

## **The Mandatory Reporting of Child Abuse Under the *Child Welfare Act*<sup>1</sup>**

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Section 3 of the *Child Welfare Act*<sup>2</sup> establishes a mandatory reporting obligation. It reads as follows:

- (1) Any person who has reasonable and probable grounds to believe and believes that a child is in need of protective services shall forthwith report the matter to a director.
- (2) Subsection (1) applies notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other Act.
- (3) This section does not apply to information that is privileged as a result of a solicitor-client relationship.
- (4) No action lies against a person reporting pursuant to this section unless the reporting is done maliciously or without reasonable and probable grounds for the belief.
- (5) Notwithstanding and in addition to any other penalty provided by this Act, if a director has reasonable and probable grounds to believe that a person has not complied with subsection (1) and that person is registered under an Act regulating a profession or occupation prescribed in the regulations, the director shall advise the appropriate governing body of that profession or occupation of the failure to comply.
- (6) Any person who fails to comply with subsection (1) is guilty of an offence and liable to a fine of not more than \$2000 and in default of payment to imprisonment for a term of not more than 6 months.

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<sup>2</sup>S.A. 1984, c. C-8.1 [hereinafter the CWA].

The mandatory reporting provisions of the *CWA* arise at the intersection between idealism and practicality, political morality and professional ethics, power and protection, crime and inter-meddling. The provisions have a superficial simplicity, yet involve multiple legal complications and policy decisions. The provisions are at once an important signal of our commitment to the protection of children, and toothless quasi-law. The provisions sometimes fall outside professional notice but at other times provoke torrents of discourse.

Why add to the discourse? The Canadian literature on mandatory reporting is not large. There is little focus, in particular, on the peculiar Alberta rules. While legal careers may begin and conclude without any advertence to mandatory reporting, the provisions may emerge with startling prominence for clients – professionals facing conflicts between obligations of confidentiality and the obligation to report, or facing liability for reporting or failing to report; those involved in custody battles; and defendants charged with offences against children. Gaining an understanding of Alberta's mandatory reporting provisions is worthwhile.

This attempt to understand the mandatory reporting provisions of the *CWA* shall move through two main stages – (I) the politico-moral background to mandatory reporting, and (II) a review and assessment of the provisions.

## I. The Politico-Moral Background to Mandatory Reporting

A primary political point is that Alberta is not alone in having mandatory reporting provisions. True, not all modern democracies have mandatory reporting laws. The United Kingdom does not.<sup>3</sup> Neither do Belgium, the Netherlands, nor Germany.<sup>4</sup>

In Canada, the United States and Australia, though, the politics of mandatory reporting have been settled for some time. The publication in 1962 of a highly influential paper by Kempe, Silverman, Brandt, Droegemueller, and Silver entitled

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<sup>3</sup>C. Cobley, *Child Abuse & the Law* (London: Cavendish Publishing, 1995) at 23; D. Berridge, "England: Child Abuse Reports, Responses, and Reforms" in N. Gilbert, ed., *Combating Child Abuse: International Perspectives and Trends* (New York: Oxford University Press, 1997) 72 at 77.

<sup>4</sup>C. Marneffe, "Alternative Forms of Intervention" in M.E. Helfer, R.S. Kempe & R.D. Krugman, eds., *The Battered Child*, 5<sup>th</sup> ed. (Chicago: University of Chicago Press, 1997) 500 at 502; C. Marneffe & P. Broos, "Belgium: An Alternative Approach to Child Abuse Reporting and Treatment" in Gilbert, ed., *supra* note 3 at 167; M.A.S. Roelofs & H.E.M. Baartman, "The Netherlands: Responding to Abuse – Compassion or Control?" in Gilbert, ed., *supra* note 3, 192; F. Lamer-Winkelman & K. Kooijman, "Prevention of Child Abuse in the Netherlands: An Overview of Existing Strategies", online: <<http://www.knoware.nl>>; R. Wolff, "Germany: A Nonpunitive Model" in Gilbert, ed., *supra* note 3 at 225.

“The Battered-Child Syndrome”,<sup>5</sup> along with waves of research effort, media frenzy, and political activism, resulted in the enactment of mandatory reporting laws in all 50 American States by 1968:<sup>6</sup> “These were the most rapidly adopted pieces of legislation in the history of the United States.”<sup>7</sup> The District of Columbia, Puerto Rico, and the Virgin Islands now also have mandatory reporting laws.<sup>8</sup> The trend was exported: most of the Australian States enacted mandatory reporting laws.<sup>9</sup> All Canadian jurisdictions save the Yukon territory have mandatory reporting laws (the Yukon territory has a general discretionary reporting provision, although teachers and daycare workers are required to report abuse).<sup>10</sup> Alberta has had mandatory reporting provisions since 1966.<sup>11</sup>

Mandatory reporting is a North American legislative reality, to which our personal practices and institutional policies and procedures must respond. The mere prevalence of mandatory reporting legislation, however, does not make it right – although cross-jurisdictional consensus is some evidence of the propriety of such legislation. We may still question whether we should have mandatory reporting

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<sup>5</sup>C. H. Kempe *et al.*, “The Battered Child Syndrome” (July, 1962) 181 JAMA 17; L.B. Costin, H.J. Karger & D. Stoesz, *The Politics of Child Abuse in America* (New York: Oxford University Press, 1996)107ff.

<sup>6</sup>J.E.B. Myers, *Legal Issues in Child Abuse and Neglect* (Newbury Park: Sage Publications, 1992) 100; Coble, *supra* note 3 at 3; O.W. Larrabee, “The Prosecution and Defense of Child Abuse” in B.A. Morosco, *The Prosecution and Defence of Sex Crimes* (New York: Matthew Bender, 1998), chap. 11, § 11.03; K.M. Healey, “Policies, Practices and Statutes Relating to Child Abuse and Neglect” Mandatory Reporting Requirements (National Institute of Justice, Child Abuse Intervention Strategic Planning Meeting, 3 October 1997), online: <<http://www.ojp.usdoj.gov/nij/childabuse/bg3.html>>; M. Robin, “The Social Construction of Child Abuse and ‘False Allegations’” in M. Robin, ed., *Assessing Child Maltreatment Reports: The Problem of False Allegations* (New York: Haworth Press, 1991) 1 at 13; National Research Council, *Understanding Child Abuse and Neglect* (Washington: National Academy Press, 1993) at 98, n. 8.

<sup>7</sup>R.W. ten Bonsel, M.M. Rheinberger & S.X. Radbill, “Children in a World of Violence: The Roots of Child Maltreatment” in Helfer, Kempe, Krugman, ed., *supra* note 4 at 25.

<sup>8</sup>J. Epstein, “The Prosecution and Defence of Child Sexual Assault,” in Morosco, *supra* note 6, chap. 9, § 9.03[1].

<sup>9</sup>A. Tomison, “A Summary of Mandatory Reporting Across Australia, June 1996” *National Child Protection Clearing House Newsletter*, online: <<http://www.aifs.org.au/external/nch/newsspring96.html>>, vol. 4 no. 2 (Spring, 1996); “Australia’s First Report Under Article 44(1)(a) of the United Nations Convention on the Rights of the Child” § 651, online: <<http://www.agps.gov.au/customer/agd/croc/crocei.html>> (December, 1995).

<sup>10</sup>British Columbia: *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 14; Saskatchewan: *Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 12; Manitoba: *Child and Family Services Act*, R.S.M. 1987, s. 18; Ontario: *Child and Family Services Act*, R.S.O. 1990, c. C-11, s. 72; Quebec: *Youth Protection Act*, R.S.Q. 1977, c. P-34.1, s. 39; Prince Edward Island: *Family and Child Services Act*, R.S.P.E.I. 1988, c. F-2 s. 14; Nova Scotia: *Children and Family Services Act*, S.N.S. 1990, c. 5, ss. 23, 24, 25; New Brunswick: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 30; Newfoundland: *Child Welfare Act*, R.S. Nfld. 1990, c. C-12, s. 38; North West Territories: *Child Welfare Act*, R.S.N.W.T. 1988, c. C-6, s. 30; Yukon: *Children’s Act*, R.S.Y. 1986, c. 22, s. 115; see K. J. Swift, “Canada: Trends and Issues in Child Welfare” in Gilbert, ed., *supra* note 3, 38 at 43. For the reception of prior law into Nunavut, see the *Nunavut Act*, S.C. 1993 c. 28, as am. (R.S.C. N-28.6), s. 29.

<sup>11</sup>*The Child Welfare Act*, 1966, S.A. 1966, c. 13, s. 39.

provisions at all, or whether we should have more limited or qualified mandatory reporting provisions.

The source for most of the unease with mandatory reporting lies in its conflict with privacy protections. Mandatory reporting compels the disclosure of information that otherwise would be kept confidential, or would be released only at the discretion of the person who came into possession of the information. I shall attempt to show that Alberta's mandatory reporting provisions are legitimate, despite the risks to privacy that they pose.

A first issue is this: how do we go about deciding whether a particular piece of legislation is "legitimate"? The method of justification must rely on our politico-moral assumptions. While I cannot defend my identification of these assumptions here, I suggest that the appropriate assumptions are pluralistic. On the one hand, we are committed to the individual, to the self, to principles of and protections for individual autonomy and dignity. On the other hand, we are committed to the interests of the community and to the interests of others, whose health and security—and whose autonomy and dignity—may require the limitation of the individual's interests. We are committed to both sets of interests at once. This dual commitment makes sense. If we are committed to promoting individuals' interests, we should be committed to promoting the interests of all individuals, not just the interests of those who might be the special targets of legislation. A difficulty may be that a particular legislative initiative engages numerous different interests – one individual may point to one group of interests at stake, while others may point to different interests at stake. Neither set of interests necessarily has priority or subordinates the other set. All relevant interests should be given full consideration. Our pluralistic commitment entails that the method of justification must be one of balancing, of seeking to promote all the relevant interests. The balancing has three main aspects: the identification of the interests at stake for individuals specifically targeted by legislation; the identification of the social interests or the interests of other individuals affected by the legislation; and the assessment of the good effects of the legislation as compared with its bad effects.

We find this sort of balancing analysis throughout the law. It occurs, most obviously, in cases decided under the *Canadian Charter of Rights and Freedoms*, where the justification of legislation found to limit guaranteed rights or freedoms is sought under s. 1;<sup>12</sup> and in the determination of the scope of internally-qualified enumerated rights, such as s. 8, which protects against *unreasonable* search and

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<sup>12</sup>*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*]. Section 1 reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

seizure.<sup>13</sup> A form of the balancing analysis occurs in the application of the “Wigmore test” for the recognition of privilege, and in analyses of the scope of solicitor-client privilege, the scope of disclosure of therapeutic records of complainants to accuseds, and the propriety of publication bans.<sup>14</sup> The most familiar and comprehensive template for a balancing justification for legislation was established in the *Oakes* case, as subsequently refined:<sup>15</sup>

- (a) the legislation in question must promote a “pressing and substantial objective”;
- (b) the legislative means of promoting the objective must
  - (i) be “rationally connected” to the objective;
  - (ii) be “minimally intrusive”, or must “minimally impair” other rights and freedoms; and
  - (iii) have salutary effects that outweigh the means’ deleterious effects.

We shall consider (A) the confidentiality and privacy interests threatened by mandatory reporting; (B) the social interest in combatting child abuse—the “pressing and substantial objective” purported promoted by mandatory reporting; (C) the “need” for mandatory reporting; and (D) balancing the risks and benefits of mandatory reporting. The “minimal intrusion” assessment must await the next section’s detailed review of s. 3(1) of the *CWA* and related provisions.

## A. Privacy and Confidentiality at Risk

The Supreme Court of Canada has recognized the centrality of privacy to a properly functioning liberal democratic society:

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<sup>13</sup>*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J., as he then was [hereinafter *Hunter v. Southam*]; *R. v. Collins*, [1987] 1 S.C.R. 265 (re: the reasonableness of searches and seizures: in this balancing, reasonableness tends to be interpreted procedurally – the search must be in accordance with law, the law must be reasonable, and the manner of the search must be reasonable; with respect to the reasonableness of the law, ordinarily searches and seizures must be made on warrant obtained through a system of prior authorization and granted by a judicial officer with the requisite discretion, on the basis of sworn evidence establishing reasonable grounds for the search and seizure); *R. v. Heywood*, [1994] 3 S.C.R. 761, Cory J. [hereinafter *Heywood*] (re: balancing under s. 7).

<sup>14</sup>See *A.M. v. Ryan*, [1997] 4 W.W.R. 1 (S.C.C.) [hereinafter *A.M. v. Ryan*] (re: the Wigmore test, specifically the last step, which involves the balancing of the interests served by protecting communications against the interests in truth and correct disposal of litigation promoted by disclosure); *Solosky v. The Queen*, [1980] 1 S.C.R. 831, Dickson J. (re: exceptions to solicitor-client privilege); *R. v. O’Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) [hereinafter *O’Connor*] (re: balancing interests in disclosure against interests in preserving the confidentiality of therapeutic records of complainants); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, Lamer C.J.C. [hereinafter *Dagenais*] (re: balancing freedom of expression and fundamental justice in the context of the granting of publication bans).

<sup>15</sup>*R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson J. at 138-139; see also *R. v. Laba*, [1994] 3 S.C.R. 965, Sopinka J. at 1006-1011; and *Dagenais*, *ibid.* at 888-889. Where internally-qualified rights such as those protected by s. 8 are engaged, balancing occurs at two levels – the level of the right itself, and the s. 1 level. For the sake of simplicity, we will work out balancing at only one “macro” level.

Grounded in [persons'] physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government from prying into the lives [sic] of the citizen go to the essence of a democratic state.<sup>16</sup>

Mandatory reporting threatens privacy interests in two ways: by compelling the disclosure of information communicated in confidence, and by compelling the disclosure of information not received in confidence.

In the first type of case, information respecting child abuse may be communicated by an alleged abuser, an alleged victim, or a third party to a person or institution, with the expectation that the information will not be disclosed to the authorities. For example, individuals may have reasonable expectations that information they communicate to a wide variety of professional service providers will be kept confidential. Individuals' expectations may be supported by ethical rules governing professions, by contract, by other common law rules, by statute or even by institutional policies.<sup>17</sup> Absent confidentiality, individuals might not disclose information, which would diminish the ability to provide appropriate services. Mandatory reporting forces professionals to disclose what they otherwise might have had no obligation or inclination to disclose.

Moreover, individuals may have reasonable expectations that information they communicate to public institutions will be used only for the purposes for which the institution required the information and will not be disclosed in any other way. These expectations are confirmed in protection of privacy statutes, such as Alberta's *Freedom of Information and Protection of Privacy Act*.<sup>18</sup> Mandatory reporting may require disclosure for purposes other than the purposes for which the information was originally provided to an institution.

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<sup>16</sup>*R. v. Dymnt* (1988), 66 C.R. (3d) 348 (S.C.C.), La Forest J. at 359.

<sup>17</sup>**ethical rules:** See e.g. the Canadian Medical Association Code of Ethics, paragraph 6 (a physician must "keep in confidence information derived from his patient, or from a colleague, regarding a patient and divulge it only with the permission of the patient except when the law requires him to do so"); quoted in J. Arboleda-Florez and M. Copithorne, *Mental Health Law and Practice* (Carswell, 1994) § 4.3; *Canadian Code of Ethics for Psychologists* (Canadian Psychological Association, 1991) I.38 - 40; *Practice Guidelines for Providers of Psychological Services* (Canadian Psychological Association, 1989) V.1-3; *Ethical Principles of Psychologists and Code of Conduct* (American Psychological Association, 1992) Principle D and § 5. The Hippocratic Oath provides that "whatsoever I shall see or hear in the course of my profession ... if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets"; Myers, *supra* note 6 at 86; *Dymnt*, *supra* note 16 at 363. **statutes:** See e.g. *Hospitals Act*, R.S.A. 1980, c. H-11, s. 40(3); *Mental Health Act*, S.A. 1988, c. M-13.1, s. 17(4); *Public Health Act*, S.A. 1984, c. P-27.1, s. 63(1); and *Alcohol and Drug Abuse Act*, R.S.A. 1980, c. A-38, s. 8. **institutional rules:** For example, University researchers may be obligated by research ethics policies and the terms of research ethics board approvals of research not to disclose information about research participants.

