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LEGAL OPINION ON THE OBLIGATION OF HEALTHCARE PROFESSIONALS TO REPORT GUNSHOT WOUNDS

**Australia, China, Colombia, Egypt, El Salvador, France, Lebanon, Mexico,
Nepal, Niger, Nigeria, Pakistan, Papua New Guinea, Philippines, Russia,
South Africa, South Sudan, Spain, Tunisia, Ukraine, United Kingdom**

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I. BACKGROUND

The Federal Department of Foreign Affairs (FDFA) has mandated the Swiss Institute of Comparative Law (Institut Suisse de droit comparé or ISDC) to prepare, for and in collaboration with the International Committee of the Red Cross (ICRC), a comparative report and analysis of obligations of healthcare professionals to report gunshot wounds to a relevant authority. The ICRC and the FDFA have provided the ISDC with the following description of the background and history of this project.¹

1. Background to the issue

Relevant international legal frameworks and the importance of their implementation into domestic legislation.

Respect for and protection of the wounded and sick, healthcare personnel and medical transports have been at the heart of the development of international humanitarian law (IHL) since the original Geneva Convention was adopted in 1864. In times of armed conflict, IHL provides rules to protect access to healthcare. These rules bind States and non-State armed groups. In situations that do not reach the threshold of armed conflict, only International Human Rights Law (IHRL) applies. Though less specific than IHL, IHRL contains several rules protecting access to healthcare.

One fundamental ethical principle, also protected by IHL and IHRL, is that of impartiality or non-discrimination in the provision of healthcare. This principle requires that healthcare professionals provide their services strictly based on healthcare needs only and that they do not differentiate between patients on any grounds other than medical ones. In turn, these are specific expressions in the healthcare context of the principles of non-adverse distinction or non-discrimination, which prohibit any distinction between patients on grounds such as sex, race, nationality, religion, or political opinions. In order for healthcare professionals to be able to comply with this ethical principle, domestic legislation has a key role to play in providing a protective environment in which healthcare professionals may treat patients, irrespective of whether they are considered friends or foes of a State involved in an armed conflict or in another emergency, without undue interference.

One particular area where domestic legislation may interfere with the impartiality of healthcare provision is to make access by certain patients to healthcare conditional upon disclosure of patient-related information to authorities. In this regard, in a range of countries, there are laws that contain disclosure requirements related to gunshot wounds. If not handled carefully, this can result in a myriad of issues, particularly during armed conflict or other emergencies, as the type of wounds may point to allegiance to one party to a conflict or to membership in opposition movements. This may lead to discriminatory delays or even denials of healthcare to certain patients. In addition, the disclosure of patient information to authorities also raises issues related to the key ethical healthcare principle of confidentiality of patient information. This may result in certain patients no longer seeking access to healthcare.

¹

What follows is excerpted from the ICRC's Draft Concept Paper: Comparative Analysis of Domestic Legislations on Medical Ethics and Confidentiality, with a Particular Focus on Duties of Healthcare Professionals to Notify Gunshot Wounds to Authorities, provided to the Swiss Institute of Comparative Law by electronic mail on Mar. 13, 2018.

Strong implementation of domestic laws protecting medical ethics and confidentiality is critical. International law does not recognize absolute protection of information relating to patients from disclosure to authorities. IHL generally requires that in times of armed conflict information relating to patients must be protected from disclosure, but emphasizes that this is subject to domestic legislation. IHRL protects the right of individuals not to be subjected to arbitrary or unlawful interference with their privacy; but this too will be interpreted based on domestic law. Therefore, it is especially important to make recommendations on how to strike a meaningful balance in domestic legislation between security and other interests underlying disclosure requirements, and the negative impact that the existence or actual implementation of such duties may have on non-discriminatory access by patients to healthcare and the protection of the confidentiality of patient information to be disclosed. Requirements to report gunshot wounds to authorities are a practical illustration of this, and have raised difficulties in armed conflict or other emergencies.

UN Security Council Resolution 2286

On May 3, 2016, the United Nations Security Council unanimously adopted Resolution 2286 (UNSCR 2286) on healthcare in armed conflict. The Council was briefed on the issue by UN Secretary-General Ban Ki-moon; Peter Maurer, President of the ICRC; and Joanne Liu, President of *Médecins Sans Frontières*. The resolution was drafted by five non-permanent Security Council Members – Egypt, Japan, New Zealand, Spain, and Uruguay – and was co-sponsored by more than eighty UN Member States. Condemning acts of violence, attacks, and threats against the wounded and sick, medical and humanitarian personnel engaged exclusively in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities, the resolution reminds parties to conflict of their obligations under international law, including applicable IHL and IHRL obligations. More specifically, UNSCR 2286 also strongly urges States and all parties to armed conflict to develop effective measures to prevent and address acts of violence, attacks and threats against medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities in armed conflict, including, as appropriate, through the development of domestic legal frameworks to ensure respect for their relevant international legal obligations the collection of data on obstruction, threats and physical attacks on medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and medical facilities, and to share challenges and good practice in this regard. UNSCR 2286 requested the Secretary-General to promptly provide the Security Council with recommendations on measures to prevent incidents of the kind described in the above paragraph and to better ensure accountability and enhance the protection of the wounded and sick and medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities.

In pursuance of the request by the UN Security Council, the Secretary-General noted in his recommendations, “Member States should adopt specific legal and practical measures to guarantee the ability of personnel exclusively engaged in medical duties to treat patients without any distinction based on medical grounds, in line with their ethical obligations, in all circumstances, without incurring any form of harassment, sanctions or punishment – including measures to

guarantee respect for the confidentiality of information obtained in connection with the treatment of patients.”

As indicated before, reporting duties by healthcare professionals on gunshot wounds enshrined in domestic legislation are a particular manifestation of potential obstacles to the ability of healthcare professionals to treat patients without adverse distinction/discrimination and may pose difficulties for healthcare professionals to comply with their ethical duties related to confidentiality of patient-related information. Dealing with this issue thus specifically contributes to implementation of UNSCR 2286 and this recommendation.

Healthcare in Danger Initiative

In 2011, the 31st International Conference of the Red Cross and Red Crescent tasked the ICRC to initiate consultations with experts from States, the International Red Cross and Red Crescent Movement and others in the healthcare sector. The aim was, and still is, to make the delivery of healthcare services safer. In 2014, the Belgian Inter-ministerial Commission for Humanitarian Law, the Belgian Red Cross and International Committee of the Red Cross (ICRC) jointly hosted a workshop on domestic normative frameworks for the protection of the provision of healthcare. The subsequent report (“the Brussels Report”) set out a range of recommendations that can be undertaken by State authorities in order to implement the existing international legal framework for protecting the provision of and access to healthcare in armed conflicts and other emergencies. This included a range of recommendations relating to medical ethics and confidentiality. A practical guidance tool (“the Guidance Tool”) was later prepared by ICRC to support State authorities in this regard.

There are strong links between the aims and activities of the Healthcare in Danger Initiative and the recently adopted UNSCR 2286.

2. Objectives

UNSCR 2286 highlights the need for measures to guarantee the ability of healthcare professionals to treat patients impartially, in line with their ethical duties, including respect for medical ethics and confidential information obtained in connection with the treatment of patients in times of armed conflict. The Brussels Report and related Guidance Tool produced as part of the HCID project support this and provide general recommendations and advice on domestic measures, procedures and other actions and considerations involved in bringing effect to these obligations.

However, despite the fact that reporting requirements of gunshot wounds have generally been identified as a potential challenging scenario in effectively guaranteeing the ability of healthcare professionals to provide impartial medical care, in line with their ethical obligations, there is currently only a limited understanding of the real extent of the problem globally. For instance, in the above-mentioned Brussels Report the issue of reporting on gunshot wounds by healthcare professionals to authorities was reported as being of concern to participants in that they feared that this might prevent the wounded and sick from accessing healthcare facilities and seeking the medical care they need for fear of criminal prosecution; however, the recommendations do not specifically tackle this issue. It is important

for States, the ICRC and others to better understand the nature, scope and implementation of legal provisions related to this issue in various contexts around the world, and to identify possible good practices in this regard for concrete guidance on implementing relevant recommendations arising out of UNSCR 2286.

Therefore, the object of this research project is to give effect to UNSCR 2286 and the recommendations made by the UN Secretary-General thereto, as well as the relevant recommendations from the Brussels report, by gaining a deeper understanding of the following:

1. The extent of protection of medical ethics and confidentiality under domestic legislation;
2. The scope of duties of disclosure by healthcare professionals of gunshot wounds of patients under domestic legislation as well as their implementation;
3. The interplay between duties of disclosure on gunshot wounds and provisions protecting medical ethics and confidentiality;
4. The impact of duties of disclosure by healthcare professionals of gunshot wounds on access by patients to healthcare services and on the ability of healthcare professionals to treat patients impartially;
5. Good practices in resolving potential tensions between protection of medical ethics and confidentiality on the one hand, and duties to report on gunshot wounds of patients on the other. [...]

To this effect, at the request of the FDFA, the ISDC, with the assistance and collaboration of the ICRC and their legal advisors, will prepare a comparative study of domestic implementation measures and procedures for any requirements to report gunshot wounds to the relevant authorities as well as the interaction between these requirements and regulation of the protection of medical ethics and confidentiality in times of armed conflict and other emergencies.

II. QUESTIONS

The questions treated in this study are the following:

1. What is the general framework for confidentiality/duties of disclosure of medical professionals towards state authorities (type of regulation (legal/ethical, if legal, detailed regulation or general principles, existence of case law), basic principles and major exceptions)?
2. Is there a duty of healthcare professionals to disclose gunshot wounds of patients to authorities, and if so, under what conditions?
 - i. If so, what are the modalities of the reporting? More specifically, is the disclosure to authorities of patients' gunshot wounds a precondition under domestic legislation for healthcare professionals to treat such patients (*i.e.* must reporting of gunshot wounds occur before patients are treated)?
 - ii. What is the scope of disclosure: what information must be revealed (*e.g.* would it be necessary to reveal the identity of a patient, or will information concerning the number of such injuries be sufficient)?
 - iii. For what purpose (criminal prosecution, statistics, etc.) and to whom (police, security forces, administrative bodies, others) must the information be reported?

- iv. What are the consequences of non-compliance with duties of disclosure of gunshot wounds, in particular would healthcare professionals face any potential sanctions, criminal or other, under domestic legislation?
- 3. Is there specific legislation protecting the provision of healthcare in line with ethical principles of healthcare? If so, does domestic legislation provide any guidance on how to resolve the potential tension between protecting medical ethics and providing for duties of disclosure of gunshot wounds of patients?

As already mentioned, the present study focuses merely on the legal framework, to the exclusion of considerations based on practice. Nevertheless, where possible, our experts of the field included some elements as to the practice in their country.

III. METHOD

The FDFA, ICRC and ISDC have agreed that the study will cover 22 countries, reflecting a selection of continents and legal traditions, and including certain jurisdictions of particular interest as a result of past or expected actual experience with these issues.

The study includes a national report for each country (in English or in French) in a standardized form, a comparative analysis of those country reports (in English) and a summary table (in English or French). The national reports have been prepared by the ISDC and/or external experts with whom the ISDC collaborates, and/or the ICRC as described below.

The ISDC and/or external experts with whom the ISDC collaborated for this project prepared national reports for the following countries.

Africa:	Nigeria, South Africa, and Tunisia
Americas:	Columbia, Mexico and El Salvador
Asia/Pacific:	Australia, Nepal and Pakistan, China
Europe and Central Asia:	France, Russia, Spain, the Ukraine and the United Kingdom
Middle East:	Egypt and Lebanon

For some of the countries, the ICRC facilitated contact with local legal counsel who not only provided the ISDC with documentation but also helped the ISDC to understand the complete framework of regulation in the country in question.

The ICRC provided national reports for the following countries:

Asia/Pacific:	Papua New Guinea and the Philippines
Africa:	Niger and South Sudan
Middle East:	Iran.

The national reports prepared by the ICRC are included in the comparative analysis of the opinion prepared by the ISDC.

IV. NATIONAL REPORTS

A. AUSTRALIA

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

1.1. Constitutional and juridical framework of regulation generally

Australia is a federation, consisting of “States”, self-governing “Territories” and non-self-governing “Territories”. New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia are the six States. The Australian Capital Territory and the Northern Territory are self-governing and Norfolk Island was self-governing between 1979 and 2015. The seven remaining Territories have either very small or no permanent populations² and will not be considered in this national contribution to the present study.

The federal constitution divides legislative competences, according to subject matter, between the federation (formally entitled “the Commonwealth of Australia” and informally “the Commonwealth”) and the States. Although the federal parliament has a reserved right to override their legislation (in very exceptional cases), the self-governing territories exercise largely the same legislative competences as the States. The regulation of firearms, the regulation of professions and the regulation of medicine and health in general are all subjects that fall within the legislative competences of the States and Territories. The Commonwealth is permitted to legislate on these subjects only in so far as is necessarily incidental to the exercise of its own legislative competences, for example in respect of postal and telecommunications services or to implement Australia’s international treaty obligations.³ In the preparation of this national contribution, it has therefore been necessary to examine the legislation enacted in each of nine States and Territories.

Australia adheres to the tradition of the English common law and does not have a tradition of codification as found in Continental Europe. Judicial decisions and principles of common law and equity, developed by courts over centuries and distilled by commentators, are thus a source of Australian law, additional to legislative sources. The applicable judicial decisions are not only those of Australian courts, but also those of courts in foreign countries that adhere to the English common law tradition.⁴ This means that relevant cases tend to be cited by numerous authors, regardless of exactly where they reside or work, and are therefore quite easy to find. Relevant legislative provisions of individual States or Territories, on the other hand, may not be cited by any authors. Such provisions may be included in statutes or secondary legislation where one would not necessarily expect to find them. It is accordingly entirely possible that the author of the present national contribution has overlooked, or simply failed to locate, some relevant legislative provisions.

² For a slightly more detailed overview of the division of Australia into 17 legal jurisdictions, refer to §§ 8 and 9 of M. Sychold, “Australia”, in B. Verschraegen (ed.), *International Encyclopaedia of Laws – Private International Law*, Alphen aan den Rijn: Kluwer Law International, 2007.

³ Refer to Part V. of Chapter I. and especially section 51 of the Australian Constitution, freely accessible in electronic form via a link from the official website for Australian federal legislation: <https://www.legislation.gov.au/Details/C2005Q00193/Download> - last consulted on 08.02.2019).

⁴ Refer to L. Waller, *Derham, Maher & Waller’s An Introduction to Law*, 7th ed, North Ryde: LBC Information Services, 1995, especially chapter 2, “The Sources of our Law”.

1.2. General disclosure duties of health services providers

All of the States and self-governing Territories impose some duties of disclosure upon “medical practitioners” (*i.e.* doctors) and other categories of persons involved in the provision of various health services. The details of these duties vary according to the information that is required to be disclosed.

1.2.1. Duty to report evidence of criminal conduct in general

1.2.1.1. At common law

Everyone in Australia has a legal duty to report serious criminal conduct.⁵ A person who breaches that duty commits the common law offence of misprision of a felony.⁶ In respect of criminal liability, the common law distinguishes three categories of offences: treasons, felonies and misdemeanours.⁷ Virtually all crimes of violence are categorized as felonies (or as treasons if they aim to injure the sovereign or overthrow the State). Failure to disclose knowledge of treasonous or felonious conduct on the part of other persons itself constitutes a misdemeanour.⁸ To cite a renowned commentary,

“The law made it the duty of every citizen to disclose any treason or felony of which he had knowledge, and a person who did not fulfil this duty was guilty of a ‘misprision’ of treason or felony”.⁹

That formulation invites clarification of the type or amount of information about a crime that needs to come to a person’s attention before she can be said to have “knowledge” of the commission of the crime. According to Blackstone’s venerable *Commentaries on the Laws of England*,

⁵ That duty was described by the Full Court of the Supreme Court of Victoria in *Regina v. Crimmins*, [1959] Victorian Reports 270, as the duty of every citizen to disclose any treason or felony of which he has knowledge (refer below, this point 1.2.1.1. in this national contribution to the present study), by the Court of Appeal of Victoria in *Regina v. Lowe*, [1997] 2 Victorian Reports 465, as the duty to disclose information concerning any specific and identifiable threat to public safety (refer below, point 1.2.1.4. in this national contribution to the present study) and by Justice Brennan of the High Court of Australia in *A et al. v. Hayden et al.*, (1984) 156 Commonwealth Law Reports 532, as the duty to assist in the investigation of crimes reasonably suspected to have been committed (refer below, point 1.2.1.4. in this national contribution to the present study).

⁶ In the Australian context, refer to P. Gillies, *Criminal Law*, 4th ed., North Ryde: LBC Information Services, 1997, p. 840.

⁷ *Ibid.*, p. 13.

⁸ Specific penalties for misprision of felonies, when committed by various named public officials, were imposed by section 9, entitled “All men shall be ready to pursue Felons”, of the Statute of Westminster the First (1275) (the legislation is reproduced in full and translated into English in W. Hawkins, *The Statutes at Large from Magna Charta to the Seventh Year of King George the Second inclusive*, London: King’s printer, 1735, available in electronic form in Gale’s database of Eighteenth Century Collections Online (<http://find.galegroup.com/ecco/> - last consulted on 12.02.2019)). Not being legislatively designated as a felony and clearly not being treasonous, the offence must be a misdemeanour. The statute refers only to misprision on the part of officials, but the preamble explains that the duty to report already existed (*i.e.* at common law) and that legislative action was needed because public officials and local aristocrats frequently failed to enforce it; refer to W. Blackstone, *Commentaries on the Laws of England*, Oxford: Clarendon Press, Vol. 4 (1769), p. 121.

⁹ W. Holdsworth, *A History of English Law*, 5th ed, London: Methuen / Sweet & Maxwell, 1942, Vol III, pp. 388-389, citing Sir Edward Coke’s *Third Part of the Institutes of the Laws of England* (1644). Holdsworth’s work was cited by the Full Court of the Victorian Supreme Court in *Regina v. Crimmins*, [1959] Victorian Reports 270, at 272, as showing that the offence of misprision was created so as to punish breaches of the pre-existing duty to disclose.

“Misprision of felony is also the concealment of a felony which a man knows, but never assented to ... This concealment becomes criminal, if the party apprised of the [felony] does not, as soon as conveniently may be, reveal it to some judge or assise or justice of the peace”.¹⁰

Blackstone’s explanation indicates that the person must have at least a basis for clearly believing that a particular crime has been committed. A modern statement of the law in Australia appears in a judgment delivered by Justice Crockett of the Supreme Court of Victoria in 1981:

“... [A] person is guilty of the crime of misprision if, knowing that a felony has been committed, he fails to disclose within a reasonable time and having a reasonable opportunity for so doing his knowledge to those responsible for the preservation of the peace. What is a reasonable time and opportunity is a question of fact for a jury, as is also whether the knowledge is so definite that it ought to be disclosed. It was said that a person is neither bound, nor would he be wise, to disclose rumour or mere gossip, but if facts are within his knowledge that would materially assist in the detection and arrest of a felon, he must disclose them, as it is a duty that he owes to the State”.¹¹

Like a “rumour or mere gossip”, evidence which only gives rise to a suspicion of some kind of criminal behaviour therefore presumably does not need to be reported. Any material evidence that could contribute to proof of a particular crime and the identity of the criminal must be reported, on the contrary; the person does not need to have been an eyewitness to the commission of the crime. The law does not try to specify the exact point within that spectrum at which the duty is activated. If a person is charged with misprision, it will be up to the jury to decide at the trial “whether [his] knowledge [was] so definite that it ought to [have been] disclosed”.

The case of *Regina v. Crimmins*,¹² heard in the Supreme Court of Victoria some twenty years earlier, provides an example of the application of the legal principles to circumstances of clear relevance to the present study. The defendant, who had suffered a gunshot wound to the abdomen, presented himself at a public hospital in Melbourne for treatment of that wound. He was interviewed by police officers at the hospital (the law report does not indicate who called the police, or for what reason). In the course of that interview, the defendant stated that he had been shot deliberately and that he knew who had shot him. He refused however, to reveal the identity of the shooter or the place at which the shooting had occurred. The trial judge understood that the defendant intended to take justice into his own hands. The defendant was charged with misprision of the felony offence of unlawful and malicious wounding with intent to do grievous bodily harm. He was found guilty of misprision and the Full Court upheld the conviction. The Full Court found that, although the defendant had not lied as to the existence of a felony (*i.e.* had not pretended to have been shot by accident), all of the requisite elements of misprision were present: the defendant knew that the crime of unlawful and malicious wounding had been committed; he failed to disclose the name of the criminal and the place at which the crime had been committed; those facts, if disclosed to the authorities, might have led to the apprehension of the criminal.¹³

¹⁰ *Commentaries on the Laws of England, op. cit.*, p. 120-121 (original footnote omitted). The commentator principally aims to distinguish misprision of a crime from the offence of being an accessory to a crime or that of being complicit in a conspiracy to commit a crime (“assented”). The reference to judicial instances (“some judge ...”) is referable to the fact that no public police forces existed in England in 1769.

¹¹ *Regina v. Stone*, [1981] Victorian Reports 737. The quote is taken from the third-to-last paragraph of the electronic version of Justice Crockett’s judgment, which is available on the Australasian Legal Information Institute’s website (<http://www.austlii.edu.au> (last consulted 07.05.2019)).

¹² [1959] Victorian Reports 270.

¹³ These findings are stated in the third-to-last paragraph of the electronic version of the judgment of the Full Court, which is available on the Australasian Legal Information Institute’s website (<http://www.austlii.edu.au>).

The facts of the case later decided by Justice Crockett¹⁴ are interesting because the last element was missing. The defendant was charged with misprision of a murder. Before parting company with the murderer, he had heard that person confess to “killing his wife” and had examined the murder weapon. The defendant went home after that person expressed his intention to leave the jurisdiction as quickly as possible. Unbeknown to the defendant, that person then almost immediately changed his mind, went to the nearest police station and confessed to the murder. Justice Crockett held¹⁵ that the police would not have been materially assisted by the information known to the defendant, because they already had custody of the murderer, who was cooperating with their investigation. The defendant could not be convicted of misprision in these circumstances.

The direct applicability of the common law offence in Australia at the present time is limited, however. The Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia have enacted “criminal codes” which, although they have not codified criminal law in the Continental European sense,¹⁶ abolish all criminal offences not set out in those codes or in other statutory provisions.¹⁷ Specific legislative provisions are of relevance in the other four jurisdictions considered here.¹⁸ The effect of those provisions will now be considered separately in respect of each jurisdiction.

1.2.1.2. Law in force in New South Wales

In New South Wales, the offence of misprision of a felony has been expressly abolished by section 341 of the Crimes Act 1900. It has been replaced¹⁹ by a statutory offence, in section 316 of that Act, of “concealing a serious indictable offence”:

“316 (1) An adult:

- (a) who knows or believes that a serious indictable offence has been committed by another person, and
- (b) who knows or believes that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and
- (c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force or other appropriate authority,

is guilty of an offence.

Maximum penalty: Imprisonment for:

- (a) 2 years—if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or
- (b) 3 years—if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or
- (c) 5 years—if the maximum penalty for the serious indictable offence is more than 20 years imprisonment”.

The common law requirement of “knowledge” of the commission of a crime has been expanded into “knowledge or belief”. Section 313 of the Crimes Act 1900 specifies that the offender need not know exactly which crime, or type of crime, has been committed. On the other hand, in addition to

¹⁴ *Regina v. Stone*, [1981] Victorian Reports 737; refer above, this point 1.2.1.1. in this national contribution to the present study.

¹⁵ In the second-to-last paragraph of the electronic version of the judgment of the Full Court which is available on the Australasian Legal Information Institute’s website (<http://www.austlii.edu.au>).

¹⁶ Refer above, to the last paragraph under point 1.1. in this national contribution to the present study.

¹⁷ Refer to K.J. Arenson, M. Bagaric & P. Gillies, *Australian Criminal Law in the Common Law Jurisdictions: cases and materials*, 3rd ed, South Melbourne: Oxford University Press, 2011, p. 17, last paragraph.

¹⁸ Refer above, to the first two paragraphs under point 1.1. in this national contribution to the present study.

¹⁹ The essential elements of the current offence were inserted into the Crimes Act 1900 by section 3 of and Schedule 1 to the Crimes (Public Justice) Amendment Act 1990.

“knowledge or belief”, the offender must have some concrete “information” that could reasonably be expected to assist police in either arresting a criminal or securing his conviction. The common law reference to “felonies” has been replaced by a reference to “serious indictable offences”. According to subsection 4(1), an indictable offence is “serious” if it is punishable by imprisonment for at least five years. All offences are “indictable”²⁰ unless a statutory provision states that an offence must be tried summarily (“summary offence”).²¹

Subsection 316(4) makes²² special provision for cases in which the requisite “knowledge or belief” is obtained or formed by certain categories of persons. These categories are to be specified in subsidiary legislation by reference to a person’s “profession, calling or vocation”. The categories of “medical practitioners”, “nurses” and “psychologists” are among those currently specified.²³ If a person obtains or forms the requisite “knowledge or belief” of criminality “in the course of practising or following [his or her] profession”, then that person can only be prosecuted for this offence if the Director of Public Prosecutions gives his approval. In effect, local police forces do not have the independent power to prosecute a doctor, nurse or psychologist for failing to give them information received in that capacity; prosecution depends upon a policy decision made at the highest level of law enforcement.

1.2.1.3. Law in force in South Australia

In South Australia, the offence of misprision of a felony has been expressly abolished by section 1(2) of Schedule 11 to the Criminal Law Consolidation Act 1935. That statute does not contain an offence similar to that of “misprision of felony” or of “concealing a serious indictable offence”²⁴. There is accordingly no longer a general duty to report suspicions of criminal conduct in South Australia.

1.2.1.4. Law in force in Victoria

In Victoria, the common law’s distinction between felonies and misdemeanours was abolished by legislation²⁵ in 1981, introducing into the Crimes Act 1958 a Part IB, which has been in force since then. The following provisions are of relevance to the present analysis:

“322B(1) All distinctions between felony and misdemeanour are hereby abolished.

(2) Subject to section 322D, in all matters to which before the commencement of this Part a distinction has been made between felony and misdemeanour (including mode of trial), the law and practice in relation to all indictable offences cognizable under the law of Victoria (including piracy and offences deemed to be piracy) shall be the law and practice applicable immediately before the commencement of this Part in relation to misdemeanour.

²⁰ This is a term of criminal procedural law. When an offence is to be tried “on indictment”, the defendant must first be “committed for trial”. At a preliminary “committal” hearing, normally before a magistrate, the prosecution is required to demonstrate that it has evidence, which, if accepted, would justify a conviction of the offence charged. If the magistrate is satisfied of this and the defendant does not plead guilty, then the defendant is “committed for trial” before a judge and jury. The alternative “summary trial” procedure involves no committal: the defendant is tried directly before a magistrate or before a judge sitting alone.

²¹ Refer to Gillies, *Criminal Law*, *op. cit.*, pp. 17-18. The legislature has largely unfettered power to designate an offence as one to be tried “on indictment”, as a “summary offence” or as an “offence triable either way”. An offence falling within the first or the last of those categories is an “indictable offence”. It is rare that an offence punishable by imprisonment for more than one year is designated a “summary offence”. The vast majority of all criminal offences are nevertheless “summary offences”.

²² This concession to professionals who may be expected to receive information indicating criminal conduct was inserted into the Crimes Act 1990 by section 3 of and Schedule 1 to the Crimes Legislation Amendment Act 1997, some seven years after the insertion of the offence.

²³ In section 4 of the Crimes Regulation 2015.

²⁴ Compare above, point 1.2.1.2. of this national contribution to the present study, to the information concerning New South Wales.

²⁵ Section 2 of the Crimes (Classification of Offences) Act 1981.

[...]

322C [...]

(3) Any offence known to the common law as a felony or a misdemeanour shall on and from the commencement of this Part be known as an indictable offence”.

A leading commentary states that one effect of the statutory abolition of the distinction between felonies and misdemeanours in Victoria is that “the common law offence of misprision of felony became inapplicable”²⁶. The author bases that conclusion at least partly on the fact that the 1981 legislative amendments also introduced a number of criminal offences into the Crimes Act 1958, including the offence of “concealing an offence for benefit”.²⁷ In reality, this is of no relevance to the offence of misprision. The common law provides a separate offence of “compounding a felony”, which is distinct from that of “misprision of a felony” in that “compounding” requires an arrangement whereby some kind of benefit is provided to the person who knows that a felony has been committed, or to a third party, in return for the continuing concealment of the felony, whereas misprision requires no element of benefit.²⁸ Subsection 326(5) of the Crimes Act 1958 makes it clear that the intention of the legislature is to place compounding on a statutory footing and no link at all is made to misprision.

The view taken by the commentary may also be based upon an opinion expressed in two reported judicial decisions. One of these is *Regina v. Lowe*,²⁹ in which the Court of Appeal of Victoria stated that “[...] the common law misdemeanour of misprision of felony has now been abolished [...]”³⁰. That statement is strictly erroneous, in that the Crimes Act 1958 did not abolish misdemeanours, but rather the distinction between felonies and misdemeanours.³¹ It was probably not intended to be an exact statement of the law, however. It is an *obiter dictum* in the course of the Court’s discussion of the conflict between the duty to maintain confidentiality (*in situ* of information provided by a patient to a psychotherapist) and the duty to disclose information (*in situ* of a specific and identifiable threat to public safety). The Court cited two Californian decisions and an Australian journal article in support of the existence of the duty of disclosure.³² The Court’s *ratio decidendi* was that the need for disclosure may override duties of confidentiality in individual cases:

“In this State it is clear that both common law and statute law subordinate private confidence to the wider public interest, at least when it comes to disclosing information in the interests of prosecuting serious crime and/ or protecting public safety [...]”³³

²⁶ Gillies, *Criminal Law*, *op. cit.*, p. 841, under point C.

²⁷ Section 326 of the Crimes Act 1958, introduced by Section 4 of the Crimes (Classification of Offences) Act 1981.

²⁸ *Regina v. Worthington*, [1921] Victorian Law Reports 660; *Regina v. Crimmins*, [1959] Victorian Reports 270; *Sykes v. Director of Public Prosecutions*, [1962] Law Reports, Appeal Cases 528 (adopting *Regina v. Crimmins* as a correct statement of the common law in England, as well as in Victoria).

²⁹ [1997] 2 Victorian Reports 465.

³⁰ *Ibid.*, the fourth-to-last paragraph of the electronic version of the judgment of the Court of Appeal which is available on <http://www.austlii.edu.au>, under the heading, “Ground 4”.

³¹ The relevant provisions of part IB of the Crimes Act 1958 are quoted above, in this point 1.2.1.4. in this national contribution to the present study.

³² *Tarasoff v. Regents of the University of California* (No 2), (1976) 17 California Reporter, Third Series 425; *People v. Clarke*, (1990) 50 California Reporter, Third Series 583; A. Abadee, “The Medical Duty of Confidentiality and Protective Duty of Disclosure”, in (1995) 3 *Journal of Law and Medicine* 75, at 80 and 90-91. The authors of I. Kerridge, M. Lowe & C. Stewart, *Ethics and Law for the Health Professions*, 4th ed., Leichhardt: Federation Press, 2013, note at p. 320 that the approach taken in the two Californian decisions has subsequently been adopted and rejected in roughly equal proportions in US-American judgments. Refer also below, to point 3.2. in this national contribution to the present study.

³³ [1997] 2 Victorian Reports 465, the fifth-to-last paragraph of the electronic version of the judgment available on <http://www.austlii.edu.au>, under the heading, “Ground 4”, citing two English cases as

That finding is in any case important for the purposes of the present study.

The second reported case in which the issue has been addressed is *A et al. v. Hayden et al.*,³⁴ decided by the High Court of Australia. Of the six judgments delivered, only two discussed the issue. Justice Sir Gerard Brennan mentioned it by way of *obiter dicta* in the course of considering whether the Commonwealth could legally bind itself to maintain confidentiality even when criminality is suspected. He considered that, although there is no general legal duty to assist in the detection of crime, “especially when misprision of felony has gone from the criminal calendar in Victoria with abolition of the distinction between felonies and misdemeanours”³⁵, yet obligations of confidentiality cannot be imposed by law or accepted by contract so as to prevent disclosure of confidential information in the public interest “to assist in the investigation of crimes reasonably suspected to have been committed”³⁶. Providing no further explanation of his analysis, Justice Brennan presumably based his position upon the judgment that Justice Mason had delivered immediately beforehand and which is, to the knowledge of the present author, the only judgment to have analysed the relevant provisions of the Crimes Act 1958.

Justice Sir Anthony Mason decided that the contractual undertaking of the Commonwealth to maintain confidentiality was judicially unenforceable because it was inconsistent with the public interest in the enforcement of criminal law. In arriving at that decision, he first considered³⁷ whether the confidentiality undertaking was unenforceable because it breached a duty to disclose information showing that a crime had been committed. He cited *Regina v. Crimmins*,³⁸ as authority for two legal principles: the common law imposes a duty upon citizens to disclose any knowledge that a treason or a felony has been committed; failure to perform that duty renders the citizen liable for misprision of treason or felony. Justice Mason went on to state that the relevant amendments to the Crimes Act 1958 had abolished the distinction between felonies and misdemeanours in Victoria and to claim that they had also abolished the offence of misprision of a felony by “making the law and practice relating to misdemeanours applicable”³⁹. He added that the amendments had created a new offence of concealing an offence for benefit. He concluded that Victorians are no longer under a duty to disclose knowledge of felonies, that they were never under a duty to disclose knowledge of misdemeanours and that a contractual undertaking to conceal information about crime did not amount to “any breach of a duty imposed by the law of Victoria in 1983”⁴⁰.

A number of observations may be made in respect of that analysis. First, it is almost certainly erroneous to interpret subsection 322B(2) of the Crimes Act 1958 as requiring the law and practice previously governing misdemeanours to effectively replace all offences previously classified as felonies. On the contrary, subsection 322C(3) requires⁴¹ all common law offences previously classified as felonies or

authority: *W v. Egdell*, [1990] 1 Law Reports, Chancery 359, at 416-417; *Regina v. Crozier*, (1990) Criminal Appeal Reports 206.

³⁴ (1984) 156 Commonwealth Law Reports 532.

³⁵ *Ibid.*, at 587, after the citation of *Sykes v. Director of Public Prosecutions*, [1962] Law Reports, Appeal Cases 528.

³⁶ *Ibid.*

³⁷ (1984) 156 Commonwealth Law Reports 532, at 552.

³⁸ [1959] Victorian Reports 270, discussed above, in point 1.2.1.1. in this national contribution to the present study.

³⁹ (1984) 156 Commonwealth Law Reports 532, at 553, first full paragraph.

⁴⁰ *Ibid.*, second full paragraph.

⁴¹ The provision has been quoted above, in this point 1.2.1.4. in this national contribution to the present study.

misdemeanours to be treated henceforth as “indictable offences”⁴². Subsection 322B(2) is concerned with criminal procedure, rather than substantive criminal law.⁴³ Part IB of the Crimes Act 1958 had the effect of designating as “misprision of an indictable offence” the offence previously referred to in Victoria as “misprision of a felony”. Secondly, the judge’s reference to the new provision governing concealment of offences for benefit confuses the common law offences of misprision of a felony and compounding a felony. He had himself noted that, in *Regina v. Crimmins*,⁴⁴ the Full Court had rejected any requirement of proving a benefit to the accused as an element of misprision of a felony.⁴⁵ The intention of the legislature in enacting section 326 of the Crimes Act 1958 was clearly to place the offence of compounding on a statutory footing, as has been explained above.⁴⁶ The legislative amendments make no mention of misprision. Those two facts, applying the maxim *expressio unius, exclusio alterius*,⁴⁷ lead to the conclusion that misprision was not affected by the amendments. Thirdly, to find that the duty of disclosure of criminal conduct was abolished by legislation supposedly terminating the possibility of punishment for misprision of felonies, is a *non sequitur*. Like the Full Court in *Regina v. Crimmins*,⁴⁸ Justice Mason had himself distinguished between the duty of disclosure and the criminal prosecution of breaches of that duty. It has been explained above⁴⁹ that the duty existed before criminal penalties were first imposed, in 1275, to more effectively enforce the duty. The existence of the duty does not depend upon the existence of criminal penalties for breaches of the duty. The Court of Appeal of Victoria took this view twelve years later, in *Regina v. Lowe*.⁵⁰ Fourthly, Justice Mason cited no authorities to support his proposition that there has never been a duty to disclose knowledge of misdemeanours and it is submitted that the proposition is probably false. The classic statements⁵¹ of the common law on the point were formulated in the context of the criminal offence of misprision. The duty of disclosure predated the imposition of criminal penalties for breaches of that duty. According to the Full Court of the Supreme Court of Victoria, the duty was originally imposed because, “[...] long before the creation of any criminal investigation department, the

⁴² The concept has been described above, in the second-to-last paragraph under point 1.2.1.2. in this national contribution to the present study.

⁴³ This appears from the text of the subsection, including its subordination to section 322D, which deals with criminal proceedings that were continuing before and after the date on which the legislative amendments came into force.

⁴⁴ [1959] Victorian Reports 270, discussed above, in point 1.2.1.1. in this national contribution to the present study.

⁴⁵ Refer in particular to the second-to-last major paragraph in the electronic version of the Full Court’s judgment, *ibid*. The distinction between misprision and compounding had already been stated by the Full Court in *Regina v. Worthington*, [1921] Victorian Law Reports 660, at 686.

⁴⁶ Immediately after the quotation from Part IB of the Crimes Act 1958 in this point 1.2.1.4. in this national contribution to the present study.

⁴⁷ Informal translation by the Institute: “when the one is stated, the other is excluded”. This is a canon of interpretation, frequently employed in Commonwealth jurisdictions (compare above, the last paragraph under point 1.1. in this national contribution to the present study), and means that, when a legislature has stated one or more manifestations of a general concept, it can be taken to have intended to exclude other manifestations of that concept, which it did not state; refer to D. Gifford, *Statutory Interpretation*, North Ryde: Law Book Company Ltd, 1990, pp. 27-29.

⁴⁸ [1959] Victorian Reports 270, at 272. The case has been discussed above, in point 1.2.1.1. in this national contribution to the present study.

⁴⁹ In point 1.2.1.1. in this national contribution to the present study.

⁵⁰ [1997] 2 Victorian Reports 465, discussed above, in this point 1.2.1.4. in this national contribution to the present study.

⁵¹ I.e. those to be found in Blackstone’s *Commentaries on the Laws of England* and in Holdsworth’s *A History of English Law*, both quoted above, in point 1.2.1. in this national contribution to the present study.

detection of offenders very largely depended upon citizens performing this duty”⁵². That was true as much of misdemeanours as of treasons and felonies. If there had been no duty to report misdemeanours, there would have been no point in classifying them as criminal offences, rather than private wrongs. The common law imposes a duty to report one’s knowledge of criminal conduct of all kinds. Two members of the Full Court made analogous findings in 1913 that “all impediments of justice”⁵³, including any “endeavour to dissuade a witness from giving evidence”⁵⁴, “are high misprisions”⁵⁵ and “also punishable on indictment as misdemeanours”⁵⁶. Since the abolition of the distinction between felonies and misdemeanours, “all impediments of justice” are punishable in Victoria as innominate indictable offences.⁵⁷ Fifthly, the analysis carried out by Justice Mason is strictly to be characterised as an *obiter dictum* because the common law duty of disclosure and offence of misprision apply only to citizens, not to the State. *A et al. v. Hayden et al.*,⁵⁸ concerned the obligations, not of a citizen, but of the Australian Commonwealth, recognised as a State under public international law. His Honour himself stated⁵⁹ this distinction when formulating his conclusion as to the effect of the Victorian legislative amendments. Sixthly, the conclusions reached by Justice Mason and Justice Brennan on this point did not comply with the principle that judges should decide only those issues on which they have heard arguments by counsel representing each of the parties⁶⁰ and may be considered to have been reached *per incuriam* (i.e. without taking into account all the applicable legal norms).⁶¹ Finally, it should be noted (and several of the judges did expressly note) that *A et al. v. Hayden et al.*⁶² was an extremely unusual type of case, arising out of investigations by a State governmental authority of whether criminal offences had been committed by a federal governmental authority. It clearly falls within the category of “hard cases”, which are known to “make bad law”.

If the criminal offence of misprision no longer exists in Victoria, the reason is therefore not that the offence has been “abolished” by legislation, but rather that it has disappeared with the passing of time.

⁵² *Regina v. Crimmins*, [1959] Victorian Reports 270, immediately after the citation of the passage in Holdsworth’s *A History of English Law* which has been quoted above, in point 1.2.1.1. in this national contribution to the present study.

