Richard Haigh’s work on freedom of conscience. See Chapter 5, note 1054 and accompanying text.) But see recently e.g. volume 75 of the Supreme Court Law Review: Howard Kislowicz, “On Collective Constitutional Rights: Lessons for Religious Rights from Language Rights” (2016) 75 SCLR (2d) 31; Alvin AJ Esau, “Collective Freedom of Religion” (2016) 75 SCLR (2d) 77; Daniel Mark, “Freedom of Religion as a Group Right” (2016) 75 SCLR (2d) 115; J Kent Donlevy, Kevin P Feehan & Peter Bowal, “A Community’s Right to Freedom of Religion: Loyola High School v. Quebec”, Case Comment on 2015 SCC 12, [2015] 1 SCR 613, (2016) 75 SCLR (2d) 163.
proof of the established practices of a religion to gauge the sincerity of belief diminishes the very freedom we seek to protect.\textsuperscript{877}

This subjectivity of religious belief poses many challenges for courts. For example, there is a real possibility that the confidentiality expectations of the client based on his or her subjective religious belief may not match the confidentiality expectations of the clergy based on his or her subjective religious belief. This is particularly likely in a situation like \textit{BB}, where the client and the clergy do not have an existing relationship. It may also occur where the clergy considers some religious obligations – like preventing violence – so serious that he or she would not warn the client about the exceptions to confidentiality, because such forewarning may prevent important actionable disclosures. In these situations, a robust protection of the religious freedom of the client should focus on the client’s subjective but sincere expectations. Evidence of those expectations would obviously be relevant. If the rabbi had at the outset told the client about the limitations to their confidentiality, the client’s contrary expectation of confidentiality may arguably not have been reasonable. However, recall from Chapter 3 that at least in the context of a section 8 analysis, the reasonable expectation of privacy is normative not descriptive, and so the subjective expectation of privacy is not determinative.\textsuperscript{878} Arguably considerable considerations would apply here.

Regardless of the existence of a clergy-client privilege, either case-by-case or class, there would certainly be some circumstances where mandatory reporting laws would infringe freedom of religion by violating the confidentiality of the clergy-client relationship, the Catholic confessional again being the obvious example. The test for infringement of religious freedom under section 2(a) is fairly easy to meet:

An infringement of s. 2(a) of the \textit{Charter} will be made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial….

\textsuperscript{877} \textit{Syndicat Northcrest v Amselem}, 2004 SCC 47 at para 54, [2004] 2 SCR 551, Iacobucci J for the majority. Surprisingly, none of the reasons (neither the majority nor the two dissents) mention s 27 of the \textit{Charter}, although Iacobucci J for the majority and Bastarache J in dissent refer to the “multicultural” character of Canada in weighing the competing interests at stake (at paras 87 and 177, respectively).

\textsuperscript{878} See Chapter 3, notes 564 to 565 and accompanying text.
“Trivial or insubstantial” interference is interference that does not threaten actual religious beliefs or conduct.\(^{879}\)

Where confidentiality is itself a key tenet, or confidential communication is part of a key rite, reporting a client (or someone mentioned by the client) to the state is certainly a non-trivial interference with a belief that requires confidential communication, especially where the likely consequences of the report are serious. Thus, whether a mandatory reporting law infringes section 2(a) of the Charter in its deterrence impact on access to religious services will depend on the particular context and circumstances. The determinative factor then becomes whether that infringement would be justifiable under section 1.

6  Deterrence and access to health care: A negative right to access health services

Mandatory reporting laws on healthcare professionals infringe section 7 by impacting security of the person in a manner that is overbroad or arbitrary. This is best conceived as a negative right, or as being close to the negative end of a positive-negative spectrum.\(^{880}\) whichever health services are provided (i.e. publicly funded) or permitted (privately financed), the government cannot actively impair access to those services. That is, I am not claiming a positive right to the provision of particular health services by the state, but a negative right to access whatever health services happen to be offered. More specifically, mandatory reporting laws impose a non-financial barrier on patients’ access to health services by reducing professional-patient confidentiality. While access to services is not prohibited or denied, that access comes only with the potential for being reported to the state.

\(^{879}\) *Hutterian Brethren, supra* note 809 at para 32, McLachlin CJ for the majority [references omitted]. See also e.g. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 86, [2015] 2 SCR 3: “To conclude that an infringement has occurred, the court or tribunal must (1) be satisfied that the complainant’s belief is sincere, and (2) find that the complainant’s ability to act in accordance with his or her beliefs has been interfered with in a manner that is more than trivial or insubstantial.”

\(^{880}\) See e.g. Cara Wilkie & Meryl Zisman Gary, “Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality” (2011) 30 Windsor Rev Legal Soc Issues 37, discussing (e.g. at 53) a spectrum of positive to negative rights.
The deterrence impact of health professionals sharing information with the state, and in particular with police, has been clearly recognized. In *R v Dyment*, La Forest J noted, in the context of the privacy aspect of a seizure under section 8 of the *Charter*, that the protection of patients’ privacy “is obviously necessary if one considers the vulnerability of the individual in such circumstances. He is forced to reveal information of a most intimate character and to permit invasions of his body if he is to protect his life or health.” The situation in *Dyment* was that a doctor had given the patient’s blood sample, collected for medical purposes, to a police officer. Justice La Forest went on to quote approvingly from the *Report of the Commission of Inquiry into the Confidentiality of Health Information*:

> It is not an unreasonable assumption to make that persons in need of health care might, in some circumstances, be deterred from seeking it if they believed that physicians, hospital employees and other health-care providers were obliged to disclose confidential health information to the police in those circumstances.

(Although La Forest J was writing only for himself and Dickson CJ, Lamer J for himself and two others concurred in the privacy analysis, thus making this a point of apparent agreement for five of the panel of six.)

This deterrence point was emphasized in subsequent cases concerning the accused’s access to, and use of, the complainant’s counselling records in sexual assault trials. Justice L'Heureux-Dubé adopted this point in the privacy analysis in her dissenting reasons in *R v Osolin*, citing both *Dyment* and the *Krever Report*: “there are concerns that persons in need of medical care might be deterred from seeking valuable and needed treatment if the exchange of information

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881 *R v Dyment*, [1988] 2 SCR 417 at 433, 55 DLR (4th) 503. Note that these comments, though made in the context of a section 8 analysis, do deal fairly specifically with the deterrence factor. I addressed search & seizure under section 8 in Chapter 3, on privacy.


884 *Dyment*, *ibid* at 440-441: “For the reasons given by my brother La Forest J., the fact that the doctor, at the time he remitted the vial to the police, had in his possession the respondent's blood subject to a duty to respect respondent's privacy is sufficient to qualify the receipt by the police of the vial of blood without the consent of the doctor's patient as being a seizure as that term is meant in s. 8 of the *Canadian Charter of Rights and Freedoms*.”
were routine and easily available.\textsuperscript{885} She accepted as “common sense” that, if witnesses can generally be cross-examined on their medical records, “people… may be reluctant to seek needed and valuable treatment if there is any prospect that they may be required to testify at trial”.\textsuperscript{886} She also noted that if counselling records were known to be available to the defence, survivors would essentially be forced to choose between seeking effective treatment and reporting the assault: those who had reported, or intended to report, would be deterred from seeking treatment or providing honest information during treatment, while those had sought treatment would be deterred from reporting the assault.\textsuperscript{887} Subsequently, in \textit{R v O’Connor}, L’Heureux-Dubé J again emphasized deterrence: “[t]he compelled production of therapeutic records… has the potential to deter sexual assault victims from reporting offences or, if they do report them, from seeking treatment.”\textsuperscript{888} This point was adopted by McLachlin and Iacobucci JJ, writing for the majority in \textit{R v Mills}.\textsuperscript{889} Indeed, Parliament in adopting the provision at issue in \textit{Mills} explicitly recognized deterrence in the preamble of the amending act.\textsuperscript{890}

As with legal and religious services, deterrence goes both to whether services are provided at all and the quality of the services provided. That is, if a patient does seek services but does not provide full or accurate information, the quality of the health care services provided may decrease.\textsuperscript{891}

\textsuperscript{885} \textit{R v Osolin}, [1993] 4 SCR 595 at 614-615, 109 DLR (4th) 478, citing Krever Report, supra note 883, vol 2 at 91. While the other judges writing in this case did not consider the deterrence effect specifically, none specifically disagreed with or rejected these comments by L’Heureux-Dubé J.

\textsuperscript{886} Osolin, \textit{ibid} at 622.

\textsuperscript{887} \textit{Ibid} at 628-629.

\textsuperscript{888} \textit{R v O’Connor}, [1995] 4 SCR 411 at para 158, 130 DLR (4th) 235. It is unclear whether this point had the support of the majority of the court. Justice L’Heureux-Dubé wrote for herself and La Forest and Gonthier JJ, and McLachlin J “concu[r]ed entirely” with those reasons (para 191), but Cory J wrote vaguely at para 189 that “I agree with the result reached by L’Heureux-Dubé J. and many of her conclusions pertaining to privacy and privilege.”

\textsuperscript{889} \textit{R v Mills}, [1999] 3 SCR 668 at 724, 180 DLR (4th) 1: “Even the possibility that this confidentiality may be breached…. can reduce the complainant’s willingness to report crime or deter him or her from counselling altogether.”

\textsuperscript{890} \textit{An act to amend the Criminal Code (production of records in sexual assault proceedings)}, SC 1997, c 30, preamble, as quoted in \textit{Mills, ibid} at 695: “Whereas the Parliament of Canada recognizes that the compelled production of personal information may deter complainants of sexual offences from reporting the offence to the police and may deter complainants from seeking necessary treatment, counselling or advice”.

\textsuperscript{891} See e.g. Judge, \textit{supra} note 790 at 20; Carlisle, \textit{supra} note 790 at 1; Ginn, \textit{supra} note 790 at 127-128.
While La Forest J in *Dyment* and the quoted excerpt of the *Krever Report* focused on disclosure to police, and the sexual assault cases focused on the court-ordered release to the accused, disclosures to other state investigative agencies are properly analogous, at least where the potential effects could be similar in seriousness. As I discussed in Chapter 3, reporting can have serious criminal or non-criminal implications for the client, even where reporting is not to the police. The clearest example is mandatory reporting of medicare fraud or payment for medicare queue-jumping, both of which constitute provincial offences in themselves. Potentially more serious but slightly less direct is mandatory reporting of children in need of protection, where the results of investigation can include child protection proceedings and charges under criminal law or provincial legislation. Mandatory reporting of animal abuse may likewise lead to charges. Similarly, mandatory reporting of gunshot wounds may lead to a police investigation and charges (particularly under the assumption that receipt of a gunshot wound is evidence of criminality). Mandatory reporting of medical conditions affecting driving ability may result in the revocation of a driver’s license, which revocation has non-criminal but nonetheless serious consequences. More indirectly, reports of communicable diseases to public health could conceivably lead to sexual assault charges for HIV non-disclosure.

### 6.1 Section 7 interest: Security of the person

Non-trivial interference with access to health services clearly engages security of the person (and potentially life) under section 7, but it is unclear from the case law what level of interference short of prohibition would qualify. Chief Justice McLachlin for the unanimous Court in *Canada (Attorney General) v PHS Community Services Society* held that “[w]here a law creates a risk to health by *preventing* access to health care, a deprivation of the right to security of the person is

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892 See Chapter 3, note 538 and accompanying text.

893 See Martin, *supra* note 800 at 198-199. See also Chapter 1 at notes 142 and 179 and accompanying text.

894 See Chapter 1, note 189 and accompanying text.

895 The life interest would apply when deterrence (either from seeking services entirely, or from honest disclosures while seeking services) has life-threatening consequences. Security of the person would apply where the consequences are not life-threatening. For my purposes, the distinction between the two interests is not important.
The services at issue in all but one of the cases she cited for this proposition were subject to criminal prohibition: abortion (Morgentaler), assisted suicide (Rodriguez), and medicinal marijuana (Parker). The other was access to privately insured services, prohibited by Quebec law, in Chaoulli. And the issue in PHS itself was the operation of a safe injection facility for prohibited drugs. In these cases, the prohibition was accepted as a prevention of access; as Rosenberg JA held in Parker, “forcing Parker to choose between his health and imprisonment violates his right to liberty and security of the person.” The choice is illusory, or at least imposes great cost.

In contrast, mandatory reporting presents a more subtle and indirect effect on security of the person: access to health services themselves is not criminalized, but made conditional on the possibility of reporting. The patient is faced with a choice that is less illusory but still constrained: between seeking health services and not coming to the attention of the state. (I assume here that the professional will obey the law, or at least that it is reasonable for the patient to assume so.) Deterrence constitutes an impairment of access, and potentially an effective prevention of access in some circumstances. That is, the end result can be the same as from a prohibition, at least for some individuals. Thus the deterrence impact of mandatory reporting laws is arguably like the deterrence impact of criminal prohibitions, in kind if not in magnitude – particularly where the reported occurrence triggers state attention or investigation that may lead to criminal or other charges. The Chief Justice’s reference in PHS to “preventing access” would also thus apply to the deterrence impairment of access.

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897 Morgentaler, ibid; Rodriguez, ibid; Parker, ibid.

898 Chaoulli, supra note 896.

899 Parker, supra note 896 at para 10.

900 I consider the issue of non-compliance in Chapter 5. See Chapter 5, notes 1015 to 1016 and accompanying text.
Some analogy may be made here to the prostitution provisions challenged in *Canada (Attorney General) v Bedford.* Prostitution was not illegal but was made more dangerous because the provisions criminalized measures that could increase a prostitute’s safety. The impact was to deter some people from working as prostitutes entirely but to deter others from working as prostitutes safely. Mandatory reporting laws do not prohibit access to health services, but impose potentially undesirable consequences on those seeking such services. As in *Bedford,* the issue of how many people are affected is irrelevant: overbreadth and arbitrariness are triggered, and section 7 infringed, by the impact on just one person. That is, one person deterred from seeking health services because of the prospect of mandatory reporting, or one person deterred from honesty while seeking such services, is enough.

This kind of section 7 claim possibly faces a causation problem: the impact on the security of the person is arguably not caused by the state action of adopting the mandatory reporting laws, but instead by the individual’s choice to engage in or incur, and conceal, reportable behaviour or incidents. The federal government made analogous but unsuccessful causation arguments in *PHS and Bedford.* In *PHS,* the government argued that the choice to use prohibited drugs, not the prohibition of those drugs, caused the harm to section 7 interests. The Supreme Court rejected this argument based on the trial judge’s findings that “addiction is a disease”, despite “the fact that some addicts may retain some power of choice”. The Court rejected related arguments on morality and policy as instead being applicable under the principles of fundamental justice or section 1. Similarly, the government argued in *Bedford* that the choice to engage in prostitution causes the harm. Again, the Court noted that many, although not all, prostitutes lack choice. And the Court rejected associated arguments that third parties – pimps and johns

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901 *Canada (Attorney General) v Bedford,* 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*].
902 *Ibid* at paras 122-123.
903 *PHS,* supra note 896 at paras 97-106 and *Bedford,* *ibid* at paras 73-92.
904 *PHS,* *ibid* at para 97.
905 *Ibid* at paras 99-101. (Quotes are from paras 100 and 101.)
906 *Ibid* at paras 102-105.
907 *Bedford,* supra note 901 at paras 79-86.
908 *Ibid* at para 86.
– cause the danger and that the government is entitled to deference on policy. Most importantly, the Court in Bedford clarified that only a “sufficient causal connection” was required: “A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities”.

In the context of these precedents, it seems clear that mandatory reporting laws applicable to health professionals are a sufficient cause of the deterrence impact on security of the person. Where the reportable occurrence is a health condition, such as a disease or a condition affecting driving or a gunshot wound, the person clearly does not choose to incur these conditions, even if the government could argue that personal choices increase the likelihood of incurring them. Similarly, an abused child or care home resident or a patient sexually abused by a health professional does not choose abuse, even where that abused person does not want the abuse to be reported. Even where choice may be more meaningful, such as non-compliance with treatment or paid queue-jumping or medicare eligibility fraud, it may still be significantly constrained: the treatment or delay may seem undesirable or even unbearable for the individual, or the individual may not be able to otherwise afford health care. In all these situations, the law is at least a but-for cause of the deterrence – but for the law’s exception to confidentiality, the person would be more likely to seek treatment. A but-for cause is not necessarily the only cause or a dominant cause, but does seem to be a sufficient cause. These deterrence effects, and the potential for violations of the principles of fundamental justice, would apply equally where the deterrence is by proxy, i.e. where it is a figure such as a spouse or parent withholding access to care so that his or her own wrongdoing and abuse of a vulnerable person is not detected. Thus, for example, one can reasonably infer that an abusive parent will be less likely to provide his or her abused child with access to health services because of the reasonably foreseeable consequence of abuse being identified and investigated. Recall also that here deterrence may result even where there has been no wrongdoing but wrongdoing may nonetheless be suspected – the archetype being the parent

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909 Ibid at paras 87-90.
910 Ibid at para 76 [citation omitted].
who does not take an accidentally-injured child to hospital out of fear that abuse will be wrongly suspected.\textsuperscript{911}

6.2 Principles of fundamental justice: Overbreadth, arbitrariness, gross disproportionality

While it is fairly clear that mandatory reporting laws engage security of the person by deterring access to health services, section 7 will only be infringed if this deprivation violates one or more principles of fundamental justice. Based on \textit{Bedford} and \textit{PHS}, the most likely principles would be arbitrariness, overbreadth, and gross disproportionality. Recall as discussed in Chapter 2 that \textit{Bedford} provides explanations of these principles.\textsuperscript{912} Arbitrariness focuses on the relationship between the purpose or objective of the law and its effect:

Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law’s purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person.... A law that imposes limits on these interests in a way that bears \textit{no connection} to its objective arbitrarily impinges on those interests.\textsuperscript{913}

Overbreadth also involves the relationship between the objective of the law and the law’s effect:

Overbreadth deals with a law that is so broad in scope that it includes \textit{some} conduct that bears no relation to its purpose. In this sense, the law is arbitrary \textit{in part}. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and \textit{some}, but not all, of its impacts....

Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law’s purpose.\textsuperscript{914}

\textsuperscript{911} See again Kirby, supra note 802.

\textsuperscript{912} See Chapter 2, note 419 and accompanying text.

\textsuperscript{913} Bedford, supra note 901 at para 111 [emphasis in original, citation omitted].

\textsuperscript{914} Ibid at paras 112-113 [emphasis in original].
In contrast, gross disproportionality focuses on the magnitude of the effect on the individual as compared to the importance of the objective:

[T]he law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure…. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

Gross disproportionality under s. 7 of the Charter does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law….915

Bedford emphasizes that the benefits and effectiveness of the law are relevant not at this section 7 stage, but instead at section 1.916

As I will demonstrate, overbreadth and arbitrariness are most likely to be relevant because of the nature of mandatory reporting laws.

Given that these three principles must be evaluated in light of the “object” or “purpose” of the challenged law,917 it is first necessary to identify the objective of those mandatory reporting laws that apply to health professionals.918 Recall from Chapter 2 that the Supreme Court in Carter emphasized that the object should be defined narrowly and “confined to measures directly targeted by the law”.919 As discussed in Chapter 1,920 most of these laws have one of two purposes: public health & safety or protection of the vulnerable. And as also discussed in Chapter 1,921 most of these mandatory reporting laws use the mechanism of investigation and intervention.

915 Ibid at paras 120-121 [emphasis in original].
916 Ibid at para 123.
917 Ibid at paras 98, 101, 193 (“object”), 111, 112, 119, 120. See also Chapter 2 at notes 422 to 426 and accompanying text.
918 See e.g. Carter v Canada (Attorney General), 2015 SCC 5 at para 73, [2015] 1 SCR 331 [Carter]. See also Chapter 2 at note 420 and accompanying text.
919 See Chapter 2, notes 422 to 426 and accompanying text; Carter, supra note 918 at paras 77-78.
920 See Chapter 1, notes 100 to 114 and accompanying text.
921 See Chapter 1, notes 137 to 140 and accompanying text.
Many of the mandatory reporting laws that apply to health professionals share a purpose of public health & safety and a mechanism of intervention, i.e. to detect risks to public health & safety in order to facilitate interventions to reduce the risk: reportable diseases, non-compliance with treatment for reportable diseases, and conditions affecting driving safety. Mandatory gunshot wound reporting, at least ostensibly,\(^{922}\) shares this purpose.\(^{923}\) Each of these laws, except for reportable non-communicable diseases and gunshot wounds, defines a group of persons who pose a danger to others. Gunshot wounds may indicate a possible ongoing danger to others.\(^{924}\) Reportable non-communicable disease define a group of persons who condition may be evidence of a danger to others.\(^{925}\) Thus, the object of each of these laws can be described as detecting, investigating, and potentially intervening to decrease a risk to public health & safety.

Recall from Chapter 2 that most of the other mandatory reporting laws that apply to health professionals share a purpose of protecting the vulnerable and a mechanism of intervention, i.e. to allow investigation and interventions to reduce harm to specific persons who may have a reduced ability to protect themselves.\(^{926}\)

The remaining mandatory reporting laws applicable to health professionals are those on paid queue-jumping or medicare eligibility fraud. In the context of the section 7 analysis, the primary mechanism of these provisions appears to be to detect for investigation, not for intervention but to identify and punish wrongdoing, and in doing so to possibly deter future wrongdoing.\(^{927}\)

\(^{922}\) For the dichotomy between public safety and crime fighting, see Chapter 1, note 142 and accompanying text; see generally Martin, \textit{supra} note 800. See also e.g. Pauls & Downie, “Shooting”, \textit{supra} note 790 at 1255: “There are significant differences between these situations and the case of gunshot wounds. Children are a vulnerable group and are usually unable to prevent ongoing abuse without the help of others. Impaired drivers represent a clear risk to others, and the removal of their licences should (at least in theory) decrease that risk. Similarly, a patient with a reportable infectious disease poses a direct risk to others, and intervention can mitigate or eliminate the risk. In the case of a gunshot wound, the person being reported may or may not pose a risk to the public. There is no clear intervention that can be undertaken to mitigate or eliminate this undefined, and probably undefinable, risk.”

\(^{923}\) \textit{Mandatory Gunshot Wounds Reporting Act 2005}, SO 2005, c 9, preamble: "gunfire poses serious risks to public safety and that mandatory reporting of gunshot wounds will enable police to take immediate steps to prevent further violence, injury or death." See e.g. Martin, \textit{ibid} at 183.

\(^{924}\) See Chapter 1, note 102 and accompanying text. See also Martin, \textit{ibid}, e.g. at 181-183.

\(^{925}\) See Chapter 1, note 102 and accompanying text.

\(^{926}\) See Chapter 2, note 428 and accompanying text.

\(^{927}\) Note that this is a different kind of deterrence than the focus of this chapter, one much like the deterrence purpose of the criminal law.
discussed in Chapter 1, punishment and deterrence may be secondary mechanisms of many mandatory reporting laws, but are typically not the primary mechanism.\textsuperscript{928} The purpose of these mandatory reporting laws on paid queue-jumping or medicare eligibility fraud can be defined at different levels, such as preserving the integrity of the medicare system, or protecting fairness or other Canadian values.\textsuperscript{929} All else equal, a morality-based purpose, like the protection of values, is more amorphous and harder to justify than a narrower purpose of preventing future harm.\textsuperscript{930}

### 6.2.1 Overbreadth

Mandatory reporting laws aimed at detection and intervention share two potential kinds of overbreadth connected to deterrence. The first is because the threshold that triggers reporting is deliberately qualified, given that the basic model for mandatory reporting is screening for the referral of potential instances to a state agency to investigate further: some of the persons who must be reported, and thus some of the people deterred by reporting, do not actually have the reportable occurrence. I first discussed this type of overbreadth in Chapter 2.\textsuperscript{931} Recall that reporting of diseases under the \textit{Health Protection and Promotion Act} applies to a physician who “forms the opinion that the person \textit{has or may have} a reportable disease”.\textsuperscript{932} The \textit{Child and Family Services Act} has an even lower threshold for reporting: “reasonable grounds to \textit{suspect}” a child is in need of protection – some of the possible instances of which also have the low threshold of a “risk”.\textsuperscript{933} A reasonable suspicion will sometimes be wrong. Some people who do not actually have the reportable occurrence will be deterred by the possibility of a false positive. Recall further the child with innocent injuries that resemble abuse, and the non-abusive parent who may be deterred from taking that child to a physician because of the possibility of an incorrect suspicion of abuse. The mandatory reporting law is overbroad in that a reasonable

\textsuperscript{928} See Chapter 1, notes 141 to 145 and accompanying text.

\textsuperscript{929} See Chapter 1, notes 115 to 118 and accompanying text; Chapter 6, note 1174 and accompanying text.

\textsuperscript{930} I return to this point in Chapter 6. See Chapter 6, notes 1161 to 1167 and accompanying text.

\textsuperscript{931} See Chapter 2, note 449 and accompanying text.

\textsuperscript{932} \textit{Health Protection and Promotion Act}, RSO 1990, c H.7, s 25(1) \textit{[HPPA]} [emphasis added].

\textsuperscript{933} \textit{CFSA}, \textit{supra} note 825, s 72(1).
suspicion is incorrect. This overbreadth is more pronounced the more qualified the triggering threshold.

Assuming the deliberately qualified triggering threshold is not unreasonably low, however, this additional degree of false positives would seem to be the permissible overbreadth for “enforcement practicality” or “evidentiary difficulties” that the Court in *Bedford* recognized as potentially justifiable under section 1,934 as a legislated policy decision to favour overreporting and false positives to underreporting and false negatives. As discussed in Chapter 2,935 this qualified-threshold overbreadth would apparently be eliminated by a reformulation of the purpose of mandatory reporting: not to protect the public (by identifying persons posing an actual danger to public health & safety) or the vulnerable (by identifying harmed vulnerable persons), but to identify a group of potential dangers to the public for further investigation and to identify a group of vulnerable persons that may need protection for further investigation. That is, the overbreadth is part of the purpose. However, such an argument is better considered at section 1.

As discussed in Chapter 3,936 another kind of possible overbreadth – definitional overbreadth – occurs where mandatory reporting laws do not provide exemptions for those subcategories of patients for whom reporting would not further the law’s objective. This overbreadth also applies in the context of deterrence: if reporting of some patients cannot further the objective, some of these patients will be deterred for no reason. For example, if the reporting of self-inflicted gunshot wounds cannot further the purpose of the mandatory reporting law, patients with self-inflicted gunshot wounds are deterred for no reason.

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934 *Bedford*, *supra* note 901 at paras 143-144. See also Chapter 2, notes 449 and 482 and accompanying text.

935 See Chapter 2, notes 449 to 451 and accompanying text.

936 See Chapter 3, notes 717 to 718 and accompanying text.
6.2.2 Arbitrariness

Arbitrariness is potentially engaged because mandatory reporting laws are self-limiting in that they cause deterrence, which prevents the intended detection and intervention. Where a patient actually has the reportable occurrence, the deterrence impact prevents that patient from being reported. This appears to be similar to the flaw in criminal restrictions on abortion as described in *Bedford*, i.e. that they impeded their stated purpose:

The purpose of the law was to protect women's health. The majority found that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to the objective of protecting women's health and, in fact, caused delays that were detrimental to women's health. Thus, the law violated basic values because the effect of the law actually contravened the objective of the law….

The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective.

For those persons who are deterred who actually have the reportable occurrence, the mandatory reporting law impedes its own purpose. If the patient does not seek health services, or does not disclose honestly when seeking those services, he or she cannot be reported. The effect of the law (deterrence) contravenes or undermines the objective of the law (detection). But this deterrence is connected to the detection, and thus is inherent in mandatory reporting laws themselves. That is, mandatory reporting will always have some deterrence potential as long as that reporting has some undesirable effects that clients would prefer to avoid. This deterrence can be reduced in several ways: by limiting reporting to the most important subset of cases – for example, for abuse and neglect, limiting reporting to those who lack capacity, or generally limiting reporting to future harm; by limiting the purposes for which the reported information is used, or by making reporting anonymized; or by including the name of the patient in the

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937 See e.g. Dalton, supra note 794 at 20: “If priests are required to report confidences, penitents will become less likely to confide in priests. If penitents are less likely to confide, then priests will no longer be a source for tips on child abuse. The State's means of protecting children will be ineffective because the reason for requiring priests to report will have dissolved.”

938 *Bedford*, supra note 901 at paras 98 and 119.

939 For capacity, see Chapter 2, note 481 and accompanying text; for future harm, see Chapter 2, under heading 11.6 and note 492 and accompanying text, and Chapter 3, under heading 6.2.1 and notes 770 to 771 and accompanying text.

940 See Chapter 1, notes 49 to 52 and accompanying text. See also e.g. the discussion in Martin, supra note 800 at 203-204.
report only with the patient’s consent.\textsuperscript{941} But the deterrence cannot be eliminated. Whereas the deterrence of patients who fear false positives is overbreadth, the deterrence of patients who actually have the reportable occurrence is arbitrariness.

6.2.3 Gross disproportionality

The principle of gross disproportionality is not likely to be engaged by the deterrence effect of existing mandatory reporting laws applicable to health professionals. Unlike overbreadth or arbitrariness, which are inherent in the nature of these mandatory reporting laws, gross disproportionality would depend on the specific weighing for any given mandatory reporting law of the negative impact against the positive impact. Those laws that have a purpose of public health & safety or protection of the vulnerable seem less likely to be grossly disproportionate. (Recall that most mandatory reporting laws applicable to health professionals have one of these two purposes.) Gross disproportionality would be even more unlikely where detection was primarily for investigation and intervention – even more so where reporting is expressly limited to require a risk of future harm. While gross disproportionality might seem to depend on both the magnitude of the deterrence and the number of people deterred, the Court is explicit in \textit{Bedford} that only a single person need be adversely affected.\textsuperscript{942} In the unlikely situation that deterrence occurred for life-saving services, such a law could be grossly disproportionate depending on the magnitude of the benefit.

However, where mandatory reporting laws applicable to health professionals do not have the purpose of public health & safety or protection of the vulnerable, and especially where the mechanism is not intervention to reduce the threat but instead punishment, the calculus is different. That is, gross disproportionality would be more likely where deterrence is counterbalanced by a less pressing purpose, such as promoting societal values or morality. The

\textsuperscript{941} See e.g. \textit{Health Professions Procedural Code}, ss 85.1 and 85.3(4), being Schedule 2 to the \textit{Regulated Health Professions Act}, SO 1991, c 18, where the report includes the patient’s name only with the patient’s consent. See also Chapter 2, notes 217 to 218 and accompanying text.

\textsuperscript{942} \textit{Bedford, supra note} 901 at para 122: “gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.”
more specific the purpose, and the more tangible the harm to societal values or morality, the less likely gross disproportionality would be. As discussed in Chapter 1, existing examples would be mandatory reporting laws for paid queue-jumping or medicare eligibility fraud. Based on the example of gross disproportionality given in *Bedford* – “a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk” – arguably any reporting law that involved reporting unlawful conduct to police, for the purpose of detecting and punishing offences, that deterred lifesaving treatment could qualify. The less serious the crime or offence, and the more serious the deterrence, the more likely the law would be grossly disproportionate. Gross disproportionality would be more likely where a mandatory reporting law applies to any crime or offence. For example, several American states require reporting any injury associated with a crime. Such a law would certainly be grossly disproportionate in its application to some clients – or at least one client.

6.3 Section 7 is infringed

Thus, a law that deters access to health services engages the security of the person interest in a similar manner as a law that prohibits access to health services, and does so in ways that are overbroad and arbitrary and possibly grossly disproportionate. Overbreadth occurs when the prospect of a false positive deters access to treatment – that is, when the law deters patients who

943 See Chapter 1, notes 115 to 118 and 123 to 124 and 129 and accompanying text.

944 As I will discuss in Chapter 6, the purpose of these laws can be re-stated in a narrower – and more convincingly important – way. See Chapter 6, note 1174 and accompanying text.

945 *Bedford*, supra note 901 at para 120.

946 See e.g. Neb Rev Stat § 28-902: “a wound or injury of violence which appears to have been received in connection with the commission of a criminal offense”; Colo Rev Stat § 12-36-135(1)(a): “a bullet wound, a gunshot wound, a powder burn, or any other injury arising from the discharge of a firearm, or an injury caused by a knife, an ice pick, or any other sharp or pointed instrument that the licensee believes to have been intentionally inflicted upon a person, or an injury arising from a dog bite that the licensee believes was inflicted upon a person by a dangerous dog, … or any other injury that the licensee has reason to believe involves a criminal act, including injuries resulting from domestic violence” [emphasis added]; Ga Code Ann § 31-7-9(b): “physical injury or injuries inflicted upon him other than by accidental means”; Idaho Code Ann § 39-1390(1)(b): “Any injury indicating that the person may be a victim of a criminal offense”. See also 20 Ill Comp Stat Ann § 2630/3.2(2): "any injury sustained in the commission of or as a victim of a criminal offense.” (I cited and quoted some of these laws in Martin, supra note 800 at 177, n 6.)
do not actually have the occurrence. Overbreadth would also occur where the law defines the reportable occurrence too broadly, i.e. where the law lacks exceptions for reporting in instances where reporting does not achieve the intended purpose. Arbitrariness occurs because mandatory reporting laws inherently impede their own purposes by deterrence of patients who actually do have the reportable occurrence – a deterred patient cannot be detected and reported. Gross disproportionality is possible, especially where the purpose is not detection for investigation and intervention for public health & safety or protection of the vulnerable, or where deterrence is life-threatening. This overbreadth, arbitrariness, and gross disproportionality infringes section 7.

As I mentioned earlier in this chapter, the deterrence impact and its overbreadth, arbitrariness, or gross disproportionality could also apply to legal services, so long as a section 7 interest was engaged. However, I assume that the lawyer-specific principles of fundamental justice, i.e. solicitor-client privilege and commitment to the client’s cause, would go further.

7 Deterrence and section 1: Are deterrence infringements of Charter rights justifiable?

The deterrence impact of mandatory reporting laws infringes different Charter rights, depending on the kind of professional services involved. As these laws apply to lawyers, they may infringe section 7 by their impact on the principles of solicitor-client privilege or commitment to the client’s cause, where a section 7 interest is engaged. As these laws apply to clergy, they may infringe freedom of religion. And as they apply to health professionals, they infringe section 7 because of deprivation of security of the person that is overbroad, arbitrary, and potentially grossly disproportionate. However, the potential justification of these various infringements under section 1 raises common issues.

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947 See above under heading 4.
7.1 Mandatory reporting laws, deterrence, and the Oakes test

Whether the deterrence-based infringement of Charter rights can be justified under section 1 depends mostly on minimal impairment and proportionality. Mandatory reporting laws are, by definition, prescribed by law. Presumably a mandatory reporting law will have a pressing and substantial objective, at least where the objective is public health & safety or protection of the vulnerable. (Mere detection for punishment, especially in the protection of social values, will be more problematic.) This leaves the section 1 determination to proportionality: “(1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law”. Whether the mechanism is intervention or punishment, reporting is rationally connected to that purpose. This leaves minimal impairment and balancing as the relevant considerations. Recall from Chapter 2 that McLachlin CJ for the majority in Hutterian Brethren rejected the idea that balancing is redundant to the rest of the Oakes test. At the balancing stage, emphasis should be placed on the long-term and societal value of the professional-client relationship and access to services, instead of on the benefit to the individual claimant. This value is perhaps clearest in the case of legal services, in that the provision of adequate legal services is seen as integral to the functioning of the legal system.

Recall from Chapter 2 that minimal impairment poses an interesting dilemma when a mandatory reporting law covers several professions, as with children in need of protection. Arguably, including any given profession may be redundant, and thus unnecessarily impairing of rights, because other professions are included. As I discussed in Chapter 2, such redundancy should not be assumed; different professions may have different opportunities and abilities to identify

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948 See also Chapter 2, note 474, and Chapter 3, note 765 and accompanying text.
950 See Chapter 2, note 492 and accompanying text; *Hutterian Brethren*, supra note 809 at paras 75-78.
951 I discuss this further in Chapter 6. See Chapter 6, notes 1121 to 1124 and accompanying text.
952 See Chapter 2, notes 489 to 491 and accompanying text.
953 See Chapter 2, note 490 and accompanying text.
different instances of the reportable occurrence. Furthermore, redundancy may be a legitimate policy choice where the reportable occurrence is particularly horrible, like child abuse.