<sup>18</sup>S.A. 1994, c. F-18.5 [hereinafter the *FOIPP Act*].

Furthermore, individuals' privacy in their bodies, their personal effects, and their personal information is protected from non-consensual State access by s. 8 of the *Charter*, which provides that "[e]veryone has the right to be secure against unreasonable search or seizure." While s. 8 does not expressly mention the word "privacy," the Supreme Court of Canada has interpreted it to protect "reasonable expectations of privacy" from "searches" or "seizures" conducted by agents of the State.<sup>19</sup> Ordinarily, the State is not entitled to extract physical, documentary, or informational evidence respecting a person, unless the State first demonstrates to a judicial officer that there are reasonable grounds for believing that the evidence sought is relevant to whether an offence has been committed, and the judicial officer issues a warrant permitting the search and seizure. Information about an individual in the hands of professional service providers is, on this basis, protected from warrantless State access. Similarly, s. 7 of the *Charter* ("[e]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice") has been interpreted to protect persons' rights to choose whether or not to communicate with State officials, and to protect persons' privacy interests.<sup>20</sup> Mandatory reporting allows the State to gain personal information about individuals without warrant.

In the second type of case, a person may have come into possession of information respecting child abuse in non-confidential circumstances. The information might have been gathered, for example, through observations of public acts. It is true that persons coming into possession of such information could always, in their own discretion, decide to pass on the information to the authorities. We have always had to bear the risk of the "tattletale"—or more generously put, the public-spirited observer, who is not afraid to get involved or to do something.<sup>21</sup> At the same time though, persons were generally under no duty to report suspected offences to the authorities—reporting was discretionary, not mandatory.<sup>22</sup> The State usually would not force neighbours, colleagues, or service providers to disclose information about individuals. This provided a measure of privacy. Mandatory reporting provisions now compel observers to inform.

Mandatory reporting does put privacy at risk. This does not entail that mandatory reporting is wrong. It does mean that mandatory reporting must be shown to yield better moral results than would be achieved by not limiting confidentiality and privacy.

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<sup>19</sup>*Hunter v. Southam*, *supra* note 13 at 159; *Dyment*, *supra* note 16, at 360-361; see *Canadian AIDS Society v. Ontario* (1995), 25 O.R. (3d) 388 (Gen. Div.), Wilson J. at paras 134 ff., *affd.* 31 O.R. (3d) 798, leave to appeal dismissed without reasons, [1997] S.C.C.A. 33 [hereinafter *Canadian AIDS Society*].

<sup>20</sup>*R. v. Hebert* (1990), 57 C.C.C. (3d) 1 (S.C.C.), McLachlin J.; *Canadian AIDS Society*, *ibid.* at paras. 125, 150.

<sup>21</sup>*R. v. Duarte*, [1990] 1 S.C.R. 185, La Forest J.

<sup>22</sup>*Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths* (Canada: Minister of Supply and Services, 1984) 563 [hereinafter the *Badgley Report*].

## B. Child Abuse

The foundation for the justification of mandatory reporting is its promotion of a set of very valuable social goods—the elimination and amelioration of child abuse. Child abuse is a serious and detestable problem. Eliminating child abuse and remedying its effects are certainly substantial social goals. Child abuse is wrong in itself. Child abuse frequently involves behaviour which we could as easily describe as assault or sexual assault—and there is no question that children should be spared from victimization by this type of behaviour. Child abuse involving assault or sexual assault is triply detestable: first, the acts are crimes; second, they are crimes with the superadded aspect of being crimes of domination; and third, they are often crimes not merely of domination, but involve the violation of special and privileged relations, such as the parent-child relation.<sup>23</sup> Even where abuse is not assaultive but a species of neglect, the responsibilities of these privileged relations are violated. Child abuse is a particularly odious crime.

Child abuse also has adverse social consequences, in addition to the injuries it directly causes. Child abuse is frequently correlated with victim underachievement and psychological difficulties, and many who have been abused turn to a criminal lifestyle.<sup>24</sup> The abused, furthermore, tend to become abusers themselves, perpetuating a generational cycle of abuse.<sup>25</sup>

The substantial nature of combatting child abuse and remedying its effects would doubtless be granted. But is child abuse a “pressing” problem? Granted, a single instance of child abuse is bad; but if child abuse is prevalent, the fight against it has added urgency and moral weight. The statistical evidence is not overwhelming, and does not disclose an “epidemic” of child abuse, but it does give a rational basis for concluding that child abuse is sufficiently prevalent to justify extraordinary legislative intervention.

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<sup>23</sup>The higher degree of moral fault attaching to abuses of power relationships is reflected in the punishment for murder. First degree murder, the most serious form of murder, includes murder that took place in the course of a crime of domination: *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*]; see *R. v. Paré* (1987), 38 C.C.C. 97 (S.C.C.) at 108, Wilson J.; *R. v. Harbottle* (1993), 84 C.C.C. (3d) 1 (S.C.C.) at 14, Cory J. In sentencing, abuse of a child or abuse of a position of trust or authority in relation to the victim are aggravating circumstances: *Criminal Code*, ss. 718.2(a)(ii) and (iii).

<sup>24</sup>D. Walters, “Mandatory Reporting of Child Abuse: Legal, Ethical and Clinical Implications within a Canadian Context” (1995) 36:3 *Canadian Psychology* 163 at 164; National Clearinghouse on Family Violence, “Child Abuse and Neglect” (Health and Welfare Canada, 1990) 2.

<sup>25</sup>*Ibid.*; *Children’s Aid Society of Hamilton-Wentworth v. S.D.* (1991), 83 D.L.R. (4<sup>th</sup>) 166 (Unified Fam. Ct.), Steinberg U.F.C.J.

Regrettably, there is no nationally representative collection of child abuse data.<sup>26</sup> The two main Canadian sources of data are the *Revised Uniform Crime Reporting Survey* (UCRII) and the *Ontario Incidence Study of Reported Abuse and Neglect* (OIS).<sup>27</sup> The UCRII data were collected from 154 police agencies in six provinces, but largely originated from Ontario and Québec.<sup>28</sup> The UCRII data disclose that in 1996, 16,300 incidents of physical assault and 6,400 incidents of sexual assault against children were reported to the sample agencies.<sup>29</sup> The extrapolated number of incidents for all of Canada would be approximately twice these numbers. Persons under age 17 were the alleged victims in 22% of all assaults reported to the agencies, comprised of accounting for 18% of victims of physical assaults, and 60% of victims of sexual assaults. The UCRII data have an important limitation: they refer only to “validated” criminal incidents—cases where there is sufficient evidence to indicate that an offence may have occurred—but do not track charges laid, dispositions, and sentences.<sup>30</sup>

Trocme and Brison tell us that

[t]he OIS used a multistage sample survey design to collect information about cases of reported abuse and neglect directly from investigating child protection workers. The weighted OIS estimates are based on a representative sample of 2,447 child and youth...abuse and neglect investigations carried out in the spring of 1993 in 15 randomly selected children’s aid societies across Ontario.<sup>31</sup>

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<sup>26</sup>R. Fitzgerald, “Assaults Against Children and Youth in the Family, 1996” (Juristat: Canadian Centre for Justice Statistics, Statistics Canada – Catalogue no. 85-002-XPE Vol. 17 no. 11) 4; N. Trocme and R. Brison, “Homicide, Assault and Abuse and Neglect: Patterns and Opportunities for Action” in Health Canada, *For the Safety of Canadian Children and Youth: From Injury Data to Preventative Measures* (Minister of Public Works and Government Services Canada, 1997) c. 17 at 257 n. 9. The development of interprovincial sets of data is complicated by the variations in definitions of abuse under different provinces’ legislation: National Clearinghouse on Family Violence, “Child Sexual Abuse” (Health Canada, 1997) 2. This problem is paralleled in the United States: National Research Council, *supra* note 6 at 70. For this reason too, we lack good sets of international data: “Pedophilia on Internet a Crisis – UNESCO” *The [Edmonton] Journal* (19 January 1999) A9.

<sup>27</sup>The frequently cited *Badgley Report* gives a very high estimate of abuse – among adults, 53% of women and 31% of men were abused as children: *Badgley Report*, *supra* note 22 at 175. In 1993, Statistics Canada conducted a General Social Survey, involving a sample of 10,000 respondents over age 15: “Extrapolating to the total adult population, three percent, or almost 700,000 Canadians, reported having been physically or sexually assaulted at some point before the age of 18”: Fitzgerald, *ibid.* at 5. Further relevant information may be gleaned from the *Alberta Family and Social Services Annual Report, 1996/97*. In 1996/97, 29,679 Child Welfare protective services investigations were completed (in 1993/94, 27,267 were completed) and in 1996/97, the average monthly protection caseload was 10,236 (as compared with 7,605 in 1993/94). This Report does not set out statistics concerning numbers of reports, numbers of substantiated reports, or dispositions of substantiated reports.

<sup>28</sup>Fitzgerald, *supra* note 26; Trocme and Brison, *supra* note 26 at 257.

<sup>29</sup>Fitzgerald, *ibid.*

<sup>30</sup>Trocme and Brison, *supra* note 26, at n. 10.

<sup>31</sup>*Ibid.* at 258-259.

The OIS discloses that “an estimated 46,683 children and youths were the subject of a child protection investigation in Ontario in 1993.”<sup>32</sup> Of these, 42% were “unfounded” (although only 3% were judged to have been intentionally false), 27% were substantiated by investigations, and 31% “could not be substantiated but were nevertheless considered to involve suspected abuse or neglect.”<sup>33</sup> The substantiation rate, one might observe, is fairly low – less than 30% of reported cases.

Child abuse statistics are problematic as child abuse may be both under-reported and over-reported. Abuse may be under-reported due to a number of factors: abuse tends to occur in private, without witnesses except the perpetrator and victim; the victim is young, and likely not in a position to speak for himself or herself; and the perpetrator may be well-positioned to cover up the abuse. As one author notes:

circumstances such as the secrecy surrounding the issue, the dependency of the victim on the perpetrator, the lack of knowledge about available help, and fear of repercussions for reporting the event, lead to under-reporting and consequentially an underestimate of the extent of the problem.<sup>34</sup>

Even where evidence of abuse is manifest, third party witnesses (including professionals) may fail to report the abuse.<sup>35</sup> (We shall return to this issue below.) At the same time, child abuse may be over-reported because statistics frequently reflect only reports, a judgment of whether charges could be or were laid. Since many persons charged with offences are not convicted, and since a sizable number of those not convicted are not only legally but morally innocent, the official determinations reflected in the statistics may give an exaggerated sense of the extent of the problem.<sup>36</sup> The statistics are both too small and too large. Nevertheless, despite the difficulties with the statistics, the incidence of child abuse does appear to be sufficiently high to count as a pressing social problem.

Is child abuse sufficiently “pressing and substantial” to warrant overriding confidentiality and privacy interests? The answer must be “yes”. Child abuse is

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<sup>32</sup>*Ibid.* at 259.

<sup>33</sup>*Ibid.* Healey reports that individual American states have “*extremely* varied rates of substantiation – from 8 percent to 80 percent”: Healey, “Policies, Practices and Statutes Relating to Child Abuse and Neglect”, *supra* note 6. See also D. Besharov, “Child Abuse and Neglect Reporting and Investigation: Policy Guidelines for Decision Making” in Robin, ed., *supra* note 6, 36 at 46.

<sup>34</sup>Fitzgerald, *supra* note 26 at 2 (citations omitted). See also Robin in Robin, ed., *supra* note 6 at 13.

<sup>35</sup>Costin, Karger & Stoesz, *supra* note 5 at 139.

<sup>36</sup>In Canada, in 1996, a little less than two thirds of cases resulted in convictions on at least one charge, nearly one-third of cases taken before the courts resulted in a stay or withdrawal of charges, 3 percent resulted in acquittals, and 4 percent were resolved “through other means”: R. Du Wors, *The Justice Data Factfinder*, vol. 17, no. 13 (Juristat: Canadian Centre for Justice Statistics, Statistics Canada – Catalogue No. 85-002-XPE) at 5.

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.

### C. The “Need” for Mandatory Reporting

The appropriateness of particular measures designed to eliminate and ameliorate child abuse must still be demonstrated. A key step in justifying mandatory reporting is to establish that the legislative measures in fact do promote the elimination and amelioration of child abuse. If they do not, they lack justification. Mandatory reporting does promote the reduction of abuse and the amelioration of its effects in three ways.

First, and most importantly, it addresses the problem of under-reporting. Absent mandatory reporting, significant numbers of cases of abuse may not be disclosed. Mandatory reporting forces abuse into the light of day. It forces others to become the voice of children who cannot plead for themselves. By compelling the disclosure of suspected abuse to State authorities, mandatory reporting increases the likelihood that therapeutic or legal interventions will occur, which, in turn, will decrease the effects and continuation of abuse.<sup>37</sup>

Second, 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.

Third, 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.<sup>38</sup>

One might argue that, regardless of what might seem to be the case in theory, no rational connection exists between mandatory reporting and the protection of children, because large numbers of witnesses fail to report despite the obligation to do so. Obtaining statistics on (the offence of) non-reporting is difficult. Some

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<sup>37</sup>Many professionals question the merits of mandatory reporting for cases of child abuse; yet they know that if a report is not made, it is not likely that victims or perpetrators will enter any system of care, protection, and rehabilitation: *Report of The American Psychological Association Presidential Task Force on Violence and the Family*, “Issues and Dilemmas in Family Violence” (1998) 7 “Are Mandatory Reporting Laws Helpful or Harmful to Families?” online: < <http://www.apa.org/pi/pii/famvio/homepage.html>.>

<sup>38</sup>Myers, *supra* note 6 at 100; National Research Council, *supra* note 6 at 73, n. 8.

research indicates that even professionals fail to report abuse that they observe.<sup>39</sup> They do not report because they fear the mishandling of cases by child protective services, or because they believe that their judgments and perspectives will be ignored. No doubt mandatory reporting fails to prompt 100% of witnesses to report. That does not mean that mandatory reporting does not prompt some persons to report who would not otherwise. In the United States, the rate of reporting jumped significantly after the introduction of the mandatory reporting laws.<sup>40</sup> Moreover, the fact that some people will violate the law does not entail that the law is useless. People continue to kill one another, yet we do not dispense with the rules against culpable homicide.

Mandatory reporting, then, has a “rational connection” to the pressing and substantial objectives of reducing child abuse and ameliorating its effects. It is not an irrational or merely arbitrary legislative measure. This still does not entail that mandatory reporting is justified. The identification of a “rational connection” is a necessary condition for justification, but not a sufficient condition. Mandatory reporting must be gauged against the threats it poses. (We are taking the *Oakes* test slightly out of order, and reversing the last two steps. This reversal eases exposition.)

#### D. Balancing Risk and Benefit

If mandatory reporting’s only consequence were to promote the elimination and amelioration of child abuse, it would be, in large measure, justified. Mandatory reporting, though, has some ill effects. To determine whether mandatory reporting is justified, its good effects—the good it actually promotes—must be balanced against its bad effects. We seek, one might say, the “marginal utility” of mandatory reporting, the excess of its benefits over its harms.

Mandatory reporting does limit confidentiality and privacy interests. It may cause further bad effects of five main types – it may (1) reduce recourse to therapy; (2) place children in situations more injurious than their abusive situations; (3)

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<sup>39</sup>Robin, *supra* note 6 at 13; Meyers, *supra* note 6 at 103, who cites G.L. Zellman, “Report Decision-making Patterns Among Mandated Child Abuse Reporters”, 14 *Child Abuse & Neglect* 325 and D. Finkelhor, “Is Child Abuse Overreported? The Data Rebut Arguments for Less Intervention” (1990) 48 *Public Welfare* 22 & 46; Cobley, *supra* note 3 at 35; Besharov, *supra* note 33 at 36; K.M. Quinn, “False and Unsubstantiated Sexual Abuse Allegations: Clinical Issues” in Robin, ed., *supra* note 6 at 145 at 153-154; J. Alfaro, “Impediments to Mandated Reporting of Suspect Child Abuse and Neglect” *Child Sexual Abuse Newsletter* (February 1986) 11. “The only research conducted to date with a Canadian sample of registered psychologists found that 12 percent of the respondents had failed to report suspected child abuse in the previous year”: Walters, *supra* note 24 at 171.