⁵³ *Rex v. Carroll*, [1913] Victorian Law Reports 380, at 383, per Justice Hood, quoting from “*Chitty’s Blackstone*, vol. iv., 126”. This may be the 18th edition of Blackstone’s *Commentaries*, edited by Joseph Chitty and published in London by William Walker in 1826, or *Chitty’s Blackstone: Commentaries on the Laws of England in Four Books (both volumes complete)*, published in Philadelphia by J.B. Lippencott & Co in 1870.

⁵⁴ *Idem*.

⁵⁵ *Idem*.

⁵⁶ *Ibid.*, at 384, per Justice Cussen, citing the judgment of Justice Wills of the High Court of Justice of England in *Rex v. Davies*, [1906] 1 Law Reports, King’s Bench 32.

⁵⁷ This is the combined effect of *Rex v. Carroll*, *ibid.*, and subsection 322C(3) of the Crimes Act 1958.

⁵⁸ (1984) 156 Commonwealth Law Reports 532.

⁵⁹ *Ibid.*, at 553, in the second full paragraph: “[...] had the promise made by the Commonwealth [...] been made by an ordinary citizen it would not have involved him in any breach of a duty [...]”.

⁶⁰ In the context of circumscribing those judicial statements which are considered authoritative, H. Halvey (Managing Ed), *Halsbury’s Laws of England*, 5th ed., London: Reed Elsevier Lexis Nexis, Vol. 11, 2015, title “Civil Procedure”, refers at par. 40 to the Practice Direction on the Citation of Authorities that was issued by Lord Chief Justice of England and Wales on 9 April 2001 and originally published in [2001] 1 Weekly Law Reports 1001. At pars. 6.1 and 6.2, His Lordship directed that judgments made after hearings not attended by counsel for both parties should be cited in later cases only if those judgments clearly indicate that they purport to extend the existing law or create new legal principles. Such judgments should not, in other words, be presented as authoritative statements of the existing law.

⁶¹ Refer to G. Morris *et al.*, *Laying Down The Law: The foundations of legal reasoning, research and writing in Australia and New Zealand*, 2nd ed., North Ryde: Butterworths, 1988, pp. 59-60 under the heading, “Precedent was wrongly decided”.

⁶² (1984) 156 Commonwealth Law Reports 532.

Formulating its judgment in *Regina v. Crimmins*,⁶³ the Full Court of the Supreme Court of Victoria stated in 1959 that a charge of misprision of felony was “a very unusual charge to be laid”.⁶⁴ To our knowledge, no prosecution for misprision in Victoria has been reported⁶⁵ since *Regina v. Stone*⁶⁶ was decided in 1981, a few days before the Crimes Act 1958 was amended to abolish the distinction between felonies and misdemeanours.⁶⁷ The issue was already considered by Lord Goddard, then Lord Chief Justice of England, in 1948. He considered at that time that misprision of felony “[...]is an offence which has been generally regarded nowadays as obsolete or fallen into desuetude”⁶⁸ in England and Wales. His Lordship was however, presented with evidence that several charges of misprision had been laid not long before. Reconsidering the issue in 1959, the Full Court of the Supreme Court of Victoria explained in *Regina v. Crimmins*⁶⁹ that, due to the lack of “any criminal investigation department” in medieval England, the prosecution of criminals originally depended almost entirely upon the performance by citizens of their duty to report evidence of crimes. “[P]rosecutions for misprision of felony have been somewhat rare in recent years” because the investigative efficiency of modern police forces usually permits the detection of crime without reliance upon input by the public. Nevertheless, there are still cases arising from time to time in which the public interest can be secured only by the disclosure of knowledge held by otherwise innocent citizens and it is important that persons who fail to fulfil this public duty can still be prosecuted for misprision in exceptional cases. The Full Court concluded that “[t]here is certainly no justification for the view that such a prosecution is no longer available to the Crown”.⁷⁰ That policy analysis is as realistic in 2019 as it was in 1959. The 38 years which have passed since the prosecution of Stone⁷¹ are too short a period in the history of the common law to warrant a conclusion that the offence of misprision has fallen into permanent desuetude, particularly in light of the common law principle that the passage of time by itself has no legal effects⁷² and of the likelihood that, if prosecutors have not laid charges of misprision since 1981, they have done so under the mistaken belief that the offence was abolished by Victorian legislation.

In conclusion, the common law offence is probably still part of the criminal law of Victoria and properly referred to as “misprision of an indictable offence”. Even if, for any reason, commission of that offence can no longer lead to a prosecution, everyone in Victoria is under a legal duty to notify the police or other public authorities of any known fact that could materially assist in the detection of serious criminal conduct and the prosecution of the criminal(s).

⁶³ [1959] Victorian Reports 270, discussed above, in point 1.2.1.1. in this national contribution to the present study.

⁶⁴ *Ibid.*, just before the citation of *Rex v. Aberg*, [1948] 2 Law Reports, King’s Bench 173.

⁶⁵ The vast majority of criminal prosecutions do not lead to judgments of superior courts, which are published online or in law reports. On the other hand, it is to be expected that anyone convicted of misprision of a felony after 1981 would have challenged the conviction on appeal.

⁶⁶ [1981] Victorian Reports 737, discussed above, in point 1.2.1.1. in this national contribution to the present study.

⁶⁷ Refer above, this point 1.2.1.4. in this national contribution to the present study.

⁶⁸ *Rex v. Aberg*, [1948] 2 Law Reports, King’s Bench 173, at 176.

⁶⁹ [1959] Victorian Reports 270, at 272.

⁷⁰ *Idem.*

⁷¹ *Regina v. Stone*, [1981] Victorian Reports 737, described above, in point 1.2.1.1. in this national contribution to the present study.

⁷² Refer to T. Prime & G. Scanlan, *The Law of Limitation*, 2nd ed, Oxford: oxford University Press, 2001, p. 1 and to J. McGhee (ed.), *Snell’s Equity*, 33rd ed., London: Thomson Reuters (Sweet & Maxwell), 2015, pp. 93-94, par. 5-011.

1.2.1.5. Law in force on Norfolk Island

The legal position prevailing on Norfolk Island is again unclear. Between 1960 and 2007, the Crimes Act 1900 of New South Wales, as amended up to 15 December 1936, also applied to Norfolk Island.⁷³ The offence of “concealing a serious indictable offence”, having been introduced by an amendment enacted in 1990, was therefore not applicable on Norfolk Island. The Criminal Code 2007 of Norfolk Island entered into force on 1 January 2008. It repealed⁷⁴ most of the New South Welsh Crimes Act and does not contain an offence similar to that of “concealing a serious indictable offence”. This may mean that there is no duty under the law of Norfolk Island to report evidence of the commission of criminal offences in general. On the other hand, the principles and rules of common law that form part of the law of New South Wales are deemed by Commonwealth legislation to apply on Norfolk Island.⁷⁵ In addition, the Criminal Code 2007, unlike the “codes” enacted on the Australian mainland,⁷⁶ does not claim to contain an exclusive list of criminal offences. Instead, a stated purpose of the Code “is to codify general principles of criminal responsibility under Norfolk Island legislation”.⁷⁷ It is accordingly possible that the common law offence of misprision of felony currently still applies to Norfolk Island.⁷⁸

1.2.1.6. Summary

Everyone in Australia has a duty at common law to notify the appropriate public authorities of facts that could materially assist the authorities to identify the perpetrator of any serious crime and/or prosecute him for that crime. The common law also provides for the punishment of anyone who fails to perform that duty.⁷⁹ The relevant criminal offence, now correctly formulated as “misprision of an indictable offence”, is probably still in force on Norfolk Island and in the State of Victoria. In the State of New South Wales, it has been replaced by a very similar statutory offence of “concealing a serious indictable offence”. A failure to perform the duty is no longer punishable in the Australian Capital Territory, the Northern Territory or the States of Queensland, South Australia, Tasmania and Western Australia.

1.2.2. Specific reporting duties of health services providers

Various *ad hoc* statutory provisions of individual Australian jurisdictions require health services providers in particular to report various types of personal health information, some of which may provide evidence of the commission of criminal offences by patients or third persons. We have not

⁷³ By virtue of section 3 of the Criminal Law Act 1960 of Norfolk Island.

⁷⁴ Subsection 2(1) of and Part 1 of the Schedule to the Criminal Code 2007.

⁷⁵ Norfolk Island Act 1979 (Commonwealth), subsection 18A(1) and paragraph 18A(6)(a). Refer also to the website of the Norfolk Island Regional Council (<http://www.norfolkisland.gov.nf/policy-and-governance/norfolk-island-legislation> - last consulted on 14.02.2019), which provides a useful overview and links, but confuses the concepts of “legislation” and “law”.

⁷⁶ Refer above, to the last paragraph under point 1.2.1.1. of this national contribution to the present study.

⁷⁷ Subsection 6(1). That provision actually specifies that this is “the main purpose” of chapter 2 of the Code, entitled “General Principles of Criminal Responsibility”. The Code contains no other statement of purpose however, and the scope of its application is uniformly defined by reference to “Norfolk Island legislation”, in contrast to “the law of Norfolk Island”.

⁷⁸ A determination of this question would require a detailed examination of the past and current sources of the law of Norfolk Island and of the extent to which the common law revives after legislation, which replaced it, becomes inapplicable. That investigation far surpasses the boundaries of the present study.

⁷⁹ This is the view taken by the authors of *Ethics and Law for the Health Professions*, *op. cit.*, p. 322, albeit without mentioning that a failure to perform the duty cannot lead to a prosecution in those jurisdictions that have abolished common law criminal offences.

attempted to establish a catalogue of all such provisions. The following categories of statutory reporting obligations are referred to in specialised commentaries.⁸⁰

1.2.2.1. Registration of deaths

Legislation in force in all Australian jurisdictions effectively requires doctors to determine the causes of the deaths of patients who die in their care and of deceased persons who are presented to them for (*post mortem*) examination. In New South Wales, section 39 of the Births, Deaths and Marriages Registration Act 1995 gives doctors a choice between lodging a notice of death with the Registrar of Births, Deaths and Marriages, and reporting the death to a coroner. In the former case, the notice must state the cause of death.⁸¹ In the latter case, the coroner may decide to hold a formal inquest in order to determine the cause and circumstances of the death.⁸² In either case, if the cause of death is stated to be “the impact of a projectile at high speed” or something similar, this is likely to be taken as evidence that the person was killed by a gunshot and lead to a criminal investigation.

1.2.2.2. Sharing information about domestic violence

Mandatory reporting of suspicions of domestic violence is foreseen by legislative provisions recently introduced in all the relevant Australian jurisdictions.⁸³ In New South Wales, Part 13A of the Crimes (Domestic and Personal Violence) Act 2007 permits “agencies”, including hospitals,⁸⁴ to collect and use health information and other personal information about a person threatened by domestic violence and about “any person that the agency reasonably believes is a cause of the threat (the *threatening person*)”⁸⁵. The hospital (or other agency) can also disclose the information to other governmental agencies and to “non-government [bodies] providing domestic violence support services”⁸⁶ in so far as this is “reasonably necessary” for the other agency or body to provide “welfare, health, counselling, housing and accommodation and legal assistance services”⁸⁷ to the person threatened.⁸⁸ This normally requires the consent of the person threatened.⁸⁹ Consent can be dispensed with, however, if this:

- “(a) [...] is necessary to prevent or lessen a domestic violence threat to [...] any [...] person, and
- (b) the threat is a serious threat, and

⁸⁰ L. Skene, *Law and Medical Practice: Rights, Duties, Claims and Defences*, 2nd ed., Chatswood, NSW: LexisNexis Butterworths, 2004, pp. 277-280; Kerridge, Lowe & Stewart, *Ethics and Law for the Health Professions*, *op. cit.*, pp. 321-322.

⁸¹ Paragraph 39(1)(a) of the Births, Deaths and Marriages Registration Act 1995. The statement must be made within 48 hours of the death occurring, but paragraph 39(1)(b) effectively permits a doctor to state that she requires more time to determine the cause of death. The section provides for a fine in case of default, but does not declare that default constitutes a criminal offence. It is not clear whether default should nevertheless be considered a criminal offence.

⁸² Section 27 of the Coroners Act 2009. Paragraph 27(1)(a) requires an enquiry if the coroner has any reason to believe that “the person died or might have died as a result of homicide”. A coroner receiving a report of a death will presumably ask the reporting doctor whether any such reason exists. A doctor is indeed required, by paragraph 6(1)(a) and subsection 35(1), to report a death to a coroner if the doctor “has reasonable grounds to believe” that it was “a violent or unnatural death”.

⁸³ According to the “National Domestic Violence Order Scheme information guide” on the official internet site of the courts of the State of Queensland (<https://www.courts.qld.gov.au/going-to-court/domestic-violence/national-domestic-violence-order-scheme/national-domestic-violence-order-scheme-information-guide> - last consulted on 13.03.2019), directly under the heading, “Legislation”.

⁸⁴ Paragraph 98A(b) of the Crimes (Domestic and Personal Violence) Act 2007 defines the term, “agency” to that effect.

⁸⁵ Subsection 98D(2), *ibid.*

⁸⁶ Subsection 98H(3), *ibid.*

⁸⁷ Section 98A, *ibid.*, defines the term, “domestic violence support services” to that effect.

⁸⁸ Paragraph 98H(3)(b), *ibid.*

⁸⁹ Paragraph 98H(3)(a), *ibid.*; see also subsection 98D(3).

(c) the person has refused to give consent or it is unreasonable or impractical to obtain the person's consent".⁹⁰

The term, "serious threat" is not legislatively defined, although only threats to "life, health or safety" are relevant.⁹¹ The decision as to whether a particular threat is "serious"⁹² is accordingly left to each person who receives apparently relevant information. The legislation specifies⁹³ that the information collection and disclosure powers which it confers override the provisions of both the Privacy and Personal Information Protection Act 1998 and the Health Records and Information Privacy Act 2002.⁹⁴

Extremely similar legislative provision for reporting of suspected domestic violence has been enacted in certain jurisdictions,⁹⁵ while others have very different rules.⁹⁶ The provisions in force in all jurisdictions reportedly⁹⁷ implement "model laws" on the subject, which were drafted by the inter-ministerial Law, Crime and Community Safety Council and formally adopted by the Council of Australian Governments (*i.e.* federal, state and territorial governments) on 11 December 2015. The primary purpose of the "model laws" was to introduce a national scheme allowing the enforcement of "domestic violence orders" in cases in which the perpetrator and/or the victim move from one jurisdiction to another.⁹⁸ It may be that the "model laws" also foresee the collection and disclosure of information indicating that domestic violence offences have been committed.⁹⁹ It is interesting for the

⁹⁰ Subsection 98M(2), *ibid.*

⁹¹ Section 98A, *ibid.*, defines the term, "domestic violence threat" to that effect.

⁹² Is a threat of violence "serious" unless it can be considered "frivolous", or is there an intermediate category of "ordinary" threats?

⁹³ Subsection 98K(1) read together with the definition of the term, "privacy legislation" in section 98A, *ibid.*

⁹⁴ Refer below, to the third paragraph under point 1.3.1. of this national contribution to the present study.

⁹⁵ For example, Part 5A of the Domestic and Family Violence Protection Act 2012 of the State of Queensland.

⁹⁶ For example, the extraordinarily complex and extensive provisions of Parts 5A and 5B of the Family Violence Protection Act 2008 of the State of Victoria. Part 5A was inserted by the National Domestic Violence Order Scheme Act 2016 with the aim of partially implementing the "national scheme". It was then heavily expanded by the Family Violence Protection Amendment (Information Sharing) Act 2017 to give effect to the recommendations of a Royal Commission held in Victoria; refer to TimeBase, "Victorian Government to Address Family Violence with Information Sharing Scheme", article dated 25.07.2017 and freely accessible on the internet site of the publisher (<https://www.timebase.com.au/news/2017/AT04319-article.html> - last consulted on 13.03.2019).

⁹⁷ Refer to: the official Explanatory Memorandum to the National Domestic Violence Order Scheme Bill 2016 of the State of Victoria (freely accessible in electronic form at [http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA257CCA00177A46CA2580100019A5CF/\\$FILE/581301exi1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA257CCA00177A46CA2580100019A5CF/$FILE/581301exi1.pdf) - last consulted on 19.03.2019), pp. 1-2, under the heading, "General"; a "media release" by the New South Wales Justice and Police Ministry, dated 16 March 2016 and entitled, "NSW leads Australia on National Domestic Violence Order Scheme", citing the Attorney General for New South Wales; TimeBase, "Victoria Becomes Latest State to Enact National Domestic Violence Order Scheme Legislation", article dated 24.10.2016 and freely accessible on the internet site of the publisher (<https://www.timebase.com.au/news/2016/AT3946-article.html> - last consulted on 13.03.2019), referring to the Act passed by the Victorian Parliament as a result of the introduction of the Bill cited at the beginning of this footnote.

⁹⁸ Refer in particular to the "National Domestic Violence Order Scheme information guide" on the official internet site of the courts of the State of Queensland, *op. cit.*

⁹⁹ It appears that the model laws have not been published and may not be publicly available. Refer in particular to the Commonwealth government internet site dedicated to the Law, Crime and Community Safety Council (<https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Pages/default.aspx> - last consulted on 13.03.2019), which has since been split into two separate councils.

purposes of the present report to note that the Victorian implementation legislation contains two provisions relating to firearms (*i.e.* guns). It amends¹⁰⁰ the Family Violence Protection Act 2008 to permit police to search for firearms or other weapons in the possession of a person who is the subject of a Domestic Violence Order or against whom such an order is being sought or is intended to be sought, if a police officer has reasonable grounds to believe that the person “is about to commit” a domestic violence offence. It also amends¹⁰¹ the Firearms Act 1996 with the aim of ensuring that firearms licences are not held by or issued to persons against whom a court has made an order under the Family Violence Protection Act 2008.

1.2.2.3. Reporting suspected child abuse

Almost all Australian jurisdictions¹⁰² require health service providers to report suspicions of child abuse. In New South Wales, the statutory obligation is imposed upon any “person who, in the course of his or her professional work or other paid employment delivers health care [...] services [...] wholly or partly, to children”¹⁰³, as well as upon managers of health care organisations (including hospitals).¹⁰⁴ The obligation specifically arises when such a person “has reasonable grounds to suspect that a child is at risk of significant harm”.¹⁰⁵ “Risk of significant harm” is defined¹⁰⁶ in very broad terms, to include the fact that the child “has been [...] physically or sexually abused or ill-treated” to an extent which raises “concerns [...] for the safety, welfare or well-being of the child”. It seems reasonable to consider that a gunshot wound to a child would almost always constitute such a fact giving rise to such concerns. The obligation is to report, to the New South Wales government’s Department of Family and Community Services, the name of the child at risk (or a description of the child if the health service provider does not know the child’s name) and “the grounds for suspecting that the child is at risk of significant harm”.¹⁰⁷ The statutory obligation presumably led to a large number of reports being made, because the statute has been amended to allow personnel of *inter alia* the New South Wales Health Service to “refer matters” to an “assessment officer” who, in accordance with departmental guidelines, assesses whether individual matters should be reported to the Department.¹⁰⁸ In addition to this mandatory reporting requirement, powers to exchange information between organisations providing services to children and young persons and their families have been introduced into the legislation.¹⁰⁹ The relevant provisions are structurally similar to those permitting the collection, use and disclosure of information about domestic violence.¹¹⁰ Disclosure does not require the consent of the relevant

¹⁰⁰ Subsection 63(1) of the National Domestic Violence Order Scheme Act 2016 amends paragraph 160(1)(a) of the Family Violence Protection Act 2008.

¹⁰¹ Paragraph 96(b) of the National Domestic Violence Order Scheme Act 2016 amends subsection 3(1) of the Firearms Act 1996.

¹⁰² The authors of Kerridge, Lowe & Stewart, *Ethics and Law for the Health Professions*, *op. cit.*, at p. 322, cite relevant legislation of all the Australian States except Western Australia and of all the major Australian Territories except Norfolk Island. The author of the present national contribution has not checked the legislation cited or the possibly relevant enactments of Norfolk Island and Western Australia.

¹⁰³ Paragraph 27(1)(a) of the Children and Young Persons (Care and Protection) Act 1998.

¹⁰⁴ Paragraph 27(1)(b), *ibid.*

¹⁰⁵ Paragraph 27(2)(a), *ibid.*

¹⁰⁶ By paragraph 23(1)(c), *ibid.*

¹⁰⁷ Subsection 27(2), *ibid.*

¹⁰⁸ Section 27A, *ibid.*

¹⁰⁹ Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998.

¹¹⁰ Refer above, to the first paragraph under point 1.2.2.2. of this national contribution to the present study.

child or young person¹¹¹ and it is specified¹¹² that other legislation prohibiting or restricting the disclosure of information does not prevent disclosure under these provisions.

1.2.2.4. Miscellaneous reporting obligations

Reports to certain administrative agencies must be made by health service providers who have reason to suspect that a patient is suffering from a listed infectious disease,¹¹³ or that a patient is drug addicted,¹¹⁴ or that a patient has been injured in a motor vehicle accident and was driving under the influence of alcohol.¹¹⁵ These pathologies are inherently different from gunshot wounds, so we have not investigated the exact terms of the statutory obligations imposed in individual Australian jurisdictions.

It may be useful to note here that database searches for “mandatory reporting” together with “medical practitioner” or “health service” in Australia produce results primarily relating to the Health Practitioner Regulation National Law. This is model legislation adopted by the Council of Australian Governments in 2008 and subsequently transposed into statute law in identical terms in almost all the Australian jurisdictions.¹¹⁶ It primarily provides for the centralised registration of 14 categories of “health practitioners” by the Australian Health Practitioner Regulation Agency.¹¹⁷ It incidentally provides for notification to that agency of “concerns” (*i.e.* complaints) about individual health service providers. Notification requirements (“mandatory reporting”) are imposed¹¹⁸ upon three categories of persons: registered health practitioners, employers of registered health practitioners and providers of educational services to registered health practitioners (and students). Any such person must make a report if he has reasons for believing that a registered medical practitioner has engaged in “notifiable conduct”.¹¹⁹ Such conduct is legislatively defined¹²⁰ to include several categories of behaviour, ranging from practising while intoxicated to practising in a way that significantly departs from “accepted professional standards”. These notification requirements may be counter-productive in so far as they require health practitioners to report other health practitioners who are their patients, in that practitioners may be dissuaded from seeking medical treatment, for example for alcohol or drug addiction.¹²¹ That danger persuaded the members of the upper house of the parliament of the State of Western Australia to introduce an amendment of the model law, exempting health practitioners from mandatory reporting in respect of reasonable beliefs of notifiable conduct which are formed in

¹¹¹ A “child” is defined as a person under the age of 16 years and a “young person” as a person over the age of 16, but not yet 18 years of age. The mandatory reporting requirement applies only in respect of significant harm to children.

¹¹² By subsection 245H(1) of the Children and Young Persons (Care and Protection) Act 1998.

¹¹³ Refer, for an example, to the Health (Infectious Diseases) Regulations 2001 of the State of Victoria.

¹¹⁴ Refer, for an example, to section 33 of the Drugs, Poisons and Controlled Substances Act 1981 of the State of Victoria.

¹¹⁵ Refer, for an example, to section 56 of the Road Safety Act 1986 of the State of Victoria.

¹¹⁶ For some background explanations, refer to N. Goiran *et al.*, “Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners”, in (2014) 22 *Journal of Law and Medicine* 209, pp. 209-210.

¹¹⁷ Its internet site is freely accessible at <https://www.ahpra.gov.au> (last consulted on 20.03.2019).

¹¹⁸ By sections 140 to 147 of the Health Practitioner Regulation National Law.

¹¹⁹ Sections 141 and 142 of the Health Practitioner Regulation National Law.

¹²⁰ In section 140 of the Health Practitioner Regulation National Law.

¹²¹ Refer to: Goiran, “Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners”, *op. cit.*; J. Hewitt, “Is whistleblowing now mandatory? The impact of mandatory reporting law on trust relationships in health care”, in (2013) 21 *Journal of Law and Medicine* 82.

the course of providing health services to other health practitioners or students.¹²² Although the amendment was supported by representatives of all four major Australian political parties in the Western Australian Legislative Council,¹²³ it seems that no other Australian jurisdiction has followed the example.¹²⁴

1.2.2.5. (Mental) Health warnings concerning firearm licensees

Another reporting duty of health services providers needs to be separately mentioned here, because it is closely related to any duty to report gunshot wounds. This reporting duty concerns gun shooters, rather than victims of gunshots. It requires certain categories of health service providers to make notifications if they have reasons for believing that particular individuals should, for medical reasons, not be allowed to hold firearms licences.

In the case of the State of Tasmania, the Police Commissioner must be informed in writing of the name and address of a “patient or client” who “is likely to possess or use a firearm” and would constitute a danger to himself, or another person, or the public if he did possess or use it.¹²⁵ The Police Commissioner must also be informed of the reasons for believing this.¹²⁶ The duty is imposed upon “prescribed persons”.¹²⁷ Medical practitioners (*i.e.* doctors), registered nurses and professional psychologists are prescribed by the legislation itself, but the relevant government minister is empowered¹²⁸ to prescribe further categories of persons. The duty accordingly arises when her knowledge of “the patient’s or client’s physical or mental condition” leads a health professional to believe that it would be unsafe for the patient or client to have access to a firearm.¹²⁹

Similar legislative provisions are in force in all of the other Australian jurisdictions, as a result of the original National Firearms Agreement¹³⁰. In reaction to a massacre perpetrated in Tasmania in 1996 by a mentally deranged holder of two semi-automatic rifles, representatives of all Australian federal, state and territorial governments agreed to take legislative and administrative measures, primarily in order to withdraw all semi-automatic firearms from public sale and to limit the categories of persons entitled to apply for or hold firearms licences. Steps were to be taken *inter alia* to ensure that “reliable evidence of a mental or physical condition which would render the applicant unsuitable for owning, possessing or using a firearm” results in the refusal of a firearm licence application or the cancellation of a firearm licence held by that person.¹³¹ An inter-governmental working party was to be established in order to formulate “possible criteria and systems for determining mental and physical fitness to own, possess

¹²² Paragraph 141(4)(ca) of the text of the Health Practitioner Regulation National Law set out in the Schedule to Health Practitioner Regulation National Law (WA) Act 2010.

¹²³ According to Goiran, “Mandatory reporting of health professionals: The case for a Western Australian style exemption for all Australian practitioners”, *op. cit.*, pp. 214-215.

¹²⁴ According to the internet site of the Australian Health Practitioner Regulation Agency, under the heading, “Mandatory reporting exceptions for health practitioners” (<https://www.ahpra.gov.au/Notifications/Make-a-complaint/Mandatory-notifications.aspx> - last consulted on 20.03.2019), Western Australia is still the only jurisdiction to have added this exemption.

¹²⁵ Section 148 of the Firearms Act 1996.

¹²⁶ Paragraph 148(2)(b), *ibid.*

¹²⁷ Subsection 148(1), *ibid.*

¹²⁸ Paragraph 148(6)(d), *ibid.*

¹²⁹ Subparagraph 148(1)(b)(i), *ibid.* Paragraph (b) is however, drafted in an odd manner which may require a report of “a threat to public safety” independently of the patient’s physical or mental condition.

¹³⁰ Actually a list of the resolutions adopted at a special meeting of the Australasian Police Ministers’ Council on 10 May 1996. The text is freely accessible in electronic form at the following internet address: <https://assets.documentcloud.org/documents/2796929/1996-National-Firearms-Agreement.pdf> (last consulted on 20.03.2019).

¹³¹ Resolution 6.2, *ibid.*

or use a firearm”¹³², but it was agreed¹³³ that legislative provisions should be introduced immediately, without waiting for the working party’s report. There being no model law to transpose and no standard criteria to apply, the various jurisdictions enacted varying provisions on the subject. The latest National Firearms Agreement¹³⁴ provides for the expansion of the categories of health service providers making notifications to include “social workers, psychiatrists [...] and professional counsellors” and for the indemnification of such providers “from civil or criminal liability for reporting in good faith to police their concerns that a person may pose a danger if in possession of a firearm or applying for a firearm licence”.¹³⁵

1.3. General confidentiality duties of health service providers

1.3.1. Legal duties of confidentiality

Obligations to treat health information confidentially have long been included in statutes governing all or parts of Australia.¹³⁶ In recent decades and in a marked departure from the principles of the common law, Australian legislatures have created broad privacy rights and especially health information privacy rights. The relevant statutory provisions impose duties of confidentiality and also allow action to be taken by individual victims of breaches of those duties (*i.e.* by the persons identified by information which has been revealed).

The Commonwealth Parliament initiated that process with its enactment of the Privacy Act 1988. It creates a detailed regulatory framework going beyond the confidentiality of information to require the protection of data security, to permit “data subjects” (*i.e.* persons identified by information) to access data concerning them and have it corrected, if it is inaccurate, and to define the third parties to whom and the circumstances under which data may be transferred. To facilitate implementation, the statutory norms have been transformed into ten National Privacy Principles, eleven Information Privacy Principles and finally thirteen Australian Privacy Principles.¹³⁷ Individual organisations holding personal data can “personalise” the Principles by adopting their privacy codes tailored to their particular circumstances, if those codes are submitted to and approved by the Office of the Australian Information Commissioner.¹³⁸ The Commissioner also has the power to accord *ad hoc* exemptions, in the form of “Public Interest Determinations”, from privacy norms in particular circumstances and upon application by interested parties. It was subsequently decided that these various mechanisms did not permit a satisfactory regulation of privacy rights to personal health information held in electronic form, so the legislation has been supplemented by Healthcare Identifiers Act 2010 and the Personally Controlled Electronic Health Records Act 2012. Due to somewhat complicated limitations imposed by Australian constitutional law, this regulatory framework governs all agencies of the Australian federal government and the government of Norfolk Island, all private sector organisations with an annual

¹³² Resolution 6.3, *ibid.*

¹³³ Resolution 6(c), *ibid.*

¹³⁴ This is a formal agreement between the Commonwealth, the States and the Territories concluded in February of 2017 in the framework of the Council of Australian Governments. The text is freely accessible in electronic form at the following internet address: <https://www.gunpolicy.org/documents/7012-australia-national-firearms-agreement-2017/file> (last consulted on 20.03.2019).

¹³⁵ Paragraph 39(a), *ibid.*

¹³⁶ The authors of Kerridge, Lowe & Stewart, *Ethics and Law for the Health Professions*, *op. cit.*, p. 324, cite as examples the Health Administration Act 1982 and the Public Health Act 2010 of the State of New South Wales.

¹³⁷ The Principles are set out in a schedule to the Privacy Act 1988. The National and Information principles were condensed into Australian Principles by the Privacy Amendment (Enhancing Privacy Protection) Act 2012.

¹³⁸ The official internet site of the Office is freely accessible at <https://www.oaic.gov.au> (last consulted on 07.05.2019).

financial turnover of more than A\$ 3 million and all private health service providers regardless of size.¹³⁹

On the Australian mainland and in Tasmania, public health service providers, including public hospitals, are governed by the privacy legislation of the individual States and Territories. In the case of New South Wales, this is the Privacy and Personal Information Act 1998 and the Health Records and Information Privacy Act 2002 specifically applicable to personal health data. The State's law takes the same approach as federal law, by formulating fifteen Health Privacy Principles and allowing variations, in the form of "Statutory Guidelines", when called for in specific circumstances. If data subjects believe that their health privacy rights have been infringed, they can apply to the New South Wales Administrative Decisions Tribunal for orders requiring compliance by the infringing organisations and for monetary compensation.

Private health service providers (including general practitioners) may be fined for breaching legal duties of confidentiality and individual health professionals employed by public health service providers may face disciplinary action if they are personally responsible for breaches.¹⁴⁰ According to a specialised commentary,¹⁴¹ sanctions for breaches of duties of confidentiality are imposed unilaterally upon health service providers, rather than upon third parties who attempt to or successfully obtain access to confidential patient information. Thus, persons including police officers "frequently attempt to gain information about patients in hospitals when it is unethical or illegal for health workers to provide it".¹⁴² The persons disclosing information in such circumstances may suffer consequences, but that is not true of the police officers who seek and obtain the information.

1.3.2. Ethical requirement of maintaining patient confidentiality

1.3.2.1. Medical ethics

Most health professions in Australia are represented by associations at the level of each state and territory and at the national level. These associations usually formulate codes of professional ethics at the national level and update them from time to time. The most interesting profession for the purposes of the present study is that of medical practitioners (*i.e.* doctors), who are represented by the Australian Medical Association (AMA). The current *AMA Code of Ethics* devotes five paragraphs to the "Protection of patient information".¹⁴³ The last three of those paragraphs give instructions for the logistical aspects of securing patient information. The first two of those paragraphs give instructions of principle to doctors working with patients and are worth quoting in relevant part:

"2.2.1 Respect the patient's right to know what information is held about them, their right to access their medical records and their right to have control over its use and disclosure, with limited exceptions.

¹³⁹ This condensed explanation of the scope of application of federal privacy law is provided by the Office of the Australian Information Commissioner on its internet site at <https://www.oaic.gov.au/privacy-law/privacy-act/australian-privacy-principles> (last consulted on 22.03.2019).

¹⁴⁰ Refer for example to paragraph 6.3.1. of NSW Ministry of Health, *Privacy Manual for Health Information*, North Sydney, 2015, freely accessible on the internet site of the Ministry at <https://www.health.nsw.gov.au/policies/manuals/Pages/privacy-manual-for-health-information.aspx> (last consulted on 22.03.2019).

¹⁴¹ Kerridge, Lowe & Stewart, *Ethics and Law for the Health Professions*, *op. cit.*

¹⁴² *Ibid.*, p. 241.

¹⁴³ Australian Medical Association Limited, *AMA Code of Ethics 2004. Editorially Revised 2006. Revised 2016*, Barton, ACT, 2017, point 2.2. This document is freely accessible in electronic form on the internet site of the AMA at <https://ama.com.au/position-statement/code-ethics-2004-editorially-revised-2006-revised-2016> (last consulted on 25.03.2019).

2.2.2 Maintain the confidentiality of the patient's personal information including their medical records, disclosing their information to others only with the patient's express up-to-date consent or as required or authorised by law".¹⁴⁴

The ethical duty of doctors to maintain the confidentiality of information concerning their patients is described in greater detail in *Ethical Guidelines*¹⁴⁵ formulated by the AMA with respect to medical records, in the context of the privacy rights conferred by Australian legislation and therefore with respect to medical data.¹⁴⁶ The document explains that,

"It is imperative that patients remain confident that [personal] information is protected by their doctor to the extent permitted by law. There is a very real and serious risk that patients may either not attend a doctor or may limit or falsify the personal information they provide to the doctor because of fears that their privacy may be breached, potentially resulting in serious consequences for the patient's health care. This is especially relevant for patients who may already perceive or experience barriers to appropriate medical care".¹⁴⁷

It goes on to present three categories of exceptions to medical confidentiality: (i) those imposed by law;¹⁴⁸ (ii) those required in medical emergencies;¹⁴⁹ (iii) other disclosures in the public interest.¹⁵⁰ It concludes that, "[a]t all times, such disclosure should be to the minimum extent necessary to achieve the objective".¹⁵¹

1.3.2.2. Regulatory relevance of medical ethics

In Australia, the so-called "liberal professions" have traditionally been subject to self-regulation. Legislative restrictions impose membership of the relevant, recognised professional association as a pre-condition to practising the profession. The association is responsible for the supervision of the qualifications and conduct of its members and can take disciplinary action where necessary, in the form of expulsion from membership in the last resort. Compliance with the internal rules of the association, including its code of professional ethics, is therefore effectively a legal requirement.¹⁵²

Australian governments have always taken a more restrictive approach to the medical profession. Responsibility for the accreditation, registration and discipline of doctors has been allocated to

¹⁴⁴ *Ibid.*

¹⁴⁵ Australian Medical Association Limited, *Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010. Revised 2015*, Barton, ACT, 2015. This document is freely accessible in electronic form on the internet site of the AMA at <https://ama.com.au/position-statement/guidelines-doctors-disclosing-medical-records-third-parties-2010> (last consulted on 25.03.2019).

¹⁴⁶ Refer above, to point 1.3.1. of this national contribution to the present study.

¹⁴⁷ *Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010. Revised 2015, op. cit.*, paragraph 1.2.

¹⁴⁸ *Ibid.*, paragraph 1.5. The *Guidelines* consider this further under point 7, mostly referring to disclosure under compulsion of a court order, a subpoena or a search warrant. Point 7.2 also refers to statutes concerning "mandatory disease notification or mandatory notification of child abuse"; refer above, respectively to points 1.2.2.4. and 1.2.2.3. of this national contribution to the present study.

¹⁴⁹ *Idem.* The *Guidelines* give no consideration to the characteristics of medical emergencies which would warrant breaches of confidentiality.

¹⁵⁰ *Ibid.*, paragraphs 1.5. and 1.6. In the latter passage, it is explained that disclosures should be required only in circumstances in which it has been proven that the resulting public benefit outweighs the risk that patients will be dissuaded from seeking medical attention or from providing full and accurate information to doctors.

¹⁵¹ *Ibid.*, paragraph 1.5, last sentence.

¹⁵² Refer to chapter 8 of J. Wallace, D. Ironfield & J. Orr, *Analysis of Market Circumstances where Industry Self-Regulation is Likely to be Most and Least Effective*, Turner, ACT: Tasman Asia Pacific Pty Ltd, 2000, taking the example of the accountancy profession.

statutory “boards” since early on in Australian legal history.¹⁵³ The maintenance of medical professional standards was literally “a matter of life or death” for the colonial populations before the establishment of local medical associations.¹⁵⁴ The members of the state and territorial medical boards were however, exclusively or mostly medical practitioners and at least when exercising their disciplinary powers, relied largely upon the ethical prescriptions of the British Medical Association.¹⁵⁵ The medical profession was therefore subject to a form of co-regulation, under which a failure to comply with medical ethics could result in the imposition of legally effective sanctions.¹⁵⁶

A legislative tendency to subject the medical profession entirely to public administration began to emerge in the 1980s and has been consecrated by the National Registration and Accreditation Scheme for the Health Professions. Among other things, the scheme provides for the reception of complaints concerning doctors to be centralised by the Australian Health Practitioner Regulatory Authority.¹⁵⁷ The complaints are investigated and where appropriate, disciplinary measures are imposed by the Medical Board of Australia. This is an entirely statutory authority, although some of its members must be medical practitioners.¹⁵⁸ By way of exception, where the practitioners complained about are registered in New South Wales, the complaints are investigated by the Medical Council of New South Wales, a majority of the members of which must represent the medical profession.¹⁵⁹ In both cases however, the norms against which the complaints are to be examined are those to be found in the codes of practice and other professional standards established by the Medical Board of Australia.¹⁶⁰ Ethical standards established by the medical profession are therefore no longer of any regulatory relevance in Australia.

1.3.2.3. Code of medical professional conduct

The current regulatory code of conduct of medical practitioners¹⁶¹ devotes a single paragraph, consisting mainly of five bullet points, to “3.4 Confidentiality and privacy”. The principal requirement is “that doctors and their staff will hold information about [patients] in confidence, unless release of information is required by law or public interest considerations”. Apart from a reference to “complex issues related to genetic information”, the only details mentioned in this code are that

“Good medical practice involves:

[...]

¹⁵³ Refer for example to the Qualifications of Medical Practitioners Ordinance 1844 and the Medical Practitioners Act 1919 of the State of South Australia.

¹⁵⁴ Very few doctors would have begun to practise in South Australia between the foundation of the colony in 1836 and the enactment of the Qualifications of Medical Practitioners Ordinance 1844.

¹⁵⁵ Doctors in the Australian colonies established branches of the British Medical Association. It was only in 1962 that these united to form the Australian Medical Association; refer to the information provided by the AMA on its internet site at <https://ama.com.au/history> (last consulted on 25.03.2019).

¹⁵⁶ Refer to V.D. Plückhahn, *Ethics, Legal Medicine and Forensic Pathology*, Carlton, VIC: Melbourne University Press, 1983, pp. 61-67.

¹⁵⁷ Compare above, the last paragraph under point 1.2.2.4. of this national contribution to the present study.

¹⁵⁸ Refer to the official internet site of the Board, freely accessible at <https://www.medicalboard.gov.au/About/Medical-Board-of-Australia-Members.aspx> (last consulted on 25.03.2019).

¹⁵⁹ Refer to the official internet site of the Council, freely accessible at <https://www.mcns.org.au/who-we-are> (last consulted on 25.03.2019).

¹⁶⁰ An overview of the current structures is to be found in Kerridge, Lowe & Stewart, *Ethics and Law for the Health Professions*, op. cit., pp. 168-170.

¹⁶¹ Medical Board of Australia, *Good medical practice: a code of conduct for doctors in Australia*, Melbourne, 2014, freely accessible on the internet site of the Board at <https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx> (last consulted on 25.03.2019).