7.2 Section 7 and section 1

Recall from Chapter 2 that Bedford changed the relationship between section 7 and section 1, such that an infringement of section 7 being justifiable under section 1 is now a real possibility even absent exceptional circumstances.\footnote{See Chapter 2, notes 463 to 471 and accompanying text; see e.g. Hamish Stewart, "Bedford and the Structure of Section 7", Case Comment on 2013 SCC 72, [2013] 3 SCR 1101, (2015) 60:3 McGill LJ 575.} I would note, in particular, that following Hutterian Brethren, a section 2(a) infringement seems readily justifiable under section 1.\footnote{Hutterian Brethren, supra note 809.}

Bedford and Carter appear to anticipate that overbreadth (and perhaps arbitrariness, and maybe even gross disproportionality) could be justifiable under section 1,\footnote{See Chapter 2, note 472 and accompanying text.} particularly where necessary for practicality or effectiveness. Thus, the overbroad deterrence impact of a deliberately qualified triggering threshold would seem to be justifiable, assuming the threshold is not unreasonably low. Recall from Chapter 2 that the Supreme Court in \textit{R v Chehil} was clear that false positives do not preclude Charter compliance, and that a lower threshold will be appropriate “where state objectives of public importance are predominant”.\footnote{\textit{R v Chehil}, 2013 SCC 49 at paras 23 and 28, [2013] 3 SCR 220. See Chapter 2, note 488 and accompanying text.} Reasonable belief or reasonable suspicion would certainly seem justifiable, both for practicality and for a legitimate policy decision to favour false positives over false negatives. Definitional overbreadth – when the definition of the reportable occurrence includes subcategories of instances that cannot further the purpose of the law – will likely be justifiable if the reporting professional may not be able to distinguish that subcategory.\footnote{See Chapter 3, notes 717 to 719 and 762 and accompanying text.} For example, a mandatory gunshot wound reporting law is overbroad if self-inflicted wounds do not further the purpose of reporting but must be reported – however, that overbreadth will likely be justifiable if there is difficulty in identifying a gunshot wound as self-inflicted or not self-inflicted. Given that the arbitrariness of mandatory reporting.

\footnote{See Chapter 2, notes 463 to 471 and accompanying text; see e.g. Hamish Stewart, "Bedford and the Structure of Section 7", Case Comment on 2013 SCC 72, [2013] 3 SCR 1101, (2015) 60:3 McGill LJ 575.}

\footnote{Hutterian Brethren, supra note 809.}

\footnote{See Chapter 2, note 472 and accompanying text.}


\footnote{See Chapter 3, notes 717 to 719 and 762 and accompanying text.}
laws is inherent and unavoidable, this arbitrariness may well be justifiable under section 1. Any gross disproportionality would seem more difficult to justify.

However, given how fiercely the courts defend solicitor-client privilege, it would be very surprising if a section 7 infringement under that principle of fundamental justice was justifiable under section 1. It remains to be seen how the new lawyer-specific principle, commitment to the client’s cause, will be protected at section 1 – fiercely, like solicitor-client privilege, or less robustly, like overbreadth.

8 Deterrence in the absence of a *Charter* interest: Education and veterinary services

Unlike legal, religious, or health services, some services provided by professionals in a relationship of trust – particularly education and veterinary care – do not seem to engage *Charter* rights. The deterrence impact of mandatory reporting laws on these services does not amount to an issue of constitutional law. However, there may nonetheless be good policy reasons to consider the deterrence impact. I briefly consider these issues here.

For education, every province and territory has legislation setting out a “right” or “entitlement” or “privilege” of children to attend school. To the extent that the deterrence impact of mandatory reporting laws for teachers reduces access to education, this statutory right is impaired. Such impairment is most likely deterrence by proxy, where abusive parents withhold school attendance to prevent teachers’ detection that a child is in need of protection. It is not obvious that effective education requires a teacher-student relationship of trust and that such a

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959 These questions are well beyond the scope of this thesis. For present purposes, I assume that there are no *Charter* rights protecting access to education or veterinary services. But for education, see e.g. Keith Lehwald, “In Search of a Right to Free Public Education in Canada” (2014) 24 Educ & LJ 25.

960 *Ibid* at 27-28: “Access to free public education is guaranteed, in turn, by ordinary statutes passed by each province and territory, using different language to approximately the same effect. Five provinces--Manitoba, Nova Scotia, Ontario, Prince Edward Island, and Saskatchewan--state that students have a ‘right’ to attend school in their respective educational statutes. Alberta, Newfoundland and Labrador, Quebec, and Yukon use the term ‘right’ in the marginal notes, but phrase the provisions as ‘entitlements’ within the legislation itself. British Columbia, the Northwest Territories, and Nunavut use the language of ‘entitlement’ without mentioning the word ‘right’ at all. Finally, New Brunswick phrases its provision as ‘privileges.’” [Citations omitted].
relationship is dependent on confidentiality. Nonetheless, the caregiver withholds access to
school because the teacher may (or will) report. Impairment of access to education, by deterrence
by proxy, is contrary to the social and legislative interest in children attending school.961

However, this negative impact on children accessing education must be balanced against the
positive impact of protecting children. As discussed in Chapter 2,962 different professions may
have different opportunities and abilities to detect a given reportable occurrence. Teachers do
seem well-placed to learn of children in need of protection.

Similarly, there is a social interest in protecting access to veterinary services. This interest is
most clear insofar as animal mistreatment constitutes an offence under both provincial and
federal laws. In Ontario, for example, an animal owner who “permit[s] the animal to be in
distress”, where “‘distress’ means the state of being in need of proper care, water, food or shelter
or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary
hardship, privation or neglect”, is guilty of an offence punishable by up to $60,000 or two years’
imprisonment.963 Similarly, under the Criminal Code, “every one commits an offence who…
wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or
injury to an animal or bird” is guilty of a hybrid offence punishable by five years’ imprisonment
(indictable) or eighteen months or a $10,000 fine (summary conviction).964 In many situations,
veterinary services would be required to provide such proper care and prevent pain or suffering
or injury. Deterrence by proxy would impair access. Like education, here the negative impact of
deterrence would have to be balanced against the positive impact on animal well-being.

Where the reportable occurrence is distress, pain, suffering, or injury, i.e. animal abuse or
neglect,965 the increased detection may more than offset the deterrence impact, such that the net

961 This societal interest is demonstrated in offences for truancy. See, for example, Education Act, RSO 1990, c E.2,
ss 21(5) and 30(1), which impose a duty on parents to make children attend school and creates an offence where that
duty is violated, which offence is punishable by fine.

962 See above note 953 and accompanying text; Chapter 2, notes 489 to 491 and accompanying text.

963 Ontario Society for the Prevention of Cruelty to Animals Act, RSO 1990, c O.36 [OSCPAA], ss 1(1) (definition),
11.2(2) (prohibition), 18.1(1)(c) (offence provision), 18.1(3) (penalty).

964 Criminal Code, RSC 1985, c C-46, s 445.1(1)(a) (offence), 1(b) (sentence).

965 See e.g. OSPCAA, supra note 963, s 11.3.
impact on animal well-being is positive. However, when the reportable occurrence is something else and reporting has a different purpose, the calculus is less clear. Consider, for example, mandatory reporting of banned breeds such as pit bulls by veterinarians to promote public health & safety. The likely result of reporting is destruction of the reported animal, which destruction is contrary to animal welfare. The serious consequence would appear to increase the deterrence impact of such a mandatory reporting law. To the extent that pit bulls pose a danger to other animals, reporting and destruction does promote animal welfare. However, the primary purpose of such breed-specific laws appears to be the protection of humans, not animals.

9  Modifying the template

As I outlined in Chapter 1, there are several existing modifications to the standard template of mandatory reporting laws: making reporting discretionary instead of mandatory; anonymizing reporting, i.e. omitting the client’s name from the report; imposing the reporting obligation on the institution instead of the individual professional; omitting the offence provision for non-compliance; and substituting retention for reporting. There are also other modifications to the template that I suggested in Chapter 2 and Chapter 3: restricting reporting to situations where there is a risk of future harm; restricting reporting, where the reporting is for the benefit of the client, to clients lacking capacity or voluntariness; increasing the triggering threshold; adding oversight mechanisms; and adding limitations on use. I will briefly assess the impact of both sets of modifications on access and deterrence.

I emphasize that the deterrence impact depends on the client’s perception of the likelihood of reporting, which includes the client’s knowledge – correct or incorrect – of the reporting law and its parameters as well as the client’s belief about professionals’ likely compliance. Thus, these modifications will change the deterrence impact only where clients are aware of the

966 I evaluate such a proposal from a policy perspective in Chapter 6. See Chapter 6, notes 1219 to 1229 and accompanying text.

967 Arguably, veterinarians also have a commitment to human welfare. However, this point is not necessary for me to decide.

968 See Chapter 1, notes 47 to 66 and accompanying text.
modifications and trust that those modifications will be followed. For example, a modification that decreases the likelihood of reporting will only decrease deterrence if clients know about that modification and believe that it will actually decrease the likelihood of reporting.

9.1 The existing modifications

Among the existing modifications to the standard template of mandatory reporting laws, only anonymization would appear to reduce the deterrence effect. The other existing modifications would not change the deterrence effect in any significant way.

9.1.1 Anonymization

So long as anonymization is effective and seen to be effective – i.e., that the client cannot be identified from the report and other information – reporting has dramatically reduced impacts for the client and so deterrence should be lessened if not eliminated. However, as identified in previous chapters, anonymization reduces the impact on the client because it drastically reduces the utility of the report for state action.

9.1.2 Discretionary reporting

Discretionary reporting is unlikely to have a significant impact on access and deterrence. While reporting is no longer a certainty, it is still quite possible. A client who, for some reason, opposes the foreseeable consequences of reporting will still be deterred from seeking treatment. Even if the client chooses the professional based on the professional’s honest preview of whether or not he or she tends to report or would report in certain circumstances, the client has no guarantee and is left with uncertainty.

See Chapter 2, under heading 11.2; Chapter 3, notes 775 to 781 and accompanying text.
9.1.3 Imposing the reporting obligation on the institution instead of the professional

Placing the reporting obligation on the institution instead of the professional may be intended to reduce the deterrence effect on access, but seems unlikely to do actually do so. As discussed in Chapter 1, in the Ontario law on mandatory reporting of gunshot wounds this modification was ostensibly intended to reduce the impact on the physician-patient relationship. However, from the perspective of the client, the determinative issue is whether the report will be made, not who actually makes the report. If the institution reports, it will be based on information from the professional.

9.1.4 No offence provision for non-compliance

Omitting an offence provision for non-compliance may have an unpredictable effect on deterrence. If the client believes that the law is the only reason the professional would report, and more specifically a penalty for non-compliance is the only reason that a professional would comply, then the deterrence effect may be reduced or eliminated. Outside such narrow circumstances, the impact would likely be negligible.

9.1.5 Substituting retention for reporting

It is unlikely that modifying a mandatory reporting law to require retention for future request by the state agency, as opposed to immediate reporting to the state agency, would change the deterrence impact. The likelihood of the state requesting any given client’s information may be less than the absolute certainty of the state obtaining it under a traditional mandatory reporting law. However, the risk is still present.

970 See Chapter 1, notes 53 to 57 and accompanying text.
9.2 My suggested modifications

Several of the modifications I have suggested will likely reduce the deterrence impact.

9.2.1 Restricting reporting to situations where there is a risk of future harm

As with the impact on the autonomy interest in Chapter 2 and the impact on the privacy interest in Chapter 3, restricting reporting to situations where there is a risk of future harm would decrease the deterrence impact on access to services and make any Charter infringement more justifiable under section 1. By narrowing the range of cases where reporting would occur to only those where intervention could prevent future harm, the deterrence would presumably be reduced. Thus, the scheme becomes more minimally impairing of the right and the balancing between positive and negative effects is improved.

Recall from above that, in the context of health services, a mandatory reporting law may be grossly disproportionate under section 7, particularly where the purpose and mechanism are not intervention for public health & safety or protection of the vulnerable. Restricting reporting to situations where there is a risk of future harm would decrease the likelihood of gross disproportionality.

This modification is particularly relevant for mandatory reporting laws applicable to lawyers, because it engages the future harm exception to solicitor-client privilege. Recall that mandatory reporting laws applicable to lawyers can violate solicitor-client privilege in two dimensions: first, as a principle of fundamental justice under section 7 and second as a freestanding right. A requirement for future harm would eliminate these impacts on solicitor-client privilege. However, to engage the future-harm exception to the privilege, the mandatory reporting law would have to limit reporting only to an imminent risk of serious bodily harm or death.972

971 See Chapter 2, notes 492 and 501 and accompanying text. See Chapter 3, notes 770 to 771 and accompanying text, and under heading 6.2.1.

972 See above, note 833 and accompanying text.
9.2.2 Restricting reporting to clients lacking capacity

Recall from Chapter 2 that one modification that reduces the impact on client autonomy, as that autonomy is embodied in Canadian law and specifically as it is protected under the section 7 liberty interest, is restricting reporting to clients lacking capacity or voluntariness where the reporting is for the benefit of the client. This modification is only meaningful to the extent that professionals covered by the mandatory reporting law are able to accurately evaluate capacity – and is only meaningful, in the deterrence context, where clients perceive that professionals can and will accurately evaluate capacity. That is, modifying the template by restricting reporting to those clients who lack capacity may decrease the deterrence impact, but only for those clients that are aware that there is an exception for capacity and are confident both that they have capacity and will not be erroneously identified as lacking capacity. Those whose capacity is impaired or borderline, and those who doubt professionals’ ability to evaluate capacity, will still be deterred. Here it is helpful to emphasize that a client who lacks decision-making capacity may have very strong wishes against reporting and may disagree that he or she lacks capacity.

9.2.3 Increasing the triggering threshold

As I discussed in Chapter 2 and Chapter 3, and above in this chapter, the overbreadth of a deliberately qualified triggering threshold will be reduced by increasing that threshold. Recall from above that, in the context of deterrence, the overbreadth is from the client fearing a false positive. The higher the threshold, the less likely a false-positive report becomes, and the less likely the client is to be deterred by the prospect of a false positive. Recall also that, in the context of deterrence, the deterrence impact from a client’s fear of a true positive constitutes arbitrariness, because it will prevent some reportable occurrences from being detected.

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973 See Chapter 2, notes 391 and 481 and accompanying text.
974 See Chapter 2, note 481 and accompanying text, and under heading 11.6; chapter 3, under heading 6.2.3.
Increasing the threshold also makes a true positive less likely and thus, presumably, decreases the arbitrariness of the deterrence impact on those clients who do have the reportable occurrence.

9.2.4 Adding oversight mechanisms

Oversight mechanisms will reduce deterrence if clients believe that such mechanisms will reduce the likelihood of a report being made. For example, if the client believes that professionals are likely to make false reports and that offence provisions for false reports will reduce this likelihood, then deterrence will be reduced.

9.2.5 Adding limitations on use

Adding limitations on use will reduce deterrence to the extent that clients are concerned about the likelihood of particular uses of the report. As I noted in Chapter 3, while mandatory reporting laws themselves often lack limitations on use, other more general laws may impose such limitations. Again, the deterrence impact depends on client awareness of the law and its parameters. Clients may be more aware of limitations on use that are specified in the mandatory reporting law itself than of the same limitations that are found in more general legislation. Thus, even if limitations on use specified in the mandatory reporting law itself are redundant – as a matter of law – to limitations otherwise imposed, the presence of those limitation provisions in the mandatory reporting law itself may decrease deterrence.

10 Conclusion

Mandatory reporting laws deter clients from seeking professional services. While this deterrence impact is not the same as an absolute prohibition of services, it is nonetheless real and, for some services, will constitute an infringement of a corresponding Charter right. For legal and health

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975 See Chapter 3, note 705 and accompanying text.
services, this decrease in access necessarily constitutes an infringement of section 7 of the Charter. For legal services, the section 7 interest engaged may vary, and the most relevant principles of fundamental justice will be solicitor-client privilege and commitment to the client’s cause. For health services, the section 7 interest engaged is security of the person and the most relevant principles of fundamental justice will be overbreadth and arbitrariness. The overbreadth comes from the deliberately qualified triggering threshold, and possibly from the absence of an exception to reporting for subcategories of the occurrence for which reporting does not further the purpose of the law. The arbitrariness comes because the deterrence impact makes mandatory reporting laws self-limiting. For religious services, this decrease in access may constitute an infringement of freedom of religion under section 2(a) of the Charter, depending on the religious significance of clergy-client confidentiality and the role of clergy and that confidentiality in any particular rites.

These infringements of section 7 and 2(a) may be justifiable under section 1. The section 1 analysis will be highly dependent on the purpose of the particular law and the outcome of the minimal impairment and balancing analyses. However, such a section 1 justification would seem near impossible where solicitor-client privilege is involved. Even if a section 7 infringement involving solicitor-client privilege as a principle of fundamental justice was justifiable under section 1, it would be unlikely to reach the absolute-necessity threshold for violating solicitor-client privilege apart from section 7. A section 1 justification may be possible where a mandatory reporting law applicable to lawyers is contrary not to solicitor-client privilege but only to the new principle of commitment to the client’s cause – but the scope of that principle remains unclear. A successful section 1 justification would be more likely where a mandatory reporting law is applicable to health professionals or clergy. Other services, specifically education and veterinary services, do not seem to infringe any Charter rights. Nonetheless, the deterrence may be contrary to a public interest in access to these services.

Unique to the deterrence impact, as opposed to the impact on the autonomy and privacy interests, is that deterrence is intimately dependent on prospective clients’ knowledge of mandatory reporting laws and their belief that professionals will comply with those laws. Where that knowledge is incorrect, mandatory reporting laws may have a deterrence impact that is different from that which might be expected based on the text of the legislation itself. And the particulars of the legislation will be irrelevant if clients believe that professionals will not comply with the
laws. Indeed, the impact of any modifications to the standard template depends on how clients perceive those modifications. Anonymization will decrease deterrence only if clients consider it effective. Discretionary reporting, imposing the reporting obligation on the institution, and omitting the offence provision for non-compliance will decrease deterrence only if clients believe that they are less likely to be reported. Similarly, retention instead of reporting will only decrease deterrence to the extent that clients believe the records will never be requested. In the same way, adding oversight mechanisms and limitations on use will decrease deterrence if clients believe those modifications will decrease the likelihood of, and impact of, reporting. Increasing the triggering threshold and restricting reporting to future harm will decrease deterrence and make any Charter infringements more justifiable under section 1 – to the extent that clients are aware of these amendments and believe that professionals will follow them.

As in Chapters 2 and 3, even where there is no Charter infringement or that infringement is justifiable, legislators should carefully consider the negative impacts of these laws – specifically, in this chapter, on access to essential professional services. This Charter-based analysis should not be assumed to be determinative of the policy decisions at stake, but it nonetheless crystallizes the relevant issues.

Unlike the Charter analysis in Chapter 2 and Chapter 3, in the context of deterrence the nature of the Charter infringement and the likelihood of such an infringement being justifiable under section 1 seem to vary based on the profession providing those services and the nature of those services. This Charter analysis of deterrence seems to establish a hierarchy in which mandatory reporting laws seem, all else equal, more permissible for some professions than others, based on the nature and importance of the services provided. Legal services are the most strongly protected. Educational and veterinary services relationships appear to warrant no protection. Between these two extremes lie religious services and health services.

While a Charter approach is helpful insofar as it crystallizes the relevant issues and provides an established framework for analysis, this resultant hierarchy is not necessarily appropriate in a

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976 See Chapter 1, note 6 and accompanying text; Chapter 2, note 504 and accompanying text; Chapter 3, note 785 and accompanying text. I will return to this point in Chapter 6: see Chapter 6, note 1116 and accompanying text.
policy context. Societal expectations about the relative trust placed in these different professionals may be different than the Charter hierarchy. The courts, constituting part of the legal system and recognizing that solicitor-client privilege is essential to the proper functioning of that system, have protected the solicitor-client relationship above all others. This protection has an internal logic. Legislators, in response to this approach by courts, have likewise acknowledged and protected solicitor-client privilege in their statutes so as to forestall successful challenges.

Public expectations, however, may not follow this legal hierarchy. Most importantly, physicians (and other health professionals) typically enjoy more public trust than lawyers, and health information is often considered more personal and more deserving of protection than other information. It is likely, then, that patients would feel more violated from mandatory reporting by a health professional than by a lawyer. While the protection of the solicitor-client relationship is near-absolute and non-negotiable, legislators are free to grant other professional-client relationships that same level of near-absolute protection. For example, mandatory reporting laws could specify that they do not affect solicitor-client privilege and also do not affect physician-patient confidentiality. It also possible that in certain contexts, different professions should be equally subject to mandatory reporting laws. Recall that the Child and Family Services Act imposes reporting of children in need of protection equally on health professionals, clergy, and teachers. (The Act does prioritize lawyers by explicitly protecting solicitor-client privilege.) Thus, an evidence-based and context-specific policy approach may be more appropriate, and more conducive to public support, than a legal approach based on Charter compliance. I return to this point in Chapter 6.

My discussion of access and deterrence in this chapter completes the analysis of the interests of the client that I started in Chapter 2 on autonomy and continued in Chapter 3 on privacy. In the next chapter, I turn to the impact of mandatory reporting laws on the interests of the professional.

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977 I return to this point in Chapter 6. See Chapter 6, notes 1121 to 1125 and accompanying text.
978 See Chapter 6, notes 1126 to 1133 and accompanying text.
Chapter 5
The interests of the professional

1 Introduction

In previous chapters, I have considered mandatory reporting laws in terms of their impact on the client: in Chapter 2, the client’s autonomy interest as that interest is embodied in Canadian law, and particularly in the liberty interest under section 7 of the Canadian Charter of Rights and Freedoms;\(^{979}\) in Chapter 3, the client’s privacy interest under section 8; and in Chapter 4, the client’s interest in access to professional services, under section 7 for legal services and health services and under section 2(a) for religious services. While mandatory reporting laws clearly impact the interests of the client, they may also impact the interests of the professional. It is these interests that I consider in this chapter.

I start by considering the ways in which mandatory reporting laws impact the professional. I first provide a brief review of how the existing literature considers the impacts of mandatory reporting laws on the professional’s interests. I then consider two main impacts on the professional. The first is that mandatory reporting laws force the professional to act contrary to his or her professional values and obligations. The second impact is that mandatory reporting laws increase conflict with and promote reprisal against the professional by the client, the employer, or other stakeholders.

Within this context, I then argue that mandatory reporting laws potentially infringe the Charter rights of professionals by requiring them to act contrary to their professional values and obligations. I evaluate this impact first on clergy, as an infringement of freedom of religion under section 2(a), and then on professionals other than clergy, as an infringement of freedom of conscience under section 2(a). I argue that, in the same way freedom of religion protects the professional values and obligations of clergy, freedom of conscience should be interpreted to

protect the professional values and obligations of other professions. I also acknowledge that religious values may play a role for professions other than clergy. I argue that these infringements of section 2(a) will likely be justifiable under section 1, with the most important stages of the justification again being minimal impairment and balancing.

As in previous chapters, I complete my analysis by considering how the modifications to the standard template of mandatory reporting laws may change the result of the analysis.

In this chapter, like the others, I use a Charter analysis to illuminate the issues at stake and to demonstrate their heft. Even where I conclude that an infringement would be justifiable under section 1, the engagement of Charter rights and the need for justification of their infringement should be meaningful to policymakers.

2 Mandatory reporting laws and the interests of the professional

I begin my analysis in this chapter by examining the interactions between professionals and mandatory reporting laws. I start by briefly describing the ways in which the professional is considered in the literature on mandatory reporting laws. I then consider the major ways in which mandatory reporting laws engage the interests of the professional.

2.1 The literature

The existing mandatory reporting literature, as it relates to the professional’s perspective, has two main focuses. One is the professional support for, awareness of, and compliance with specific mandatory reporting laws. These generally take the form of surveys, often with vignettes where the respondent is asked whether or not the law would apply. The other main focus is the

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ethical dilemmas that specific mandatory reporting laws pose for specific professions. The archetype here is child abuse reporting by lawyers,\(^ {981}\) although there is a similar element in the literature on child abuse reporting by clergy.\(^ {982}\) There is particularly little analysis in the literature on the constitutional dimensions of mandatory reporting laws.\(^ {983}\)

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983 The US literature on child abuse reporting by clergy often addresses constitutional considerations: ibid.
2.2 Mandatory reporting laws & professional values and obligations

Mandatory reporting laws potentially engage the interests of the professional in several different ways. I focus here on the two main ones that might cause professionals to oppose mandatory laws: first, that these laws force them to act contrary to their professional obligations; and second, that these laws are contrary to the professional’s own interests.

I first consider the professional obligations or values that might be engaged by mandatory reporting laws. The particular values and obligations tend to be specific to each profession. However, it is important to note that there may also be variations within each profession. This might be due to the nature of the professional-client relationship. For example, a family medicine practitioner or psychiatrist might form longer-term relationships with – and thus feel greater obligations to – patients than would a doctor working at a walk-in clinic or in emergency medicine. But there may also be disagreement even within the same type of practice. For example, one of the strongest advocates for mandatory gunshot wound reporting, Dr. Howard Ovens, was an emergency physician at a downtown Toronto hospital – and one of the strongest opponents, Dr. Daniel Cass, was an emergency physician at a different downtown Toronto hospital. (While the two hospitals are separated by less than a mile, Dr. Cass described his facility as “an inner-city hospital” and emphasized that it served “marginalized

984 See e.g. Gordon A Judge, “Compulsory Disclosure of Health Care Information” (1981) 2:1 Health L Can 20 at 20, contrasting “the impersonal setting of a large city hospital” with “a rural practice.” See also e.g. Ronda Bessner, “The Duty to Report Child Abuse” (1999) 17 Can Fam LQ 277 at 299, characterizing “family physicians and psychiatrists” as “the most problematic in the medical profession”. See also e.g. Stephen G Coughlan et al, “Mandatory Reporting of Suspected Elder Abuse and Neglect: A Practical and Ethical Evaluation” (1996) 19 Dal LJ 45 at 48, contrasting physicians generally with “emergency room staff”.


986 For Dr Cass’ appearance at committee in Ontario, see Ontario, Legislative Assembly, Standing Committee on Justice and Social Policy, Official Report of Debates (Hansard), 38th Parl, 1st Sess, No JP-22 (2 March 2005) at JP-432 to JP-437. His affiliation is given at JP-432: “chief of emergency medicine at St. Michael's Hospital”. See also Martin, ibid, e.g. at 203.
populations”, while noting that Dr. Ovens’ facility “is not a trauma centre, … not a centre that sees many gunshot patients”.987)

Within any profession, there tends to be a tension between duties to the individual client and duties to the collective more broadly – whether that collective is the public at large, the profession, and/or the system in which the professional works. However, note that this group of duties to the collective is rarely if ever to the government itself. Thus lawyers have duties to the client but also duties to the court and the profession. Those lawyers who do legal aid work likewise have some duties to the legal aid system. Similarly, physicians have duties to the patient but also duties to the public at large, i.e. public health, and to the health-care system itself, such as the gatekeeper function and the prudent use of resources. But lawyers would be greatly distressed if their obligations were characterized as being to the government itself, and physicians would likely react similarly. While different professions may balance this tension between duties to the individual client and duties to the collective differently, that tension itself is a common feature.

These values, and the tensions among them, are clearly identified for most professions. Typically there is one value that is recognized as primary or overarching or fundamental. Confidentiality tends to be a shared value among the professions, one that is a critical support for the other values. Disagreements tend not to be over specific values themselves, but instead over how they balance in a specific situation.

In the Canadian context, the values of the medical profession provide an excellent example of these various duties and the interplay among them. The commitment to the individual patient is demonstrated by the first “fundamental responsibilit[y]” in the Code of Ethics of the Canadian Medical Association: “Consider first the well-being of the patient”.988 (I note that physicians may disagree over whether such well-being is determined by the patient’s best interests or by his or her wishes.) The Code goes on to recognize three detailed sets of responsibilities: “to the

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988 Canadian Medical Association, CMA Code of Ethics (Ottawa: CMA, 2004), last reviewed 2015, at 1, online: <www.the-cma.org/regulatory/code-of-ethics>.
Confidentiality is a key component of the responsibilities to the patient.\textsuperscript{990} Those responsibilities to society include “us[ing] health care resources prudently”.\textsuperscript{991}

A similar interplay exists in the values of the legal profession.\textsuperscript{992} Zealous advocacy for the individual client, although subject to certain constraints, is typically considered the overriding duty: “In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.”\textsuperscript{993} (This value is similar to the newest principle of fundamental justice, “the lawyer's duty of commitment to the client's cause”.\textsuperscript{994}) As with medicine, confidentiality is a key duty that supports, among other things, this primary duty.\textsuperscript{995}

Similarly, veterinary codes of ethics have been adopted by regulators in some provinces. These include commitments against animal suffering and to confidentiality. For example, the ethics regulations adopted by the Alberta Veterinary Medical Association provide that a veterinarian

\begin{footnotes}
\footnotetext[989]{\textit{Ibid} at 2, 3, and 4. Note that at 4 there is also a short set of “Responsibilities to Oneself”.
\footnotetext[990]{\textit{Ibid} at 3, numbers 31-37.
\footnotetext[991]{\textit{Ibid} at 4, number 44.
\footnotetext[992]{See e.g. the Federation of Law Societies of Canada, \textit{Model Code of Professional Conduct} (Ottawa: FLSC, 2009), revised 2016 [FLSC Model Code], online: <flsc.ca/national-initiatives/model-code-of-professional-conduct>.
\footnotetext[993]{\textit{FLSC Model Code, ibid}, r 5.1-1, commentary 1. The commentary goes on to survey those constraints: “The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done.” Rule 5.1-1 itself is similar effect but is a little less detailed: “When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.” For recognition of this rule by the courts, see e.g. \textit{Schwisberg v Perry Krieger & Associates} (1997), 33 OR (3d) 256 at 260, 99 OAC 75 (CA), Finlayson, Charron & Rosenberg JJA: “The appellant had a duty to represent his client ‘resolutely and honourably within the limits of the law’. He was obliged ‘to raise fearlessly every issue [and] advance every argument’ that he thought would assist his client's case” ” [Citation omitted.]
\footnotetext[994]{\textit{Canada (Attorney General) v Federation of Law Societies of Canada}, 2015 SCC 7 at para 8, [2015] 1 SCR 401 [Canada v FLSC]. Indeed, Amy Salyzyn has suggested that zealous advocacy and commitment are different terms for the same duty: “To be sure, a duty of commitment to a client’s cause or, stated in its more familiar form, a duty of zealous advocacy, is well-recognized in legal ethics scholarship and in the Court’s jurisprudence on lawyer conflicts of interest.” (Amy Salyzyn, “A False Start in Constitutionalizing Lawyer Loyalty in \textit{Canada (Attorney General) v. Federation of Law Societies of Canada},” Case Comment on 2015 SCC 7, [2015] 1 SCR 401 (SSRN, July 2016) at 1, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2812652>.)
\footnotetext[995]{\textit{FLSC Model Code, supra} note 992, R 3.3.}
“should be dedicated to the benefit of society, the conservation of animal resources and the relief of the suffering of animals,” “should be merciful and humane, preventing needless suffering among animals,” and must maintain confidentiality except where required by law or where there is “inhumane or negligent treatment”.996 Similarly, the Code of Ethics of the College of Veterinarians of British Columbia provides that a veterinarian “must use his or her knowledge and skill to improve the health, safety and well-being of patients, clients and the public”.997

Mandatory reporting laws can further these values in a way that promotes the client’s interests and/or appropriately maintains the balance between commitment to the individual client and to the greater good. For example, mandatory reporting that is intended to protect vulnerable patients, such as abused or neglected children, should protect the patients reported as well as others – assuming appropriate infrastructure is in place to ensure that reporting does not actually cause harm. Similarly, communicable disease reporting promotes public health by allowing contact tracing, while minimally detracting from patient confidentiality. However, mandatory reporting laws can also clash with these values outright, or break the balance between commitment to the individual client and to the greater good. For example, a physician may be reluctant to report a patient with a medical condition affecting the ability to drive safely, where the likely result is a revocation of the patient’s driver’s license, because the benefit to public safety has a significant negative impact on the patient’s life. Nonetheless, because of the tension among different kinds of professional values, most of these provisions can be positioned as consistent with some view of professional obligations.

Another reason to oppose mandatory reporting is practical: that compliance will interfere with, and delay, the provision of professional services by creating bureaucratic demands that add to the professional’s workload. For example, Dr. Ovens, while supporting mandatory gunshot wound reporting, cautioned against more cumbersome reporting requirements: “Our emergency

996 Veterinary Profession General Regulation, Alta Reg 44/1986, ss 16.1 (a), (f), (g). The Veterinary Profession Act, RSA 2000, c V-2, s 13(1)(j) grants regulation-making power to the Alberta Veterinary Medical Association, which is the professional regulator. Inexplicably, neither the Act nor the Regulation make any other reference to animal health, welfare, well-being, or safety.

departments are struggling to meet the demand for life-saving services, and every minute that a physician or nurse spends on government paperwork is a minute that patient care is delayed for not only that patient but everyone in the queue.” 998 This subordination of client care may also be contrary to professional values and obligations.

2.3 Pragmatic reasons for professionals to support or oppose mandatory reporting: conflict

Professionals may also oppose, or support, mandatory reporting laws for more pragmatic reasons. The most important of these reasons is conflict with, or reprisal from, three sources: the client, the employer, and other stakeholders.

Reporting laws may promote reprisals by the client against the professional. 999 The most dramatic example here is from mandatory gunshot wound reporting, i.e. the prospect that criminals who have been shot will threaten harm to health professionals if they report them to police: “There may even be the risk that persons knowing that an ordinary approach to the hospital will be immediately reported, will attend the hospital ER in a threatening manner demanding quick treatment with no report – perhaps with such demands backed up by threats or weapons.” 1000 This argument is supported by the assumption that patients with gunshot wounds – or at least those patients who resist reporting – are criminals: “One presumes that the individual

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998 Ovens (Hansard), supra note 985 at JP-442.

999 As mentioned in Chapter 1, there is the potential for reporting to provoke reprisal against the client. (See Chapter 1, note 185 and accompanying text.) This may be one reason that professionals oppose reporting. The classic example here is where the patient is an abused spouse or child, and the abuser retaliates for reporting. However, opposition for this reason is likely in accordance with professional values, specifically a commitment to the client’s well-being and safety.

1000 John R Carlisle, “Mandatory Reporting of Gunshot Wounds to Police... Not as Simple as it Seems” (2004) 25:1 Health L Can 1 at 6. See also e.g. Cass (Hansard), supra note 986 at JP-435: “it may increase the risk to hospital personnel if a victim feels that their care provider has betrayed their confidence. There's potential for coercion and threats to staff.” See also e.g. Saskatchewan, Legislative Assembly, Debates and Proceedings (Hansard), 25th Leg, 3rd Sess, No 11A (13 November 2006) at 357 (Greg Brkikch): “A guy’s coming in. He’s been hurt. He’s a gang member. He tells the nurse, he says, you report me, I’ll find out where you live or whatever.” I used these quotes in Martin, supra note 985, at 206, n 144. See also Judge, supra note 984 at 20, referring to “personal safety”.

with a bullet wound is someone who has just engaged in some sort of criminal activity.”\textsuperscript{1001} Or, as put more dramatically by legislator Bob Runciman, “police say the hospitals are virtual safe havens for injured gunmen on the lam.”\textsuperscript{1002} However, others argue that mandatory reporting will decrease such conflict with patients: “This act in itself [making reporting mandatory instead of discretionary] minimizes the potential for victimization by an offender or retaliation on the medical profession for making this decision to call the police, because they have no choice.”\textsuperscript{1003} This decrease in conflict of course relies on a key presumption: of “an understanding assailant with a particular view of causation and responsibility – one who accepts that professionals must comply with the reporting law.”\textsuperscript{1004} Indeed, if patients with gunshot wounds are criminals, it seems questionable whether they will consider compliance with the law to be a meaningful excuse.

Reporting laws may also provoke other kinds of reprisal by the client, such as complaints to the professional’s regulatory body or negligence actions.\textsuperscript{1005} This was one reason that both the College of Veterinarians of Ontario (the regulator) and the Ontario Veterinary Medical Association (the professional organization) supported the mandatory reporting of animals in distress. Prior to the adoption of this law, reporting was discretionary and tended to provoke complaints against the reporting veterinarian. Legislated mandatory reporting meant that the College could reject those complaints without an investigation:


\textsuperscript{1002} Ontario, Legislative Assembly, \textit{Official Report of Debates (Hansard)}, 38th Parl, 1st Sess, No 87A (17 November 2004) at 4196 (Bob Runciman, Leader of the Opposition). I used this quote in Martin, \textit{ibid} at 199, n 103. See also Chapter 1, note 142.

\textsuperscript{1003} Saskatchewan, Legislative Assembly, Standing Committee on Intergovernmental Affairs and Infrastructure, \textit{Debates and Proceedings (Hansard)}, 25th Leg, 3rd Sess, No 34 (5 February 2007) at 545 (Chief Clive Weighill). (I used this quote in Martin, \textit{ibid} at 206, n 135.) See also Ovens (\textit{Hansard}), \textit{supra} note 985 at JP-444: “on the issue of intimidation or retaliation, if we have discretionary reporting, which has been suggested by many people who are against us, then you have the physician bringing judgment to bear and I think more opportunity for intimidation”.