<sup>40</sup>“Since the introduction of mandatory reporting laws in the 1960s, the burgeoning number of child maltreatment reports has stretched the [Child Protective Services] system to its limits – increasing from just 4 reports per 1000 children in 1975 to 47 reports per 1000 children in 1994”: Healey, *supra* note 6, “Child Protective Services, Child Welfare and the Criminal Justice System: Case Processing from Report to Intervention” (citation omitted); Besharov, *supra* note 33 at 35-36.

squander resources; (4) reinforce classist and racist prejudice; or (5) encourage false reporting.

### **1. Reduction in Therapeutic Intervention**

The threat of disclosure may cause abusers not to seek professional assistance, for fear of being turned in. They will not receive treatment, and will be left more likely to continue their abusive practices: “While intended to expose more cases, stop the abuse, and get help for the victims, the laws often had the opposite effect, as offenders aware of the trouble that might ensue stopped talking so freely in therapy.”<sup>41</sup> This sort of argument was rejected in *United States v. Burtrum*: “[Appellant] argues that child molesters will not seek treatment without a privilege, and that, as a result, society will suffer a relative increase in active molesters. He does not cite legal or other authority for this proposition. We note, however, that studies cast a doubtful light on [this] premise.... We are not persuaded by [this] policy argument.”<sup>42</sup>

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. Dickens responds with this assertion: “[A]uthorities in the field have observed that incidents of physical abuse tend to be triggered by crises, and that when these have passed parents show concern to obtain treatment.”<sup>43</sup>

Given the inconclusive state of the literature, while it is possible that disclosure will deter the seeking of assistance, we cannot say that disclosure is a likely deterrent or that it has significant deterrent effects.

### **2. Increasing Threats to Children**

Given present funding and resource levels, even if children are in abusive situations, taking them from their families may wreak greater harm than seeking to correct problems within their families.<sup>44</sup> Reporting may cause harm rather than help. Too often, children do not receive assistance with state intervention, but are merely removed from their families. The lack of any counselling or any appropriate assistance may result in further injury to them: “Unfortunately, our present system makes us go to extremes.... We either remove children too quickly and [do] not provide enough services for the family or the children stay and then suffer serious

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<sup>41</sup>D.C. Anderson, *Sensible Justice: Alternatives to Prison* (New York: New Press, 1998) at 92.

<sup>42</sup>17 F.3d 1299 (10<sup>th</sup> Cir. 1994) at 1302.

<sup>43</sup>B.M. Dickens, *Legal Issues in Child Abuse* (University of Toronto: Centre of Criminology, 1976) at 24.

<sup>44</sup>J. Kahn, “Domestic Violence Laws May Do More Harm Than Good” *Medical Tribune* (July 13, 1995) online: <<http://www.thriveonline.com/health/Library/CAD/abstract23234.html>, 36(13):13>.

brain damage from physical abuse or die. Removing a child from the home works only when there are realistic services to take the place of the home.”<sup>45</sup>

This is a serious concern. If reporting leads to State actions that lead to more harm than good, then mandatory reporting loses its justification. Two responses can be made to this assertion. First, the actual risk of harm caused by intervention, as opposed to the risk of harm caused by non-intervention, has not been established. Second, the concern is properly addressed not through revision of the mandatory reporting rules, but through the allocation of more resources to child protection services.

### 3. *Squandering of Resources*

Mandatory reporting arguably encourages excessive reporting of cases that should not be reported. When too many cases are reported, system resources are drained, and those resources are not available for the proper treatment of true abuse cases.<sup>46</sup>

The responses to this claim are similar to those given for the previous claim. First, it is not clear either that “too many” cases are reported, or that many cases “should not” have been reported. The statistics described above do show a substantiation rate of less than 30%, but this does not entail that reporting and investigation in a far larger percentage of cases was not warranted. Second, the issue again becomes one of funding for child protective services.

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<sup>45</sup>D.J. Willis, quoted in “Psychologists Call for Overhaul of Child Protective System; Present System Too Reactive and Unable to Prevent Abuse” (American Psychological Association) online: <<http://apa.org/releases/protect.html>>. “Observing the overwhelming burden on the child protection system, service providers sometimes fear that making a report will hinder a child’s recovery rather than assist in it. Family members often are separated from each other by the system and may not continue treatment with the reporting professional. Investigations may be conducted poorly by minimally trained caseworkers who have little understanding of family dynamics or their clients’ cultural characteristics. Reports indicate that outright bias may affect the handling of poor families, and relatively few child protection agencies can afford to provide sufficient services to re-direct a child’s or family’s life toward healthy functioning. Many people who work with abused children are discouraged by the lack of resources for dealing with reports of abuse. The system may protect some of the more seriously physically abused children from being killed, but many children who are removed from their homes experience longstanding disruption and uncertainty, and remain in foster care for years. Rarely do these children receive any psychotherapy or other treatment, and even less frequently do they receive help to reduce the trauma after-effects such as nightmares, poor concentration in school, cognitive confusion, intrusive memories, and other acute anxiety and depression symptoms associated with abuse. Although treatment plans are usually ordered in juvenile court proceedings, rarely is access to psychotherapy or other treatment readily available to parents, even when they are motivated to seek help”: *Report of the American Psychological Association Presidential Task Force on Violence and the Family*, *supra* note 37.

<sup>46</sup>R. Lawrence-Kanski, “United States: California’s Reporting System” in Gilbert, ed., *supra* note 3, 9 at 31; Healey, *supra* note 6, “Policies, Practices and Statutes Relating to Child Abuse and Neglect.”

#### **4. Reinforcing Classist and Racist Prejudice**

Reporting may tend to operate in a classist and racist way. Results of poverty or benign differences in cultural approaches to child rearing have been characterized as problems of abuse. Consequently, families have been broken up, leading to greater damage to fragile social fabrics. Child abuse labelled as “neglect” is particularly problematic. What appears to be neglect to an observer may be, in fact, a non-dangerous culturally accepted accommodation to difficult social conditions. Care should be taken not to assume that a single, culture-specific norm of child care is the standard for judging neglect and non-neglect:

Because of both class and cultural differences between social workers and clients, the definition of neglect imposed in practice has been criticized as ethnocentric. In fact, Aboriginal people have considered that inappropriate application of the neglect definition has accounted for the apprehension and permanent loss of many of their families’ children. The problem of distinguishing neglect from poverty has plagued workers for decades.<sup>47</sup>

Furthermore, where what might be judged as neglect is a product of difficult social conditions, the appropriate response should not be the removal of the child, but the provision of assistance and support for the family. More financial or practical aid, rather than more child apprehension, may sometimes be the best approach to neglect.

But while cultural sensitivity is necessary, and ways of dealing with children should not be condemned just because they are not the ways that an observer would deal with children, a “reverse racism” should not be countenanced. Objectively abusive practices, regardless of the class or race of the perpetrators, should not be tolerated.<sup>48</sup>

#### **5. Encouraging False Reporting**

Mandatory reporting may encourage people to make hasty judgments about abuse, and encourage the mischaracterization or misidentification of injuries as caused by abuse. The consequences for children and families can be devastating. Inappropriate State intervention can destroy families and careers. We should remember that s. 2(a) of the CWA itself confirms that the family is the basic unit of society, and its well-being should be supported – not threatened and undermined. Under s. 2(c), the family is entitled to the least invasion of privacy and interference

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<sup>47</sup>Swift, *supra* note 10 at 44.

<sup>48</sup>Costin, Karger & Stoesz, *supra* note 5 at 142ff.

with its freedom as is compatible with its own interests, the interests of family members, and the interests of society.

Again, this is a serious charge. Fear of penal consequences has doubtless led some persons to report abuse that they otherwise would not have reported, the charge of abuse was unfounded, and the alleged perpetrators and their families suffered because of the reports. We do not know how many persons have been wrongfully accused and have suffered because of the accusations. We cannot say whether the injuries caused are greater than injuries that have been avoided through mandatory reporting.

## 6. *The Balance*

The difficulty under which this whole discussion labours is lack of evidence. On the one hand, mandatory reporting *should* promote the good of children, and it *should* result in an increase in the rate of protection of children over the rate of protection of children without mandatory reporting (keeping in mind the limited research indicating that not all professionals comply with mandatory reporting obligations). On the other hand, mandatory reporting *may* result in children being put into situations worse than their abusive situations, and *may* lead to other forms of social injury. But we cannot truly judge the measure of good effects against bad, we cannot tell whether mandatory reporting causes more harm than good, because we do not have enough evidence. On the evidence, all we have are abstract risks – risks of injury to children because of abuse, and risks of injury because of a remedy for abuse. We cannot say that the balance of risk is in favour of reporting, but neither can we say that it is against it. Given the pressing and substantial nature of the objectives promoted by mandatory reporting, the mere identification of possible risks does not derail its justification.

A more aggressive approach to the difficulty of abstract risk might be borrowed from the *Lyons* case,<sup>49</sup> which concerned, in part, the balancing of risks relevant to dangerous offender applications: declaring a person to be a dangerous offender creates the risk that the offender will remain imprisoned even though he or she would not have committed any further crimes; not declaring a person to be a dangerous offender creates the risk that members of the public will be injured by the offender, once he or she completes an ordinary sentence. In the course of rejecting arguments that the standard of proof applicable to dangerous offender applications and the use of psychiatric evidence in these applications violate fundamental justice protections under s. 7 of the *Charter*, La Forest J. wrote as follows:

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<sup>49</sup>*R. v. Lyons* (1987), 37 C.C.C. (3d) 1 (S.C.C.).

...Floud and Young...reject the notion that in enacting dangerous offender legislation Parliament unfairly sacrifices innocent persons in favour of the public good...:

This argument is misconceived. Errors of prediction do not represent determinable individuals. It is not that we have difficulty in identifying the subjects of predicted error with the methods available to us; it is that they are in principle indeterminable. There are no hidden individuals identifiable in principle, but not in practice, who certainly would or would not reoffend. In this sense there are no innocent or guilty subjects of predictive judgment.... The question is not “how many innocent persons are to sacrifice their liberty for the extra protection that special sentences for dangerous offenders will provide?” but “what is the moral choice between the alternative risks: the risk of harm to potential victims or the risk of unnecessarily detaining offenders judged to be dangerous?” *The essential nature of the problem of preventing willful harm is misrepresented by talk of balancing individual and social costs. The problem is to make a just redistribution of risk in circumstances that do not permit of its being reduced.* There is a risk of harm to innocent persons at the hands of an offender who is judged likely to inflict it intentionally or recklessly—in any case culpably—in defiance or disregard of the usual constraints. His being in the wrong by virtue of the risk he represents is what entitles us to consider imposing on him the risk of unnecessary measures to save the risk of harm to innocent victims.<sup>50</sup>

La Forest J. followed this quotation with the words “I agree with this reasoning.”<sup>51</sup> In the case of mandatory reporting, one also might assert that the problem is to make a “just redistribution of risk.” The child may not be in fact abused, and reporting could have dire consequences for the accused abuser. But if the child is at risk, the child faces greater injury. One might continue that what “entitles us” to balance risk in favour of retaining mandatory reporting is an alleged abuser’s “being in the wrong” by virtue of the risk he or she represents. One might suggest that the alleged abuser is responsible for the risk he or she represents by being responsible for the creation of a familial situation which, to a reasonable observer, gives rise to the inference that the child is being abused.

The foregoing reflections may or may not convince. Perhaps it will be conceded, though, that mandatory reporting survives the test of balancing good and

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<sup>50</sup> *Ibid.* at 50 [emphasis in original].

<sup>51</sup> *Ibid.* at 51. Further exploration of this difficult passage of Floud and Young and an examination of the propriety of La Forest J.’s assent must be burdens of a later project.

bad effects. Even with this concession, the justification of mandatory reporting is not complete. It still must be shown that the mandatory reporting scheme impairs confidentiality and privacy rights to the least reasonable degree, consistent with securing its ends. The assessment of mandatory reporting under the “minimal intrusion” test is the burden of the next section.

## II. Review and Assessment of Alberta’s Mandatory Reporting Provisions

The mandatory reporting laws of various jurisdictions are uniform in sentiment, but not in execution. They apply to different groups of persons with respect to different evidence of different types of abuse, and involve different reporting obligations and different follow-up procedures. (Certainly professionals should become familiar with the mandatory reporting requirements of their jurisdictions.) To determine the nature of obligations under mandatory reporting provisions and their appropriateness, seven main areas must be considered: (A) the persons to whom the reporting obligation applies; (B) the types of abuse relevant to the reporting obligation; (C) the circumstances that trigger the reporting obligation; (D) compliance with the obligation to report; (E) procedures following the making of a report; (F) immunities and liabilities of reporters; and (G) consequences of failing to report.

### A. Persons to Whom the Reporting Obligation Applies

#### 1. *The Law*

##### (a) “any person”

Subsection 3(1) of the *CWA* has a very broad application – it applies to “[a]ny person who has reasonable and probable grounds to believe and does believe that a child is in need of protective services.” This broad sweep embodies an important policy decision. Mandatory reporting statutes outside Canada tend to restrict their application to specific professions and occupations, such as judges, physicians, social workers, counsellors, nurses, teachers, police officers, and persons who develop photographic films.<sup>52</sup> The *CWA*, though, like most other Canadian legislation, applies not only to these groups, but to all other persons.

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<sup>52</sup>For example, *California Penal Code*, Article 2.5 (*The Child Abuse and Neglect Reporting Act*) §§ 11165.8 et seq.; R. Lawrence-Karski, *supra* note 46 at 19; *Louisiana Children’s Code*, art. 603(13)(a); Healey, *supra* note 6, “Mandatory Reporting Requirements”; Myers, *supra* note 6 at 101; Cobby, *supra* note 3 at 32; Epstein, *supra* note 8; Larrabee, *supra* note 6; *Massachusetts General Law*, Title XVII, Chap. 119, § 51A; *Connecticut General Statutes*, Title 17a, § 17a-101(g); fourteen American States, however, use the “any person” language: Healey, *supra* note 6; Tomison, *supra* note 9; *Reporting Child Abuse – the Law* (Victoria) online: <<http://hna.ffh.vic.gov.au/yafs/cis/reportin/contents.htm>> [hereinafter *Reporting Child Abuse*].

**(b) exemption**

Another policy decision embodied in the *CWA* is its very limited exemption provision. Only information arising from specified communications are exempted – not specified persons or persons with specified statuses. Subsection 3(3) of the *CWA* only exempts from disclosure information “that is privileged as a result of a solicitor-client relationship.” Subsection 3(3) does not exempt lawyers as a class from the mandatory reporting obligation. Only those communications that meet the tests for solicitor-client privilege are exempted. Generally, the other Canadian statutes also protect solicitor-client privilege through an exemption, as do the majority of American reporting statutes. Four states, though, prioritize child protection over the solicitor-client relationship, and “suspend” the privilege in the case of suspected child abuse.<sup>53</sup>

The scope of the solicitor-client privilege exemption should not be exaggerated, since it is subject to an internal limitation that may compel the disclosure of child abuse. The “Statement of Principle” in Chapter 7 of the *Alberta Code of Professional Conduct* provides that “[a] lawyer has a duty to keep confidential all information concerning a client’s business, interests and affairs acquired in the course of the professional relationship.”<sup>54</sup> The confidentiality rules are subject to qualifications. Rule 8(c) mandates mandatory reporting in certain circumstances but permits discretionary reporting in other circumstances. The mandatory reporting element of Rule 8(c) provides as follows: “[a] lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm, and may disclose confidential information when necessary to prevent any other crime.” If a client advises a lawyer that he or she is a child abuser and the lawyer concludes that the client will cause bodily injury to or kill a child, the lawyer is obligated to disclose information so that the abuse may be averted. The obligation to disclose relates to future crimes: there is no obligation to disclose if the only information received by counsel concerns past (alleged) offences. If the harm threatened is not bodily harm or death—e.g., if the abuse is emotional abuse or neglect not constituting a threat to bodily integrity—then Rule 8(c) imports a discretion, not an obligation, to disclose confidential information.