2. Appropriately sharing information about patients for their health care, consistent with privacy law and professional guidelines about confidentiality.
3. Using consent processes, including forms if required, for the release and exchange of health information [...]"¹⁶²

and the only "professional guidelines" cited are those set out in the Board's own "social media policy".

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

Our research indicates that only two Australian jurisdictions specifically require health service providers to report gunshot wounds. Press articles indicate that public hospitals in Australia are in fact reporting gunshot wounds to police, but only some of those reports are attributable to the specifically relevant legislative requirements. So as to provide a comprehensible overview of the situation, we will describe the specifically relevant legislative provisions of the States of Tasmania and South Australia (point 2.a), summarise the relevant press articles discovered to date (point 2.b.) and present the framework for reporting gunshot wounds in New South Wales (point 2.c), before proceeding with the structured analysis of disclosure duties (points 2.1. to 2.4).

2.a. Expressly relevant legislative provisions

2.a.i. Tasmania

In the State of Tasmania, section 158A of the Firearms Act 1996 is specifically applicable:

- "(1) If a medical practitioner, or other person prescribed for the purposes of this subsection, has reasonable cause to suspect, in relation to a person whom he or she has seen in his or her professional capacity, that the person is suffering from a wound inflicted by a firearm, the medical practitioner, or other prescribed person, must make a report to a police officer under this section. Penalty: Fine not exceeding 50 penalty units.
- (2) A report under this section –
 - (a) must be made as soon as practicable after the suspicion is formed; and
 - (b) must include –
 - (i) the name and address of the person who is the subject of the suspicion or, if the name and address are not known, a description of the person; and
 - (ii) details of the wound; and
 - (iii) any information provided to the practitioner or other person about the circumstances leading to the infliction of the wound.
- (3) If a medical practitioner, or other person prescribed for the purposes of this subsection, treats a person for a wound that the practitioner or person has reasonable cause to suspect was inflicted by a firearm, the practitioner or person must take reasonable steps to retain any ammunition or fragment of ammunition recovered from the wound until it can be collected by a police officer.
- (4) A person incurs no civil or criminal liability in taking action in good faith in compliance, or purported compliance, with this section".

The term "medical practitioner" is not defined in that Act, but it should be understood as referring to any person registered under the Health Practitioner Regulation National Law (Tasmania)¹⁶³ as a doctor.

The word "firearm" is defined in section 3 of that Act as basically referring to a "weapon that is capable of propelling anything wholly or partly by means of an explosive" (a "gun"), but extended for legislative

¹⁶² *Ibid.*, points 3.4.2. and 3.4.3.

¹⁶³ Refer above, to the last paragraph under point 1.2.2.4. of this national contribution to the present study. According to the Health Practitioner Regulation National Law (Tasmania) Act 2010, the version of the Law in force in Tasmania is that enacted in the State of Queensland, as amended by and interpreted in conformity with that Tasmanian Act.

purposes to include a range of similar devices, like air rifles and imitation pistols, which would not correspond to that traditional description.

“Penalty units” are defined by section 4A of the Penalty Units and Other Penalties Act 1987 by reference to a mathematical formula, increases in the consumer price index and information to be published annually in the official *Gazette*. A “penalty unit” is currently equivalent to A\$ 163.¹⁶⁴ “50 penalty units” therefore amount to 8’150 Australian Dollars, equivalent to about 5’750 Swiss Francs. The effect of subsection 158A of the Firearms Act 1996 is that a doctor who does not make the required report in relevant circumstances can be prosecuted and if convicted, punished with a fine of any amount not exceeding A\$ 8’150.-.

Section 158A was introduced into the Firearms Act 1996 by section 60 of the Firearms (Miscellaneous Amendments) Act 2015 and came into effect on 4 November 2015.

Our extensive research has failed to identify the origins of this legislative reporting obligation or the process which led to its introduction by amendment of the Firearms Act 1996. No such obligation¹⁶⁵ is foreseen by the Australian National Firearms Agreement¹⁶⁶ of 1996, the National Firearm Trafficking Policy and Handgun Control Agreements¹⁶⁷ of 2002 or the National Firearms Agreement¹⁶⁸ of 2017. Draft amendments of the Firearms Act 1996, which were introduced into the Tasmanian legislature in 2003 and 2007 while the Labor Party (social democratic) was in power, contain no equivalent of the current section 158A or other additional obligation of medical practitioners.¹⁶⁹

The Firearms (Miscellaneous Amendments) Bill 2015 was introduced into the Tasmanian legislature when the Liberal Party (conservative) was in power. Of the approximately 50 paragraphs of *Hansard* reporting the second reading speech of the Minister for Police and Emergency Management in that respect,¹⁷⁰ only one concerns the reporting obligation of medical practitioners. The Minister argued that it is reasonable to ensure that any “firearm incident”, which results in injury to a person, will be investigated by police. The investigation should determine whether any criminal offences have been committed and whether the suitability of any person to access firearms under a licence or permit needs to be reassessed. The Minister implicitly accepted that this obligation burdens doctors, but argued that

¹⁶⁴ A list of the values attributed to a “penalty unit” during various periods since 2007 is published by the Tasmanian Department of Justice and freely accessible on its official internet site at https://www.justice.tas.gov.au/about/legislation/value_of_indexed_units_in_legislation (last consulted on 28.03.2019).

¹⁶⁵ Compare the obligation to report doubts about persons likely to be in possession of guns, discussed above, at point 1.2.2.5. of this national contribution to the present study.

¹⁶⁶ Refer above, to the last paragraph under point 1.2.2.5. of this national contribution to the present study.

¹⁶⁷ It seems that these resolutions adopted by the Australasian Police Ministers’ Council have not been published in full. Summaries of their contents are provided however, in a document entitled “Legislative reforms”, published by the Commonwealth government’s Australian Institute of Criminology and freely accessible on the official internet site of that organism at <https://aic.gov.au/publications/rpp/rpp116/legislative-reforms> (last consulted on 28.03.2019).

¹⁶⁸ Refer above, to the footnotes to the last paragraph under point 1.2.2.5. of this national contribution to the present study.

¹⁶⁹ Firearms Amendment Bill 2003, Bill 24-I; Firearms Amendment Bill 2007, Bill 20-III.

¹⁷⁰ *Hansard* is the term currently used in many jurisdictions formerly belonging to the British Empire to refer to the official verbatim records of proceedings in legislatures. In the case of Tasmania, the electronic text of *Hansard* since 1992 is freely accessible on the official internet site of the Parliament of Tasmania at <http://www.parliament.tas.gov.au/ParliamentSearch/IsysHAHansard.html> (last consulted on 28.03.2019). The Minister’s speech introducing the Firearms (Miscellaneous Amendments) Bill 2015 is recorded in the House of Assembly Hansard for Tuesday, 24 March 2015, beginning at “3.10 p.m.” and ending at “3.38 p.m.”

“it is not unreasonable to place this requirement on clinicians, who have other mandatory reporting requirements relating to community safety”.¹⁷¹

No further reference was made to the proposed reporting obligation of medical practitioners during the period of almost three hours during which the House of Assembly (lower chamber of the Tasmanian Parliament) debated the Bill. When the Bill was examined in detail, the clause which later became section 158A of the Firearms Act 1996 was agreed to without any discussion.¹⁷² By far the largest part of the parliamentary debates concerned a government proposal to introduce a mandatory minimum sentence of imprisonment for the criminal offence of possessing a stolen firearm. The remainder concerned proposals by the Green Party (environmentalist) to introduce additional limitations upon the lawful ownership of firearms, which proposals were rejected by both Labor and Liberal parties in the interests of “shooters”¹⁷³. During debate in the Legislative Council (upper chamber of the Tasmanian Parliament), the proposed reporting obligation of medical practitioners was mentioned only by one independent Member, who considered it to be one of “a number of common-sense amendments” foreseen by the Bill.¹⁷⁴ The relevant clause was again agreed to without discussion at the committee stage.¹⁷⁵

We have not been able to find any indication of how this provision is implemented in practice or of any prosecution of a doctor for failure to comply with the provision in the last three years.

It may be of interest to note that subsequent legislative action in respect of firearms has involved no reconsideration of the proposed reporting obligation of medical practitioners. Provisions in the Firearms (Miscellaneous Amendments) Act 2015 for more secure storage of privately owned guns were not brought into force in 2015, unlike the provisions for mandatory reporting by medical practitioners. Draft regulations to implement the storage provisions were the subject of an inquiry by the Tasmanian Parliament’s Joint Standing Committee on Subordinate Legislation in 2017. Responding to questions from committee members, the Minister for Police and Emergency Management explained that both the 2015 amendments to the Firearms Act 1996 and the 2017 draft amendments to the Firearms Regulations 1996 were “influenced by the issue of stolen firearms and their use in criminal activity”¹⁷⁶. According to a summary formulated by the chairwoman of the Committee, representatives of associations of private gun owners in Tasmania militated in favour of the imposition of higher

¹⁷¹ The sixth-to-last paragraph in the *Hansard* report of the Minister’s speech, *ibid*.

¹⁷² Following debate in the full House of Assembly, a bill is normally considered clause-by-clause by a small committee of Members, which then reports back to the House. The Firearms (Miscellaneous Amendments) Bill 2015 was considered sufficiently important to warrant detailed consideration by “the Committee of the House”, *i.e.* all Members of the House of Assembly. The proceedings “in committee” are recorded in the House of Assembly Hansard for Wednesday, 25 March 2015, beginning at “12.03 p.m.” and ending at “8.18 p.m.”

¹⁷³ This colloquial expression refers mainly to primary producers in rural areas, who shoot wild animals that come onto their properties, and recreational or “sporting shooters”, who shoot at artificial targets and must be members of gun clubs.

¹⁷⁴ The fourth paragraph of the speech made by Mr. Gaffney, as recorded in the Legislative Council Hansard for Thursday, 23 April 2015, beginning at “12.11 p.m.” and ending at “12.35 p.m.”

¹⁷⁵ According to Legislative Council Hansard for Tuesday, 28 April 2015, beginning at “3.45 p.m.” and ending at “5.15 p.m.”, the relevant clause 61 of the Bill was “agreed to”, together with clauses 53 to 60.

¹⁷⁶ The Report “S.R. No. 51 – Firearms Amendment Regulations 2017” of the Parliamentary Standing Committee on Subordinate Legislation, dated 30.11.2017, is freely accessible in electronic form on the official internet site of the Parliament of Tasmania at <http://www.parliament.tas.gov.au/ctee/Joint/subord.htm> (last consulted on 29.03.2019), under the heading, “Reports”. According to the Report, on p. 5, the Minister attended a closed committee hearing on 16.11.2017 and answered questions asked by committee members. The quotation is from the third point of the Report’s summary of the Minister’s responses.

penalties on criminals convicted of using firearms, instead of the tightening of restrictions upon law-abiding gun owners.¹⁷⁷ The current Liberal Party government decided in February of 2018 to further amend the Firearms Act 1996 and proposed that the Legislative Council establish a select committee to consider submissions by all interested parties and formulate recommendations for firearms law reform.¹⁷⁸ Of the 111 written submissions received by the Select Committee, eight were provided by medical associations or other organisations of health service providers.¹⁷⁹ None of the submissions made any reference to the reporting obligation of medical practitioners contained in section 158A of the Firearms Act 1996. According to the submission of Medics for Gun Control, the National Firearms Agreement of 1996 was more completely transposed in Tasmania than in any other jurisdiction and all amendments introduced or proposed since 1996 have attempted to weaken the legislative framework at the behest of “shooting groups in Tasmania”.¹⁸⁰ Statistical data to the effect that Tasmania has a higher density of gun ownership than any other Australian jurisdiction was noted in the submission of the Royal Australian and New Zealand College of Psychiatrists.¹⁸¹ As a result of his research, the author of the present national contribution to this study concluded that the reporting obligation of medical practitioners contained in section 158A of the Firearms Act 1996 was introduced by a government wanting to be seen to take action in response to criminality using firearms, but also wanting to avoid the imposition of additional restrictions and costs on registered firearm owners.

2.a.ii. South Australia

Regulation 97 of the Firearms Regulations 2017 of the State of South Australia is formulated in terms that are almost identical to those of section 158A of the Firearms Act 1996 of the State of Tasmania.¹⁸² The principal difference is that, while the Tasmanian obligation is imposed upon medical practitioners and such other categories of persons as may be prescribed by ministerial proclamation, the South Australian obligation is imposed (only) upon medical practitioners and nurses. The terms “medical practitioner” and “nurse” are defined¹⁸³ by reference to registration according to the Health Practitioner Regulation National Law¹⁸⁴.

A secondary difference, as compared to the Tasmanian provision, is that the South Australian regulations require reporting to “the Registrar”, rather than to a police officer. Section 49 of the Firearms Act 2015 attributes the office of “Registrar” to the Commissioner of Police of South Australia, but permits the Commissioner to delegate individual powers and functions of the Registrar. It would appear that at least the function of receiving mandatory reports has in fact been delegated to the Firearms Branch of the State’s police force. The internet site of the police force includes a page

¹⁷⁷ *Ibid.*, particularly on p. 3.

¹⁷⁸ Refer to pp. 4-5 of the Final Report of the Legislative Council Select Committee on Firearms Law Reforms, dated 30.08.2018 and freely accessible in electronic form on the official internet site of the Parliament of Tasmania at <http://www.parliament.tas.gov.au/CTEE/Council/LC%20Select%20Firearms%20Law%20Reforms.htm> (last consulted on 29.03.2019).

¹⁷⁹ Except for those marked “confidential”, all submissions are published in electronic form together with the Select Committee’s report, *ibid.*

¹⁸⁰ Medics for Gun Control, *Submission – Legislative Council Select Committee, Proposed Firearms Law Reforms*, Hobart, undated, freely accessible in electronic form as submission 64 on the official internet site of the Parliament of Tasmania, *ibid.*

¹⁸¹ Page 2 of a letter dated 02.08.2018, signed by Dr. M. McArthur in his capacity as chairman of the Tasmanian Branch of the Royal Australian and New Zealand College of Psychiatrists, addressed to the Honourable I. Dean MLC in his capacity as select committee chairman and freely accessible in electronic form as submission 48 on the official internet site of the Parliament of Tasmania, *ibid.*

¹⁸² Compare above, point 2.a.i. of this national contribution to the present study.

¹⁸³ “Nurse” is defined in subregulation 3(1), making express reference to both “registered nurses” and “enrolled nurses”. “Medical practitioner” is defined in section 4 of the Firearms Act 2015.

¹⁸⁴ Refer above, to the last paragraph under point 1.2.2.4. of this national contribution to the present study.

encouraging people to “Notify the registrar” of threats to safety or other risks arising from a person’s possession or use of a firearm.¹⁸⁵ The information and instructions provided on that page are entirely formulated with reference to the obligation of health service providers to make notifications if they have reasons for believing that particular individuals should not be allowed to hold firearms licences.¹⁸⁶ No mention is made on the webpage of gunshot wounds or the need to report them. A hyperlink from the webpage leads to the electronic version of Form PD486A for Medical notification to the Registrar of Firearms¹⁸⁷, which can be sent by e-mail, or printed and faxed to the Firearms Branch. Unlike the webpage, this form contains a part “B. Notification in relation to wound suspected to be inflicted by firearm”¹⁸⁸. It provides a space for the formulation of “Details of wound, including any ammunition recovered and version of events provided by patient”¹⁸⁹.

Thirdly, the South Australian provision, unlike its Tasmanian counterpart, provides no penalty for failures of compliance.¹⁹⁰

Seen as a whole, these distinctive characteristics of the South Australian provision indicate that it is not intended to apply to general practitioners or local surgeries. Instead, compliance is expected on the part of large hospitals with emergency departments.¹⁹¹ Administrative officers of SA Health, in particular, should ensure that medical notification forms are completed by doctors in public employment and forward them to the Firearms Branch.

Our research has revealed no explanation for the introduction of this provision into the Firearms Regulations 2017, which came into force, together with the Firearms Act 2015, on 1 July 2017. The statutory authorisation of the State government to promulgate the regulations is formulated as a very broad power to “make such regulations as are contemplated by this Act or as are necessary or expedient for the purposes of this Act”.¹⁹² It is expressly envisaged that regulations may

“make provision in relation to mandatory reporting and other obligations of medical practitioners, employers, licensees, firearm owners and other specified persons in relation to prescribed matters or circumstances”¹⁹³,

¹⁸⁵ Internet page freely accessible at <https://www.police.sa.gov.au/services-and-events/firearms-and-weapons/notification-to-the-registrar> (last consulted on 05.04.2019).

¹⁸⁶ Refer above, to point 1.2.2.5. of this national contribution to the present study. The obligation has been extended by the relevant South Australian legislation to apply to other categories of persons, including employers and officers of gun clubs, who might have non-medical reasons for considering a particular shooter to be a danger to himself or others.

¹⁸⁷ Freely accessible in electronic form on the official internet site of the South Australian police force at https://www.police.sa.gov.au/__data/assets/pdf_file/0016/2590/Firearms-Medical-Notification-to-Registrar-of-Firearms-PD486A.pdf (last consulted on 08.04.2019).

¹⁸⁸ At the top of p. 2, *ibid*.

¹⁸⁹ *Idem*.

¹⁹⁰ The Firearms Act 2015 provides penalties in the form of fines and in the form of imprisonment. Part 11 of the Firearms Regulations 2017, on “Mandatory reporting and other obligations”, is composed of six regulations, two of which specify maximum financial penalties. Four of the regulations, including regulation 97, do not mention any penalty. According to Australian rules of statutory construction, this certainly means that no criminal penalty can be incurred by virtue of a failure to comply with regulation 97.

¹⁹¹ The “prescribed person details” of the doctor or nurse, which are to be filled in at the end of Form PD486A, *op. cit.*, include the “Unit, Clinic, Ward, Hospital” in which she or he is working.

¹⁹² Subsection 78(1) of the Firearms Act 2015.

¹⁹³ Paragraph 78(2)(b) of the Firearms Act 2015.

an aspect clearly referable to the reporting of mentally unfit shooters foreseen by the National Firearms Agreements¹⁹⁴. Regulations requiring reporting of gunshot wounds were not envisaged by the South Australian legislature, but they may nevertheless be considered to be “expedient for the purposes of” the Firearms Act 2015. It is interesting to note that that Act, unlike its counterparts in other Australian States and Territories, empowers any police officer to

“require a person who the police officer suspects on reasonable grounds has knowledge of matters in respect of which information is reasonably required for the administration or enforcement of this Act to answer questions in relation to those matters [...]”.¹⁹⁵

A penalty in the form of a fine or imprisonment for up to four years is provided for the criminal offence of “failing or refusing, without reasonable excuse, to answer a question put by a police officer to the best of one’s knowledge, information and belief”.¹⁹⁶ That provision requires any health service provider, under threat of prosecution and imprisonment, to answer police questions about patients suffering from gunshot wounds.

The most likely (and simple) explanation for the introduction of the gunshot reporting requirement in South Australia, in the light of all of these provisions and the opinion of the author of the present national contribution to this study, is that the South Australian government employee charged with the drafting of the new Firearms Regulations decided that it would be consistent with legislative policy to essentially copy the new Tasmanian provision.

2.b. *Evidence of gunshot wound reporting by health services providers*

A non-systematic search of news media content has revealed a number of cases¹⁹⁷ in which persons suffering from gunshot wounds either themselves asked to be admitted to hospital emergency

¹⁹⁴ Refer above, to the last two paragraphs under point 1.2.2.5. of this national contribution to the present study.

¹⁹⁵ Subsection 55(1) of the Firearms Act 2015.

¹⁹⁶ This is not an exact quotation, but rather a reformulation of subsection 55(5) together with paragraph 55(5)(b) of the Firearms Act 2015.

¹⁹⁷ J. Craven, “Man turns up to Western Hospital with mystery gunshot wound”, in *The Herald Sun* of 13.02.2011, referring to the Western Hospital in Victoria; A. Worrall, “Woman with gunshot wound dropped off at Geelong hospital”, in *The Age* of 07.03.2016, also referring to a hospital in Victoria; R. Junge, “Man takes himself to hospital with gunshot wound”, published in electronic form by mygc.com on 07.05.2016 (freely accessible at <http://www.mycg.com.au/man-takes-hospital-gunshot-wound/>) referring to Fairfield Hospital in New South Wales; T. Akers & A. Utting, “Man who died after being dumped outside Tweed Heads hospital with gunshot wound named as Ace Hall”, in *The Daily Telegraph* of 25.06.2017, referring to Tweed Heads Hospital in New South Wales; “Man attends hospital with gunshot wound, NSW”, published in electronic form by miragenews.com on 26.06.2017 (freely accessible at <https://www.miragenews.com/man-attends-hospital-with-gunshot-wound-nsw/>), referring to the Maitland Hospital in New South Wales; “Man With Gunshot Wound Dumped Outside Hospital”, published in electronic form by thesydney.news on 13.01.2018 (freely accessible at <https://thesydney.news/2018/01/13/man-with-gunshot-wound-dumped-outside-hospital/>), referring to Monash Medical Centre in Victoria; S. Duncan, “Man, 25, DUMPED at a hospital in Sydney’s south-west with a gunshot wound to his leg”, in *The Daily Mail Australia* of 11.02.2018, referring to Campbelltown Hospital in New South Wales; “Investigation after woman shot, NSW”, published in electronic form by miragenews.com on 11.11.2018 (freely accessible at <https://www.miragenews.com/investigation-after-woman-shot-nsw/>), referring to the Mount Druitt Hospital in New South Wales; “Man presents to hospital with a gunshot wound in Cessnock”, published in electronic form by miragenews.com on 19.12.2018 (freely accessible at <https://www.miragenews.com/man-presents-to-hospital-with-a-gunshot-wound-in-cessnock/>), referring to the Cessnock Hospital in New South Wales (all last consulted on 09.04.2019); “Man admits himself to Flinders Medical Centre with gunshot wound but will not tell police what happened”, in *The Advertiser* of 31.12.2018, referring to the Flinders Medical

services, or were anonymously delivered by third parties to the entrance to an emergency service, whereupon police were called to the hospitals in question, presumably by hospital administrators. The two most recent cases are clearly linked to the reporting requirement imposed by regulation 97 of the Firearms Regulations 2017 of the State of South Australia.¹⁹⁸ The earliest cases occurred in the State of Victoria, where the common law duty to report information that might be helpful in the investigation of serious crime is still in force.¹⁹⁹ Most of the cases discovered (six out of eleven) occurred in the State of New South Wales, where section 316 of the Crimes Act 1900 requires doctors and anyone with knowledge of facts indicating the commission of a “serious indictable offence” to inform police thereof.²⁰⁰ These statistical frequencies may be explained by demographic factors: New South Wales is the most populous Australian jurisdiction and Tasmania, where section 158A of the Firearms Act 1996 requires doctors to report gunshot wounds to police,²⁰¹ is the least populous Australian State.

Nevertheless, the objectively high frequency of cases occurring in New South Wales itself warrants an examination of the norms followed and practice observed by New South Welsh hospitals when persons requiring emergency treatment are found to have suffered gunshot wounds. We chose to make a targeted enquiry in the somewhat atypical case of a woman, aged 19 years, who went to Mount Druitt Hospital in November of last year seeking treatment of a bullet wound to her left foot.²⁰² According to news media, New South Welsh police were contacted, apparently by hospital staff, and came to the hospital, presumably in order to interview the woman. With the information they obtained, the police reportedly identified the place at which the shooting had taken place and “established a crime scene”.²⁰³ We directly contacted the relevant hospital official²⁰⁴ and have received a detailed response from the New South Welsh Ministry of Health²⁰⁵. The response directs attention to the Ministry’s official policy manuals in respect of domestic violence, in particular, and health information privacy, in general. It states that any one or more of three circumstances may have motivated the police report made by Mount Druitt Hospital: the patient was apparently a victim of a shooting incident; the patient was a young woman who could have been a victim of domestic violence; the patient was such a young adult that there may have been doubts as to her age and consideration of whether she was a victim of child abuse. The first and simplest of those perspectives is the subject of this study in the narrow sense and will be considered in detail below²⁰⁶. It is nevertheless interesting also to consider gunshot wound reporting obligations from the more complicated perspectives of domestic violence and child abuse.

It has been explained above²⁰⁷ that detailed frameworks of “information sharing” in respect of domestic violence have recently been adopted throughout Australia and that they provide for mandatory reporting in some circumstances. The concrete tasks of public health service providers in New South Wales are set out by an equally extensive and detailed policy document issued by the

Centre in South Australia; “Man treated for suspected gunshot wound at Lyell McEwin Hospital”, in *The Advertiser* of 17.01.2019, referring to the Lyell McEwin Hospital in South Australia.

¹⁹⁸ Refer above, to point 2.a.ii. of this national contribution to the present study.

¹⁹⁹ Refer above, to point 1.2.1.4. of this national contribution to the present study.

²⁰⁰ Refer above, to point 1.2.1.2. of this national contribution to the present study.

²⁰¹ Refer above, to point 2.a.i. of this national contribution to the present study.

²⁰² “Investigation after woman shot, NSW”, *op. cit.*

²⁰³ *Idem.*

²⁰⁴ A “privacy contact officer” is designated for each public hospital. In the case of Mount Druitt Hospital, that person is Ms. Dhana Profilio, Privacy and Information Compliance Manager of the Western Sydney Local Health District.

²⁰⁵ E-mail of 12.02.2019 received from Mr. John Godwin, Senior Privacy Officer in the Regulation and Compliance Unit of the legal and Regulatory Services Division of the Ministry.

²⁰⁶ Point 2.c. of this national contribution to the present study.

²⁰⁷ Point 1.2.2.2. of this national contribution to the present study.

Health Ministry.²⁰⁸ The response we received from the Ministry²⁰⁹ very helpfully crystalizes those duties within the current regulatory framework in circumstances involving guns. Thus, when a service provider becomes aware that any of the following circumstances are likely to exist, he must notify the police:

- the partner or former partner of the adult victim has stabbed or broken a bone of the victim or inflicted a gunshot wound or other serious injury upon the victim;
- the partner or former partner has access to a gun and is threatening to shoot the victim or any other person;
- the partner or former partner is using or carrying a gun or other weapon in a manner which is likely to either cause physical injury to any person or cause a reasonable person to fear for his or her personal safety;
- there exists another serious risk to the safety of any person or to public safety.

Similarly, a mandatory reporting duty is imposed by legislation²¹⁰ on all health service providers “where they have reasonable grounds to suspect that a child or young person is at risk of significant harm”²¹¹. The report must be made to the New South Welsh government’s Department of Family and Community Services. The response received from the Health Ministry explains that an existing gunshot wound does not necessarily of itself prove that there is a “risk of significant harm” occurring in the future. Whether that is true depends upon the individual circumstances of each case. According to the response, the Department of Family and Community Services makes an assessment of each reported case and decides whether or not to notify the New South Welsh police.²¹²

2.c. *Reporting gunshot victims admitted to public hospitals in New South Wales*

Operational directives addressed to employees of the New South Welsh public health service are contained in the Ministry of Health’s manual²¹³ concerning privacy obligations in respect of patients’ personal health information. The manual explains how employees should comply with their statutory obligations to maintain the confidentiality of such information and with their related statutory obligations (and rights) to disclose such information to third parties in certain circumstances. Victims of shootings in New South Wales (and elsewhere in Australia) usually seek medical treatment in the emergency departments of public hospitals.²¹⁴ The manual is therefore effectively of great importance in determining when gunshot wounds will be reported to police in the State of New South Wales.

²⁰⁸ NSW Department of Health, *Policy and Procedures for identifying and responding to domestic violence*, 2nd ed, North Sydney, 2006. This is a public document formally designated as PD2006_084. It is no longer accessible on the Ministry’s internet site, because it is outdated and due for replacement.

²⁰⁹ E-mail of 12.02.2019 received from Mr. John Godwin, Senior Privacy Officer in the Regulation and Compliance Unit of the legal and Regulatory Services Division of the Ministry.

²¹⁰ Section 27 of the Children and Young Persons (Care and Protection) Act 1998 (NSW).

²¹¹ NSW Ministry of Health, *Policy Manual for Health Information*, 3rd ed., North Sydney, 2015, p. 11.20, par. 11.3.2.1. This is a published booklet (ISBN: 978-1-76000-002-8). It is freely accessible on the Ministry’s internet site at <https://www.health.nsw.gov.au/policies/manuals/Pages/privacy-manual-for-health-information.aspx> (last consulted on 16.04.2019).

²¹² Compare above, point 1.2.2.3. of this national contribution to the present study.

²¹³ NSW Ministry of Health, *Policy Manual for Health Information*, *op. cit.*

²¹⁴ The number of private sector hospitals in Australia is relatively small and such hospitals normally do not offer emergency services. In one of the recent shooting cases presented by news media, the victim allegedly sought treatment initially at a privately owned medical centre, but was refused treatment there and sent to the Fairfield Hospital; see Junge, “Man takes himself to hospital with gunshot wound”, *op. cit.*

Structured in line with the Health Privacy Principles formulated under the Health Records and Information Privacy Act 2002 of New South Wales,²¹⁵ the manual states that personal health information may normally be used only for “the primary purpose” of providing an effective health service,²¹⁶ may exceptionally be used and disclosed for “a secondary purpose” listed in the Principles²¹⁷ and may be disclosed in circumstances in which that is authorised or required by some other law.²¹⁸

In that last respect, the manual refers *inter alia* to the obligation to report suspected child abuse,²¹⁹ which has been discussed above,²²⁰ to the duty to comply with a subpoena or search warrant issued by a judicial authority²²¹ and to the obligation effectively imposed by section 316 of the Crimes Act 1900 to report information about serious criminality, which has been discussed above²²². The statutory definition of a “serious criminal offence”, namely that it be punishable by imprisonment for at least five years, is repeated in the manual.²²³ It is worth noting here that numerous offences under the Firearms Act 1996, such as unauthorised use or possession of a firearm, or breach of a firearms prohibition order, are in fact punishable by imprisonment of up to five or in some cases fourteen years, and thus fall within the definition of “serious criminal offences” which must be reported. The manual only mentions “offences such as drug trafficking, serious assaults, sexual assaults, murder and manslaughter”²²⁴. In its list of sources providing “further guidance” in this respect, the manual also refers to domestic violence offences.²²⁵

Among the “secondary purposes” for which personal health information may be used and disclosed, the manual lists²²⁶ the provision of assistance to “law enforcement agencies”. Those agencies are defined²²⁷ as including the Australian Federal Police or the police force of any Australian State or Territory, the Commonwealth Director of Public Prosecutions or the equivalent officer of any Australian State or Territory, the specialised Crime Commission of New South Wales or the Australian Criminal Intelligence Commission, as well as the New South Welsh authorities responsible for criminal incarceration. The manual emphasises²²⁸ that health service staff have no legal obligation to disclose information for “secondary purposes” without the consent of the patient. They should do so only in cases in which two conditions are fulfilled: (i) the staff member must have reasonable grounds for believing that a criminal offence was committed in the past or may be committed in the future; (ii) the disclosure must be “reasonably necessary” to enable the relevant law enforcement agency to carry out its tasks with respect to the offence.²²⁹ If the conditions are fulfilled, the staff member (perhaps in consultation with hospital management and or the hospital’s privacy contact officer) should weigh the public interest, in the enforcement of the law governing that offence, against the patient’s interest, in

²¹⁵ Refer above, to the third paragraph under point 1.3.1. of this national contribution to the present study.

²¹⁶ NSW Ministry of Health, *Policy Manual for Health Information*, *op. cit.*, point 11.1.

²¹⁷ *Ibid.*, point 11.2.

²¹⁸ *Ibid.*, point 11.3.

²¹⁹ *Ibid.*, point 11.3.2.

²²⁰ At point 1.2.2.3. of this national contribution to the present study. Refer also to the last paragraph under point 2.b.

²²¹ NSW Ministry of Health, *Policy Manual for Health Information*, *op. cit.*, point 11.3.6.

²²² At point 1.2.1.2. of this national contribution to the present study.

²²³ NSW Ministry of Health, *Policy Manual for Health Information*, *op. cit.*, point 11.3.4.

²²⁴ *Idem.*

²²⁵ Refer above, to point 1.2.2.2. as well as to the second-to-last paragraph under point 2.b. of this national contribution to the present study.

²²⁶ NSW Ministry of Health, *Policy Manual for Health Information*, *op. cit.*, point 11.2.7.

²²⁷ At point 11.2.7.1, *ibid.*

²²⁸ In the second paragraph under point 11.2.7.2, *ibid.*

²²⁹ *Ibid.*, the first paragraph under point 11.2.7.2.

the maintenance of the confidentiality of the information to be disclosed.²³⁰ If the staff member decides that the public interest has preponderant weight in the particular circumstances, then she should in principle disclose only the “identity” (*i.e.* name) and residential address of the patient.²³¹ To that principle, there are two categories of exceptional cases in which “limited clinical information can be provided to the police”²³². One is the category of cases in which there is reason to believe that the patient is a victim of domestic violence.²³³ The other is a category of cases in which police officers “are actively investigating the commission of [a criminal] offence” and request assistance in that respect.²³⁴ The manual instructs health service staff, in this second type of case, to consider four aspects when deciding whether or not to provide additional information: (i) whether that information will be “essential to the execution of [the police] duty”²³⁵; (ii) the seriousness of the offence being investigated, whereby the manual indicates that disclosure will be warranted only if it is “an offence involving serious physical harm, such as attempted murder or assault”²³⁶; (iii) whether there is any “ongoing public risk or risk to particular individuals”,²³⁷ indicating that the prevention of planned criminality is more important than the punishment of past criminality; (iv) the extent to which disclosure may “impact on the patient’s mental state or wellbeing” and of the risk that “the patient may discontinue obtaining care and treatment”,²³⁸ whereby it will be relevant to consider the clinical importance of the health service being sought and/or provided.

2.1. Conditions

2.1.1. Tasmania

According to the relevant Tasmanian legislative provision,²³⁹ only doctors are required to report gunshot wounds. The obligation is effectively imposed whenever a doctor sees a patient and the consultation gives the doctor reason to believe that the patient is suffering from a gunshot wound. A doctor who actually treats such a wound is also required, by the same provision, to use best endeavours to recover and retain the bullet or fragments of ammunition which inflicted the wound and hand them over to the police upon request.

The making of a report is not a precondition to treatment of the shooting victim. The provision requires the report to “be made as soon as practicable after the suspicion is formed”²⁴⁰, but is formulated²⁴¹ in such a way as to indicate that this will not be “practicable” before the wound has been treated or the consultation has ended.

²³⁰ *Ibid.*, the second paragraph under point 11.2.7.2.

²³¹ *Ibid.*, the third paragraph under point 11.2.7.2.

²³² *Ibid.*, the fourth paragraph under point 11.2.7.2. No indication is given of the extent or criteria according to which the additional information should be limited.

²³³ *Ibid.*, the second-to-last paragraph under point 11.2.7.2. For more information on that aspect, refer above, to point 1.2.2.2. and also to the second-to-last paragraph under point 2.b. of this national contribution to the present study.

²³⁴ *Ibid.*, the fourth paragraph under point 11.2.7.2.

²³⁵ *Idem.*

²³⁶ *Ibid.*, the first bullet point under the fourth paragraph under point 11.2.7.2. It is worth noting that a criminal assault does not necessarily involve any actual physical harm and that attempted murder and common assault lie at the two extremes of the spectrum of gravity of criminal offences against the person.

²³⁷ *Ibid.*, the second bullet point under the fourth paragraph under point 11.2.7.2.

²³⁸ *Ibid.*, the third bullet point under the fourth paragraph under point 11.2.7.2.

²³⁹ Refer above, to point 2.a.i. of this national contribution to the present study.

²⁴⁰ Paragraph 158A(2)(a) of the Firearms Act 1996 (Tasmania).

²⁴¹ Subsection 158A(1), *ibid.*, refers to the patient in the past tense, as “a person whom [the doctor] has seen”.

2.1.2. South Australia

According to the relevant South Australian legislative provision,²⁴² doctors and nurses are required to report gunshot wounds. As in Tasmania,²⁴³ the obligation is effectively imposed whenever a doctor or nurse sees a patient and the consultation gives the doctor or nurse reason to believe that the patient is suffering from a gunshot wound. A doctor or nurse who actually treats such a wound is also required, by the same provision, to use best endeavours to recover and retain the bullet or fragments of ammunition which inflicted the wound and hand them over to police upon request.

The making of a report is not a precondition to treatment of the shooting victim. The provision requires the report to “be made as soon as practicable after the suspicion is formed”²⁴⁴, but is formulated²⁴⁵ in such a way as to indicate that this will not be “practicable” before the wound has been treated or the consultation has ended.

2.1.3. New South Wales

No legislative provisions in force in the State of New South Wales directly require notification of gunshot wounds. A combination of various normative structures requires employees of the State’s public health service to report suspicions of the occurrence of certain phenomena:²⁴⁶ child abuse,²⁴⁷ domestic violence;²⁴⁸ the commission of serious criminal offences.²⁴⁹ The fact that a person has been injured as a result of a gunshot, seen in the light of the victim’s circumstances, may in fact raise strong suspicions of one or more of these. Employees of the State’s public health service are the people most often solicited for the treatment of gunshot wounds.²⁵⁰ As a result, gunshot wounds are in fact frequently reported to New South Welsh public authorities.²⁵¹

In no case is the making of a report a precondition to treatment of the shooting victim.

2.2. Scope

2.2.1. Tasmania

The relevant Tasmanian legislative provision²⁵² defines exactly the scope of the required disclosure. The identity of the shooting victim is the most important information to be disclosed. If the victim’s

²⁴² Refer above, to point 2.a.ii. of this national contribution to the present study.

²⁴³ Refer above, to point 2.1.1. of this national contribution to the present study.

²⁴⁴ Paragraph 97(2)(a) of the Firearms Regulations 2017 (South Australia).

²⁴⁵ Regulation 97(1), *ibid.*, refers to the patient in the past tense, as “a person whom the medical practitioner or nurse has seen in a professional capacity”.

²⁴⁶ Refer above, to the first and the second paragraph under point 2.c. of this national contribution to the present study. The presence of a gunshot wound is clearly most likely to be detected by a doctor, nurse or other person trained to provide emergency medical services (“paramedic”). The *Policy Manual for Health Information* does not specifically refer to these categories of employees, however. Its directives are equally addressed to receptionists, orderlies, pharmacists and other employees of the public health service.

²⁴⁷ Refer above, to the last paragraph under point 2.b. of this national contribution to the present study.

²⁴⁸ Refer above, to the second-to-last paragraph under point 2.b. of this national contribution to the present study.

²⁴⁹ Refer above, to the third paragraph under point 2.c. of this national contribution to the present study.

²⁵⁰ Refer above, to the relevant footnote to the first paragraph under point 2.c. of this national contribution to the present study.

²⁵¹ Refer above, to the first paragraph under point 2.b. of this national contribution to the present study.

²⁵² Refer above, to point 2.a.i. of this national contribution to the present study.

identity is not known to the doctor, she must provide “a description of the person”.²⁵³ “Details of the wound”²⁵⁴ must also be reported, along with any information obtained by the doctor “about the circumstances leading to the infliction of the wound”²⁵⁵.

2.2.2. South Australia

The relevant South Australian legislative provision²⁵⁶ has the same scope as its Tasmanian counterpart,²⁵⁷ except that the report must contain not only “details of the wound”²⁵⁸, but also a statement as to “whether any ammunition or fragment of ammunition has been, or may be recovered from the wound”²⁵⁹.

2.2.3. New South Wales

It is precisely the identity (*i.e.* the name) and the residential address of a gunshot victim that employees of the New South Welsh public health service are directed to report, when they decide that reporting is reasonably necessary to enable a law enforcement agency to investigate the possible commission of a criminal offence.²⁶⁰ Disclosure going beyond those two items of information is permitted only in two categories of exceptional cases. One is the category of cases in which there is reason to believe that the patient is a victim of domestic violence. The other is the category of cases in which the police are already investigating a possible criminal offence and take the initiative of asking hospital staff for information of possible relevance to that investigation, which was not initiated by a report on the part of hospital staff. In these two categories of cases, employees of the New South Welsh public health service may provide “limited clinical information” about the gunshot wound and its treatment.²⁶¹

2.3. Purpose

2.3.1. Tasmania

The relevant Tasmanian legislative provision²⁶² requires a doctor to “make a report to a police officer”²⁶³.

The legislation does not reveal the purpose of the reporting obligation. When presenting the draft legislation to the legislature, the responsible minister of the Tasmanian state government explained that reporting is necessary in order to permit police investigation of the shooting which led to the infliction of the gunshot wound. That investigation may lead police to suspect that one or more

²⁵³ Subparagraph 158A(2)(b)(i) of the Firearms Act 1996 (Tasmania).