\textsuperscript{1004} Martin, \textit{supra} note 985 at 206-207.

The college has received complaints from disgruntled clients about veterinarians who have reported suspected abuse, and the college has had no recourse but to investigate the veterinarian in these cases…. Once there is a positive obligation under law to report under the new legislation, along with the immunity protection that already exists in section 19 of the current OSPCA Act, the requirement to report means that the college will not be forced to act on complaints from alleged animal abusers, nor will the veterinarian be vulnerable to legal process.1006

The registrar of the College emphasized the impact of even a frivolous complaint on the professional: “An investigation of alleged misconduct against a professional is a very stressful, time-consuming and expensive process, often taking months to resolve. It’s a very trying experience.”1007

On the other hand, professionals may also oppose mandatory reporting laws because they fear frivolous or unwarranted reports against them. That is, mandatory reporting may cause reprisal by clients, but may also be a mechanism of reprisal. This concern was a key theme in the committee hearing on mandatory reporting of abuse or neglect in long-term care homes. For example, the chair of the Ontario Medical Association’s working group on long-term care asked, “Why would I want to subject myself to a demeaning work environment where I am constantly worried about the possibility of being the subject of a frivolous or vexatious complaint?”1008

More specifically, the president of the OMA warned that the penalties for failure to report “may result in overzealous reporting”.1009

1006 Ontario, Legislative Assembly, Standing Committee on Justice Policy, Official Report of Debates (Hansard), 39th Parl, 1st Sess, No JP-9 (25 July 2008) at JP-209 (Susan Carlyle, Registrar, College of Veterinarians of Ontario). See also No JP-6 (22 July 2008) at JP-121: “we welcome becoming mandated reporters. We have been advocating for this for years and we uphold this as a responsibility and obligation that we do want. We certainly are very happy with the fact that it gives us protection at the same time from liability when we’re making reports in good faith”. (Dr Debbie Steowen, on behalf of the Ontario Veterinary Medical Association).

1007 Carlyle, ibid at JP-209.

1008 Ontario, Legislative Assembly, Standing Committee on Social Policy, Official Report of Debates (Hansard), 38th Parl, 2d Sess, No SP-39 (16 January 2007) at SP-1470 (Dr Stephen Chris, Chair, Section on Long-term Care, Ontario Medical Association). From the surrounding text, it is clear that Dr Chris used the term “complaint” to mean a mandatory report.

A different, but nonetheless important, kind of reprisal against the reporting professional is reprisal from that professional’s employer. Even where mandatory reporting laws contain whistle-blower or anti-reprisal provisions, the potential for intimidation can still be powerful. During hearings on the mandatory reporting of abuse and neglect in long-term care homes, for example, several groups said that these protective provisions should be stronger – that they were “a bit weak”,¹⁰¹⁰ “insufficient”,¹⁰¹¹ and “barely more than the existing status quo”.¹⁰¹²

A third major type of conflict affecting professional support for or opposition to mandatory reporting laws is conflict with other stakeholders. Here again the clearest example is mandatory gunshot wound reporting by hospitals. Advocates of reporting, including Dr. Ovens, identified reducing conflicts with police as one of the reasons for these laws: “The OMA Section on Emergency Medicine also proposed mandatory reporting as a way to avoid conflict occurring between EPs [emergency physicians] and police when patients with GSWs [gunshot wounds] presented to EDs [emergency departments].”¹⁰¹³ These conflicts can lead to reprisals for refusing to share information. The Saskatoon Chief of Police, testifying on behalf of the Saskatchewan Association of Chiefs of Police, volunteered that sometimes police threaten hospital staff with arrest in order to get them to release confidential patient information: “We just can’t get any information at all. And you know trying to conduct any type of police investigation, sometimes we’ve had to threaten some staff to arrest them for obstruction.”¹⁰¹⁴

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¹⁰¹⁴ Weighill (*Hansard*), *supra* note 1003 at 547. See also Ovens et al, *supra* note 980 at 18, citing “significant police efforts that border, at times, on intimidation”. I used these quotes in Martin, *ibid* – the Weighill quote at 189, n 64, and the Ovens quote at 179.
At some level, all of these issues of reprisal and conflict can be portrayed as going to the ability of professionals to effectively provide services. A professional under the threat of violence, or complaints, or litigation, or termination of employment, or criminal charges will no doubt have his or her judgment affected, and any of these threats that indeed materialize would interfere with the ability of the professional to provide services. At the same time, these concerns can also seem like convenient and selfish excuses for shirking professional values.

2.4 Available responses when a law conflicts with the professional’s interests

The professional has several options when faced with a mandatory reporting law – or any other kind of law – that conflicts with his or her understanding of professional values or otherwise adversely impacts his or her interests. Individual professionals can follow the law, with or without advocating for change; or ignore the law, with or without advocating for change. I note that some commentators draw a distinction between “civil disobedience” and “conscientious objection”, with the latter being a personal reaction to the dilemma and the former “a political act, an appeal to the public, … its aim is to bring about a change in the law or in policy”.\textsuperscript{1015} Under that model, non-compliance with advocacy parallels this disobedience concept, while mere non-compliance without advocacy parallels objection. Institutional actors who purport to speak for a profession, such as regulators and professional organizations, have a similar choice. In particular, regulators must also decide whether non-compliance should be considered a matter of professional misconduct. (Where the body’s enabling statute dictates that it is, regulators have a more difficult choice as to whether this particular violation of law should be an investigative and enforcement priority.) Individual professionals and these organizational actors can also channel their advocacy into legal measures, such as triggering a test case to challenge the law.\textsuperscript{1016} Obviously, all of these stakeholders have an important role not just after the law is enacted but


\textsuperscript{1016} See e.g. Canada v FLSC, supra note 994. As a lawyer, I am mindful here of the rules of professional conduct around assisting a client in triggering a test case. See FLSC Model Code, supra note 992, r 3.2-7 and commentary 4.
also when such a law is proposed. The spectre of non-compliance is thus a serious practical consideration.

As an alternative to actual non-compliance, the professional may decrease the impact on the professional value of confidentiality and client autonomy by adopting a practice of forewarning.\textsuperscript{1017} Forewarning may deter the client from disclosing the reportable occurrence, and thus avoid triggering the duty to report.\textsuperscript{1018} Forewarning thus has the same end result as the professional refusing to report after the client discloses the reportable occurrence, but somewhat less brazenly and technically without a violation of the mandatory reporting law.

3 Mandatory reporting laws and the \textit{Charter} rights of the professional: Professional values and obligations

Within this context, I now consider the extent to which mandatory reporting laws are contrary to the \textit{Charter} in their impact on the interests of the professional. I argue that mandatory reporting laws may require the professional to act contrary to his or her professional obligations and values. I begin with clergy, under freedom of religion, and then move to the other professions – especially the legal and health professions – under freedom of conscience. I also consider the role for freedom of religion claims by professionals other than clergy, and how these claims might interact with conscience.

It is worth emphasizing that the issue here is not a purported \textit{Charter} right to practice a certain profession, or to do so without regulation. Instead, it is a right to act, in the exercise of professional functions, in accordance with sincerely-held and fundamental beliefs – beliefs about that profession and how it must be practiced.


3.1 The professional values and obligations of clergy: Freedom of religion

Mandatory reporting laws applicable to clergy may infringe the Charter rights of the clergy as well as those of the client.1019 In Chapter 4, I examined how mandatory reporting laws applicable to clergy potentially infringe the client’s religious freedom under section 2(a) of the Charter.1020 I noted that while access to religious services is not actually denied, it is made contingent on the possibility of reporting to the state. Such mandatory reporting laws may infringe the religious freedom of the clergy more directly than that of the client. The professional obligations and values of clergy are religious in nature, i.e. a matter of religious belief and practice, and a mandatory reporting law that requires clergy to violate these obligations and values infringes the freedom of religion of those clergy under section 2(a). For example, where clergy have a professional obligation to maintain client confidentiality, that obligation is a matter of religious belief and practice, and thus a mandatory reporting law requires them to violate that obligation infringes their freedom of religion. The clearest example here is the Catholic confessional, where priests who disclose information face a penalty of excommunication under Church law.1021

While there are few cases concerning the religious freedom of clergy, as opposed to parishioners, the leading case is the Reference re Same-Sex Marriage.1022 The Supreme Court noted that “[t]he performance of religious rites is a fundamental aspect of religious practice” and held that “the guarantee of religious freedom in s. 2(a) of the Charter is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.”1023 Following this reasoning, a mandatory reporting law would infringe freedom of religion insofar as it forced clergy to not perform rites, or to perform them in a manner contrary to their professional values or obligations. For example, recall the Catholic priest and the rite of the confessional. If the priest follows the law, he must either

1019 See e.g. the concurring reasons of L'Heureux-Dubé J in R v Gruenke, [1991] 3 SCR 263 at 300-301, 67 CCC (3d) 289, noting that freedom of religion is a freedom for the client and the clergy.

1020 See Chapter 4, notes 854 to 879 and accompanying text.

1021 See e.g. Beerworth, supra note 982 at 106.


1023 Ibid at paras 57, 60.
violate the rules around confessions by reporting, and thus violate his professional obligations, or not perform confessions at all, thus neglecting his professional obligations.

Of course, some clergy may not recognize such an obligation of confidentiality, or may recognize exceptions to it – in which case, a mandatory reporting law may not infringe the religious freedom of the clergy. Recall from Chapter 4 the rabbi in *R v BB*, whose position was that confidentiality was not a religious requirement:

[T]here is no religious dictate that any communications be kept confidential. He [the rabbi] can share information in certain circumstances, if, for example, public safety issues arise, as saving a life precedes everything else in Jewish law…. He did not feel that his decision to speak to police impinged on his duties as a Rabbi.\textsuperscript{1024}

Indeed, in this situation, the rabbi’s breach of any confidentiality was itself a religious imperative. A mandatory reporting law aimed at future harm – for example, targeting children in need of protection – would not infringe the freedom of religion of such a rabbi, because reporting would be consistent with his professional values and obligations.

The test for an infringement of the clergy’s freedom of religion is the same for that of the client: a sincere “belief or practice that has a nexus with religion”, and non-trivial interference with “the ability to act in accordance with” the belief or practice.\textsuperscript{1025} As with any other freedom of religion claim, the relevant factor is the subjective sincere religious belief of the claimant – in this context, the clergy: “the focus of the inquiry is not on what others view the claimant’s religious obligations as being, but rather what the claimant views these personal religious ‘obligations’ to be…. Religious belief is intensely personal and can easily vary from one individual to another.”\textsuperscript{1026} Thus, those clergy associated with particular religious orders may have a personal

\textsuperscript{1024} *R v BB*, [2009] OJ No 864 at para 8, 2009 CarswellOnt 1084 (SC), as discussed in Chapter 4. See Chapter 4, notes 873 to 876 and accompanying text.

\textsuperscript{1025} *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 54, [2009] 2 SCR 567, McLachlin CJ for the majority [*Hutterian Brethren*].

view that conflicts with the official institutional rules, and any clergy may oppose mandatory reporting laws even if those laws are supported or opposed by leaders in their faith. The converse, however, is also true: even where religious authorities oppose mandatory reporting laws, individual clergy may support them. This individualistic approach, while difficult to square with the collective or group nature of some religious beliefs about the obligations of clergy, is unavoidable as a matter of law.

3.2 The professional values and obligations of professions other than clergy: Freedom of conscience

Insofar as mandatory reporting laws require professionals other than clergy to act contrary to their professional values and obligations, such laws arguably infringe the freedom of conscience of those professionals under section 2(a) of the Charter. This infringement is analogous to the way that mandatory reporting laws applicable to clergy infringe freedom of religion. In the same way that professional values or obligations of clergy are religious beliefs or practices, the professional values or obligations of other professionals are arguably matters of conscience. Thus, just as a mandatory reporting law requiring clergy to violate their professional values or obligations infringes the freedom of religion of those clergy, a mandatory reporting law requiring professionals other than clergy to violate their professional values or obligations infringes the freedom of conscience of those professionals. For example, if a physician believes that his or her primary duty is beneficence or non-maleficence, and he or she expects reporting to harm the patient, mandatory reporting laws requiring him or her to violate those duties may infringe his or her freedom of conscience. Similarly, a lawyer may consider reporting the client to violate his or her duty of loyalty and thus infringe his or her freedom of conscience.1027

1027 Some professions’ rules may actually use the phrase “professional conscience”. See e.g. Code of ethics of notaries, CQLR c N-3, r 2, art 64: “A notary who is called upon to collaborate with another notary or with any other person must maintain professional independence. He shall not perform a task contrary to his professional conscience or to the principles governing the practice of his profession.” However, I use the term conscience as it is used in section 2(a) of the Charter, which is not necessarily the same.
The typical context where professionals’ freedom of conscience or religion claims have tended to arise is where health professionals refuse to provide particular services, the common examples being physicians who refuse to offer abortions and/or refuse to prescribe medication such as contraceptives or erectile dysfunction treatments to all or some patients – such as the unmarried – and pharmacists who refuse to fill such prescriptions.\(^{1028}\) The abortion and prescription refusals are often on religious grounds. For example, in the discipline decision \textit{Dawson (Re)}, four patients complained that the physician refused to provide a prescription for contraceptives because of their marital status:

\begin{quote}
Dr. Dawson told them that as unmarried women, he could not prescribe the pill to them, as their blood would be on his hands since "fornicators ... will not inherit the Kingdom of God." He … explained that it was his job to warn his patients of their condemnation by God for their lack of celibacy and the possibility of sexual exploitation by their boyfriends.\(^{1029}\)
\end{quote}

The abortion refusals may be on grounds of professional values as well as religious values. The Hippocratic Oath, for example, proscribes abortion: “I will not give to a woman an abortive remedy.”\(^{1030}\) (However, the modern version of the oath has no equivalent provision.\(^{1031}\))


\(^{1029}\) \textit{Dawson (Re)}, [2012] OCPSD No 34 at para 50 (see paras 48-56). (This was an unsuccessful application for reinstatement. The member’s certification of registration had been revoked for sexual abuse of a patient: \textit{Dawson (Re)}, [2005] OCPSD No 12.)

\(^{1030}\) English translation in Oswei Temkin & C Lilian Temkin, eds, \textit{Ancient Medicine: Selected Papers of Ludwig Edelstein} (Baltimore: Johns Hopkins University Press, 1967) at 3, 6 [“Hippocratic Oath”]. I note that the oath has been extensively criticized. See e.g. Robert D Orr et al, “Use of the Hippocratic Oath: A Review of Twentieth Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993” (1997) 8:4 J Clinical Ethics 377 at 382-383. I do not suggest that any part of the oath is authoritative or determinative of legal or ethical issues.

\(^{1031}\) See e.g. Dr Louis Lasagna, \textit{A Modern Hippocratic Oath} (1964) [“Modern Hippocratic Oath”], online: Association of American Physicians & Surgeons <www.aapsonline.org/ethics/oaths.htm>, cited e.g. in Orr et al, \textit{ibid.}
The current issue for professionals’ freedom of religion and conscience is whether physicians who refuse to provide such services have a duty to refer patients to another physician who does offer them. In March 2015, a Charter application was commenced challenging the Professional Obligations and Human Rights policy of the College of Physicians and Surgeons of Ontario, which requires these physicians to make “an effective referral”, i.e. “a referral made in good faith, to a non-objecting, available, and accessible physician, other health-care professional, or agency… made in a timely manner”. The application alleged violations of both freedom of conscience and freedom of religion, as well as a violation of section 15. The College announced that it will “vigorously defend” the policy. In the build-up to, and wake of, the Supreme Court’s decision in Carter striking down the prohibition against assisted suicide, physician refusal to provide this service, or to provide a referral to this service, is a particularly live issue. Indeed, the Supreme Court in Carter, while holding that “nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying”, did note specifically that “a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief”, and that “the Charter rights of patients and physicians will need to be reconciled.” As the Court noted, such refusal

1032 College of Physicians and Surgeons of Ontario, Professional Obligations and Human Rights, Policy #2-15 (March 2015) [footnote omitted], online: <www cpso.on.ca/Policies-Publications/Policy/Professional-Obligations-and-Human-Rights>. This policy replaced CPSO, Physicians and the Ontario Human Rights Code, Policy 5-08 (September 2008). Notice of Application, The Christian Medical and Dental Society of Canada et al v College of Physicians and Surgeons of Ontario (20 March 2015), Court file 15-63717 (Ont SC) [CMDS v CPSO NOA, on file with author]. As of the time of writing, the application is scheduled to be heard June 13 to 15, 2017 at Toronto. See e.g. Lauren Pelley, “Doctors say policy violates their rights; Christian medical group insists College shouldn't force them to refer patients for euthanasia”, The Toronto Star (25 March 2015) GT1 (QL). Waldron, supra note 1028 at 210-212 discusses a 2008 predecessor of this conflict.

1033 CMDS v CPSO NOA, ibid at paras 1 d, e, f.


1036 The CMDS executive director said in March 2015 that “Our big concern is euthanasia, which is right around the corner” (Pelley, supra note 1032). See e.g. Jocelyn Downie, “Carter v. Canada: What’s Next for Physicians?” (2015) 187:7 Can Medical Assoc J 481 at 482.

1037 Carter, supra note 1035 at para 132. See also An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), SC 2016, c 3, amending the Criminal Code, RSC 1985, c
may be for reasons of professional conscience as well as religion. For example, the Hippocratic Oath also proscribes assisted suicide: “I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect.”\(^{1038}\) (As with abortion, however, the modern version of the oath does not have a corresponding provision.\(^{1039}\)) Thus, the freedom of religion and conscience of professionals under section 2(a) is now a live legal issue.

3.2.1 Richard Haigh’s test

My argument that mandatory reporting laws may infringe the professional’s freedom of conscience is based largely on the idea that freedom of conscience is the secular analogue to freedom of religion. Freedom of conscience is underdeveloped in Canadian law, particularly in contrast to freedom of religion. The most comprehensive treatment is Richard Haigh’s 2012 dissertation, parts of which he has repeated and developed in two articles.\(^{1040}\) He argues that freedom of conscience should protect individual beliefs that are not religious but analogous to religious beliefs. In this respect, he emphasizes the concurrence of Wilson J in Morgentaler – which he refers to as “[t]he high water mark of conscience-based jurisprudence” – and her references to conscience as “a secular morality” and “a personal morality which is not founded in religion”.\(^{1041}\) Haigh also emphasizes Dickson CJ’s reasons in Big M Drug Mart, describing them

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\(^{1038}\) “Hippocratic Oath”, supra note 1030. (The same caveats about the significance of the Oath apply.)

\(^{1039}\) “Modern Hippocratic Oath”, supra note 1031.


\(^{1041}\) Haigh, Burl, ibid at 117 (“high water mark”), at 124 quoting Wilson J in R v Morgentaler, [1988] 1 SCR 30 at 178, 44 DLR (4th) 385, and at 125 quoting her at 179. Haigh notes many other decisions in which the Supreme Court seems to recognize this role for conscience, but it is clearest in Morgentaler. See e.g. Haigh, Burl at 132, quoting Hutterian Brethren, supra note 1025 at para 90 [citations omitted]: “this pluralistic context also includes ‘atheists, agnostics, sceptics and the unconcerned’. Their interests are equally protected by s. 2(a)”.
as recognizing “the possibility of conscience as a secular parallel to religion.” Thus, Haigh clearly identifies conscience as a secular equivalent or parallel to religion, and freedom of conscience as a secular equivalent to freedom of religion.

Haigh sets out, based on the test for freedom of religion in *Amselem*, a modified three-part test for freedom of conscience: a “moral” or otherwise fundamental belief, sincerity of that belief, and a non-trivial interference with that belief. He describes the requisite nature of the belief in detail:

[A] belief of a moral nature (defined broadly...), or a belief governing his or her perception of his- or herself, humankind, or nature, which either calls for a particular line of conduct that is subjectively obligatory or is a demonstrably fundamental decision that goes to the heart of who he or she is (in other words, is comparable with religious belief).

Thus, whereas the test in *Amselem* requires a “practice or belief having a nexus with religion”, Haigh’s test requires a “nexus with morality”, although Haigh does not specifically use that phrase. It is worth emphasizing that in Haigh’s model, following *Amselem* the relevant belief is that of the individual, and it is not necessary to show that the belief is shared among a group or is the ‘official’ understanding of that belief.

While Haigh did not have the benefit of the decision of Gascon J for the Supreme Court of Canada in *Mouvement laïque québécois v Saguenay (City)*, that decision does not seem to affect his analysis. The issue in *Saguenay* was whether the recitation of a prayer at the beginning of

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1043 While Haigh, *Burl*, ibid, specifically uses the word “parallel” (see e.g. 209) and “equivalent” (see e.g. 192), and repeatedly cites Wilson J’s phrase of “a secular morality”, as opposed to these phrases, any of these descriptions of this idea (and any similar descriptions) should be properly attributed to his work.

1044 The test set out for an infringement of freedom of religion in *Amselem* is equivalent to that set out in *Hutterian Brethren*, supra note 1025.

1045 Haigh, *Burl*, supra note 1040 at 260, citing *Amselem*, supra note 1026 at para 56. See also Haigh & Bowal, supra note 1040 at 123.

1046 Haigh, *Burl*, ibid at 260.


1048 See e.g. Haigh, *Burl*, ibid at 213.

1049 *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*].
city council meetings violated section 2(a). The appellants were an individual who identified as agnostic and an organization that “advocates the complete secularization of the state in Quebec.” Thus, this appeal would appear to have been an opportunity for the Court to clarify the scope of “conscience” under section 2(a). However, the reasons of Gascon J do not clearly differentiate between conscience and religion – indeed, every mention of conscience is alongside religion. While Gascon J cites “[t]he freedom not to believe, to manifest one's non-belief and to refuse to participate in religious observance” and specifically mentions “non-belief, atheism and agnosticism”, it is unclear whether those beliefs are matters of conscience or religion or both. That is, it may be that non-belief is properly considered a matter of religion as opposed to one of conscience. For my purposes, it is unnecessary to resolve this issue.

Haigh also advocates a radical re-orientation of freedom of religion and freedom of conscience. He argues that freedom of conscience should be used for individual claims, with individual religious claims being a subset of individual conscience claims, whereas freedom of religion should be used for group- or community-based claims. While this argument is interesting and promotes clarity, it has not yet been adopted by Canadian courts. I thus proceed on the basis that religion and conscience are parallel under section 2(a). For my purposes, both individual and communal dimensions are relevant – professional values claims can have both individual and group aspects, whether or not those claims involve religion.

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1050 Ibid at para 2.
1051 Ibid at paras 9 (individual) and 15 (the organization).
1052 Ibid. See esp paras 1 and 150: “The state is required to act in a manner that is respectful of every person's freedom of conscience and religion. .... Its corollary is that the state must remain neutral in matters involving this freedom. The interplay between freedom of conscience and religion, on the one hand, and this duty of neutrality, on the other, is sometimes a delicate one …. The prayer creates a distinction, exclusion and preference based on religion that has the effect of impairing Mr. Simoneau's right to full and equal exercise of his freedom of conscience and religion.” [Emphasis added.]
1053 Ibid at para 70.
1054 Haigh, Burl, supra note 1040. See esp 179-188.
3.2.2 Canadian precedents for freedom of conscience

While the Canadian case law on freedom of conscience is limited, it suggests that professional values could reasonably ground an infringement claim. These cases can be grouped into three categories: the vegetarian inmate case, the income tax cases, and the citizenship oath case.

The vegetarian inmate case, *Maurice v Canada (Attorney General)*, is — as Haigh notes — the leading case on freedom of conscience and indeed the only reported case where a conscience claim under the *Charter* was successful.\(^{1055}\) *Maurice* involved a prisoner’s request for a vegetarian diet. He had previously received that diet as a religious accommodation because he identified as Hare Krishna.\(^{1056}\) Having disavowed that religion, he claimed the same diet on the basis of a non-religious belief that eating animals was wrongful.\(^{1057}\) Corrections Canada’s refusal to provide the diet was held to violate Maurice’s freedom of conscience. The judge described vegetarianism as being “founded in a belief that consumption of animal products is morally wrong”, noting that “[m]otivation for practising vegetarianism may vary, but, in my opinion, its underlying belief system may fall under an expression of ‘conscience’.”\(^{1058}\) As Haigh notes, this wording makes it unclear whether the application judge would have accepted the vegetarianism as engaging freedom of conscience if it was based on some other reasoning, such as the health benefits.\(^{1059}\) However, at a minimum, *Maurice* establishes that vegetarianism, when rooted in morality, qualifies as belief that will be protected under freedom of conscience. Presumably, by extension, the more stringent practice of veganism would similarly qualify by its roots in morality.

The other two groups of cases, while all involving unsuccessful claims, provide examples of other beliefs that presumably could trigger freedom of conscience. In the income tax cases, a taxpayer refuses to pay all or some of their income tax because that money may be used by the


\(^{1056}\) *Ibid* at para 3.

\(^{1057}\) *Ibid* at para 3.

\(^{1058}\) *Ibid* at para 10.

\(^{1059}\) Haigh, *Burl*, supra note 1040 at 243-244.
government to fund services to which the taxpayer objects. These cases are arguably closer to a professional-values claim than the claim in *Maurice*, as conscience is being used to challenge laws with which an individual refuses to comply. The majority of these cases involve pacifism, where the taxpayer withholds, or pays to a peace-oriented organization, the portion of his or her income tax that corresponds to defense spending as a proportion of the federal budget, claiming that paying that tax would infringe their freedom of religion or conscience.\textsuperscript{1060} Other analogous cases involve taxpayer opposition to abortion.\textsuperscript{1061} The pacifism claims tend to be made by Quakers,\textsuperscript{1062} and the anti-abortion claimants sometimes identify as Catholic,\textsuperscript{1063} but it is unclear in some of these cases whether the claim is in religion only or in both religion and conscience.\textsuperscript{1064} The claims all fail, almost all on the basis that there is no connection between income tax paid and any specific government expenditures, and so section 2(a) is not engaged.

As the Federal Court of Appeal stated in *Petrini v Canada*:

The taxpayer, so long as he or she is not compelled to agree with government policy or forbidden from advocating contrary views, has no justiciable complaint. The simple, if subjectively unpleasant, obligation to pay taxes to a government some or all of whose views and programs one opposes does not imply support of such views and programs or force the taxpayer to act contrary to his or her personal beliefs and convictions.\textsuperscript{1065}

Such a claim may also fail on sincerity. In *Law Society of British Columbia v Raynier*, a lawyer defended his refusal to pay income tax for over twenty-five years as “a lengthy course of civil


\textsuperscript{1061} *R v Little*, 2009 NBCA 53, 349 NBR (2d) 54; *O’Sullivan v Canada*, 84 DLR (4th) 124, [1991] 2 CTC 117 (Fed TD); *Norejko v Canada*, 2004 TCC 829, [2005] 1 CTC 2765 [did not decide the issue because no notice of constitutional question was filed].

\textsuperscript{1062} See e.g. *Prior*, supra note 1060, and *Woodside*, supra note 1060.

\textsuperscript{1063} See e.g. *Little*, supra note 1061.

\textsuperscript{1064} See e.g. Haigh, *Burl*, supra note 1040 at 257: “Human practices based on strong beliefs – such as vegetarianism, euthanasia, and conscientious objection – may have religious overtones, but they need not.”

\textsuperscript{1065} *Petrini v Canada*, [1995] 1 CTC 200, 94 DTC 6657 at para 3 (Fed CA), leave to appeal to SCC refused, [1994] SCCA No 504. It is unclear from the judgment in *Petrini* to what expenditure the taxpayer objected and whether that objection was based on religion or conscience.
obedience” protected by section 2(a).\footnote{Law Society of British Columbia v Raynier, 2006 LSBC 44 at para 15, [2006] LSDD No 159. At some points, the reasons refer to section 2, but it is clear from para 29 that it was conscience, and thus section 2(a), that was specifically being argued.} The panel rejected this argument on the basis that, although the lawyer had participated “in numerous social protests over the years”, he spent the “unpaid income taxes… entirely on himself and his family”.\footnote{Ibid at paras 29-30.} Nonetheless, these cases and their underlying facts do suggest that pacifism and opposition to abortion are two beliefs that fit within freedom of conscience. That is, if these cases had been about opposition to a tax that funded a specific expenditure – such as an explicit “war” tax or “abortion” tax – or about pacifist opposition to conscription, and that opposition was sincere, freedom of conscience would almost certainly be infringed. (I note that no conscription cases have arisen in the Charter era.)

The citizenship oath case also involves unsuccessful claims under section 2(a), some of which are religious and some of which are non-religious. \textit{McAteer v Canada} was a challenge to the portion of the citizenship oath declaring allegiance to the Queen and her successors.\footnote{McAteer v Canada (Attorney General), 2014 ONCA 578, 121 OR (3d) 1 [McAteer], leave to appeal to SCC refused, [2014] SCCA No 444.} Three of the applicants argued a violation of their freedom of conscience: two were “committed republican[s]” opposed to the monarchy, and one objected to the Queen as a “symbol of a class system”.\footnote{Ibid at para 8. The Court at para 8 describes this belief as “egalitarianism”.} (Two other applicants, one Jewish and one a Rastafarian, argued that the oath to the Queen violated their freedom of religion.\footnote{Ibid at para 9.} The Court of Appeal held that there was no violation of conscience because the oath was properly understood not as being to the Queen in her personal capacity, as the applicants argued, “but to our form of government of which the Queen is a symbol.”\footnote{Ibid at para 120.} Similarly, while the reference to “heirs and successors” would seem on its face to be referring to or endorsing the monarchy, the Court held that “in today’s context, [that reference] is a reference to the continuity of our form of government extending into the future.”\footnote{Ibid at para 54.} However, given these conclusions about the true character of the oath, the Court did
not address whether republicanism or egalitarianism constituted matters of conscience or whether, if the oath had been to the Queen and the monarchy, the oath may have constituted an infringement of freedom of conscience. It would seem that conscientious opposition to the monarchy, such as that of a republican, would necessarily be infringed by the requirement that a person swear or affirm allegiance to a monarchy. (The Federal Court of Appeal had previously rejected a similar challenge to the oath; however, the reasons appear to address the applicant’s republicanism and the content of the oath under freedom of belief and opinion in section 2(b), while considering only the making of the oath or affirmation itself under freedom of conscience in section 2(a).)

The Court in *McAteer* also seemed to acknowledge that religion and conscience claims may be parallel, which acknowledgement reinforces Haigh’s model. The appellants argued that the application judge did not adequately address the conscience claims because he failed in his reasons to specifically address freedom of conscience separately from freedom of religion. In rejecting this argument, the Court noted that “[m]uch of the application judge's analysis respecting freedom of religion applies equally to the appellants’ argument respecting freedom of conscience.”

The case law thus reveals or at least suggests several kinds of beliefs that will likely be protected under freedom of conscience: vegetarianism, veganism, pacifism, republicanism, egalitarianism (i.e. opposition to the monarchy because all people are equal) and opposition to abortion. Pacifism, vegetarianism, veganism, and opposition to abortion can also be religious, while vegetarianism and veganism can also be for reasons other than conscience or religion. While only vegetarianism has anchored a successful conscience claim, these others beliefs seem similar in kind. Based on these examples, professional values and obligations could also support a freedom of conscience claim.

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1074 *McAteer,* supra note 1068 at para 118.
3.2.3 The professional’s freedom of conscience

As discussed above, professions are typically guided by codes of ethics or similar sets of values. These include specific standards that may clash with some, or all, mandatory reporting laws. Moreover, some professions use oaths that include some of these values. For example, the Law Society of Upper Canada requires all lawyer applicants to swear or affirm an oath that includes the following:

I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one’s interest and shall faithfully serve and diligently represent the best interests of my client…. I shall strictly observe and uphold the ethical standards that govern my profession.\(^{1075}\)

Note that this oath references both a specific ethical norm – loyalty to the client – and all other ethical standards. Similarly, many medical and dental schools require some kind of oath of students.\(^{1076}\) Among other things, those oaths generally refer to maintaining confidentiality.\(^{1077}\) Consider, for example, elements of the oath contained in the World Medical Association’s Declaration of Geneva:

I will practise my profession with conscience and dignity;
The health of my patient will be my first consideration;
I will respect the secrets that are confided in me, even after the patient has died;
I will maintain by all the means in my power, the honour and the noble traditions of the medical profession;\(^{1078}\)

The oath identifies the patient’s health as the priority, but also includes commitments to confidentiality, conscience, and professional honour and traditions. As discussed above, these elements reflect fundamental professional values as expressed in codes of ethics such as that of


\(^{1077}\) Schwartz, Peterson & Edelstein, *ibid* at 748, Table 2; Orr et al, *ibid* at 381, Table 3.

\(^{1078}\) World Medical Association, *Declaration of Geneva* (September 1948), online: <www.wma.net/en/30publications/10policies/g1/>.
the Canadian Medical Association. Similarly, some Canadian veterinary schools use “The Veterinarian Oath” on graduation.\(^\text{1079}\) The oath includes a commitment to “the benefit of society” and specifies that veterinarians are to “strive to promote animal health and welfare, relieve animal suffering, protect the health of the public and environment, and advance comparative medical knowledge”, to “practise my profession… in keeping with the principles of veterinary medical ethics” and “to maintain the highest professional and ethical standards for myself and the profession”.\(^\text{1080}\) (Note, however, that there is no authoritative Canadian statement of what those “principles of veterinary medical ethics” are.\(^\text{1081}\)

The citizenship oath case discussed above provides helpful guidance about the nature and significance of an oath. The Court in McAteer noted that “[t]hrough an oath or affirmation, a person attests that he or she is bound in conscience to perform an act or to hold to an ideal faithfully and truly.”\(^\text{1082}\) These oaths, in themselves, are evidence of both sincerity and a nexus with morality. While the presence of a professional oath is evidence of a conscientious belief, the absence of an oath is not determinative.

As discussed above, the general nature of professional values and the typical tension between the individual client and society more broadly will usually mean that any given law can be portrayed as consistent with professional values. That is, the disagreement is usually not over the identity of professional values, but how they apply and balance in a specific situation. The professional values themselves are objective, but their application may be subjective. However, this is where the element from Amselem – sincerity over accuracy – plays a critical role.\(^\text{1083}\) If conscience is

\(^{1079}\) Caroline J Hewsen, “Veterinarians Who Swear: Animal Welfare and the Veterinary Oath” (2006) 47:8 Can Veterinary J 807 at 808: “However, in recent years, graduating veterinary students have taken the oath at their colleges.”

\(^{1080}\) See e.g. Canadian Veterinary Medical Association, “The Veterinarian Oath”, online: <www.canadianveterinarians.net/about/veterinary-oath>, quoted in Hewsen, ibid at 808.

\(^{1081}\) Jim Berry, “President’s Message: Ethical Practice” (2014) 55:1 Can Veterinary J 1187 at 1187. (Note that a correction was made to the pagination of this issue: “Erratum” (2014) 55:2 Can Veterinary J 106; 1187 should be 3.) Berry was, at that time, the president of the Canadian Veterinary Medical Association.

\(^{1082}\) McAteer, supra note 1068 at para 53, quoting with approval from Roach, supra note 1073 at 79, Linden JA dissenting – but the majority per MacGuigan JA agreed on, inter alia, “the nature of an oath” (71). Note that Linden JA specifically refers to the call to the bar oath as being such an oath: 79. See also Roach at 71, MacGuigan JA for the majority: “An oath is a solemn declaration before God or on something sacred that a statement is true”.

\(^{1083}\) Amselem, supra note 1026 at paras 43-55.
truly an analogue to religion, then it follows from Amselem that the views of leaders or officials, such as the regulators or professional organizations, are not determinative. Even if the profession as a whole overwhelmingly supports a given mandatory reporting law as being consistent with professional values, any minority group or even a single member of the profession can nonetheless make a credible claim that the law clashes with their understanding of professional values. Likewise, even if there is major division within the profession, or disagreement between the regulator and the professional organization, a conscience claim is still viable.

On the other hand, conscience – at least professional conscience – may be different from religion, such that while courts should not make determinations about the correctness of religious beliefs, they can make such determinations about professional values. Arguably, these questions are closer to questions of standard of care or professional conduct, which questions are frequently determined by tribunals and courts in matters of negligence and professional discipline. A discipline tribunal composed primarily of professionals would arguably have expertise to which a court should defer. However, it is not clear what objective standard a tribunal or court should, or could, use to evaluate competing claims of professional conscience. Ultimately, the same considerations that support a pluralistic view of religious belief should also support a pluralistic view of professional values.