Aside from solicitor-client communications, confidential communications – whether their confidentiality is supported by agreement, practice, ethical rules, common law rules, or statute – are not exempted from disclosure.<sup>55</sup> Under s. 3(2),

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<sup>53</sup>Healy, *supra* note 6, “Mandatory Reporting Requirements”.

<sup>54</sup>(Law Society of Alberta, 1995). The Supreme Court of Canada recently visited the “public interest exception” to solicitor-client privilege. See W. Renke, “Secrets and Lies – the Public Safety Exception to Solicitor-Client Privilege” (1999) *Alta. L. Rev.* (forthcoming).

<sup>55</sup>Although s. 3(2) overrides privileges that might otherwise be recognized in civil cases, as a provincial statute, it cannot have the effect of overriding privileges that might be recognized under federal common law (e.g., under the law of privilege in criminal cases) or under federal statutes: *Bisaillon v. Keable*

reporting is required “notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other Act.”

Subsection 3(2) may appear to override the *FOIPP Act* privacy protections. Under the *FOIPP Act*, “personal information”—which would include information about whether a person had been abused or was an abuser—generally must not be disclosed to third parties. This Act, then, seems to forbid reporting. A provision similar to s. 3(2) in the Ontario *Child and Family Services Act*, however, has been interpreted to override the Ontario *Freedom of Information and Protection of Privacy Act*. The decision was built on the language of the reporting provisions, which imposed the obligation to report “notwithstanding that ...[the] disclosure is prohibited *under any other Act*.”<sup>56</sup> The Ontario Act was an “other Act,” so the disclosure could be compelled. Similarly, one might argue, under s. 3(2) of the *CWA*, Alberta’s *FOIPP Act* is an “other Act,” so the *CWA* provisions should govern. This argument, however, runs into s. 5(2) of the *FOIPP Act*, which makes the *FOIPP Act* paramount, unless the conflicting statute or a regulation under the *FOIPP Act* expressly provides that the other statute prevails. The *CWA* does not expressly refer to its own paramountcy over the *FOIPP Act*. Neither does the relevant regulation under the *FOIPP Act* give s. 3(2) of the *CWA* paramountcy over the Act.<sup>57</sup> Hence, by virtue of s. 5(2), the *FOIPP Act* is not overridden by s. 3(2) of the *CWA*.

Regardless, s. 31 of the *FOIPP Act* provides that the head of a public body *must* disclose information about a risk of significant harm to an affected group of people, or any other information the disclosure of which is clearly in the public interest. The Act, then, compels disclosure of information about child abuse, at least where the information relates to a risk of significant harm to a child. Even where there are not grounds for a finding of “significant risk,” the information might be disclosed as a matter of public interest. Hence, even if the *CWA* does not override the Act, the *FOIPP Act*’s provision brings us to essentially the same disclosure result as the *CWA*.

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(1983), 7 C.C.C. (3d) 385 (S.C.C.). The requirement to disclose under the *CWA* cannot automatically entail that the information disclosed may be introduced as evidence in federal proceedings, although it may be some evidence of the strength of the policy considerations in favour of introducing the evidence. The information disclosed under the *CWA* may be introduced as evidence in federally-regulated proceedings, if it was not collected in circumstances that meet the criteria of any federal common law or statutory privilege.

<sup>56</sup>*Children’s Aid Society of Hamilton-Wentworth v. T.M.*, [1995] O.J. No. 4317 (Gen. Div.), Steinberg J.

<sup>57</sup>Alta. Reg. 200/95, as am. [hereinafter the *FOIPP Regulation*]. See M. Marshall, “Freedom of Information, Protection of Privacy and Health Information” in *Freedom of Information and Protection of Privacy* (Legal Education Society of Alberta, 1999), tab. 9, 1.

Some mandatory reporting statutes exempt from disclosure information provided through various religious confessional communications. Healey points out that State laws vary:

In 12 States, the clergy, when receiving confession or counseling a member of their religion, are specifically exempted from mandatory reporting requirements. In six other States, clergy are specifically compelled to report suspected child abuse, regardless of the source of information or context in which the information was disclosed.<sup>58</sup>

No Canadian statute has a religious confessional communications exception.

## 2. *Assessment*

The CWA provisions are very broad. Are they overbroad? As a matter of balancing, has Alberta, in pursuit of a legitimate objective, used means that are broader than necessary to accomplish that objective?<sup>59</sup> Certainly less intrusive options are available—at least on the level of rhetoric, if not reality—and are in use in other jurisdictions. The ambit of the reporting obligation could be restricted to specified professionals. A greater number of exemptions could be made available for confidential communications. But would less intrusive options accomplish the legislative objective? The CWA provisions are not overbroad, for practical, legal, and moral reasons.

Practically, restricting the ambit of the provisions to some list of professionals would be inadequate. One objective of mandatory reporting is to combat unreported abuse generally, not to address a problem of under-reporting by a particular group of professionals. Moreover, if the legislation did apply only to certain professionals, they might legitimately complain that they were being singled out, as if they were especially at fault.

Legally, as was seen in the case of solicitor/client privilege, confidentiality and privacy protections are not absolute. Mandatory reporting, even in professional relationships, does not go much beyond limits to privacy which are already built into confidential relations, absent mandatory reporting. The legislation, it is true, may in some cases make disclosure mandatory when it would otherwise only have been discretionary. Nonetheless, professional and institutional confidentiality is subject to a general principle that in exigent circumstances, where serious injury to

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<sup>58</sup>Healey, *supra* note 6, “Mandatory Reporting Requirements”. For a religious confessional communications protection provision, see *e.g.* the *Louisiana Children’s Code*, art. 603(13)(b).

<sup>59</sup>Heywood, *supra* note 13 at 792.

persons is threatened, even confidential information may be disclosed.<sup>60</sup> Recall that in the case of lawyers, in such circumstances, the information *must* be disclosed.

In any event, very few relationships support a legally-recognized privilege, that would entitle a professional to refuse to divulge communications to a court without penalty. For example, there are no physician/patient, psychiatrist or psychologist/client, priest/penitent, or journalist/source privileges – yet these relationships have continued to thrive.<sup>61</sup> Again, the effect of the legislation is to compel disclosure in circumstances in which disclosure was otherwise permitted.

The “right not to be spied on” is more of a cultural than a legal protection. While the authorities may not have been able to compel one person to inform on another, persons (not bound by professional obligations) have always been entitled to inform on others, should they fear that children are being abused or other offences are being committed. Mandatory reporting, unlike the electronic interception of private communications, for example, does not result in the creation by the State of permanent records that would not otherwise exist – it does not involve the creation of a sort of dangerous supplement, an additional, phantom, doppelganger record.<sup>62</sup> It involves the re-communication of information that has been acquired through an initial communication or observation. Mandatory reporting lies only mid-way between the “tattletale” and recorded State surveillance.

Morally, the provisions are not overbroad, since they are but a statutory reflection of duties we all have. We are our neighbours’ children’s keepers. This might seem an odd claim. Our law of negligence, for example, recognizes no general obligation to “rescue”, to render assistance by making a report.<sup>63</sup> Why should we have an obligation in this case? Again, the elimination and amelioration of child abuse is a good that should be promoted. Add to this the particular vulnerability of children. Ordinarily, the vulnerability of children is the concern of their parents or guardians or State institutions, not each of us. The difficulty with child abuse, though, is that those who should be protecting their children are not. They are harming them. Abused children need help. Add too the ability of witnesses to do something about abuse. “Can”, of course, does not (by itself) imply “ought”. But acting to promote this good is easy. All that must be done is to “drop a dime”. Moreover, heroism or the taking of personal risk is not required – or at least personal risks are minimized to the degree legally possible. As will be seen below, the identity of reporters is strongly protected, and would only be disclosed where

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<sup>60</sup>Disclosure to exonerate the innocent overrides confidentiality obligations: *R. v. Ross* (1993), 79 C.C.C. (3d) 253 (N.S.S.C. App. Div.). Disclosure may also be justified where the information tends to show that a person poses a real risk of significant harm to himself or herself or to a third party. For a general discussion of this issue, see E.I. Picard & G.B. Robertson, *Legal Liability of Doctors and Hospitals in Canada*, 3d ed. (Scarborough, Ontario: Carswell, 1996) at 30-32.

<sup>61</sup>See the research cited by Lacourcière J.A. in *R. v. R.J.S.*, [1985] O.J. No. 1047 (C.A.) at para. 51.

<sup>62</sup>Contrast La Forest J.’s remarks concerning electronic surveillance in *Duarte*, *supra* note 21.

<sup>63</sup>L.N. Klar, *et al.* eds., *Remedies in Tort* (Toronto: Carswell, 1987) Vol. 2, “Negligence,” para. 141.

a “need to know” is demonstrated in litigation by a suspected abuser. We should act to promote the good, we should promote the protection of children, abused children need help, giving assistance is easy, and little risk attaches to the giving of assistance: in the circumstances, nothing militates against assisting children, so we should. The *CWA* calls us to our duty.

## **B. Relevant Types of Abuse**

### ***1. The Law***

The *CWA* sets out the types of abuse to which the reporting obligation relates through a group of interlocking definitions. The obligation concerns (a) “children” that are (b) “in need of protective services”.

#### **(a) “child”**

Mandatory reporting under the *CWA* relates to child abuse. Under s. 1(1)(d) of the *CWA*, “child” means “a person under the age of 18 years.” This definition is not surprising, since 18 is the age of majority in Alberta.<sup>64</sup> What should not be forgotten is that the reporting obligation does not apply only to infants, toddlers, and young children, but also to teenagers. Some researchers have suggested that reports tend not to be made for older children, improperly leaving these children at risk. Walter claims that “[t]here is overwhelming evidence that reports involving adolescent youth are given low priority or not responded to at all.”<sup>65</sup> A practice of ignoring adolescent abuse would violate the law and the policy behind the law.

#### **(b) “in need of protective services”**

Under s. 1(1)(s) of the *CWA*, “protective services” means any service provided under the *CWA*, except those under s. 72 (provision of services to handicapped children). Subsection 1(2) provides that a child is in need of protective services:

if there are reasonable and probable grounds to believe that the survival, security or development of the child is endangered because of any of the following:

- (a) the child has been abandoned or lost;
- (b) the guardian of the child is dead and the child has no other guardian;
- (c) the guardian of the child is unable or unwilling to provide the child with necessities of life, including failing to obtain for the child or to permit the child to receive essential medical, surgical

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<sup>64</sup>*Age of Majority Act*, R.S.A. 1980, c. A-4, s. 1.

<sup>65</sup>B. Walter, *In Need of Protection: Children and Youth in Alberta* (Edmonton: Children’s Advocate, 1993) at 46. Bernd Walter was formerly the Children’s Advocate for Alberta.

- or other remedial treatment that has been recommended by a physician;
- (d) the child has been or there is substantial risk that the child will be physically injured or sexually abused by the guardian of the child;
  - (e) the guardian of the child is unable or unwilling to protect the child from physical injury or sexual abuse;
  - (f) the child has been emotionally injured by the guardian of the child;
  - (g) the guardian of the child is unable or unwilling to protect the child from emotional injury;
  - (h) the guardian of the child has subjected the child to or is unable or unwilling to protect the child from cruel and unusual treatment or punishment;
  - (i) the condition or behaviour of the child prevents the guardian of the child from providing the child with adequate care appropriate to meet the child's needs.<sup>66</sup>

Protective services required because of "child abuse" under ss. (d) to (f)—physical injury, sexual abuse, and emotional abuse—are of particular concern.

Under s. 1(3)(b), a child is "physically injured" (ss. 1(2)(d), (e))

if there is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bony injury, a dislocation, a sprain, hemorrhaging, the rupture of viscus, a burn, a scald, frostbite, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth.<sup>67</sup>

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<sup>66</sup>Under s. 1(1)(k), "guardian" means "a person who is or who is appointed a guardian of [a] child under Part 7 of the *Domestic Relations Act*, or...a person who is a guardian of the child under an agreement or order made pursuant to [the *Child Welfare Act*]." Walter *ibid.* s. 1(2)(c) ("medical, surgical or other remedial treatment") encompasses educational, developmental, emotional, or rehabilitative services and therapy: Walter, *supra* note 65 at 34. He also raises the issue of whether the provision encompasses psychiatric and dental treatment: *ibid.* at 35. "Neglect" conceals multiple problems – there are difficulties in formulating the criteria for judging "neglect" and there is a widespread lack of appreciation for the varieties of neglect: H.B. Cantwell, "The Neglect of Child Neglect" in Helfer, Kempe & Krugman, eds., *supra* note 4 at 347.

<sup>67</sup>Some parental discipline could be classified as "non-accidental application of force" under the Alberta definition of physical injury abuse. So long as the force used did not produce "substantial and observable injury" (and a reasonable application of force should not do so), the discipline would not be classifiable as physical abuse. Where the force did produce injury (e.g. bruising), the child could be regarded as having been physically abused. There is a tension between this strict approach of the *CWA* and the more "liberal" drawing of boundaries for discipline under s. 43 of the *Criminal Code*: Swift, *supra* note 10 at 43. Section 43 of the *Criminal Code* provides as follows: "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable in the circumstances." The *Code* contemplates that at least some physical assaults on children by parents

Under s. 1(3)(c), a child is “sexually abused” (ss. 1(2)(d), (e)) if “the child is inappropriately exposed or subjected to sexual contact, activity or behaviour including prostitution related activities.” Under s. 1(3)(a), a child is “emotionally injured” (s. 1(2)(f), (g))

- (i) if there is substantial and observable impairment of the child’s mental or emotional functioning that is evidenced by a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development, and<sup>68</sup>
- (ii) if there are reasonable and probable grounds to believe that the emotional injury is the result of
  - (A) rejection,
  - (B) deprivation of affection or cognitive stimulation,
  - (C) exposure to domestic violence or severe domestic disharmony,
  - (D) inappropriate criticism, threats, humiliation, accusations or expectations of or towards the child, or
  - (E) the mental or emotional condition of the guardian of the child or chronic alcohol or drug abuse by anyone living in the same residence as the child.

Under s. 1(2)(d), not only is past physical or sexual abuse a basis for concluding that a child is in need of protective services, but so is prospective physical or sexual abuse, where there is a substantial likelihood that it will occur. Emotional abuse, in contrast, must have actually occurred to be a ground for intervention. The risk of emotional abuse, under current legislation, is not a basis for intervention.<sup>69</sup>

The application of s. 1(2) is premised on a finding that a child faces present danger. Evidence of present danger may be provided by evidence of current or past abuse. If past abuse is purely “historical,” if it is not evidence of present danger to a child, then it does not trigger the reporting obligation. Both ss. 1(2)(d) and (f), however, refer to past abuse (“historical complaints”) as a basis for a finding of present danger. Nonetheless, according to Walter, “[t]he field interpretation seems to be that intervention is only to be focused on protection from injury or abuse which is current or imminent, not to remediate its effects. This interpretation is

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are tolerable, so long as the force employed does not exceed what is reasonable in the circumstances. The *Code* reinforces the propriety of the physical discipline of children. Child welfare workers must distinguish between proper discipline and abuse. In Canada’s multi-cultural environment, they must take care not to be insensitive to cultural and familial differences respecting the scope of discipline, but they must also never forget the pre-eminent importance of protecting children, regardless of cultural permissions: *ibid.* at 46; Fitzgerald, *supra* note 26 at 2.

<sup>68</sup>The “and”, which requires evidence of facts described in both subparagraphs (i) and (ii), makes determining whether emotional abuse has occurred extremely difficult: Walter, *supra* note 65 at 37.