²⁵⁴ Subparagraph 158A(2)(b)(ii), *ibid.*

²⁵⁵ Subparagraph 158A(2)(b)(iii), *ibid.*

²⁵⁶ Refer above, to point 2.a.ii. of this national contribution to the present study.

²⁵⁷ Refer above, to point 2.2.1. of this national contribution to the present study.

²⁵⁸ Subparagraph 97(2)(b)(ii) of the Firearms Regulations 2017 (South Australia).

²⁵⁹ *Idem.*

²⁶⁰ Refer above, to the last paragraph under point 2.c. of this national contribution to the present study. Subsection 316(1) of the Crimes Act 1900 effectively requires disclosure of all types of “information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender”. The discrepancy may be explained by reference to prosecutorial discretion and medical ethical considerations; refer below, to point 3.2.3. of this national contribution to the present study.

²⁶¹ Refer above, towards the end of the last paragraph under point 2.c. of this national contribution to the present study.

²⁶² Refer above, to point 2.a.i. of this national contribution to the present study.

²⁶³ Subsection 158A(1) of the Firearms Act 1996 (Tasmania).

criminal offences were committed and/or that the suitability of a person to possess or use the relevant gun needs to be reassessed. These explanations imply that the police may use the reported information to prosecute suspected criminal offenders or to withdraw firearms licences or permits.

2.3.2. South Australia

The relevant South Australian legislative provision²⁶⁴ requires a doctor or nurse to “make a report to the Registrar [of Firearms]”²⁶⁵. The legislation does not state the purpose of the reporting obligation, but may be interpreted as seeking to facilitate “the administration or enforcement”²⁶⁶ of the provisions regulating the acquisition, possession and use of guns.²⁶⁷

2.3.3. New South Wales

The purpose of the requirements to notify gunshot wounds, which evoke suspicions of child abuse or domestic violence, is the protection of the child or other cohabitant from further violence or other types of abuse.²⁶⁸ The statutory criminal offence of “concealing a serious indictable offence” was enacted to replace the common law offence of “misprision of felony”.²⁶⁹ That offence had been created in order to encourage citizens to comply with their ancient legal duty to assist public authorities with the identification, apprehension and punishment of criminals.²⁷⁰ The formulation of the statutory offence (concealing “information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender”²⁷¹) indicates that this remains the essential purpose of the current legislation.

The statutory criminal offence effectively requires that reports be made to “a member of the NSW Police Force or other appropriate authority”²⁷². According to the guidance issued to employees of the New South Welsh public health service,²⁷³ the police force or the public prosecution authority of any Australian jurisdiction, as well as certain specialised authorities, may be an “appropriate authority” in that context, presumably depending upon the nature of the criminal conduct to be reported.

Our understanding is that no particular instance has been designated to receive reports of suspected domestic violence. Australia’s national domestic violence prevention scheme foresees that such reports received or generated by any governmental agency or non-governmental domestic violence support service will be transferred to a “central referral point” for distribution to other agencies and services.²⁷⁴ The New South Welsh government’s Department of Justice acts as the “central referral point” in that State.²⁷⁵

²⁶⁴ Refer above, to point 2.a.ii. of this national contribution to the present study.

²⁶⁵ Regulation 97(1) of the Firearms Regulations 2017 (South Australia), read together with subsection 49(1) of the Firearms Act 2015 (South Australia).

²⁶⁶ Subsection 55(1) of the Firearms Act 2015.

²⁶⁷ Refer above, to the third-to-last paragraph and the last quotation under point 2.a.ii. of this national contribution to the present study.

²⁶⁸ Refer above, to points 1.2.2.2. and 1.2.2.3. as well as to the last two paragraphs under point 2.b. of this national contribution to the present study.

²⁶⁹ Refer above, to point 1.2.1.2. of this national contribution to the present study.

²⁷⁰ Refer above, to point 1.2.1.1. (particularly the footnotes to that point) of this national contribution to the present study.

²⁷¹ Paragraph 316(1)(b) of the Crimes Act 1900 (New South Wales).

²⁷² Paragraph 316(1)(c) of the Crimes Act 1900 (New South Wales).

²⁷³ Refer above, to the last paragraph under point 2.c. of this national contribution to the present study.

²⁷⁴ Refer above, to the first paragraph under point 1.2.2.2. of this national contribution to the present study.

²⁷⁵ Sections 98A and 98F of the Crimes (Domestic and Personal Violence) Act 2007 (New South Wales).

Reports of suspected child abuse must be made to the New South Welsh government's Department of Family and Community Services.²⁷⁶

2.4. Consequences of non-compliance

2.4.1. Tasmania

The relevant Tasmanian legislative provision²⁷⁷ states that a "penalty"²⁷⁸, in the form of a fine, may be imposed upon a doctor who fails to comply with the reporting obligation. The maximum amount of the fine is currently A\$ 8'150.-. Failure to comply is a criminal offence and a conviction will be noted in the criminal record of a doctor who is successfully prosecuted.

2.4.2. South Australia

The relevant South Australian legislative provision²⁷⁹ does not impose any kind of penalty for non-compliance with the reporting obligation. Our research indicates that the provision is intended to primarily bind employees of public hospitals and therefore to be enforceable as part of their employment duties.²⁸⁰

2.4.3. New South Wales

The directives on disclosure of health information issued to public health service employees in New South Wales²⁸¹ are again primarily enforceable in the framework of employment law, as they contribute to the definition of the employees' duties.

Those directives refer to the statutory duties to report suspicions of child abuse or domestic violence. A failure to comply with those duties does not constitute a criminal offence or otherwise attract a penalty under the specifically relevant statutory provisions.²⁸² It may be that a health care professional who consistently or blatantly fails to comply could nevertheless be subjected to administrative sanctions within the framework of the Health Practitioner Regulation National Law.²⁸³

²⁷⁶ Refer above, to the last paragraph under point 2.b. of this national contribution to the present study.

²⁷⁷ Refer above, to point 2.a.i. of this national contribution to the present study.

²⁷⁸ Subsection 158A(1) of the Firearms Act 1996 (Tasmania).

²⁷⁹ Refer above, to point 2.a.ii. of this national contribution to the present study.

²⁸⁰ Refer above, to the fourth paragraph under point 2.a.ii. of this national contribution to the present study.

²⁸¹ Refer above, to points 2.c. and 2.1.3. of this national contribution to the present study.

²⁸² Respectively Part 2 of Chapter 3 of the Children and Young Persons (Care and Protection) Act 1998 and Part 13A of the Crimes (Domestic and Personal Violence) Act 2007 (New South Wales). The Crimes Act 1900 (New South Wales) was amended with effect from 31 August 2018 with the introduction, as section 316A, of a criminal offence of "concealing a child abuse offence". That provision, which will not be considered in detail in this national contribution to the current study, is very similar to section 316 of that Act, with the additional complication that it defines seven circumstances in which an accused person can avail herself of "a reasonable excuse" for failing to report the evidence of which she is aware.

²⁸³ Refer above, to the last paragraph under point 1.2.2.4. of this national contribution to the present study. Reports lodged with the National Health Practitioner Board may be referred to an adjudication tribunal. Under subparagraph 193(1)(a)(i) of the Health Practitioner Regulation National Law, the Board must make such a reference if it arrives at the reasonable belief that a "practitioner has behaved in a way that constitutes professional misconduct". The term "professional misconduct" is defined in section 5 to include "conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience" and "conduct [...] that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession". Whether a refusal to comply with reporting duties falls within either of those definitions, is an open question.

Those directives also refer to the statutory offence of “concealing a serious indictable offence”. A penalty of imprisonment is prescribed for a person convicted of that offence. The maximum sentence of imprisonment which may be imposed is normally two years, but may extend to three or even five years if the “serious indictable offence”, which was not reported, is itself punishable by a particularly long period of imprisonment.²⁸⁴ Some health services providers benefit from a degree of protection against prosecution under this statutory provision. According to subsection 316(4) of the Crimes Act 1900,

“A prosecution for [concealing a serious indictable offence] is not to be commenced against a person without the approval of the Director of Public Prosecutions if the knowledge or belief that an offence has been committed was formed or the information referred to in the [definition of the offence] was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection”.

The effect of that proviso is to give to the government of the State of New South Wales a power to designate categories of persons who are likely to encounter evidence that criminal offences have been committed and are likely to have reasons for not reporting that evidence. If a person suspected of “concealing a serious indictable offence” falls within one of the designated categories, he can be prosecuted only if the individual prosecution is subsequently approved by the Director of Public Prosecutions (“DPP”) of the State of New South Wales. Criminal prosecutions can normally be brought by any police officer, a police force,²⁸⁵ another public authority or any other person. The office of the DPP was created as an expert body particularly competent in the prosecution of very complex and/or serious crimes and as a body independent of the New South Wales police and government.²⁸⁶ One of the DPP’s tasks is to determine, expertly and independently of party politics, whether a specific prosecution of a particular offence would further the public interest. At present, ten categories of persons are designated by regulations²⁸⁷ for the purposes of prosecution for concealment of an offence. They include “medical practitioners”, “psychologists”, “nurses” and “social workers”.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

We are not aware of legislation of any Australian jurisdiction expressly protecting the provision of healthcare in line with ethical principles of healthcare. In particular, the Health Practitioner Regulation National Law contains no provisions permitting health service providers to rely upon ethical considerations in response to complaints or in administrative proceedings. The Law is premised upon the assumption that the community requires protection from potentially abusive, incompetent or uncooperative health service providers.²⁸⁸

²⁸⁴ Refer above, to the quotation from section 316 of the Crimes Act 1900 which is provided under point 1.2.1.2. of this national contribution to the present study.

²⁸⁵ Local or regional police forces normally appoint specialised “police prosecutors” to appear in court, rather than have each prosecution led by the police officer who investigated the alleged offence; refer to K. Drew, *The New South Wales Police Prosecutor*, freely accessible in electronic form on the internet site of the Australian Institute of Criminology at <https://aic.gov.au/sites/default/files/publications/proceedings/downloads/03-drew.pdf> (last consulted on 01.05.2019).

²⁸⁶ Refer to the internet site of the Office of the Director of Public Prosecutions, particularly at <https://www.odpp.nsw.gov.au/crown-prosecutors> (last consulted on 01.05.2019).

²⁸⁷ Regulation 4 of the Crimes Regulation 2015. The designations are also made for the purposes of section 316A of the Crimes Act 1900. It is worth noting that this is the only subsidiary legislation promulgated under the Crimes Act 1900, a particularly long and complex Act, and that its sole purpose is to make designations for the purposes of sections 316 and 316A of that Act.

²⁸⁸ Refer above, to the second paragraph under point 1.2.2.4. of this national contribution to the present study.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

We are not aware of legislation of any Australian jurisdiction expressly providing guidance on how to resolve the potential tension between protection of medical ethics and duties to report gunshot wounds suffered by patients. Legislation and certain other sources do, however, take an implicit stance in respect of that issue.

3.2.1. Relationship of Ethics to Reporting Duties according to Legislation

Some legislative structures implicitly, but clearly, indicate that statutory reporting duties always prevail over ethical and other requirements to maintain confidentiality. For example, New South Welsh legislation provides thoroughgoing protection for health service providers who share with other child and family services organisations any personal information of relevance to the safety, welfare or well-being of children and young persons.²⁸⁹ As long as the health worker acts “in good faith”, no criminal or civil liability can be imposed upon her, she cannot be subjected to disciplinary action and she “cannot be held to have breached any code of professional etiquette or ethics or departed from any accepted standards of professional conduct” as a result of the disclosure.²⁹⁰ Similarly, the Health Practitioner Regulation National Law²⁹¹ apparently seeks to prevent reliance upon ethical confidentiality requirements by stating that the making of reports cannot “constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct”²⁹².

To the same effect, according to the government of the State of Victoria,²⁹³ legislation providing for the disclosure of personal health information indicating acts of domestic violence²⁹⁴ was enacted in 2017 with the aim of ensuring that “the safety of victims” always prevails over “the privacy of perpetrators” and the state’s Health Records Act 2001 was amended so as to weaken its confidentiality requirements.

3.2.2. Relationship of Ethics to Reporting Duties according to Professional Bodies

One might imagine that representatives of health professionals take a different view, but that is apparently not the case. Neither the *AMA Code of Ethics* nor the *Ethical Guidelines* formulated by the AMA with respect to medical records²⁹⁵ contains any suggestion that doctors may be obliged to breach statutory or other legal obligations of disclosure of confidential health information. The *Guidelines* simply “encourage” doctors to inform patients in advance that data contained in their medical records and other personal health information can be disclosed in certain circumstances.²⁹⁶ If data is actually

²⁸⁹ Refer above, to point 1.2.2.3. of this national contribution to the present study.

²⁹⁰ Section 245G of the Children and Young Persons (Care and Protection) Act 1998.

²⁹¹ Refer above, to the second paragraph under point 1.2.2.4. of this national contribution to the present study.

²⁹² Paragraph 237(3)(a) of the Health Practitioner Regulation National Law.

²⁹³ TimeBase, “Victorian Government to Address Family Violence with Information Sharing Scheme”, *op. cit.*, quoting the Victorian Special Minister of State.

²⁹⁴ Refer above, to point 1.2.2.2. of this national contribution to the present study.

²⁹⁵ Refer above, to point 1.3.2.1. of this national contribution to the present study.

²⁹⁶ *Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010. Revised 2015, op. cit.*, paragraph 1.4. Doctors are euphemistically told to “align expectations as to how patients’ personal information [...] will be handled”, but the alignment will need to take place unilaterally on the patient’s side, as there is no indication that a doctor may refuse to comply with disclosure requirements imposed by law.

disclosed, this should be noted in the patient's medical record and "where appropriate the patient should be informed of that having occurred".²⁹⁷

The AMA's *Ethical Guidelines* foresee that, in certain circumstances, Australian law may authorise, but not oblige, medical practitioners to disclose patient health information without the patients' consent. Three of the five categories of relevant circumstances foreseen by the *Guidelines* are worth quoting here:

- certain types of medical research;
- [...]
- to lessen or prevent a serious threat to the life, health or safety of any individual or to public health or safety;
- taking appropriate action in relation to suspected unlawful activity or serious misconduct [...].²⁹⁸

Unfortunately, guidance as to how doctors should proceed is provided only in so far as the information is to be used "for clinical or epidemiological research". In those circumstances, "it is incumbent on the treating medical practitioner to ensure that the patient's identity is safeguarded and that any legislation or statutory guidelines are complied with". Only research conducted according to "a written protocol approved by a written ethics committee" is to be contributed to and such a "protocol should explicitly provide for the maintenance of confidentiality of any individually identified or identifiable data".²⁹⁹

3.2.3. Relationship of Ethics to Reporting Duties according to a Public Health Service

A much more balanced view of the practical application of the implied statutory duty of New South Wales public health service employees, to report gunshot wounds as evidence of the commission of serious criminal offences,³⁰⁰ has been communicated to us by the Ministry of Health of New South Wales.³⁰¹ Hospital staff allegedly assess each case in the light of its individual circumstances. If they conclude that a gunshot wound was suffered accidentally, or was otherwise self-inflicted by the victim, then they are unlikely to report the case to police, even where the gunshot obviously amounted to an offence against firearms control legislation.³⁰² In other cases, the team treating the patient may decide not to report his gunshot wound to police on the basis that such a report would "likely undermine the therapeutic relationship between health care workers and the particular patient"³⁰³. The Ministry cited the evaluation made, in its health information privacy directives, of the legislative provisions³⁰⁴ requiring the Director of Public Prosecutions to approve any prosecution of a doctor, psychologist, nurse or social worker under sections 316 or 316A of the Crimes Act 1900:

²⁹⁷ *Ibid.*, paragraph 7.4. No indication is given of when it might be inappropriate to notify a patient that her health information has been disclosed.

²⁹⁸ *Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010. Revised 2015, op. cit.*, paragraph 6.1.

²⁹⁹ *Ethical Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010. Revised 2015, op. cit.*, paragraph 6.2.

³⁰⁰ Refer above, to point 1.2.1.2. and to the second-to-last paragraph under point 2.c. of this national contribution to the present study.

³⁰¹ Refer above, to the second paragraph under point 2.b. of this national contribution to the present study.

³⁰² Refer above, to the second-to-last paragraph under point 2.c. of this national contribution to the present study.

³⁰³ E-mail of 12.02.2019 received from Mr. John Godwin, Senior Privacy Officer in the Regulation and Compliance Unit of the legal and Regulatory Services Division of the Ministry of Health of New South Wales.

³⁰⁴ Refer above, to point 1.2.1.2. and to the last two paragraphs under point 2.4.3. of this national contribution to the present study.

“The aim of the provision is to protect health care providers who, in good faith and on reasonable grounds, do not disclose [...] information to police”.³⁰⁵

The Ministry considers that the DPP would not permit a prosecution to proceed if it considered that an accused doctor believed, honestly and on reasonable grounds, that the public interest in her reporting of a gunshot wound was outweighed by the public interest in the maintenance of her therapeutic relationship with the victim.

3.2.4. Relationship of Ethics to Reporting Duties according to Commentators

Finally, one academic commentary addresses³⁰⁶ the potential conflict between the legal and medical ethical duties to maintain the confidentiality of information about patients and the medical ethical duty to protect third parties from injury, for example as a result of being shot by a patient. It cites US-American, English and Canadian court judgments³⁰⁷ and two Australian administrative decisions³⁰⁸ which held that a health service provider may be entitled, or even required, to breach his obligation of confidentiality and report to police that he has reason to fear that a patient will commit an act of violence. Such a breach would be admissible or excusable only in very limited circumstances, however. The authors consider that four requirements would need to be met in the specific circumstances of the individual case:

- (i) an identifiable individual or group of persons would need to be threatened;
- (ii) by a clear risk of death or serious bodily harm;
- (iii) which could be inflicted imminently;
- (iv) and the person making the report has taken due care to ensure the accuracy of the information to be reported (particularly as concerns the identity of the patient from whom the danger emanates).

³⁰⁵ NSW Ministry of Health, *Policy Manual for Health Information*, op. cit., point 11.3.4.

³⁰⁶ *Ethics and Law for the Health Professions*, op. cit., pp. 319-320.

³⁰⁷ Refer above, to the last paragraph under point 1.1. of this national contribution to the present study.

³⁰⁸ *Re Noble*, [2002] Psychologists Registration Board Decisions (Victoria) 6; *NK v. Northern Sydney Central Coast Area Health Service*, [2010] New South Wales Administrative Decisions Tribunal 258.

B. CHINA

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

With the longest unitary history (“大一统”) in the world, China has maintained a centralised framework since it was united in the Qin dynasty 2’500 years ago. Under such a centralised system, the central government has always enjoyed supreme authority over local government and its people.³⁰⁹ Therefore, Chinese legal norms provide a hierarchy of various types of legal instruments as follows: constitution, laws (“法律”), administrative regulations; local regulations,³¹⁰ autonomous regulations, and separate regulations (“单行条例”)³¹¹. In addition, the ministries and commissions under the State Council, the People’s Bank of China, the Auditing Office, and other departments with administrative responsibilities directly under the State Council, and local governments are authorized to make Departmental Rules and Local Rules (“部门规章和地方政府规章”).³¹²

Constitutional law is a fundamental law and thus has the highest legal authority in the Chinese legal order. Any other laws or regulations must not contravene constitutional law.³¹³ Beneath constitutional law are laws (“法律”) promulgated by the National People’s Congress and its Standing Committee. Administrative regulations, which are adopted by the State Council, may govern matters requiring the implementation of law and matters within the administrative functions and powers of the State Council set forth in the Constitution.³¹⁴ Local regulations, autonomous regulations, and separate regulations are adopted by local people’s congresses and their standing committees. Constitutional law, laws, and administrative regulations are applied all over the country, whereas local regulations, autonomous regulations and separate regulations are applied merely in certain regions defined by the regulations or their legislators. National laws and regulations have priority over local ones. Judicial interpretations issued by the Supreme People’s Court (“SPC”), although not part of the People’s Republic of China (“PRC”) law under the Chinese Constitution, play a significant roles in practice. Judicial interpretations not only interpret or clarify national laws, but also supplement national laws,³¹⁵

³⁰⁹ Q.F. Zhang, *The Constitution of China: A Contextual Analysis*, Oxford and Portland, Oregon, Hart Publishing 2012, p. 81.

³¹⁰ Local regulation is made by the provincial people’s congresses and their standing committees (including those of provinces, autonomous regions, and municipalities directly under the central government) and the legislature of “comparatively large cities”, which usually refers to the capital cities of provinces or autonomous regions, special economic zones, and other cities approved as such by the State Council, available at: <https://blogs.loc.gov/law/2014/01/a-guide-to-chinese-legal-research-who-makes-what/> (16 May 2019).

³¹¹ Autonomous regulations and separate regulations are formulated by the people’s congress of the relevant ethnic autonomous area on the basis of the political, economic, and cultural characteristics of the local ethnic groups. They must be submitted to the people’s congress at a higher level for approval before entering into force. *Ibid.*

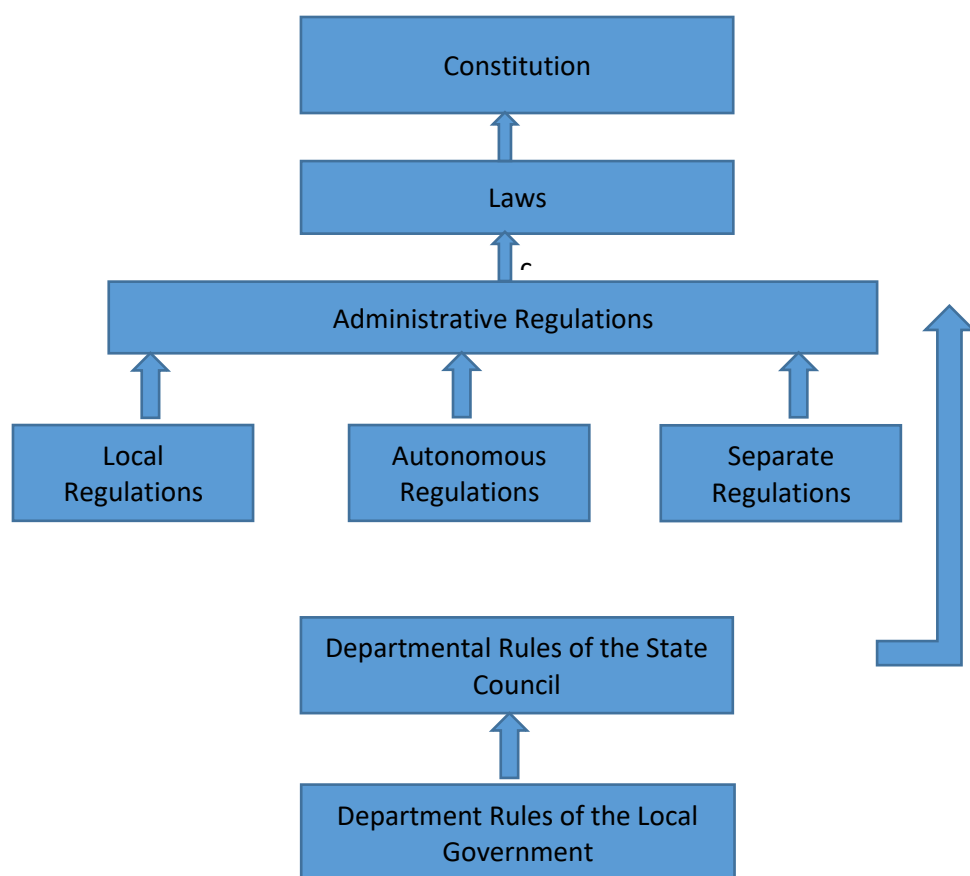
³¹² Departmental rules are promulgated by the ministries and commissions under the State Council, the People’s Bank of China, the Auditing Office, and other departments with administrative responsibilities directly under the State Council. Local rules are promulgated by the local governments. Legislation Law of PRC, Article 2. See also: <https://www.loc.gov/law/help/legal-research-guide/china.php> (16 May 2019).

³¹³ Constitution of the PRC, Preamble.

³¹⁴ Legislation Law of the PRC, Article 65.

³¹⁵ C. von Wunschheim & F. Kun, *Arbitrating in China: The Rules of the Game/Practical Recommendations concerning Arbitration in China*, ASA Bulletin, 2008 (26) Issue 1 Kluwer Law International p.35 *et seq.*

particularly where new legal issues appear in reality.³¹⁶ Please find below the hierarchy of Chinese legislations:



Chinese legislation concerning healthcare professionals contains rules for both confidentiality and the duties of healthcare professionals; on the one hand, certain healthcare professionals are obliged to maintain the confidentiality of their patients, on the other hand, they are obliged to report to relevant state authorities where the patient appears to have been the victim of a perpetrator of violence or where a patient dies of an abnormal cause, including a gunshot wound. These rules are not unified and are sometimes contained in a single legislation but also sometimes provided for separately in several legislations at many levels.

The main legislations concerning the confidentiality of medical professionals and duties of disclosure to state authorities include, in particular:

³¹⁶ The legal basis of the binding legal effect of a judicial interpretation arises from the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (effective as of on 10 June 1981). Paragraph II of that document provides that the interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People's Court.

Constitution	Constitution of the People's Republic of China ("PRC" or "China"),
Laws	<ol style="list-style-type: none"> 1. Criminal Law of the PRC (XII Amendment) ("CL") 2. Law on Licensed Doctors of the PRC (2009 Amendment) ("LLD") 3. Counterterrorism Law of the PRC ("CL") 4. Criminal Procedure Law of the PRC ("CPL") 5. General Rules of Civil Law of the PRC ("GRCLP") 6. Tort Law of the PRC ("TL") 7. Decision of the Standing Committee of the National People's Congress on Strengthening Information Protection of Networks
Administrative regulations	1. Regulation of Nurses ("RN")
Military regulations	Measures of the Chinese People's Liberation Army for the Implementation of the Law of the PRC on Medical Practitioners
Judicial interpretation	<ol style="list-style-type: none"> 1. Opinions of the Supreme People's Court ("SPC") ("Zui Gao Ren Min Fa Yuan") on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the PRC (for Trial Implementation) 2. Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in Examining Cases Involving Liabilities for Medical Damage Compensation 3. Supreme People's Court, the Supreme People's Procuratorate ("Zui Gao Ren Min Jian Cha Yuan")³¹⁷, the Ministry of Public Security ("Gong An Bu"), the Ministry of Justice ("Si Fa Bu") and the National Health and Family Planning Commission ("Guo Jia Wei Sheng He Ji Hua Sheng Yu Wei Yuan Hui") jointly issued Opinions Punishing Illegal Acts and Crimes against Medical Staff in accordance with Law and Maintaining the Normal Medical Order ("Opinions") 4. Memorandum of Understanding on Taking Joint Disciplinary Actions against Those Liable for Unfaithful Acts that Seriously Disrupt the Normal Order of Medical Services ("Memorandum")
Department rules	Provisions on the Administration of Medical Records in Medical Institutions ("PAMRMI")

Case law is not a legal resource in China and no cases were found regarding gunshot wounds. Case law will therefore not be discussed in this report.

Definition of healthcare professionals

Although Chinese law³¹⁸ offers a general legal term of healthcare professional (“医务人员”, “卫生技术人员”),³¹⁹ Chinese legislation offers no definition of this term. Generally speaking, “healthcare

³¹⁷ Supreme People's Procuratorate is the highest national level agency responsible for prosecution and investigation in the PRC. Supreme People's Procuratorate and procuratorates at all levels are also responsible for supervising activities of the corresponding Chinese courts and public security agencies. See <http://www.spp.gov.cn/> (19.04.2019).

³¹⁸ After the return of Hong Kong and Macao to the motherland in 1997 and 1999, respectively, Hong Kong and Macao become special administrative regions (SARs) and have different legal systems from Mainland China. In this report, Chinese law refers only to laws in mainland China.

³¹⁹ For instance, Article 16 of Interpretation of Supreme People's Court on Several Issues Concerning the Application of Law in Examining Cases Involving Liabilities for Medical Damage Compensation (effective

professional” refers to all types of persons in health-related fields at all levels who obtain relevant healthcare professional certifications or diplomas after examination, and who are certified and recognized by health authorities.³²⁰ This definition includes at least licensed doctors and nurses, if not all healthcare professionals. Chinese law does provide a definition of “licensed doctors” (“执业医师”) and “nurses” (“护士”). “Licensed doctors” refers to “professional medical personnel who have legally obtained the qualifications as practicing doctors or assistant practising doctors and who practice at institutions for medical treatment, disease prevention and healthcare after registration”.³²¹ “Nurses” refers to “health technicians who have obtained a nurse practice certificate and who, upon practice registration, are engaged in nursing activities and perform the duties of protecting lives, mitigating pain and enhancing health”.³²² All of these legal terms fall within the scope of healthcare professionals as defined by Resolution 2286 (2016) adopted by the UN Security Council.³²³

Confidentiality & Privacy

With regard to the confidentiality of healthcare professionals, the object of the protection of confidentiality is to preserve the privacy of patients. Article 36 of Chapter II of the Constitution of the PRC offers protection for the personal dignity of each person,³²⁴ which establishes a solid constitutional basis for the protection of privacy. The term “privacy” was first used in *the Notice of the SPC on Issuing the Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law of the PRC (for Trial Implementation)* that went into effect on 2 April 1988. The subsequent *Interpretation of the SPC on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts* (Article 3(2)) allows a close relative of the deceased to claim emotional damages where the deceased’s private information was illegally disclosed or used, or whose privacy was infringed by other means contrary to the public interest or societal norms. *The Tort Law of the PRC* (“TL”) adopted on 1 July 2010 first gives protection to the right to privacy as a right separate from that of dignity (Articles 2 and 62 of TL). This is further confirmed by the newly adopted *General Rule of the Civil Law of the PRC* (“GR”) in 2018, according to which the right to privacy is protected in the same way as rights to life, inviolability and integrity of the person, health, name, likeness, reputation, honor and marital autonomy.³²⁵ The GC explicitly offers protection for the personal information of a natural person. Any organization or individual needing to obtain personal information must legally obtain and ensure the security of such information, and may not illegally collect, use, process, or transmit the personal information of other persons, nor illegally buy, sell, provide, or publish the personal information of other persons.³²⁶

In addition, with the development of IT, electronic data plays an increasingly significant role in daily life, particularly in the medical field. On 25 April 2018, the *Opinions of the General Office of the State Council on Promoting the Development of “internet plus Health Care”* (“Internet Plus Health Care Opinions”) were issued, and the development of “internet plus” healthcare services was identified as one of the targets for refining and promoting the healthcare service system in China. According to the *Internet Plus Health Care Opinions*, “medical institutions shall be encouraged to apply the Internet and other information technologies to expand the space and content of health care services and build an

as of 14 December 2017); Article 2 of Regulation on Management of Medical Record of Medical Institutions (effective as of 1 January 2014).

³²⁰ Available at: <https://baike.baidu.com/item/医务人员/8356497?fr=aladdin> (15.03.2019).

³²¹ Law on Licensing Doctors of the PRC (effective as of 27 August 2009), Article 2.

³²² Regulation of Nurses (effective as of 12 May 2008), Article 2.

³²³ United Nations Security Council, Res. 2286 (3 May 2016).

³²⁴ Constitution of the PRC, Article 36.

³²⁵ General Rules of the Civil Law of the PRC, Article 110.

³²⁶ *Ibid.*, Article 111.

online and offline integrated health care model covering the whole process of health care”.³²⁷ As early as 28 December 2012, the Standing Committee of the National People’s Congress (“SCNPC”) issued the *Decision of SCNPC on Strengthening Information Protection on Networks* (“IPN”), which expressly provides that the State must protect electronic information by which individual citizens can be identified and which involves the individual privacy of citizens. Organizations and individuals may not sell or illegally provide others with electronic personal information of citizens.³²⁸ Violation of this right leads to civil (contractual³²⁹ or tort³³⁰) liabilities, and may even lead to criminal liability³³¹.

Laws and Regulations on Confidentiality and Duty of Disclosure

The Law on Licensed Doctors of the PRC (“LLD”) sets forth rules on the confidentiality of healthcare, whereby doctors and nurses shall “care for and respect the patients and preserve the privacy thereof”. Nevertheless, no further rules regarding how to respect and preserve the privacy of patients by doctors and nurses are provided in the law.³³²

The Medical Record is one of the fundamental documents for patients, which contains most private information concerning patients. In order to reinforce the management of medical records of medical institutions and to protect the legal interests of both healthcare professionals and patients, *Provisions on the Administration of Medical Records in Medical Institutions* (“PAMRMI”) were promulgated jointly by the National Health and Family Planning Commission (“NHFPC”)³³³ and State Administration of Traditional Chinese Medicine of the PRC (“SATCM”) on 20 November 2013. According to the *PAMRM*, a medical record refers to “all the documents that are formulated by healthcare professionals in their medical treatment process, such as text, symbol, chart, image, biopsy *etc.*”³³⁴ It further provides for the obligations of medical institutions and health professionals to respect and preserve the privacy of patients as well as the procedures and conditions for disclosing the medical record to relevant authorities.³³⁵

Meanwhile, Chinese law also offers regulations on the duty of healthcare professionals to disclose certain information to relevant authorities under certain circumstances. The *LLD* expressly provides for the duties of a doctor to report to relevant authorities **where (s)he finds that the patient is suspected of being involved in a case where someone is injured (“an injury case”) or dies of an abnormal cause**. Furthermore, both the *Criminal Procedure Law of the PRC* (“CPL”) and the *Counter-terrorism Law of the PRC* (“CTL”) provide that **anyone** who is aware of possible criminal or terrorist acts or activities must report the crime or criminal suspect to a public security authority³³⁶ and must

³²⁷ Opinions of the General Office of the State Council on Promoting the Development of “Internet Plus Health Care” (effective as of 25 April 2018), *op. cit.*, Part I. 1(1).

³²⁸ Decision of the Standing Committee of the National People’s Congress on Strengthening Information Protection on Networks (effective as of 28 December 2012) *op. cit.*, Par. I.

³²⁹ Contract Law of the PRC, Chapter VII: Liabilities for Breach of Agreement.

³³⁰ Tort Law of the PRC, Article 15.

³³¹ Criminal Law of the PRC, Article 253 (1); Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues concerning the Application of Law in the Handling of Criminal Cases of Infringing on Citizen’s Personal Information (effective as of 1 June 2017).

³³² Law on Licensed Doctors of the PRC (effective as of 27 August 2009), Article 22 (3); Regulation of Nurses (effective as of 05 December 2008), Article 18.

³³³ The NHFPC was cancelled on 22 March 2018 and the National Health Commission of the PRC was newly established, see: http://www.gov.cn/zhengce/content/2018-03/24/content_5277121.htm (20.03.2019).

³³⁴ Provisions on the Administration of Medical Records in Medical Institutions, Article 2.

³³⁵ *Ibid.*, Article 6.

³³⁶ Criminal Procedure Law of the PRC, Article 110 (3). Articles 2 and 3 of the Organic Administration Regulation of Public Security Authorities (effective on 1 January 2007) defines public security authorities

faithfully cooperate with any public security authority investigation into any suspect terrorist activity.³³⁷ Healthcare professionals will certainly be included within the scope of “anyone”. Accordingly, doctors must disclose gunshot wounds to relevant authorities where a **patient is suspected of being involved in a case where someone is injured (“an injury case”) or dies of an abnormal cause**. This duty is not imposed on nurses according to the *RN*. Nonetheless, the doctors’ duties of disclosure will not prevent them from carrying out emergency treatment measures for the gunshot wounds of patients.³³⁸

In addition, the *PAMRM* provides that **medical institutions may** provide patients’ medical records, in part or in full, *inter alia*, to public security authorities or judicial authorities where these authorities request to review, check or copy a medical record in the process of handling a case.³³⁹ Unlike doctors’ duties of disclosure, medical institutions are not obliged to disclose patients’ information appearing in a medical record to relevant authorities but are authorized to make their own decisions where certain conditions are met.³⁴⁰ The details will be discussed in the following part (§ 2.1 *infra*).

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

As mentioned above, article 29 (2) of the *LLD* explicitly provides for the duty of a licensed doctor to report to state authorities where (s)he finds that a patient is **suspected of being involved in a case where someone is injured (“an injury case”) or dies of an abnormal cause**. Although the rule fails to set forth explicitly that gunshot wounds must be disclosed, it is clear that such a case falls within the scope of “**injury case**” in this text. Nurses, however, even though they are healthcare professionals, have no such duty.³⁴¹ Licensed doctors include licensed doctors and assistant licensed doctors under article 2 of the *LLD*. Therefore, a doctor (rather than a nurse or any other healthcare professional) is obliged to disclose a gunshot wound to relevant authorities according to Chinese law.

2.1. Conditions

Chinese law fails to set forth specific rules regulating whether the disclosure of gunshot wounds of patients to authorities constitutes a precondition for healthcare professionals to treat patients. In practice, medical institutions, such as hospitals, do indeed report to public security authorities immediately where a gunshot wound patient has been sent to a hospital;³⁴² the failure to do so would lead to administrative liabilities or criminal sanctions (see § 2.4 *infra*).³⁴³

as “an important instrument of the people's democratic dictatorship. The people's police are the public security administration force and criminal justice force of the state, which are equipped with weapons, and assume the duties of preventing, stopping and punishing illegal and criminal activities according to law, protecting the people, serving economic and social development, maintaining national security, and maintaining the public security order.” The public security authorities at all levels are in charge of public security work nationwide under the leadership of the State Council and local people’s governments.

³³⁷ Counterterrorism Law of the PRC (effective as of 27 April 2018), Article 51.

³³⁸ Law on Licensed Doctors of the PRC, Article 24.

³³⁹ Provisions on the Administration of Medical Records in Medical Institutions, Article 20.

³⁴⁰ *Ibid.*

³⁴¹ Law on Licensed Doctors of the PRC, Article 29 (2); Regulation of Nurses.

³⁴² In one news item it was claimed that a gunshot wound patient was immediately reported to a public security authority; see: <http://news.163.com/07/0303/09/38LA4U7G000120GU.html> (01.04.2019).

³⁴³ Law on Licensed Doctors of the PRC, Article 37 (12).

Moreover, in the event that the gunshot wounds are related to terrorism, Article 51 of the *Counterterrorism Law of the PRC* (“CTL”) provides that where a public security authority carries out an investigation of any suspected terrorist activity, any relevant entities and individuals must provide truthfully any relevant information and materials.

Nonetheless, **emergency treatment** must be given to the patient regardless of whether the gunshot wound has been reported to the relevant authorities. The *LLD* explicitly provides that **doctors** are obliged to adopt emergency treatment measures for the patient and shall not refuse to give emergency treatment for emergency and critical patients. Failure to fulfil the obligation of giving emergency treatment may lead to administrative punishment or criminal liabilities; failure to report may also give rise to the same liabilities.³⁴⁴ The obligation of not refusing to diagnose or treat the wounded or the sick also applies to military doctors, no matter whether in peacetime or during an armed conflict.³⁴⁵ Therefore, doctors must provide emergency treatment for emergency and critical patients regardless of whether the gunshot wounds of the patient have been reported to state authorities. A nurse must immediately inform the doctor where (s)he finds that a patient is in a severe and urgent condition. (S)he must first take necessary urgent rescue measure to save the life of the patient in danger.³⁴⁶ It is unclear whether reporting to authorities is a precondition for treatment, however, in this author’s opinion, under the appropriate legal interpretation, reporting is not a precondition for emergency treatment.

With regard to specific conditions for the disclosure, article 20 of the *PAMRM* offers explicitly specific regulations, which provide that:

“Governmental departments and institutions such as public security, the judiciary, human resources and social protection, insurance and medical incidents technical assessment department may request to check, consult or copy information in medical records in order to deal with cases, carry out professional technical assessment, review or arbitrate medical insurance and review commercial insurance. Medical institutions may provide all or a part of medical records as needed, provided that the following supporting documents are given by the person responsible for these departments:

- (1) legal proof of a request for medical records provided by an administrative department, a judicial authority,³⁴⁷ an insurance department or a medical incidents technical assessment department which makes such a request;
- (2) the responsible person’s valid proof of identity; and
- (3) the responsible person’s valid employment certificate which is verified by the corresponding administrative department, the judiciary, the insurance department or the medical incidents technical assessment department.

Where insurance institutions request to check, consult or copy information in a medical record in order to review commercial insurance, insurance institutions shall also provide a copy of insurance contract and legal proof approved by the patient or the patient’s representative; insurance institutions must provide a copy of the insurance contract and legal proof approved by the deceased patient’s heir or the heir’s representative in case of a deceased patient, except as otherwise provided for by the contract or any law.”

Accordingly, **medical institutions** are required to report to relevant authorities upon the latter’s **application** on the condition that those authorities provide relevant documents that are required by

³⁴⁴ *Ibid.*, Article 37 (2).