For physicians and other health professionals, the most likely claim would be that mandatory reporting laws violate the commitment to the health and the well-being of the patient – where reporting is expected to harm the patient. These claims would, in some circumstances, be informed by the previous experience of the professional and/or the patient. The violation is most clear where the intended purpose of reporting is to protect a vulnerable patient but reporting is actually likely to cause them harm. Thus, where a professional reasonably expects reporting of abuse or neglect of a vulnerable patient to result in greater harm or death to that patient, reporting would violate the commitment to the health and well-being of the patient.  

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1084 As I discussed in Chapter 2, the purpose of mandatory reporting of abuse and neglect of the vulnerable may actually be to protect the public interest instead of the individual vulnerable patient. See Chapter 2, notes 384 to 387 and accompanying text. But even under this view, the harm to the individual patient may still violate the professional’s commitment to the well-being of the individual patient.
Such an infringement of health professionals’ freedom of conscience may also occur where the purpose of reporting is public health or safety, particularly where the harm to the individual patient may exceed the benefit to the public. For example, there may be situations where driving is essential to the patient’s safety or livelihood, such that reporting him or her for a medical condition affecting driving ability – and the likely revocation of his or her driver’s license – is overly harmful, especially if the medical condition and thus the risk posed is relatively minor. Similarly, the physician or patient may reasonably believe that public health authorities poorly protect confidentiality and so reporting a disease like HIV may result in harm to employment or other discrimination, which is contrary to patient well-being. That commitment to patient well-being would also be violated where reporting of a gunshot wound and resulting police involvement may reasonably result in retaliatory violence against the patient.

A violation would also occur where the purpose of the report is to detect and punish an offence – most clearly where reporting is of an offence itself, such as medicare eligibility fraud or paid queue-jumping, but also where the patient may be suspected of an offence because of the report, for example in gunshot wound reporting. The downstream harms here may include decreased access to future health care, as with medicare eligibility fraud, or incarceration, as with reporting of a gunshot wound.

The claims by members of other professions may be more varied. Such a conscience claim could apply even where there is no Charter right to the professional services at issue, such as education or veterinary services. Where reporting is meant to assist the vulnerable client but is likely to cause harm – such as child abuse reporting, if there is a likelihood of retaliation and insufficient protection – non-health professionals such as lawyers and teachers could be expected to make analogous claims to those of health professionals, based on a similar overriding commitment to the client’s well-being. Similarly, where reporting banned breeds is likely to result in the patient animal’s destruction, veterinarians could claim a violation of their commitment to the well-being of the animal. For lawyers, zealous advocacy and commitment to the client’s cause will be relevant. Indeed, lawyers could claim that any reporting obligation opposed by clients impairs the value of commitment to the client’s cause. Any profession that includes a professional value of confidentiality, such as health professions or law, could presumably claim a violation where reporting is non-anonymized or where it is nominally anonymized but poor information protection would reasonably be expected to result in a breach.
While any professional could conceivably make this type of conscience claim, the weight – and likely success – of such a claim will vary from profession to profession according to the strength of the particular professional value that is articulated as being violated. Professions with clear statements of professional values, particularly those commonly included in oaths – such as lawyers and physicians – will likely be more successful. The clearer the clash between the law and a specific value, the stronger the claim. For example, a general value of promoting the client’s well-being may be consistent with any helping profession, but that general value will likely carry less weight than one that can be more clearly articulated and demonstrated to be contradicted by a mandatory reporting law.

The breadth of possible claims under section 2(a) varies with the values of each profession and the manner in which each professional interprets those values. The broader the professional values, the broader the potential conscience claim. Thus, for example, lawyers’ commitment to the client’s cause, or duty of zealous advocacy or loyalty, would be engaged by virtually any mandatory reporting law where reporting was contrary to the client’s interests or wishes. Similarly, physicians’ commitment to the well-being of the patient would be engaged by virtually any mandatory reporting law where reporting was contrary to the client’s well-being. For both physicians and lawyers, the duty of confidentiality would also apply very broadly. This breadth of claims under section 2(a) shifts the final determination to be made under section 1.

One obstacle to this conscience-based approach is the argument that all professional values and imperatives are subject to the law, i.e. that professionals have an ultimate or overriding obligation to comply with the law. For my purposes, two responses are sufficient. First, as I explained in Chapter 1,\textsuperscript{1085} the purpose of the Charter analysis throughout this thesis is to crystallize the issues at stake and demonstrate how mandatory reporting laws clash with law more generally, including the constitution. Even where a Charter infringement is justified under section 1, the fact that a Charter interest is engaged and infringed should give legislators and policymakers pause. Second, and more fundamentally, any law that violates the constitution,

\textsuperscript{1085} See Chapter 1, note 6 and accompanying text.
including a mandatory reporting law that unjustifiably infringes a Charter right, is not a valid law.\(^{1086}\)

### 3.3 The professional values and interests of professions other than clergy: Freedom of religion?

As discussed above, the freedom of religion of professionals is most clearly engaged by mandatory reporting laws where such laws require clergy to act contrary to their professional values and obligations. The most direct analogue, for professionals other than clergy, is conscience. However, a professional other than clergy could conceivably claim that a mandatory reporting law violated his or her freedom of religion by requiring him or her to act contrary to his or her religious beliefs. Historically, some helping services – particularly education and health – were dominated by religious orders, and some professionals and institutions did and still do anchor their identity and professional role in religious beliefs. For example, as discussed above, professional opposition to services such as abortion or assisted suicide may often be grounded in religion. That is, a professional’s understanding of his or her professional values and obligations may be informed by – indeed, intimately connected to – his or her religious beliefs. This reality makes the distinction between freedom of religion and freedom of conscience somewhat complicated.

Recall, for example, Arizona SB 1405 as mentioned in Chapter 1.\(^{1087}\) That bill would have required hospitals to check every patient’s immigration status and report any undocumented patients to police or immigration authorities. During hearings on the bill, one health care provider opposed to the bill read from the book of Jeremiah, including “do no violence to the foreigner”, and described the bible’s emphasis on “people that are travelling through our country and how we treat people”\(^{1088}\). That is, this person’s understanding of his professional values and

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\(^{1086}\) See e.g. Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 52; Big M Drug Mart Ltd, supra note 1042 at 313.

\(^{1087}\) See Chapter 1, note 97 and accompanying text.

\(^{1088}\) US, SB 1405, An Act Amending Title 36, Chapter 4, Article 1, Arizona Revised Statutes, by Adding Section 36-415; Relating to Health Care Institutions, 50th Leg, 1st Reg Sess, Arz, 2011 [SB 1405]; Arizona Senate, Senate
obligations, and specifically to clients who are undocumented, was informed by his religious beliefs.

Where the professional’s religious beliefs inform his or her professional values, the Charter interest at stake could be described as freedom of religion, or freedom of conscience, or both. The analysis would appear to be the same as where the professional value or obligation is entirely non-religious in nature. For my purposes, such a claim is perhaps more cleanly framed as freedom of conscience. If freedom of religion and freedom of conscience are indeed analogous, as they appear to be from the case law to date, then little would turn on the distinction. However, if freedom of religion and freedom of conscience do diverge in the future, this distinction may gain importance.

3.4 Section 1

Mandatory reporting laws are thus likely to infringe the Charter rights of professionals insofar as such laws require professionals to act contrary to their professional values and obligations. For clergy, the infringement will be of freedom of religion under section 2(a). For professionals other than clergy, the infringement will be of freedom of conscience under section 2(a).

The breadth of possible claims under section 2(a) would leave a large role for section 1. This breadth necessarily follows from the fundamental nature of professional values as broad abstract

Appropriations Committee, 50th Leg, 1st Reg Sess (22 February 2011) (Robert Hash). Note that the Arizona Senate does not publish official transcripts of debates, but does post video recordings online. As of the time of writing, the corresponding video is online at <azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=8503>, with the quoted remarks starting at video time 03:18:18 and ending at 03:18:55. Mr. Hash appeared to be reading from the New International Version translation of Jeremiah 22:3: “This is what the LORD says: Do what is just and right. Rescue from the hand of the oppressor the one who has been robbed. Do no wrong or violence to the foreigner, the fatherless or the widow, and do not shed innocent blood in this place.” (The Holy Bible: New International Version, containing the Old Testament and the New Testament (Grand Rapids, Mich: Zondervan, 1978).) Other translations use similar terms in the place of “the foreigner”. See e.g. The Bible: Authorized King James Version (Oxford: Oxford University Press, 2008) ("the stranger"); Michael D Coogan, ed, The New Oxford Annotated Bible, 3rd ed (Oxford: Oxford University Press, 2001) ("the alien"). It is unclear from Mr. Hash’s remarks which profession he belonged to. However, this view could be held by any health professional.
principles, the precise application of which can be legitimately disputed in many situations. For example, the lawyer’s professional value of commitment to the client’s cause would cover almost any mandatory reporting law that could harm the client’s interests. Similarly, the physician’s professional value of considering first the well-being of the client would cover almost any mandatory reporting law that could harm the client. This breadth only increases when the professional value of confidentiality is also considered.

While mandatory reporting laws would be likely to infringe section 2(a), it is difficult to predict whether those infringements would be justifiable under section 1. Recall, as mentioned above, that the Supreme Court has noted that “[t]he performance of religious rites is a fundamental aspect of religious practice”. In the context of marriage, the Court also held that “state compulsion on religious officials to perform [rites]… contrary to their religious beliefs” would be an infringement that “absent exceptional circumstances… could not be justified under section 1”. Mandatory reporting laws do not coerce the professional to perform any rites, but they do require the professional to breach professional obligations around performance of rites. It also remains to be seen whether conscience will be protected as robustly as religion under section 1. After Hutterian Brethren, a section 2(a) infringement of freedom of religion appears very easy to justify under section 1. If conscience is analogous to religion, it would seem that a conscience infringement would also be easy to justify under section 1.

The section 1 analysis, and particularly the balancing, will engage similar conflicts to those explored in Chapters 2, 3 and 4 on the client’s interests. When the professional value is preventing harm to the client, whether physical harm or otherwise, professional values may appear to become a proxy for the client’s interests. Nonetheless, professional freedom of conscience should be recognized as an additional and distinct Charter interest that may be engaged. I expect that an infringement of the rights of the professional would be easier to justify

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1089 Reference re Same-Sex Marriage, supra note 1022 at para 57.
1090 Ibid at para 58.
1091 Hutterian Brethren, supra note 1025.
than an infringement of the rights of the client. As in previous chapters,\footnote{See Chapter 2, note 474 and accompanying text; Chapter 3, notes 763 to 766 and accompanying text; Chapter 4, note 948 and accompanying text.} mandatory reporting laws – especially those aimed at public health & safety or the protection of the vulnerable – clearly have a pressing and substantial objective. Insofar as reporting allows investigation and intervention, there is clearly a rational connection. The most important parts of the section 1 analysis are likely to be minimal impairment and balancing.

Recall from Chapter 2 that minimal impairment poses an interesting dilemma when a mandatory reporting law covers several professions, as with children in need of protection.\footnote{See Chapter 2, notes 489 to 491 and accompanying text.} Arguably, including any given profession may be redundant, and thus unnecessarily impairing of the 

Charter rights of those professionals, because other professions are included. However, different professions may have different opportunities and abilities to identify different instances of the reportable occurrence, and some overlap may be desirable. The trade-off is to reduce or eliminate the impact on freedom of religion or conscience of one profession by imposing the impact on another profession.

### 3.5 Some examples

The 

Charter analysis can be more clearly demonstrated through a few key examples. I start with the standard archetypes and then consider some proposals.

Recall that the archetype for mandatory reporting laws aimed at public health & safety is communicable diseases. A family physician who diagnoses a patient’s gonorrhea may consider his or her first professional obligation to be the well-being of that patient. The patient may fear that, if the diagnosis is reported to public health authorities and used for contact tracing, others will be able to draw inferences about his or her conduct – for example, perhaps his spouse may suspect an extramarital affair. However, the physician is likely to decide that such consequences are unlikely, and his or her obligations to public health outweigh those of the individual patient in these circumstances. Thus, mandatory reporting likely does not force this physician to violate
his or her conscience. If the law did infringe section 2(a), that infringement would likely be justifiable under section 1. The importance of the law to public health objectively outweighs the harm to the individual patient – and if the professional does not report, it is unclear how the occurrence would come to the attention of the state.

Recall that the archetype for mandatory reporting laws aimed at protection of the vulnerable is children in need of protection. Such reporting laws present different issues of professional values and obligations depending on whether the client is the abuser or abused child. For example, consider a physician who suspects abuse based on the injuries and explanations of a child patient. If the physician’s experience is that state investigations and interventions are unsuccessful, and a report is likely to result in worsened retaliatory abuse, he or she may decide that reporting would violate his or her professional obligations to the patient’s well-being and confidentiality. However, absent such circumstances reporting would likely be consistent with that obligation – even more so if there is the prospect of continued abuse or there are other children who may be abused by the same abuser. In contrast, where the patient discloses that he or she has abused a child, the physician may determine that reporting – and the prospect of state intervention and criminal charges – would violate his or her obligation to the patient’s well-being and confidentiality, particularly where the abuse is historical and seems unlikely to be repeated. Thus, freedom of conscience is infringed. However, the societal interest in addressing child abuse would likely support a strong section 1 justification.

Similar considerations would apply to proposed mandatory reporting laws. Consider, for example, a law requiring physicians to report drinking and driving to the police. An emergency physician who concludes that the patient was driving impaired or over 80 would need to weigh his or her obligations to the individual patient’s well-being and confidentiality against his or her obligations to public safety and patients at large. The professional values involved parallel those for the family physician diagnosing gonorrhea, but the balancing would likely be less difficult. As with child abuse, it would be reasonable to assume that past misconduct is indicative of future misconduct and a risk of repetition. Reporting would likely result in a criminal investigation and charge, and potentially incarceration, all of which are contrary to the patient’s well-being. Reporting would also reduce the likelihood of serious injury and death, including that of the patient as driver. Thus the physician is likely to conclude that reporting does not violate his or her professional values or obligations – or even furthers them. Moreover, given that many
Charter infringements are justified under section 1 because of the carnage of impaired driving, it is almost certain that any infringement of freedom of conscience would be justifiable.

The Arizona proposal, mandatory reporting by hospitals of patients’ immigration status to federal authorities or police, exemplifies a strong freedom of conscience claim. Reporting is likely to result in deportation, possibly preceded by a period of incarceration. The physician may reasonably believe that in such circumstances the patient will have decreased access to inferior health services, whether in jail or in his or her home country. Reporting would violate the professional value of first considering the well-being of the patient, particularly where the patient has specific foreseeable health needs – such as pregnancy requiring prenatal care, or cancer requiring treatment. In particular, the patient’s access to certain services, such as family planning and abortion or palliative care and physician-assisted death, may well be limited in his or her home jurisdiction. It is difficult to see how reporting would advance the competing professional value of protecting public health. Indeed, where the patient has a communicable disease, treatment may well be the best option to protect the public. Any obligation to the health care system or the state, under the questionable argument of the bill’s sponsor that reporting and deportation will reduce the financial burden on publicly-funded hospitals, is likely to be outweighed. Indeed, even under this financial argument, early intervention or prevention may be most cost-effective. Thus, the physician is likely to claim that reporting violates his or her freedom of conscience. Moreover, such a questionable state objective would be unlikely to successfully anchor a justification under section 1.

These kinds of dilemmas are also illuminated by existing and potential mandatory reporting laws applicable to veterinarians. Recall from Chapter 1 that veterinarians, alongside some health professionals such as physicians, are required to report animal bites to public health

1094 As mentioned in Chapter 1. See Chapter 1, note 3 and accompanying text.
1095 SB 1405, supra note 1087. See also Chapter 1, note 97 and accompanying text.
1096 Again see Chapter 1, note 130 and accompanying text.
authorities. Assume the animal’s owner discloses to the veterinarian that certain injuries occurred in the process of the animal biting a person. Where the bite is violent, or where the animal does indeed have rabies, the likely result of reporting is that the animal will be destroyed. In these contexts, the veterinarian has to weigh his or her commitment to the well-being of the individual animal against his or her commitments to the public health of both animals and people. Given the danger of rabies to animals and humans, reporting would seem unlikely to require veterinarians to act contrary to their professional values.

However, mandatory reporting of banned breeds would change the calculus – particularly if the likely result of reporting was the destruction of the animal. If a veterinarian believes that banned breeds do not actually pose a threat to public safety, and/or that the particular animal does not pose such a threat, then the likelihood of destruction may cause reporting to infringe the veterinarian’s freedom of conscience. The section 1 justification of such an infringement would largely depend on the evidence, especially at the final balancing.

In all of these examples, a freedom of conscience claim requires the weighing and interpretation of competing professional values. While the values may be generally accepted and uncontroversial among the members of the profession, their weighing and application in a particular set of circumstances may vary widely. Indeed, the same professional may accept some mandatory reporting laws while objecting to others, or comply with a given mandatory reporting law in some circumstances but not others.

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1097 See Chapter 1, note 102 and accompanying text, and Table 1. Communicable Diseases – General, RRO 1990, Reg 557, s 2 (1). The reporting provision specifically identifies veterinarians and other professionals, but it also applies to “any other person”.

1098 Many veterinarians oppose breed-specific bans in principle. Such veterinarians may honestly feel that reporting, in any circumstances, violates their professional obligation to the health of the animal. See e.g. the position of the Ontario Veterinary Medical Association: “OVMA has conducted a thorough review of the available research on dog bites and the use of breed-based bans to curb dog attacks. Based on that review, we are here today with three simple messages. First, breed-based dog bans are not an effective way to reduce the frequency of dog attacks. Second, a breed ban would have a number of serious negative consequences for affected animals, their owners and the general public. Finally, it would be possible through the appropriate use of licensing, deterrents and education to significantly reduce the number of dog bites by all breeds in Ontario… Why are breed-based bans ineffective? It is because they are based on two simple but incorrect assumptions: (1) that only certain breeds of dogs are dangerous, and (2) that all dogs that belong to those breeds are dangerous. Available data do not support either of these two assumptions.” (Ontario, Legislative Assembly, Standing Committee on the Legislative Assembly, Official Report of Debates (Hansard), 38th Parl, 1st Sess, No M-9 (24 January 2005) at M-149 (Dr Tim Zaharchuk, president, Ontario Veterinary Medical Association).)
4 Modifying the template

As I outlined in Chapter 1, there are several existing modifications to the standard template of mandatory reporting laws: making reporting discretionary instead of mandatory; anonymizing reporting, i.e. omitting the client’s name from the report; imposing the reporting obligation on the institution instead of the individual professional; omitting the offence provision for non-compliance; and substituting retention for reporting. There are also other modifications to the template that I suggested in Chapter 2 and Chapter 3: restricting reporting to situations where there is a risk of future harm; restricting reporting, where the reporting is for the benefit of the client, to clients lacking capacity or voluntariness; increasing the triggering threshold; adding oversight mechanisms; and adding limitations on use. I will briefly assess the impact of both sets of modifications on the rights of the professional under section 2(a).

4.1 The existing modifications

Among the existing modifications to the standard template of mandatory reporting laws, only anonymization and discretionary reporting would appear to reduce the effect on professional values.

4.1.1 Discretionary reporting

Making reporting discretionary instead of mandatory would lessen if not eliminate the impact on professional values. Each professional becomes free to exercise that discretion as he or she sees fit. A professional who opposes mandatory reporting in all circumstances can choose to never report, and one who opposes it in some circumstances can choose to report only in other circumstances. Some professionals may choose to report in all circumstances.

1099 See Chapter 1, notes 47 to 66 and accompanying text.
4.1.2 Anonymized reporting

Anonymization, i.e. removing the client’s name from the report, could affect the impact on professional values. By essentially eliminating any consequences for the client, including any negative consequences, anonymized reporting does not impede the professional value of confidentiality, or of acting pursuant to the wishes of the client.

4.1.3 Imposing the reporting obligation on the institution instead of the professional

Placing the reporting obligation on the institution instead of the professional has only a formal or illusory impact on professional values. The report is formally made by the institution, but the information still comes from a professional within that institution. The professional is still participating in the process even if he or she is not the one filing the report itself.

4.1.4 No offence provision for non-compliance

Omitting an offence provision for non-compliance will only have an effect on professional values for professionals who consider an offence provision to be meaningful in itself. It seems unlikely that a principled consideration of a law would be affected by the presence or absence of an offence provision.

4.1.5 Substituting retention for reporting

Recall that mandatory reporting laws may be modified to require that instead of making an immediate report, the professional must retain the information and surrender it upon request by the relevant state agency. This modification would not affect the impact on professional values. Investigation and possible intervention by the state agency may be delayed or never actually occur, but the professional has no role in that decision.
4.2  My suggested modifications

Several of the modifications I have suggested will likely reduce the impact on professional values.

4.2.1 Restricting reporting to situations where there is a risk of future harm

As with the impact on the autonomy interest in Chapter 2, as on the privacy interest in Chapter 3, and on the access interest in Chapter 4, restricting reporting to situations where there is a risk of future harm would decrease the impact on professional values and make any Charter infringement more justifiable under section 1. By narrowing the range of cases where reporting would occur to only those where intervention could prevent future harm, the professional is required to act contrary to his or her values only in a narrow subset of cases. Thus, the scheme becomes more minimally impairing of the right, and the balancing between positive and negative effects is improved.

4.2.2 Restricting reporting to clients lacking capacity

Recall from Chapter 2 that one modification that reduces the impact on client autonomy, as that autonomy is embodied in Canadian law and specifically as it is protected under the section 7 liberty interest, is restricting reporting to clients lacking capacity or voluntariness where the reporting is for the benefit of the client. This modification would reduce the impact on professional values insofar as honouring the wishes of clients with capacity is a professional value. (Presumably, a professional who values honouring the wishes of clients with capacity will

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1100 See Chapter 2, under heading 11.6.
1101 See Chapter 3, under heading 6.2.1.
1102 See Chapter 4, under heading 9.2.1.
1103 See Chapter 2, notes 391 and 481 and accompanying text, and under heading 11.6.
have some ability to evaluate capacity, or at least think that he or she has that ability.) As I mentioned above, physicians may disagree over whether the well-being of the patient should be evaluated based on the patient’s best interests or on his or her wishes.

4.2.3 Increasing the triggering threshold
Increasing the threshold would lessen but not eliminate the impact on professional values. Insofar as reporting violates professional values, that violation would occur in a smaller subset of cases as the threshold increases.

4.2.4 Adding oversight mechanisms
Oversight mechanisms would not appear to change the impact on professional values.

4.2.5 Adding limitations on use
Adding limitations on use will reduce the impact on professional values to the extent that the professional fears that the information may be used in a way that will harm the client. Even if the breach of confidentiality in the making of the report is in itself contrary to professional values, the consequences of that breach may be reduced by limitations on use.

5 Conclusion
The interests of the client are critical considerations for the legal and policy assessment of mandatory reporting laws. At the same time, these laws have a significant impact on the professional himself or herself. In particular, these laws may force the professional to act contrary to his or her professional values and thus infringe his or her freedoms under section 2(a).
As I have discussed in this chapter, similar professional-values claims will be anchored in different *Charter* provisions, depending on the profession involved. Thus such claims by clergy would fit best under freedom of religion, while equivalent claims by other professions would fit best under freedom of conscience. Claims by clergy under freedom of religion would appear to be stronger than claims by other professionals under conscience – if only because freedom of conscience is so poorly developed in Canadian law, and the interpretation I have suggested is relatively novel. Among the conscience claims, the professions with the most clearly articulated professional obligations and values – likely the legal and health professions – would be in a stronger position than other professions, such as teachers.

Any *Charter* infringement will likely be justifiable under section 1, so long as no realistic alternatives to reporting are available at the minimal impairment stage, and the purpose and effects of any specific mandatory reporting law are sufficiently important at the balancing stage.

Few template modifications would significantly impact this legal analysis of professional values. Discretionary reporting would eliminate the impact on professional values by allowing each individual professional to exercise that discretion in accordance with his or her understanding of those values. Similarly, restricting reporting to clients who lack capacity would accord better with the professional value of respecting the wishes of competent clients. Anonymized reporting would decrease the impact on professional values, insofar as it virtually eliminates any consequences of reporting for the client and respects confidentiality. Restricting reporting to future harm or increasing the triggering threshold would reduce the number of cases in which reporting occurs and the likelihood of any given client being reported, and thus reduce the impact on professional values.

As a legal and policy matter, professional values and obligations in themselves – such as zealous advocacy, commitment, or a dedication to the health and well-being of the patient – seem to be the weakest arguments against mandatory reporting laws. The issues that arise from the professional’s interests do overlap with those that arise from the client’s interests in autonomy,

1104 As discussed above, Haigh made the root arguments in 2012 (Haigh, *Burl*, supra note 1040), but those arguments have not yet been adopted by the courts.
privacy, and access to services. This overlap exists because professional values tend to support some aspect of the client’s interests. The lawyer’s commitment to the client’s cause and the physician’s primary consideration of the patient’s well-being do further the client’s interests. Similarly, confidentiality supports the trust and secrecy of the client-professional relationship and thus the client’s interest in access to services. To the extent that these values and obligations promote trust in the client-professional relationship and enable effective access to and provision of services, the underlying considerations are those of access and deterrence considered in Chapter 4. To the extent that these values and obligations promote client autonomy and privacy, the considerations are those considered in Chapters 2 and 3. However, the professional may value some particular client interests – such as physical well-being – over others, and potentially in a different way than would the client. Moreover, the professional must weigh duty to the client against duty to the public, a weighing that the client may not incorporate into his or her conception of best interests. Thus, despite some overlap, the professional’s interests warrant separate consideration from the interests of the client. It is certainly objectionable to force anyone to act contrary to his or her fundamental beliefs. It is also impractical in the context of professionals, as two likely responses are to not comply or to cease offering services entirely. However, the impact on the client seems to be more meaningful than the impact on the professional.

A concern for professional values, as an end in themselves, is reminiscent of the “honour theory” that first grounded solicitor-client privilege. As Adam Dodek explains, this approach held that the privilege was necessary to protect the honour of the lawyer against breach of his or her oath of secrecy.1105 (Indeed, the “honour theory” was premised on lawyers being unique among all professionals.1106) In contrast, subsequent understandings of solicitor-client privilege focused instead on the interests of the client, the provision of legal services, and the legal system itself.1107 While the “honour theory” may still resonate with the profession, it has been eclipsed by other, more client-centric, ideas.1108 Similar conceptions of honour may ground the values of

1105 Adam M Dodek, Solicitor-Client Privilege (Toronto: LexisNexis Canada, 2014) at paras 1.4 to 1.5.
1106 Ibid at para 1.9.
1107 Ibid at paras 1.8 to 1.21.
1108 Ibid at para 1.9.
other professions. Recall, for example, that the physician’s oath cited above includes a commitment that “I will maintain by all the means in my power, the honour and the noble traditions of the medical profession”. Professional honour, in itself, is a questionable justification for legal protection of conscience.

Regardless of the legality or policy desirability of these laws, it may be unrealistic to expect professionals to comply with a law that they consider to be contrary to their professional values. It is particularly unreasonable in the most extreme contexts, such as the Catholic confessional, where the choice is between non-compliance and potentially a fine, on the one hand, and unemployment and damnation on the other. I will return to compliance as a policy issue in Chapter 6.

It is also worth noting that in many of these situations, the professional may fail to report for more practical reasons than professional conscience or religion. The physician reporting gonorrhea or health conditions affecting the ability to drive may reasonably fear retaliation, in the form of regulatory complaints or litigation or violence, especially where the patient has made such a threat. Similarly, the owner of a violent or banned animal may seem likely to retaliate against a reporting veterinarian. These barriers to compliance are essential policy considerations, even though they do not affect the Charter analysis.

Policymakers should consider these issues of professional interests and compliance carefully even where a proposal is unlikely to violate the Charter and otherwise seems to be good policy. Professionals are crucial stakeholders in these laws, and their views should be carefully considered when these laws are proposed. Without some degree of professional support, these laws simply cannot function. As a cautionary tale, consider the response of the Alberta Minister of Health when asked why the health professions were not consulted on mandatory gunshot

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1109 Declaration of Geneva, supra note 1078 and accompanying text.
1110 See e.g. Gruenke, supra note 1019 at 303, L’Heureux-Dubé J: “Other authors express the view that it would be impractical and futile to attempt to force the clergy to testify, because often the cleric would refuse.” Also see above at notes 1015 to 1016 and accompanying text.
1111 See Chapter 6, note 1214 and accompanying text.
wound reporting: “I can tell you who was consulted. It was Albertans, and they’re fed up with crime.”

As I noted in Chapter 1, the fact that a law infringes a Charter right should be meaningful to policymakers and legislators even where that infringement is justified under section 1. Even if some – or even many – infringements of professional conscience are justifiable under section 1, these justifications do not make the infringements meaningless. Where key stakeholders, in this case professionals, reasonably believe that a law interferes with the basic norms of their profession, that belief should prompt careful consideration.

A Charter analysis does have limitations. Given my conclusions in Chapter 2, Chapter 3, Chapter 4, and this chapter – that most Charter infringements of mandatory reporting laws will likely be justifiable under section 1 – a Charter analysis gives little guidance on what kind of mandatory reporting laws should be adopted. That is, the possibilities for Charter-compliant mandatory reporting laws are vast. Given these possibilities, legislators and policymakers would benefit not only from a Charter analysis but also a policy analysis. I turn to that policy analysis in the next chapter.

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1112 Alberta, Legislative Assembly, Alberta Hansard, 27th Leg, 2d Sess, No 40a (13 May 2009) at 1129 (Hon Ron Liepert). I used this quote in Martin, supra note 985 at 185.

1113 See Chapter 1, note 6 and accompanying text. See also Chapter 2, note 504 and accompanying text; Chapter 3, under heading 7; and Chapter 4, under heading 10.
Chapter 6
Beyond constitutionality and towards a policy framework

1 Introduction

In previous chapters, I have considered how mandatory reporting laws conflict with the interests of the client as recognized elsewhere in Canadian law, specifically autonomy, privacy, and access to services. I have also examined how these laws engage the interests of the professional. My emphasis has been on the constitutionality of these laws under the *Canadian Charter of Rights and Freedoms*.\textsuperscript{1114} I concluded that mandatory reporting laws potentially infringe several provisions of the *Charter*, but that these infringements are likely justifiable under section 1 – and where they are not justifiable, straightforward amendments will eliminate the infringement or make that infringement justifiable. In this chapter, I go beyond constitutionality towards a policy framework for legislators and policymakers. This framework supplements but does not replace the *Charter* analysis, although the two approaches do have some elements in common.

In Chapter 2, I argued that mandatory reporting laws intended to protect vulnerable persons against abuse and neglect, such as children in need of protection, are contrary to autonomy as that concept is embodied in Canadian law, and particularly capacity and consent law. More specifically, I argued that these mandatory reporting laws are potentially unconstitutional insofar as they engage the liberty interest in section 7 of the *Charter* by interfering in the fundamental personal choice to seek state assistance or to initiate state involvement. Such laws contravene the principle against overbreadth in two ways. The first way is because they apply not only to clients who lack capacity and voluntariness, i.e. lack the ability to make that choice, but also to those clients who have capacity and voluntariness, and provide no opportunity for clients to demonstrate capacity and voluntariness. This first overbreadth is unlikely to be minimally impairing under section 1; however, it could be adequately reduced by requiring the professional to evaluate capacity and report only if the client lacks capacity and voluntariness – with a

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presumption of incapacity and involuntariness. The second way that these laws are overbroad is
that that they apply to some persons who are not abused or neglected at all, because the threshold
that triggers reporting is deliberately qualified. Following Canada (Attorney General) v
Bedford, this second overbreadth may well be justifiable under section 1 as a matter of
enforcement practicality and effective detection. This overbreadth could also be reduced – and
made more justifiable under section 1 – by raising the triggering threshold, although this change
would reduce the screening effectiveness of mandatory reporting laws. Moreover, the minimal
impairment and balancing steps of a section 1 justification would be easier to meet if reporting
was restricted to situations where there is a risk of future harm. Anonymization would reduce or
eliminate the impact on autonomy, but at the cost of dramatically reducing the utility of the
reporting law.

In Chapter 3, I argued that mandatory reporting laws engage and infringe the client’s right
against unreasonable search and seizure under section 8 of the Charter. Section 8 is engaged
because the client has a reasonable expectation of privacy in information about herself or
himself, most of which will be “core” information, that he or she has necessarily disclosed to
receive vital services from a professional who has legal and ethical obligations of confidentiality.
Reporting thus constitutes a search or seizure. Section 8 is infringed because the search or
seizure is unreasonable, and the search or seizure is unreasonable because the law itself is
unreasonable in two main ways. The first way is the deliberately qualified triggering threshold,
which makes the search unreliable or the law itself overbroad. The second way is the absence of
oversight mechanisms. The deliberately qualified triggering threshold is likely justifiable under
section 1 as a matter of enforcement practicality, and can be raised if necessary. The absence of
oversight mechanisms is likely unjustifiable, but may be fairly easily corrected by adding
provisions such as a notice requirement. Mandatory reporting laws applicable to lawyers will
also infringe section 8 in three more specific ways: where they do not provide an exception for
solicitor-client privilege, where there are reasonable alternatives for the state agency to obtain the
information, and where they do not allow the client the chance to assert solicitor-client privilege.
None of these lawyer-specific infringements will likely be justifiable under section 1. However,

these infringements can be eliminated by adding an exception for solicitor-client privilege (which most mandatory reporting laws already have), adding an exception to reporting where the lawyer is reasonably satisfied that another non-lawyer professional to whom the law applies is already aware of the occurrence, and adding a provision requiring the lawyer to notify the client that he or she intends to make a report. As with the section 7 infringements discussed in Chapter 2, the minimal impairment and balancing steps of a section 1 justification would be easier to meet if reporting was restricted to situations where there is a risk of future harm. Such a restriction also avoids contravening solicitor-client privilege, because that privilege has an exception for future harm. Again, anonymization would reduce or eliminate the impact on privacy, but at the cost of dramatically reducing the utility of the reporting law.

In Chapter 4, I concluded that mandatory reporting laws infringe various Charter rights of the client through the deterrence impact on access to services. That is, mandatory reporting laws decrease access by discouraging clients from making honest disclosures while seeking services, or from seeking services altogether. The specific Charter provision infringed depends on the kind of services and professionals involved. Mandatory reporting laws applicable to lawyers will infringe section 7 insofar as they engage liberty or security of the person – of the client or the lawyer – and either do not provide an exception for solicitor-client privilege or do not accord with the principle of fundamental justice of commitment to the client’s cause. They may also violate solicitor-client privilege as a freestanding right. (However, mandatory reporting laws generally include an exception for solicitor-client privilege.) Mandatory reporting laws applicable to clergy may infringe the freedom of religion of the client under section 2(a) of the Charter, particularly where confidentiality is a religious requirement or otherwise associated with a specific rite or belief. Mandatory reporting laws applicable to health professionals infringe the rights of the client under section 7 because they engage security of the person – through the impairment of access to health services – in a way that is overbroad or arbitrary in three respects. First, the deliberately qualified triggering threshold means that reporting is overbroad: some clients who must be reported, and thus some who will be deterred because of reporting, do not actually have the reportable occurrence. Second, the law will be overbroad if it lacks exceptions for occurrences that do not further its purposes. For example, mandatory gunshot wound reporting laws may be overbroad because they do not exclude self-inflicted wounds. Third, mandatory reporting laws may be arbitrary because they are self-limiting: they deter clients with
the reportable occurrence from seeking services, which prevents those occurrences from being detected and reported. The overbreadth of a deliberately qualified triggering threshold is likely justifiable as enforcement practicality under section 1. The overbreadth of an absence of exceptions may be similarly justifiable, or easily fixed by adding exceptions. The arbitrariness, however, is inherent to the structure of mandatory reporting laws and cannot be eliminated. If such arbitrariness is not justifiable under section 1, mandatory reporting laws are unsalvageable. The section 1 justification, and specifically the minimal impairment and balancing stages, can be eased by restricting reporting to future harm. Again, anonymization would reduce or eliminate the impact on access – if potential clients were aware of, and trusted, the anonymization – but at the cost of dramatically reducing the utility of the reporting law.

In Chapter 5, I moved from the interests of the client to the interests of the professional. I argued that mandatory reporting laws infringe the Charter rights of professionals insofar as they require them to act contrary to their professional values. The specific infringement is of freedom of religion under section 2(a) for clergy, and of freedom of conscience under the same section for other professionals. The broad scope of section 2(a) would seem to mean that almost all of these professional-values claims would be determined under section 1. However, I noted that infringements of the Charter rights of professionals would appear, all else equal, easier to justify than infringements of the Charter rights of clients. I also noted that these infringements could be eliminated by making reporting discretionary or reduced by anonymization, and that a future-harm requirement or an increase to the triggering threshold would ease the section 1 justification of any infringement.

