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Mandatory Reporting – Does it work?

1. We can define mandatory reporting as a **statutory obligation on a party prescribed by regulation** to notify a prescribed authority on certain conditions. Often penalties apply for failure to comply with the mandated obligation. In some cases protection is granted for those reporting¹.
2. Mandatory reporting, originally developed in relation to child abuse, has spread to areas such as aged care and the Medical Practice Act in NSW via the Medical Practice Amendment Bill 2008. There are plans to introduce mandatory reporting to all health professions covered by national registration with the passage of Bill B.
3. At first glance it would appear to be reasonable and beneficial for an obligation of mandatory reporting to be introduced into any area of public protection. However with any significant policy change the implications of mandatory reporting need careful and critical analysis. In particular the question has to be asked, does it work? And what are its potential consequences, positive and negative?
4. If mandatory reporting does not work, then the public protection claims that justify its introduction are invalid.
5. The ADF has been unable to find substantial detailed evaluation of the impact of mandatory reporting in any setting. This in itself should raise concerns.
6. Where analysis has been undertaken, mandatory reporting has failed the test. Dr Frank Ainsworth, Senior Principal Research Fellow of the School of Social Work and Community Work at James Cook University, conducted an analysis of the impact of mandatory reporting on child abuse and neglect in WA in 2002. Interviewed in 2004 by the ABC, Dr Ainsworth made the following comments,

¹ Butterworth's Australian Legal Dictionary 1997 defines mandatory reporting as follows, "*mandatory reporting is the statutory obligation on medical practitioners and other professions prescribed by regulation including school principals and teachers to notify the prescribed authority if there are reasonable grounds to suspect that a child under 16 years of age is being abused.... Such a professional person commits an offence if he/she fails to comply with this obligation... a person making a report under this provision is protected from an action for breach of professional ethic, defamation, malicious prosecution or conspiracy. (NSW) Children (Care and Protection) Act 1987.*"

“FRANK AINSWORTH: I think everywhere in the world that has adopted mandatory reporting, has found that the mandatory reporting system has distorted the child welfare system to the point where it becomes largely an investigative or forensic system, rather than the system that's designed to provide support services to children of families where there are difficulties of the kind that we know exist in some of these situations.

The substantiation rate [of valid child abuse complaints] in Western Australia that doesn't have mandatory reporting appears to be higher than in those states that do have mandatory reporting. So you have to have a question about the effectiveness of mandatory reporting.

TONI HASSAN: Would you be urging legislators, politicians, to reconsider mandatory reporting legislation?

FRANK AINSWORTH: I would say that mandatory reporting legislation is more about politics than protection. I would say it's about the politicians wanting to appear to be doing something against what is increasingly being viewed as a national scandal”².

7. The Australian Lawyers Alliance (NSW) is also a critic of mandatory reporting.

”A submission earlier this year by the then President of the Australian Lawyers Alliance (NSW) Maurie Stack revealed these startling facts. Since the commencement of the 1998 amendments in 2000, notifications of child abuse in NSW have increased by a staggering 463% with 40,937 notifications recorded in 2000-01 compared to 189,928 notifications in the 2006-07 period (Australian Institute of Health and Welfare figures).

Of the 189,928 notifications, only 92,729 of the reports have had their investigations finalised. Of these finalised investigations, only 40% of reports warranted further attention.

In 2006-07 Victoria and Queensland had 38,675 and 28,580 notifications compared to our 189,928.”³

8. Melbourne based lawyer Moira Rayner is an outspoken opponent against mandatory reporting for child abuse. Detailing the history of mandatory reporting in the United States in 1963, she notes how mandatory reporting laws “became more complex because of a misplaced belief that if such reports were publicised resources to address the issues would be found.” Rayner goes on to claim that “mandatory reporting can actually make the problems worse in a number of ways” and further that “it makes the public feel better when they shouldn't” and “it does not guarantee a better outcome”. Rayner further claims that mandatory reporting leads to a decline in support services because “money gets siphoned

² Concerns about efficacy of mandatory reporting of child abuse, <http://www.abc.net.au/pm/content/2004/s1267067.htm> & Does mandatory reporting of child abuse and neglect work? http://www.acwa.asn.au/Conf2002/Conf_proceedings/10%20Mandatoryreporting.ppt

³ http://www.stacklaw.com.au/content/upload/files/newsroom/media_articles/080902_Child_Protection.pdf

*from services which support children to reports about children. Mandatory reporting is expensive. No government maintains these systems well anywhere” and alarmingly “it may discourage older, articulate children from reporting abuse at all, fearing the consequences”.*⁴