³⁴⁵ Measures of the Chinese People’s Liberation Army for the Implementation of the Law of the PRC on Medical Practitioners (effective on 14 September 2000), Articles 13 and 17.

³⁴⁶ Regulations of Nurses, Article 17 (1).

³⁴⁷ Judicial authority in China is composed of three parts: the people’s court system, people’s procuratorate system, and the public security system. See: <https://olemiss.edu/courses/pol324/chnjudic.htm> (26.06.2019).

law. The medical institutions are authorized to decide the scope of the disclosure. As the *PAMRM* regulates only medical records managed by medical institutions, but not a doctor's duties or liabilities, the law does not apply to the medical personnel, *e.g.* doctors, as defined by the *LLD*.

2.2. Scope

Although the *LLD* provides for the duty of doctors to report gunshot wounds in article 29, no rules offer a clear scope of such disclosure in that legislation. In this regard, the *PAMRM* provides for the specific scope of information to be included in a medical record, which consists of almost all the medical information about a gunshot wound patient and thus may constitute the possible scope of reporting (to be determined by the medical institutions, although not all of them) Pursuant to article 2 of the *PAMRM*, "medical records" include both hardcopy records and electronic medical records; both are treated the same way from a legal standpoint.

According to article 9 of the *PAMRM*, medical records should be sorted in the following order: body temperature list, medical orders, admission record, disease record, preoperative discussion record, surgical consent form, anesthesia consent form, pre-anesthesia visit record, surgical safety check record, surgical inventory record, anesthesia records, surgical records, post-anesthesia visit records, postoperative progress note, care records for critically ill patients, discharge records, death records, informed consent for transfusion therapy, special examination (special treatment) consent, consultation records, critical illness (heavy) notice, pathological data, auxiliary examination report form, medical imaging examination data. The medical record shall be bound and preserved in the following order: in-patient medical record home page, admission record, disease record, preoperative discussion record, surgical consent form, anesthesia consent form, pre-anesthesia visit record, surgical safety check record, surgical inventory record, anesthesia record, surgical records, post-anesthesia visit records, postoperative course records, discharge records, death records, death case discussion records, blood transfusion informed consent, special examination (special treatment) consent, consultation records, critical illness (heavy) notice, pathological data, auxiliary examination report form, medical imaging examination data, body temperature list, medical order, and patient care records (article 9 of the *PAMRM*).

Where the gunshot wound concerns terrorism, the *CTL* provides that **all entities and individuals** have the obligation to assist and cooperate with the relevant departments in counterterrorism work, and must report any suspected terrorist activity, or person suspected of terrorist activities that they have discovered, to the public security authority or the relevant department in due time.³⁴⁸ A public security authority investigating any suspected terrorist may interrogate, inspect, and summon the suspect, may extract or collect a **headshot, fingerprints, iris scan or other biometric identification information, blood, urine, cast-off cells or other biologic samples, and keep his or her signature on file**. Furthermore, the public security authority is empowered to interrogate any person who knows the facts related to terrorism at the office of a public security authority or any other sites.³⁴⁹

Furthermore, the *CPL* imposes on any entity or individual that discovers any facts of a crime or a criminal suspect both the right and the obligation to report the crime or criminal suspect to a public security authority, a people's procuratorate, or a people's court.³⁵⁰ Accordingly, where the gunshot wound concerns a crime, a person may, and is obliged to, report "any facts" of a crime to a public security authority, and no other person or authority may prevent him or her from doing so. Failure to report, however, does not give rise to criminal liability unless it is proven that the person intentionally assisted

³⁴⁸ Counterterrorism Law of the PRC (effective as of 27 April 2018), Article 9.

³⁴⁹ *Ibid.*, Article 50.

³⁵⁰ Criminal Procedure Law of the PRC, Article 110 (3).

a suspect to escape or to hide, or protected the suspect by falsifying evidence.³⁵¹ Nonetheless, the duty of disclosure of a doctor set forth in article 29 of the *LDD* obviously **constitutes an exception** to the *CPL*. It can be derived from the theory of hierarchy of legislations, by which the general law should yield to the special law. In the present case, the *CPL* is a general law but the *LDD* constitutes a special law and therefore takes precedence over the general law where it applies. Thus, under the *LDD*, a doctor has a duty of disclosure, but since the *LDD* does not apply to an entity or individual other than a doctor, where such entity or individual discovers any facts concerning a gunshot wound, there is a right, but not an obligation, to report to the relevant authorities. Where a doctor discovers any facts concerning a gunshot wound, however, he is obliged to report. Failure to do so will give rise to legal liability of the doctor (§2.4 *infra*).

2.3. Purpose

The purposes of reporting and the authorities to whom such reporting must/may be made may vary depending on the specific circumstances.

The *LDD* provides for neither the purpose of the disclosure nor the specific authorities to which such disclosure may be made. However, as stated above (§ 2.2 *supra*), the *CPL* specifies that any entity or individual that discovers any facts of a crime or a criminal suspect shall have the right and the obligation to report the crime or criminal suspect to a public security authority, a people's procuratorate, or a people's court.³⁵² Where gunshot wounds concern a criminal case, Chinese law offers no specific purpose but a general purpose instead, which aims to "ensure the accurate and timely finding of criminal facts and correct application of the law, sanction criminals, ensure that innocent people are not incriminated, raise citizens' awareness of abiding by law and combating crimes, safeguard the socialist legal system, respect and protect human rights, protect the personal rights, property rights, democratic rights, and other rights of citizens, and ensure smooth progress in China's socialist construction."³⁵³ The obligation to report to **public security authorities, procuratorates or courts** applies to any entity or individual (including any healthcare professional).

Where the gunshot wounds concern terrorism, the purpose for the disclosure is "to prevent and impose sanctions on terrorist activities, to safeguard national security, public security, and the security of people's lives and property."³⁵⁴ In this case, the relevant authority is the public security authority.

2.4. Consequences of non-compliance

There are specific rules in Chinese law defining the consequences of non-compliance with duties of disclosure of gunshot wounds. Under article 37 (2) of the *LDD*, where doctors fail, in the course of carrying out medical practice, to report according to the regulations, in case of malpractice, or when an epidemic situation is found, or when a patient is suspected of being involved in an injury case or dies of an abnormal cause, the doctors shall be warned or have their medical practice suspended for a period of between six months and one year (depending on the severity of the facts) by the health administration departments of the people's government (*i.e.* The National Health Commission of the PRC³⁵⁵) at or above the county level; the licensed certificates shall be revoked in cases with serious consequences; if the facts are deemed to constitute a criminal offence, possible criminal liabilities shall

³⁵¹ Criminal Law of the PRC, Article 310.

³⁵² Criminal Procedure Law of the PRC, Article 110 (3).

³⁵³ *Ibid.*, Article 2.

³⁵⁴ Counterterrorism Law of the PRC, Article 1.

³⁵⁵ The National Health Commission of the PRC was re-structured according to the decision by the CPC Central Committee on deepening reform of Party and state institutions adopted by the 19th CPC National Congress and the third plenary sessions of the Central Committee, available at: <http://www.nhc.gov.cn/>. (04.02.2019).

be investigated and prosecuted according to law. In this regard, article 310 of the Criminal Law of the PRC (“CL”) provides that a doctor’s failure to report does not constitute a crime, in and of itself, unless it is proven that the doctor intentionally assisted a suspect to escape or to hide, or protected the suspect by falsifying evidence. Under such circumstances, the doctor will be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or public surveillance; when the circumstance are severe, to not less than three years but no more than ten years of fixed-term imprisonment.³⁵⁶

When the gunshot wounds concern terrorism, the doctors shall be sentenced to imprisonment of not more than three years, criminal detention or surveillance if the circumstances are serious, where (s)he, being **obviously aware** of any other person's commission of a crime of espionage, terrorism or extremism, refuses to provide relevant information or evidence, when a judicial authority investigates or collects relevant evidence.³⁵⁷

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Over the past few decades, doctor-patient relations in China have deteriorated. Several severe conflicts between doctors and patients have taken place in China, in which many doctors or other medical professionals have been physically attacked by patients.³⁵⁸ In order to punish illegal acts and crimes against medical staff, maintain the normal medical order and establish harmonious relationships between medical staff and patients, the SPC, the Supreme People's Procuratorate (“SPP”), the Ministry of Public Security (“MPS”), the Ministry of Justice and the National Health and Family Planning Commission (“MJ”) jointly promulgated the *Opinions of Punishing Illegal Acts and Crimes against Medical Staff in accordance with Law and Maintaining the Normal Medical Order* (“Opinions”) on 22 April 2014. This type of Opinion is a document with judicial interpretation nature and binding legal effect.³⁵⁹ The Opinions offer a special protection to **healthcare professionals** (doctors, nurses and other medical staffs) and impose heavier legal sanctions on offenses or crimes which have been committed against them with particular cruelty, illustrate “substantial subjective malice” or are very dangerous, or concerning a crime against medical staff with adverse social impacts. Specifically, it punishes the following acts:

- 1) Whoever beats medical staff, intentionally injures medical staff, or intentionally damages public or personal property in a medical institution;
- 2) Persons who set up mourning halls without permission, lay wreaths, burn joss paper, hang banners, block the gates or disrupt medical order by other means in a medical institution;
- 3) Whoever illegally restricts personal freedom of any medical staff by prohibiting him or her from leaving the workplace or by other means;
- 4) Whoever openly insults or intimidates medical staff;

³⁵⁶ Criminal Law of the PRC, Article 310.

³⁵⁷ *Ibid.*, Article 311.

³⁵⁸ W. Jing, H. Otten, L. *etc.*, Improving the Doctor-Patient Relationship in China: the Role of Balint Groups (2014), available at: <https://journals.sagepub.com/doi/10.2190/PM.46.4.g> (03.04.2019).

³⁵⁹ The legal basis for the binding effect of a judicial interpretation arises from the Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law (effective as of on 10 June 1981). Paragraph II of that document provides that the interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People’s Court.

- 5) Whoever enters a medical institution illegally carrying a firearm, ammunition or a tool subject to regulation, or any explosive, radioactive, toxic or corrosive substance;
- 6) Whoever intentionally escalates a matter and incites another person to commit an illegal act or a crime against a medical institution or any medical staff, or engages in extortion, picks quarrels and makes trouble, or commits another act in the name of handling a medical dispute, with the authorization of another person.

Furthermore, the *Opinions* also provide that a working mechanism for coordination and cooperation shall be established and improved (section IV of the *Opinions*). In order to implement the *Opinions*, the *National Development and Reform Commission* (“NDRC”), the *People’s Bank of China* (“PBC”), the *National Health Commission* (“NHC”), *et al* issued a *Memorandum of Understanding on Taking Joint Disciplinary Actions against Those Liable for Unfaithful Acts that Seriously Disrupt the Normal Order of Medical Services* (“*Memorandum*”) on 25 September 2018. The *Memorandum* defines the objects of joint disciplinary actions as the “natural persons that are given administrative detention or a more severe punishment by the public security organ due to their commission of, or participation in, criminal activities related to medical treatment or natural persons who are investigated for criminal liabilities for their acts that seriously disrupt the normal order of medical services”.

In addition to the six actions set forth in the *Opinions*, the *Memorandum* adds two more actions defined as unfaithful acts that seriously disrupt the normal order of medical services: reselling hospital registration numbers and other illegal and criminal activities related to medical treatment that damage or disrupt the normal diagnosis and treatment order of hospitals. The *Memorandum* sets forth a series of measures to take against the offences against medical professionals and medical services as follows (Section II of the *Memorandum*):

- 1) Restricting subsidized financial support (to be implemented by the NDRC and the State-owned Assets Supervision and Administration);
- 2) Guiding insurance companies in adjusting the property insurance premium rates according to the principle of risk pricing (to be implemented by that enforced by the China Banking and Insurance Regulatory Commission);
- 3) Regarding unfaithful acts that seriously disrupt the normal order of medical services as an important reference factor for restricting unfaithful persons from enjoying preferential policies (to be implemented by the NDRC, the Ministry of Commerce, the General Administration of Customs, and the State Administration for Market Regulation);
- 4) Restricting those who do not act in good faith from assuming the legal representative, director, supervisor, or senior executive of a state-owned enterprise (to be implemented by the Organization Department of the CPC Central Committee, the State-Owned Assets Supervision and Administration, and the State Administration for Market Regulation);
- 5) Restricting those who do not act in good faith from being registered as the legal representative of a public institution (to be implemented by the State Commission Office of Public Sectors Reform);
- 6) Restricting those who do not act in good faith from being recruited (employed) as a civil servant or staff member of any public institution (to be implemented by the Organization Department of the CPC Central Committee and the Ministry of Human Resources and Social Security);
- 7) Revoking the relevant honorary titles in a timely manner by following the procedures, canceling the qualification of objects of disciplinary actions in participating in the selection of advanced and outstanding individuals, and prohibiting awarding the objects of disciplinary actions such honorary titles as “Moral Model,” (“道德模范”) “Model of Labor,” (“劳动模范”) and “May 1st Labor Medal” (“五一劳动奖章”) (to be implemented by the Office of the Spiritual

Civilization Development Steering Commission of the CCCPC, All China Federation of Trade Unions, the Central Committee of the Communist Youth League, the All-China Women's Federation, and other relevant entities);

- 8) Restricting those who do not act in good faith from taking a plane, an upgraded sleeper train, a G-series high-speed CRH train, a first-class or upper deck seat of a D-series high-speed CRH train, and other upscale consumptions as well as other consumptions not necessary for living and work where the unfaithful person fails to perform the payment obligations as determined in an effective legal document during a time limit as prescribed in the notice on enforcement and is taken the measure of restricted consumption by the people's court, or fails to perform the obligation as determined in an effective legal document and is included in the list of unfaithful persons subject to enforcement by the people's court according to the law (to be implemented by the Ministry of Transport, China Railway Corporation, the Civil Aviation Administration, the Ministry of Culture and Tourism, the Ministry of Natural Resources, the Ministry of Housing and Urban-Rural Development, and the Supreme People's Court);
- 9) Incorporating the unfaithful persons that seriously disrupt the normal order of medical services into the National Credit Information Sharing Platform and reporting to the entities where they work (to be implemented by the National Health Commission and the Ministry of Public Security);
- 10) Releasing the unfaithful persons that seriously disrupt the normal order of medical services to the public through the website of "Credit China" and other major news websites (to be implemented by the Publicity Department of the CPC Central Committee and the Office of the Central Cyberspace Affairs Commission);
- 11) Restricting the unfaithful persons from obtaining the qualification of a certification institution. (to be implemented by the State Administration for Market Regulation);
- 12) Regarding information on illegal and unfaithful acts as the reference for the approval or recording of the formation of securities companies, insurance companies, fund management companies, and futures companies and the changes in equities or actual controllers, the recording of the changes in shareholders or actual controllers of insurance intermediary business licensing or professional insurance intermediaries, the registration of private investment fund managers, changes in major issues, and recording of funds (to be implemented by the China Securities Regulatory Commission and the China Banking and Insurance Regulatory Commission);
- 13) Regarding the illegal and unfaithful acts as a reference for the qualification approval or recording of the directors, supervisors, and senior executives of securities companies, insurance companies, fund management companies, and futures companies, and persons in charge of branch offices (to be implemented by the China Securities Regulatory Commission and the China Banking and Insurance Regulatory Commission);
- 14) Regarding the illegal and unfaithful acts as a reference for the approval of independent fund sales agencies, conducting strict approval of applications for practicing qualifications in securities, funds, and futures filed by the relevant subjects with records of poor faith, and paying close attention to the relevant subjects that have become securities, fund, or futures practitioners. (to be implemented by the Securities Regulatory Commission);
- 15) Restricting those who do not act in good faith from enjoying preferential policies in investment and other fields (to be implemented by the National Development and Reform Commission and other relevant entities);
- 16) Regarding the unfaithful acts as an important reference for the review of the relevant license in a dishonest person's application for operational Internet information services (to be implemented by the Ministry of Industry and Information Technology).

Although both the Opinions and the Memorandum fail to explicitly state that the protections are offered to healthcare professionals in the context of gunshot wounds, under the appropriate legal interpretation, the aforesaid rules will be applied.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

As stated in the beginning of this report, the conflicts between medical ethics and duties of disclosure of gunshot wounds have existed for a long time and have evolved. However, when limited to gunshot wounds related to criminal acts or terrorism, it seems that those conflicts do not really exist. The following can be concluded from the aforesaid legislation: generally, doctors and nurses are obliged to maintain confidentiality of patients in compliance with medical ethics; exceptionally, doctors and, under emergency circumstances, nurses are obliged to report to state authorities, where a patient with a gunshot wound is suspected of being involved in an injury case or dies of an abnormal cause. Particularly, where the gunshot wounds are related to crimes and terrorist activities, anyone (all healthcare professionals included), is obliged to provide the information and materials. Chinese legislation does not yet offer resolution of potential conflicts where the gunshot wounds are unrelated to criminal and terrorist activities.

C. COLOMBIA

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

As mentioned in the report “Domestic Normative Frameworks For The Protection Of Healthcare”³⁶⁰, Colombia has had to deal with an armed conflict (that has now lasted for over 60 years), as well as with other emergencies. Its healthcare system has been adapted to take into account both of these situations.

A comprehensive system has been put in place to provide healthcare services for victims of the armed conflict. Colombia has developed normative frameworks specifically for the protection of healthcare delivery in armed conflicts and other emergencies. In addition, a 2011 law on reparations for victims and restitution of land includes various provisions on access to healthcare, as part of the reparations for victims of the armed conflict. The victims of armed conflict and other situations of violence have the right to receive healthcare through two systems:

- a. through the Solidarity Fund of the Social Security System, which offers the possibility for healthcare institutions to charge to the Fund the expenses of assistance to victims.
- b. through the Victims and Land Restitution Law of 2011, which includes a list of health services to which victims of the armed conflict are entitled (hospitalization, drugs, transportation, treatments).

Internally displaced victims of armed groups are also considered as beneficiaries of attention, assistance and integral reparation obligations established by the Law³⁶¹.

The Colombian Constitutional Court has adopted the general definition of “professional secrecy” as being “any reserved or confidential information acquired through the exercise of a certain profession or activity”³⁶². A specific (though not very detailed) definition of “medical secrecy” appears in Law 23 of 1981 (Law 23)³⁶³. According to Art. 37 of Law 23, “professional medical secrecy” is “what is not ethical or legal to reveal without a just cause”³⁶⁴.

Authors³⁶⁵ underline the fact that the obligation not to reveal medical secrets is in line with the provisions of International Humanitarian law, as consecrated in Protocol II of the Geneva Conventions.

³⁶⁰ Domestic Normative Frameworks for The Protection of Healthcare, Report of The Brussels Workshop 29-31 January 2014, International Committee of the Red Cross, May 2015, p. 27.

³⁶¹ *Ibid.*, p. 75.

³⁶² Corte Constitucional, Auto No. 006/93: “Por secreto profesional se entiende la información reservada o confidencial que se conoce por ejercicio de determinada profesión o actividad; como los sacerdotes, por confesión de los delincuentes; los abogados o defensores, por revelación de sus patrocinados; los militares, por estar en cierto establecimiento de la defensa nacional, en investigaciones o cargos que impiden toda manifestación”. (Diccionario Enciclopédico De Derecho Usual”, Guillermo Cabanellas, Ed. Heliasta S.R. L., Bs. Aires, 1986, tomo VII, pág. 309), available at <http://www.corteconstitucional.gov.co/relatoria/Autos/1993/A006-93.htm> (17.10.18).

³⁶³ Ley 23 DE 1981, (febrero 18), Diario Oficial No. 35.711 de 27 de febrero de 1981. Por la cual se dictan normas en materia de ética médica available at https://www.icbf.gov.co/cargues/avance/docs/ley_0023_1981.htm (09.10.2018).

³⁶⁴ Ley 23, Art. 37: « Entiéndese por secreto profesional médico aquello que no es ético o lícito revelar sin justa causa”.

³⁶⁵ G. Salgero, La confidencialidad en el ámbito de la salud y sus valores implícitos : secreto, intimidad y confianza, p. 44, Bogotá 2009, available at http://www.bioeticaunbosque.edu.co/Investigacion/tesis/SALUD/GLORIA_LUCIA_RODRIGUEZ.pdf (09.10.2018).

Art. 10.4 of the aforementioned Protocol II protects practitioners from being penalized for refusing or failing to give information concerning the wounded and sick who are, or who have been, under their care³⁶⁶.

In the following sections, we shall specify the different pieces of Colombian legislation that regulate the topic of medical secrecy.

1.1. The Colombian Constitution

Colombian Constitution. Art. 15 of the Colombian Constitution (Cst)³⁶⁷, consecrates the general right to privacy:

“All individuals have the right to personal and family privacy and to their good reputation, and the State has to respect them and to make others respect them.

Similarly, individuals have the right to know, update, and rectify information collected about them in data banks and in the records of public and private entities.

Freedom and the other guarantees approved in the Constitution will be respected in the collection, processing, and circulation of data [...]”³⁶⁸.

Following in this vein, Art. 74 Cst states the principle according to which “professional secrets are inviolable”.

Art. 95 Cst states that “... The following are duties of each person and each citizen: (...) 2. To strive, in accordance with the principle of social solidarity, to respond with humanitarian actions when faced with situations that endanger the life or health of individuals [...]”.

³⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts Entry into force: 7 December 1978, in accordance with Article 23 Article 10 - General protection of medical duties, Art. 10: “1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.

4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care”, available at <https://www.ohchr.org/en/professionalinterest/pages/protocolii.aspx> (09-10.2018).

³⁶⁷ Colombian Constitution, available at http://www.corteconstitucional.gov.co/mwg-internal/de5fs23hu73ds/progress?id=0jDMKFcm-ij9nuZ_5cpuy70dPTLyYgm3pkkWf1YR4HM (09.10.2018).

³⁶⁸ Colombian Constitution, unofficial English translation, available at https://www.constituteproject.org/constitution/Colombia_2005.pdf (09.10.2018).

1.2. Colombian Codes

The Criminal Code

The Colombian Criminal Code (CCC)³⁶⁹ refers to **professional secrecy** in Art. 417³⁷⁰. This provision provides for a punishment, which consists of a fine and the loss of professional working post **for public servants** who fail to **inform the authorities of criminal conduct that must be investigated *ex officio* (i.e. without a complaint)**. A punishment is also imposed on **public servants** who **reveal documents or information that must be kept secret** (art. 417 CCC)³⁷¹.

The Code of Criminal Procedure

Another source to take into account is the Colombian Code of Criminal Procedure (CCP)³⁷². **Art. 218 CCP³⁷³ imposes an obligation on practitioners to inform the police, whenever a person with bodily or health injuries is admitted for medical treatment:**

“Notice of admission of presumed victims. Whosoever in a hospital, a public health institution, a medical practice or other similar establishment, either public or private, receives or admits a person **who has suffered a bodily or health injury**, being the presumed victim of a crime, shall immediately inform the police post”.

Art. 67 CCP³⁷⁴ provides that **every person must denounce to the authorities the crimes (*delitos*) that must be investigated *ex officio*** of which s/he has knowledge. The second part of that provision refers specifically to public servants, establishing that whenever they have knowledge that a crime that must be investigated *ex officio* has been committed, they must immediately start an investigation if they are competent to do so, or, if not, immediately inform the competent authority.

³⁶⁹ Lex 599 DE 2000, (Julio 24) Por la cual se expide el Código Penal, available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=6388> (09.10.18).

³⁷⁰ CCC, Art. 417 : « Abuso de autoridad por omisión de denuncia. El servidor público que teniendo conocimiento de la comisión de una conducta punible cuya averiguación deba adelantarse de oficio, no dé cuenta a la autoridad, incurrirá en multa y pérdida del empleo o cargo público. La pena será de dos (2) a cuatro (4) años de prisión si la conducta punible que se omitiere denunciar sea de las contempladas en el delito de omisión de denuncia de particular”.

³⁷¹ CCC, Art. 418 : “Revelación de secreto. Modificado por el art. 25, Ley 1288 de 2009. El servidor público que indebidamente dé a conocer documento o noticia que deba mantener en secreto o reserva, incurrirá en multa y pérdida del empleo o cargo público. Si de la conducta resultare perjuicio, la pena será de uno (1) a tres (3) años de prisión, multa de quince (15) a sesenta (60) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas por cinco (5) años ».

³⁷² Código de Procedimiento Penal, Ley 906 de 2004, available at http://leyes.co/codigo_de_procedimiento_penal.htm (09.10.18).

³⁷³ CCP, Art. 218 : « Aviso de ingreso de presuntas víctimas. Quien en hospital, puesto de salud, clínica, consultorio médico u otro establecimiento similar, público o particular, reciba o dé entrada a persona a la cual se le hubiese ocasionado daño en el cuerpo o en la salud, dará aviso inmediatamente a la dependencia de policía judicial que le sea más próxima o, en su defecto, a la primera autoridad del lugar”.

³⁷⁴ CCP, Art. 67: “Deber de denunciar. Toda persona debe denunciar a la autoridad los delitos de cuya comisión tenga conocimiento y que deban investigarse de oficio. El servidor público que conozca de la comisión de un delito que deba investigarse de oficio, iniciará sin tardanza la investigación si tuviere competencia para ello; en caso contrario, pondrá inmediatamente el hecho en conocimiento ante la autoridad competente”.

1.3. Colombian Laws and Resolutions

Law 23

At the level of national legislation, we refer to the aforementioned Law 23, which regulates the **ethics of the medical profession**. Art. 37 *in fine* of Law 23³⁷⁵, provides that **medical practitioners are obliged to maintain confidentiality of professional secrets** “related to anything that, in the framework of the exercise of their profession, they have seen, heard or understood”. The same provision establishes an exception to the obligation to maintain the confidentiality of professional medical secrets, *i.e.* “with the **exception of cases contemplated by the legal provisions**”.

Similarly, Art. 38 of Law 23³⁷⁶, enumerates the cases in which, by applying “prudence”, **a professional secret may be revealed**. Among these cases, par. d) of Art. 38 of Law 23 mentions that a professional secret may be revealed to **judicial authorities or medical and hygiene authorities, in the cases provided by law**. The Constitutional Court³⁷⁷ has stated that the obligation to reveal professional secrets as provided by law stands to the extent that:

- a. the disclosure of the information transmitted by the patient to the doctor may not cause the self-incrimination of the patient,
- b. it will not be possible to identify the patient from the sanitary and epidemiologic reports.

Art. 39 of Law 23³⁷⁸, imposes on medical practitioners the obligation to make certain that their assistants also maintain the confidentiality of unrevealed professional secrets. Art. 24 of Decree 3380³⁷⁹, establishes a limit to this obligation, *i.e.*; that the practitioners shall not be responsible if their assistants actually do reveal the secret³⁸⁰.

Law 266

Another piece of legislation relevant to the subject of medical secrecy is Law 266 of 1996 (Law 266)³⁸¹. This law contains provisions regulating the deontological responsibility for the exercise of **the nursing profession (enfermería)** in Colombia. Article 18 of Law 266, states that professional nurses shall

³⁷⁵ Ley 23, Art. 37: “[...] El médico está obligado a guardar el secreto profesional en todo aquello que por razón del ejercicio de su profesión haya visto, oído o comprendido, salvo en los casos contemplados por disposiciones legales”.

³⁷⁶ Ley 23, Art. 38 : « Teniendo en cuenta los consejos que dicte la prudencia, la revelación del secreto profesional se podrá hacer: a) Al enfermo, en aquello que estrictamente le concierne o convenga; b) A los familiares del enfermo, si la revelación es útil al tratamiento; c) A los responsables del paciente, cuando se trate de menores de edad o de personas mentalmente incapaces; d) A las autoridades judiciales o de higiene y salud, en los casos previstos por la ley; e) A los interesados cuando por defectos físicos irremediables o enfermedades graves infecto-contagiosas o hereditarias, se pongan en peligro la vida del cónyuge o de su descendencia”.

³⁷⁷ Sentencia C-264/96, available at <http://www.corteconstitucional.gov.co/relatoria/1996/c-264-96.htm> (09.10.2018); Sentencia C-301/12, available at <http://www.corteconstitucional.gov.co/relatoria/2012/c-301-12.htm> (09.10.2019): “[...] salvo cuando se trate de informaciones que el paciente ha confiado al profesional y cuya declaración pueda implicar autoincriminación, y siempre que en los informes sanitarios o epidemiológicos no se individualice al paciente”.

³⁷⁸ Ley 23, Art 39 « El médico velará porque sus auxiliares guarden el secreto profesional ».

³⁷⁹ Decreto 3380 de 1981, (noviembre 30). Por el cual se reglamenta la Ley 23 de 1981, art. 24: “El médico velará porque sus auxiliares guarden el secreto profesional, pero no será responsable por la revelación que ellos hagan”.

³⁸⁰ Secreto profesional, available at <https://encolombia.com/medicina/guiasmed/mision-medica/modulo3misionmedica11/> (09.10.2018).

³⁸¹ Ley 266 DE 1996 (Enero 25), Diario Oficial No. 42.710, del 5 de febrero de 1996. Por la cual se reglamenta la profesión de enfermería en Colombia y se dictan otras disposiciones, available at https://www.mineducacion.gov.co/1759/articles-105002_archivo_pdf.pdf (09.10.2018).

maintain professional secrecy at all times during the care that they afford to a patient - and even after the death of the patient - “except in situations provided by law”. The term professional secrecy is defined as the confidentiality that must be kept by the nursing professional in order to guarantee the right to privacy of the patient. Secrecy include everything that has been seen, heard, deduced and written in the framework of the exercise of the profession.

Law 35

Law 35 of 1989³⁸², which regulates the professional secrets in the hands of **dentists**, takes the same approach. Pursuant to Art. 23 of Law 35³⁸³, dentists are obliged to keep confidential everything that, in the framework of the exercise of their profession, they see, hear and understand - except when they are released from that obligation by a legal provision. They are also obliged to instruct their assistants on the obligation to maintain professional secrecy.

Law 1090

With respect to the profession of **psychologist**, Law 1090 of 2006³⁸⁴, (the Deontological Code for psychologists) states, in Art. 10, that psychologists must maintain complete confidentiality concerning the person, situation or institution where they intervene, the reasons for consultation and the identity of the persons consulting, except in cases contemplated by the law. Art. 10 f) of this Law provides that a psychologist must maintain professional secrecy regarding any prescription or act that is performed in connection with their specific tasks, as well as the data or facts that are communicated to them as a result of their professional activity.

Finally, the law imposes obligations on healthcare providers to inform the authorities when they receive information about **violence against women** or cases of abuse or neglect of **minors** (these rules do not refer specifically to gun injuries):

Law 1257

With respect to violence against **women**, Law 1257 of 2008³⁸⁵ states, in Art. 9.9.9, that the entities responsible for gender violations shall provide information on gender-based violence to the information system determined by the Ministry of Social Protection and to the Presidential Advisory Office for Women's Equity, through the Gender Affairs Observatory, for information, monitoring and follow-up. Additionally, Decree 4796 of 2011³⁸⁶, provides, in Art. 4, that, pursuant to Article 9, Paragraph 9, of Law 1257 of 2008, the entities responsible for reporting information on gender-based violence within the framework of that law must submit such information to the Social Protection

³⁸² Ley 35 de 1989, (Marzo 8), Diario Oficial No. 38.733, del 9 de marzo de 1989, Sobre ética del odontólogo colombiano available at http://www.saludcapital.gov.co/Normo/jur/Ley_35_de_1989.pdf (09.10.18).

³⁸³ Ley 35 de 1989, (Marzo 8), Diario Oficial No. 38.733, del 9 de marzo de 1989, Sobre ética del odontólogo colombiano available at http://www.saludcapital.gov.co/Normo/jur/Ley_35_de_1989.pdf (09.10.18), art. 23: “El odontólogo está obligado a guardar el secreto profesional en todo lo que, por razón del ejercicio de su profesión, haya visto, escuchado y comprendido, salvo en los casos en que sea eximido de él por disposiciones legales. Así mismo, está obligado a instruir a su personal auxiliar sobre la guarda del secreto profesional”.

³⁸⁴ Ley 1090 de 2006 (Septiembre 06), por la cual se reglamenta el ejercicio de la profesión de Psicología, se dicta el Código Deontológico y Bioético y otras disposiciones, available at <http://www.sociedadescientificas.com/userfiles/file/LEYES/1090%2006.pdf> (09.10.2018).

³⁸⁵ Ley 1257 de 2008, (diciembre 4), Diario Oficial No. 47.193 de 4 de diciembre de 2008, available at https://www.oas.org/dil/esp/LEY_1257_DE_2008_Colombia.pdf (09.10.2018).

³⁸⁶ Ministerio de Salud y Protección Social, Decreto número 4796 de 2011, available at http://wsp.presidencia.gov.co/Normativa/Decretos/2011/Documents/Diciembre/20/dec47962012201_1.pdf (09.09.2018).

Information System of the Ministry of Health and Social Protection, in accordance with the regulations issued by that Ministry.

Law 1438

Concerning violations against **children and adolescents**, Law 1438 of 2011³⁸⁷ provides, in Art. 21, for the **obligation to report possible violation of rights, mistreatment or neglect**. The Health Promoting Entities and Health Providing Institutions must notify the authorities (*i.e.*; the Colombian Family Welfare Institute, the police stations or, in their absence, the police inspectors or municipal or district staff), of cases in which there may be negligence on the part of parents or adults responsible for the care of children and adolescents. The mentioned authorities must also report to the Attorney General's Office when they detect signs of physical or psychological abuse or sexual violence.

Law 782³⁸⁸

This law requires hospitals to provide immediate care to victims of terrorist attacks or any armed conflict, regardless of ability to pay.

Resolution 4481

Resolution 4481³⁸⁹, adopted by the Colombian Ministry of Health on 28.12.2012, adopts the Manual of the Medical Mission of 2012 (“MMM”), which applies in times of **armed conflicts and other situations of violence**. The MMM enumerates the rights and responsibilities of healthcare personnel, *inter alia* the obligation of safeguarding professional secrecy. The Manual provides a **series of recommendations**³⁹⁰, namely concerning the necessity to protect medical confidentiality as an abiding principle of healthcare ethics in all circumstances (*i.e.*; in peacetime as well as in armed conflict and other emergencies). The exceptions to protecting medical secrets must be limited and strictly circumscribed in domestic legislation. Medical secrecy is a right of the patient rather than a simple privilege and ethical duty of healthcare personnel. **The information disclosed must only be that which is strictly required**. Disclosure of patients’ personal and healthcare-related information without consent where there is no legal obligation to do so, constitutes a violation of a professional duty under their code of ethics and the responsible person may be subject to administrative or disciplinary measures. The obligations of confidentiality include the duty to ensure proper training for healthcare personnel to apply and respect their ethical duties, particularly for resolving dilemmas when confronted with legal obligations to disclose patients’ personal and healthcare-related information. Law enforcement officials (police, prosecutors) should be properly trained in the ethical duties of healthcare personnel. Appropriate measures should be taken to manage healthcare personnel’s interactions with the media, particularly in emergency situations, in order to better protect medical confidentiality. The media should also be made aware of the ethical duties of healthcare personnel, and respect for medical confidentiality should be enshrined in their code of ethics. Section 3.5 of the

³⁸⁷ Ley 1438 de 2011, (enero 19), por medio de la cual se reforma el Sistema General de Seguridad Social en Salud y se dictan otras disposiciones, available at <http://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Leyes/1680431> (09.10.2018).

³⁸⁸ Ley 782 de 2002, available at <http://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=6677> (19.02.19), Artículo 19. Las instituciones hospitalarias, públicas o privadas, del territorio nacional, que prestan servicios de salud, tienen la obligación de prestar atención de manera inmediata a las víctimas de atentados terroristas, combates y masacres, ocasionadas en marco del conflicto armado interno, y que la requieran, con independencia de la capacidad socioeconómica de los demandantes de estos servicios y sin exigir condición previa para su admisión.

³⁸⁹ Ministerio de Salud y Protección Social, Resolución n°. 4481 de 2012, available at http://legal.legis.com.co/document?obra=legcol&document=legcol_d40ba452eae100d6e0430a01015_100d6 (06.11.18).

³⁹⁰ Resolución n° 4481 de 2012, MMM, Recommendations 11 and 12.

MMM, as annexed to Resolution 4481,³⁹¹ refers to those who cause practitioners to violate medical secrets. According to this Section, forcing practitioners to reveal information that they acquired with respect to wounded and sick persons that they treated; sanctioning practitioners for refusing to furnish such information; and sanctioning the disclosure of medical information to the competent authorities where specifically authorized, constitute such violations. Medical ethics remain the same during armed conflict as in peacetime.³⁹²

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

Article 38 of Law 23, permits practitioners to disclose professional secrets, “based on grounds of prudence”, inter alia d) to the judicial or health and hygiene authorities, in the cases provided for by law. This provision must be read in combination with **Article 218 of the CCP, which, as previously discussed³⁹³, imposes on practitioners the obligation to notify the police in cases of injuries.**

Despite the fact that Article 218 CCP is drafted in general terms - in the sense that it does not refer specifically to gunshot injuries, but to damages caused to the body or health - it is obvious that **gunshot injures would be included in the notion of “damage caused to the body or to health”**.

The Supreme Court of Justice, Chamber of Criminal Cassation, stated that the CCP only obliges **the physician or personnel in charge to give notice of admission of the person suffering damage to her body or health, but no more**”.³⁹⁴ This judgment follows the line of reasoning of Sentence C-264 of the Constitutional Court³⁹⁵, according to which the doctor should **only inform authorities of the admission of people who suffer damage** to the body or health, but **they should not disclose information, given by the patient in confidence, based on which self-incrimination could be established nor information enabling identification of the patient**³⁹⁶.

³⁹¹ Resolución n°. 4481 de 2012, MMM, Sec. 3.5: “Violaciones al secreto profesional: a) Obligar a las personas que ejerzan una actividad médica, a revelar información que habrían adquirido sobre los heridos y los enfermos por ellas asistidos.

b) Sancionar a las personas que ejerzan una actividad médica por el hecho de no proporcionar o de negarse a proporcionar información sobre los heridos y los enfermos a quienes asista o haya asistido.

c) Sancionar la revelación lícita de información médica a las autoridades competentes ».

³⁹² The Implementation of Rules Protecting the Provision of Healthcare in Armed Conflicts and Other Emergencies: A Guidance Tool, p. 366, available at <http://healthcareindanger.org/wp-content/uploads/2017/05/hcid-guiding-tool-icrc-eng.pdf> (10.11.18).

³⁹³ See §1.2 *supra*.

³⁹⁴ Corte Suprema de Justicia-Sala de Casación Penal, M.P., Jorge Aníbal Gómez Gallego. Proceso N° 14043 de 2002, available at <https://www.womenslinkworldwide.org/en/files/2708/gjo-col-14043-es-pdf.pdf> (10.10.2018).

³⁹⁵ Corte Suprema de Justicia, Sentencia C-264/96, available at <http://www.corteconstitucional.gov.co/relatoria/1996/c-264-96.htm> (10.10.2018); in doctrine J. Arbeláez & D. Cuesta, El secreto profesional en Colombia, regulación y sanciones por su revelación, p. 50 ff, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwja6eGmsoreAhWBp4sKHeHWD00QFjACegQIBxAC&url=http%3A%2F%2Frevistas.unibague.edu.co%2Findex.php%2Fdsmiltresmil%2Farticle%2Fdownload%2F20%2F5&usg=AOvVaw0eQv_Ll1vajyZgSIlw8B4e (10.10.2018).

³⁹⁶ Arbeláez & D. Cuesta, El secreto profesional en Colombia, regulación y sanciones por su revelación, p. 50 ff, available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwja6eGmsoreAhWBp4sKHeHWD00QFjACegQIBxAC&url=http%3A%2F%2Frevistas.unibague.edu.co%2Findex.php%2Fdsmiltresmil%2Farticle%2Fdownload%2F20%2F5&usg=AOvVaw0eQv_Ll1vajyZgSIlw8B4e (10.10.2018).

Exceptions to this rule can be extreme situations in which the disclosure of a secret could serve to prevent the perpetration of a serious crime³⁹⁷.

2.1. Conditions

The disclosure of gunshot wounds of patients to authorities is not a precondition to medical treatment of a patient.

In practice, the question of the modalities of the reporting is linked to that of the treatment of elements of proof in criminal cases. According to Resolution 6394 of the Colombian General Prosecutor³⁹⁸, the entities furnishing medical services (*Instituciones prestadoras de servicios "IPS"*) must furnish to the authorities (judicial police), **the elements that appeared in the course of medical and surgical procedures** practiced on persons who suffered damage in their body or their health, as a consequence of a possible crime³⁹⁹. The rules contained in Resolution 6394 apply to health institutions and health staff that have contact with persons that are probably related to punishable conduct, to elements of proof or to physical evidence. The rules apply from the moment of the initiation of the medical treatment until the submission to the judicial police of the elements discovered⁴⁰⁰.