Thus my overall conclusion from Chapters 2 through 5 is that while mandatory reporting laws do infringe some Charter rights – and such infringements are important to acknowledge – those infringements should be arguably justifiable under section 1 and/or correctible by feasible and relatively minor amendments to the legislation. As such, constitutionality is not a significant constraint on legislative action in this area. Given this large legal space, it becomes even more important to consider how legislators and policymakers should choose among the existing and potential mandatory reporting laws that are open to them. In this chapter, I thus return to my original question: how should legislators and policymakers decide what client information professionals must report to the state? First, I propose and defend a four-component policy framework for decision-making. I then consider how the possible modifications to the standard
template may change the result of the policy analysis. Finally, I demonstrate how the framework would apply to several potential mandatory reporting laws that have not yet been adopted in Canada.

First, though, I reflect on some of the limitations of a Charter-based analysis and the ways in which a policy analysis might lead to different conclusions.

2 More than constitutionality: The limitations of a Charter-based analysis

The question of constitutionality is important, but not always in itself determinative, in the evaluation of any existing or proposed law. Constitutionality, and particularly Charter compliance, is a necessary but not sufficient requirement for legislative decision-making. A Charter analysis is always a useful tool – even where there is no infringement of a Charter right, or that infringement is justifiable under section 1, a Charter analysis does illuminate some of the key interests at stake and provides a framework to navigate and evaluate those interests. Any Charter infringement should give legislators pause, whether or not it is justifiable under section 1. However, any given law is not necessarily “good” from a policy perspective, that is appropriate or desirable, merely because it does not violate the Charter. This is particularly true in the specific context of mandatory reporting laws, given the inherent impositions on autonomy, privacy, and access to services, as well as on professional interests, that do not rise to the level of unjustifiable Charter infringements. For example, recall from Chapter 4 that some professional services having great social value – such as education and veterinary care – may not engage any Charter interests of the client. The most important example, however, of the limitations of a Charter analysis is the unique protection of legal services.

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1117 See Chapter 4, note 959 and accompanying text.
2.1 Should lawyers alone be special?

As demonstrated in previous chapters, lawyers and the lawyer-client relationship enjoy special protection as a matter of constitutional law.\textsuperscript{1118} This protection is primarily through solicitor-client privilege working in three ways: as a principle of fundamental justice under section 7, as a major factor under section 8, and as a freestanding legal right. Indeed, because of the strength of solicitor-client privilege, any mandatory reporting law applicable to lawyers must contain an exception for solicitor-client privilege or a provision restricting reporting to situations where there is a risk of future harm. Lawyers and the lawyer-client relationship are further protected by the new principle of fundamental justice of commitment to the client’s cause. While sections 2(a) and 7 of the \textit{Charter} provide some protection for religious and health services, those protections are lesser. This difference is reflected in the many mandatory reporting laws that explicitly protect solicitor-client privilege but not other privileges or confidentiality.\textsuperscript{1119} Solicitor-client privilege may seem to some to be less important than other societal objectives, such as protecting abused children – but it is a settled point.\textsuperscript{1120}

The fact that the \textit{Charter} requires protections for lawyers, and does not require such protections for other professions, does not mean that other professions should not also be protected. While legislators could likely not abolish the exception for solicitor-client privilege, they could extend equivalent protection to other professional-client relationships. For example, they could amend mandatory reporting laws to add an exception for other kinds of confidentiality or professional secrecy.

The legal protection for solicitor-client privilege is very much an inward-looking rule, whereby the legal system – working through judges and lawyers – has protected itself by protecting

\textsuperscript{1118} See Chapter 3, notes 739 to 747 and accompanying text; Chapter 4, notes 812 to 840 and accompanying text.

\textsuperscript{1119} As mentioned in Chapter 1 and Chapter 4. See Chapter 1, note 18 and accompanying text; Chapter 4, notes 825 to 828 and accompanying text. See \textit{Child and Family Services Act}, RSO 1990, c C.11, ss 72(7) and 72(8) [CFSA]; \textit{Long-Term Care Homes Act}, 2007, SO 2007, c 8, ss 24(2) and 24(7); \textit{Retirement Homes Act}, 2010, SO 2010, c 11, ss 75(3) and 75(4); \textit{Health Insurance Act}, RSO 1990, c H.6, s 43.1, ss 43.1(6) and 43.1(8). \textit{Commitment to the Future of Medicare Act}, 2004, SO 2004, c 5, s 17 [CFMA] does not explicitly override confidentiality or privilege, but does specify in subsection 17(7) that it does not affect solicitor-client privilege.

\textsuperscript{1120} See e.g. Donald J Lange, “Child Abuse and Ontario’s New Reporting Register” (1980) 3 Fam L Rev 3 at 9: “I cannot accept that the solicitor-client exemption is consonant with our espoused concern for protecting children from abuse and neglect”.

privilege. Indeed, this rationale has been quite explicit. For example, Lamer CJ in rejecting a class privilege for clergy in *R v Gruenke* emphasized that solicitor-client privilege was necessary to a functioning legal system:

The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are *essential to the effective operation of the legal system*. Such communications are inextricably linked with the very system which desires the disclosure of the communication.\(^{1121}\)

In contrast, noted Lamer CJ, “religious communications, notwithstanding their social importance, are not inextricably linked with the justice system” – and thus are not worthy of a class privilege.\(^{1122}\) Justice Major for the Court in *R v McClure* essentially repeated this point, noting that solicitor-client privilege “commands a unique status within the legal system…. and is integral to the workings of the legal system itself. The solicitor-client relationship is a part of that system, not ancillary to it.”\(^{1123}\) In so doing, he specifically contrasted that privilege with physician-patient confidentiality.\(^{1124}\)

This is not to suggest that solicitor-client privilege has necessarily been protected in order “to protect and promote lawyers’ interests”.\(^{1125}\) Instead, it has been protected in order to protect the functioning of the justice system – which functioning benefits, among others, lawyers. The lawyer-client relationship is essential not only to lawyers’ professional and economic interests, but also to the legal system.

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\(^{1121}\) *R v Gruenke*, [1991] 3 SCR 263 at 289, 67 CCC (3d) 289 [emphasis added, citations omitted]. The italicized portion was quoted by the majority in *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 82, [2015] 1 SCR 401 [*Canada v FLSC*]. I note that Adam Dodek distinguishes among three existing rationales, all focused on the connection to the legal system and legal services: “full and frank disclosure”, “a well-functioning adversarial system”, and “facilitating access to justice”. (Adam M Dodek, *Solicitor-Client Privilege* (Toronto: LexisNexis Canada, 2014) at paras 1.10 to 1.14.) He also identifies the emergence of “a rights-based justification for the privilege”, one of the relevant rights being clients’ “right to protect or assert their legal rights through exercising their right to counsel.” (Dodek at paras 1.15-1.21, quote from para 1.18).

\(^{1122}\) *Gruenke*, *ibid* at 289.

\(^{1123}\) *R v McClure*, 2001 SCC 14 at para 31, [2001] 1 SCR 445. The latter part of this quote was quoted by the majority in *Canada v FLSC*, *supra* note 1121 at para 82.

\(^{1124}\) *McClure*, *ibid* at para 31.

\(^{1125}\) See e.g. Adam M Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 Queen’s LJ 493 at 514-519 (quote at 519), what Dodek terms “the protectionist critique".
However, that most professional-client relationships are not important to the legal system itself does not mean that they are not important enough to society to be protected by statute. Health services, and potentially religious services, would seem integral enough to our common conception of the good life to warrant protection. A person is more than the assertion of his or her collection of legal rights. If indeed it is “a sacred principle that Ontarians should have access to medically necessary health care services based on need, not on ability to pay”, it would also seem a sacred principle that all have access to medically necessary health care services – access unconstrained by the deterrence impact of mandatory reporting laws. And as discussed in Chapter 4, confidentiality is essential for effective access. Similarly, Erika Chamberlain and Robert Solomon assert that “[a] doctor’s duty of confidentiality… should be taken every bit as seriously as a lawyer’s duty of confidentiality.” Moreover, health services are arguably connected to the operation of the legal system, at least indirectly. Without effective access to health services, people would not be healthy enough to meaningfully participate in the legal system. Thus Gordon Judge has argued, though somewhat dramatically, that “without health care, the legal rights may amount to little but the sanctity of the grave.” As for religion, as held by L’Heureux-Dubé J concurring in Gruenke, “there is a human need for a spiritual counsellor, a need which, in a system of religious freedom and freedom of thought and belief, must be recognized.” In particular, in a multicultural and free and democratic society, religious needs for confidentiality seem particularly compelling. If a person sincerely believes that confession to clergy is essential to eternal salvation, perhaps that rite should be protected as strenuously as the constitution protects the work of lawyers.

1126 See e.g. Greenough v Gaskell (1833), 39 ER 618 (Ch D), quoted e.g. in Dodek, “Reconceiving Privilege”, ibid at 506: “certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.”


1130 Gruenke, supra note 1121 at 309.
Moreover, such exclusions do not need to be uniform across all mandatory reporting laws. Some professions may warrant protection from some mandatory reporting laws, but not others. For example, there may be some occurrences so reprehensible, such as child abuse, or so dangerous, such as impaired driving, that confidentiality must yield and so an exclusion for professional confidentiality is inappropriate. But that does not necessarily preclude corresponding exclusions in other mandatory reporting laws aimed at less serious occurrences.

Whether any given profession should be included in or excluded from any given mandatory reporting law, and whether there should be protections for confidentiality as there are for solicitor-client privilege, are open questions that legislators must answer. Such exclusions or protections have a heavy cost, as they could dramatically reduce the utility of mandatory reporting laws for achieving social goals. However, these costs may be worthwhile. These costs may also be minimized by restricting mandatory reporting to future harm. As discussed in Chapter 4, mandatory reporting laws that are restricted to future harm do not breach solicitor-client privilege because that privilege includes an exception for future harm. Restricting reporting to future harm for other professionals would likewise narrow the impact on confidentiality to the most compelling situations only.

3 Towards a framework

The limited constitutional constraints on mandatory reporting laws, as analyzed in previous chapters, allow legislators and policymakers remarkably wide leeway in lawmaking. This large potential space increases the need for a policy framework to guide decision-making in this area. I propose a framework consisting of four components:

1. The purpose of the mandatory reporting law;

2. The professional’s special ability or opportunity to detect the reportable occurrence;

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1131 See Chapter 3, note 783 and accompanying text; Chapter 4, under heading 9.2.1.
3. The connection between the purpose of the reporting and the purpose of the profession; and

4. The impact of reporting on the professional-client relationship and the relative value of that relationship.

Whereas the question of Charter compliance is about whether legislators can adopt a given mandatory reporting law, the policy question is whether they should adopt such a law. While separate from the issue of constitutionality, this analysis should be informed by Charter values.

In creating this framework, I aim to go beyond a simple balancing of positive and negative effects to a more structured analysis that honours and incorporates the interests at stake, and reflects the exceptionality of mandatory reporting laws. In this respect I agree with Stephen Coughlan et al that a mere balancing of benefits and costs is inadequate to evaluate mandatory reporting laws, because such laws clash with the legal landscape.\textsuperscript{1132}

While Coughlan et al were writing in the context of a mandatory reporting law that applied to all persons, including but not limited to professionals (Nova Scotia’s \textit{Adult Protection Act}),\textsuperscript{1133} even stronger societal assumptions are made about the appropriateness of professionals reporting their clients.\textsuperscript{1134} A framework constructed by drawing on existing mandatory reporting laws promotes consistency and uses past experience to inform future action. Moreover, a more sophisticated analysis can crystallize and articulate the specific points that attract support or opposition from different stakeholders. Appel has proposed a four-part test, in the context of medical practice,

\begin{footnotes}
\item[1132] Stephen G Coughlan et al, “Mandatory Reporting of Suspected Elder Abuse and Neglect: A Practical and Ethical Evaluation” (1996) 19 Dal LJ 45 at 53: “[O]ur society makes certain assumptions about the degree to which it is appropriate to intervene in other people's lives, and about the extent to which private citizens should be required to report details about one another to government agencies. Simply to look at the pros and cons of reporting in a particular situation is to ignore these inherent assumptions and to miss the place in society that any mandatory reporting law will play.” [Footnotes omitted.]
\item[1133] \textit{Adult Protection Act}, RSNS 1989, c 2.
\item[1134] Coughlan et al, \textit{supra} note 1132, do note at 67 that health professionals are a special case [citations omitted]: “Indeed, beyond departing from unspoken assumptions about our general obligations to one another, mandatory reporting actually conflicts with some stated assumptions. In particular, any mandatory reporting law which applies to health professionals assumes that the response to elder abuse is more important than confidentiality: that nurses, doctors, and other professionals should sometimes play a "policing" role with regard to their patients. It is this aspect of the law which is frequently cited as giving rise to an ethical problem. Health care professionals have a duty of confidentiality to their patients: mandatory reporting overrides that duty.”
\end{footnotes}
that goes a little beyond a cost-benefit analysis: “(1) the patient is aware that such reporting is probable; (2) the patient is likely to seek medical care, despite the possibility of reporting; (3) no reasonable alternatives exist for achieving the same policy end; and (4) the public need is compelling.”\textsuperscript{1135} (Appel was addressing the specific context of physicians reporting impaired driving, but this model can be extended to other professionals by replacing “patient” with “client” and “medical care” with “professional services”.) Parts three and four reflect a streamlined and nonspecific proportionality analysis, with part two using deterrence as the major negative impact to be weighed, and part one introducing a fairness or reasonable-expectations component. While these four parts are certainly relevant, my framework disaggregates the issues further.

Coughlan et al distinguish between the practical and ethical justifications for mandatory reporting laws, and argue that the practical impact should be evaluated first, because if a law is ineffective it is pointless to pursue further: “If the law does not in fact increase the number of cases of elder abuse that are found, then there is no practical reason for having it. In that case, it would be unnecessary to consider how the ethical considerations should be balanced against one another.”\textsuperscript{1136} While my framework partly incorporates practical components, I argue that their evidence-first approach is impractical in an imperfect policymaking and lawmaking environment in which empirical studies on the impact of these laws may not be available, may not be accurate, and may not be of interest to legislators. Similarly, an evidence-first approach makes it difficult to make generalizations about mandatory reporting laws as a class, as opposed to any one mandatory reporting law.

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\textsuperscript{1136} Coughlan et al, supra note 1132 at 46. They proceed at 47 to set out three conditions for a mandatory reporting law: “1) the people to whom the law applies would not report suspected cases of abuse if they were not required to do so by law; 2) those people will report suspected cases of abuse if there is a mandatory reporting law; and 3) the cases reported due to mandatory reporting would not otherwise have come to light.”
3.1 Component one: Categories of purpose

The first component of my framework for legislators and policymakers is to identify the purpose of a proposed mandatory reporting law and determine if that purpose fits within an accepted category. Starting with the purpose has several advantages. First, it requires policymakers and legislators to be explicit – at least among themselves, if not publicly – about what the purpose or purposes of a mandatory reporting law actually are. For example, mandatory gunshot wound reporting laws appear to have multiple purposes. While the preamble to the Mandatory Gunshot Wounds Reporting Act stated that the purpose was public safety, some legislators emphasized the purpose as being “tough on crime” or promoting “accountability” for criminals. Second, as Coughlan et al argue in regard to elder abuse, how one conceives the issue to be addressed and how reporting purports to address it fundamentally shape any mandatory reporting law. Third, this step includes not just the stated or ostensible purpose, but whether the law actually furthers that purpose. That is, a given purpose will be suspect if the parameters of the law, particularly the agency to which the report is made and that agency’s purported response, do not appear to advance that purpose. Like Coughlan et al, I divide existing mandatory reporting laws into two categories “[a]s a starting point”.

At this stage, it is necessary to connect the purpose of the mandatory reporting law to the mechanism of the law. As I discussed in Chapter 1, the primary mechanism of mandatory reporting laws is intervention, i.e. as a screening tool to identify potential occurrences for

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1137 See Chapter 1, notes 142 and 179 and accompanying text; Chapter 5, notes 1001 to 1002 and accompanying text; Andrew Flavelle Martin, “The Adoption of Mandatory Gunshot Wound Reporting Legislation in Canada: A Decade of Tension in Lawmaking at the Intersection of Law Enforcement and Public Health” (2016) 9:2 McGill JL & Health 175 at 185-186.

1138 Coughlan et al, supra note 1132, e.g. at 53: “To contend that mandatory reporting is an appropriate response is to construct elder abuse as a particular type of problem: indeed, to label the problem as ‘elder abuse’ does just as much towards that construction. Many views might be taken of the problem. The initial decision is the most important one since if the problem were regarded differently, mandatory reporting would hardly be considered as an option.” And at 56: “Accordingly, rather than consider the pros and cons of mandatory reporting, this paper will consider the question of what kind of problem elder abuse would have to be for mandatory reporting to be an appropriate response. What social construction of the problem must be adopted, and what does it say about the nature of the problem, the possible responses, the abuser, the victim, and the reporter, to say that there should be a mandatory reporting law?”

1139 Ibid at 56.

1140 See Chapter 1, notes 137 to 140 and accompanying text.
investigation and intervention. Punishment and deterrence (through punishment and the risk of punishment) may be secondary mechanisms, as may gathering statistics.\textsuperscript{1141} If intervention is not the primary mechanism, the proposed law will be less defensible.

Recall from previous chapters that the purpose of a mandatory reporting law is a critical consideration in the section 1 justification analysis.\textsuperscript{1142} To some extent, this framework component will overlap with that justification analysis.

3.1.1 Two core categories: public health & safety and protection of the vulnerable

As identified in Chapter 1, most mandatory reporting laws are understood as falling into two categories of purpose: public health & safety and protection of the vulnerable.\textsuperscript{1143} These two categories of purposes may be lumped into one, such as anything that “poses a threat to the greater public good”.\textsuperscript{1144} However, although I recognize that the distinction may not always be perfect, these are indeed two different categories.

Three questions arise from the identification of these two categories. The preliminary question, and most straightforward, is whether these two categories of purposes are themselves justifiable. Public health & safety are fairly basic fundamental functions of government.\textsuperscript{1145} Protection of the vulnerable is supported both by the parens patriae responsibility of the state\textsuperscript{1146} and by modern

\textsuperscript{1141} See Chapter 1, notes 141 to 145 and accompanying text.

\textsuperscript{1142} See Chapter 2, note 474 and accompanying text; Chapter 3, notes 763 to 766 and accompanying text; Chapter 4, note 948 and accompanying text; Chapter 5, note 1092 and accompanying text.

\textsuperscript{1143} See Chapter 1, notes 101 to 114 and accompanying text. See e.g. Coughlan et al, supra note 1132 at 56, who divide mandatory reporting laws into two groups, one being about “a threat to the public at large…. some potential ongoing danger to the general public” (e.g. diseases, driving safety, gunshot wounds) and one being about a specific vulnerable person.

\textsuperscript{1144} Laura M Criddle, Carol Bonnomo & Susan Shapiro, “ED Staff’s Reporting of Impaired Drivers: Understanding the Issues, Continuing the Work” (2001) 27:2 J Emergency Nursing 199 at 200.

\textsuperscript{1145} See e.g. Reference re Assisted Human Reproduction Act, 2010 SCC 61 at para 58, [2010] 3 SCR 457, McLachlin CJ: “To preserve human life and security is the state’s most fundamental concern.”

\textsuperscript{1146} See e.g. E (Mrs) v Eve, [1986] 2 SCR 388, esp at 426, 31 DLR (4th) 1: “The parens patriae jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the ‘best interest’ of the protected person, or again, for his or her ‘benefit’ or ‘welfare’.” See also Coughlan et al, supra note 1132 at 57.
constitutionalism’s emphasis on the dignity and worth of every individual. The other two questions, however, are more fundamental. One is an internal question: what is the scope of each category? The other is external: what other categories of purposes, if any, should be recognized? These two questions work in tandem. The narrower the scope of these two categories, the more likely that additional categories should be recognized. Conversely, the broader the scope of these two categories, the less likely are additional categories to be necessary. To answer these questions, I focus on the laws mentioned in Chapter 1, and their purposes as identified in the legislative record. As noted in Chapter 1, mandatory reporting laws for public health & safety tend – at present – to be limited to physical harm. However, this does not necessarily preclude a broader conception of public health & safety.

As I detailed in Chapter 1, there are several mandatory reporting laws with stated purposes that do not appear – at least at first glance – to fit into these two categories. These include purposes of values protection or the prevention of moral harm (e.g. paid queue-jumping for health care), the affordability and sustainability of social services (e.g. medicare and legal aid eligibility fraud), and protection of the economy or prevention of economic harm (e.g. animal health events).

Some professionals, often health professionals, argue that public health & safety, sometimes including protection of the vulnerable, is the only acceptable purpose for mandatory reporting laws. For example, the Ontario Medical Association argued that mandatory reporting of health care eligibility fraud was unlike mandatory child abuse reporting, because “[n]o one’s life or

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1147 See e.g. Lorraine Weinrib, “Constitutionalism in the Age of Rights – A Prolegomenon” (2004) 121:2 South African LJ 278 at 285: “The primary feature of the modern constitutional state is its conceptual foundation. The foundation is substantive: it regards the free and equal person as the basic building block of the political order. This basis generates the values, aspirations and institutional roles of the modern constitutional state.” See also e.g. Lorraine Eisenstat Weinrib, “The Activist Constitution”, in Paul Howe & Peter H Russell, eds, Judicial Power and Canadian Democracy (Montreal & Kingston: McGill-Queen's University Press, 2001) 80 at 85-86: “The allegiance to majoritarian democracy… denies precisely what the Charter embraces: the post-war honouring of individual conscience and equal human dignity as intrinsic to the modern democratic state.” See also e.g. Lorraine E Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada’s Constitution” (2001) 80 Can Bar Rev 699 at 704: “The postwar model of liberal democracy rejects a simple majoritarian idea of democratic rule, respects the rule of law and offers effective protection for liberty, equality and human dignity.”

1148 See Chapter 1, notes 101 to 107 and accompanying text.

1149 See Chapter 1, notes 115 to 136 and accompanying text.
safety is at risk as a result of suspected health care fraud.”1150 Similarly, this was the position of the Ontario College of Family Physicians on queue-jumping reporting: “we oppose in principle mandatory reporting in any instance where public safety is not a demonstrated concern.”1151

Recall from Chapter 1 that the archetype for mandatory reporting laws with the purpose of public health & safety is communicable disease reporting.1152 (Disease reporting has expanded into non-communicable diseases, dog bites, and non-compliance with treatment for communicable diseases.) Another core example is reporting of health conditions affecting the ability to drive safely. Mandatory gunshot wound reporting also belongs in this category, at least purportedly. These core examples demonstrate that the purpose of public health & safety has to date been limited to physical harm. (As in other areas of law, it would seem appropriate to view significant psychological harm as being analogous to physical harm.1153) In this category it is typically the client himself or herself who poses the danger to public health & safety. The exceptions are non-communicable reportable diseases, dog bites, and gunshot wounds, where the client’s health is indicative of a risk that may continue to the public.1154 Viewed as a whole, the threshold for this category of purposes appears to be an active risk to public health & safety that is not de minimis and for which specific and feasible action may plausibly reduce the risk.1155 For example, contact

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1151 Ontario, Legislative Assembly, Standing Committee on Justice and Social Policy, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No J-9 (24 February 2004) at JP-331 (Dr Peter Deimling, president). See similarly the position of the Ontario Association of Optometrists: Ontario, Legislative Assembly, Standing Committee on Justice and Social Policy, *Official Report of Debates (Hansard)*, 38th Parl, 1st Sess, No J-8 (23 February 2004) at JP-282 (Dr Shirley Ha, vice-president): “The prohibitions contained in subsections (1)(a), (b) and (c) [the definition of paid queue-jumping] are not matters of patient health and safety and should not be subject to mandatory reporting requirements.”

1152 See Chapter 1, note 101 and accompanying text.

1153 See e.g. in the context of torts, *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at paras 8-9, [2008] 2 SCR 114, McLachlin CJ for the Court: “Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury…. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept.”

1154 See Chapter 1, note 102 and accompanying text. As discussed in other chapters, a gunshot wound may also be an indicator that the patient is a dangerous criminal. See e.g. Chapter 5, notes 1001 to 1002 and accompanying text.

1155 See e.g. Merril A Pauls & Jocelyn Downie, “Shooting Ourselves in the Foot: Why Mandatory Reporting of Gunshot Wounds Is a Bad Idea” (2004) 170:8 Can Medical Assoc J 1255 at 1255: “Impaired drivers represent a clear risk to others, and the removal of their licences should (at least in theory) decrease that risk. Similarly, a patient
tracing and treatment may reduce the risk posed by a communicable disease; revocation of a driver’s license may reduce the risk posed by an unsafe driver; an animal control investigation and intervention may reduce the risk posed by a rabid animal; and police investigation may reduce the risk that a person who has shot someone may go on to shoot others. However, it is not obvious that other kinds of harm to the public at large – such as moral harm or harm to values, harm to the economy, or the harm of increased spending – cannot belong in this category.

Defining the second category of purpose, protection of the vulnerable, requires two parameters: what constitutes a vulnerable group, and the kinds of harm to which such groups are vulnerable. As discussed in Chapter 1, mandatory reporting laws can define vulnerability in several different ways: by age (children), by species (non-human animals), relationship status (spouses), living arrangements (care homes), or by position in a relationship (sexual abuse of patients by health professionals). These characteristics are all indicators of, or proxies for, likely vulnerability. This broad notion of vulnerability is matched by a broad notion of harm that goes far beyond the physical. Recall from Chapter 1 that this harm may include physical, verbal, sexual, emotional, and even financial harm, whether active (abuse) or passive (neglect).

Unlike the first category of public health & safety, this second category is to some extent self-limiting because characterizing a group as vulnerable constitutes a loaded, and possibly contested and unwelcome, judgment about that group. As I discussed in Chapter 2, since children are the primary or archetypical vulnerable group, extending reporting to other groups analogously characterizes such groups as being like children.

with a reportable infectious disease poses a direct risk to others, and intervention can mitigate or eliminate the risk.” (Note, however, that they dispute that gunshot wounds meet this criteria at 1255.) (I used this quote in Martin, supra note 1137 at 195.) Recall also the description by Coughlan et al, supra note 1132 at 56, which makes this point a little less explicitly: Laws in this category “are based on some potential ongoing danger to the general public. If a health hazard, a person unfit to drive, or a criminal involved with the use of firearms is allowed to go uninvestigated, then further danger to new and unknown people will exist: accordingly, action is taken at an early stage.” [Emphasis added.]

1156 See Chapter 1, notes 106 to 114 and accompanying text.
1157 See Chapter 1, notes 106 to 114 and accompanying text.
1158 See Chapter 2, note 214 and accompanying text. See e.g. Coughlan et al, supra note 1132 at 57: “if mandatory reporting is justified in the case of elder abuse, it is because the child protection model is adopted as the appropriate
For both of these categories of purpose, the primary mechanism toward that purpose is very clearly intervention. Where the purpose is public health & safety, the state agency receiving the reports can intervene to reduce the risk to public health & safety. Where the purpose is protection of the vulnerable, the state agency can intervene to protect a vulnerable person from abuse or neglect, and/or protect similarly situated persons from abuse and neglect from the same source. (For example, investigation of a report of child abuse may reveal that a parent is abusive and other children in the household are at risk.)

3.1.2 Moral harm or harm to values

Recall from Chapter 1 that the stated purpose of mandatory reporting of paid queue-jumping was to protect social values, specifically the value that medical care be allocated according to need. This law and this purpose do not appear to fit into either of these two categories as defined so far. Any harm would be somewhat indirect and remote, in that the prospective patients on the waiting list may incur physical (or psychological) harm from the additional delay. These waitlisted patients could be considered members of the general public or a poorer or more ethical group vulnerable to harm by richer or less ethical patients who can afford to, and are willing to, pay to queue-jump. This purpose of values protection, or the prevention of moral harm, would appear to be either a new third category or an expansion of the scope of harm in the first category. As a preliminary issue, reporting paid queue-jumping is fundamentally unlike the existing mandatory reporting laws for public health & safety in a key way: reportable diseases, non-compliance with treatment, having a medical condition affecting the ability to drive, and construction of the problem. Arguments in favour of mandatory reporting usually stress an analogy to child abuse, where mandatory reporting is routine.” [Citation omitted.] Similarly in the context of spousal abuse reporting, see e.g. Diana Ginn, “Mandatory Reporting of Wife Assault by Health Care Professionals” (1994) 17:1 Dal LJ 105 at 119: “[I]mposed intervention would also reinforce the stereotype that as a woman, and particularly as a battered woman, she is incapacitated and childlike.”

1159 See Chapter 1, notes 115 to 118 and accompanying text.
receiving a gunshot wound are not offences in themselves, whereas in paid queue-jumping the professional is reporting a provincial offence committed by the client.

The more fundamental challenge of moral harm is that such a purpose is incredibly broad, seemingly fitting almost any potential reporting obligation and so negating the value of a purpose-based approach. If paid queue-jumping is reportable because it threatens societal values, whatever poses an equal or greater threat to values arguably should for consistency, or at least could, also be made reportable. From a criminal law perspective, one would likely include at least the crimes of “stigma” or “moral opprobrium”, such as murder and attempted murder. Indeed, one might reasonably assume most crimes carry equal stigma as paid queue-jumping, especially because the provincial offence of queue-jumping carries a maximum penalty of merely $10,000 plus compensation or restitution, which is relatively low compared to criminal offences. Discrimination under the Human Rights Code would appear to have sufficient moral implications, especially since the Code’s preamble is values-based:

[R]ecognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…. [I]t is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities… having as its aim

1160 The act of driving while knowing that one has a condition making it unsafe to drive could constitute an offence under the Criminal Code, RSC 1985, c C-46 and/or Highway Traffic Act, RSO 1990, c H.8 [HTA]; see e.g. R v Robinson (2007), 45 MVR (5th) 118 at paras 55 and 58, [2007] OJ No 716 (QL) (SC): “A driver who fails to take his medication, or who may have a bipolar attack, if this is a partial or direct cause of resulting death in a motor vehicle accident cannot avoid the consequences, of the impairment respecting his ability to drive, by saying, he did not intend to place himself or to get into that condition…. The accused's guilt lies therefore in his historical awareness, that because of his diagnosed condition, he could be a danger to the public while driving…. he failed to take his medication, and knows or should know at this relevant time, he should not be operating his vehicle.” See also McLachlin J (as she then was) in R v Creighton, [1993] 3 SCR 3 at 387, 105 DLR (4th) 632; see also R v Jiang, 2007 BCCA 270 at para 17, 220 CCC (3d) 55.

1161 See e.g. the discussion in Hamish Stewart, Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms (Toronto: Irwin Law, 2012) at 166-187, where Stewart argues that these also include theft, terrorism, war crimes, and crimes against humanity. Stewart is critical of stigma based in public perception, and cites Alan Brudner for the point that if there is a disconnection between the legal definition of an offence and the public’s conception of the substance of that offence, it is preferable to use education to change the latter instead of rewriting the former: Stewart, ibid at 184, citing Alan Brudner, “Proportionality, Stigma, and Discretion” (1996) 38 Crim LQ 302 at 304. Recall also, from Chapter 1, the Criminal Code, ibid, s 50(1)(b), establishing the offence of failing to report a person who “is about to commit high treason or treason”. See Chapter 1, note 167 and accompanying text. As the only offences for which there is a duty to warn, treason and high treason could also be considered stigma offences.

1162 CFMA, supra note 1119, s 19. (The maximum penalty for a corporation is $25,000.) Stewart, ibid, mentions at 166 the relationships among subjective fault, stigma, and penalties.
the creation of a climate of understanding and mutual respect for the dignity and worth of each person.\textsuperscript{1163}

Moral harm could also extend reporting to purportedly undesirable activities that are not contrary to law, such as sex-selective abortion or late-term abortion – or even abortion itself. Moreover, legislators may invoke moral harm to target unpopular members of society, such as criminals or illegal immigrants.\textsuperscript{1164} For example, during the debates on mandatory gunshot wound reporting, some legislators fixated on criminals and gangsters.\textsuperscript{1165} A purpose of moral harm would be difficult to limit.

In comparison to physical harm and protection of the vulnerable, a threshold for non-trivial moral harm that would warrant mandatory reporting is inherently more contested and difficult to establish. Not only could moral harm justify a large number of reporting laws, which is contrary to the idea that these laws should be exceptional and not routine,\textsuperscript{1166} but it is amorphous enough to be not only highly contested but highly colourable as well. Even though there may well be conduct that is reprehensible for solely moral reasons, I argue that in itself that will usually be insufficient to soundly ground a reporting obligation. Thus, the appropriate scope of such a category would necessarily be narrow. While extreme enough moral harm would make a reporting obligation an appropriately proportional policy choice, a law with such a purpose is – all else equal – less defensible than a law with the purpose of public health & safety or protection of the vulnerable.

This weakness of moral harm as a purpose is also reinforced by \textit{Charter} jurisprudence. Moral harm is essentially a “broad, symbolic objectiv[e]”, which is problematic in a section 1 analysis:

\begin{itemize}
\item \textsuperscript{1163} \textit{Human Rights Code}, RSO 1990, c H.19, preamble.
\item \textsuperscript{1164} See e.g. Kent Roach, “The Varied Roles of Courts and Legislatures in Rights Protection”, in Murray Hunt, Hayley Hooper & Paul Yowell, eds, \textit{Parliaments and Human Rights: Redressing the Democratic Deficit} (Oxford: Hart, 2015) 405 at 407: “As the welfare state has shrunk and the economy has lurched from global crisis to global crisis, criminal justice and immigration policies have become the site of symbolic, expressive and at times utterly irrational and cruel politics.” See also 410: “As elected institutions, legislatures will have an incentive to minimise the rights of the truly unpopular, most notably those accused of crime.”
\item \textsuperscript{1165} See e.g. Martin, \textit{supra} note 1137.
\item \textsuperscript{1166} Recall Coughlan et al, \textit{supra} note 1132, as quoted in Chapter 1, note 211.
\end{itemize}
Precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation.1167

These problems – amorphousness, distortion, manipulation – apply equally to moral harm as a policy objective, even where Charter rights are not engaged. Where the primary purpose of a mandatory reporting law is to combat moral harm, it is best to be as specific as possible about the values at stake and the way in which the reportable occurrence contravenes those values. For example, mandatory reporting of paid queue-jumping was intended to protect a very specific moral value: that health care should be allocated by need instead of by ability to pay. Paid queue-jumping allocates health care by ability to pay, in direct contravention of that value. The more narrowly a moral or values-based harm can be articulated, the less problematic it will be as the primary purpose of a mandatory reporting law.

Moral harm is also problematic in that the primary mechanism appears to be punishment and deterrence, as opposed to intervention. Consider, for example, a mandatory reporting provision on paid queue-jumping within a statute that, like Ontario’s, makes paid queue-jumping an offence. If a patient is reported under this law, the primary mechanism toward the purpose of combatting moral harm seems to be charging the patient with an offence, so as to punish the patient and dissuade patients in general from paid queue-jumping in the future. There is no clear and specific ongoing risk that the stage agency can reduce or eliminate. That is, it is the punishment that appears to be the primary function of the law and the report.

Moral harm is not, however, necessarily problematic when it is an additional purpose for reporting obligations, alongside public health & safety or the protection of the vulnerable. The debate over mandatory gunshot wound reporting, though ostensibly about safety, also focused on detecting and punishing criminality. As described by one government legislator, “this is a bill that’s going to strengthen communities, be tough on crime and help to make gunshot wounds –

let’s say, the fallout or the after-effects – that much less dangerous.”

Similarly, a representative of the Ontario Police Association testified at committee that “[t]his legislation will enable police officers to investigate all incidents, gather intelligence, help to hold persons accountable, and hopefully prevent future acts of violence.”

This moral dimension is not necessarily a problem as an additional purpose, but it is insufficient in itself and may also cast doubt as to a law’s true purpose. Where the moral harm coincides with a real risk of physical harm to the general public, such as (arguably) with gunshot wound reporting, it should be the physical harm that justifies the reporting obligation.

It is important to recall here that mandatory gunshot wound reporting is the tip of the iceberg in the US, where mandatory reporting laws applicable to health professionals often include any injury that could be a result of a violent crime. The most defensible justification for such broad provisions is that the person who inflicted the injury (if indeed it was not self-inflicted) poses an ongoing threat to public safety and police are the appropriate state actors to investigate and intervene against such threat.

