



GREY AREAS NEWSLETTER

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

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Reflecting on Reporting and Responding Requirements

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Vastly different words are used to describe the concept, each with their own moral implications: “snitch”, “informant”, “whistleblower”, “professional”. Whatever term is used, an obligation to report problematic conduct by other registrants is an important regulatory tool. Such information enables the regulator to investigate issues of misconduct, incompetence, or incapacity that may place the public at risk and that might otherwise never be known.

An example of a [mandatory reporting provision](#) that, anecdotally at least, has contributed to the protection of the public is the obligation on Ontario health practitioners to report information received in the course of their practice that another registrant has sexually abused a patient. That provision originated with the 1991 Final Report of the Task Force on Sexual Abuse of Patients commissioned by the College of Physicians and Surgeons of Ontario.

The Canadian armed forces has had a similar obligation on its member to report breaches of rules by other members, but it has [recently announced](#) that it would be

repealing that duty. This action was recommended by former Justice of the Supreme Court of Canada, Louise Arbour, in her final Report of the [Independent External Comprehensive Review](#).

Intuitively it seems surprising to entirely eliminate this tool for obtaining information about alleged misconduct. However, the recommendation makes more sense after reading Arbour’s concerns about the reporting requirement in the military setting:

- For many members of the armed forces, the fear of reprisals and ostracization outweighs the fear of not making a report (especially since in almost no case was anyone sanctioned for failing to make such a report).
- There is widespread mistrust in the investigation process that would result from any report. This was particularly true for the military’s ability to address sexual misconduct. This mistrust reflected a “structural barrier” in the “toxic masculinity” culture within the armed forces.

- The making of a report could harm the victim or, would at the least, remove their control over the process.
- The duty was too broad. It applied to any breach of the rules and to almost all military personnel, including the recipient of the misconduct, including for sexual abuse.
- Despite the breadth of the duty, there remained confusion on how, and to whom, a report should be made.

It is worth noting that there is a distinction between the military's duty to report and that of many regulated professions. The military duty to report is typically in relation to conduct that harms staff and colleagues rather than conduct that jeopardizes the welfare of clients or patients.

The concerns identified in Arbour's Report may have application to professional mandatory reporting requirements. For example, the mandatory reporting obligation for sexual abuse flowing from the 1991 Sexual Abuse Task Force Report anticipated many of these same concerns and included measures intended to address them. For example:

- The duty (at that time at least) was only in respect of sexual abuse of patients, a pressing and important issue.
- The identity of the patient cannot be included in the mandatory report without the prior written consent of the patient.
- There are heightened confidentiality obligations for the report. For example, the report cannot be disclosed to other regulators.
- The reporting obligation is accompanied by multiple protections for the patient, including a right to insist on a ban on the publication of their identity in any subsequent discipline hearings, a right to make an impact statement where sexual

abuse is proven, and access to a compensation fund for therapy.

- The introduction of the reporting obligation was also accompanied by an extensive educational initiative for registrants, patients, and members of the public, including the obligation on every health regulator to develop a sexual abuse prevention plan. Part of the education resulted from the mandatory revocation (for at least five years) of registrants who engaged in frank sexual acts with patients, which brought home to practitioners how seriously government was in its attempts to prevent and address the sexual abuse of patients.

Even with these refinements, the mandatory requirement to report sexual abuse continues to create challenges. For example, the duty includes having to report "behaviour or remarks of a sexual nature" which includes an isolated sexualized comment or joke. One suspects that there may be understandable reasons why some registrants pretend not to notice such remarks and therefore do not intervene, (such as reproving the registrant who made the remark or supporting the recipient patient), or make a formal report to a regulator. These reasons may include the power imbalance that exists between practitioners (such as that between doctors and nurses, or dentists and dental hygienists), or the likelihood that the observer may themselves have been subject to similar conduct from the registrant. Anecdotally, it seems most reports are made by registrants who are informed about such conduct by the patient after the fact, rather than by actual observers of the conduct.

There are other options that exist, besides a rigid mandatory reporting obligation, that some regulators have been employing. These include:

1. A voluntary reporting mechanism in which the registrant can weigh the surrounding circumstances (including the nature of the conduct and the

- wishes of the patient or client) in exercising judgment on whether to make a report.
2. A whistleblower scheme which is similar to a voluntary reporting mechanism, but can include heightened confidentiality protections for the reporter (analogous to the “Crime Stoppers” program) and which can also provide financial rewards for reporters, such as is used by [some securities regulators](#).
 3. A duty to intervene without specifying the nature of the intervention. This approach facilitates the exercise of judgment in the pursuing of the most effective option (e.g., speaking privately with the offending registrant, supporting the client or patient, or raising the concern with the employer or other local authority). The UK regulator for physicians has recently [published guidance](#) that uses this approach to address discriminatory conduct.
 - a. Be reserved for serious concerns that jeopardize the welfare of vulnerable people (or else face the risk of widespread non-compliance by the profession and the damage (e.g., moral injury, guilt, etc.) that failing to report causes to registrants and public confidence in the regulatory regime);
 - b. Be accompanied by an education program for registrants, clients or patients, and members of the public to emphasize the seriousness of the conduct that must be reported;
 - c. Include measures to respect the wishes of and support the concerns of the target of the misconduct so that they are not revictimized;
 - d. Result in compassionate and effective regulatory action so that reporters have confidence that their report will make a real difference; and
 - e. Result in credible enforcement consequences for those failing to make a mandatory report when they should have.

These options have their disadvantages, including leaving it open to regulated professionals to not intervene or report at all or incentivizing what should be a professional expectation.

The primary implication of these developments is that regulators should carefully and thoughtfully approach the development of a reporting or responding obligation or expectation. For example, mandatory reporting obligations might balance the following factors:

Perhaps the lesson that professional regulators can learn from the experience of Canada’s military is that a mandatory (or expected) reporting obligation is an important, regulatory tool that should be employed in a thoughtful, nuanced manner, taking into consideration all relevant factors, and learning from existing schemes, so as to reduce unintended consequences.

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