According to Art. 7.11.3 of Resolution 6394:

"Whoever in IPS, hospital, health post, clinic, doctor's office or other similar establishment, public or private, receives or admits a person whose body or health has been damaged as a result of a possible crime, shall **immediately notify the nearest Judicial Police** unit or, in its absence, the first official authority present in the place. Chain of custody procedures must be initiated for the material evidence or physical evidences with which such person has contact".⁴⁰¹

Art. 7.11.3 of Resolution 6394, also contains a provision related to **bullets** that appear during medical treatment. When such evidence is discovered, **the practitioners must place the projectiles in a plastic bag** or a bottle that shall be **labeled with the identity of the patient, the number of his Clinical history, date and time**. It must also **describe the characteristics of the element collected, the place of the**

³⁹⁷ Sentencia C-264/96, *op. cit.*: "En situaciones extremas en las que la revelación del secreto tuviere sin duda la virtualidad de evitar la consumación de un delito grave podría inscribirse el comportamiento del profesional en alguna de las causales justificativas del hecho"; see, also, Sentencia N° C-411/93 Fundamento jurídico 5.2.2; Sentencia N° C-264/96 Fundamento jurídico 3. The Ethic Code of the Colombian Association of Psychiatry states in Art. 25, that the confidential information can only be revealed to the patient, excepting cases where his life or the life of others is in danger: Principios Éticos Y Código Deontológico Asociación Colombiana De Psiquiatría, available at <http://psiquiatria.org.co/web/wp-content/uploads/2012/05/codigodeontologico.pdf> (22.01.19).

³⁹⁸ Resolución 6394 de 2004 Fiscalía General de la Nación, Fecha de Expedición: 22/12/2004, Diario Oficial 45772 de diciembre 24 de 2004, available at <http://www.alcaldiabogota.gov.co/sisjurMantenimiento/normas/Norma1.jsp?i=15634> (31.10.18).

³⁹⁹ Resolución 6394, *op. cit.*, Art. 7.11.1 « Corresponde a las actividades que las IPS realizan para aportar los EMP o EF hallados en los procedimientos médicos y quirúrgicos practicados a personas a las cuales se les ha ocasionado daño en el cuerpo o en la salud como consecuencia de un posible delito ».

⁴⁰⁰ Resolución 6394, *op. cit.*, Art. 7.11.2 « LÍMITES: Aplica a las instituciones y servidores de la salud que por sus funciones tengan contacto con personas posiblemente relacionadas con una conducta punible y/o EMP o EF. Inicia con la atención médica o paramédica inicial, hasta la entrega de los EMP o EF a la Policía Judicial o en su defecto a la primera autoridad del lugar ».

⁴⁰¹ Translation by the Institute of Resolución 6394, *op. cit.*, Art. 7.11.3: "Quien en IPS, hospital, puesto de salud, clínica, consultorio médico u otro establecimiento similar, público o particular reciba o de entrada a persona a la cual se le hubiese ocasionado daño en el cuerpo o en la salud con ocasión de un posible delito, dará aviso inmediatamente a la dependencia de Policía Judicial que le sea más próxima o en su defecto, a la primera autoridad del lugar. A los elementos materia de prueba o evidencias físicas con los cuales tenga contacto les deberá iniciar los procedimientos de cadena de custodia".

body or clothing where it was found, the name and identification of the person that collected the bullet and those of the person storing it. The finding must also be registered in the Clinical History of the patient. Finally, the bullets must be **submitted to the judicial police**.⁴⁰²

Resolution 6394 includes also a chronological table describing the different steps that are to be followed in the handling of cases of possible crime injuries, namely:

1. Receiving by the practitioner of the person injured as a result of a possible crime. If possible, the practitioner **identifies the injured person and gives notice to the nearest judicial police authority** or in the absence of such authority, to the national police or to the first local authority when the first one does not exist.
2. The practitioner provides **emergency medical assistance services**. If care is required in another hospital, this is recorded in the medical record and the practitioner informs the judicial police authority or the national police or the first authority in the place where the case was brought.
3. If **evidence** was collected, it must be packaged, labeled and delivered to the judicial police or the national police or the first authority in the place where the practitioner has heard about the case.
4. If care is required in another hospital, the practitioner moves to the new hospital and continues to treat the patient, where this is possible; otherwise, he informs his counterparts of the new health center for the same purpose.
5. The practitioner performs the medical-surgical procedure and, if he recovers evidence, he packages it, labels it and delivers it to the judicial police, national police or first authority of the place.

In general terms, Art. 69 CCP⁴⁰³ establishes the conditions for filing a denunciation. **Denunciations can be introduced orally, in written form, or by any other technical mean allowing identification of the author, the date and the time of presentation.** It must contain a detailed description of the facts known to the author. If the facts were already [brought to the attention of /provided to] another authority, the author must so indicate. The authority receiving the denunciation must warn the author that false denunciations may give rise to criminal responsibility. The authority receiving the denunciation may ask for clarification of some points that are important to the investigation.

⁴⁰² Resolución 6394, *op. cit.*, Art. 7.11.3 : « Manejo de proyectiles. Cuando se recuperen proyectiles se deberá tener las siguientes precauciones: a) Recuperar individualmente cada proyectil. b) Si son varios, embalarlos por separado e introducirlos en bolsa plástica o frasco plástico, evitando alteraciones en el micro rayado. c) Rotular y marcar con la identidad del paciente, número de "Historia Clínica", fecha y hora, características del elemento recuperado, lugar del cuerpo o prenda donde se recuperó, el nombre e identificación de quien lo recupera y quien lo embala. d) Registrar en la Historia Clínica o Epicrisis la recuperación del EMP o EF. e) Entregar las proyectiles a la policía judicial que conozca del caso o a la primera autoridad del lugar junto con el registro de cadena de custodia”.

⁴⁰³ Artículo 69 CCP: “Requisitos de la denuncia, de la querella o de la petición. La denuncia, querella o petición se hará verbalmente, o por escrito, o por cualquier medio técnico que permita la identificación del autor, dejando constancia del día y hora de su presentación y contendrá una relación detallada de los hechos que conozca el denunciante. Este deberá manifestar, si le consta, que los mismos hechos ya han sido puestos en conocimiento de otro funcionario. Quien la reciba advertirá al denunciante que la falsa denuncia implica responsabilidad penal. En todo caso se inadmitirán las denuncias sin fundamento. La denuncia solo podrá ampliarse por una sola vez a instancia del denunciante, o del funcionario competente, sobre aspectos de importancia para la investigación. Los escritos anónimos que no suministren evidencias o datos concretos que permitan encauzar la investigación se archivarán por el fiscal correspondiente”.

2.2. Scope

As described above⁴⁰⁴, Art. 38 of Law 23, enumerates the cases in which, by applying “prudence”, a professional secret may be revealed⁴⁰⁵. Among these cases, par. d) of Art. 38 of Law 23 mentions the judicial and medical or hygiene authorities, in the cases provided by law. The Constitutional Court⁴⁰⁶ stated that **this obligation to reveal professional secrets** as provided by law **stands to the extent that**:

- a. the disclosure of the information transmitted by the patient to the doctor may not cause the **self-incrimination** of the patient,
- b. it will **not be possible to identify** the patient from the sanitary and epidemiologic reports.

2.3. Purpose

According to Resolution 6394, the practitioner must give notice to the nearest judicial police authority or in effect to the national police or to the first local authority when the first one does not exist. Such authorities shall take the necessary steps to **investigate and/or to prosecute**.

2.4. Consequences of non-compliance

Art. 143.8 CCP⁴⁰⁷, provides that **health establishments that host injured persons without giving immediate notice to the authorities will be sanctioned by a fine** of between 10 and 100 minimum salaries (this is a measure to calculate the fines on the basis of the Minimum salaries in the Country). With respect to **individual health practitioners**, Art. 143.3 CCP⁴⁰⁸ may apply. According to this provision, a sanction of imprisonment from one to 30 days will be applied to any person obstructing or failing to collaborate in order to obtain any evidence or realizing a procedure.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Several legal provisions protect the provision of healthcare in Colombia.

The Colombian Constitution, as already mentioned, provides for an obligation for each citizen to “strive, in accordance with the principle of social solidarity, to respond with humanitarian actions when faced with situations that endanger the life or health of individuals [...]”⁴⁰⁹

⁴⁰⁴ See §1.3 *supra*.

⁴⁰⁵ The Ethical Code of the Colombian Association of Psychiatry states in its Art. 26, that whenever the law obliges a practitioner to reveal clinical information, he should limit himself to information that is strictly related to the case and the specific circumstances: “Los casos previstos por la ley que obligan a la revelación de información clínica deberán limitarse a los estrictamente relacionados con el caso y circunstancias específicas”.

⁴⁰⁶ Sentencia C-264/96, available at <http://www.corteconstitucional.gov.co/relatoria/1996/c-264-96.htm> (09.10.2018); Sentencia C-301/12, available at <http://www.corteconstitucional.gov.co/relatoria/2012/c-301-12.htm> (09.10.2019): “[...] salvo cuando se trate de informaciones que el paciente ha confiado al profesional y cuya declaración pueda implicar autoincriminación, y siempre que en los informes sanitarios o epidemiológicos no se individualice al paciente”.

⁴⁰⁷ Art. 143.8 CCP: « Al establecimiento de salud que reciba o dé entrada a persona lesionada sin dar aviso inmediato a la autoridad respectiva, lo sancionará con multa de diez (10) hasta cien (100) salarios mínimos legales mensuales vigentes ».

⁴⁰⁸ Art. 143.3 CCP: “A quien impida u obstaculice la realización de cualquier diligencia durante la actuación procesal, le impondrá arresto inmutable de uno (1) a treinta (30) días según la gravedad de la obstrucción y tomará las medidas conducentes para lograr la práctica inmediata de la prueba”.

⁴⁰⁹ Art. 95 Cst. See above, section 1.1.

Moreover, article 131 criminalizes the failure to provide assistance and/or humanitarian aid to endangered persons. Art. 131 CCC states that: “Failure to provide assistance/relief: A person who fails, without just cause, to assist a person whose life or health is in grave danger, shall be liable to imprisonment from two to four years.”

Several provisions are especially applicable in times of armed conflict or other emergencies. The CCC considers the medical personnel as protected persons and, as a result, several provisions especially criminalize delicts committed against them in situation of armed conflicts and other emergencies (articles 135 ff. CCC).

Moreover, section 2.1.1. of the Manual on Medical Mission 2012, which applies in times of armed conflicts and other situations of violence, consecrates the right not to be punished for performing medical care and not to be obliged to act contrary to medical ethics. Also, article 10 of Geneva Protocol II, which forms part of Colombia’s legal system⁴¹⁰, states that “under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

In practice however, it appears doubtful that healthcare workers are duly protected. Indeed, **some practitioners who have treated guerrillas have been prosecuted** under Art. 467 CCC⁴¹¹, which punishes the **crime of rebellion**, a fact that has been strongly criticised⁴¹².

Some cases against medical providers show that the **courts interpret protection for medical care to be limited to provision of emergency medical care or any care that is urgently needed, and provision of medical treatments falling outside these situations may be subject to prosecution**. Thus, a Colombian doctor was convicted of rebellion for having provided repeated medical care to FARC members for combat wounds and referral to specialists in Bogota. He was initially sentenced to three years in prison and a fine. The Supreme Court upheld the decision in 2009⁴¹³, concluding that referral services went beyond emergency medical care into the realm of sustained support, as those who recovered were able to return to the fight.

In another case⁴¹⁴, also upheld by the Supreme Court, a Colombian pharmacist was convicted for having provided care to a wounded FARC member one day after he had been shot. The court ruled that care provided 24 hours or more after the initial gunshot wound was no longer urgently needed and thus did not constitute emergency medical care.

⁴¹⁰ Corte Constitucional, Sentencia No. C-225/95, DERECHO INTERNACIONAL HUMANITARIO-Naturaleza imperativa/IUS COGENS, available at <http://www.corteconstitucional.gov.co/relatoria/1995/c-225-95.htm> (19.01.2019).

⁴¹¹ Art. 467 CCC : « Los que mediante el empleo de las armas pretendan derrocar al Gobierno Nacional, o suprimir o modificar el régimen constitucional o legal vigente, incurrirán en prisión de noventa y seis (96) a ciento sesenta y dos (162) meses y multa de ciento treinta y tres punto treinta y tres (133.33) a trescientos (300) salarios mínimos legales mensuales vigentes ».

⁴¹² Ó. Vega, El médico frente al conflicto interno de Colombia, Rev. Col. Gastroenterol. vol.24 no.2 Bogotá Apr./June 2009, available at http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0120-99572009000200003 (19.01.2019).

⁴¹³ Suprema Corte de Justicia - Sala de Casación Penal nº 27227 of May 21, 2009, Mayo 21, 2009, Proceso 27227, available at <https://app.vlex.com/#vid/69223885> (19.02.19).

⁴¹⁴ See, Vega, El médico frente al conflicto interno de Colombia, *op. cit.*

Other medical providers have faced charges for treating members of the guerrilla, even though they provided the care in question under coercion or false pretense. In February 2008⁴¹⁵, a Sports physician was arrested, then charged with rebellion for having treated members of the guerrilla. The physician claimed that he was brought to a guerrilla camp after being invited to take part in a paid medical mission. He claimed that he treated guerrilla members under coercion. He even returned to provide treatment for a second time, claiming again that he did so under coercion. The prosecution argued that the doctor was paid for the services, and did not report what happened to the authorities in violation of the duty to report under the CCP. The doctor was sentenced to one year in prison, later commuted to house arrest.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

According to Art. 89 of Law 23⁴¹⁶, when the **National Tribunal of Professional Ethics** imposes a sanction of suspension, the practitioner may introduce a request of review ("*reposición*") before that instance. This request allows the instance that took the decision to reexamine the case and, eventually, revoke the decision. The practitioner may also file an "appeal" before the **Ministry of Health**. Thus, in principle, it seems possible that a healthcare worker be suspended for treating a guerrilla, but then request a review of that decision.

In some cases, the **Constitutional Court** has been called upon to resolve some situations⁴¹⁷.

⁴¹⁵ Doctors working for FARC: Medical mix-up? *Semana*, 13.02.2009, available at <https://www.semana.com/international/print-edition/articulo/doctors-working-for-farc-medical-mix-up/100099-3> (19.02.19).

⁴¹⁶ Law 23, Art. 89: "La sanción consistente en la suspensión de que trata el literal d) del artículo 83, sólo podrá ser impuesta por el Tribunal Nacional Etico Profesional y en su contra son procedentes los recursos de reposición para ante el mismo Tribunal, dentro de los treinta días hábiles siguientes a la fecha de modificación de la sanción, o el subsidiario de apelación para ante el Ministerio de Salud, dentro del mismo término".

⁴¹⁷ See cases cited in fn. 47, *supra*.

D. EGYPT

1. Cadre général relatif à la confidentialité et aux devoirs de déclarer pour le personnel soignant

Le devoir de confidentialité du médecin et son devoir de dénonciation aux autorités étatiques⁴¹⁸ se trouvent détaillés dans les sources juridiques suivantes (applicables tant en temps de paix qu'en temps de guerre et autres situations d'urgence) :

- **Code pénal de 1937**⁴¹⁹ :

Art. 310 al. 1^{er} :

« Les **médecins, chirurgiens** et autres officiers de santé, ainsi que les pharmaciens, les sages-femmes et toutes autres personnes dépositaires, par état ou profession, des secrets qu'on leur confie, qui, **hors le cas où la loi les oblige à se porter dénonciateurs**, révèlent ces secrets, sont punis d'un emprisonnement ne dépassant pas six mois ou d'une amende n'excédant pas 500 Livres égyptiennes ».

- **Code de procédure pénale de 1951** (ci-après CPP)⁴²⁰ :

Art. 25 :

« Quiconque a connaissance d'une infraction, susceptible de l'action du ministère public sans l'intervention d'aucune plainte ou réquisition, peut la dénoncer à celui-ci ou à un officier de la police judiciaire ».

Art. 26 :

« Tout **fonctionnaire public**, toute personne chargée d'un service public qui, dans l'exercice ou à l'occasion de l'exercice de ses fonctions, a acquis la **connaissance d'une infraction**, susceptible de l'action du ministère public sans l'intervention d'aucune plainte ou réquisition, **est tenu de la dénoncer immédiatement** au ministère public ou à l'officier de la police judiciaire le plus proche »⁴²¹.

- Le **règlement de déontologie de la profession** (لائحة آداب المهنة) adopté par un décret du Ministre de la Santé n° 238/2003 du 5 septembre 2003.

Art. 20 :

« Le médecin doit faire de son mieux pour soigner ses patients et doit soulager leurs douleurs. Il doit bien les traiter et ne pas discriminer entre eux ».

Art. 24 :

« Dans les cas non urgents, le médecin peut refuser de soigner un patient, initialement ou à n'importe quel stade, pour des raisons personnelles ou professionnelles. Dans les cas urgents, le médecin ne peut refuser de soigner un patient ».

⁴¹⁸ Certains rapports indiquent que les professionnels de santé peuvent voir parfois leur mission entravée par les autorités. V. par ex. le rapport sur *The Criminalization of Healthcare* disponible sous V. aussi Hamdy et Bayoumi, *Egypt's Popular Uprising and the Stakes of Medical Neutrality, Culture, Medicine and Psychiatry* June 2016, Volume 40, Issue 2, pp 223–241.

⁴¹⁹ Pour une traduction française du Code pénal et du Code de procédure pénale égyptiens, V. V. Abagnara, *Il diritto e la procedura nell'Islam*, Salerno 1997. Pour une traduction anglaise : <https://www.refworld.org/docid/3f827fc44.html>

⁴²⁰ *Ibid.*

⁴²¹ Cette disposition concerne les médecins ayant le statut de fonctionnaire public.

Art. 30 :

« Le médecin ne peut révéler les secrets de son patient qu'il a connus du fait de sa profession sauf si une décision judiciaire l'exige, **si un préjudice grave et hautement probable peut affecter les tiers** ainsi que dans les autres hypothèses prévues par la loi ».

Art. 33 :

« Le médecin **doit signaler** aux autorités compétentes les blessures et accidents vraisemblablement d'origine criminelle tels que les **blessures par armes à feu**, les blessures pénétrantes ou autres. Il doit rédiger un rapport médical détaillé au moment du diagnostic. Le médecin peut demander à un collègue de participer au diagnostic et de rédiger le rapport ».

2. Devoir du personnel soignant de déclarer les cas de blessures par arme à feu

Le droit égyptien reconnaît **l'obligation pour les médecins de dénoncer les blessures par armes à feu**. En effet, l'article 33 du **règlement de déontologie de la profession** de 2003 concerne le cas des blessures et accidents vraisemblablement d'origine criminelle et vise expressément le cas des blessures par armes à feu, et prévoit **l'obligation** pour le médecin de signaler ces cas aux autorités compétentes.

Dans le même sens, l'article 26 du **Code de procédure pénale** susmentionné dispose que le médecin qui exerce en qualité de **fonctionnaire public** et **qui a acquis connaissance d'une infraction susceptible de l'action du ministère public sans dépôt de plainte ou réquisition**, est tenu de dénoncer ce fait **immédiatement au ministère public ou à l'officier de la police judiciaire le plus proche**. Les blessures par armes à feu observées sur un patient sont susceptibles de révéler à tout le moins un délit poursuivi d'office⁴²². L'observation de telles blessures entraîneront dès lors vraisemblablement l'obligation pour le médecin fonctionnaire public de dénoncer les faits aux autorités compétentes.

Enfin, il convient encore de relever que l'article 30 du règlement de déontologie de la profession prévoit la **possibilité** pour le médecin de **révéler des informations couvertes par le secret professionnel si un préjudice grave et hautement probable peut affecter les tiers**. Etant donné que cette disposition ne concerne pas tant la question de la dénonciation des blessures par armes à feu (qui est par ailleurs obligatoire en vertu d'une autre disposition : l'article 33 du règlement de déontologie de la profession), mais plutôt la possibilité pour le médecin de révéler des informations confidentielles en cas de risque d'infraction pouvant affecter les tiers, nous n'examinerons pas plus amplement la disposition de l'article 30 du règlement de déontologie de la profession dans le présent rapport. En effet, en cas de blessures par armes à feu existantes, c'est essentiellement l'article 33 du règlement de déontologie qui s'appliquera.

2.1. Conditions

Bien que l'article 33 du règlement de déontologie de la profession prévoit une obligation de dénoncer aux autorités les blessures par armes à feu, **il ne précise pas les modalités de cette dénonciation**. Etant donné que le médecin urgentiste est celui qui, très probablement, traitera le patient blessé par arme à feu et que l'article 24 du règlement de déontologie de la profession dispose que, dans les cas urgents, le médecin ne peut refuser de soigner un patient,

⁴²²

L'article 3 CPP prévoit que l'action pénale ne peut être introduite qu'à la suite d'une plainte présentée, oralement ou par écrit, par la victime de l'infraction ou son mandataire spécial, au parquet ou à un officier de la police judiciaire, pour les crimes réprimés par les articles 185, 274, 277, 279, 292, 293, 306, 307 et 308 du Code pénal, ainsi que pour les autres cas prévus par la loi. Or, les infractions de blessures (volontaire et involontaire) ne font pas partie des infractions visées par ces textes.

nous pouvons considérer que la dénonciation des blessures par arme à feu n'est pas une condition préalable pour traiter celles-ci.

2.2. Champ d'application

L'article 33 du règlement de déontologie de la profession n'apporte pas de réponses précises à ces questions. Cela dit, cette disposition précise que le médecin doit rédiger un rapport médical détaillé au moment du diagnostic.

2.3. But

L'article 33 du règlement de déontologie de la profession ne précise pas dans quel but et auprès de quelles autorités les déclarations interviennent. La disposition fait uniquement référence aux « **autorités compétentes** ».

Selon les règles générales prévues par le CPP, la dénonciation permet aux autorités de **prendre connaissance des infractions afin de rechercher leurs auteurs et de recueillir les informations utiles à l'instruction** (art. 21 CPP). Les officiers de la police judiciaire doivent rechercher tous renseignements, opérer tous constats utiles à l'instruction des faits dénoncés ou parvenus à leur connaissance de n'importe quelle façon et prendre toutes les mesures conservatoires nécessaires pour assurer la preuve (art. 24 CPP).

La dénonciation doit se faire auprès **du Ministère public ou à un officier de police judiciaire**. Lorsque la dénonciation est reçue par ce dernier, il doit la transmettre au Ministère public.

D'après l'article 23 CPP, ont notamment la qualité d'officier de police judiciaire (مأمور الضبط القضائي) : les membres du ministère public, les officiers de police et les chefs de village (عمدة).

2.4. Conséquences du non-respect

L'article 26 CPP qui impose, aux fonctionnaires, une obligation de dénonciation de la commission d'infraction aux autorités ne prévoit **aucune sanction** en cas de non-respect de cette obligation⁴²³. Cela dit, cette obligation de dénonciation fait partie de leurs obligations professionnelles dont le non-respect peut être sanctionné par la voie disciplinaire⁴²⁴.

Selon certains auteurs, il serait simplement recommandé aux médecins d'accomplir cette dénonciation⁴²⁵.

Il en est de même de l'article 33 du règlement de déontologie de la profession qui ne prévoit pas expressément de sanction à l'absence de dénonciation. Cela dit, une sanction administrative ou disciplinaire du fait de non-respect du règlement de déontologie de la profession semble envisageable.

⁴²³ A. Mahdi, Traité de procédure pénale (شرح القواعد العامة للإجراءات الجنائية), Dar ennahda el-arabiya 2011, p. 295-296.

⁴²⁴ M. Harga, Commentaire du Code de procédure pénale (التعليق على قانون الإجراءات الجنائية), tome 1, Le Caire 2011, p.349 .

⁴²⁵ O. Qayed, La responsabilité pénale du médecin du fait de sa violation du secret professionnel (المسؤولية الجنائية للطبيب عن إفشاء سر المهنة – دراسة مقارنة), Dar ennahda el-arabiya 1994, p. 90.

3. Protection de la fourniture des soins de santé

3.1. Législation spécifique protégeant la fourniture des soins de santé

L'article 18 al. 4 de la **Constitution égyptienne** de 2014⁴²⁶ prévoit :

« S'abstenir de fournir le traitement médical sous toutes ses formes en cas d'urgence ou de danger pour la vie est criminalisé ».

Dans le même sens, l'article 24 du **règlement de déontologie de la profession** prévoit que pour les cas non urgents, le médecin peut s'excuser de ne pas s'occuper d'un patient pour des raisons personnelles ou professionnelles. Dans les cas **urgents**, le **médecin ne peut pas s'excuser**.

L'article 25 de ce règlement prévoit que le médecin spécialiste ne peut refuser de s'occuper d'un patient s'il est convoqué par le médecin généraliste et qu'il n'y a pas d'autres médecins spécialistes.

Le **règlement de déontologie de la profession** précise encore les devoirs des médecins à l'égard des patients. Ainsi, l'article 20 dispose que le médecin doit faire de son mieux pour soigner ses patients et doit soulager leurs douleurs. Il ajoute qu'il doit bien traiter ses patients et **ne pas discriminer entre eux**. L'article 24 précise que dans les cas non urgents, le médecin peut refuser de soigner un patient, initialement ou à n'importe quel stade, pour des raisons personnelles ou professionnelles. En revanche, **dans les cas urgents, le médecin ne peut refuser de soigner un patient**.

Il est à noter enfin que le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), adopté à Genève le 8 juin 1977, est entré en vigueur en Egypte le 9 octobre 1992⁴²⁷.

Ce Protocole prévoit notamment que **nul ne sera puni pour avoir exercé une activité de caractère médical conforme à la déontologie**, quels qu'aient été les circonstances ou les bénéficiaires de cette activité (art. 10).

3.2. Moyens de résolution des litiges potentiels entre éthique médicale et obligation de déclarer les cas de blessures par arme à feu

Nous n'avons pas trouvé de telles directives dans la législation nationale.

⁴²⁶ Une traduction française de la Constitution égyptienne de 2014 est disponible sous <https://www.wipo.int/edocs/lexdocs/laws/fr/eg/eg060fr.pdf>.

⁴²⁷ Voir ce propos : https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPagesNORMStatesParties&xp_treatySelected=475.

E. EL SALVADOR

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

El Salvador has enacted several legal provisions dealing with the duty to respect confidentiality:

1.1. Constitutional level

Art. 23 of the Salvadorian **Constitution** (Cst.)⁴²⁸, states that every person has the right to her honour, personal secrecy ("*intimidad personal*") and self-image.

1.2. Codification & Laws

Art. 187 of Salvador's **Criminal Code** (CCS)⁴²⁹, punishes those who reveal a secret that was acquired in the exercise of their profession. The punishment for violating such secrets is imprisonment (from 6 months to 2 years).

Art 312 CSS⁴³⁰ imposes a fine (from 50 to 100 "fine days"), on any public servant, employee or agent who, in the exercise of his functions, becomes aware that a criminal act has been committed and does not inform the competent authorities within a period of 24 hours. The second part of this article states that the same sanction will be imposed on the chiefs or persons in charge of hospitals, clinics or other similar establishments who omit to inform the competent authority (within a period of 8 hours), that it has taken charge of a person whose injuries appear to have been sustained under circumstances "that reasonably should be considered as a crime", unless they are bound by a duty to keep professional secrets.

Art. 187 of Salvador's **Code of Criminal Procedure** (CCP)⁴³¹, imposes on (*inter alia*) doctors, the duty to abstain from declaring, according to the terms of the duty to keep professional secrets, any facts about which they acquired knowledge in the course of performing their duties. Art. 232 CCP, provides for an exception, by stating that, in crimes prosecuted by public action, doctors, nurses and other persons exercising related tasks who acquire information related to such a prosecution are obliged to provide such information to the authorities (cf. §2 *infra*).

⁴²⁸ Decreto Nº 38 - Constitución Política de la República de El Salvador de 1983, available at https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072857074_archivo_documento_legislativo.pdf (29.01.19).

⁴²⁹ Decreto Nº 1030, Código Penal de El Salvador, available at <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/C0AB56F8-AF37-4F25-AD90-08AE401C0BA7.pdf> (29.01.19).

⁴³⁰ Art. 312 CCS: "El funcionario o empleado público, agente de autoridad o autoridad pública que en el ejercicio de sus funciones o con ocasión de ellas, tuviere conocimiento de haberse perpetrado un hecho punible y omitiere dar aviso dentro del plazo de veinticuatro horas al funcionario competente, será sancionado con multa de cincuenta a cien días multa. Igual sanción se impondrá al jefe o persona encargada de un centro hospitalario, clínica u otro. establecimiento semejante, público o privado, que no informare al funcionario competente el ingreso de personas lesionadas, dentro de las ocho horas siguientes al mismo, en casos en que racionalmente debieran considerarse como provenientes de un delito".

⁴³¹ Art. 187 CCP: DEBER DE ABSTENCION. "No podrán declarar los hechos que han llegado a su conocimiento en razón del propio estado, oficio o profesión, bajo pena de nulidad, los ministros de una iglesia con personalidad jurídicas, los abogados, notarios, médicos, farmacéuticos y obstetras, según los términos del secreto profesional y los funcionarios públicos sobre secretos de Estado. Sin embargo, estas personas no podrán negar el testimonio cuando sean liberadas por el interesado del deber de guardar secreto".

The **Health Code** of El Salvador (HCS)⁴³² states, in Art. 37⁴³³, that professional secrecy is a duty arising from the very essence of the profession. Public interest, the safety of the sick, the honor of the family and the respectability of the professional require maintaining secrecy concerning everything doctors see, hear or discover in the exercise of their profession. Art. 38 HCS⁴³⁴ explains that professional secrecy is acquired in two forms:

- a) Explicit formal secret, textually entrusted by the patient to the professional; and,
- b) Implicit secrecy resulting from the patient's relationship with the professional:

According to Art. 37 HCS, professional secrecy must not be violated; except:

- a) When maintaining the secret would violate the laws in force, or,
- b) In cases of giving expert opinions or reports in cases of contagious infectious diseases.

Art. 282 HCS states that health professionals shall be sanctioned with suspension from the exercise of their profession if they commit the infractions established in Art. 284 of the HCS or serious misconduct established in the respective regulations. According to Art. 283 HCS, the owners and professionals responsible for the establishments related to health that commit the infractions established in Art. 284 HCS will be sanctioned by closing the establishment.

Art. 284 HCS provides that revealing a professional secret as provided by Art. 37 and Art. 38 HCS is a “serious infringement” against health (*infracciones graves contra la Salud*). The sanctions for the violation of the duty to maintain secrecy are established in Articles 282 *et seq.* HCS (cf. §2.4 *infra*).

The **Law on rights and duties of patients** (LRP)⁴³⁵, provides in Art. 19 that every patient has a right to privacy during his treatment. Art. 20 of the same Law⁴³⁶ states that a patient has a right to confidentiality of his or her clinical files and all information relating to his or her diagnosis, hospital stay, and data concerning his or her illness, unless s/he waives this right in writing, or when imperative legal or medical reasons justify the disclosure.

1.3. Ethical provisions

The Code of Ethics and Medical Deontology (CEMD)⁴³⁷, deals with secrecy in Chapter VIII.

⁴³² Código de Salud, Decreto N° 955, available at https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_072938709_archivo_documento_legislativo.pdf (29.01.19).

⁴³³ Art. 37 HCS: “El secreto profesional es un deber que nace de la esencia misma de la profesión. El interés público, la seguridad de los enfermos, la honra de la familia y la respetabilidad del profesional exigen el secreto por lo cual deben mantener confidencialmente cuanto vean, oigan o descubran en el ejercicio de su profesión”.

⁴³⁴ Art. 38 HCS: “El Secreto profesional se recibe bajo dos formas:
a) El secreto explícito formal, textualmente confiado por el paciente al profesional; y,
b) El secreto implícito que resulta de las relaciones del paciente con el profesional.
El secreto profesional es inviolable; salvo el caso de que, mantenerlo, vulnere las leyes vigentes o se tenga que revelar en un peritaje o para notificar enfermedades infecto contagiosas ante las autoridades de salud.”

⁴³⁵ Ley de Deberes Y Derechos de los Pacientes y Prestadores de Servicios de Salud, Decreto N° 307, available at https://www.asamblea.gob.sv/sites/default/files/documents/decretos/171117_073651293_archivo_documento_legislativo.pdf (29.01.19).

⁴³⁶ Derecho a la Confidencialidad. Art. 20 LRP: “Los pacientes tendrán derecho a que se respete el carácter confidencial de su expediente clínico y toda la información relativa al diagnóstico, tratamiento, estancia, pronósticos y datos de su enfermedad o padecimiento, a menos que por autorización escrita del mismo o porque existan razones legales o médicas imperiosas, se deba divulgar tal información.”

⁴³⁷ Código de Ética y Deontología Médica, 4a. ed., San Salvador, 2013.

Art. 64 CEMD defines medical secrets as “things that unethical to reveal without just cause (*“justa causa”*)”⁴³⁸. Practitioners are obliged to keep secret everything that their patients reveal, that they see and what they deduce as a consequence of their work that is related to the health or the privacy of the patient, including the contents of their clinical history. Furthermore, doctors must preserve the secrecy even in their social, work and family environments.

Art. 65 CEMD describes the cases in which medical secrecy can or must be revealed, among which is the case in which the medical doctor is obliged by law to report to the competent authorities. The doctrine differentiates between cases where a person was shot by someone else (in which the medical doctor must inform the authorities of the injury), and cases where the injury is self-inflicted (in which the medical doctor is not obliged to report, since he is still bound by his duty of confidentiality, but he may disclose it if failure to do so would cause a prejudice to himself or to third parties (see below 2).

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

Art. 232 CCP (Art. 265 of the 2009 version⁴³⁹), establishes the **duty to report crimes of public prosecution** (*“acción pública”*). According to Art. 232.2 CCP⁴⁴⁰, **medical doctors, pharmacists, nurses and other persons exercising health professions who, in the course of treatment, acquire knowledge that these types of crimes have been perpetrated must report the facts, unless they are protected by the duty to keep professional secrets.**

Art 312 CSS⁴⁴¹ imposes a **fine** (from 50 to 100 “fine days”), on any public servant, employee or agent who, in the exercise of his functions, becomes aware that a criminal act was committed and does not

⁴³⁸ The CEDM contains a list of definitions of different terms, among which are “Medical secret” and “Secret, discretion and reserve”: *“Secreto médico: compromiso que adquiere el médico, ante el paciente y la sociedad, de guardar silencio sobre toda la información que llegue a conocer sobre el paciente en el curso de su actuación profesional, o de la información recogida con vistas a obtener cualquier servicio de los derivados de dicha profesión. Expresión deontológica y jurídica clásica. Ahora el profesional tiene un deber porque el usuario tiene un derecho; se trata por tanto de uno de los llamados derechos-deberes, uno de los derechos que generan deberes en todos los demás. La diferencia es fundamental porque será el paciente quien diga qué datos pueden ser divulgados y cuáles no.*

***Secreto, sigilo o reserva:** términos clásicos deontológicos y jurídicos que vienen ya de tiempos del Juramento Hipocrático. Lo que cuidadosamente se tiene reservado y oculto, es decir, aquello que debe mantenerse separado de la vista y del conocimiento de los demás. El secreto era considerado un deber profesional de excepcional importancia, refrendado por una tradición sin fisuras, que hundía sus raíces en el mismísimo Juramento Hipocrático. El texto hipocrático deja claro que el secreto no es un derecho del paciente sino un deber del profesional, esto es lo que clásicamente se ha denominado el ‘deber de sigilo’.”*

⁴³⁹ Decreto Nº 733, La Asamblea Legislativa de la Republica de El Salvador, available at <https://www.asamblea.gob.sv/decretos/details/390> (19.03.19).

⁴⁴⁰ Art 232 CCP : OBLIGACION DE DENUNCIAR. EXCEPCION. *“Tendrán la obligación de denunciar los delitos de acción pública: [...] 2) Los médicos, farmacéuticos, enfermeros o demás personas que ejerzan profesiones relacionadas con la salud, que conozcan esos hechos al prestar los auxilios de su profesión, salvo que el conocimiento adquirido por ellos este bajo el amparo del secreto profesional.”*

⁴⁴¹ Art. 312 CCS.-*“El funcionario o empleado público, agente de autoridad o autoridad pública que en el ejercicio de sus funciones o con ocasión de ellas, tuviere conocimiento de haberse perpetrado un hecho punible y omitiere dar aviso dentro del plazo de veinticuatro horas al funcionario competente, será sancionado con multa de cincuenta a cien días multa. Igual sanción se impondrá al jefe o persona encargada de un centro hospitalario, clínica u otro establecimiento semejante, público o privado, que no informare al funcionario competente el ingreso de personas lesionadas, dentro de las ocho horas siguientes al mismo, en casos en que racionalmente debieran considerarse como provenientes de un delito”.*

inform the competent authorities within a period of 24 hours. The second part of this article states that the same sanction will be imposed on the chiefs or persons in charge of hospitals, clinics or other similar establishments who omit to inform the competent authority (within a period of 8 hours), that took charge of an injured person “in cases where the injury reasonably should be considered to be the result of a crime”.

Art. 232 CCP *in fine*⁴⁴² states that, in any case, **it is not compulsory to report if by doing so,, the practitioner himself or his close family would risk a criminal prosecution.**

According to the doctrine, the obligation to inform the authorities does not contradict the ethical duty of confidentiality imposed on medical doctors⁴⁴³.

The CEMD underlines that the cooperation of doctors with the authorities of justice and administration must not hinder the rights of the patient. A doctor acting as an expert must respect professional secrecy, “with the exceptions detailed in the CEMD”. Art. 65 CEMD defines these exceptions, by detailing the cases when medical secrets can be disclosed. There is no specific provision concerning gunshot wounds, but among **the justifications for breaking confidentiality** are the following reasons:

- a. If the doctor’s silence would **cause a prejudice** to the patient or to third parties, or would create a collective danger,
- b. If the doctor would **suffer a prejudice** as a result of keeping the secret and the patient allows this situation to occur,
- c. **Where required by law**, namely the information that every doctor is obliged to send to the judge when he treats an injured person.

As will be seen below (see section 3.2 *infra*), it appears that **the duty to keep a professional secret should be understood as including only cases where the injured person tells the doctor that he/she is the author of a crime. Thus, the obligation to report would be reduced to the cases where the injured person is the victim of an attack by a third party**⁴⁴⁴. This position could be justified by the fact that, in the second case, there may be a presumption of permission by the victim to break confidentiality rule, which would not be the case where the victim’s statements to the doctor might incriminate him. On the other hand, our research revealed no sources indicating what would be the situation if, in the second case, the victim had expressly asked the doctor not to transmit the confidential information to the competent authorities.

2.1. Conditions

The disclosure to authorities of gunshot wounds is **not a precondition** under domestic legislation for healthcare professionals to treat patients:

“The professional duty to assist [patients] is not incompatible with the obligation to communicate the ‘*notitia criminis*’ to the authorities in charge of prosecution. Indeed, performing this duty does not contradict the principles governing the assistance to the persons that they (doctors) treat. Furthermore, the reporting of the criminal facts may allow [the authorities to prosecute the offenders] for these facts

⁴⁴² Art. 232 CCP *in fine* : “*En todos estos casos, la denuncia no es obligatoria si razonablemente arriesga la persecución penal propia, del cónyuge o de ascendientes, descendientes, hermanos o del compañero de vida o conviviente*”.

⁴⁴³ J. Pérez & others, *Código Procesal Penal Comentado, Tomo 1*, available at <http://www.cnj.gob.sv/index.php/recursos/publicaciones-cnj/233-codigo-procesal-penal-de-el-salvador-comentado> (19.01.19), p. 873.

⁴⁴⁴ J. Pérez *et al.*, *op. cit.*

thereby avoiding the recourse to private vendetta”⁴⁴⁵. (translation, parenthesis and brackets by the Institute).

Some authors emphasize that the obligation to report injuries is particularly important in cases of patients presenting gunshot wounds. These persons are likely to be immediately carried to the operating room where the bullets or pieces of the bullets may be extracted, and this essential piece of evidence will not be treated according to the rules of evidence. In such cases, it is crucial that the doctors inform the prosecution authorities (police or prosecutors), in order that the relevant investigations can be implemented⁴⁴⁶.

2.2. Scope

The doctrine underlines that it is important that the notice to the police or the prosecutors be sent **as soon as possible, if necessary, using electronic means** and within a period of 8 hours (see §1.2 *supra*). It is also important to use a form that is easy to complete (“*formulario sencillo*”) that contains only the **essential information** (“*datos esenciales*”). The reporting of a crime must contain, when possible, the relevant facts, including the names of the participants, in order to allow the authorities to check the circumstances of the commission of a criminal act⁴⁴⁷.