Where moral harm appears to be the basis for a reporting obligation, legislators and policymakers should be more specific about the root harm or wrongness, and fit the law into a category more narrow than simply “moral harm”. For example, I would argue for a more narrowly tailored category of purpose for reporting paid queue-jumping: fighting corruption. Acceptance of payment or consideration for special treatment, or differential treatment not related to medical factors, is essentially bribery. Like corruption of public officials more generally, bribery of health professionals – specifically, by payment for preferential access – reduces confidence in public health insurance and the health care system itself.

I recognize
that “public confidence”, like moral harm, can be a broad and empty concept, and that it also risks pandering to public fear and misconceptions and providing an excuse to target unpopular activities or services.\textsuperscript{1171} However, demonstrable corruption, including bribery, narrows this scope significantly to public confidence in fairness and priority based on medical need.

3.1.3 Affordability & sustainability of social services

Recall from Chapter 1 that affordability or financial harm, in the form of the unintended use of public funds, was the major purpose given for mandatory reporting laws on medicare eligibility fraud and legal aid eligibility fraud.\textsuperscript{1172} Some legislators also focused on the moral wrongness of such fraud. As stated above, the goals of detecting and punishing moral harm should carry little if any weight in themselves as purposes for mandatory reporting. The nature and effect of the underlying wrong, in contrast, are important. Similarly, it is important to distinguish the idea of “abuse” of social services or “abuse” of the generosity of taxpayers from the physical or other abuse of the vulnerable. However, arguably there is a narrower special wrongness about fraud against the public budget, i.e. “theft” of medicare or legal aid resources, somewhat analogous to the bribery and corruption of paid queue-jumping.

Putting aside the moral purpose of protecting taxpayers from “abuse”, affordability and sustainability – i.e., cost control – could arguably fit into the categories of public health & safety or protection of the vulnerable, but only with some stretching. Assuming a fixed budget for publicly-funded health care services, any use of those services for ineligible persons means those


\textsuperscript{1172} See Chapter 1, notes 120 to 129 and accompanying text.
resources are not available for eligible persons, resulting either in budget overruns or a denial of care. If it is the latter, then harm may result – plus, in either case, the increased demand for services will lengthen wait times and delay diagnosis and treatment, potentially resulting in medical harm. However, if the money saved from fraud prevention and detection is removed from the medicare budget and used to fund unrelated spending increases or tax cuts, protecting the public from harm is no longer a credible purpose. The other problem with putting this provision in the first category is that, as with reporting paid queue-jumping, in reporting the client for medicare eligibility fraud the professional is informing the government that the client has committed an offence. Alternately, this purpose of targeting financial harm could be considered a mechanism to protect the vulnerable, if the medicare-eligible population is considered vulnerable to the effects of resource use by the non-eligible. However, vulnerability by residence, as opposed to by financial means or medical need, seems to stretch the definition of vulnerability.

In contrast, mandatory reporting of legal aid eligibility fraud fits better into the category of protection of the vulnerable than into the category of public health & safety, albeit not readily. Use of legal aid resources by ineligible persons would result in delay and potentially a denial of services (assuming a fixed legal aid budget), but while inadequate legal representation can have significant consequences, the harm of a guilty verdict and incarceration is different in kind than the medical harm of delayed or denied diagnosis and treatment. Recall that the other reporting obligations that fit within public health & safety – disease diagnoses, non-compliance with treatment, inability to drive safely, and (arguably) gunshot wounds – are directed at a risk of physical harm, typically posed by the client. Any physical harm suffered during incarceration is indirect, and harm to the liberty interest is fundamentally different. This reporting obligation arguably fits better into the category of protection of the vulnerable than into the category of public health & safety; however, this vulnerability of the very poor to those who would misuse

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1173 Assuming that the conviction is not wrongful, and instead that the person had in fact committed the offence but would have received a lesser punishment with proper representation, a draconian and unsympathetic approach would be that any physical harm is arguably the person’s fault for being a criminal – “but for their own prior criminal activity these applicants would not have found themselves in Kingston Penitentiary where they were injured” (Re Sheehan and Criminal Injuries Compensation Board (1975), 5 OR (2d) 781 at 783, 52 DLR (3d) 728 (CA), leave to appeal to SCC refused, [1975] 1 SCR xii (the Court was quoting from the reasons of the Board)).
legal aid funds is more indirect than the vulnerability of children, animals, patients, or care home residents to abuse. Once vulnerability is indirect and via the medium of government resources, it could apply to virtually any misuse of public money. That is, vulnerability risks morphing into poverty, need for government services, a synonym for disadvantage – or even just rhetoric about protecting taxpayers.

3.1.4 Affordability and sustainability reimagined: preserving the integrity of social programs delivered by professionals

While it is possible to place medicare and legal aid eligibility fraud reporting in the purpose categories of public health & safety and protection of the vulnerable, respectively, these two provisions stretch the traditional boundaries of these categories by using indirect notions of harm and vulnerability. Making these categories broader by diluting their meaning diminishes their usefulness. A preferable and analytically cleaner approach is to recognize an independent additional category of purpose for mandatory reporting laws: preserving the integrity of social programs delivered by professionals. This approach would promote cohesiveness by uniting the seemingly similar medicare and legal aid ineligibility reporting in a single category, and reducing the strain on the boundaries of the first two categories. Moreover, the corruption-fighting purpose of reporting paid queue-jumping would fit easily into such a category. All three reporting obligations revolve around corruption or financial impropriety in social services delivered by professionals. Likewise, all three of these reporting obligations involve the professional informing the government that the client has committed an offence.

While integrity may seem somewhat open-ended, this particular concept of integrity – of social programs delivered by professionals – is fairly narrow. Its two core dimensions would be ensuring that social programs are accessed only by those who are eligible and in priority according to need.

This category, preserving the integrity of social programs delivered by professionals, reflects the obligation of professionals to the systems in which they work. For example, the parliamentary assistant to the Minister of Health cited the gatekeeper role in support of mandatory reporting of medicare eligibility fraud: “[i]t is important to recognize that since doctors are one of the
gatekeepers of our system, they should be active in fighting health card abuse.” Furthermore, a subset of this category could simply be understood as the responsibility of the health or legal professional to not be complicit in fraudulent billing, part of the professionals’ broader responsibility to the system as a whole. Once the professional becomes aware that the patient/client is not eligible, it would be unethical for that professional to continue to submit claims and accept payment for services provided to that person.

This third category can be a colourable justification for other motives, more so than the two main categories of public health & safety and protection of the vulnerable. A good example is the Arizona bill on mandatory reporting of immigration status. The bill’s sponsor claimed that affordability was the reason for the reporting – i.e., that the state government could no longer afford to pay for hospital services for uninsured illegal immigrants. However, the bill was part of a package targeting undocumented persons in several different ways – a package that strongly suggested opposition to illegal immigration per se was the real purpose.

3.1.5 Harm to the economy

Recall from Chapter 1 that legislators described the primary purpose of mandatory reporting of animal health events as the prevention of harm to the economy. This economy-harm purpose of reporting is challenging to categorize. It does not seem to readily fit into the two established categories identified above. Although it is true that a strong economy generates the tax revenue for government spending, including spending on health care and other social services, the asserted connection between the economy and “the very well-being of all Ontarians” is in itself too remote to be useful or even meaningful: by that logic, any reporting obligation that

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1175 See Chapter 1, note 128 and accompanying text.

1176 See Chapter 1, note 131.

1177 See Chapter 1, notes 132 to 136 and accompanying text.

promotes economic growth or increases government revenue could be considered as supporting public health & safety. Thus, like prevention of moral harm, prevention of economic harm is a broad and amorphous purpose.

Mandatory reporting of animal health events seems to have two levels of purposes: one being the protection of the economy, and one being animal and human health. The reason that animal disease hurts the agriculture industry, and thus the economy, is that it can cause human disease or further animal disease. Indeed, during the debates on this mandatory reporting law, the parliamentary assistant specifically mentioned the past economic impact of a BSE (bovine spongiform encephalitis, “mad cow” disease, linked to Creuzfeld-Jacob disease in humans) diagnosis. Diseases such as BSE and avian flu pose a threat to human health in the same way as more common animal diseases affecting humans but not often connected to the viability of the agricultural industry, such as rabies. This raises a fundamental question: does the endpoint or motivation for the reporting obligation alter its function or purpose? Mandatory reporting of reportable diseases in humans could conceivably be instituted to promote tourism and local commerce – but so long as it did so by protecting human health, the underlying purpose and ultimate effect would presumably be the same.

Like protecting morality, protecting the economy is simply too open-ended to serve as a valid purpose to warrant mandatory reporting from a policy perspective. If there were a subset of circumstances that posed such a threat to the economy that they could truly cripple the state’s ability to provide basic services necessary for public health & safety or protection of the vulnerable, such as by causing the collapse of the medicare system, then they would be better placed in one or both of those categories of purpose. As with morality, recognizing a general

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1180 The loss to tourism from SARS has been estimated at $350 million: Canada, National Advisory Committee on SARS and Public Health, Learning from SARS: The Renewal of Public Health in Canada (Ottawa: Health Canada, 2003) at 211 (Chair: Dr David Naylor), online: Public Health Agency of Canada <www.phac-aspc.gc.ca/publicat/sars-sras/pdf/sars-e.pdf>. Indeed, the impact of SARS on tourism is considered to have contributed to the too-early reduction of special precautions: see e.g. Ontario, Commission to Investigate the Introduction and Spread of SARS in Ontario, Final Report: Spring of Fear (Toronto: Queen’s Printer for Ontario, 2006), vol 2 at 6 (Commissioner: Justice Archie Campbell), online: Archives of Ontario <www.archives.gov.on.ca/en/e_records/sars/report/index.html >.
category of purpose in order to leave room for the most extreme cases creates the potential for abuse and diminishes the utility of the framework for policymaking. However, like morality, the mere fact that economic harm is one purpose – even the primary purpose – does not necessarily make a reporting obligation illegitimate, so long as public health & safety or protection of the vulnerable is also a true purpose. Thus, mandatory reporting of animal health events fits into the first purpose of public health & safety even though an equally important, or possibly even more important, result is protection of the economy.

3.1.6 Framework component one: Three purposes for mandatory reporting are more defensible

I conclude that there are not only two, but actually three, defensible categories of purpose for mandatory reporting laws: public health & safety, protection of the vulnerable, and the integrity of social programs provided by professionals. Protecting morality is, in itself, too open-ended a category of purpose to be useful. Economic harm is also problematic. There is the possibility that new categories of purpose may be recognized in the future. However, if a proposed mandatory reporting law cannot fit into one of these three categories of purpose, it should be regarded as less defensible.

3.2 Component two: The professional’s special ability and/or opportunity

Having identified the purpose of the law in the first component, the next question is why the members of the specific profession or professions should be required to report. Reporting is justifiable from this perspective only if the professionals have a special ability and/or opportunity to detect the reportable occurrence. By special, I mean unusual or rare or unique. A special ability relates to professional training and skills, whereas a special opportunity relates to the services that the professional provides. For example, Dickens notes in the context of child abuse
that professionals are “possessed of special skills, opportunities for detection or social responsibilities.” Physicians also arguably have a unique ability to judge whether particular injuries are indicative of abuse. Likewise, physicians have the unique professional – and legal – ability to detect reportable diseases and “condition[s] that may make it dangerous for the person to operate a motor vehicle” because their scope of practice is “the assessment of the physical or mental condition of an individual and the diagnosis, treatment and prevention of any disease, disorder or dysfunction”, and they are authorized by statute to “[c]ommunicat[e] a diagnosis identifying a disease or disorder as the cause of a person’s symptoms”. Likewise, optometrists have an ability to detect “eye condition[s]” affecting the ability to drive because their scope of practice is “the assessment of the eye and vision system and the diagnosis, treatment and prevention of” eye and vision problems, and they are authorized by statute to “communicate” the corresponding diagnosis. Both physicians and optometrists also have a special opportunity to detect these conditions because patients consult them in order to receive medical and vision services. For these same reasons, health professionals have a special ability and opportunity to identify children in need of protection, patients that have been sexually abused by other health professionals, and abused or neglected residents of care homes, as do veterinarians for abused and neglected animals. Similarly, in the words of the CFSA,

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1182 Lange, supra note 1120 at 6.
1183 HTA, supra note 1160, s 203(1). Under the amended section 203 (as amended by the Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer), 2015, SO 2015, c 14, s 55), this description defines the scope of discretionary reporting, with mandatory reporting being restricted simply to prescribed conditions. (This amendment is not yet in force at the time of writing.)
1185 Ibid, s 4, para 1.
1186 HTA, supra note 1160, s 204(1). (This language does not appear in the amended section 203 (as amended by the Transportation Statute Law Amendment Act (Making Ontario’s Roads Safer), 2015, supra note 1183) in which optometrists and eye conditions are not specifically mentioned – however, they will presumably be prescribed persons and conditions, respectively. This amendment is not yet in force at the time of writing.)
1187 Optometry Act, 1991, SO 1991, c 35, s 3, and s 4, para 1. To be more precise, section 3 specifies not “eye and vision problems” but “(a) disorders of refraction; (b) sensory and oculomotor disorders and dysfunctions of the eye and vision system; and (c) prescribed diseases”.
1188 While it is reasonable to assume that a veterinarian is able to identify animal abuse and neglect – in the same way as one presumes that a physician is able to identify child abuse and neglect – that assumption may be incorrect. See Jennifer A Woolf, “How Can Veterinarians Be Reporters of Animal Abuse When They Are Not Taught to Recognize It?” (2015) 247:12 J American Veterinary Medical Assoc 1363.
“person[s] who perfor[m] professional or official duties with respect to children”1189 – not only health professionals, but also teachers, lawyers, and clergy – have a special opportunity, and possibly a special ability depending on their training and skills, to detect that children are in need of protection.1190 The regularity with which some of these professionals, such as teachers and clergy, interact with children may mean that they will suspect child abuse earlier than physicians, i.e. “before medical care is demanded or received”.1191

The special ability of professionals to perform tasks within their legal scope of practice may sometimes be contested. For example, an editorial in the *Journal of the American Medical Association* once questioned why physicians alone should be required to report gunshot wounds: “ordinarily, medical or surgical skill is not required to determine when a person is suffering from a gunshot wound or other injury due to a firearm.”1192 However, professional skill gives a level of certainty that laypersons might not be able to provide. Moreover, physicians have a special opportunity to observe gunshot wounds when persons with such wounds present for treatment.

Other reporting obligations involve information that may require no special skill to detect, but that only professionals will have the opportunity to observe. Professionals providing social services, and their staff, are best positioned – and likely uniquely positioned – to detect social service eligibility fraud, whether health professionals providing publicly insured health services or lawyers providing legal aid services. See for example the comments of the parliamentary assistant to the Minister of Health on the reporting of medicare eligibility fraud:

> I think it's fair to say that it's felt that without a system of required reporting you're not going to have an effective enforcement procedure with respect to the whole question of health card fraud, *because the only people who are going to be aware of such fraud are those who are actually involved in or related to the delivery of the service. It's not going to come to the attention of anyone other than those directly related*.1193

1189 *CFSA*, *supra* note 1119, s 72(5).
1191 Lange, *supra* note 1120 at 8.
1193 Wessenger (*Hansard*), *supra* note 1136 at S-403 [emphasis added].
Similarly, health professionals and their staff are well positioned to detect paid queue-jumping or attempted paid queue-jumping, as they are the ones to which payment would be offered. This special opportunity ties closely into the new category of purpose I developed above, preserving the integrity of social programs delivered by professionals.

Mandatory reporting laws will present a problem at this component where the professional lacks the ability to identify the reportable occurrence. For example, though health professionals have a unique *opportunity* to detect health-care eligibility fraud, there was some concern that they may not have the *ability* to detect such fraud. Recall that health care eligibility in Ontario is based on residence. It is not obvious, absent a specific disclosure from a patient that he or she is not a resident, what the indicators of fraud are:

> We would respectfully ask the committee how they wish this reporting requirement to be implemented. A new patient walks into the doctor's office. What should cause the doctor to suspect that the person is not a resident? How does the physician then determine whether this person is a resident? Based on his or her belief that the patient obviously comes from another country? Should the doctor ask for proof of citizenship or immigration status before he or she accepts the person as a patient?\(^{1194}\)

Similarly, there was some concern that ethnicity could be used as a proxy for possibility of eligibility fraud.\(^{1195}\)

Most of all, the idea of a special opportunity to observe cannot legitimately include the ability to coerce information out of a client by denying access to essential services, i.e. making that access conditional on revealing particular information. An extreme example of such coercion is the proposed Arizona proposal, under which a hospital must inquire into every patient’s immigration


\(^{1195}\) See e.g. Dickson (*Hansard*), supra note 1150 at S-414: “if residency is the major determinant of insurability under our system, then clearly immigrants to this province are the ones who are automatically going to be front and centre in this whole process.” See also the comments by one legislator, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 35th Parl, 3d Sess, No 95B (8 December 1993) at 4760 (Jim Wilson): “physicians kept asking us: ‘Well, on what grounds would we suspect someone of health card fraud? Would it be their ethnicity? Would it be what part of the province they lived in? Exactly how are we supposed to judge on reasonable grounds that the person appearing before us in our office might have a fraudulent card, given the limited information on the card itself which makes it virtually impossible to tell who the person is?’”
status and report undocumented patients to immigration authorities or police. The obligation to positively inquire, especially where it would not otherwise be necessary or relevant in the course of service delivery, is an indicator of coercion and harnessing the professional for convenience.

However, efficiency – absent coercion – is not necessarily a red flag. Recall from Chapter 3 that there is a reduced reasonable expectation of privacy when operating a motor vehicle. I argued that there should similarly be a reduced expectation in one’s ability to operate a motor vehicle. I noted that because driving is a privilege and not a right, and is highly regulated, the state could require regular assessments by its own physician or optometrist. Substituting a reporting obligation on all physicians and optometrists is, on one level, a matter of convenience and efficiency – not only in terms of cost, but also in terms of timeliness and thus effectiveness. This kind of convenience is not necessarily problematic.

This idea of a special ability and/or opportunity, whether unusual or rare or unique, is inherently relative and so includes a consideration of alternatives, i.e. alternative ways to detect the reportable occurrence. In this way, it is analogous to the minimal impairment stage of the Oakes test for justification of a Charter infringement. Mandatory reporting is an invasive and problematic way for the government to gather this information, in its impacts as assessed in previous chapters on autonomy, privacy, access to services, and professional values. If there is another effective mechanism for detection that does not involve harnessing the professional and

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1196 I discuss further below, in the context of the third component of the framework, how such reporting is irrelevant to the purpose of the profession. See below under heading 3.3.1.

1197 See also e.g. Canada v FLSC, supra note 1121 at para 1, where a red flag for a mandatory retention law is that it includes information not necessary to the provision of services: “They [the challenged laws] require lawyers, on pain of imprisonment, to obtain and retain information that is not necessary for ethical legal representation and provide inadequate protection for the client’s confidences subject to solicitor-client privilege.” [Emphasis added.]

1198 See Chapter 3, note 616 and accompanying text.

1199 See e.g. HTA, supra note 1160, s 31(a): “The purpose of this Part is to protect the public by ensuring that … the privilege of driving on a highway is granted to, and retained by, only those persons who demonstrate that they are likely to drive safely”

the relationship of trust – that is, that the professional does not have a special ability or opportunity to obtain this information – then a mandatory reporting law is a questionable choice.

This second component of the framework should also consider the triggering threshold for reporting. If reporting is based on some special ability or opportunity that the professional has, then a defensible triggering threshold should reflect the level of certainty with which a professional should be able to identify that occurrence.

3.2.1 Framework component two: A mandatory reporting law is less defensible if the professionals involved do not have a special ability or opportunity to detect the reportable occurrence, where “special” is unusual, rare or unique

As a matter of description, mandatory reporting laws typically do involve professionals with a special ability and/or opportunity to detect the reportable occurrence; indeed, this seems logical and even intuitive. However, my argument is that this typical feature is actually a normative requirement for good lawmaking. If it is not met, the mandatory reporting provision will be markedly less defensible. The power to coerce information, by withholding essential services, should not be considered a special ability or opportunity.

3.3 Component three: The purpose of the profession versus the purpose of reporting

The third framework component is the connection between the purpose of the reporting obligation (as identified at the first component) and the purpose of each of the professions the obligation covers. This connection can be separated into three categories: the purpose of the reporting obligation is consistent with the purpose of the profession; the purpose is unrelated to the purpose of the profession; and the purpose is inconsistent with or contrary to the purpose of the profession. (The distinction between these second and third categories may blur, as I will discuss below.) In addition to these three, there is a possible fourth category: the professional, as a licensee of restricted powers by the state, has some special responsibility to promote the purpose of the reporting obligation.
This framework will raise similar considerations as a *Charter* analysis of professional values. The essential question is whether the purpose of the law corresponds to a purpose of the profession. As under the *Charter* analysis,\(^{1201}\) I recognize that there can be disagreement over the purpose of any profession, and that there can also be disagreement both within and outside the profession on what that purpose entails in any given situation.

3.3.1 Three categories of purpose-purpose connection

In many cases, the purpose of the reporting obligation will be consistent with the purpose of the profession. Promoting health and safety through the prevention, diagnosis and treatment of injury and disease is generally understood to be the purpose of medicine and the other health professions.\(^{1202}\) Mandatory reporting laws on reportable diseases and conditions affecting the ability to drive safely are both fairly consistent with this purpose. To the extent that gunshot wound reporting is truly aimed at public health & safety, it shares the same consistency of purpose. Similarly, the protection of vulnerable persons – such as children in need of protection, abused or neglected residents of care homes, sexually abused patients, or abused or neglected spouses or seniors – is consistent with this professional purpose. The reporting of children in need of protection also aligns with the well-being of children as the purpose of the teaching profession. In contrast, the protection of children, residents of care homes, and other vulnerable persons does not appear to match the purpose of the legal profession as a whole. While the best interests of the child is a major principle of child protection and family law,\(^{1203}\) that does not necessarily translate into the purpose of the legal profession in these practice areas, and certainly not the purpose of the rest of the legal profession. Parallel to the health professions, the

\(^{1201}\) See Chapter 5, notes 984 to 991 and accompanying text.

\(^{1202}\) See e.g. *Medicine Act*, *supra* note 1184, s 2: “The practice of medicine is the assessment of the physical or mental condition of an individual and the diagnosis, treatment and prevention of any disease, disorder or dysfunction.”

\(^{1203}\) See e.g. *CFSA, supra* note 1119, s 1(1): “The paramount purpose of this Act is to promote the best interests, protection and well being of children.” See also *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 10, [2004] 1 SCR 76, McLachlin CJ for the majority: “The ‘best interests of the child’ is widely supported in legislation and social policy, and is an important factor for consideration in many contexts.”
protection of abused and neglected animals and the prevention, diagnosis and treatment of animal diseases and health events are both consistent with the veterinary profession’s goal of animal health and welfare.

In some cases, the purpose of the reporting obligation may appear to be unrelated or even contrary to the purpose of the profession, although the distinction may not always be clear. Immigration status, for example, is unconnected to human health, and immigration enforcement is irrelevant to the goals of the health profession. (There is a difference between immigration status, which is a legal categorization, and the geographic area where a person has lived or travelled, which may have specific implications for health and appropriate medical treatment.) Indeed, the presumptive result of reporting an undocumented person to police or immigration authorities is deportation, which could interfere with prompt medical treatment. Similarly, reporting injuries indicative of criminality to the police furthers law enforcement and punishment, but any connection to health is at most indirect – if investigation, and potential prosecution and incarceration, do indeed prevent further harm. The affordability of social programs and the prevention of fraud are, in and of themselves, unrelated to the purposes of the legal and medical professions that may use those programs to provide services.

3.3.2 A fourth category of connection: Professional duty to the state

Separate from the purpose of the profession, professionals may have some obligations as delegates or licensees of the state exercising restricted powers. These obligations may be related to the particular profession’s purpose and scope of practice. Related obligations could include preserving the integrity of social programs under which the professional provides services, such

1204 This is consistent with the common concern in the literature that mandatory reporting laws require professionals, especially health professionals, to perform the functions of other actors, particularly the law enforcement role of police – functions in which they may not have expertise or training. See e.g. Merrill A Pauls & Jocelyn Downie, “Mandatory Reporting of Gunshot Wounds: Rebuttal” (2004) 170:8 Can Medical Assoc J 1258 at 1258: “We encourage physicians to support police investigations within the context of current Canadian laws and professional regulations. Although Ovens claims that he is not advocating for physicians to become crime fighters, that is exactly what we believe a law for mandatory reporting of gunshot wounds would do.”
as medicare and legal aid. For example, recall that the parliamentary assistant to the Minister of Health cited the gatekeeper role in support of mandatory reporting of medicare eligibility fraud: “It is important to recognize that since doctors are one of the gatekeepers of our system, they should be active in fighting health card abuse.”\textsuperscript{1206} Profession-related obligations could also include protecting the public from harm by unscrupulous members of the profession.\textsuperscript{1207} Such responsibilities are consistent with professional obligations to the profession or to public institutions.\textsuperscript{1208}

There could also be obligations that transcend the nature of the profession; that is, some occurrences may be so bad or wrongful that all professionals have a special obligation to report them, such as child abuse. Thus, for example, while the protection of vulnerable persons does not correspond closely to the purpose of the legal profession as a whole, lawyers may nonetheless have some obligation to report abuse and neglect as professionals exercising power delegated by the state. However, this type of obligation, like the purpose of preventing moral harm, risks being open-ended. As discussed in Chapter 1, there is no legal duty to report past crime, either on

\textsuperscript{1205} See e.g. one legislator’s question to a representative of the Ontario Medical Association during public hearings on mandatory reporting of medicare eligibility fraud (Ontario, Legislative Assembly, Social Development Committee, \textit{Official Report of Debates (Hansard)}, 35th Parl, 3d Sess, No S-16 (19 October 1993) at S-413 (Stephen Owens)): “In terms of whether or not it’s a care issue, perhaps it’s not a care qua care issue in the strictest sense, but ultimately, if there is not some effort to reduce what is viewed as a serious problem of fraud, then effectively care will be affected at the end of the day, so I guess I need some clarification on why you feel as an association that your members, who derive their income from a particular system -- why there is what appears to be, and I don’t want to put words in your mouth, an unwillingness to accept responsibility for ensuring that it is an efficacious system and in terms of ensuring that people who are entitled to care get the best care possible and that those who, for whatever reason, are not entitled to receive care in this province do not receive the medical services.” [Emphasis added.]

\textsuperscript{1206} Wessenger (\textit{Hansard}), supra note 1174 at S-390.

\textsuperscript{1207} See e.g. the submission by the Ontario Board of Examiners in Psychology on mandatory reporting of sexual abuse by health professionals: “We do nevertheless endorse the view that professionals should take responsibility for each other.” (Ontario, Legislative Assembly, Standing Committee on Social Development, \textit{Official Report of Debates (Hansard)}, 35th Parl, 3d Sess, No S-25 (30 November 1993) at S-606 (Dr Catherine Yarrow)).

\textsuperscript{1208} See e.g. Federation of Law Societies of Canada, \textit{Model Code of Professional Conduct} (Ottawa: FLSC, 2009), last revised 2016, rr 5.1-5 (“A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.”) and 7.2-1 (“A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.”), online: \textless flsc.ca/national-initiatives/model-code-of-professional-conduct\textgreater. See also e.g. \textit{Law Society Act}, RSO 1990, c L.8, s 29: “Every person who is licensed to practise law in Ontario as a barrister and solicitor is an officer of every court of record in Ontario.”
the general public or on professionals; indeed, as discussed in Chapters 3 and 5, reporting crime may violate professional ethics. Thus, for example, it would be difficult to argue that professionals have an obligation to report illegal immigration in the same way that they have an obligation to report children in need of protection. Furthermore, note that this fourth category would truly become meaningless if one asserted a professional responsibility to obey the law.

This fourth branch, of a professional duty to the state, would be least relevant for clergy. While I have considered clergy alongside health professionals and lawyers, because of the relationship of trust and the importance of confidentiality, clergy have a much more tenuous connection with the state than regulated professions.

3.3.3 Challenges of this four-category purpose-purpose approach

This approach, however, poses a significant challenge: how to determine the purpose and obligations of a given profession. The view of the profession may differ from that of the public or politicians, and there may be dispute within the profession itself (as discussed, for example, in Chapter 5). A major focus of this disagreement is often the responsibilities of the professional to the individual client, the public as a whole, and the state. This was a key element of the debate over mandatory gunshot wound reporting, best demonstrated in the comments by one Ontario legislator:

I find it passing strange that you, as a professional body, feel that if someone had been engaged, for example, in a murder, in a homicide, and was wounded in the carrying out of that homicide and is in your hospital, you’d feel no obligation to the community or in terms of broader public safety with respect to a requirement to contact the police about that individual in your institution. I find that disturbing…. I have a problem with that and your obligation and sense of feeling for the community and others who might be involved.

1209 See Chapter 1, notes 155 to 161 and accompanying text.
1210 See e.g. Chapter 3, note 571 and accompanying text; Chapter 5, notes 990 and 995 and accompanying text.
1211 See Chapter 5, notes 985 to 987 and accompanying text.
Recall from Chapter 5 that the medical profession itself was divided on the issue,\textsuperscript{1213} with some physicians supporting mandatory reporting to promote public health & safety and some opposed in order to maintain patient trust and confidentiality. Similarly, there may be disagreement about whether there is an individual or collective responsibility to protect the public from members of one’s profession.\textsuperscript{1214}

If a mandatory reporting law clashes with one or more conceptions of the profession’s purpose, a more practical problem will be compliance.

3.3.4 Framework component three: A mandatory reporting law is less defensible if the purpose of the reporting is not consistent with the purpose of the profession

Because of disputes over the purpose and responsibilities of the professions, competing purposes may be articulated for each profession. As such, this component is the least stringent of the four, but the most likely to crystallize opposition to the law. If the purpose of the reporting obligation is unrelated or contrary to the purpose of the profession, or if the purpose of the profession is contested and there is no accepted purpose that aligns with the purpose of reporting, or if it is necessary to cast the reporting as a professional obligation to the state, the proposal should be regarded as less defensible.

\textsuperscript{1213} See Chapter 5, notes 985 to 987 and accompanying text; Martin, supra note 1137.

\textsuperscript{1214} See e.g. Yarrow (Hansard), supra note 1207. Note that to the extent that this involves legal obligations to report colleagues who are incompetent or incapacitated, this is beyond the scope of mandatory reporting laws as I have defined the phrase for this thesis.
3.4 Component four: The impact of reporting on the professional-client relationship and the relative value of that relationship

The first three components of the framework, as I have set them out, consider the purpose of the mandatory reporting law, the reasons why a given profession is a suitable target of that law (via members’ special ability or opportunity to detect the reportable occurrence), and the compatibility of the law’s purpose with the purpose of the profession. These three components provide an incomplete framework on their own, insofar as they do not directly consider the social value of the particular profession and the likely short- and long-term impact that a reporting obligation will have on the professional-client relationship and thus public trust in, and utilization of, that profession. To incorporate these elements, I use as a fourth component the impact of reporting on the professional-client relationship and the relative value of that relationship. This component has some overlap with the four-part Wigmore test for case-by-case privilege in the law of evidence, as set out in R v Gruenke:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.\(^{1215}\)

Justice McLachlin (as she then was) in 1997 rephrased the third step to “in the public good”, instead of “in opinion of the community”.\(^{1216}\) The question underlying the test for privilege closely parallels a relevant question underlying the evaluation of a mandatory reporting law. As

\(^{1215}\) Gruenke, supra note 1121 at 284 [emphasis in original source, citation omitted]; re-stated in M(A) v Ryan, [1997] 1 SCR 157 at para 20, 143 DLR (4th) 1, McLachlin J as she then was for the majority: “First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be ‘sedulously fostered’ in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.”

\(^{1216}\) Ryan, ibid at para 20.
the Wigmore test considers impeding the truth-seeking and fact-finding function of a trial in order to protect a socially valuable relationship, so does this fourth framework component consider impeding the information-gathering function of mandatory reporting to protect a socially valuable relationship.

A mandatory reporting law applies to an entire class of situations defined by a particular profession and particular kinds of information. The long-term impact on the profession thus becomes particularly important. This fourth component incorporates deterrence, as well as the general community trust in, and effectiveness of, the profession as a whole. Critically, this component requires considering the impact of a given mandatory reporting law in the context of whatever existing mandatory reporting laws apply to that profession. It is the cumulative impact, not the impact of a single mandatory reporting law in a legal vacuum, that should be determinative.

I emphasize here the long-term impact on trust in the profession because that is the most tangible and most harmful negative effect of a mandatory reporting law. The deterrence impact that I discussed in Chapter 4 applies to all mandatory reporting laws and is, relatively speaking, more important than the autonomy impact of mandatory reporting laws on protection of the vulnerable that I discussed in Chapter 2. This deterrence impact is also, as I acknowledged in Chapter 3, directly related to the privacy impact.

1217 See Gruenke, supra note 1121, e.g. at 295, L'Heureux-Dubé J (concurring): “One of the primary aims of the adversarial trial process is to find the truth…. If the aim of the trial process is the search for truth, the public and the judicial system, must have the right to any and all relevant information in order that justice be rendered. Accordingly, relevant information is presumptively admissible. Exceptions may be found both in statutory form, and in the common law rules of evidence, which have developed in order to exclude evidence that is irrelevant, unreliable, susceptible to fabrication, or which would render the trial unfair. Courts and legislators have also been prepared to restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy. The latter are the source of privileges for certain private communications.”
3.5 A four-component framework for evaluating a mandatory reporting law

These four components together provide a thorough but straightforward policy framework for evaluating a proposed mandatory reporting law. Where a component is not satisfied, the proposal is less defensible but not necessarily inappropriate. The more components that are not satisfied, the less defensible the proposal will be. The framework allows the identification and articulation of the specific points of controversy for any given proposal, which facilitates more meaningful discussion even if it does not result in consensus.

3.6 Modifying the template

If policymakers determine that a proposed mandatory reporting law would be unacceptable based on the result of the framework policy analysis, that proposal can be modified to be more acceptable. As described in Chapter 1, mandatory reporting laws follow a fairly standard template with a few existing modifications: to anonymize reporting by omitting the client’s name from the report (or including the name only with the client’s permission); to make reporting discretionary instead of mandatory; to place the reporting obligation on the institution instead of on the professional; to omit the offence provision for non-compliance; and to require not reporting but record retention for future inspection by a state agency. In Chapters 2 through 5, I considered how these modifications may decrease the impact on Charter rights. There are also other modifications to the template that I suggested in Chapter 2 and Chapter 3: restricting reporting to situations where there is a risk of future harm; restricting reporting, where the reporting is for the benefit of the client, to clients lacking capacity or voluntariness; increasing the triggering threshold; adding oversight mechanisms; and adding limitations on use. I will briefly assess the impact of both sets of modifications on the outcome of the four-component policy framework.

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1218 See Chapter 1, note 18 and accompanying text (template) and notes 46 to 66 and accompanying text (modifications).
The existing modifications are unlikely to affect the policy framework analysis. As I have suggested in previous chapters, several of these modifications have essentially no impact or no positive impact. Discretionary reporting allows individual professionals to honour their values by electing not to report, but the remaining possibility of reporting does not alter the effects on the client’s autonomy or privacy, or the deterrence effect on access – indeed, it increases uncertainty for clients. Similarly, discretionary reporting does not affect any of the four components: the purpose of reporting, the special ability or opportunity of the profession, the connection between the purpose of reporting and the purpose of the profession, or the impact on the professional-client relationship. Placing the reporting obligation on the institution instead of the professional is essentially a shell game that only appears to change the impact on the professional-client relationship. Similarly, omitting an offence provision for failure to report may be a goodwill gesture towards the professions, but raises more questions than answers, and only changes the calculus if the absence of an offence provision dramatically reduces expected compliance. Mandatory recording and retention, as opposed to mandatory reporting per se, is essentially an administrative modification with no substantive impact – other than introducing a possibility that the records will never be requested.

Anonymized reporting, so long as the anonymization is effective and trusted, dramatically changes the impacts on autonomy, privacy, access, and professional values (especially confidentiality) – but only at the cost of dramatically reducing the utility of the mandatory reporting law. As for the framework, anonymization dramatically reduces the impact on component four, the impact on the professional relationship. However, anonymization may interfere with the mechanism of reporting and dramatically reduce its utility. Thus the purpose, the focus of the first component, will be compromised.

My proposed modifications would improve the outcome of the policy analysis, mostly by narrowing the circumstances in which the mandatory reporting law would apply. Restricting reporting to situations where there is a risk of future harm constrains reporting to the subset of occurrences where investigation and intervention will be most meaningful. At the first component, this modification clarifies that intervention is the mechanism of the law; at the third component, it makes the purpose of the law more consistent with the purposes of most professions, especially health professions; and at the fourth component, it reduces the negative impact on public trust in the profession. Similarly, restricting reporting to clients lacking
capacity or voluntariness (where the reporting is for the benefit of the client) constrains reporting to a more defensible subset of occurrences, reducing the negative impact at the fourth component. Increasing the triggering threshold reduces the risk of false positives and thus reduces the negative impact at the fourth component. My last two modifications, adding oversight mechanisms and limitations on use, should improve the public perception of these laws, and thus also reduce the negative impact at the fourth component. Thus, all of my modifications should be considered for any proposed mandatory reporting law.