9. The ADF maintains that if the justification for the introduction for mandatory reporting rests solely on claims of greater public protection then the question arises as to **why mandatory reporting is not immediately introduced to a raft of areas** where failure to report impairment could result in death or injury to the public i.e. in the transport industry, the building industry, all trades and virtually every area of professional, commercial and community activity.
10. Advocates of mandatory reporting on public safety grounds alone need to answer the question as to why mandatory reporting should be restricted to selective groups or occupations. If it is valid to protect the public by demanding that members of the medical profession report any conduct that they believe or ought to believe is associated with being intoxicated by drugs or alcohol, departing from professional standards and engaging in sexual misconduct then **surely it is equally as valid to demand that parliamentarians be subject to the same test.** The argument can be made that in regards to high profile cases of sexual misconduct and behaviour whilst intoxicated by parliamentarians, that a mandatory reporting system may have prevented some of the damage that has now become evident and which lowers public confidence in our elected representatives.
11. Mandatory reporting requirements into the medical profession have been mandated in the US, namely in Arizona, Delaware, Montana, Nebraska, New Jersey, Oregon and Texas.⁵ In the UK too, doctors have been found guilty of serious professional misconduct for failure to pursue complaints against colleagues.⁶
12. The NSW Government introduced mandatory reporting requirements into the Medical Practice Act 1992 via an amendment in 2008. In introducing mandatory reporting the then NSW Health Minister, Reba Meagher stated clearly that its introduction was **based on public perceptions** not any evidence that it would improve medical standards. “[NSW Medical Board] *advises that the level of reporting by practitioners since that time [2005] had not changed greatly. This reinforces the public perception of a closed shop culture in the medical profession. The government has therefore decided it is an appropriate time to impose legal mandatory reporting on the medical profession*”.⁷
13. In considering the introduction of mandatory reporting, the ADF maintains that parliamentarians need a far more strident test namely **as to whether its introduction will improve the standards of care or behaviour being targeted** (or decrease unwanted behaviour) **without adverse unintended consequences.**

⁴ Mandatory reporting bound to fail, www.newmatilda.com, 14/3/07

⁵ Arnold P C, Mandatory reporting of professional incompetence, MJA 2008 189(3): 132:133

⁶ Dyer, C., Consultant found guilty of failing to act on colleague, BMJ, 1994 308:809 cited in Arnold, P C op cit.

⁷ NSW Hansard, NSW Medical Practice Amendment Act 2008, 7/5/08

14. On the 3rd July 2009 Elizabeth McIntosh from the Medical Observer Magazine, a national Australian publication covering medico-political issues from a doctor's perspective, filed a story entitled, "Mandatory reporting blamed for suicide". She reported as follows,
*"The tragic suicide of a doctor too fearful to seek help from colleagues has renewed serious concerns about the unintended consequences of mandatory reporting laws.
The doctor took his own life in December last year, and Medical Observer has learned that within his suicide note, he specifically blamed mandatory reporting laws as preventing him from turning to colleagues for support or advice."*⁸
15. The most important two elements to be considered are,
a. will mandatory reporting work to the betterment of the community? and
b. is the test that triggers the mandatory reporting requirement sufficiently objective to be fair and reasonable in all potential circumstances? i.e can it be applied fairly without the benefit of hindsight?
16. The hazard that legislators (who believe in procedural justice for all citizens including those subject to mandatory reporting requirements) must avoid is a test of reporting that is only valid with the benefit of hindsight. Phrases like 'will come to a view' or 'based on a belief' or 'ought to have known' are extremely subjective foundations on which to build a mandatory reporting system. Worse, they can introduce the potential for grave injustice for those who are honestly seeking to obey the law. It is a fundamental principle of our justice system that **the law is capable of being obeyed** and hence confidence is maintained in the rule of law.
17. In NSW under mandatory reporting legislation a doctor can be de-registered for not reporting "**some other registered medical practitioner**" in circumstances where he or she **believes** or '**ought reasonably to believe**' that some other registered medical practitioner
a. practised medicine while intoxicated by drugs or alcohol,
b. flagrantly departed from accepted standards of professional practice and risked harm to some other person or
c. engaged in sexual misconduct in connection with medical practice.
18. This legislation immediately throws up important questions of natural justice including,
a. Why is it mandatory only to report a registered medical practitioner? Presumably there is no requirement to report a person performing medical treatment or holding themselves out to be a doctor who has not been registered in NSW.
b. Why should doctors only be mandated to report on doctors, and not on other health professionals, administrators and allied health staff, who are breaching professional standards?
c. What constitutes being intoxicated?