This will then be used in the criminal process as proof that the obligation to report was respected, and as a notice of the commission of a crime that gave rise to the investigation⁴⁴⁸.

2.3. Purpose

The purposes of the information that practitioners must give to the authorities are investigation and possible prosecution⁴⁴⁹.

2.4. Consequences of non-compliance

Art. 187 of CCS imposes on those **who reveal a secret that was acquired by means of one’s profession**, a sentence of imprisonment that can go from 6 months to 2 years. Art. 282 HCS imposes deontological sanctions (suspension) on practitioners who, in their professional activities, reveal professional secrets.

Art. 232 CCP establishes the duty to report crimes of public prosecution (“*acción pública*”). According to Art. 232.2 CCP⁴⁵⁰, doctors, pharmacists, nurses and other persons exercising health professions that acquire knowledge during treatment, that these types of crimes have been perpetrated must report the relevant facts, unless they are protected by the duty to keep professional secrets. Art. 232 *in fine*⁴⁵¹ states that, in any case, it is not compulsory to report if, by doing so, the practitioner himself or his close family would be at risk of criminal prosecution.

⁴⁴⁵ J. Pérez *et al.*, *op. cit.*

⁴⁴⁶ J. Pérez *et al.*, *op. cit.*, p. 876.

⁴⁴⁷ Art. 230 CCP.

⁴⁴⁸ J. Pérez *et al.*, *op. cit.*, p. 876.

⁴⁴⁹ J. Pérez *et al.*, *op. cit.*, p. 876.

⁴⁵⁰ Art 232 CCP : OBLIGACION DE DENUNCIAR. EXCEPCION. “Tendrán la obligación de denunciar los delitos de acción pública: [...] 2) Los médicos, farmacéuticos, enfermeros o demás personas que ejerzan profesiones relacionadas con la salud, que conozcan esos hechos al prestar los auxilios de su profesión, salvo que el conocimiento adquirido por ellos este bajo el amparo del secreto profesional.”

⁴⁵¹ Art. 232 CCP *in fine* : “En todos estos casos, la denuncia no es obligatoria si razonablemente arriesga la persecución penal propia, del cónyuge o de ascendientes, descendientes, hermanos o del compañero de vida o conviviente.”

Art 312 CSS⁴⁵² **imposes a fine** (from 50 to 100 “fine days”), on any public servant, employee or agent who, in the exercise of his functions, becomes aware that a criminal act was committed and does not inform the competent authorities within a period of 24 hours. The second part of this article states that the same sanction will be imposed **on the chiefs or persons in charge of hospitals, clinics or other similar establishments who omit to inform the competent authority** (within a period of 8 hours), **that it took charge of a person whose injuries were sustained in connection with circumstances that “reasonably should be considered as a crime”**.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

In addition to the general declaration of the Constitution⁴⁵³ that health is a public asset and the State and persons are obliged to act in the interest of its preservation, the LRP contains more concrete provisions protecting the provision of healthcare.

Art. 10 LRP⁴⁵⁴ provides that every patient has the right to be treated in a timely, efficient and quality manner by a health service provider when requested or required, which includes actions aimed at promotion, prevention, cure, health rehabilitation and palliative care in accordance with existing rules.

Art. 12 LRP⁴⁵⁵ states that patients have a right to quality and caring health care, afforded by professionals and health workers duly accredited, certified and authorized by the competent authorities for the exercise of their tasks or functions, in the public and private spheres.

Art. 5 CEMD states that doctors are obliged to afford to all the patients medical attention of human and scientific quality.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Art. 187 of Salvador’s Criminal Code (CCS)⁴⁵⁶ punishes those who reveal a secret that was acquired by means of their profession, by imprisonment for a term of from 6 months to 2 years. On the other hand,

⁴⁵² Art. 312 CCS.-“El funcionario o empleado público, agente de autoridad o autoridad pública que en el ejercicio de sus funciones o con ocasión de ellas, tuviere conocimiento de haberse perpetrado un hecho punible y omitiere dar aviso dentro del plazo de veinticuatro horas al funcionario competente, será sancionado con multa de cincuenta a cien días multa. Igual sanción se impondrá al jefe o persona encargada de un centro hospitalario, clínica u otro establecimiento semejante, público o privado, que no informare al funcionario competente el ingreso de personas lesionadas, dentro de las ocho horas siguientes al mismo, en casos en que racionalmente debieran considerarse como provenientes de un delito.”

⁴⁵³ Constitution of the Republic of El Salvador, 1983 (as Amended to 2003), Article 65: “The health of the inhabitants of the Republic constitutes a public good. The State and the persons are obligated to see to its conservation and restoration.

The State shall determine the national health policy and shall control and supervise its application.”

⁴⁵⁴ Art. 10 LRP: “Todo paciente tiene derecho a ser atendido de manera oportuna, eficiente y con calidad, por un prestador de servicios de salud cuando lo solicite o requiera, que comprende las acciones destinadas a la promoción, prevención, curación, rehabilitación de la salud y cuidados paliativos de acuerdo a las normas existentes.”

⁴⁵⁵ Art. 12 LRP: “Art. 12.- El paciente tiene derecho a una atención en salud con calidad y calidez, con profesionales y trabajadores de salud debidamente acreditados, certificados y autorizados por las autoridades competentes para el ejercicio de sus tareas o funciones, en el ámbito público y privado.”

⁴⁵⁶ Decreto N° 1030, Código Penal de El Salvador, available at <https://www.asamblea.gob.sv/sites/default/files/documents/decretos/C0AB56F8-AF37-4F25-AD90-08AE401C0BA7.pdf> (29.01.19).

Art 312 CCS⁴⁵⁷ imposes a fine on any public servant, employee or agent who, in the exercise of his functions, acquires notice that a criminal act was committed and does not inform the competent authorities within a period of 24 hours. The second part of this article states that the same sanction will be imposed on the chiefs or persons in charge of hospitals, clinics or other similar establishments who omit to inform the competent authority (within a period of 8 hours), that it took charge of an injured person rather “in cases in which the injuries reasonably appear to be the result of a crime “

The contradiction between Art. 187 CCS and Art 312 CCS may be only apparent. The Supreme Court has stated that:

“In some crimes, mainly blood crimes or sexual abuse, health professionals are the first to obtain the version of the way in which the facts have occurred by being called to provide assistance services to the aggrieved party. The fulfilment of the professional duties of assistance is not incompatible with the legal obligation to communicate the ‘*notitia criminis*’ to the authorities in charge of the prosecution. Indeed, the fulfilment of this duty does not contradict the ethical principles that govern assistance to victims. In addition, the reporting of criminal acts helps prevent these acts from going unpunished, and avoids private vendettas.”⁴⁵⁸ [translation by the Institute]

In its opinion, the Supreme Court mentions **the obligation to report cases in which the patient is the victim of a crime**, such as in the case of an assault and battery, attempted homicide or sexual abuse. In these cases, **the victim is presumed to have agreed that the service provider should disclose the professional secret**. Therefore, such reporting to the competent authorities is not considered to be a violation of the duty of confidentiality and there is thus **no conflict between the two legal obligations**⁴⁵⁹.

⁴⁵⁷ Art. 312 CCS.-“El funcionario o empleado público, agente de autoridad o autoridad pública que en el ejercicio de sus funciones o con ocasión de ellas, tuviere conocimiento de haberse perpetrado un hecho punible y omitiere dar aviso dentro del plazo de veinticuatro horas al funcionario competente, será sancionado con multa de cincuenta a cien días multa. Igual sanción se impondrá al jefe o persona encargada de un centro hospitalario, clínica u otro establecimiento semejante, público o privado, que no informare al funcionario competente el ingreso de personas lesionadas, dentro de las ocho horas siguientes al mismo, en casos en que racionalmente debieran considerarse como provenientes de un delito.”

⁴⁵⁸ Escalante Saravia. *Código Penal comentado. 1ra Edición. Editorial Corte Suprema de Justicia*. El Salvador 2001. P. 641. vol. 1, quoted in K. Zúniga & D. Cruz, *SECRETO PROFESIONAL Una obligación del personal de salud*, p. 7, EL SALVADOR, available at: http://repositorio.gire.org.mx/bitstream/123456789/2200/1/SecretoProfesional_obligacionPersonal.pdf (10.02.19): “[...] En algunos delitos, los de sangre o abuso sexual principalmente, los profesionales de la salud son los primeros en obtener la versión sobre la forma en que se han producido los hechos al ser llamados a prestar servicios asistenciales al agredido. El cumplimiento de los deberes profesionales de asistencia no resulta incompatible con la obligación legal de comunicar la “*notitia criminis*” a las autoridades encargadas de su persecución. En efecto, el cumplimiento de este deber no contradice los principios éticos que rigen la asistencia a las personas que auxilian. Además, la denuncia de los hechos delictivos coadyuva a que los mismos no queden impunes y evitan el recurso a la venganza privada. La única excepción que cabría corresponde al secreto profesional”.

⁴⁵⁹ K. Zúniga & D. Cruz, *op. cit.*, p. 8: “En su interpretación, la Corte Suprema de El Salvador habla de la obligación de reportar los casos en los cuales el o la paciente es víctima de un crimen, como en el caso de un asalto con lesiones físicas, un intento de homicidio o el abuso sexual. En estos casos, se presume que la víctima está de acuerdo en que el prestador de servicios revele el secreto profesional, por lo tanto, no se considera que haya violación del mismo y no hay conflicto entre las dos obligaciones legales. La Corte aclara que el secreto profesional no debe ser revelado y es una excepción al deber de aviso.”

Finally, with respect to the ethical sphere, art. 115 c) CEMD⁴⁶⁰ states that the fact that medical conduct was declared by courts to be exempt from liability (criminal or civil), does not prevent the same conduct from being condemned later by the deontological instances. Finally, Art. 118 CEMD⁴⁶¹, states that whenever a conflict exists between the principles and recommendations of the World Medical Association and the law of Salvador, the latter shall apply.

⁴⁶⁰ Art. 115 c) CEMD: *“El hecho de que una conducta médica haya sido declarada exenta de responsabilidad penal o civil en los tribunales no impedirá que, a posteriori, pueda ser enjuiciada por la jurisdicción deontológica competente.”*

⁴⁶¹ Art. 118 CEMD : *“Cuando exista conflicto entre los principios y las recomendaciones aprobadas por la Asociación Médica Mundial y las disposiciones legales vigentes, se aplicarán las correspondientes a la legislación salvadoreña.”*

F. FRANCE

1. Cadre général relatif à la confidentialité et aux devoirs de déclarer pour le personnel soignant

Le respect de la vie privée et du secret des informations concernant toute personne prise en charge par un professionnel de santé, y compris dans un service de santé des armées, est un droit de la personne⁴⁶². **Les médecins ont pour devoir général de respecter ce secret professionnel** institué dans l'intérêt des patients. Ce « secret couvre **tout ce qui est venu à la connaissance du médecin dans l'exercice de sa profession, c'est-à-dire non seulement ce qui lui a été confié, mais aussi ce qu'il a vu, entendu ou compris** »⁴⁶³. La loi précise que le secret professionnel des médecins est un principe déontologique fondamental⁴⁶⁴. La jurisprudence précise que le secret médical revêt un caractère général et absolu; ceci signifie en particulier que le secret s'impose même devant le juge⁴⁶⁵. Sa violation est punie d'un an d'emprisonnement et de 15 000 euros d'amende⁴⁶⁶.

Le Conseil national de l'Ordre des médecins considère que **le secret médical est à la fois d'intérêt privé et d'intérêt public**. L'intérêt privé est celui du patient, dont la réputation, la considération ou l'intimité doivent être protégées. L'intérêt public, ou général, « veut que chacun puisse être convenablement soigné et ait la garantie de pouvoir se confier à un médecin, même s'il est dans une situation sociale irrégulière/marginale, pour bénéficier de ses soins, sans craindre d'être trahi ou dénoncé »⁴⁶⁷.

Néanmoins, il existe des **exceptions** à cette obligation des médecins/droit des patients. En particulier, la peine susmentionnée n'est pas applicable et, de manière générale, **la responsabilité civile, pénale ou disciplinaire ne peut pas être engagée lorsqu'un professionnel de santé, agissant de bonne foi, :**

- « informe les autorités judiciaires, médicales ou administratives de privations ou de **sérvices**, y compris lorsqu'il s'agit d'atteintes ou mutilations sexuelles, dont il a eu connaissance et **qui ont été infligées à un mineur ou à une personne qui n'est pas en mesure de se protéger en raison de son âge ou de son incapacité physique ou psychique** » ;
- « porte à la connaissance du procureur de la République ou de la cellule de recueil, de traitement et d'évaluation des informations préoccupantes relatives aux mineurs en danger ou qui risquent de l'être, [...] [avec l'accord de la victime], les sérvices ou privations qu'il a constatés, sur le plan physique ou psychique, dans l'exercice de sa profession et qui lui permettent de **présumer que des violences physiques, sexuelles ou psychiques de toute nature ont été commises. Lorsque la victime est un mineur ou une personne qui n'est pas en mesure de se protéger en raison de son âge ou de son incapacité physique ou psychique, son accord n'est pas nécessaire** »⁴⁶⁸ ;

⁴⁶² Code de la santé publique, article L. 1110-4 ; voir également l'article L. 1111-5 pour les mineurs.

⁴⁶³ Code de la santé publique, article R. 4127-4.

⁴⁶⁴ Code de la sécurité sociale, article L. 162-2.

⁴⁶⁵ Conseil national de l'Ordre des Médecins, Article 4 – Secret professionnel, 04.02.2016, disponible sous : <https://www.conseil-national.medecin.fr/article/article-4-secret-professionnel-913> (21.03.2018); citant : Cour de cassation, arrêt Watelet, 1885 ; Cour de cassation, chambre criminelle, arrêt Degraene, 08.05.1947 ; Conseil d'Etat, arrêt d'assemblée Deve, 12.04.1957 ; Conseil d'Etat, avis de la Section sociale, 06.02.1951 – 02.06.1953.

⁴⁶⁶ Code pénal, article 226-13.

⁴⁶⁷ Conseil national de l'Ordre des Médecins, Article 4 – Secret professionnel, *op. cit.*.

⁴⁶⁸ Dans le cadre de la protection de l'enfance, voir également l'article L. 226-2-2.

- « informe [...] le préfet et, à Paris, le préfet de police du caractère dangereux pour elles-mêmes ou pour autrui de personnes qui le[...] consultent[...] et dont il[..] [sait] qu'elles détiennent une arme ou qu'elles ont manifesté leur intention d'en acquérir une »^{469, 470}

En outre, lorsque le patient est un militaire et qu'il est admis dans un établissement public de santé pour des soins urgents, le directeur de l'établissement signale son admission à l'autorité militaire ou, à défaut, à la gendarmerie⁴⁷¹.

En ce qui concerne les professionnels de santé des armées (« praticiens des armées »⁴⁷²), il est prévu qu'ils doivent respecter le secret professionnel dans les conditions fixées par la loi⁴⁷³. Toutefois, à des fins de protection de l'intégrité des personnes ou de la sécurité de leur mission, **le praticien des armées peut communiquer une information à l'autorité susceptible de prendre les mesures nécessaires**⁴⁷⁴. Par ailleurs, un praticien des armées appelé à exercer son activité dans le cadre d'une coopération internationale à l'étranger doit respecter les règles de déontologie applicables dans le pays d'origine de son patient, notamment en termes de secret professionnel – sauf contradiction avec un principe général d'éthique médicale ou une stipulation conventionnelle contraire⁴⁷⁵. Dans le même sens, «[l]a mise à disposition, sous quelque position statutaire que ce soit, d'un praticien des armées auprès d'un Etat étranger entraîne de sa part l'acceptation des règles nationales du pays d'accueil [;

⁴⁶⁹ Code pénal, article 226-14.

⁴⁷⁰ D'autres exceptions au secret professionnel des professionnels de santé existent, par exemple pour la déclaration des naissances (article 56 du Code civil) et décès (article L.2223-42 du Code général des collectivités territoriales), le signalement de maladies contagieuses (article L.3113-1 du Code de la santé publique), les admissions en soins psychiatriques (articles L.3212-1 à L.3212-12 du Code de la santé publique), les cas de dopage (article L.232-1 à L.232-4 du Code du sport) ou encore les traitements de données à caractère personnel dans le domaine de la santé ayant pour finalité de répondre, en cas de situation d'urgence, à une alerte sanitaire (article 55 de la Loi n° 78-17 du 06.01.1978 relative à l'informatique, aux fichiers et aux libertés).

⁴⁷¹ Code de la santé publique, article R. 1112-29.

⁴⁷² Norme pertinente : Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées. Les praticiens des armées sont définis dans un autre décret (Décret n° 2008-933 du 12.09.2008 portant statut particulier des praticiens des armées, article 1) comme étant les internes des hôpitaux des armées, les médecins des armées, les pharmaciens des armées, les vétérinaires des armées et les chirurgiens-dentistes des armées. Le Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées précise qu'il s'applique en outre aux élèves des écoles du service de santé des armées et aux praticiens militaires étrangers en stage ou en formation au sein du ministère de la défense (article 1).

⁴⁷³ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 12 disposant que : « Le secret professionnel s'impose à tout praticien des armées dans les conditions fixées par la loi ainsi que par les articles 21, 26 et 28 ci-après. Il doit veiller à ce que les personnes qui l'assistent dans l'exercice de sa profession soient instruites de leurs obligations au regard de ce secret et s'y conforment. Il s'assure qu'aucune atteinte ne puisse être portée par ses proches au secret qui s'attache à sa correspondance professionnelle. Lorsqu'un patient s'adresse au service de santé des armées, le secret professionnel est nécessairement confié à l'ensemble des praticiens des armées appelés à le prendre en charge, sauf prescription particulière de ce patient. ». Ce décret prévoit une exception au secret professionnel des praticiens des armées pour les nécessités des actions de médecine préventive ou curative, individuelle et collective (article 21).

⁴⁷⁴ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 26.

⁴⁷⁵ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 28.

mais] [c]ette obligation ne peut en aucun cas le conduire à réaliser des actes ou à tolérer des situations contraires aux principes généraux de l'éthique médicale »⁴⁷⁶.

2. Devoir du personnel soignant de déclarer les cas de blessures par arme à feu

Certaines dérogations légales susmentionnées au 1. peuvent être pertinentes en matière de blessures par arme à feu. En effet, **un professionnel de santé pourra déroger au secret médical si une blessure par arme à feu sur un mineur ou une personne qui n'est pas en mesure de se protéger⁴⁷⁷, voire sur un majeur avec son accord, constitue des sévices**. Le professionnel de santé pourra encore déroger à son devoir de respect du secret médical **pour avertir du caractère dangereux, pour lui-même ou pour autrui, d'un patient détenant une arme ou ayant manifesté son intention d'en acquérir une⁴⁷⁸**.

Il ne s'agit toutefois pas de dérogations obligatoires, mais de simples permissions de la loi. Le professionnel de santé ne pourra voir sa responsabilité civile, pénale ou disciplinaire engagée en cas de divulgation, selon les procédures et dans les conditions prévues, d'informations ordinairement protégées par le secret médical. Le professionnel de santé n'est pas obligé de divulguer les informations, sauf dans les cas où l'absence d'information aux autorités compétentes constituerait l'infraction de non-assistance à personne en danger.

En effet, l'incrimination de la **non-assistance à personne en danger⁴⁷⁹** est applicable aux professionnels de santé. Le Code pénal prévoit ainsi en son article 223-6 :

« Quiconque pouvant empêcher par son action immédiate, sans risque pour lui ou pour les tiers, soit un crime, soit un délit contre l'intégrité corporelle de la personne s'abstient volontairement de le faire est puni de cinq ans d'emprisonnement et de 75 000 euros d'amende.

Sera puni des mêmes peines quiconque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter soit par son action personnelle, soit en provoquant un secours.

Les peines sont portées à sept ans d'emprisonnement et 100 000 euros d'amende lorsque le crime ou le délit contre l'intégrité corporelle de la personne mentionnée au premier alinéa est commis sur un mineur de quinze ans ou lorsque la personne en péril mentionnée au deuxième alinéa est un mineur de quinze ans. »

Cette disposition doit être lue en combinaison avec l'article 434-1 du Code pénal qui prévoit que **les personnes astreintes au secret ne peuvent pas être punies**, contrairement à toute autre personne, si elles n'informent pas les autorités d'un crime dont il est encore possible de prévenir ou de limiter les effets, ou dont les auteurs sont susceptibles de commettre de nouveaux crimes qui pourraient être empêchés.

⁴⁷⁶ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 29.

⁴⁷⁷ Voir également l'article 434-3 du Code pénal qui pose une exception pour les personnes astreintes au secret professionnel, à l'incrimination de la non information des autorités de privations, mauvais traitements, agressions ou atteintes sexuelles infligés à un mineur ou à une personne qui n'est pas en mesure de se protéger.

⁴⁷⁸ Code pénal, article 226-14 ; cf. *supra* 1..

⁴⁷⁹ Voir également l'abstention de combattre un sinistre, incrimination introduite dans le Code pénal pour réprimer des faits qui ne pouvaient pas tomber sous le coup de la non-assistance à personne en péril, parce qu'aucun péril pour autrui n'était caractérisé (article 223-7 du Code pénal : « Quiconque s'abstient volontairement de prendre ou de provoquer les mesures permettant, sans risque pour lui ou pour les tiers, de combattre un sinistre de nature à créer un danger pour la sécurité des personnes est puni de deux ans d'emprisonnement et de 30 000 euros d'amende. »). Voir P. Bonfils, Fasc. 20 : Entrave aux mesures d'assistance, omission de porter secours, Jurisclasseur Pénal Code, 2018, N 92 et s..

Lues en combinaison, ces deux dispositions du Code pénal signifieront en l'occurrence, par exemple, que **le professionnel de santé doit provoquer les secours pour les éventuelles personnes en péril autres que son patient blessé par arme à feu ou pour empêcher un crime ou un délit contre l'intégrité corporelle d'une personne, sans pour autant devoir violer le secret médical en révélant notamment qu'il a un patient blessé par arme à feu.**

Par conséquent, si les professionnels de santé n'ont **pas l'obligation générale de révéler les blessures par arme à feu**, ils doivent néanmoins prendre les mesures nécessaires pour **mettre hors de danger les personnes qui le seraient**. Par ailleurs, **leur responsabilité ne serait pas engagée s'ils ne respectaient pas le secret professionnel, si les conditions de fond** (sévices sur un mineur ou une personne qui n'est pas en mesure de se protéger, voire sur un majeur avec son accord, caractère dangereux pour lui-même ou pour autrui d'un patient détenant une arme ou ayant manifesté son intention d'en acquérir une⁴⁸⁰) **et les conditions de forme**⁴⁸¹ précédemment évoquées étaient réunies.

Dans l'hypothèse, par exemple, où un professionnel de santé apprend de son patient blessé par arme à feu qu'il projette de commettre un crime, le professionnel de santé est obligé, comme toute personne, d'agir pour empêcher la commission de ce crime. Si son patient peut être considéré comme détenant une arme ou ayant manifesté son intention d'en acquérir une, le professionnel de santé est libéré de son obligation de respecter le secret médical et choisira l'action la plus indiquée ; il pourra en particulier informer les autorités de police. En dehors des cas où un professionnel de santé est libéré de son obligation de respecter le secret professionnel, il pourra difficilement agir afin d'empêcher la commission du crime sans engager sa responsabilité au regard du respect du secret médical. Face à une telle difficulté, la doctrine a pu conseiller le recours à la disposition générale du droit pénal français qui prévoit que « n'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace »⁴⁸².

En ce qui concerne plus spécifiquement les professionnels de santé des armées, le décret spécial pertinent prévoit que la révélation d'information de nature à éviter qu'il soit porté atteinte à l'intégrité des personnes ou à la sécurité de leur mission est possible. C'est au praticien d'estimer cette nécessité ; la « décision de cette communication lui appartient en conscience et nul ne peut le contraindre, par principe, à la prendre »⁴⁸³. Cependant, un arrêté relatif à l'organisation et au fonctionnement du conseil de déontologie médicale des armées prévoit des sanctions professionnelles pour des fautes ou des manquements à des obligations professionnelles qui pourraient éventuellement placer les praticiens des armées face à une difficulté d'évaluation des situations. En effet, il est prévu que :

- « Pour un praticien des armées, peut être qualifié de faute professionnelle ou de manquement aux obligations professionnelles un fait résultant :
- d'une imprudence, négligence ou manquement grave à une obligation de prudence ou de sécurité dans l'exercice de son activité professionnelle ;
 - d'une inobservation manifeste ou d'une méconnaissance inadmissible des directives relatives à l'exécution des missions qui lui sont confiées ou des bonnes pratiques professionnelles ;
 - d'un comportement contraire aux règles de déontologie ou aux principes généraux de l'éthique médicale.

⁴⁸⁰ Code pénal, article 226-14 ; cf. *supra* 1.

⁴⁸¹ Cf. *supra* 1. la citation de l'article 226-14 du Code pénal ; et *infra* 2.3.

⁴⁸² Code pénal, article 122-7 ; V. Ricouveau, Quelques réflexions sur le médecin et le terroriste, 2017, disponible sous : <https://www.village-justice.com/articles/quelques-reflexions-sur-medecin-terroriste-par-vincent-ricouveau-professeur,26685.html> (14.06.2019).

⁴⁸³ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 26 alinéa dernier.

Il est tenu compte de la nature de ses missions ou de ses fonctions, de ses compétences ainsi que des moyens dont il disposait et des circonstances dans lesquelles le fait reproché s'est produit. »⁴⁸⁴

2.1. Conditions

Les circonstances dans lesquelles intervient la divulgation des blessures par arme à feu ont été décrites ci-dessus.

Selon qu'il s'agisse de patients mineurs ou de personnes n'étant pas en mesure de se protéger, d'autres majeurs victimes de sévices, ou encore de patients dangereux pour eux-mêmes ou autrui et détenant ou ayant l'intention d'acquérir une arme, **le Code pénal indique des autorités différentes à prévenir**⁴⁸⁵.

Quoi qu'il en soit, il n'est nul part indiqué que les professionnels de santé doivent effectuer ces signalements avant d'avoir secouru un patient. De plus, **une telle hiérarchisation des priorités, si elle venait à mettre en danger la santé du patient, pourrait être contraire à l'article susmentionné 223-6 du Code pénal réprimant la non-assistance à personne en danger**. On retrouve encore cette dernière obligation de secours dans le Code de déontologie médicale codifié dans le Code de la santé publique :

« Tout médecin qui se trouve en présence d'un malade ou d'un blessé en péril ou, informé qu'un malade ou un blessé est en péril, doit lui porter assistance ou s'assurer qu'il reçoit les soins nécessaires »^{486 487}

Toutefois, dans **les situations où le danger est encouru par d'autres personnes que le patient**, la hiérarchisation du respect dans le temps des normes impliquées n'est pas expressément indiquée aux professionnels de santé confrontés à l'urgence.

En ce qui concerne plus spécifiquement les professionnels de santé des armées, dans le cas où un praticien estime qu'une information qu'il a recueilli dans le cadre de son activité professionnelle est de nature à éviter qu'il soit porté atteinte à l'intégrité des personnes ou à la sécurité de leur mission, et qu'il décide de la communiquer, il est prévu qu'il doit le faire auprès de « l'autorité susceptible de prendre les mesures nécessaires ». En outre, le praticien des armées « doit, dans le même temps, rappeler à cette autorité qu'elle est tenue, dans les mêmes conditions que lui, de respecter le secret qui lui a été confié à raison de ses fonctions »⁴⁸⁸.

2.2. Champ d'application

Hors les cas de **signalements de sévices sur mineurs ou majeurs hors d'état de se protéger** (pour lesquels des formulaires de signalement sont proposés par le Conseil national de l'Ordre des médecins, et comprennent des rubriques pour indiquer l'identité du patient et la description des lésions)⁴⁸⁹, nos

⁴⁸⁴ Arrêté du 30.09.2008 fixant l'organisation et le fonctionnement du conseil de déontologie médicale des armées, article 8.

⁴⁸⁵ Cf. *infra* 2.3..

⁴⁸⁶ Code de déontologie médicale, article 9, codifié à l'article R. 4127-9 du Code de la santé publique.

⁴⁸⁷ Concernant les réquisitions, saisies, perquisitions, témoignages, certificats produits en justice, voir : Conseil national de l'Ordre des Médecins, Article 4 – Secret professionnel, *op. cit.*, pp. 7 à 8 ; W. Vorhauer, Le secret médical et les autorités judiciaires, in Médecins. Bulletin d'information de l'Ordre national des médecins, Le secret médical. Entre droit des patients et obligation déontologique, n° sp. 11/12.2012, pp. 13 à 15, disponible sous : https://www.conseil-national.medecin.fr/sites/default/files/cn_bulletin/specialmedecin_secretmedical_web.pdf (15.02.2019).

⁴⁸⁸ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 26 alinéa premier *in fine*.

⁴⁸⁹ Conseil national de l'Ordre des médecins, formulaire de signalement proposé pour le cas où il s'agit d'une personne majeure hors d'état de se protéger en raison de son âge ou de son incapacité physique ou psychique disponible sous : <https://www.conseil-national.medecin.fr/sites/default/files/modele>

recherches n'ont pas permis d'identifier une norme précisant le contenu d'un signalement de blessure par arme à feu.

En ce qui concerne plus spécifiquement les professionnels de santé des armées, nos recherches n'ont pas non plus permis d'identifier une norme précisant le contenu du signalement.

2.3. But

La signalisation de blessures par arme à feu poursuit l'objectif de **protéger** un mineur en danger, voire un majeur qui n'est pas en état de se protéger lui-même, ou même tout autre majeur avec son accord⁴⁹⁰ ou s'il détient ou envisage d'acquérir une arme⁴⁹¹. Il peut viser la protection de tierces personnes, en particulier contre un patient dangereux détenant une arme ou envisageant d'en acquérir une⁴⁹².

En fonction de l'objectif poursuivi, l'autorité que les professionnels de santé doivent avertir n'est pas la même. La loi mentionne qu'il s'agira, pour protéger le patient, d'informer « les autorités judiciaires, médicales ou administratives », « le procureur de la République ou [...] la cellule de recueil, de traitement et d'évaluation des informations préoccupantes relatives aux mineurs en danger ou qui risquent de l'être » ; ou bien, pour protéger des atteintes avec une arme, « le préfet et, à Paris, le préfet de police »⁴⁹³. Pour faire obstacle à la commission d'une infraction ou assister des personnes en péril, le Code pénal n'indique pas le secours qu'il convient de provoquer⁴⁹⁴.

En ce qui concerne plus spécifiquement les professionnels de santé des armées, les praticiens des armées sont libérés du secret médical lorsque la révélation des informations peut « éviter qu'il soit porté atteinte à l'intégrité des personnes ou à la sécurité de leur mission »⁴⁹⁵. Quant à l'autorité à laquelle l'information doit être transmise, il est prévu qu'ils doivent le faire auprès de « l'autorité susceptible de prendre les mesures nécessaires »⁴⁹⁶.

2.4. Conséquences du non-respect

Lorsque la non révélation d'informations obtenues dans le cadre de l'exercice de sa profession a pour conséquence la commission par le professionnel de santé de l'infraction de **non-assistance à personne en danger** (il s'agit de l'hypothèse où un patient blessé par arme à feu permet à un professionnel de santé d'avoir connaissance d'un danger couru par ailleurs), le Code pénal prévoit une peine de **cinq ans d'emprisonnement et 75 000 euros d'amende, voire sept ans d'emprisonnement et 100 000**

[signalement_majeur.pdf](#) (15.02.2019); formulaire de signalement proposé pour le cas où il s'agit d'un mineur disponible sous : https://www.conseil-national.medecin.fr/sites/default/files/modele_signalement_mineur.pdf (15.02.2019).

⁴⁹⁰ Dans le cas de l'article 226-14 du Code pénal, 1° et 2°.

⁴⁹¹ Dans le cas de l'article 226-14 du Code pénal, 3°.

⁴⁹² Dans le cas de l'article 226-14 du Code pénal, 3°.

⁴⁹³ Code pénal, article 226-14. Pour les mineurs, voir également l'article L. 226-2-2 du Code de l'action sociale et des familles.

⁴⁹⁴ Code pénal, article 223-6 ; voir Bonfils, Fasc. 20 : Entrave aux mesures d'assistance, omission de porter secours, *op. cit.*, N 67.

⁴⁹⁵ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 26 alinéa premier *in limine*.

⁴⁹⁶ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 26 alinéa premier *in fine*.

euros d'amende lorsque la personne en danger est un mineur de quinze ans⁴⁹⁷. Rappelons que cette incrimination doit être lue en combinaison avec l'article 434-1 du Code pénal qui prévoit que les professionnels tenus au secret n'encourent pas de sanction pénale si, ayant connaissance d'un crime dont il est encore possible de prévenir ou de limiter les effets, ou dont l'auteur est susceptible de commettre de nouveaux crimes qui pourraient être empêchés, le professionnel de santé n'en informe pas les autorités judiciaires ou administratives. En conséquence, l'incrimination de la non-assistance à personne en danger ne libèrent pas les professionnels de santé du secret médical (et ne leur impose par conséquent pas d'avertir les autorités de la blessure par arme à feu de leur patient), mais elle leur impose d'agir de manière à ce qu'une assistance soit apportée aux personnes en danger, tout en respectant le secret professionnel.

Les professionnels de santé n'ont pas d'obligation de non-respect du secret médical. Au contraire, ils engageraient leur responsabilité s'ils ne respectaient pas le secret professionnel, et leurs patients pourraient introduire des recours aux niveaux pénal, civil ou disciplinaire pour non-respect du secret médical. Rappelons que le Code pénal punit d'un an de prison et de 15 000 € d'amende la violation du secret médical^{498, 499}.

En ce qui concerne plus spécifiquement les professionnels de santé des armées, il est prévu que la décision d'un praticien de communiquer une information de nature à protéger l'intégrité des personnes ou la sécurité de leur mission est libre. Le praticien ne peut pas être forcé de la prendre. Par conséquent, il ne peut *a priori* pas y avoir de sanction réprimant son silence, sauf toutefois à considérer qu'il s'agit par exemple d'un manquement grave à une obligation de prudence ou de sécurité réprimable par le biais d'une sanction professionnelle⁵⁰⁰.

3. Protection de la fourniture des soins de santé

3.1. Législation spécifique protégeant la fourniture des soins de santé

Le Code de déontologie médicale, codifié dans le Code de la santé publique, prévoit que :

« Tout médecin qui se trouve en présence d'un malade ou d'un blessé en péril ou, informé qu'un malade ou un blessé est en péril, **doit lui porter assistance ou s'assurer qu'il reçoit les soins nécessaires.** »⁵⁰¹

En ce sens, encore, le Code pénal punit la **non-assistance à personne en danger**⁵⁰².

Pour les cas de guerre, en particulier, il a été prévu dans le Code de déontologie médicale et repris dans le Code de la santé publique, que :

« **Le médecin ne peut pas abandonner ses malades en cas de danger public**, sauf sur ordre formel donné par une autorité qualifiée, conformément à la loi. »⁵⁰³

⁴⁹⁷ Code pénal, article 223-6. Voir également l'article 223-7 du Code pénal relatif à l'abstention de combattre un sinistre, lorsqu'aucun péril pour autrui n'est caractérisé ; la sanction est dans ce cas de deux ans d'emprisonnement et de 30 000 euros d'amende.

⁴⁹⁸ Code pénal, article 226-13.

⁴⁹⁹ Voir le Site officiel de l'administration française, Secret médical, 2017, disponible sous : <https://www.service-public.fr/particuliers/vosdroits/F34302> (21.03.2018).

⁵⁰⁰ Cf. *supra* 2. et l'article 8 de l'Arrêté du 30.09.2008 fixant l'organisation et le fonctionnement du conseil de déontologie médicale des armées.

⁵⁰¹ Code de déontologie médicale, article 9 ; Code de la santé publique, article R. 4127-9.

⁵⁰² Code pénal, article 223-6 (voir *supra* 2.).

⁵⁰³ Code de déontologie médicale, article 48 ; Code de la santé publique, article R. 4127-48.

En ce qui concerne plus spécifiquement les professionnels de santé des armées, il est également prévu qu'un « praticien des armées doit porter assistance à tout malade ou blessé en péril ou s'assurer qu'il reçoit les soins nécessaires »⁵⁰⁴.

Enfin, la France est par ailleurs **partie au Protocole II additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes de conflits armés non internationaux**⁵⁰⁵ dont l'article 10 prévoit qu'en cas de conflit armé, nul ne sera puni pour avoir exercé une activité de caractère médical conforme à la déontologie, quels qu'aient été les circonstances ou les bénéficiaires de cette activité.

3.2. Moyens de résolution des litiges potentiels entre éthique médicale et obligation de déclarer les cas de blessures par arme à feu

Les hypothétiques problèmes juridiques relatifs à la hiérarchisation des obligations des professionnels de santé, voire de la conciliation de ces obligations, ou, en d'autres termes de l'ordre de leur réalisation dans le temps, ne sont pas expressément résolus. Comme cela a déjà été relevé⁵⁰⁶, la **hiérarchisation des priorités face, d'un côté, à un patient en danger blessé par arme à feu et, de l'autre côté, la nécessité de révéler cette blessure pour protéger d'autres personnes**, n'est pas expressément indiquée aux professionnels de santé confrontés à l'urgence.

Le Conseil national de l'Ordre des médecins, dans son commentaire sur l'article 4 du Code de déontologie portant sur le secret professionnel, invite, de manière générale, les médecins confrontés à un dilemme, à **consulter les instances ordinales**⁵⁰⁷, ce qui peut être de peu de secours s'il convient d'agir dans l'urgence.

En ce qui concerne plus spécifiquement les professionnels de santé des armées, nos recherches n'ont pas permis d'identifier de directive relative à la résolution de tension potentielle entre le respect de l'éthique médicale et la nécessité de révéler les blessures par arme à feu de patients.

Une fois le conflit entre secret médical et nécessité de révéler aux autorités la blessure par arme à feu tranché par un médecin, ce dernier peut être accusé devant le juge pénal aussi bien pour avoir privilégié l'information des autorités au détriment des soins immédiats à son patient lui ayant ainsi porter préjudice, que pour la révélation aux autorités trop tardive pour permettre d'éviter un acte terroriste imminent, par exemple. Il reviendra au juge pénal de déterminer si oui ou non il y a infraction et, par conséquent, si oui ou non le conflit a été correctement résolu par le médecin accusé. Le professionnel de santé peut encore voir sa responsabilité engagée pour non-respect du secret médical par son patient blessé par arme à feu, devant le juge pénal, le juge civil ou le conseil compétent de l'Ordre des médecins⁵⁰⁸. Ces instances décideront de la justesse de la décision prise par le professionnel de santé. A notre connaissance, aucune décision n'a encore été prise sur cette question du conflit entre obligations découlant de l'éthique médicale et nécessité de révéler des blessures par arme à feu.

⁵⁰⁴ Décret n° 2008-967 du 16.09.2008 fixant les règles de déontologie propres aux praticiens des armées, article 5 *in limine*.

⁵⁰⁵ Loi n° 83-1130 du 23.12.1983 autorisant l'adhésion de la République française au protocole additionnel aux conventions de Genève du 12.08.1949 relatif à la protection des victimes des conflits armés non internationaux (protocole II), adopté à Genève le 08.06.1977 ; Décret n° 84-727 du 17.07.1984 portant publication du protocole additionnel aux conventions de Genève du 12.08.1949 relatif à la protection des victimes des conflits armés non internationaux (protocole II), adopté à Genève le 08.06.1977.

⁵⁰⁶ Cf. *supra* 2.1.

⁵⁰⁷ Conseil national de l'Ordre des Médecins, Article 4 – Secret professionnel, *op. cit.*, p. 6 et p. 13.

⁵⁰⁸ Voir : Service public (site officiel de l'administration française), Secret médical, vérifié le 03.07.2017, disponible sur : <https://www.service-public.fr/particuliers/vosdroits/F34302> (20.03.2019).

G. LEBANON

1. Cadre général relatif à la confidentialité et aux devoirs de déclarer pour le personnel soignant

Le devoir de confidentialité du médecin et son devoir de dénonciation aux autorités étatiques se trouvent détaillés dans les sources juridiques suivantes (applicables tant en temps de paix qu'en temps de guerre et autres situations d'urgence) :

- **Code pénal de 1943**⁵⁰⁹

Art. 400 :

« Quiconque, dans l'exercice d'une **profession sanitaire**, aura assisté une personne paraissant avoir été la victime d'un crime, ou d'un délit susceptible d'être poursuivi d'office, et ne l'aura **pas dénoncé à l'autorité**, encourra la **peine d'amende** prévue à l'article précédent⁵¹⁰ ».