4 Application of the framework

Having set out my policy framework, I will now demonstrate how it would apply to several different proposals for mandatory reporting laws that have not yet been adopted in Canada.

4.1 Restricted dog breeds

The government of Ontario banned pit bulls in 2005, prohibiting their ownership, importation, and breeding but grandparenting existing dogs with restrictions.\(^{1219}\) However, one measure that was not contained in the bill was requiring veterinarians to report pit bulls brought for treatment.

A Charter analysis of this proposal would not be very helpful. The autonomy analysis under section 7, as discussed in Chapter 2, would be inapplicable both because a dog has no legal interests and because reporting is not for the benefit of the dog. Similarly, the dog has no legal privacy interest under section 8 as discussed in Chapter 3. While the owner may claim a privacy interest under section 8 as discussed in Chapter 3. While the owner may claim a privacy interest under section 8, the owner is unlikely to have a reasonable expectation of privacy in the dog, and thus the owner’s section 8 interests are not engaged.\(^{1220}\) (In particular, while the owner may have a relationship of trust with the veterinarian, that relationship and trust is lesser than the


\(^{1220}\) See Chapter 3 under heading 2.7.
owner would have with a health professional; the information is not in the owner’s biographical core; the dog and its breed are in public view; and the search is not particularly invasive.) While the reporting law may deter the owner from seeking veterinary care for the dog – deterrence by proxy, as discussed in Chapter 4 – neither the owner nor the dog has a Charter interest in receiving veterinary services. The strongest Charter claim would be that the law infringes the freedom of conscience of the veterinarian under section 2(a), as discussed in Chapter 5, for reasons I will address below. However, given the importance of the purpose – public health & safety – such an infringement would appear to be readily justifiable under section 1. Thus, the Charter analysis would not provide much guidance about the proposed law.

In contrast, the four-component policy analysis would better identify potential problems with this mandatory reporting law. This law would not be problematic at the first and second components of the framework. The purpose of the ban, which mandatory reporting would further, was squarely public health & safety. The Attorney General stated that the ban

responds to the growing alarm of Ontarians over the aggressiveness and danger of these dogs; the danger that these dogs pose to public safety; the danger that these dogs pose to other animals; and the imperiling of the safety of our streets, our parks and our communities…. This is real; it is not just fear. It is fear based upon real harm caused by pit bulls against animals and victims…. This is real, and we are going to protect Ontarians in the province of Ontario.1221

In a subsequent legal challenge, the Ontario Court of Appeal observed “[t]here is no dispute that the legislative purpose of the pit bull provisions is to reduce, and ultimately to eliminate, the risk of pit bull attacks in Ontario.”1222 The mechanism of reporting is intervention to reduce the risk, i.e. to destroy the animal. Like with animal abuse reporting, a downstream consequence may be that the owner is charged with a provincial offence, but the immediate focus is the risk itself. At the second component, veterinarians have a special ability to identify particular breeds and a special opportunity to do so when dogs are brought for treatment. This ability is demonstrated by the ban’s provision, upheld by the Court of Appeal, that a veterinarian’s written identification of

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1221 Ontario, Legislative Assembly, Official Report of Debates (Hansard), 38th Parl, 1st Sess, No 78A (26 October 2004) at 3736 (Hon Michael Bryant).
1222 Cochrane v Ontario (Attorney General), 2008 ONCA 718 at para 19, 92 OR (3d) 321, Sharpe JA, with Laskin and Cronk JJA concurring [Cochrane].
a dog as being a pit bull is “proof, in the absence of evidence to the contrary, that the dog is a pit bull”.

Problems begin, however, at the third component. If one assumes that the purpose of the veterinary profession is the health and well-being of animals, and given that the likely result of reporting is the destruction of the dog, reporting is inconsistent with the purpose of the profession except to the extent that a pit bull poses a danger to other animals.1224 There is a serious question about compliance, all the more so given the strong opposition to the pit bull ban by veterinarians’ groups.1225

The fourth component would also be problematic. Given not only the likely destruction of the dog, but also that possession of a pit bull is a provincial offence punishable by up to a $10,000 fine and imprisonment for six months,1226 it seems likely that the ability of veterinarians to retain the trust of dog owners, and thus dogs’ ability to enter and benefit from a treatment relationship with those veterinarians, would be impaired because the owner would be deterred from allowing the dog to access care. Deterrence promotes animal neglect, which legislators have also strenuously opposed.1227 The deterrent effect is likely heightened because of uncertainty over which dogs are pit bulls or have “an appearance and physical characteristics substantially similar” to pit bulls1228 – that is, there may be some owners whose dogs might not be reported as

1223 DOLA, supra note 1219, s 19(1); Cochrane, ibid at paras 54-70.

1224 See e.g. Bernard E Rollin, “An Ethicist's Commentary on Whether a Veterinarian Should Report an Owner with Pit-bull Puppies” (2005) 46:12 Can Veterinary J 1081 at 1081: “veterinarians, by the very nature of their art, owe primary moral obligation to animals…. reporting the woman would very likely involve the animals being confiscated, removed from the woman’s care in, presumably, a good home, and euthanized, since they can’t be adopted. Were I the veterinarian, for this reason alone, I would treat the puppies to avoid suffering and not report the owner.”

1225 See e.g. the position of the Ontario Veterinary Medical Association, as discussed in Chapter 5, note 1098, that the ban would be ineffective and have many negative effects.

1226 DOLA, supra note 1219, ss 6(a), 18(1). The maximum penalty for a corporation is $60,000.

1227 Recall the Provincial Animal Welfare Act, SO 2008, c 16, as discussed in Chapter 1: the preamble stated that “how we treat animals in Ontario helps define our humanity, morality and compassion as a society” [emphasis added] and the Minister stated that “[t]he care, love and protection of animals represents all that is good about our society.” (Ontario, Legislative Assembly, Official Report of Debates (Hansard), 39th Parl, 1st Sess, No 39 (5 May 2008) at 1585 (Hon Rick Bartolucci.).) See Chapter 1, note 119 and accompanying text.

1228 DOLA, supra note 1219, s 1(1). See Cochrane, supra note 1222 at paras 37-53 (on vagueness). Rollin, supra note 1224 mentions this point only briefly at 1082: “Fourth, and quite important, you cannot know with certainty that the puppies are pit bulls or even pit-bull crosses.”
pit bulls who might nonetheless fear reporting. There may also be an impact on the overall trust of veterinarians by dog owners, particularly past or current pit bull owners.

The deterrence and trust impact of a pit bull reporting law should be examined in the context of existing mandatory reporting laws that apply to veterinarians. At the time that the pit bull ban was adopted, as now, veterinarians were one of the professions required to report dog bites to public health authorities.\textsuperscript{1229} However, a difference between evaluating a pit bull reporting law now and in 1995 is the intervening adoption of mandatory reporting laws for veterinarians on animal abuse and neglect (in 2008) and animal disease and health events (in 2009). The question becomes whether the impact on the veterinarian-animal relationship, via the deterrence effect on owners, would be lesser or greater in light of these other laws. The impact might be lesser if one assumes that abusive and neglectful owners – those already deterred by the reporting of abuse and neglect – are more likely to own pit bulls.

None of the existing modifications to the template discussed above would lessen the negative impacts of a pit bull reporting law while maintaining its functionality. In particular, anonymized reporting would allow the collection of statistics for epidemiological purposes, but would not allow intervention in individual cases. However, some of my template modifications would be improvements. Restricting reporting to occurrences where there is a risk of future harm emphasizes at the first component that the true purpose of the law is public health & safety, improves the compatibility with the purpose of the veterinary profession at the third component, and reduces the negative impact at the fourth component. Increasing the triggering threshold reduces the risk of false positives and thus reduces the negative impact at the fourth component.

\textsuperscript{1229} \textit{Communicable Diseases – General}, RRO 1990, Reg 557, s 2(1), as it appeared in 1995: “A physician, registered nurse in the extended class, veterinarian, police officer or any other person who has information concerning any animal bite or other animal contact that may result in rabies in persons shall as soon as possible notify the medical officer of health and provide the medical officer of health with the information.” \textit{Communicable Diseases – General}, O Reg 420/07, ss 1-2, amended this section to add extended-class nurses but did not change its application to physicians or veterinarians.
4.2 Transplant tourism

Glenn Cohen has proposed mandatory reporting as one tool against “transplant tourism”, which he defines as “travel abroad to purchase organs for transplant”. Specifically, he argues that if transplant tourism was prohibited by the domestic law of tourists’ home countries and/or if public and private health insurers were prohibited from covering follow-up care, physicians and/or hospitals could be required to report patients seeking care after transplants abroad. Cohen analogizes such a requirement to the mandatory reporting of child and elder abuse:

Involving doctors in such reporting situations would impinge on the doctor-patient relationship. However, doing so seems in keeping with other reporting duties already imposed upon physicians including the abuse of children or the elderly. While one might try to distinguish those provisions by suggesting that they are aimed at preventing future abuses of the patient, it is not clear why deterring such abuses before they happen is not an equally worthy goal. In any event, other reporting requirements such as gunshot or other violent wounds are primarily about crimes that have already occurred.

Recall that Cohen is writing here in the American context, in which the reporting of crimes of violence is typically mandatory.

Under the framework, this proposal may be problematic at the first component. Recall that criminality or immorality per se are problematic purposes in themselves. Based on Cohen’s contention that transplant tourism is harmful for the persons who sell their organs and their experience is characterized by incomplete and misleading information and poor treatment, the second category of purpose, i.e. protection of the vulnerable, is most directly applicable. Transplant tourism is characterized as a wrong, but not as a threat to public health & safety. The mechanism is not intervention – as there is no feasible intervention that can reduce the harm to the person from whom the individual transplanted organ came – but punishment and deterrence. However, Cohen perhaps minimizes the distinction between reporting to protect a specific vulnerable person or group of persons from additional future harm and reporting merely to deter

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1231 Ibid at 281-282.

1232 Ibid at 282 [citations omitted].
harm to other similarly situated vulnerable persons in the future. Cohen’s reporting functions by punishment, whether prosecution for an offence or refusal of the insurer to cover medically necessary care – that is, the intended result of reporting may be to deny care to the reported patient.

The second component is met because, as Cohen indicates, the requirement for lifetime post-transplant care, including prescription drugs, allows physicians and/or hospitals a special opportunity to detect transplant tourism.1233 (I assume here that physicians have a special ability to detect transplants, given their professional skills.)

The third component – the connection between the purpose of the profession and the purpose of reporting – is more complex. As discussed above, protecting the health and safety of vulnerable persons is generally consistent with the purpose of the health professions. However, recall that the intended result of reporting is to deny care to the reported patient, which seems to be contrary to the purpose of the medical profession. Also, recall that mandatory gunshot wound reporting engaged the health professional’s obligation to the individual patient versus his or her obligation to the community at large.1234 In the transplant tourism context, where both the particular organ seller already harmed and potential future organ sellers to be protected are in other countries, the at-risk “community” is now geographically distant. Physicians may view their obligations to that distant population differently than to a local population of past and future patients or community members.

Mandatory reporting of transplant tourism is also problematic at the fourth component. Given that post-transplant care is medically necessary, deterrence from seeking care may be fairly minimal, as it is for patients with gunshot wounds. However, deterrence from honest disclosure about the nature of the transplant seems quite likely, potentially interfering with both the treatment itself and the physician-patient relationship more generally. Unlike mandatory gunshot wound reporting...

1233 Ibid at 282: “Detecting violations of domestic law that occur abroad is no easy feat, and it is important to design context-specific ways of implementing the prohibition. Since prescriptions are required for immunosuppressive drugs, it is possible that doctors could be induced to monitor and report patients who have engaged in transplant tourism, as could hospitals in which follow-up care is sought.”

1234 See Chapter 5, notes 985 to 987 and accompanying text.
wound reporting, under which a patient may merely be suspected of criminality because of the injury, if transplant tourism itself is an offence or a disqualifier from insurance coverage then reporting it attracts not suspicion but punishment. Moreover, the benefit of reporting accrues to potential organ sellers in other jurisdictions, with whom the reporting physician has no relationship and to whom he or she arguably has few if any obligations. The harm of reporting accrues to patients in the reporting physician’s jurisdiction, with whom the physician does have a relationship and to whom he or she arguably has concrete obligations.

The modifications discussed above would not mitigate these problems substantially. Anonymous reporting would not achieve the intended outcome of punishment and deterrence. Capacity is irrelevant, as the patient is the wrongdoer and not the vulnerable person. Because the mechanism of reporting is punishment and deterrence, there is no meaningful risk of specific future harm – that is, restricting reporting to situations of future harm would essentially nullify the law. Increasing the triggering threshold would not significantly change the analysis. Similarly, oversight mechanisms and limitations on use would seem to have no significant effect. Increasing the triggering threshold reduces the negative impact at the fourth component, but only if there is a serious prospect of false positives.

Thus, this proposal would be relatively less justifiable under the four-component policy framework.

In contrast, a Charter analysis does not provide much guidance on such a proposal. Reporting is not for the benefit of the patient, so the autonomy analysis under section 7 is irrelevant. While the patient’s right to privacy under section 8 and interest in access to services under section 7 may both be infringed, these infringements would appear to be relatively typical – that is to say, as about the same as those of other mandatory reporting laws applicable to physicians – and thus not particularly difficult to justify under section 1. The most serious infringement would likely be of the physician’s freedom of conscience under section 2(a), because of the negative impact on the well-being of the reported patient. However, some physicians may find reporting consistent with their understanding of professional obligations and values, given the exploitation and significant physical harm of transplant tourism. The ultimate result of the Charter analysis would likely turn on the section 1 justification, which may be difficult to predict.
4.3 Social assistance eligibility fraud

In defining the categories of purpose for the first component, I acknowledged that it is appropriate to require professionals who deliver social services to protect the integrity of those services by reporting eligibility fraud or payment for preferential treatment.\textsuperscript{1235} This category of purpose included mandatory reporting laws on legal aid eligibility fraud for lawyers, and medicare eligibility fraud or paid queue-jumping for health professionals. However, professionals may also learn of a client’s ineligibility for social services that they do not themselves deliver. The best example is social assistance. Given the incredibly low quantum of modern welfare, lawyers, health professionals, and teachers may observe indicia that a client who is on welfare is living beyond his or her means, such as in housing, nutrition, or clothing, or in an ability to pay for uninsured services. Alternately, the client may disclose information about his or her disqualifying income or assets in the course of the professional-client relationship. Should these professionals be required to report welfare eligibility fraud?

Such a mandatory reporting law would raise red flags at all four of the framework components. At the first component, it would not fit into one of the three standard categories of purpose. There is a subtle but meaningful distinction between requiring professionals to maintain the integrity of social services which they deliver by avoiding complicity in fraud or bribery, as a health professional or lawyer arguably do when reporting legal aid or medicare eligibility fraud or paid queue-jumping, and requiring them to police public expenditures more general – a requirement that has no relation to their profession. Recall from Chapter 1 that there is no general duty to report crime, and even when there was such a duty, professionals were potentially exempt from it.\textsuperscript{1236} Further, the health or legal professional does not have a particularly special ability or opportunity to detect welfare eligibility fraud, certainly not a unique or even rare one. At the third component, the detection and punishment of welfare eligibility fraud has no connection with the purpose of any profession. And at the fourth component, there is great harm to the relationship of trust.

\textsuperscript{1235} See above under heading 3.1.4.
\textsuperscript{1236} See Chapter 1, notes 155 to 160 and accompanying text.
Given the low asset and income thresholds for both legal aid eligibility and welfare eligibility, one could imagine a situation where a lawyer learns that a client receiving legal aid and welfare is ineligible for both social programs. If the lawyer-client relationship is already being infringed by reporting the legal aid eligibility fraud, one might ask whether there is additional harm in mandatory reporting of the welfare fraud. However, I would argue that the reporting to the social assistance authority is a separate and additional harm to the professional-client relationship, and that harm is unnecessary and unjustifiable. Depending on the law governing information-sharing between ministries, the legal aid authority may communicate with the social assistance authority – but that is a separate matter.

There is a wrinkle in this analysis, however, because of two aspects of the social assistance regime that do involve health professionals: the increase in welfare quantum where a claimant’s medical condition requires a more expensive diet (in Ontario, the “special diet allowance”), and the higher quantum for disabled claimants because of the distinction between welfare and disability support. In both cases, eligibility for the higher payments requires documentation from a health professional. A possible mandatory reporting law could be analogized from those on medicare ineligibility and payment for queue-jumping: health professionals could be required to report patients requesting – or offering payment for – unsupported documentation establishing their eligibility.

Such a mandatory reporting law would be consistent with those on medicare eligibility fraud or paid queue-jumping. While the health professional is not providing welfare services, he or she is involved in their administration. Similarly, requesting false documentation, whether or not the request is combined with payment, attempts to involve the health professional in wrongdoing. Indeed, the College of Physicians and Surgeons of Ontario emphasizes the importance of honesty when providing documentation for third parties. The College’s discipline committee has also

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1237 For the special diet allowance, see General, O Reg 134/98 (made under the Ontario Works Act, 1997, SO 1997, c 25, Schedule A), ss 2(4) and 41(2). For disability support, see General, O Reg 222/98 (made under the Ontario Disability Support Program Act, 1997, SO 1997, c 25, Schedule B), s 46(1).

1238 College of Physicians and Surgeons of Ontario, “Third Party Reports: Reports by Treating Physicians and Independent Medical Examiners”, Policy Statement 2-12 (2002, updated 2009 and 2012), online: <www.cpso.on.ca/Policies-Publications/Policy/Third-Party-Reports>: “Trustworthiness, compassion, altruism and service are values which guide the medical profession. When providing reports, physicians embody these values and
held that providing unsupported diagnoses in special diet allowance applications was “unprofessional”, even where it was intended to help financially vulnerable patients:

Dr. Wong’s practice… appears to have been motivated by a desire to financially benefit the patients. In so doing, however, he exhibited poor judgment and sacrificed his integrity which is essential to the practice of medicine.

....

The temptation to exaggerate in order to maximize financial benefit for a patient is entirely understandable. The suggestion was made that Dr. Wong’s endorsement of these claims represented advocacy for his patients. Advocacy for a patient, however, should not trump one’s professional integrity.\textsuperscript{1239}

Thus, at the first component, such reporting laws would fit in the category of preserving the integrity of social services that professionals deliver – although the category would have to be slightly expanded, from social services that professionals deliver to social services that professionals administer. At the second component, health professionals have a unique ability to recognize that a patient does or does not meet the medical criteria and a unique opportunity to detect attempted corruption (as the one being induced into corruption). The third and fourth components do present mild red flags. At the third component, it is difficult to conceive a purpose of the health professions that is consistent with fighting welfare fraud, and so it would have to be a professional responsibility to the state. At the fourth component there is a serious threat to the trust of the professional-client relationship. However, reasonable people can disagree over whether these components are outweighed by the first two.

There are no template modifications that would change this policy analysis. Anonymization would eliminate the utility of the reporting law. Capacity is irrelevant because reporting is not for the benefit of the client. A restriction to future harm is not relevant, because the mechanism of this law is punishment and deterrence – that is, there is no possibility of future harm. Increasing

\textsuperscript{1239} Ontario (College of Physicians and Surgeons of Ontario) v Wong, 2012 ONCPSD 37 [Wong]. The panel imposed a six-month suspension: 2014 ONCPSD 3.
the triggering threshold would not appear to change the analysis, as false positives do not seem to be a serious concern. Similarly, oversight mechanisms and limitations on use would seem to have no significant effect.

Thus, under the four-component policy framework, this proposal would be relatively more defensible.

In contrast, a Charter analysis provides little guidance on such a proposal. Reporting is not for the benefit of the patient, so the autonomy analysis under section 7 is irrelevant. The patient’s privacy right under section 8 would likely not be engaged, as there is no reasonable expectation of privacy. While the physician-patient relationship is one of trust, that trust does not compellingly extend to concealing the decision to engage the physician in fraud, and such fraud is not information about the patient’s body and does not fall within the biographical core. Similarly, there is no deterrence impact on the client’s access to health services under section 7, merely on the client’s willingness to attempt to engage the physician in fraud. The most compelling Charter argument would be that mandatory reporting is inconsistent with the physician’s values and thus infringes his or her freedom of conscience under section 2(a). However, using reasoning similar to that in the Wong decision quoted above, it would not be difficult to justify this infringement under section 1. Maintaining the integrity of the profession, at least insofar as combatting patient efforts to damage that integrity, is a pressing objective; and the reporting law is minimally impairing, as it seems unlikely that such fraud would be detectable by anyone other than the physician. The Charter analysis would likely turn on the balancing, which would seem difficult to predict.

4.4 Drinking and driving

Alcohol-impaired driving has been recognized as a serious threat to public safety. Some American states have adopted mandatory reporting laws requiring health professionals – in

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practice, typically those providing emergency care – to inform police when treating drivers involved in collisions that appear to be impaired.\textsuperscript{1241} Such a reporting law was proposed in the Canadian press in 2014 by Ontario doctor Brett Belchetz.\textsuperscript{1242} Belchetz’s argument is primarily by analogy to gunshot wound reporting, noting that drinking and driving causes much more morbidity than gun violence and that gunshot wound reporting is now generally accepted and has had only a minor impact on the physician-patient relationship.\textsuperscript{1243}

Such a mandatory reporting law is quite defensible under the four-component policy framework. At the first component, combating drinking and driving falls squarely into the purpose of public health & safety. While there may be an element of morality or denunciation, intervention is squarely aimed at reducing harm. At the second component, physicians (and other health professionals) providing emergency medical services have both a special opportunity and special ability to detect alcohol impairment. The special opportunity is because persons involved in automobile collisions tend to seek treatment, or be brought for treatment by paramedics.

Although laypersons are considered able (as a matter of evidence law) to make conclusions about alcohol impairment,\textsuperscript{1244} health professionals have a special ability to recognize indicia of impairment and to distinguish it from medical conditions that may present similarly. At the third stage, public health & safety is an accepted purpose of the health professions.

\textsuperscript{1241} As mentioned in Chapter 1. See Chapter 1, note 94 and accompanying text. See e.g. Criddle, Bonnomo & Shapiro, \textit{supra} note 1144 at 201, Table 1. See e.g. 625 Ill Comp Stat 5/11-501.4-1(a) (2016).


\textsuperscript{1243} For the proposition that gunshot wound reporting laws are generally accepted and have had little deterrence, Belchetz relies on Howard Ovens, Hannah Park & Bjug Borgundvaag, “Reaction in Ontario to Bill 110: Canada’s First Mandatory Gunshot Wound Reporting Law” (2009) 11:1 Can J Emergency Medicine 3. (Cited in Martin, \textit{supra} note 1137 at 179, n 15.)

\textsuperscript{1244} See \textit{Gratt v The Queen}, [1982] 2 SCR 819 at 837-838, 144 DLR (3d) 267, Dickson J (as he then was) for the Court: “It is well established that a non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state…. If a witness is to be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to a particular degree…. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience.”
Any caution about mandatory reporting of alcohol-impaired drivers to the police arises at the fourth stage of the framework, specifically the impact on the physician-patient relationship. Gunshot wound reporting to police is an apt analogy; indeed, deterrence from seeking care seems unrealistic in both situations and, as discussed elsewhere, the relationship with professionals providing emergency care is less trust-centred than other relationships, such as with a psychiatrist or family doctor. However, there is one key difference that Belchetz does not mention: while police and legislators may consider receiving a gunshot wound to be an indicator of criminality, and in particular circumstances it may be evidence of an offence, it is not in itself an offence; in contrast, impaired driving is a criminal offence and alcohol impairment is evidence of that offence. However, given the general recognition of the danger of alcohol-impaired driving, it would be quite difficult to argue that mandatory reporting fails on a policy level at this stage. Thus mandatory reporting of drinking and driving would be quite defensible under this analysis, at least as applied to health professionals providing emergency care.

However, it is not clear how such a reporting obligation should apply outside of an emergency-treatment context. Consider, for example, a patient disclosing past impaired driving to a general practitioner or to a psychologist or psychiatrist. Reporting to police in these contexts would be less helpful for law enforcement purposes, as the passage of time makes it unlikely that an investigation would produce sufficient evidence for a conviction, and would be more likely to deter honest disclosures by the patient and to harm the long-term relationship. If the professional considers the past behaviour to be part of a pattern or otherwise indicative of future drinking and driving, it would seem more appropriate to report the patient to the Ministry of Transportation, whether under the existing statutory provision on conditions affecting the ability to drive or under the discretion to warn. Alcohol-impaired driving may be a situation where a distinction among the roles of different kinds of health professionals would be appropriate.

The template modifications would not significantly change the framework result. In particular, anonymized reporting eliminates the potential for intervention and any impact on driving behaviour. Restricting reporting to clients lacking capacity is irrelevant, because reporting is not for the benefit of the patient. A restriction to future harm would be redundant, insofar as the premise of the mandatory reporting law would seem to be that past impaired driving is, in itself, predictive of future impaired driving. Increasing the triggering threshold would have little impact
unless false positives were a real concern. Similarly, oversight mechanisms and limitations on use would seem to have no significant effect.

For this proposal, the outcome of a Charter analysis would be similar to that of the policy analysis. Under both approaches, the importance of combatting the phenomenal threat that impaired driving poses to public health & safety would override essentially any other consideration. However, in this respect impaired driving is truly an exceptional case.

5 Conclusion

My focus in previous chapters has been a Charter analysis. A Charter analysis illuminates the issues at stake, and Charter compliance is a necessary test for lawmaking. However, Charter compliance, in itself, does not mean that a law should be adopted and leaves some questions unanswered. Mandatory reporting laws will rarely constitute unjustifiable or unfixable Charter infringements, which leaves broad possibilities for legislators and policymakers to navigate. In particular, the unique protection for lawyers and legal services, as a matter of constitutional law, does not provide any guidance as to whether legislators should for policy reasons provide similar protection for other professionals in statute. In this chapter, I have set out and demonstrated a four-component policy framework for legislators and policymakers to evaluate proposed mandatory reporting laws. Although the framework may not provide unanimity, it will nonetheless help crystallize the actual points of disagreement and thus allow more productive debate.

The first component evaluates the purpose of a proposed mandatory reporting law. For this component, I argued that three categories of purpose are more defensible. In addition to the two generally accepted categories of public health & safety and protection of the vulnerable, I identified a third category as the preservation of the integrity of social services provided by professionals. I argued that several other purposes sometimes cited by legislators – the prevention of moral harm or economic harm, and the affordability and sustainability of social services – should, in themselves, be considered inappropriate or less defensible, although they may accompany the three more defensible purposes. I also argued that, at this component, a
The proposed law will be suspect if the reporting does not seem to advance the ostensible purpose or if the mechanism is not intervention but merely punishment and deterrence.

The second component holds that a mandatory reporting law is more defensible if the professional has a special ability and/or opportunity to detect the reportable occurrence. Here I emphasized that special was inherently relative, as in unusual or rare or unique, and without that specialness the desired information should be gathered without harnessing the professional-client relationship. I drew a distinction between ability and opportunity, with ability premised on professional expertise and opportunity premised on the services provided, recognizing that the two may coincide. I also noted that, if the professional truly has a special ability or opportunity to detect the reportable occurrence, then the triggering threshold should be high enough to reflect that ability or opportunity. I also emphasized that forcing clients to reveal information unrelated to the professional services being provided is not appropriate.

At the third component, a mandatory reporting law is less defensible if the purpose of reporting is not consistent with at least one conception of the role of that profession. I acknowledged that, given the range of views on any profession’s purpose and tensions among the obligations to the individual client, potential clients as a group, the public at large, and the state, this component is the least stringent of the four. However, I argued that this component is particularly helpful in identifying the points of disagreement over mandatory reporting proposals.

The fourth and final component of the framework is the impact of reporting on the professional-client relationship and the relative value of that relationship. I explained that this fourth component encompasses both levels of deterrence, deterrence from seeking professional services and deterrence from providing honest information when doing so. I emphasized that this component requires a consideration of effects in the long term as well as the short term.

Having established this framework, I evaluated how the existing modifications and my suggested modifications would change the outcome of the framework. I demonstrated that the existing modifications to the standard template for a mandatory reporting laws would have little impact on the framework analysis. However, some of my proposed modifications would improve the outcome of the framework analysis. In particular, restricting reporting to situations where there is a risk of future harm would emphasize the purpose and mechanism of the law at the first stage, make the purpose of reporting more clearly compatible with the purpose of most professions at
the third stage, and reduce the negative effects at the fourth stage. Similarly, restricting reporting to patients lacking capacity – where the reporting is for the benefit of the client – would improve the match with professional values at the third stage, and improve the result at the fourth stage. Raising the reporting threshold would also improve the result at the fourth stage, to the extent that false positives are a real concern.

I concluded my analysis by demonstrating how this four-component framework applied to several potential mandatory reporting laws.

As I indicated in Chapter 1, a major goal of this thesis has been to disaggregate visceral or intuitive reactions to existing or proposed mandatory reporting laws – not to devalue those reactions, but to allow legislators and policymakers to identify and articulate specific points of concern and disagreement. The policy framework I have set out is fundamentally about when it is acceptable to harness professions for social goals beyond service delivery. It goes beyond the *Charter* issues of autonomy, privacy, access, and professional values – as important as those issues are. It is about the goal legislators seek to pursue, the reasons why certain professions will be able to further that goal, the consistency of that goal with the broader purposes of each profession, and the ultimate social costs of the pursuit to the functioning of the profession and the delivery of professional services.

To emphasize, any policy evaluation of an existing or proposed mandatory reporting law should consider the cumulative impact of these laws. Any single such law, in isolation, may appear to be defensible. However, the combined impact on the client-professional relationship of trust may be different. Recall, from Chapter 1,\(^{1245}\) the physician who forewarns a new patient that he or she must breach confidentiality for reportable diseases, elder abuse, spousal abuse, child abuse, ability to drive safely, gunshot wounds, stab wounds, burns, transplant tourism, and sexual abuse of a patient by a health professional, and then asks the client about illegal drug use. How forthcoming would such a patient be? As these individual exceptions to confidentiality increase, they appear and act less like exceptions.

\(^{1245}\)See Chapter 1, note 123 and accompanying text.
This policy analysis reveals issues that are not clear from the legal analysis. In the end, the fundamental problem with mandatory reporting laws may not be just their specific impacts on the client’s privacy or autonomy or access to services, or their impact on professionals’ freedom of conscience. Instead, the underlying problem may be something deeper: that professionals are being required to do something irrelevant or counterproductive to the services they provide — that is, to restrict access to services, or make access contingent, in order to meet the information needs of the state.  

Here the Arizona proposal is particularly relevant. Physicians can require proof of their patients’ immigration status in the same way as they can conceivably require confirmation of anything else — for example, that the patient has filed tax returns — and report the patient to the corresponding state agency if he or she cannot provide that confirmation. These steps may promote social goals, but they have nothing to do with the practice of medicine. Instead, they are useful solely because the professional is in a position to impose conditions on access to essential services.

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1246 See above note 1204.
Conclusion

In this thesis, I have completed a thorough legal and policy analysis of mandatory reporting laws. In so doing, I have identified potential Charter issues and proposed solutions to those issues. I have also developed a policy framework that policymakers and legislators can use to evaluate existing laws and new proposals.

In Chapter 1, I provided an overview of mandatory reporting laws in the Canadian context. I explained what I meant by the phrase “mandatory reporting laws” and the scope of the term “professionals”. Mandatory reporting laws share a characteristic template and there are several existing modifications to that template. I then set out the historical, current, and potential scopes of these laws in Canada, identifying the steady growth in these laws and the real possibility of substantial growth in the future. I identified the two most common purposes of mandatory reporting laws as public health & safety and the protection of the vulnerable, and intervention as the most common mechanism that these laws use to further those purposes. For example, mandatory reporting of children in need of protection has the purpose of protecting the vulnerable and uses the mechanism of intervention by child welfare authorities to achieve that purpose. I also identified other purposes, such as targeting moral harm and economic harm, and secondary mechanisms, i.e. punishment, deterrence via punishment, and gathering statistics. I then explained that mandatory reporting laws are extraordinary in the Canadian common law context, in which there is no duty to rescue, no duty to report crime, and at most a limited duty or discretion to warn. I suggested that these laws are nonetheless popular among legislators because of their superficial simplicity and similarity and because the benefits are immediately apparent but the costs are intangible. Within this context, I noted the limits of the existing literature on mandatory reporting laws, most importantly that the literature rarely considers the constitutionality of these laws and usually considers each of these laws individually instead of as a family of related laws. I concluded by explaining how this thesis would target these gaps in the literature.

In Chapter 2, I considered how mandatory reporting laws impact the client’s autonomy interest – the interest in making, or the ability to make, important personal decisions that accord with his or her values through a considered and reflective process – as that interest is embodied in Canadian
law. I explained that this impact on the autonomy interest is most important where the purpose of reporting is to protect the vulnerable client against abuse or neglect.

I demonstrated that mandatory reporting laws on abuse and neglect appear to clash with autonomy as it is embodied in the legal concepts of capacity and consent. An individual’s decisions are generally respected if he or she has capacity, i.e. can understand the relevant information and appreciate the foreseeable consequences, and voluntariness. The major exceptions are that treatment may be imposed without consent to protect the public interest and that some conduct will be wrongful despite consent because it is not in the public interest. I acknowledged here that this emphasis on capacity and consent has been criticized, especially for protecting mere liberty – the freedom to make choices, even if those choices do no accord with the individual’s values – instead of autonomy. Canadian law seems to use liberty as a proxy for autonomy, i.e. liberty as a means to autonomy as an end. I also noted that there are some situations in which the law requires more than capacity and voluntariness as usually evaluated, specifically assisted suicide and the refusal of lifesaving treatment by adolescents, and that a common factor in those situations is vulnerability. I then discussed vulnerability as the inability to make a decision or to implement that decision. I argued that mandatory reporting laws on abuse or neglect appear to clash with autonomy because the client is referred for state investigation regardless of his or her capacity or voluntariness – or even his or her individual best interests. This apparent clash could be resolved in four ways: if all clients lack capacity, or some lack capacity and it is difficult to identify them; if all clients lack voluntariness, or some lack voluntariness and it is difficult to identify them; if abuse and neglect is a special situation, like assisted suicide; or if reporting is in the public interest. I suggested that the best approach to the clash is to amend mandatory reporting laws to include an exception to reporting where the client has capacity and voluntariness, but with a presumption of incapacity and involuntariness. I also considered how forewarning promotes autonomy but may decrease the effectiveness of mandatory reporting laws.

I then turned to a Charter analysis, arguing that the autonomy impact of mandatory reporting laws infringes section 7. Section 7 is engaged because the client’s liberty interest includes the right to make fundamental personal decisions, and because the decision to seek state assistance or initiate state involvement is one such decision. Section 7 is infringed through two kinds of overbreadth. One overbreadth is that the laws apply not only to clients lacking capacity or
voluntariness, but also to those who have capacity and voluntariness. This overbreadth is unlikely to be justifiable under section 1. However, it should be made justifiable if mandatory reporting laws are amended to include an exception to reporting where the client has capacity and voluntariness, with a rebuttable presumption of incapacity and involuntariness. The second overbreadth is that, because of the deliberately qualified reporting threshold, some clients who are reported as abused and neglected are not actually abused or neglected. This overbreadth is likely to be justifiable under section 1 as a matter of enforcement practicality, although there will be some threshold – likely a reasonable suspicion that the client may have the occurrence – below which justification is impossible. While mandatory reporting laws could potentially be contrary to the principle of fundamental justice against vagueness, this principle requires very little and will likely not be contravened by mandatory reporting laws.

I concluded Chapter 2 by evaluating how the possible modifications to the template of mandatory reporting laws would change the Charter analysis. In addition to adding an exception for capacity and raising the triggering threshold, I argued that any infringement would be more easily justifiable if reporting were required only where there is some risk of future harm. I also noted that anonymization would reduce or eliminate the autonomy infringement, but would also reduce the utility of the reports.

In Chapter 3, I considered the client’s privacy interest. I focused on privacy as embodied in section 8 of the Charter. Section 8 is engaged by most mandatory reporting laws because the client has a reasonable expectation of privacy – in particular, because the subject matter tends to be the client and his or her body, the professional has obligations of confidentiality, and the information is typically within the client’s biographical core.