<sup>69</sup>*Ibid.* at 37.

obviously wrong and requires clarification.”<sup>70</sup> If Walter is right about the “field interpretation,” he is right that the interpretation is wrong.

Subsection 1(2) and the reporting obligation are not engaged if the abuse is committed solely by a third party, who is not the guardian of the child, and the abuse has no connection to the guardian of the child. Abusers may still be turned in, pursuant to ethical or other rules (which may or may not provide for mandatory reporting). The abuse may also be dealt with under the criminal law.<sup>71</sup> In most American jurisdictions, child protective services take jurisdiction only respecting alleged abuse by a person responsible for the health and welfare of the child, such as a parent, caretaker, or guardian.<sup>72</sup>

Subsection 1(2) does apply even if the abuse is perpetrated by a third party, if the guardian is “unable” or “unwilling” to protect the child from physical injury, sexual abuse, or emotional injury by a third party. Suppose, for example, that a parent regularly takes a child to church, where a religious leader regularly abuses the child. The parent knows about the abuse, but continues to attend the church. In this sort of case, the guardian is “unable or unwilling” to protect the child from abuse, and so Child Welfare jurisdiction is engaged. One of Walter’s concerns is that “Child Welfare policy excludes from the concept of a report the actions of third parties such as teachers, clergy and day care staff, over whom parents have no ‘influence’” and that “[e]xtra-familial abuse incidents are treated as strictly criminal in nature and referred to law enforcement or other systems.”<sup>73</sup> This reading of Child Welfare Policy is accurate. The Screening Procedures Policy limits the Child Welfare intervention to cases where “the child is at risk within the home” or where “the guardian is not protecting the child from a person over whom the guardian should have influence.”<sup>74</sup> The Policy elaborates:

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<sup>70</sup>*Ibid.* at 35.

<sup>71</sup>In the case of reports of third party abuse, Child Welfare Policy provides that, if the child has been physically or sexually assaulted, the worker is to instruct the caller to inform the parent and to report the matter to the police; to contact the police to ensure that the matter was reported; and, if the alleged perpetrator is a school staff member, to notify the local school board. If the alleged perpetrator is a staff member of a Day Care Centre or is a Family Day Home Operator, the worker is to notify the regional director, who will follow up with the police: Alberta Family and Social Services, Preliminary Intervention and Case Management Policies; Screening Procedures, CWH-02-02-02, 2 [hereinafter “CWH-02-02-02”]. See also *Protocols for Handling Child Abuse and Neglect in Day Care Services* (Alberta Family and Social Services, 1990) 2.1 and 2.2 [hereinafter *Day Care Protocols*]. To facilitate inter-agency cooperation entailed by the limitations of CWA jurisdiction, particularly between child welfare services and policing agencies, protocols have been established, such as the *Young Offender Protocol*, between Alberta Family and Social Services and the federal Solicitor General: *Young Offender Protocol* (Government of Alberta, November, 1990) [hereinafter *Young Offender Protocol*]. Child Welfare Services Policy also supports inter-agency cooperation.

<sup>72</sup>Healey, *supra* note 6.

<sup>73</sup>Walter, *supra* note 65 at 45.

<sup>74</sup>CWH-02-02-02, *supra* note 71 at 1.

A guardian is expected to have influence over any person to whom the guardian gives status, such as a boyfriend or babysitter. A guardian cannot be expected to have influence over a person to whom the community gives status, such as a child care worker, a teacher or a religious leader.<sup>75</sup>

Walter criticizes the exclusion of third-party abuses from Child Welfare purview. Legally, the Policy is unduly restrictive. It is true that a third party, such as a child care worker, a teacher, or a religious leader, is not a child's "guardian."<sup>76</sup> But the CWA does not restrict itself to scrutiny of what the guardian alone does. It refers to the guardian being "unable or unwilling" to protect the child. It does not say "unable or unwilling to protect the child *from persons over whom the guardian has [legal] influence or over whom the guardian should have influence*". To this extent, Walter is right. Under the current language of the CWA, however, absent a connection with a guardian's inability or unwillingness to act, reporting of third party abuse is not mandated, and the Child Welfare response to mandated reporting is not engaged. Perhaps third-party abuses should be captured under s. 3(1), but they are not now.

## 2. Assessment

The definitions of abuse are not overbroad. The CWA concerns serious forms of abuse that pose present dangers to children, respecting which guardians of children are implicated. The issue in this context is whether the provisions are too "vague" – do the definitions so lack precision that they fail to give sufficient guidance for legal debate or for practical decisions about whether to report?<sup>77</sup>

The definitions of "physical injury", "sexual abuse" and "emotional abuse" are general, but that is no cause for complaint.<sup>78</sup> The definitions do leave scope for judgment, but that is common fare for lawyers and the courts. The *Criminal Code*, for example, establishes an offence of assault that "causes bodily harm".<sup>79</sup> "Bodily harm" is defined as "any hurt or injury to a person that interferes with the health or

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<sup>75</sup>*Ibid.*

<sup>76</sup>It is also true that the CWA refers expressly to "guardians" as defined in the Act, and does not use broad language such as a "person having charge of the child," found, for example, in the Ontario statute. Under this broad language, a day care worker was found to be a "person having charge of the child," respecting whom a report of abuse should have been made: *R. v. Kates*, [1987] O.J. No. 2032 (Dist. Ct.), Gotlib D.C.J, paras. 28-31; rev'g [1986] O.J. No. 2185 (Prov. Div.), Fisher Prov. J. [hereinafter *Kates*]. Even under the broad Ontario language, the reporting obligation is not engaged where an allegation of sexual assault relates to a perpetrator who does not have "charge" of the child: *R. v. Rahalkar*, [1995] O.J. No. 653 (Gen. Div.), Abbey J. (an uncle); *R. v. Stachula*, [1984] O.J. No. 685 (Prov. Ct. Fam. Div.), Main Prov. Ct. J. (a brother) [hereinafter *Stachula*].

<sup>77</sup>See *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, Gonthier J. at 639.

<sup>78</sup>*Ibid.*

<sup>79</sup>*Criminal Code*, s. 267.

comfort of the person and that is more than merely transient or trifling in nature”.<sup>80</sup> This definition, which has posed no difficulties for the courts, is considerably less precise than the definition of “physical injury” in the *CWA*. The “sexual” aspect of the criminal offence of sexual assault has been defined by the courts (as a matter of interpretation of the *Criminal Code*) as interference with the sexual integrity of the victim.<sup>81</sup> This oft-employed definition is less precise than the *CWA*’s definition of “sexual abuse”. The neglect provisions of s. 1(2) of the *CWA* are similar to the “failure to provide necessities” provisions in s. 215 of the *Criminal Code*. Walter, we should note, claims that Alberta’s level of detail in its definitions provides “the most restrictive and precise” definitions of abuse in Canadian legislation.<sup>82</sup> The realities involved elude truly precise description, but Alberta’s legislation is more definite than that of the other provinces. In any event, the reporting obligation is not triggered by the presence of the merest possible evidence of abuse; it does not require fine-tuned judgments of abuse. Rather, it requires reporting only in circumstances where a reasonable person would discern abuse. The definitions cannot be found to be vague.

### **C. Circumstances in which the Reporting Obligation is Engaged**

#### **1. The Law**

For a person to be obligated to report child abuse, the person must *have* the requisite grounds, must *believe* that a child is in need of protective services, and the grounds must be *reasonable and probable*.

##### **(a) “having grounds”**

The person must “have” the grounds in question. The term “have” is more significant for what it does not denote than for what it does. The term does not require, as is the case under some mandatory reporting statutes, that the person have been exposed to the grounds in connection with the provision of professional services. Regardless of how the person came to be confronted by the grounds, his or her obligation will be assessed in relation to those grounds.

##### **(b) “belief”**

To satisfy the belief condition, the person must in fact have (subjectively) held the belief or the opinion that the child was in need of protective services. The obligation, then, does not attach only if a reasonable person would have believed or arrived at the opinion that a child was in need of protective services. Hence, if

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<sup>80</sup>*Ibid.* s. 2, “bodily harm”.

<sup>81</sup>*R. v. Chase*, [1987] 2 S.C.R. 293, McIntyre J. at 302; *R. v. K.B.V.*, [1993] 2 S.C.R. 857, Iacobucci J. at 859.

<sup>82</sup>Walter, *supra* note 65 at 32. See also Swift, *supra* note 10 at 43.

a person did not in fact believe that abuse occurred, even if that lack of belief was unreasonable in the circumstances, that person would neither be obligated to report nor be liable for failing to report. As a matter of evidence, the stronger the reasonable grounds for belief, the more likely a trier of fact's inference that a person did in fact have the belief. Moreover, a person could not evade liability if he or she were found to have been willfully blind (advertently ignorant) respecting the abuse – i.e., if he or she were in fact aware of circumstances calling for an inquiry or the drawing of an inference of child abuse, and intentionally or deliberately refrained from making appropriate inquiries.<sup>83</sup>

**(c) “reasonable and probable grounds”<sup>84</sup>**

The reasonable grounds language imports an objective component that must be satisfied for the obligation to report to attach. Reasonable grounds for a belief exist if a reasonable person, confronted by the evidence, would form the belief or opinion. The “probable” language refers to the standard of proof that must be met – the proposition in question (“the child is in need of protective services”) must be likely true or more probably true than not.<sup>85</sup> Having reasonable and probable grounds for a belief is not the same as having conclusive proof of the truth of the belief.<sup>86</sup> Rather, to have reasonable grounds is to have more evidence supporting the belief than evidence undermining the belief.

Four points must be kept in mind about the satisfaction of the “reasonable and probable grounds” standard. First, the issue at the reporting stage is not whether there is proof beyond a reasonable doubt that the child has been abused. The issue is only whether a reasonable person would believe, looking at the evidence, that the child is at serious risk. Second, the determination is made on the evidence available at the time, which may well be incomplete. The evidence may not be all of the

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<sup>83</sup>For recent discussions of wilful blindness, see *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *R. v. Oluwa* (1996), 107 C.C.C. (3d) 236 (B.C.C.A.).

<sup>84</sup>The word “probable” has been held not to add anything to the “reasonableness” qualification: *Baron v. Canada* (1993), 78 C.C.C. (3d) 510 (S.C.C.), Sopinka J. at 531: “In my view nothing turns on the omission of the word ‘probable’...I respectfully disagree with Locke J.A.’s holding...that ‘reasonable’ is not the same as ‘reasonable and probable’”. With the introduction of R.S.C. 1985, most of the references in the *Criminal Code* to “reasonable and probable grounds” were replaced by references to “reasonable grounds”. The view of the Statutory Revision Committee was that this would not change the law. In *Re N.L.*, [1986] A.J. No. 726, Russell Prov. Ct. J., as she then was, did interpret “reasonableness” and “probability” as separate criteria. She wrote that “[t]he section requires that there be both reasonable as well as probable grounds. It is not sufficient that the probability of the allegations being true is high; they must also be reasonably true.”

<sup>85</sup>The House of Lords has defined belief on reasonable grounds as follows: “an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed”: *Herniman v. Smith*, [1938] A.C. 305 (H.L.) at 316.

<sup>86</sup>Myers, *supra* note 6 at 102; Besharov, *supra* note 33 at 44.

evidence which might be tendered at trial or in a hearing. A full investigation will not have been (and generally should not have been) done. Third, the evidence which a reasonable person might consider is not limited to evidence that would be admissible at trial. Fourth, the standard employed is only that of the reasonable person, not that of the reasonable professional with expertise in child abuse detection.<sup>87</sup> Many of those exposed to evidence of child abuse—including both laypeople and professionals—have no special training in detecting child abuse. If they err by failing to identify child abuse or by wrongly identifying non-abuse as abuse, they cannot be held to too exacting a standard. The standard against which they are judged is that of the reasonable person (keeping in mind that their obligation and liability for reporting under the Act also depends on the subjective factor). What about experts, or persons who hold themselves out as experts? While the “floor” of the reasonable person test cannot be lowered, in a sense it can be raised – not because of the status of experts, but because of the work that they hold themselves out as competent to perform. Experts are expected to know the literature, follow appropriate procedures, and make proper inquiries and investigations. The standard is still that of the reasonable person. A reasonable person who acted as a child abuse expert would take appropriate precautions to ensure that his or her services were competent.<sup>88</sup> Experts could be expected to take all proper steps to avoid making false accusations of abuse and false assurances of non-abuse.

**(d) what evidence could constitute reasonable and probable grounds?**

Probably the most difficult issue in this area concerns the evidence that would justify the making of a child abuse report. The evidence, whatever its nature, must support the opinion or belief that the survival, security, or development of the child

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<sup>87</sup>In the *Stachula* case, a prosecution for non-compliance with the Ontario mandatory reporting provisions, Main Prov. Ct. J. held that the standard of a paediatric specialist with a sub-speciality in child abuse was not applicable to a family physician, *Stachula*, *supra* note 76 at para. 12. In contrast, Marceau J. held in the *Brown* case that “the standard of care of tertiary care facilities and the experts who practice there is basically the same across Canada. Although in some cases the difference between a neuro-radiologist (Dr. Miller) and a paediatric neuro-radiologist (Dr. Poskitt) might require a different standard of care, I find that the obligation to diagnose haematomata and to know that they are indicative of child abuse was required of both of these physicians, regardless of whether they were practising at the University of Alberta Hospital or at a hospital devoted solely to the care of children. I reject the argument that the University of Alberta Hospital can adhere to a lesser standard in detecting and preventing child abuse than other tertiary care hospitals in Canada”: *Brown v. University of Alberta Hospitals* (1997), 145 D.L.R. (4<sup>th</sup>) 63 (Q.B.) at para. 133 [hereinafter *Brown v. University of Alberta Hospitals*].

<sup>88</sup>The approach offered is consistent with the majority approach to objective liability in the *Creighton* case: *R. v. Creighton*, [1993] 3 S.C.R. 3, McLachlin J. at 61, 71 – the standard of the reasonable person is constant; the standards of appropriate conduct vary with the circumstances of the activity. A good statement of the reasonable grounds test (with due allowance for the “suspicion” language) is set out in the *California Penal Code* § 11166: “it is objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training or experience, to suspect child abuse.”

is endangered for any of the reasons described in s. 1(2). The evidence—the grounds—need not be evidence admissible in court. It is evidence in the popular sense of observable events in the physical world. This evidence may be any or any combination of the following (since the evidence of abuse is frequently circumstantial, particular items of evidence have low probative value without linkages to and support by other evidence; hence, no one of the following pieces of evidence is generally sufficient, by itself, to constitute reasonable grounds for believing abuse to have occurred):<sup>89</sup>

**(i) verbal evidence<sup>90</sup>**

A person may receive oral or written communications from an abuser, a victim, or third parties, such as parents, friends, neighbours, school personnel, police officers, or other professionals. The communications may expressly describe abuse, provide some sort of abbreviated account from which abuse may be inferred, or may not expressly describe abuse at all, but nonetheless allow abuse to be inferred. Some evidence of abuse might be inferred, for example, from “vague or intangible” parental explanations of injury (e.g. “we found him like this”, “he may have fallen at day care yesterday”); from parental explanations of injury that blame the injured child for acts beyond his or her developmental level; or that blame siblings for acts beyond their physical abilities.<sup>91</sup> Of course, abuse should not be inferred just because it is reported. There must be reasonable grounds for judging that abuse is likely. In particular, it should not simply be assumed that children never lie about abuse. As Robin has written, “[t]he point is that children’s statements need to be critically assessed rather than taken on faith”.<sup>92</sup> We should also be on guard against improper influences on children’s accounts of abuse caused by suggestive interviewing techniques, such as multiple interviews, repeated

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<sup>89</sup>Abuse is usually discerned through a pattern, rather than through isolated incidents: *Child Abuse: Awareness Information for People in the Workplace* (Health Canada, 1995). “Several diagnostic indicators of child maltreatment have emerged through clinical experience in medical settings, including: discrepant, partial, or vague history; delay in seeking care; a family crisis; trigger behaviour by the child; unrealistic expectations of the child by the parents; isolation of the family; and a history of the parent being abused as a child ...”: National Research Council, *supra* note 6 at 67-68.