⁸ Elizabeth McIntosh, Mandatory reporting blamed for suicide, Medical Observer, 3 July 2009

- d. What constitutes practising medicine given that doctors are always potentially available to treat patients?
 - e. What constitutes flagrant departure as opposed to departure?
 - f. Why must flagrant departure co-exist with the risk of harm?
 - g. What constitutes the risk of harm? In fact, what constitutes harm? Is it different from serious harm?
 - h. What constitutes belief?
 - i. How do we determine what someone 'ought to have believed'?
- 19.** The ADF maintains that determining the above as is done in cases of alleged medical negligence may take weeks, months or years in court with the benefit of expert witnesses and hindsight judgement. Yet mandatory reporting legislation requires these matters to be determined by the doctor concerned based on potentially limited evidence, hearsay or observation. If the doctor's judgement does not coincide with the group of experts after the event, the doctor may be subject to de-registration under current NSW legislation.
- 20.** Further complex, ethical and moral questions are generated by mandatory reporting. First and foremost is the question of who should be exempted from reporting, if any.
- a. Should psychiatrists be exempted for patients in therapy or treatment?
 - b. Should medical counsellors who are registered practitioners be exempted?
 - c. Should doctors who review insurance claims be exempted?
 - d. Should doctors in training be exempted?
 - e. Should medical students be exempted?
 - f. Should medical academics be exempted?
 - g. Should doctors who treat other doctors be required to report, i.e. does a doctor honour the sanctity of the doctor-patient relationship and the Hippocratic oath or the mandatory reporting system?
- 21.** Furthermore, who should mandatory reporting cover?
- a. Only registered medical practitioners?
 - b. Should medical students be subject to a report?
 - c. Should doctors in training be subject to a report?
 - d. Should all health workers be subject to a report?
 - e. Should all allied health workers be subject to a report?
 - f. Should all health administrators be subject to a report?
 - g. Should all health managers be subject to a report?
- 22.** Furthermore, how do mandatory reporting requirements conflict or harmonise with other reporting requirements? e.g. does mandatory reporting over-ride ethical reporting requirements? Given that doctors in NSW are already subject to ethical and legal reporting requirements, where does mandatory reporting fit in?

Conclusion

The Australian Doctors' Fund has serious misgivings about mandatory reporting requirements for medical practitioners.

The ADF accepts the concerns of Prof Paul Komesaroff who has warned elsewhere about the confusion of the law and ethics, *“the imposition of a comprehensive and elaborate set of quasi legal rules is likely to be counter productive. It reflects a confusion between the roles of law and of ethics. The distinction between these two spheres is an ancient one, which derives from the separation of the realms of private and public that originally made society possible at all.....Law is global, abstract and universally applicable. Ethics is local, context sensitive and highly dependent on interactions between individuals.”*⁹

The ADF believes that legislated mandatory reporting for medical and health practitioners opens the way for potential grave injustice and a false sense of security for those who believe that quality and safety can be achieved by punitive legislation. Already there are claims that one doctor has been driven to suicide. The advice of RACGP President Dr Chris Mitchell should not be lightly dismissed, when he states that *“if doctors weren’t guaranteed confidential advice, they wouldn’t seek help, which would ultimately put patients at risk.”*¹⁰

The ADF notes the submission to the Senate by the Medical Indemnity Insurance Association of Australia (MIIAA) which states categorically, *“The MIIAA does not support mandatory reporting obligations. The MIIAA supports the existing ethical obligations and codes of professional conduct which govern the reporting of colleagues by health professionals.”*¹¹

The ADF also notes that the proposed Bill B would modify existing NSW Legislation and introduce a test of reportable conduct whereby *“the health practitioner has practised the profession in a way that constitutes a departure from accepted professional standards”*. Given the complexities of medical practice alone arriving at a reasonable consensus of what constitutes a ‘departure from accepted standards’ is a very wide ranging and difficult question to answer in some circumstances particularly given the dynamic nature of science and medicine.

History shows that what is considered unacceptable medical practice today was not always so and vice versa.

Medical practice remains a complex, diverse and dynamic field of human endeavour.

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⁹ Paul A Komesaroff & Ian Kerridge, The AMC Draft Code of Professional Conduct. Good practice or creeping authoritarianism? MJA-2008-11209, 18/4/09

¹⁰ Elizabeth McIntosh, Mandatory Reporting blamed for suicide, Medical Observer, 3 July 2009

¹¹ MIIAA Submission to the Senate Community Affairs Committee inquiry into the National Registration and Accreditation Scheme for Doctors and other Health Workers, 20 April 2009