Mandatory reporting laws will infringe section 8 in several ways, but all of these infringements will either be justifiable under section 1 or eliminated by minor amendments. Mandatory reporting laws infringe section 8 insofar as they lack oversight and accountability measures and especially a notice requirement. This infringement will be difficult to justify, but such measures can easily be added. Section 8 is also infringed because the deliberately qualified threshold that triggers the reporting obligation – such as a reasonable suspicion that the client may have the reportable occurrence – makes the reports unreliable and the law overbroad by increasing the likelihood of false positives. This infringement will likely be justifiable under section 1, and can
be made more justifiable by raising the threshold. (Mandatory reporting laws may also infringe section 8 for two other reasons, definitional overbreadth and overbreadth in the information that must be included in the report – the latter being fixable by amendment and the former potentially being justifiable.) Mandatory reporting laws applicable to lawyers will infringe section 8 if they do not include an exception for solicitor-client privilege, but most mandatory reporting laws already do so. Mandatory reporting laws applicable to lawyers will also infringe section 8 if they apply where there are reasonable alternatives for the state agency to obtain the information. This infringement can be addressed by amending mandatory reporting laws that also apply to other professionals to provide that lawyers are not required to report if they are reasonably satisfied that another non-lawyer professional to whom the law applies is already aware of the occurrence. Mandatory reporting laws applicable to lawyers will also infringe section 8 if they do not provide the client the opportunity to assert privilege before the report is made. This infringement can be addressed by adding a provision requiring the lawyer to notify the client that he or she intends to make a report. A section 1 justification can be made easier by amending mandatory reporting laws to apply only where there is a risk of future harm. Again, anonymization would reduce or eliminate the privacy infringement, but would also reduce the utility of the reports.

In Chapter 4, I analyzed the deterrence impact of mandatory reporting laws on the client’s interest in access to professional services. I noted that the client may be deterred from providing honest and complete information while seeking services or even from seeking services entirely. While I acknowledged that the deterrence impact of mandatory reporting laws is less severe than the impact of an outright prohibition, I argued that those impacts are similar in kind. I argued that the deterrence impact on access to legal services infringes section 7 of the Charter where a section 7 interest – of the client or the lawyer – is engaged. The relevant principles of fundamental justice would be solicitor-client privilege and commitment to the client’s cause. This deterrence also violates solicitor-client privilege as a separate right external to the Charter. I argued that the deterrence impact on access to religious services infringes section 2(a). I also argued that the deterrence impact on access to health services infringes section 7, specifically by engaging the client’s security of the person in a manner that is both overbroad and arbitrary. The overbreadth from the deliberately qualified triggering threshold would, as in other chapters, seem justifiable so long as the threshold was not unreasonably low. Mandatory reporting laws will also be overbroad insofar as they do not provide an exception to reporting for subsets of the
reportable occurrence that cannot further the purpose of the law. This overbreadth can be fixed by adding such an exception. Mandatory reporting laws are also inherently arbitrary because the deterrence impact makes them self-limiting. This arbitrariness is unavoidable and thus likely to be justifiable. I also noted that mandatory reporting laws applicable to health professionals could potentially be grossly disproportionate, particularly where the purpose is not public health & safety or protection of the vulnerable and where the mechanism is punishment. Any such gross disproportionality appears to be difficult to justify, but could be reduced by a future harm requirement.

I also considered the deterrence impact on other services, specifically veterinary services and education services. I argued that although the deterrence impact on access to these services does not engage *Charter* rights, it may be contrary to the public interest in children receiving educational services and in animals receiving veterinary services.

I concluded Chapter 4 by considering how modifications to the template might change the *Charter* analysis. I emphasized that the deterrence impact depends on the client’s knowledge of the law, his or her confidence that the law will be followed, and the likelihood of being reported to the state. Anonymization, if trusted by the client, would drastically reduce deterrence – but at the cost of reducing the utility of the mandatory reporting law. The other existing modifications would change the impact only insofar as they affected the client’s expectations. Of my proposed modifications, a future harm exception and an increased triggering threshold would reduce deterrence and make any infringements more justifiable under section 1. Other modifications, particularly adding oversight mechanisms and limitations on use, could reduce deterrence by increasing the client’s confidence in compliance and information protection.

In Chapter 5, I considered the impact of mandatory reporting laws on the interests of the professional. I argued that insofar as mandatory reporting laws require the professional to act contrary to his or her understanding of professional obligations and values, these laws infringe the professional’s *Charter* rights. Mandatory reporting laws applicable to clergy may infringe the clergy’s religious freedom under section 2(a). Similarly, mandatory reporting laws applicable to professionals other than clergy may infringe the professional’s freedom of conscience. I acknowledged that similar claims could be made under freedom of religion for professionals other than clergy. However, these claims are better formulated under freedom of conscience.
As in other chapters, I concluded Chapter 5 by considering how modifications to the template of mandatory reporting laws would change the Charter analysis. I argued that making reporting discretionary would eliminate the impact on professional values, as each individual professional would be able to exercise that discretion as he or she saw fit. Similarly, restricting reporting to clients lacking capacity would honour the professional value of respecting the wishes of clients with capacity. I also noted that insofar as anonymization reduces the impact of reporting on the client, it would also reduce the impact on professional values. As in other chapters, restricting reporting to future harm and increasing the triggering threshold would decrease the impact and make any infringement related to professional values more justifiable under section 1.

In Chapter 6, I supplemented my Charter-based analysis with a policy analysis. I acknowledged that a Charter-based analysis does not provide sufficient guidance for policymakers and legislators. Charter compliance alone does not ensure good lawmaking – all the more so in the context of mandatory reporting laws, where any Charter infringements will likely be justifiable under section 1 or correctible by fairly simple amendments. In particular, a Charter analysis prioritizes lawyers and legal services over all other professionals and the services they provide. However, legislators and policymakers may well decide that other professionals and services should be given similar protection in statute.

Against this backdrop, I set out a four-component policy framework to evaluate existing and proposed mandatory reporting laws. The first component considers the purpose of the law. Mandatory reporting laws will be less defensible if they do not fit within one of three categories of purpose. Two of these categories, public health & safety and protection of the vulnerable, are generally recognized. I set out a new third category, preserving the integrity of social programs delivered by professionals, that would include mandatory reporting laws on legal aid and medicare eligibility fraud as well as paid queue-jumping for health services. All else being equal, mandatory reporting laws with a primary purpose of preventing moral harm or protecting social values would be less defensible. The second component considers the professional’s special ability or opportunity to detect the reportable occurrence. If the professional does not have such a special ability or opportunity, a mandatory reporting law will be less defensible. The third component evaluates the connection between the purpose of the law and the purpose of the profession. If the purpose of the law is not consistent with the purpose of the profession, then the law will be less defensible. The fourth and last component considers the impact of reporting on
the professional-client relationship and the relative value of that relationship. The greater the impact and value, the less defensible the law. I emphasized that it is the cumulative impact of these laws on the professional-client relationship that is important.

I also assessed how the modifications to the standard template would change this policy analysis. I argued that many of the existing modifications – placing the reporting obligation on the institution instead of the professional, omitting an offence provision for non-compliance, and substituting retention for reporting – would not change the analysis. Making reporting discretionary would be only a slight improvement, and anonymization would improve the outcome at the fourth component but cripple the effectiveness of the mandatory reporting law. In contrast, my proposed modifications would each improve the outcome, particularly by ameliorating the negative impact on the professional-client relationship at the fourth component. The most powerful of these modifications is to restrict reporting to cases where there is a risk of future harm.

I concluded the policy analysis in Chapter 6 by demonstrating how my policy framework would apply to four hypothetical mandatory reporting laws: on restricted dog breeds (by veterinarians), transplant tourism (by physicians), social assistance eligibility fraud (primarily by physicians), and drinking and driving (by physicians).

This thesis has accomplished several goals. Most importantly, it has addressed a gap in the literature on mandatory reporting laws by providing a comprehensive analysis of the constitutionality of those laws under the Charter. More specifically, it has demonstrated that existing mandatory reporting laws likely require amendments to be Charter-compliant. Laws on abuse and neglect of vulnerable clients require an exception to reporting where the client has capacity and voluntariness, likely with a rebuttable presumption of incapacity and involuntariness. Laws applicable to lawyers require, in addition to the existing exceptions for solicitor-client privilege, a notification provision to allow the client to assert privilege before the report is made. Laws applicable to lawyers and other professionals likely require an exception to reporting where the lawyer is reasonably satisfied that another non-lawyer professional to whom the law applies is already aware of the occurrence. All mandatory reporting laws likely require oversight mechanisms and limitations on use. This thesis has also argued that mandatory reporting laws are inherently overbroad because of the deliberately qualified triggering threshold
and inherently arbitrary because their deterrence impact limits their own effectiveness. This overbreadth and arbitrariness will, within some limits, be justifiable under section 1. Restricting reporting to future harm will make any Charter infringement more justifiable.

In the course of the Charter analysis, this thesis has also grappled with significant recent changes in the law: primarily the relationship between section 7 and section 1, but also the meaning of arbitrariness and overbreadth and gross disproportionality, the relationship between section 8 and section 1, the importation of principles of fundamental justice into section 8, and the scope of the new lawyer-specific principle of fundamental justice of commitment to the client’s cause. This thesis has also broken new ground in section 2(a) by proposing that freedom of conscience should protect the professional values and obligations of professionals other than clergy in the same way that freedom of religion protects the professional values and obligations of clergy.

This thesis will provide guidance to policymakers and legislators, both from a legal perspective and a policy perspective. In addition to the conclusions of the Charter analysis, it has set out a policy framework for the evaluation of existing and proposed mandatory reporting laws. This framework would, if used, improve the consistency of lawmaking in this area.

More research remains necessary. In particular, mandatory reporting laws with the purposes of protecting social values or preventing moral harm require more consideration. I have concluded that these purposes are less defensible than the existing purpose categories of public health & safety and protection of the vulnerable, as well as the new category of preserving the integrity of social programs delivered by the professional. However, this characterization may be disputed, and a new conception of such laws may reveal a compelling theory in support of them.

As I stated in Chapter 1, mandatory reporting laws as a group suffer from a troubling lack of consistency. Each individual one was adopted as a deliberate response to a perceived problem. But when viewed together, these laws form a patchwork with apparently inexplicable gaps. It is my hope that if mandatory reporting laws are re-examined with this legal and policy coherence in mind, and are routinely – but critically – considered as a tool for each legislative goal that arises, they will become better understood and be used responsibly.

Mandatory reporting laws have an important role to play in the pursuit of social goals. These laws are powerful tools, but that power comes with real though often intangible harms to
fundamental interests and constitutional rights. The social value of professionals in the professional-client relationship depends on trust, and that trust depends on solemn confidentiality – and, ultimately, faith that the professional’s loyalty is to the client. Mandatory reporting laws harness the power of the professional-client relationship but also risk serious harm to that relationship by impairing that loyalty, confidentiality, and trust. These laws should be adopted only with cautious deliberation and should remain an exceptional measure instead of a standard legal tool.
Bibliography

1 Legislation

18 USC § 4
20 Ill Comp Stat Ann § 2630/3.2(2)
625 Ill Comp Stat 5/11-501.4-1(a)
Adult Guardianship Act, RSBC 1996, c 6
Adult Protection Act, RSNS 1989, c 2
Adult Protection Act, RSPEI 1988, c A-5
Aeronautics Act, RSC 1985, c A-2
An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), SC 2016, c 3
An Act to amend the Criminal Code (production of records in sexual assault proceedings), SC 1997, c 30
An Act to improve the legal situation of animals, SQ 2015, c 35
An Act to protect persons with regard to activities involving firearms, SQ 2007, c 30
The Animal Care Amendment Act, SM 2009, c 4
Animal Health Act, 2009, SO 2009, c 31
Animal Health and Protection Act, SNL 2010, c A-9.1
Animal Protection Act, SNS 2008, c 33
Animal Welfare and Safety Act, CQLR c B-3.1
Cal Penal Code § 11160(a)(2)
Canada Shipping Act, 2001, SC 2001, c 26
Charter of Human Rights and Freedoms, CQLR c C-12
Chase McEachern Act (Heart Defibrillator Civil Liability), 2007, SO 2007, c 10, Schedule N
Child and Family Services Act, RSO 1990, c C.11
The Child Welfare Act, 1965, SO 1965, c 14
Code of ethics of notaries, CQLR c N-3, r 2
Code of ethics of veterinary surgeons, CQLR c M-8, r 4
Colo Rev Stat § 12-36-135(1)(a)
Commitment to the Future of Medicare Act, 2004, SO 2004, c 5
Communicable Diseases – General, RRO 1990, Reg 557
Communicable Diseases – General, O Reg 420/07
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5
Criminal Code, RSC 1953-54, c 51
Criminal Code, RSC 1985, c C-46
Dog Owners’ Liability Act, RSO 1990, c D.16
Education Act, RSO 1990, c E.2
Expenditure Control Plan Statute Law, 1993, SO 1993, c 32
Family Services Act, SNB 1980, c F-2.2
Food and Drugs Act, RSC 1985, c F-27
Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31
Ga Code Ann § 31-7-9(b)
General, O Reg 257/69 (made under The Legal Aid Act, 1966, SO 1966, c 80)
General, RRO 1990, Reg 710 (made under the Legal Aid Act, RSO 1990, c L.9)
General, O Reg 134/98 (made under the Ontario Works Act, 1997, SO 1997, c 25, Schedule A)
Good Samaritan Act, 2001, SO 2001, c 2
Gunshot and Stab Wound Disclosure Act, SBC 2010, c 7
Gunshot and Stab Wound Mandatory Disclosure Act, SA 2009, c G-12
Gunshot and Stab Wound Mandatory Disclosure Act, SNWT 2013, c 19
Gunshot and Stab Wound Reporting Act, SNL 2011, c G-7.1
The Gunshot and Stab Wounds Mandatory Reporting Act, SM 2008, c 21, CCSM c G125
Gunshot and Stab Wounds Mandatory Reporting Act, SS 2007, c G-9.1
Gunshot Wounds Mandatory Reporting Act, SNS 2007, c 30
Health Care Consent Act, 1996, SO 1996, c 2, Schedule A
Health Fraud, O Reg 173/98
Health Insurance Act, RSO 1990, c H.6
Health of Animals Act, SC 1990, c 21
Health Professions Procedural Code, being Schedule 2 to the Regulated Health Professions Act, 1991, SO 1991, c 18
Health Protection and Promotion Act, RSO 1990, c H.7
Highway Traffic Act, RSO 1990, c H.8
Human Rights Code, RSO 1990, c H.19
Idaho Code Ann § 39-1390(1)(b)
Ind Code § 35-47-7-3
Ind Code § 35-47-7-5
Ind Code § 35-47-7-7
Law Society Act, RSO 1990, c L.8
Legal Aid Services Act, 1998, SO 1998, c 26
Long-Term Care Homes Act, 2007, SO 2007, c 8
Mandatory and Voluntary Reporting, O Reg 590/94
Mandatory Gunshot Wounds Reporting Act, 2005, SO 2005, c 9
Mental Health Act, RSBC 1996, c 288
Mental Health Act, RSO 1990, c M.7
Neb Rev Stat § 28-902
Neglected Adult Welfare Act, SNL 1973, c 81
NH Rev Stat § 631:6
Nursing Homes Act, RSO 1990, c N.7
Personal Health Information Protection Act, 2004, SO 2004, c 3, Schedule A
Personal Information Protection Act, SA 2003, c P-6.5
Personal Information Protection and Electronic Documents Act, SC 2000, c 5
Prevention of Cruelty to Animals Amendment Act, SBC 2011, c 7
Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17
Protecting Canadians from Unsafe Drugs Act (Vanessa’s Law), SC 2014, c 24
Protection for Persons in Care Act, SA 2009, c P-29.1
Protection for Persons in Care Act, SM 2000, c 12, CCSM c P144
Provincial Animal Welfare Act, 2008, SO 2008, c 16
Provincial Offences Act, RSO 1990, c P.33
The Public Health Act, 1884, SO 47 V, c 38
Public Hospitals Act, RSO 1990, c P.40
Railway Safety Act, RSC 1985, c 32 (4th Supp)
Regulated Health Professions Act, 1991, SO 1991, c 18
Regulated Health Professions Amendment Act (Spousal Exception), 2013, SO 2013, c 9
Regulated Health Professions Amendment Act, 1993, SO 1993, c 37
Reporting of Hazards and Findings, O Reg 277/12
Reports, RRO 1990, Reg 569
Retirement Homes Act, 2010, SO 2010, c 11
Specification of Reportable Diseases, O Reg 559/91
Specification of Virulent Diseases, O Reg 95/03
Substitute Decisions Act, 1992, SO 1992, c 30
Succession Law Reform Act, RSO 1990, c S.26
Transportation Statute Law Amendment Act (Making Ontario's Roads Safer), 2015, SO 2015, c 14
The Veterinary Profession Act, RSA 2000, c V-2
Veterinary Profession General Regulation, Alta Reg 44/1986
Wills Variation Act, RSBC 1979, c 435
Wills, Estates and Succession Act, SBC 2009, c 13

2  Cases

Abrams v Abrams, 247 OAC 380, [2009] OJ No 1223 (Div Ct, single judge)
AC v Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 SCR 181
Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401, 2013 SCC 62, [2013] 3 SCR 733
Alberta (Information and Privacy Commissioner) v University of Calgary, 2016 SCC 53, 403 DLR (4th) 1
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 SCR 567
Bella v Young, 2006 SCC 3, [2006] 1 SCR 108
Canada (Attorney General) v Bedford, 2013 SCC 72, [2013] 3 SCR 1101
Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44, [2011] 3 SCR 134


Carter v Canada (Attorney General), 2015 SCC 5, [2015] 1 SCR 331, vary’g 2012 BCSC 886, 287 CCC (3d) 1


Childs v Desormeaux, 2006 SCC 18, [2006] 1 SCR 643

Ciarlariello v Schacter, [1993] 2 SCR 119, 100 DLR (4th) 609

Cochrane v Ontario (Attorney General), 2008 ONCA 718, 92 OR (3d) 321

Cris and Cris v Sylvester et al, [1956] OR 132, 1 DLR (2d) 502 (CA), aff’d [1956] SCR 991, 5 DLR (2d) 601

Cummings v Cummings (2004), 69 OR (3d) 398, 235 DLR (4th) 474 (CA), leave to appeal to SCC refused, [2004] SCCA No 93

Cuthbertson v Rasouli, 2013 SCC 53, [2013] 3 SCR 341

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835, 120 DLR (4th) 12

Dawson (Re), [2005] OCPSD No 12

Dawson (Re), [2012] OCPSD No 34

Descôteaux v Mierzwinski, [1982] 1 SCR 860, 141 DLR (3d) 590

Doré v Barreau du Québec, 2012 SCC 12, [2012] 1 SCR 395

Dueck (Re) (1999), 171 DLR (4th) 761, 176 Sask R 152 (QB)

E (Mrs) v Eve, [1986] 2 SCR 388, 31 DLR (4th) 1

Fleming v Reid (1991), 4 OR (3d) 74, 82 DLR (4th) 298 (CA)

Godbout v Longueuil (City), [1997] 3 SCR 844, 152 DLR (4th) 577

Goodis v Ontario (Ministry of Correctional Services), 2006 SCC 31, [2006] 2 SCR 32

Goodwin v British Columbia (Superintendent of Motor Vehicles), 2015 SCC 46, [2015] 3 SCR 250

Gratt v The Queen, [1982] 2 SCR 819, 144 DLR (3d) 267

Greenough v Gaskell (1833), 39 ER 618 (Ch D)

Hall v Bennett Estate (2003), 64 OR (3d) 191, 227 DLR (4th) 263 (CA)


Hertzog v Canada, [1991] 1 CTC 2529, 91 DTC 720 (TCC)

Histed v Law Society of Manitoba, 2007 MBCA 150, 287 DLR (4th) 577, leave to appeal to SCC refused, [2008] SCCA No 67
Hunter v Southam, [1984] 2 SCR 145, 11 DLR (4th) 641
Jones v British Columbia (Attorney General), 2007 BCSC 1455, 286 DLR (4th) 66
Jones v Tsige, 2012 ONCA 32, 108 OR (3d) 241
Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211, 81 DLR (4th) 545
Law Society of British Columbia v Raynier, 2006 LSBC 44, [2006] LSDD No 159
Lazaroff v Lazaroff, 23 ETR (3d) 75, [2005] OJ No 5197 (SC)
Ludmer v Ludmer, 2014 ONCA 827, 52 RFL (7th) 17
M(A) v Ryan, [1997] 1 SCR 157, 143 DLR (4th) 1
Malette v Shulman (1990), 72 OR (2d) 417, 67 DLR (4th) 321 (CA)
Marine Services International Ltd. v Ryan Estate, 2013 SCC 44, [2013] 3 SCR 53
Maurice v Canada (Attorney General), 2002 FCT 69, 210 DLR (4th) 186
McAteer v Canada (Attorney General), 2014 ONCA 578, 121 OR (3d) 1, leave to appeal to SCC refused, [2014] SCCA No 444
Minet v Kossler, 2007 YKSC 30, [2007] YJ No 30, var’d 2008 YKCA 12, 258 BCAC 120
Mouvement laïque québécois v Saguenay (City), 2015 SCC 16, [2015] 2 SCR 3
Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 SCR 256
Mussani v College of Physicians and Surgeons of Ontario (2003), 64 OR (3d) 641, 226 DLR (4th) 511 (CA)
Nagy v Canada, 2006 ABCA 227, 272 DLR (4th) 601
Neill v Pellolio (2001), 151 OAC 343, 43 ETR (2d) 99 (CA)
New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46, 177 DLR (4th) 124
O’Sullivan v Canada, 84 DLR (4th) 124, [1991] 2 CTC 117 (Fed TD)
Ontario (College of Physicians and Surgeons of Ontario) v Wong, 2012 ONCPSD 37, 2014 ONCPSD 3
Piscitelli v Dinelle, [1999] OJ No 4396 (SC), aff’d [2001] OJ No 1743 (CA)
R v AM, [2008] 1 SCR 569, 293 DLR (4th) 187
R v Arvaluk, 2002 NUCA 1, 2002 CarswellNun 4
R v Audet, [1996] 2 SCR 171, 135 DLR (4th) 20
R v B(GD), 2000 SCC 22, [2000] 1 SCR 520
R v Badesha, 2011 ONCJ 284, 238 CRR (2d) 83
R v Banks, 2007 ONCA 19, 84 OR (3d) 1, leave to appeal to SCC refused, [2007] SCCA No 139
R v Belnavis, [1997] 3 SCR 341, 151 DLR (4th) 443
R v Big M Drug Mart Ltd, [1985] 1 SCR 295, 18 DLR (4th) 321
R v Bonnell, 2012 NBQB 34, 410 NBR (2d) 210
R v Chehil, 2013 SCC 49, [2013] 3 SCR 220
R v Chehil, 2011 NSCA 82, 308 NSR (2d) 122
R v Chehill, 2009 NSCA 111, 284 NSR (2d) 130
R v Colarusso, [1994] 1 SCR 20, 87 CCC (3d) 193
R v Conception, 2014 SCC 60, [2014] 3 SCR 82
R v CTC, [1996] OJ No 2131 (Prov Ct)
R v Daly, 2014 ONSC 115, 60 MVR (6th) 156
R v Dersch, [1993] 3 SCR 768, 85 CCC (3d) 1
R v Duarte, [1990] 1 SCR 30, 65 DLR (4th) 240
R v Dyment, [1988] 2 SCR 417, 55 DLR (4th) 503
R v Francis, [1995] OJ No 3729 (QL) (Gen Div)
R v Gruenke, [1991] 3 SCR 263, 67 CCC (3d) 289
R v Hall, 2002 SCC 64, [2002] 3 SCR 309
R v Heywood, [1994] 3 SCR 761, 120 DLR (4th) 348
R v Jiang, 2007 BCCA 270, 220 CCC (3d) 55
R v JJP, 196 Nfld & PEIR 142, [2000] NJ No 311 (QL) (SCTD)
R v Jobidon, [1991] 2 SCR 714, 66 CCC (3d) 454
R v Little, 2009 NBCA 53, 349 NBR (2d) 54
R v Mabior, 2012 SCC 47, [2012] 2 SCR 584
R v McDonald, 2012 ONCA 379, 284 CCC (3d) 470
R v Mills, [1999] 3 SCR 668, 180 DLR (4th) 1
R v Morgentaler, [1988] 1 SCR 30, 44 DLR (4th) 385
R v Mortarity, 2015 SCC 55, [2015] 3 SCR 485
R v O’Connor, [1995] 4 SCR 411, 130 DLR (4th) 235
R v Oakes, [1986] 1 SCR 103, 26 DLR (4th) 200
R v Orbanski; R v Elias, 2005 SCC 37, [2005] 2 SCR 3
R v Parker (2000), 49 OR (3d) 481, 188 DLR (4th) 385 (CA)
R v Patrick, 2009 SCC 17, [2009] 1 SCR 579
R v Pertab, 27 CR (6th) 126, [2004] OJ No 5109 (QL) (SC)
R v Plant, [1993] 3 SCR 281, 84 CCC (3d) 203
R v RJS (1985), 19 CCC (3d) 115, 45 CR (3d) 161 (Ont CA), leave to appeal to SCC refused, [1985] SCCA No 92
R v Rodgers, 2006 SCC 15, [2006] 1 SCR 554
R v RPF (1996), 149 NSR (2d) 91, 105 CCC (3d) 435 (CA)
R v RSM (1991), 94 Nfld & PEIR 80, 69 CCC (3d) 223 (PEI CA)
R v Safarzadeh-Markhaliat, 2016 SCC 14, [2016] 1 SCR 180
R v Spencer, 2014 SCC 43, [2014] 2 SCR 212
R v TF, 2016 BCPC 6, 27 CR (7th) 66
R v Tse, 2012 SCC 16, [2012] 1 SCR 531
R v Welsh, 2013 ONCA 190, 115 OR (3d) 81, leave to appeal to SCC refused, [2013] SCCA Nos 383, 384, 385
R v Wilson (1982), 38 OR (2d) 240, [1982] OJ No 3411 (QL) (Prov Ct)
Re Eve, [1986] 2 SCR 388, 31 DLR (4th) 1
Re Kaufman, [1961] OR 289, 27 DLR (2d) 178 (CA)
Re Sheehan and Criminal Injuries Compensation Board (1975), 5 OR (2d) 781, 52 DLR (3d) 728 (CA), leave to appeal to SCC refused, [1975] 1 SCR xii
Re: Leonard Foundation Trust (1990), 74 OR (2d) 481, 69 DLR (4th) 321 (CA)
Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698
Rocket v Royal College of Dental Surgeons (Ontario), [1990] 2 SCR 232, 71 DLR (4th) 68
Rodriguez v British Columbia (Attorney General), [1993] 3 SCR 519, 107 DLR (4th) 342
Sauvé v Canada (Chief Electoral Officer), 2002 SCC 68, [2002] 3 SCR 519
Schwisberg v Perry Krieger & Associates (1997), 33 OR (3d) 256, 99 OAC 75 (CA)
Smith v Jones, [1999] 1 SCR 455, 169 DLR (4th) 385
Sykes v DPP, [1962] AC 528, [1961] 3 All ER 33 (HL)
Tarasoff v Regents of University of California, 551 P.2d 334, 17 Cal 3d 425 (Cal 1976)
Toms v Foster, 7 MVR (3d) 34, [1994] OJ No 1413 (QL) (CA)
Victoria (City) v Adams, 2009 BCCA 563, 313 DLR (4th) 29
Wakeling v United States of America, 2014 SCC 72, [2014] 3 SCR 549
Wellesley v Duke of Beaufort (1827), 2 Russ 1, 38 ER 236 (Chancery)

3   Bills

US, SB 1405, An Act Amending Title 36, Chapter 4, Article 1, Arizona Revised Statutes, by Adding Section 36-415; Relating to Health Care Institutions, 50th Leg, 1st Reg Sess, Arz, 2011
US, SB 1309, An Act Amending Title 1, Arizona Revised Statutes, by Adding Chapter 7; Relating to Arizona Citizenship, 50th Leg, 1st Reg Sess, Arz, 2011
US, SB 1407, An Act Amending Title 15, Chapter 2, Article 2, Arizona Revised Statutes, by Adding Section 15-249.02; Relating to the Department of Education, 50th Leg, 1st Reg Sess, Arz, 2011

US, SB 1611, An Act Amending Sections 1-501, 1-502 and 13-2009, Arizona Revised Statutes; Amending Title 13, Chapter 29, Arizona Revised Statutes, by Adding Section 13-2930; Amending Sections 13-3961, 15-828, 15-1445, 15-1626, 23-214, 28-1559, 28-2051, 28-2059, 28-2157, 28-2163 and 28-3304, Arizona Revised Statutes; Amending Title 36, Chapter 12, Article 1, Arizona Revised Statutes, by Adding Section 36-1409.02; Amending Sections 41-1080, 41-1758.01 and 41-1822, Arizona Revised Statutes; Amending Title 41, Arizona Revised Statutes, by Adding Chapter 48; Relating to Unlawfully Present Aliens, 50th Leg, 1st Reg Sess, Arz, 2011

4 Legislative Proceedings

Alberta, Legislative Assembly, Alberta Hansard, 27th Leg, 2d Sess, No 40a (13 May 2009)

Arizona, Senate, Senate Appropriations Committee, 50th Leg, Reg Sess (22 February 2011), online: <azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=8503>

Ontario, Legislative Assembly, Official Report of Debates (Hansard), 27th Parl, 5th Sess, No 56 (7 April 1967)


Saskatchewan, Legislative Assembly, *Debates and Proceedings (Hansard)*, 25th Leg, 3rd Sess, No 11A (13 November 2006)

Saskatchewan, Legislative Assembly, Standing Committee on Intergovernmental Affairs and Infrastructure, *Debates and Proceedings (Hansard)*, 25th Leg, 3rd Sess, No 34 (5 February 2007)

5 Codes, Policies, Reports, etc


Canada, Royal Commission on the Revision of *Criminal Code, Report* (Ottawa: Queen’s Printer, 1952) (Chairman: WM Martin)
Canadian Association for Community Living, *Assessing Vulnerability in a System for Physician-Assisted Death in Canada* (2016), online:


Canadian Medical Association, *CMA Code of Ethics* (Ottawa: CMA, 2004), last reviewed 2015, online: <www.the-cma.org/regulatory/code-of-ethics>

Canadian Veterinary Medical Association, “The Veterinarian Oath”, online: <www.canadianveterinarians.net/about/veterinary-oath>


*Vulnerable Persons Standard* (2017), online: <www.vps-npv.ca/readthestandard>

World Medical Association, *Declaration of Geneva* (September 1948), online: <www.wma.net/en/30publications/10policies/g1/>

6 Court filings

Notice of Application, *The Christian Medical and Dental Society of Canada et al v College of Physicians and Surgeons of Ontario* (20 March 2015), Court file 15-63717 (Ont SC)

7 Newspaper articles


David Langstry, “Terrorism can be fought without racial profiling. Train and marathon cases prove it” *The Globe and Mail* (29 April 2013), online: <www.theglobeandmail.com/opinion/terrorism-can-be-fought-without-racial-profiling-train-and-marathon-cases-prove-it/article11604838/>

Lauren Pelley, “Doctors say policy violates their rights; Christian medical group insists College shouldn't force them to refer patients for euthanasia”, *The Toronto Star* (25 March 2015) GT1 (QL)

8 Books, articles, and book chapters


The Criminal Code of Canada with Annotations and Notes by JC Martin, QC (Toronto: Cartwright & Sons, 1955)


Elizabeth Anderson et al, “Consequences and Dilemmas in Therapeutic Relationships with Families Resulting from Mandatory Reporting Legislation” (1992) 14:2-3 Law & Pol’y 241


Phil Arkow, “Child Abuse, Animal Abuse, and the Veterinarian” (1994) 7:4 J American Veterinary Medical Assoc 1004


Susanne Boucher & Kenneth Landa, Understanding Section 8: Search, Seizure, and the Canadian Constitution (Toronto: Irwin Law, 2005)


Alan Brudner, “Proportionality, Stigma, and Discretion” (1996) 38 Crim LQ 302

Scott Burris & Edwin Cameron, “The Case Against Criminalization of HIV Transmission” (2008) 300:5 J American Medical Assoc 578


John R Carlisle, “Mandatory Reporting of Gunshot Wounds to Police... Not as Simple as it Seems” (2004) 25:1 Health L Can 1


I Glenn Cohen, “Transplant Tourism: The Ethics and Regulation of International Markets for Organs” (2013) 41:1 JL Med & Ethics 269


Caroline Mala Corbin, “The First Amendment Right against Compelled Listening” (2009) 89:3 BUL Rev 939


Steve Coughlan & Glen Luther, Detention and Arrest, 2d ed (Toronto: Irwin Law, 2017) at 86-88


Laura M Criddle, Carol Bonnomo & Susan Shapiro, “ED Staff’s Reporting of Impaired Drivers: Understanding the Issues, Continuing the Work” (2001) 27:2 J Emergency Nursing 199


R Steven Daniels, Lorin A Baumhover & Carolyn L Clark-Daniels, “Physicians’ Mandatory Reporting of Elder Abuse” (1989) 29:3 Gerontologist 321


Bernard M Dickens, “Legal Responses to Child Abuse in Canada” (1978) 1:1 Can J Fam L 87


Adam M Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 Queen’s LJ 493


Alvin AJ Esau, “Collective Freedom of Religion” (2016) 75 SCLR (2d) 77

Lawrence R Faulkner, “Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults” (1982) 16:1 Fam LQ 69


Martha Albertson Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008) 20:1 Yale JL & Feminism 1


Diana Ginn, “Mandatory Reporting of Wife Assault by Health Care Professionals” (1994) 17:1 Dal LJ 105

Jennifer Beth Glick, “Protecting and Respecting Our Elders: Revising Mandatory Elder Abuse Reporting Statutes to Increase Efficacy and Preserve Autonomy” (2005) 12:4 Va J Soc Pol’y & L 714


Leigh Goodmark, “Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases” (2009) 37:1 Fla St UL Rev 1


Peter W Hogg, “The Brilliant Career of Section 7 of the *Charter*” (2012) 58 SCLR (2d) 195


AC Jost, “The Notification of Communicable Disease” (1925) 15:3 Can Medical Assoc J 278


W Page Keeton, ed, Prosser & Keeton on Torts, 5th ed (St Paul: West, 1984)


Lewis N Klar, Tort Law, 5th ed (Toronto: Carswell, 2012)


Anne L Mactavish, “Mandatory Reporting of Sexual Abuse under the Regulated Health Professions Act” (1994) 14 Health L Can 89


Ronald D Manes & Michael P Silver, Solicitor-Client Privilege in Canadian Law (Toronto: Butterworths, 1993)
Daniel Mark, “Freedom of Religion as a Group Right” (2016) 75 SCLR (2d) 115

Andrew Flavelle Martin, “The Adoption of Mandatory Gunshot Wound Reporting Legislation in Canada: A Decade of Tension in Lawmaking at the Intersection of Law Enforcement and Public Health” (2016) 9:2 McGill JL & Health 175


JP May, D Hemenway & A Hall, “Do Criminals Go to the Hospital When They Are Shot?” (2002) 8:3 Injury Prevention 236

Margaret McCallum, “Mandatory Child Abuse Reporting and Confidentiality in the Lawyer-client Relationship” (2001) 50 UNBLJ 263


Colin McNaughton, ed, Wigmore on Evidence, revised ed (Boston: Little Brown, 1961), vol 8


Steven Penney, “Unreasonable Search and Seizure and Section 8 of the Charter: Cost-benefit Analysis in Constitutional Interpretation” (2013) 62 SCLR (2d) 101

Ellen I Picard & Gerald B Robertson, Legal Liability of Doctors and Hospitals in Canada, 4th ed (Toronto: Thomson Carswell, 2007)


John ES Poyser, Capacity and Undue Influence (Toronto: Thomson Reuters Canada, 2014)


Laura L Sessums, Hanna Zembrzuska & Jeffrey L Jackson, “Does This Patient Have Medical Decision-Making Capacity?” (2011) 306:4 JAMA 420


Hamish Stewart, Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms (Toronto: Irwin Law, 2012)


Hamish Stewart, “Normative Foundations for Reasonable Expectations of Privacy” (2011) 54 SCLR (2d) 335


Don Stuart, Charter Justice in Canadian Criminal Law, 6th ed (Toronto: Carswell, 2014)


Rollie Thompson, “Rounding Up the Usual Criminal Suspects, and a Few More Civil Ones: Section 7 after Chaoulli” (2007) 20 NJCL 129

Mary Anne Waldron, Free to Believe: Rethinking Freedom of Conscience and Religion in Canada (Toronto: University of Toronto Press, 2013)


Lorraine E Weinrib, “‘This New Democracy...’: Justice Iacobucci and Canada’s Rights Revolution” (2007) 57:2 UTLJ 399