<sup>90</sup>*Reporting Child Abuse*, *supra* note 52.

<sup>91</sup>K.W. Feldman, “Evaluation of Physical Abuse” in Helfer, Kempe & Krugman, eds., *supra* note 4 at 177.

<sup>92</sup>Robin in Robin, ed. *supra* note 6 at 98. According to Robin, little research has been done respecting children’s accounts of abuse: *ibid.* at 99. D. J. Besharov, “The Central Dilemma: Protecting Abused Children While Protecting Innocent Parents” in H. Wakefield & R. Underwager, eds., *Accusations of Child Sexual Abuse* (Springfield, Illinois: Charles C. Thomas, 1988) 3 at 10; “Baby Talk” (1994) 2:2 *Forensics, Policing and the Law* 3; U. Farr & J.C. Yuille, “Assessing Credibility” (1988) July *Child Sexual Abuse Newsletter* (July, 1988) 1.

questions, leading questions, and the use in interviews of anatomically correct dolls.<sup>93</sup>

**(ii) physical evidence**

Abuse may be inferred from the physical condition of a child. The child may exhibit bruising, burns, broken bones, head injuries, abdominal injuries, other injuries, or other physical symptoms that were not likely caused accidentally or that are not age or activity-appropriate.<sup>94</sup> In a pamphlet published in the 1980s, the Alberta government described the following physical “indicators” of physical and sexual abuse: “welts, burns, bruises, scars, human bite marks, fractures or unexplained head injuries;” “difficulty walking or sitting;” or “stained or bloody underclothing”.<sup>95</sup> Care should be taken in asserting abuse on the basis of findings of micro-trauma, since the correlation or causal linkage of these conditions with abuse may not be adequately established, and are a focus of controversy in the medical literature.<sup>96</sup> Alternative, non-abuse explanations should always be seriously considered.<sup>97</sup>

**(iii) behavioural evidence**

Abuse may be inferred from a child’s behaviour. Some behavioural “indicators” described in the Alberta government pamphlet include “consistently [coming] to school hungry or inappropriately dressed for the weather;” being “consistently frightened to go home;” “a noticeable change in a child’s behaviour pattern or a child who is excessively defiant or compliant”; and “a child who shows unusual interest in or knowledge of sexual matters.”<sup>98</sup>

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<sup>93</sup>R. L. Lougee, “Defending Against Allegations of Child Sexual Abuse” online: <<http://www.nlada.org/indig/janfeb98/lougee.htm>>; R. Underwager, *et al.*, “Interrogation as a Learning Process” in Wakefield & Underwager, eds., *supra* note 92 at 32; and Wakefield & Underwager, *ibid.* at 196 (“interviewing guidelines”); A.D. Gold, “Expert Opinion of Sexual Abuse” *Program on Criminal Evidence* (Halifax: Federation of Law Societies, 1997) paras. 59ff.

<sup>94</sup>Feldman, *supra* note 91 at 179 and *passim*.

<sup>95</sup>Alberta Social Services and Community Health, *Child Protection in Alberta: What is Child Abuse?* (1985) [hereinafter the *Pamphlet*]. The Pamphlet summarizes the more complete descriptions found in Appendix A to Chapter 2, Preliminary Intervention, of the Child Welfare Program Manual: Alberta Social Services and Community Health, *Child Welfare in Progress* (Child Welfare Program Manual, 1986), PM-19 [hereinafter the *Program Manual*]. According to the American Academy of Pediatrics, the only physical findings that make a diagnosis of sexual abuse a “medical certainty” are the presence of semen, sperm, or acid phosphatase; a positive culture for gonorrhea; or a positive serological test for syphilis: National Research Council, *supra* note 6 at 73, n. 4.

<sup>96</sup>Lougee, *supra* note 93; Besharov, *supra* note 92 at 11; Gold, *supra* note 93 at paras. 14-15.

<sup>97</sup>K.B. McGovern, “Was There Really Child Sexual Abuse or Is there Another Explanation?” in Robin, ed., *supra* note 6 at 115; J.A. Adams, “Is it (or is it Not) Sexual Abuse? The Medical Examiner’s Dilemma” in Robin, ed., *supra* note 6 at 129; Besharov, *supra* note 92 at 11; Wakefield & Underwager, *supra* note 92 at 180-188.

<sup>98</sup>*Pamphlet*, *supra* note 95.

Behavioural evidence may also be provided by the parent, such as the parent's anger with the child, indifference to the child's condition, suspicion upon inquiries being made, use of inappropriate discipline or blaming, use of harsh or negative language about the child, or inappropriate expectations of the child.<sup>99</sup> Delay in the seeking of treatment for injuries may also be significant.<sup>100</sup>

Again, behavioural evidence must be used carefully. Behavioural evidence of child abuse, especially of sexual abuse, has a valid place in decision making. Particularly when there is an otherwise unexplained change in behaviour, this evidence provides important clues for potential reporters to pursue, and provides crucial corroborative evidence of maltreatment. However, the lists of "behavioural indicators" now being circulated, standing on their own and without an accompanying full history of past and present behaviours, should not be the basis of a report. Such behaviours have many other possible explanations.<sup>101</sup>

**(iv) opinion evidence**

A competent professional may have provided an opinion bearing on whether a child has been abused, which, along with other evidence, may support the inference that the child is in need of protective services.

**2. Assessment**

The reasonable grounds language not only aids in refuting a claim that the CWA provisions are vague, it sets out the constitutional standard for limiting privacy rights. Privacy rights may be limited when mere suspicion is replaced by "credibly-based probability".<sup>102</sup> The reporting obligation, which could be regarded as, in effect, an information seizure, is only triggered where the person coming into possession of information has grounds to believe that abuse has likely occurred and that a child is in danger. Information is not turned over to the authorities on the basis of mere suspicion, whim or "gut instinct". This minimization of interference with privacy is reinforced by s. 3(4) of the CWA, which strips reporters of immunity from actions if the report was made "without reasonable and probable grounds".

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<sup>99</sup>See the Indicators of Abuse in the *Day Care Protocols*, *supra* note 71 at 7-8.

<sup>100</sup>Feldman, *supra* note 91 at 178-179.

<sup>101</sup>Besharov, *supra* note 33 at 44; Besharov, *supra* note 92 at 12-13; Wakefield & Underwager, *supra* note 92 at 190.

<sup>102</sup>*Hunter v. Southam*, *supra* note 13 at 167: "The State's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point when credibly-based probability replaces suspicion."

## **D. Satisfying the Reporting Obligation**

### ***I. The Law***

#### **(a) mandatory obligation**

Subsection 3(1) of the *CWA* imposes a mandatory obligation to report – the person with the grounds and belief *shall* report the matter to a director. Unlike some statutes, the *CWA* does not modify the obligation, depending on the type of abuse. For example, under the mandatory reporting rules in the State of Victoria, while the reporting of physical abuse is mandatory, the reporting of emotional abuse is discretionary.<sup>103</sup> This difference in legislative treatment doubtless reflects the greater difficulties of identifying emotional or behavioural conditions as symptomatic of abuse.

The mandatory obligation is imposed on “any person”. Hence, if more than one person is aware of evidence supporting the belief that abuse occurred, each is liable to report that abuse. For example, a child may have been observed, at about the same time, by a physician and a nurse. Each would have the obligation to report. It would not be necessary, though, for each to file a separate report. One could provide the report on behalf of both – but the non-reporter should ensure that the report is in fact made, otherwise both could be liable.

#### **(b) timing of report**

Section 3 does not set any specific timing requirements for the making of the report. It does not require, for example, that the report be provided within a set number of hours (e.g., 24). It only requires that the report be made “forthwith,” which is synonymous with “without delay”, “promptly”, “directly”, “within a reasonable time under the circumstances of the case,” “with reasonable dispatch”, or “at the first opportunity offered”.<sup>104</sup>

#### **(c) form and contents of report**

Section 3 does not specify the form of the report. The report may be oral or written. The report could be made by telephone or in person to a director, or the report could be made by telephone by calling the Child Abuse Hotline (1-800-387-

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<sup>103</sup>*Reporting Child Abuse, supra* note 52.

<sup>104</sup>*Black's Law Dictionary*, 5<sup>th</sup> ed. (St. Paul, Minnesota: West Publishing, 1979) at 588. *Black's* refers to “immediately” as a synonym for “forthwith” – this term, though, seems too restrictive; a requirement to act forthwith does not entail action without any delay whatsoever, but without an unreasonable delay.

KIDS (5437)).<sup>105</sup> In contrast, some jurisdictions require that the report be in writing, or that an initial oral report be followed up with a written report (within a set time).<sup>106</sup>

Section 3 does not specify the contents of the report. It requires only that “the matter” be reported. In some other jurisdictions, report contents are specified in the mandatory reporting legislation. Generally, legislated report contents include the name and address of the child, parents, and responsible care giver; the child’s age and gender; the nature and extent of the child’s injuries, maltreatment, or neglect; the circumstances in which the abuse became known to the reporter; information respecting previous injuries of the child; any other helpful information; and any action taken respecting the child.<sup>107</sup> As a matter of common sense and common law, this sort of detail should be provided in a report, so that the worker can make an informed decision about the child.<sup>108</sup> A report is deficient if it is merely conclusory, does not indicate its information source, and merely confirms an accuser’s viewpoint.<sup>109</sup>

In Alberta, appropriate detail is obtained for reports through the Policy applicable on receipt of the information. Information is recorded by the receiving worker on a Screening Form. The worker is obliged to ask questions respecting the following matters:

- the caller’s reasons for reporting the family;
- the incident precipitating the report (facts, dates, and descriptions);
- the condition of the child and the risk for further harm to the child<sup>110</sup>;
- the source of the reporter’s information (was the reporter an eye witness or did the reporter hear about the incident from someone else?);

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<sup>105</sup>Another resource is the Kid’s Help Phone, “a national, bilingual confidential helpline for children and adolescents”, funded by the Canadian Children’s Foundation: 1-800-668-6868; Fitzgerald, *supra* note 26 at 12. Calling this number does not discharge the reporting obligation under the *CWA*.

<sup>106</sup>Connecticut requires an oral report within 24 hours, and a written report within 48 hours from the making of the oral report: §§ 101b, 101c; Massachusetts requires an immediate oral report and a written report within 48 hours: § 51A; California requires an immediate oral report and a written report within 36 hours: § 11166(a).

<sup>107</sup>Connecticut: § 101d; Massachusetts: § 51A; Louisiana: art. 610.

<sup>108</sup>Walters, *supra* note 24 at 168. Under the *Young Offender Protocol*, a joint project of Alberta Family and Social Services and the Solicitor General (Canada), staff members of the Department of the Solicitor General who receive information respecting child abuse are urged to gather the following information for the report to Family and Social Services: the name, age, sex and address of the young person; the full names and addresses of the parents or guardians; the name address and other identifying information about the alleged offender; the name, address, and telephone number of the person reporting the information (i.e., the Department staff member); and specific details of the incident or situation which precipitated the report: *Young Offender Protocol*, *supra* note 71 at 35.

<sup>109</sup>*C.M.H. v. S.R.C.* (1991), 106 N.S.R. (2d) 67 (N.S. Fam. Ct.), Williams Fam. Ct. J. at para. 64 [hereinafter *C.M.H. v. S.R.C.*].

<sup>110</sup>CWH-02-02-02, *supra* note 71 at 1.

- whether the reporter can identify any specific incidents, dates or times when abuse occurred;
- whether the reporter knows of any other incidents of abuse or neglect;
- whether the family of the child is aware of the report;
- how long the condition has existed and whether it has recently changed;
- whether the situation has worsened or has remained relatively constant;
- whether the reporter knows of any efforts made to resolve the situation and the results;
- whether the situation or the perpetrator might pose a threat to an investigator.<sup>111</sup>

Policy also requires that information be gathered concerning the adults and children involved, and concerning “collaterals” (any other person or agency familiar with the situation). Information should be gathered respecting the reporter himself or herself, including information respecting the following matters:

- the reporter’s name, address and phone number (if the reporter wants to remain anonymous, the reasons);
- the reporter’s relationship with the family or child;
- if the reporter was aware of previous abuse or neglect, why the reporter is calling now;
- whether the reporter stands to gain anything for reporting or from the report being validated (e.g. is there a child custody dispute?)<sup>112</sup>;
- whether the reporter knows and how long the reporter has known the family;

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<sup>111</sup>*Ibid.* This type of information is also required for reports under the *Day Care Protocols*, *supra* note 71 at § 3.

<sup>112</sup>“The context of divorce and custody disputes does seem to increase the incidence of allegations of sexual abuse, although there is considerable controversy over whether false allegations of sexual abuse are disproportionately high in custody and visitation disputes ...”: Robin, *supra* note 6 at 21 (citation omitted); see A.M. Eastman and T. J. Moran, “Multiple Perspectives: Factors Related to Differential Diagnosis of Sex Abuse and Divorce Trauma in Children under Six”, in Robin, ed., *supra* note 6, 159. “Recent literature on child custody cases indicates that false accusations of sexual abuse are becoming a serious problem ....”: Wakefield & Underwager, *supra* note 92, 294 (citations omitted). False allegations in this context—by spouses or children—may be malicious lies. Sometimes, though, false allegations, particularly by spouses, are the result of misinterpretations of, for example, normal parental caretaking practices, normal sexual behaviours of children, common psychological symptoms (such as anxiety, regressive behaviour, sleep disorder), or physical features of children: A H. Green, “Factors Contributing to False Allegations of Child Sexual Abuse in Custody Cases” in Robin, ed., *supra* note 6, 177 at 178-183. These misinterpretations may be goaded by the often unpleasant emotional states of custody-battling spouses. The following are examples of cases in which improper allegations of abuse were leveled by one spouse against another: *C.M.H. v. S.R.C.*, *supra* note 109; *M.K. v. P.M.*, [1996] O.J. No. 3212 (Gen. Div.), Wilson J.; *W.A.H. v. S.M.L.*, [1997] N.S.J. No. 283 (Fam. Ct.), Legere Fam. Ct. J.; *R.G.H. v. Christison*, [1996] S.J. No. 702 (Q.B.), Wedge J. [hereinafter *Christison*]. A Canadian study has recently been released (too recently for review in this paper) by Nicholas Bala and John Schuman of the Faculty of Law of Queen’s University concerning the prevalence of false accusations of abuse in custody litigation: S. Galashan, “False claims of child abuse rampant: study” *National Post*, (27 May 1999) A1; N. Ayed, “Study finds truth, lies in parents’ claims of child abuse” *The [Edmonton] Journal*, (27 May 1999) A11.

- whether the reporter's competency is questionable because of unusual behaviour (e.g. whether the reporter seems drunk, distraught, angry or bitter);
- whether the reporter is able or willing to name other sources of information about the allegations.

**(d) person to whom report must be given**

The report must be given to a "director", who, under s. 1(1)(i) of the *CWA*, is a person designated by the Minister of Family and Social Services as a director for the purposes of the *CWA*. Pursuant to s. 87(3) of the *CWA*, a director is entitled to delegate any of his or her duties or powers, including the power to form an opinion, to receive a report under s. 3, and to delegate or subdelegate to (among others) a person employed or engaged in the administration of the *CWA*. Unlike some other statutes, the *CWA* does not give an option to report either to child welfare authorities or the police. Since the *CWA* requires reporting to a director, reporting to other persons (e.g. police officers or school authorities) does not discharge the obligation to report.

There is no requirement to notify the alleged perpetrator or the parents of child of the apparent abuse. In fact, notification to these persons is discouraged, until any investigation following the report is complete.

**2. Assessment**

The reporting obligation would be less intrusive if it provided for discretionary reporting, rather than mandatory reporting. Discretionary reporting would not be a reasonable means of achieving the legislative objective, however. The point of the legislation is to cause persons to report, regardless of what they think they should do or what they think is right. Under-reporting is not adequately addressed by giving a legislatively sanctioned choice to report or not; the best way to generate reports is to compel reports to be made. In theory, mandatory reporting makes the jobs of professionals easier: the legislation resolves the ethical difficulties attending a decision to report or not. In actuality, as noted above, many professionals, despite the legislative mandate, still do not report. We could reasonably predict that reports would be made even less frequently, had they a choice. Additional excuses not to report would be found. Moreover, mandatory reporting may be better for reporters than discretionary reporting. If reporting were discretionary, the making of the report would depend on the reporter's judgment and choice. Reporting would be his or her responsibility – for which the reporter might be held to account by alleged abusers. Under a mandatory reporting regime, the reporter has no choice, and cannot be "blamed" for his or her actions.<sup>113</sup>

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<sup>113</sup>Compare the argument that spouses of criminal accuseds be made competent and compellable for the Crown to "relieve the witness of the difficult pressures of choosing to testify against his or her life partner" and to "reduce the incidence of spousal abuse, as accused spouses would be unable to abuse

The reporting provisions are defective in their failure to set out timing, form, and content requirements. Fortunately, Policy sets out appropriate standards for information gathering. These standards would be better set out in legislation. Reporters should be given clear guidance on what they must do. These defects operate to the advantage of reporters, though. They need do very little to perform their reporting obligation (a simple phone call will suffice). Opponents of the legislation might point to these omissions, but they are certainly insufficient to overturn the legislation.

## **E. Procedures Following the Making of a Report**

### ***1. The Law***

#### **(a) rules for response**

Upon receiving a report, a director is required by s. 5(1) of the *CWA* to “examine” it and any other allegation or evidence that the child is in need of protective services, and must “cause the matter to be investigated,” unless the director is satisfied that

- (a) the report or allegation was made maliciously,
- (b) the report or allegation was made without reasonable and probable grounds for the belief,
- (c) the report or allegation or evidence is unfounded, or
- (d) it would be consistent with the protection of the child to refer a member of the family or the family to community resources for services.

#### **(i) screening**

As a preliminary matter, upon receiving information respecting alleged child abuse, Alberta Child Welfare Policy requires screening or examination to determine whether or not the information constitutes a “report”.<sup>114</sup> Information is considered to be a “report” “only if the information, if true, would indicate that the child is at risk [within the meaning of s. 1(2)]”.<sup>115</sup> That is, the worker need not investigate to determine the factual basis to the report. The facts alleged are assumed to be true, and it is then determined whether those facts engage Child Welfare jurisdiction.

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their competent partners to dissuade them from testifying”: *R. v. Hawkins and Morin*, [1996] 3 S.C.R. 1043, Lamer C.J. and Iacobucci J. at 1071.

<sup>114</sup>Walter, *supra* note 65 at 44. The British Columbia Ministry for Children and Families has developed *The Risk Assessment Model for Child Protection in British Columbia*, based on a model designed for the New York State Child Protection Services in 1991 (Victoria: Queen’s Printer, 1997) [hereinafter the *B.C. Risk Assessment Model*]. The *B.C. Risk Assessment Model* identifies nine risk decision points, of which the first is whether or not to investigate a report.

<sup>115</sup>CWH -02-02-02, *supra* note 71 at 1.

If the information is found to constitute a report, a director must decide whether an investigation is warranted.<sup>116</sup> Walter points out an apparent oddity in s. 5(1): it grants the director the discretion to refuse to investigate if any of the indicated grounds are made out – but how could the director determine whether the grounds are made out, without an investigation? Walter also points out that Alberta is the only Canadian jurisdiction that grants this discretion to refuse to investigate; other jurisdictions are required to investigate any report.<sup>117</sup> In response to Walter, it should be pointed out that the “examination” that occurs before an investigation concerns the report itself, rather than the facts to which the report relates. What Policy requires is that the worker check the Child Welfare Information system (more on this below) and other department records to determine whether there is information on the child or alleged perpetrator.<sup>118</sup> The “validity” of the report is determined by considering whether

- there have been repeated unfounded allegations;
- the reporter is involved in a custody dispute or has been denied visitation;
- the report describes only a general feeling without complete information, a specific incident, or a pattern of incidents;
- the reporter disapproves of the parent or custodian’s lifestyle, religious practices, housekeeping, or over use of baby sitters;
- the complaint could best be handled by an agency or service provider already involved;
- the complaint is an attempt to harass or is malicious by intent.<sup>119</sup>

Laws in the United States differ on whether the child welfare agency must investigate every report; and the National Association of Public Child Welfare Administrators’ *Guidelines for a Model System of Protective Services for Abused and Neglected Children and their Families* recommend that intake staff should have the discretion to screen out reports at the time they are received, so that resources are not wasted on allegations which, even if substantiated, would not fall within the child welfare mandate.<sup>120</sup> Besharov argues that child protective services have an obligation to screen purported reports: “Agencies that carefully screen calls have lower rates of unsubstantiated reports and expend fewer resources investigating inappropriate calls”.<sup>121</sup>

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<sup>116</sup>*Ibid.*

<sup>117</sup>Walter, *supra* note 65 at 4.

<sup>118</sup>CWH-02-02-02, *supra* note 71 at 4.

<sup>119</sup>*Ibid.* at 5. Similar criteria are considered under the *B.C. Risk Assessment Model*, *supra* note 114 at 18-19.

<sup>120</sup>M.W. Weber, “The Assessment of Child Abuse: A Primary Function of Child Protective Services” in Helfer, Kempe & Krugman, *supra* note 4 at 128. In the United States, about 50% of reported maltreatment cases meet screening criteria and are investigated: Healey, *supra* note 6.

<sup>121</sup>Besharov, *supra* note 33 at 45.

**(ii) investigation**

If information constitutes a “report,” and there are no grounds for not pursuing the report, the matter is referred for investigation.<sup>122</sup> Under Policy, as part of every investigation, the investigator must see and interview the child and have a face-to-face interview with the parent or caretaker.<sup>123</sup> Where appropriate, siblings, other witnesses, and “professionals knowledgeable about the family” should be interviewed.<sup>124</sup> Since professionals are obligated to report child abuse, they cannot refuse to answer on the grounds of confidentiality, unless the information is subject to solicitor/client privilege. In cases involving physical injuries, medical examinations should be arranged.<sup>125</sup> Information gathered in the investigation is analyzed in a “case conference, supervision session or other form of suitable consultation”.<sup>126</sup> Because investigations involve medical, social work, psychological, and legal issues, investigations are best done through interdisciplinary investigatory teams.<sup>127</sup>

If, after an investigation, the director is of the opinion that the child is in need of protective services, s. 5(3) provides that the director “shall take whatever measures [the director] considers appropriate under the Act”.

**(b) time frames**

The CWA does not legislate the time frames within which the investigation must be taken. Many American State laws set time lines, requiring family contact within 24 hours of a serious report and within 72 hours for other reports.<sup>128</sup> Alberta Child Welfare Policy, however, states that the decision to investigate shall be made

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<sup>122</sup>CWH-02-02-02, *supra* note 71 at 6. The use of the term “investigation” is itself significant: it accurately describes the practice of collecting information, and it marks the influence of law enforcement models on child protective services – “the attention to criminal liability, and the concern for assembling the evidence needed for presenting a sound case in court.” Weber, *supra* note 120 at 129.

<sup>123</sup>*Program Manual*, *supra* note 95 at PM-13. The observation and interviewing of the child (if old enough) is generally a requirement under American law: Weber, *ibid* at 129.

<sup>124</sup>*Program Manual*, *ibid.* at PM-14. Appendix B to Chapter 2 sets out Guidelines for Contacts with Children and Families, including factors to be taken into account when observing the home (e.g. state of housekeeping, food supply, safety of home conditions relative to age of child, presence of child-oriented recreation and learning materials), and “do’s and don’t’s” for interviewing the child and interviewing the parents. Risk assessment protocols have been developed to ensure that adequate information is collected during investigation and to determine the level of risk faced by the child in the home: Weber, *ibid.* at 130. See the *B.C. Risk Assessment Model*, *supra* note 114 at 35.

<sup>125</sup>*Program Manual*, *ibid.*

<sup>126</sup>*Ibid.*

<sup>127</sup>Besharov, *supra* note 33 at 46. An example of this type of team is the Suspected Child Abuse and Neglect (SCAN) team, operating out of the Hospital for Sick Children in Toronto: see *M.K. v. P.M.*, *supra* note 112.

<sup>128</sup>Weber, *supra* note 120 at 129. Under the *B.C. Risk Assessment Model*, the decision to investigate or not must generally be made within 24 hours from receipt of the report: *supra* note 114 at 19.

immediately if the matter is urgent, and otherwise within 3 working days of the original contact.<sup>129</sup> Protocols also set standards for the timing of investigations.<sup>130</sup>

**(c) child abuse register**

The CWA does not now contemplate the creation and maintenance of a “register” of child abuse reports. A registry provision was enacted in 1973, but it was eliminated by 1984 amendments. Only the child welfare legislation of Ontario, Nova Scotia, and Manitoba currently provide for a register.

In practice, a sort of register has developed in Alberta. In June 1993, the Alberta government commenced an electronic Child Welfare Information System (“CWIS”) pilot project. The CWIS went province-wide in 1994.

The CWIS contains all of Alberta’s Child Welfare information, including registered information about families and children and the Department’s involvement with them. Information is kept for varying lengths of time, depending on its importance. Child welfare workers across the province have access to CWIS ....<sup>131</sup>

Such a system poses the danger of improper disclosure of personal information. Unless access to the information is highly restricted and the information is kept highly secure, the CWIS will violate both the *Child Welfare Act* protection of information provisions and the protection of privacy provisions of the *FOIPP Act*.

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<sup>129</sup>CWH-02-02-02, *supra* note 71 at 7; *Child Abuse: What is It? What to Do About It* (Alberta Family and Social Services, 1990) at 8. Healey reports that in the United States, a typical investigation begins in one to two days following the report, and is completed in less than 10 days: Healey, *supra* note 6. Under the *B.C. Risk Assessment Model*, an immediate response (investigation) is required when the child’s health or safety is in immediate danger or when the child is vulnerable because of age or developmental level; otherwise, the response is required within 5 days: *supra* note 114 at 20.

<sup>130</sup>Under the *Young Offender Protocol*, the Department of Family and Social Services commits to determining the need to investigate and proceed “within three working days of receiving the report”, unless there are indications of imminent danger, in which case the investigative process must begin immediately. The *Protocol* continues that “[w]here a decision is made to investigate, the process will be concluded within thirty calendar days”: *supra* note 71 at 36-37. Under the *B.C. Assessment Model*, investigations are expected to be completed within 30 days: *supra* note 114 at 35.

<sup>131</sup>Liberal Party of Alberta, *To Fend for Themselves: Alberta’s Approach to Reforming Child Welfare* (June 1997) at 20.

## 2. *Assessment*

None of the provisions respecting the treatment of reports vitiates the mandatory reporting provisions. The screening potential gives Child Welfare the ability to dismiss unmeritorious cases. It protects privacy, and allows for the minimization of State intrusion. The absence of a "register" also favours privacy, although the CWIS system must be closely monitored to ensure that it is not abused. It would be preferable, though, if time frames for response were legislated.

## F. Immunities and Liabilities of Reporters

### 1. *The Law*

#### (a) no privilege for reports

The CWA does not create a statutory privilege for the full contents of reports. Some cases suggest that the Wigmore criteria may be applied, in particular circumstances, to support a privilege for reports.<sup>132</sup> Regardless of this possibility, if the information contained in a report is relevant to civil litigation, the courts will compel the disclosure of the report. In the *Ryan* case, we should recall, even psychiatrist/patient communications were ordered disclosed.<sup>133</sup> If the information contained in a report were relevant to criminal litigation, and if it were provided to the Crown, it would be disclosed under the *Stinchcombe* rules;<sup>134</sup> even if it were not provided to the Crown, an application could be made for its production.<sup>135</sup>

#### (b) protection of reporter's identity

In ss. 91(1) and (4), the CWA establishes a statutory privilege respecting the name of the reporter and any information that could identify the reporter. This privilege is analogous to the privilege recognized for informers in criminal cases. Were no statutory privilege for reporters recognized by the legislation, a strong argument could be made for the recognition of a common law privilege to prevent their public identification. If potential reporters were likely to have their names

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<sup>132</sup>*R. v. Lefebvre*, [1994] B.C.J. No. 2819 (Prov. Ct.), de Villiers Prov. Ct. J. (*voir dire*), at para. 32 [hereinafter *Lefebvre*]; *Re T.A.M.H.*, [1992] B.C.J. No. 2856 (Prov. Ct.), Doherty Prov. Ct. J.

<sup>133</sup>*A.M. v. Ryan*, *supra* note 14.

<sup>134</sup>*R. v. Stinchcombe*, [1995] 1 S.C.R. 754; the Bill C-46 disclosure provisions also apply to records in the possession of the Crown: *Criminal Code*, s. 278.2(2).

<sup>135</sup>The Bill C-46 *Criminal Code* production rules in ss. 278.1 - 278.9 have been challenged as unconstitutional. The Supreme Court has heard the appeal and reserved: *R. v. Mills*, S.C.C. Bulletin, 1999, 129; [1997] S.C.C.A. No. 624. If these rules are struck down, the common law production rules developed in the *O'Connor* case would be relied on: *O'Connor*, *supra* note 14.

disclosed to alleged perpetrators, they would be discouraged from making reports, and, to that extent, the protection of children from abuse would be compromised.<sup>136</sup>

No privilege, of course, is absolute, but the names of informers and reporters should only be disclosed in compelling circumstances, where the alleged perpetrator genuinely requires the reporter's name to defend himself or herself, i.e., where "innocence is at stake."<sup>137</sup> Subsection 91(2) authorizes the release of reporter's names to a list of persons, including the guardian, parent or foster parent of the child to whom the information relates or the lawyer of any of them; the child to whom the information relates or the child's lawyer; a member of the police service, if there are reasonable grounds for believing that an offence has been committed; and a teacher having responsibility for the child's education. Subsection 91(4) provides a further protection for reporters: a reporter's name may not be disclosed without the Minister's written consent.

The reporter's name could also be disclosed if the disclosure were ordered by the court in civil or criminal proceedings, or if the reporter consented to the disclosure.

### **(c) protections from liability**

Under s. 3(4), "[n]o action lies against a person reporting pursuant to this section unless the reporting is done maliciously or without reasonable and probable grounds for the belief". Against what "actions" does s. 3(4) serve as protection? Conceivably, a person accused by a reporter of being a child abuser might bring an action against the reporter for defamation, deceit or fraud, negligence or negligent misrepresentation,<sup>138</sup> malicious prosecution, or civil conspiracy (should others have been involved). If the allegations in the report turned out to be true, the reporter would have a good defence against all of these causes of action. Subsection 3(4) provides its service where abuse turns out not to have occurred.

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<sup>136</sup>The statutory protection for informers is confirmed under s. 15(1)(b) of the *FOIPP Regulation*, *supra* note 57, which prevents access to informer information through a "FOIPP" request. Outside of the statutory protection, the strength of the common law "informer privilege" argument is acknowledged in obiter in *Dudley v. Doe*, [1997] A.J. No. 847 (Q.B.), Sanderman J., at paras. 26ff; and in *R. v. Lefebvre*, *supra* note 132. See also *Payukaytano James v. T.*, [1994] O.J. No. 921 (Gen. Div.), Noble J. In the *Leipert* case, McLachlin J. remarks, in connection with the issue of the scope of the common law informer privilege, that "it applies in civil proceedings as well"; the privilege is broad in scope: *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 17 [hereinafter *Leipert*]. The *Leipert* case, then, could be used to protect abuse informers in both civil and criminal contexts.

<sup>137</sup>*Leipert*, *ibid.* at para. 20. This case emphasizes that informer privilege is "an ancient and hallowed protection:" *ibid.* at para. 9. Abuse informers can take much comfort from the tenacity with which the Supreme Court defends this privilege from disclosure.

<sup>138</sup>Currently, authority does not support a negligence claim by a parent against a reporter for injuring family relationships: *Christison*, *supra* note 112 at para. 96.

The subsection does not provide “absolute immunity.” A reporter can still be sued, and put to his or her defence. Innovative approaches to relieve against this, though they have not been tried in Alberta, are to require superior court leave to commence an action against a reporter, without which the action is a nullity—a Saskatchewan procedure;<sup>139</sup> or to provide a State-funded indemnity for reasonable legal costs for “health practitioner” defendants—a California procedure.<sup>140</sup>

Subsection 3(4) protects reporters, despite their error, only so long as the reporter did not act (i) maliciously or (ii) “without reasonable and probable grounds for the belief.”

**(i) malice**

A malicious act is an act not done in good faith; an act done for an “impure motive”; an act done for an indirect motive or ulterior purpose that conflicts with the duty applicable or apparently applicable in the circumstances. It is an act done dishonestly, with a knowing or reckless disregard for the truth.<sup>141</sup> Subsection 3(4) provides protection if the reporter was wrong, but not if the reporter was both wrong and made the report for an improper purpose – e.g. to gain an advantage in a custody dispute, or as retaliation against a neighbour or co-worker.

Subsection 3(4) provides protection in cases where the report was made only to a director under the *CWA*. If a reporter published potentially defamatory allegations to other persons (e.g. school teachers, police officers, physicians, or family friends), s. 3(4) would not be available to protect the reporter. In certain cases, the reporter could claim a common law “qualified privilege”, where the reporter had a legal, social, or moral interest or duty to make the communication to its recipient, and the recipient had a corresponding interest or duty to receive the communication.<sup>142</sup> As is the case with s. 3(4), though, the protection of qualified privilege is lost if the reporter published the communication maliciously. The privilege is also lost if the limits of the interest or duty are exceeded. The privilege does not have unlimited scope. It does not shelter unlimited commentary about what might be, in part, a legitimate subject of communication.<sup>143</sup>

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<sup>139</sup>*Child and Family Services Act*, S.S. 1989, c. C-7.2, s.s. 12(3) and 12(3.1).

<sup>140</sup>*California Penal Code* § 11172.

<sup>141</sup>*Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4<sup>th</sup>) 129, Cory J. at para. 145; *Christison*, *supra* note 112 at para. 47.

<sup>142</sup>*Christison*, *supra* note 112 at para. 36; Klar, *et al.*, eds., *supra* note 63 at vol. 1, c. 6, “Defamation” at para. 106.

<sup>143</sup>*Ibid.*

**(ii) without reasonable and probable grounds**

Subsection 3(4) provides protection if the reporter was wrong, but not if the reporter was so negligent that he or she had no reasonable and probable grounds for making the report. Reports should not be made on the basis of mere speculation, suspicion, or hunches.

**(d) no offence of false reporting**

The CWA does not create an offence of making a false report. In contrast, the British Columbia Act does: "A person who knowingly reports to a director, or a person designated by a director, false information that a child needs protection commits an offence".<sup>144</sup> A false reporting offence, though, is not necessary.

In circumstances where a false report charge might be justified, the reporter would have acted maliciously or without reasonable grounds. Hence, the limitation on the s. 3(4) protection would leave the reporter exposed to civil action at the suit of the alleged perpetrator. Furthermore, the reporter could be charged under the *Criminal Code* with public mischief or obstruction of justice.<sup>145</sup>

A false reporting offence could send the wrong message to potential reporters. The point of the mandatory reporting provisions is to encourage persons to report child abuse. A high-visibility false reporting provision would deter reporting, contrary to mandatory reporting's ambition. If false reports have become such a problem under the mandatory reporting regime that a special offence must be created to deal with it, perhaps the better course would be to repeal or amend the mandatory reporting provisions.

**(e) employment protections**

The CWA does not contain an express provision protecting employees from employment discipline, should they make a report contrary to workplace policy. The mandatory reporting laws of some other jurisdictions, such as Massachusetts and Connecticut, do protect employees from discipline for making a report.<sup>146</sup>

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<sup>144</sup>*Child, Family and Community Service Act*, s. 14(4). The Connecticut statute also creates a false reporting offence: Anyone who knowingly makes a false report of child abuse or neglect may be fined up to \$2000 or imprisoned for not more than one year, or both. The identity of any such person shall be disclosed to the appropriate law enforcement agency and to the perpetrator of the alleged abuse: 101e(c); see also the Louisiana statute, art. 609C.

<sup>145</sup>*R. v. McQuarrie*, [1992] M.J. No. 72 (Prov. Ct.), Devine Prov. Ct. J. [accused acquitted because of lack of evidence of intent to cause police investigation through child protective services complaint; and no evidence that admittedly false portions of complaint caused the police investigation].

<sup>146</sup>Under Massachusetts law, any employer who discharges, discriminates or takes any other negative action against his or her employee shall be liable for triple damages and related attorney's fees: § 51A. Under Connecticut law, employers may not discharge, discriminate or retaliate against an employee for

Despite their silence, reporting protection provisions similar to those in the *CWA* have been interpreted to protect against at least public sector employment discipline. In *Public Complaints Commissioner v. Dunlop*, McRae J. held that the “no action shall be brought” language in the parallel section of the Ontario Act protected a police officer from disciplinary proceedings under the *Police Services Act* (Ontario), where the officer had violated an order and made a child abuse report (in conformity with his statutory reporting obligations).<sup>147</sup> This decision is probably of small comfort to most employees, since their employers’ punitive measures, including firing, would tend not to have the appearance of litigation and might well not be characterized as “actions”.

## 2. *Assessment*

The immunities the *CWA* does provide are appropriate. The *CWA* does not give reporters too much protection. Too much protection could lead to irresponsible reporting, by inducing a lack of fear of consequences. Too little protection would tend to undermine the goal of encouraging reporting. The *CWA* errs, if at all, in providing too little protection to reporters— but alleged abusers cannot complain of this.

## G. Liabilities for Failure to Report

### 1. *The Law*

Some persons will not report abuse, despite their obligation under s. 3(1) to do so. Those who fail to report face multiple jeopardy – at least in theory.<sup>148</sup>

#### (a) the *CWA* offence

Subsection 3(6) provides that “[a]ny person who fails to comply with subsection (1) is guilty of an offence and liable to a fine of not more than \$2000 and in default of payment to imprisonment for a term of not more than six months”.

#### (i) limitation period

Under the *Provincial Offences Procedure Act*, the limitation period for the prosecution of provincial offences is 6 months from the date that the alleged offence

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making a good faith report or testifying in an abuse or neglect proceeding. The attorney general can bring a court action against any employer who violates this provision, and the court can assess a civil penalty of up to \$2,500 plus other equitable relief: § 101e(a); see also the California statute, § 11166(f).<sup>147</sup> *Police Complaints Commissioner v. Dunlop* (1995), 26 O.R. (3d) 582 (Div. Ct.).

<sup>148</sup>The maintenance of some business licences, such as a day care centre licence, are conditional on compliance with child welfare legislation. Should a day care operator be found not to have complied with the duty to report, the operator could lose his or her license: *Wilkins v. Provincial Child Care Facilities Licensing Board*, [1986] B.C.J. No. 773 (S.C.), MacKinnon J.

occurred.<sup>149</sup> The CWA does not exempt the s. 3(6) offence from this limitation, so the ordinary six-month limitation applies. In British Columbia, the non-reporting offence is exempted from the ordinary limitation period for provincial offences;<sup>150</sup> in Nova Scotia, the limitation period is two years.<sup>151</sup>

**(ii) standard of proof**

For both provincial offences and criminal offences, to obtain a conviction, the prosecution must prove its case beyond a reasonable doubt. The Ontario courts have confirmed the application of that burden to mandatory reporting offence prosecutions.<sup>152</sup>

**(iii) nature of the offence**

The Ontario non-reporting offence has been held to be a “strict liability” offence – that is, the accused has the burden of establishing, on a balance of probabilities, that he or she was not negligent or that he or she was duly diligent in the circumstances.<sup>153</sup> The Alberta offence, though, should not be construed as a strict liability offence. Proof of the offence requires proof of a subjective state. Subsection 3(6) applies to “[a]ny person who fails to comply with subsection (1)”. A person is obligated to comply with subsection (1), though, only if he or she both had reasonable and probable grounds to believe that a child is in need of protective services, and he or she *believed* that the child is in need of protective services. For the Crown to obtain a conviction under s. 3(6), it must prove three things beyond a reasonable doubt: the presence of reasonable grounds, the accused’s state of mind at the relevant time – the accused’s belief, and either the failure to make a report or, if a report was made, the failure to make the report “forthwith”. If the Crown can only prove the presence of reasonable grounds, but fails to prove that the accused in fact believed that the child was in need of protective services, the accused cannot be convicted. The accused should not be put to his or her defence. Of course, as a matter of evidence, if the accused had reasonable grounds for believing that abuse had occurred, a trier of fact could well infer that the accused did in fact believe that the child was abused – but this is a more-or-less probable inference only. The likelihood of the reasonable person drawing the inference does not amount to a legal presumption that the accused did draw the inference. The presence of a

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<sup>149</sup>S.A. 1988, c. P-21.5, s. 4(1).

<sup>150</sup>*Child, Family and Community Service Act*, s. 14(7).

<sup>151</sup>*Children and Family Services Act*, S.N.S. 1990, c. 5, ss. 23(4), 24(7).

<sup>152</sup>*R. v. Cook*, [1985] O.J. No. 158, 10 O.A.C. 101, 46 R.F.L. (2d) 174 (C.A.), Zuber J.A., rev’g [1984] O.J. No. 712 (Co. Ct.), rev’g [1983] O.J. No. 808, 37 R.F.L. (2d) 93 (Prov. Ct. Fam. Div.) [hereinafter *Cook*]. The burden of proof point is express in the decision of Nasmith Prov. Ct. J. at para. 4, whose decision, without reference to this ruling, was affirmed by the Court of Appeal; see also *Kates*, *supra* note 76 at para. 8.

<sup>153</sup>*Cook*, *ibid.* All levels of court considered this a strict liability offence; see also *Kates*, *ibid.* at paras. 9-10.

subjective element in an offence does not, it is true, necessitate that the offence be found to be a *mens rea* offence; even with a mental element, an offence may be categorized as a strict liability offence.<sup>154</sup> The addition of the intentional element in the Alberta offence provision, however, in contrast to the purely objective language of the Ontario legislation, suggests that Alberta intended to create a *mens rea* offence and not a strict liability offence.<sup>155</sup>

**(iv) the penalty**<sup>156</sup>

A person found guilty under s. 3(6) does not face a very stiff penalty. The maximum penalty is a fine only—and only of \$2000—not a fine or imprisonment or both. The imprisonment reference in s. 3(6) is only to “default time”, the imprisonment that must be served if a fine imposed is not paid. Under the British Columbia statute, an offender faces a maximum penalty of a fine of \$10,000, imprisonment for 6 months, or both.<sup>157</sup>

**(b) professional consequences**<sup>158</sup>

Professionals are (or may someday be) singled out for special treatment, should they fail to comply with their reporting obligations. Subsection 3(5) provides as follows:

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<sup>154</sup>*Strasser v. Roberge* (1979), 50 C.C.C. (2d) 129 (S.C.C.), Beetz J.

<sup>155</sup>*R. v. Brown and Ballman* (1982), 69 C.C.C. (2d) 301 (Alta. C.A.), Prowse J.A. at 308 - 309.

<sup>156</sup>In contrast to the situation of professionals (see note 158 below), there is no Canadian case in which a non-professional has been held liable in negligence for consequences attributable to a failure to report. The key to making out a claim against a non-professional would be to establish the duty of care. It may be argued that s. 3(1) is evidence of a duty of care; but then the old line of cases denying the obligation to rescue would have to be overcome.

<sup>157</sup>*Child, Family and Community Service Act*, s. 14(6). In one of the few cases in which a person was convicted of non-compliance with a mandatory reporting statute, because of the novelty of the prosecution for non-reporting and the circumstances of the offender, the offender received neither a fine nor imprisonment, but an absolute discharge: *R. v. Kates*, *supra* note 76.

<sup>158</sup>A negligence claim may lie against a professional, such as a physician, psychologist, or psychiatrist who has examined an injured child, in circumstances in which a reasonable professional would have judged the child to be at risk of further serious abuse, and the professional failed to report. The duty of care is established by the professional's duties to his or her patient. Subsection 3(1) is further evidence of those duties. A failure to diagnose abuse may be a breach of the standard of care. The failure to report, whether based on a failure to diagnose abuse or a conscious decision not to report abuse, could also be judged to be a breach of the standard of care. Causation is an issue. A third party (e.g. a parent) would be the actual abuser, and would have actually caused the injuries suffered by the plaintiff. If, however, the professional's reporting of the abuse would have caused the abuse not to have occurred or not to have been as severe as it was, the professional should be found to have been a legal cause of the injuries suffered by the abused child: *Brown v. University of Alberta Hospital*, *supra* note 87; *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425 (1976); *Tanner v. Norys*, [1980] 4 W.W.R. 33 (Alta C.A.); *Landeros v. Flood*, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976) [physician and hospital may be held liable for injuries sustained following negligent failure to diagnose child abuse].

Notwithstanding and in addition to any other penalty provided by this Act, if a director has reasonable and probable grounds to believe that a person has not complied with subsection (1) and that person is registered under an Act regulating a profession or occupation prescribed in the regulations, the director shall advise the appropriate governing body of that profession or occupation of the failure to comply.

There are no statistics available on the numbers of complaints to professional bodies based on failures to report, or on the disposition of those complaints. Since no professions or occupations have been prescribed in the regulations under the CWA, there could be no Alberta statistics.

Both professional discipline and penal liability for the same violation of statutory duty would be permitted under the “double jeopardy” rules under the *Charter*.<sup>159</sup>

## 2. *Assessment*

Reflections on the offence provisions are important to the minimal intrusion argument. If the penalties for non-compliance were too high, persons could be improperly influenced, out of self-interest, to make reports. The Alberta penalty, however, is relatively low – a \$2000 maximum, with no additional or alternative jail (except in default of payment). This penalty should not be an inducement to falsely accuse out of an abundance of caution.

The low level of prosecutions, though, particularly given the known incidence of non-reporting among professionals, raises more serious issues. This offence, and its kindred offence in other Canadian child welfare statutes, creates a paradox. On the one hand, we feel so strongly about the protection of children that we impose an obligation to report abuse on an extremely broad group of people, and we back up that obligation with a penalty. On the other hand, there are no reported cases of prosecutions under s. 3(6) of the CWA, and few for the like offence across the rest of Canada. One might observe that we feel strongly enough to write laws, but not strongly enough to enforce them. Less charitably, one might observe that we do not really care about the reporting of child abuse, but only wish to create the appearance of caring. According to Walter, “[t]he appeal of such legislation is that it communicates a high degree of concern with, and the appearance of doing something about child maltreatment at very little cost”.<sup>160</sup>

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<sup>159</sup>*R. v. Shubley*, [1990] 1 S.C.R. 3; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541.

<sup>160</sup>Walter, *supra* note 65 at 43.

#### **H. Conclusions Respecting the “Minimal Impairment” Test**

In summary, the *CWA* provisions involve minimal impairment of persons' confidentiality and privacy interests. The broad scope of the legislation is appropriate; the definitions of abuse are sufficiently precise; the reasonable grounds standard entails interferences with privacy only where an appropriate evidential standard is reached; the procedural provisions do not harm confidentiality and privacy; the protections for reporters are appropriate; and the penal provisions do not compel improper disclosures. The mandatory reporting provisions are justified.

#### **Conclusion**

Alberta's mandatory reporting legislation is a surprisingly complex and value-laden skein of rules and practices. We should have the legislation, and in its present form it is not fatally flawed. Yet the legislation still seems half done: we have relatively good descriptions of abuse, but our legislation lacks the development of many of the details pursued in other Canadian and American legislation. We leave much up to policy that elsewhere has been debated and set out in public statutes. Furthermore, our practice seems contrary to our legislation. We make bold declamations of responsibility, but do not seek to enforce responsibility. And behind our words, our actions, and our inaction grinds the grim reality of child abuse. It is like dark matter to us. We know that it is there, yet we can barely measure it, and we lack the tools to deal with it.