Art. 579 :

« Quiconque ayant, à raison de son état, de sa fonction, de sa profession ou de son art, connaissance d'un **secret**, le **révélera** sans juste motif, ou bien l'utilisera à son profit personnel ou au profit d'un tiers sera puni, si le fait est susceptible de causer un préjudice même moral, d'un **emprisonnement** d'un an plus et d'une amende qui n'excèdera pas quatre cent mille livres ».

- **Code de procédure civile de 1983**⁵¹¹

Art. 264 :

« Les avocats, mandataires, médecins et autres personnes ayant eu connaissance, par le biais de leurs professions, d'informations confidentielles ne peuvent les divulguer, même après la fin de leurs services ou la disparition de leurs titres sauf si ces informations révèlent l'intention de commettre un crime ou un délit.

Cela dit, les personnes susmentionnées devront témoigner de cette circonstance ou des informations lorsque les personnes leur ayant confié ces informations le leur demanderont. Ce témoignage ne doit pas contrevenir aux dispositions des lois spécifiques aux professionnels ».

- **Loi n° 574 du 11 février 2004 sur les droits du patient et le consentement éclairé**⁵¹²

Art. 12 :

« Tout patient pris en charge par un médecin ou un établissement de santé a le droit à ce que sa vie privée et la confidentialité des informations qui s'y rapportent soit respectées

Lorsque le patient est pris en charge par une équipe médicale dans un établissement de santé, cette équipe sera dépositaire des informations relatives à ce patient et sera tenue par le secret professionnel comme c'est le cas du médecin traitant tel que cela est prévu par le Code pénal et la loi sur l'éthique médicale ».

⁵⁰⁹ Une version française du Code pénal libanais se trouve dans : Le Code pénal (accompagné des principales décisions judiciaires), A. Antoine édition 2009 ainsi que sur le site de l'Université libanaise : <http://www.legallaw.ul.edu.lb/LawView.aspx?opt=view&LawID=244611>.

⁵¹⁰ La peine d'amende prévue à l'article 399 est de vingt mille à deux cent mille livres.

⁵¹¹ La version arabe de ce Code se trouve sous <http://legiliban.ul.edu.lb/LawView.aspx?opt=view&LawID=244565>.

⁵¹² La version arabe de cette loi est disponible sous <http://www.legallaw.ul.edu.lb/Law.aspx?lawId=256595>.

Art. 14 :

« Lorsque le diagnostic ou le pronostic médical laissent penser que la mort du patient est proche, le secret professionnel ne s'oppose pas à la communication des informations nécessaires à la famille du patient ».

- Loi n° 240 de 2012 modifiant la loi n° 288 du 22 février 1994 sur **l'éthique médicale**⁵¹³.

Art. 7 intitulé « **Le secret professionnel** » :

« Le secret professionnel imposé au médecin est d'ordre public. Il doit le respecter dans toutes les circonstances dans lesquelles il est appelé à s'occuper d'un patient ou à lui donner une consultation, et ceci en tenant compte des exceptions requises par la sécurité publique, les lois, les règlements et les contrats.

Ce secret couvre les informations communiquées par le patient ainsi que tout ce que le médecin a vu, connu, découvert ou déduit dans le cadre de l'exercice de sa profession. Il en résulte que :

- 1- Le patient ne peut dispenser le médecin de son devoir de garder le secret. Le médecin demeure toujours tenu de préserver l'intérêt du patient et l'intérêt général.

[...]

- 4- Lorsqu'il est convoqué par la police judiciaire pour témoigner sur des faits couverts par le secret professionnel, le médecin peut taire certaines informations. Le médecin devra révéler toutes ses informations devant la justice pénale lorsque ceci lui sera demandé et qu'il aura prêté serment.

- 5- Il est **interdit au médecin de dénoncer un malade lui ayant avoué la commission d'une infraction**. Dans l'hypothèse où un **médecin découvre** la commission d'une infraction lors de l'examen d'un patient, **il doit faire une dénonciation** auprès du Ministère public. Il en est de même **lorsqu'il est convaincu que la dénonciation est de nature à empêcher de commettre d'autres infractions**.

- 6- Le médecin doit témoigner en justice lorsque son témoignage est de nature à empêcher la condamnation d'un innocent.

- 7- Le médecin est dispensé de son devoir de garder le secret professionnel lorsqu'il est convoqué par le tribunal en tant qu'expert pour examiner un patient ou étudier son dossier, et ceci dans les limites de sa mission.

[...]

- 17- Le médecin poursuivi devant le conseil disciplinaire de l'ordre des médecins ne peut se prévaloir du secret professionnel.

[...] ».

Art. 27 :

"1. Le médecin doit traiter le patient avec humanisme, mansuétude et droiture. Il doit l'entourer de sa protection et son attention.

2. Si le médecin accepte le traitement d'un patient, il s'engage à garantir son traitement, que ce soit seul ou avec une personne compétente, et ceci avec précision et conscience conformément aux données scientifiques les plus récentes dont il doit être au courant".

⁵¹³

Cette loi est applicable à tous les médecins inscrits dans les deux ordres des médecins au Liban (art. 1^{er} de la loi). La version arabe de cette loi est disponible sous <https://website.aub.edu.lb/fm/shbpgp/ethics/public/Documents/Law-no-240.pdf>.

Art. 45 :

“Le médecin peut refuser de s’occuper d’un patient pour des raisons professionnelles ou personnelles sauf en cas d’urgence et sauf dans les cas dans lesquelles il enfreindrait ses devoirs humains”.

2. Devoir du personnel soignant de déclarer les cas de blessures par arme à feu

L’examen des dispositions de droit libanais en la matière révèle l’existence d’une obligation pour les médecins tenus au secret professionnel, de dénoncer les blessures par armes à feu dans l’hypothèse où celles-ci sont observées sur leurs patients. En effet, en vertu de l’article 400 du Code pénal, les professionnels de la santé ont une **obligation de dénoncer** aux autorités les cas où il paraît qu’une personne a été **victime d’un crime ou d’un délit poursuivi d’office**. Commentant l’article 400 du Code pénal, un auteur⁵¹⁴ précise que le **simple soupçon d’une infraction** visée par cet article suffit. Le médecin n’a pas à être certain de la commission de cette infraction⁵¹⁵. Cet auteur précise également que cette obligation de dénonciation est valable pour tous les crimes, mais que concernant les délits (infractions moins graves que les crimes), il convient de distinguer les délits pour lesquels la plainte de la victime est nécessaire pour la mise en œuvre de l’action publique⁵¹⁶ et ceux pour lesquels une pareille plainte n’est pas nécessaire. Ainsi, la dénonciation est suspendue à l’accord de la victime pour un délit non poursuivi d’office tel que notamment en cas de coups et blessures (volontaires ou involontaires) n’ayant entraîné qu’une maladie ou incapacité de travail de moins de 10 jours (art. 554 et 565 CP). Il est à noter que l’accord de la victime couvre le médecin s’il révèle le secret, mais ne peut en aucun cas l’obliger à le faire⁵¹⁷. Dans le même sens, l’article 7 al. 5 de la loi sur l’éthique médicale impose au **médecin qui découvre la commission d’une infraction**⁵¹⁸ lors de l’examen d’un patient, de **faire une dénonciation** auprès du Ministère public.

On relève encore que la même loi sur l’éthique médicale prévoit aussi, à l’art. 7 al. 5, 3ème phrase, une **obligation de dénonciation lorsque celle-ci est de nature à empêcher de commettre d’autres infractions**. Dans le même sens, l’article 264 du Code de procédure civile susmentionné prévoit la **possibilité de divulguer des secrets** lorsque les informations confidentielles recueillies par le médecin révèlent **l’intention de commettre un crime ou un délit**. Etant donné que ces dernières dispositions ne concernent pas tant l’obligation du médecin de dénoncer une blessure par arme à feu existante mais plutôt celle (ou la possibilité) qui se rapporte à de possibles infractions futures avant que celles-ci ne soient commises, elles ne sont pas plus amplement commentées dans le présent rapport. De plus, s’il devait y avoir une blessure par arme à feu, la dénonciation serait une obligation pour le médecin en vertu de l’art. 400 du code pénal et de l’article 7 al. 5, 2^{ème} phrase de la loi sur l’éthique médicale, tels qu’exposés ci-avant.

2.1. Conditions

Bien que la loi sur l’éthique médicale et le Code pénal prévoient une obligation de dénoncer aux autorités les blessures par armes à feu dans certaines hypothèses, ces lois ne précisent pas les

⁵¹⁴ Ph. Nasr, L’aspect juridique du secret médical, in Du droit aux soins au droit de la santé dans les sociétés contemporaines, Publications de l’université Saint-Esprit de Kaslik, Jounieh 2000, p. 119, spéc. p. 124.

⁵¹⁵ Nasr, l’aspect juridique du secret médical, op. cit., p. 124 : « Pas la peine de charger le médecin de s’assurer de toute la vérité. Ce sera l’affaire des autorités judiciaires ».

⁵¹⁶ Ces infractions sont limitativement énumérées par le législateur. Pour une recension de ces infractions, V. M. Al-qadi, Procédure pénale (قانون الإجراءات الجنائية), Beyrouth 2013, p. 76-77.

⁵¹⁷ Nasr, l’aspect juridique du secret médical, op. cit., p. 124.

⁵¹⁸ Contrairement au Code pénal, la loi sur l’éthique médicale parle d’infraction en général sans plus de précisions.

modalités de cette dénonciation. Etant donné que le médecin urgentiste est celui qui très probablement traitera le patient blessé par arme à feu et que l'article 45 de la loi sur l'éthique médicale dispose qu'en cas d'urgence, le médecin ne peut refuser de s'occuper d'un patient, nous pouvons considérer que la dénonciation des blessures par arme à feu n'est pas une condition préalable pour traiter celles-ci.

2.2. Champ d'application

Nous n'avons pas trouvé de réponses à ces questions dans les textes susmentionnés.

Cela dit, il convient de préciser que l'article 29 de la loi sur l'éthique médicale prévoit que chaque médecin garde un dossier médical individuel pour chaque patient. Les sections 7 et 8 de cet article réglementent la perquisition des cliniques et des départements médicaux ainsi que le droit des autorités judiciaires et sanitaires d'obtenir une copie des dossiers médicaux.

De son côté, l'article 16 de la loi n° 574 de 2004 sur les droits du patient et le consentement éclairé énumère les données que le dossier médical doit contenir.

2.3. But

Les textes susmentionnés ne précisent pas la finalité de la dénonciation.

L'article 7 al. 5 de la loi sur l'éthique médicale impose au médecin, qui découvre la commission d'une infraction lors de l'examen d'un patient, de faire une dénonciation auprès du **Ministère public**.

De la même manière, l'article 400 du Code pénal prévoit que la dénonciation se fait auprès de « l'autorité », ce qui englobe le Ministère public.

2.4. Conséquences du non-respect

Selon l'article 400 du Code pénal, quiconque, dans l'exercice d'une profession sanitaire, aura assisté une personne paraissant avoir été la victime d'un crime, ou d'un délit susceptible d'être poursuivi d'office, et ne l'aura pas dénoncé à l'autorité, encourra la **peine d'amende de vingt mille à deux cent mille livres**.

Par ailleurs, toute violation des dispositions de la loi sur l'éthique médicale peut entraîner une procédure devant le Conseil disciplinaire (art. 61 de cette loi). Ce Conseil peut prononcer les sanctions suivantes : l'avertissement, le blâme, la suspension temporaire de l'exercice de la profession pendant une période ne dépassant pas six mois ou l'interdiction définitive de l'exercice de la profession⁵¹⁹.

3. Protection de la fourniture des soins de santé

3.1. Législation spécifique protégeant la fourniture des soins de santé

La loi n° 574 du 11 février 2004 sur les **droits du patient et le consentement éclairé** et la Loi n° 240 de 2012 modifiant la loi n° 288 du 22 février 1994 sur **l'éthique médicale** précisent les devoirs des médecins à l'égard des patients.

⁵¹⁹ Art. 37 de la loi n° 313 de 2001 relative à la création de deux ordres de médecin au Liban. Cette loi est publiée au Journal officiel n° 19 du 19 avril 2001 à la page 1495. Cette loi est disponible en arabe sous http://www.legallaw.ul.edu.lb/OriginalLawView.aspx?opt=view&LawID=244046#Section_273887.

Ainsi, l'article 3 al. 1 de cette dernière loi dispose que le médecin doit traiter tout patient, que ce soit en temps de guerre ou de paix et quelle que soit sa situation financière et sociale, et ceci sans égard à son ethnie, sa nationalité, ses croyances (religieuses), ses opinions politiques, ses sentiments ou sa réputation.

L'article 3 al. 3 impose au médecin, que ce soit en temps de paix ou de guerre, de refuser, même sous la menace des armes, d'utiliser ses connaissances pour aider, participer ou accepter n'importe quel traitement inhumain. Cette disposition ajoute que s'il est demandé au médecin de soigner ou d'examiner un incapable et qu'il découvre que celui-ci a été torturé, il doit le dénoncer immédiatement aux autorités judiciaires et à l'ordre des médecins.

L'article 5 prévoit que, sauf cas de force majeure, tout médecin, qui se trouve avec un patient ou blessé en situation dangereuse, doit l'aider ou s'assurer qu'il a obtenu les secours nécessaires. Cette disposition ajoute que le médecin ne peut refuser de traiter un cas urgent sauf s'il s'assure de l'absence d'un danger imminent ou s'il est déjà occupé avec un cas urgent d'importance équivalente. En tout cas, il devra exprimer son refus et ses causes avec célérité.

Il est à noter que le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), adopté à Genève le 8 juin 1977, est entré en vigueur au Liban le 23 janvier 1998⁵²⁰.

Ce Protocole prévoit notamment que nul ne sera puni pour avoir exercé une activité de caractère médical conforme à la déontologie, quels qu'aient été les circonstances ou les bénéficiaires de cette activité (art. 10).

3.2. Moyens de résolution des litiges potentiels entre éthique médicale et obligation de déclarer les cas de blessures par arme à feu

Nous n'avons pas trouvé de telles directives dans la législation nationale.

⁵²⁰ Voir à ce sujet : https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.

H. MEXICO

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

In Mexico health is a constitutional right. Health services provided in public health facilities are based on the principles of universality, free access according to social and economic conditions and non-discrimination⁵²¹. Mexican domestic regulation for situations of armed conflict is scattered and not abundant. The regulations on medical personnel, units and transports do not make reference to any special regime. The only emergency context in Mexico that has been regulated is civil protection during disaster situations⁵²². Victims of emergency situations or accidents have the right to receive health care immediately and to be transferred to the nearest health facilities. There is a legal obligation for public and private health-care facilities and for the Public Attorney to guarantee access, attention to, and transfer of patients.

Constitution, Art 20 c) III. Rights of victims of crimes⁵²³. According to this provision, the victims of a crime have the right to receive urgent medical and psychological assistance from the moment when the act was committed. Art. 20 c) V. of the Constitution grants to victims the protection of their identity and other personal data, *inter alia*, in cases involving organized crime, kidnapping and rape⁵²⁴.

Code of Federal Criminal Procedure (CFCP)⁵²⁵. The CFCP establishes that persons such as health professionals or civil servants who are bound by medical confidentiality may not be compelled to testify concerning any information received, known or in their possession. Art. 16 CFCP⁵²⁶ provides that in no case during the preliminary phase of a criminal procedure, will reference be made to confidential information related to personal data of the victim or the suspect, witnesses, public officers or any other person related to the procedure. Art. 243 Bis CFCP⁵²⁷ states that doctors, surgeons, specialists and

⁵²¹ Domestic Normative Frameworks for the Protection of Health Care, Report Of The Brussels Workshop 29-31 January 2014, ICRC, 2015, p. 83.

⁵²² *Ibid.*, p. 84.

⁵²³ *Constitución Política de los Estados Unidos Mexicanos, (Texto vigente al 27 de agosto de 2018)*, available at: <https://www.juridicas.unam.mx/legislacion/ordenamiento/constitucion-politica-de-los-estados-unidos-mexicanos#10555> (19.02.19), Art. 20 c) III : “Recibir, desde la comisión del delito, atención médica y psicológica de urgencia”.

⁵²⁴ *Constitución Política de los Estados Unidos Mexicanos*, art. 20 c) V. De los derechos de la víctima o del ofendido: “Al resguardo de su identidad y otros datos personales en los siguientes casos: cuando sean menores de edad; cuando se trate de delitos de violación, trata de personas, secuestro o delincuencia organizada; y cuando a juicio del juzgador sea necesario para su protección, salvaguardando en todo caso los derechos de la defensa”. (Reformado el primer párrafo mediante Decreto publicado en el Diario Oficial de la federación el 14 de julio de 2011).

⁵²⁵ CÓDIGO FEDERAL DE PROCEDIMIENTOS PENALES, Nuevo Código publicado en el Diario Oficial de la Federación el 30 de agosto de 1934, TEXTO VIGENTE, Última reforma publicada DOF 09-06-2009, available at: https://www.oas.org/juridico/spanish/mesicic3_mex_anexo22.pdf (19.02.19).

⁵²⁶ CFCP, Art.16 “ [En la fase diligencias y averiguación previa] El Juez, el Ministerio Público y la Policía estarán acompañados, en las diligencias que practiquen, de sus secretarios, si los tuvieren, o de dos testigos de asistencia, que darán fe de todo lo que en aquéllas pase [...] En ningún caso se podrá hacer referencia a información confidencial relativa a los datos personales del inculpado, víctima u ofendido, así como testigos, servidores públicos o cualquier persona relacionada o mencionada en la indagatoria”.

⁵²⁷ CFCP Art. 243 Bis: “No estarán obligados a declarar sobre la información que reciban, conozcan o tengan en su poder: IV. Las personas o servidores públicos que desempeñen cualquier otro empleo, cargo oficio o profesión, en virtud del cual la ley les reconozca el deber de guardar reserva o secreto profesional, [...] V). Los médicos cirujanos o especialistas y psicólogos clínicos, respecto de la información concerniente a la salud de sus pacientes, que conozcan con motivo de su ejercicio profesional.”

clinical psychologists are not obliged to report any information that they receive in the framework of their professional activities. Public servants violating the duty of confidentiality may be sanctioned under Art. 215 or 225 of the Criminal Code. Article 278 Bis. CFCP⁵²⁸ regulates the subject of “Private Communications between Individuals”. According to this provision, privileged communications may be revealed to the authorities (both at the preliminary phase and during the criminal procedure), if done so voluntarily and directly by one of the parties to the conversation. The duty of confidentiality is not violated when there is the express consent of the person benefitting from the right to confidentiality.

Federal Criminal Code (FCC). Art. 210 FCC⁵²⁹ imposes a sanction of between thirty days and two hundred days of work in favor of the community to those who, without justification and without the consent of the victim, cause a prejudice to the latter by revealing secrets or reserved communications received by reason of such person’s employment or position.

General Health Law (GHL). Art. 17 GHL⁵³⁰ provides that the duty of confidentiality also applies to persons benefitting from health and/or social protections.

Regulations of the General Health Act. Article 19, section V of the Regulations of the General Health Act⁵³¹, establishes the obligation of medical personnel to inform the Public Prosecutor (*Ministerio Público*) of the possible commission of any crime, but without denying medical attention.

Official Mexican Norm⁵³² NOM-004-SSA3-2012, concerning the clinical file (OMN)⁵³³. This Norm establishes “the mandatory scientific, ethical, technological and administrative criteria in the elaboration, integration, use, management, archiving, conservation, ownership and confidentiality of the clinical files, which constitutes a binding legal instrument for the personnel of the health area, of the public, social and private sectors that integrate the National Health System”. A fundamental aspect of this standard is the recognition of the patient’s ownership of the data provided to health personnel. In

⁵²⁸ CFCP Art. 278 Bis : “Las comunicaciones entre particulares podrán ser aportadas voluntariamente a la averiguación previa o al proceso penal, cuando hayan sido obtenidas directamente por alguno de los participantes en la misma.[...] En ningún caso el Ministerio Público o el juez admitirán comunicaciones que violen el deber de confidencialidad que establezca la Ley, ni la autoridad prestará el apoyo a que se refiere el párrafo anterior cuando se viole dicho deber. [...] No se viola el deber de confidencialidad cuando se cuente con el consentimiento expreso de la persona con quien se guarda dicho deber.”

⁵²⁹ CÓDIGO PENAL FEDERAL, Nuevo Código Publicado en el Diario Oficial de la Federación el 14 de agosto de 1931, TEXTO VIGENTE, Última reforma publicada DOF 21-06-2018, available at: <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo83048.pdf> (19.02.19): Artículo 210: “Se impondrán de treinta a doscientas jornadas de trabajo en favor de la comunidad, al que sin justa causa, con perjuicio de alguien y sin consentimiento del que pueda resultar perjudicado, revele algún secreto o comunicación reservada que conoce o ha recibido con motivo de su empleo, cargo o puesto.”

⁵³⁰ LEY GENERAL DE SALUD, ÚLTIMA REFORMA PUBLICADA EN EL DIARIO OFICIAL DE LA FEDERACIÓN: 21 DE JUNIO DE 2018. Available at : <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo11037.pdf> (19.02.19), Art. 77 Bis 37: “Los beneficiarios del Sistema de Protección Social en Salud tendrán además de los derechos establecidos en el artículo anterior, los siguientes: [...] X. Ser tratado con confidencialidad.”

⁵³¹ Reglamento de la Ley General de Salud en Materia de Prestación de Servicios de Atención Médica, Nuevo Reglamento publicado en el Diario Oficial de la Federación el 14 de mayo de 1986, última reforma publicada DOF 17-07-2018, available at: http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGS_MPSAM_170718.pdf (19.02.19): “Art. 18 Los establecimientos en los que se presten servicios de atención médica [...] Art. 19 V.- Notificar al Ministerio Público y, en su caso, a las demás autoridades competentes, los casos en que se les requieran servicios de atención médica para personas con lesiones u otros signos que presumiblemente se encuentren vinculadas a la comisión de hechos ilícitos.”

⁵³² A Norm is a form of official directive.

⁵³³ NORMA OFICIAL MEXICANA NOM-004-SSA3-2012, DEL EXPEDIENTE CLINICO, available at: http://dof.gob.mx/nota_detalle_popup.php?codigo=5272787 (19.02.19).

this sense, data that refer to personal identity and information provided in relation to treatment are considered confidential. This fact ratifies and consolidates the ethical principle of professional secrecy. Similarly, the actions of health personnel in connection with diagnosis, treatment and rehabilitation which appear in patients' clinical files in the form of medical notes and other notes for the purposes of medical care are also deemed confidential.

Ethic Code of Doctors in Mexico. Section 2.5⁵³⁴ states that doctors must maintain in strict confidentiality the information they receive during the exercise of their duties, with the exception of information they are required by law to disclose.

Data protection Law (DPL). Art. 6 of this Law⁵³⁵ provides that the State shall guarantee the privacy of individuals and shall ensure that third parties do not engage in conduct that may arbitrarily affect such privacy. The right to the protection of personal data shall only be limited for reasons of national security, in terms of the law on the matter, provisions of public order, public security and public health, or to protect the rights of third parties. According to Art. 3 X⁵³⁶ of this law, "Sensitive personal data" is the information referring to the most intimate sphere, or information whose improper use may give rise to discrimination or entail a serious risk for the owner. Personal data that may reveal aspects such as present or future state of health is considered sensitive.

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

Article 19, section V of the Regulations of the General Health Act, establishes the obligation of medical personnel to inform the Public Prosecutor (*Ministerio Público*) of the possible commission of any crime. Among the injuries that must be reported are wounds caused by firearm projectile, explosives, weapons with blades, domestic violence, sexual abuse and/or rape, homicide, poisoning, suffocation, burns, etc.⁵³⁷

While complying with the duty to report, practitioners may not deny the medical attention needed by the person who has been shot, beaten or hurt. The article is not specific to gunshot wounds; it applies to any crime. (*cf.* § 2.1*infra*).

⁵³⁴ CODIGO DE ETICA PARA EL EJERCICIO PROFESIONAL DEL MEDICO COLEGIADO EN MEXICO, available at: http://www.comego.org.mx/reglamentos/codigo_etica.pdf (19.02.19), Art. 2.5: "El médico colegiado debe mantener estrictamente la confidencialidad de la información que le sea confiada en el ejercicio de su especialidad, salvo los informes que le sean requeridos conforme a la ley."

⁵³⁵ LEY GENERAL DE PROTECCIÓN DE DATOS PERSONALES EN POSESIÓN DE SUJETOS OBLIGADOS Nueva Ley publicada en el Diario Oficial de la Federación el 26 de enero de 2017, available at: https://www.colmex.mx/assets/pdfs/10-LGPDPPSO_57.pdf (19.02.19), Art. 6: "El Estado garantizará la privacidad de los individuos y deberá velar porque terceras personas no incurran en conductas que puedan afectarla arbitrariamente. El derecho a la protección de los datos personales solamente se limitará por razones de seguridad nacional, en términos de la ley en la materia, disposiciones de orden público, seguridad y salud públicas o para proteger los derechos de terceros."

⁵³⁶ DPL, Art. 3: "Para los efectos de la presente Ley se entenderá por [...] X. Datos personales sensibles: Aquellos que se refieran a la esfera más íntima de su titular, o cuya utilización indebida pueda dar origen a discriminación o conlleve un riesgo grave para éste. De manera enunciativa más no limitativa, se consideran sensibles los datos personales que puedan revelar aspectos como origen racial o étnico, estado de salud presente o futuro, información genética, creencias religiosas, filosóficas y morales, opiniones políticas y preferencia sexual."

⁵³⁷ Guía para el cumplimiento obligatorio del protocolo de actuación para la notificación, Oportuna y atención inmediata de los casos médico legales, que se harán al ministerio Público por los prestadores de servicios de atención médica del sector público, social y privado, incluidos los consultorios", 17 de julio de 2013 ("Guide").

The notification to the Public Prosecutor must be made as soon as possible. The refusal to give medical assistance to a person is a crime under the Criminal Code.

2.1. Conditions

The obligation to disclose to the authorities cases of gunshot wounds is **not** a precondition under Mexican legislation for healthcare professionals to treat such patients. **Art. 27 of the Code of Criminal Procedure expressly establishes that healthcare professionals must first and foremost give medical attention to the victims.** This provision also describes the type of information that must be notified to the authorities. This is in line with Art. 469 of the GH⁵³⁸. According to this last article, doctors, technicians or assistants who - without just cause - refuse to provide assistance in cases of notorious emergencies and put the life of the victim in danger, are punishable by imprisonment for a term of from six months to five years, a fine, and/or a suspension from practice of the profession for up to two years. If damage occurs as a result of the lack of intervention, the judicial authority may also impose a definitive suspension of practice of the profession.

Art. 470 GH states that whenever a public servant, working in the area of health, commits a crime described in that provision, in addition to the punishments mentioned in Art. 469 GH, they will be relieved of their posts and will be barred from access to similar positions for a period equivalent to the punishment imposed by the judicial authorities.

Under the Title "Objectives", the OMN states that the Norm establishes the obligatory scientific, ethical, technological and administrative criteria for the elaboration, integration, use, management, archiving, conservation, ownership and confidentiality of medical clinical files. The personal data contained in the clinical file, which make patient identification possible, in terms of the scientific and ethical principles that guide medical practice, should not be disclosed or made public.

Personal data provided to health personnel by the patient or by third parties, which is covered by the duty of professional medical confidentiality, may only be provided to third parties upon the written request of the patient, the guardian, legal representative or a physician duly authorized by the patient.

In health care facilities, the information contained in the clinical record shall be handled with discretion and confidentiality by all personnel of the facility, in accordance with the scientific and ethical principles that guide medical practice.⁵³⁹

From the formal point of view, the information to the authorities must be sent in accordance with the Guide for the compulsory respect of the Protocol for Notifications (*"Guía para el cumplimiento obligatorio del Protocolo de actuación para la notificación oportuna y atención inmediata de casos médicos legales, que se harán al Ministerio Público, por los prestadores de servicios de atención médica del sector público, social y privado, incluidos los consultorios"* – "GUIDE")⁵⁴⁰.

The form provided for making the notifications is known as "the Single Format for Notification of a Legal Medical Case"⁵⁴¹. **When a practitioner is required to report cases of injuries by firearms and**

⁵³⁸ GH, Art. 469: *"Al profesional, técnico o auxiliar de la atención médica que sin causa justificada se niegue a prestar asistencia a una persona, en caso de notoria urgencia, poniendo en peligro su vida, se le impondrá de seis meses a cinco años de prisión y multa de cinco a ciento veinticinco días de salario mínimo general vigente en la zona económica de que se trate y suspensión para ejercer la profesión hasta por dos años. Si se produjere daño por la falta de intervención, podrá imponerse, además, suspensión definitiva para el ejercicio profesional, a juicio de la autoridad judicial."*

⁵³⁹ NORMA OFICIAL MEXICANA NOM-004-SSA3-2012, DEL EXPEDIENTE CLINICO, op. cit. Art. 5.7.

⁵⁴⁰ Guide, op. cit.

⁵⁴¹ Id.

explosives, he must do so directly on the platform and send it electronically⁵⁴². The obligation to report lies with the treating doctor.

2.2. Scope

Practitioners must communicate to the authorities the identity of the person treated, the place and circumstances where the victim was found, the nature of the wounds and their possible cause, the type of medical treatment given, or the precise place where the victim will be available to the authorities (art. 301 Criminal Code for the Federal District).

According to the "the Single Format for Notification of a Legal Medical Case", the following information must be transmitted to the authorities:

1. Name of the concerned Medical Unit
2. No. of the Notification
3. Date of the Notification to the Public Prosecutor's Office.
4. Time of Notification
5. Name of the Person Responsible for the Notification
6. Full Name of the Patient.
7. Age of the Patient.
8. Sex of the Patient.
9. Number of the Bed in the Medical Unit in which the Patient is placed.
10. Service in which the Patient Resides.
11. Time of Admission
12. File Number Assigned by the Unit to the Patient.
13. Medical Condition with which the Patient was Admitted to the Medical Unit.
14. Description of Each of the Patient's Injuries
15. Name and Signature of the Notifying Physician
16. Name, Position, Date, Time and Signature of the Person or Authority Receiving the Notification at the Public Prosecutor's Office.

2.3. Purpose

The purpose of the notice is to allow investigation of the case and, if relevant, to allow the authorities to begin prosecution procedures. Article 21 of the Constitution states that it is the Public Prosecution Service's responsibility to investigate crimes together with police bodies, who shall work under the Public Prosecution Service's command.

Article 19, section V of the Regulations of the General Health Act, establishes the obligation of medical personnel to inform the Public Prosecutor (*Ministerio Público*) of the possible commission of any crime, but without denying medical attention.

Once the Public Prosecutor's Office receives the "Single Form for Notification of a Legal Medical Case", via internet or in writing, it must immediately go to the health establishment, accompanied by the

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Id.: "IMPORTANTE: Cualquier Caso Médico Legal que conozcan los prestadores de servicios de atención Médica en el Distrito Federal, de los sectores públicos, sociales y privados, incluidos los consultorios, deberá ser mediante el "Formato Único de Notificación de Caso Médico Legal". Excepto en los casos de lesiones por arma de fuego y explosivos, en el cual se tendrá que llenar directamente en la plataforma y será enviado vía electrónica."

Forensic Doctor, Investigation Police, experts and other auxiliaries if necessary, who Who will provide proper identification and, in the context of an official act, perform the following tasks:

- initiate a preliminary inquiry
- attest to the psychophysical state and injuries of the victim
- complete the certificate of psychophysical status
- obtain a victim's statement, if the patient is able to give a statement,

These tasks are based on Article 265 of the Criminal Procedure Code of the Federal District and Article 2 of the Organic Law of the Attorney General's Office of the Federal District.

Art. 10 of the Protocol for Notifications⁵⁴³, provides that there will be a Unit in charge of receiving the notifications of practitioners. This Unit ("*Unidad receptora de notificaciones*") intervenes only in cases of injuries caused by gunshots or explosives. By virtue of Art. 11 of the Protocol, the Unit shall acknowledge receipt of the electronic notifications. After that, (Art. 12 of the Protocol), the Public Prosecutor's office shall:

- begin the preliminary investigation;
- proceed immediately to the relevant user's location, accompanied by the forensic doctor, investigative police and other auxiliaries, if necessary;
- attest to the victim's psychophysical state and injuries;
- in the event that the victim is in a position to make a statement, obtain his statement, if this is not possible due to his state of health, to attest to his personal data;
- determine whether custody and protection should be granted;
- notify facility personnel for medical care, the legal status of the victim; and,
- any other diligence that is necessary for the investigation.

2.4. Consequences of non-compliance

Art. 301 of Chapter V of the Criminal Code for the Federal District States provides that a sanction of imprisonment (from six months to 3 years) will be imposed on practitioners who, having treated a victim, do not communicate immediately to the competent authority the identity of the person, the place and circumstances where the victim was found, the nature of the wounds and their possible cause, the type of medical treatment given, and/or the precise place where the victim will be available to the authorities.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Art. 27 of the Code of Criminal Procedure **protects the provision of healthcare** by expressly establishing that healthcare professionals must first and foremost give medical attention to the victims.

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Acuerdo mediante el cual se emite el Protocolo de actuación para la notificación Oportuna y atención inmediata de casos médicos legales, que se harán al Ministerio público, por los prestadores de servicios de atención médica del sector Público, social y privado, incluidos los consultorios"), GACETA OFICIAL DEL DISTRITO FEDERAL, 11 March 2013, p. 5.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Our research revealed no direct information on the possible interaction in the Mexican context between law, policy and ethics. Each situation is to be decided according to its particular facts.

I. NEPAL

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

The rights to privacy are recognized and guaranteed in the Constitution of Nepal as fundamental rights under Article 28. According to Article 28, the privacy of any person, his or her residence, property, document, data, correspondence and matters relating to his or her character shall, except in accordance with law, be inviolable⁵⁴⁴. The right relating to health states that every citizen shall have the right to free basic health services from the State, and no one shall be deprived of emergency healthcare services⁵⁴⁵. Every person shall have the right to obtain information about his or her medical treatment and every citizen shall have equal access to health services⁵⁴⁶.

The Individual Privacy Act 2075 BS⁵⁴⁷ (2018) came into force on 18 September 2018; it deals specifically with the protection and right to privacy of every individual. It defines personal information as information relating to caste, ethnicity, birth, origin, religion, race or marital status, education or educational achievements, address, telephone or email address, passport, citizenship, national identity number, driving license or identification card issued by a public body⁵⁴⁸. It further defines individual privacy as a letter sent or received with personal information, fingerprint, handprint, eye retinas, blood group or other biometric information, criminal background or details on any sentencing on criminal offence or served sentence. It also includes any professional or expert suggestion provided in any decision process and the nature of such opinion or suggestion in the decision process⁵⁴⁹.

Every individual shall have the right to the confidentiality of personal written documents⁵⁵⁰. The personal written document of an individual includes the medical history, certificate or medical report⁵⁵¹. Such documents can only be disclosed or made public or be part of any study, investigation or test if the concerned individual gives consent, if there is need for an identity card disclosing the identity of the person in order to receive public services from the government (free governmental medical treatment, medicine, scholarships etc.), or by the order of the Court or a concerned authority regarding any cases and the investigating officer for the purpose of investigation and prosecution of any offense⁵⁵².

This Act states that every individual has the right to privacy to physical and mental condition and the right to maintain confidentiality on issues concerning his or her private life which includes identity of an individual, gender, sexual orientation, sexual relations, pregnancy or abortion or physical disease⁵⁵³. Any information regarding an individual's physical or health check up, treatment or during emergency rescue activity can be disclosed under certain conditions⁵⁵⁴: if the concerned person provides

⁵⁴⁴ The Constitution of Nepal, English translation according to the Ministry of Law, Justice, and Parliamentary Affairs.

⁵⁴⁵ The Constitution of Nepal, Art. 35 (1).

⁵⁴⁶ *Ibid.* Art. 35 (2) and (3).

⁵⁴⁷ The official calendar of Nepal follows the Bikram Sambat (BS) System. The English year is mentioned in brackets.

⁵⁴⁸ The Individual Privacy Act 2075 (2018) Section (2) (c) (1) - (4).

⁵⁴⁹ *Ibid.* Section 2 (c) (5) - (8).

⁵⁵⁰ *Ibid.* Section 11 (1).

⁵⁵¹ *Ibid.* Section 11 (2) (b).

⁵⁵² *Ibid.* Section 11 (4) (a) - (d).

⁵⁵³ *Ibid.* Section 3 (1) and (3).

⁵⁵⁴ *Ibid.* Section 3 (5).

consent⁵⁵⁵ or, on his own, makes such information public⁵⁵⁶, if requested by an investigating officer for the purpose of investigation of any offense⁵⁵⁷ and in conditions which require information of an individual's physical and mental conditions or disclosure of personal life for receiving any facilities or concessions⁵⁵⁸.

Similar provisions of confidentiality are also included in the Public Health Act 2075 (2018) which provides that the condition of a patient's health, prognosis or the treatment received by the patient is to be kept private⁵⁵⁹. Exceptions to this obligation allowing the disclosure of such information exist where a patient has given written consent for disclosure⁵⁶⁰, where a court has ordered disclosure in accordance with law⁵⁶¹ and when the failure to disclose the information would cause a serious negative effect on public health⁵⁶². Whether or not a serious negative effect on public health would result is to be determined by the official concerned⁵⁶³.

The duties of confidentiality notwithstanding, the Public Health Act has clearly laid down conditions for when the local authorities should be informed. When a person is taken to any health organization for treatment due to an accident or any other reason, such organization should provide immediate treatment. If the identity of such person is unknown, the local authority should be immediately informed⁵⁶⁴ and while informing the local authority, the health organization should provide any information available which is related to the person under treatment⁵⁶⁵. On receiving such information the authority should look for the family and guardian of the concerned person and inform them⁵⁶⁶.

The Nepal Health Professional Council Act, 2053 (1997)⁵⁶⁷ formed the Nepal Health Professional Council. The Council is an autonomous body for regulating health professions in Nepal, from registration of health professionals, revocation of certificate, and recognition to education qualification, professional conduct and ethical behavior. The Nepal Health Professional Council Rules 2056 (1999) (hereafter Council Rules 1999) was framed to implement the objectives of the Nepal Health

⁵⁵⁵ *Ibid.* Section 5 (a).

⁵⁵⁶ *Ibid.* Section 5 (b).

⁵⁵⁷ *Ibid.* Section 5 (c).

⁵⁵⁸ *Ibid.* Section 5 (d). The provision provides no explanation as to what kinds of information on physical or mental conditions of an individual are required to be disclosed to receive public services or concessions for instance treatment facilities, medicines.

⁵⁵⁹ Public Health Act 2075 (2018). Section 14 (1).

⁵⁶⁰ *Ibid.* Section 14 (2) (a).

⁵⁶¹ *Ibid.* Section 14 (2) (b).

⁵⁶² *Ibid.* Section 14 (2) (c).

⁵⁶³ *Ibid.* Section 14 (3).

Retrieved from Nepal Law Commission <http://www.lawcommission.gov.np/np/archives/6427> (Nepali text).

⁵⁶⁴ *Ibid.* Section 17 (1). (the sentence - "or any other reason" is not specified and it may include many other reasons for the injuries both accidental or non accidental injuries. There is no specific mention of gunshot or any other accidental or non accidental cases).

⁵⁶⁵ *Ibid.* Section 17 (2). This provision attempts to address the case where the identity of the person is unknown. (This may contradict the confidentiality of the patient especially where the person is unconscious and injuries may be either accidental or non accidental. However, hospitals report such incidents to the police if the identity of the patient is unknown so that the police may find his/her family members or any others who may know him/her and the hospital may provide any information they find on the patient to find his/ her family).

⁵⁶⁶ *Ibid.* Section 17 (3).

⁵⁶⁷ Refer to Nepal Health Professional Council Act, 2053 (1997). Official translation by Nepal Law Commission available at <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/nepal-health-professional-council-act-2053-1997.pdf> (27.06.10).

Professional Council Act, 2053 (1997)⁵⁶⁸. Rules are made in exercise of a power conferred by an Act/enactment⁵⁶⁹ and they are legally binding and enforceable.

The provisions of the Council Rules 1999 deals in detail with the registration of health professionals, professional conduct such as maintaining decency and secrecy⁵⁷⁰, prohibition on discrimination against any person while using the professional knowledge and skills⁵⁷¹, personal responsibility⁵⁷². Failure to observe the professional conduct is considered as violation of the professional conduct⁵⁷³ and subjected to inquiry and removal of the name from the register of the Nepal Health Professional Council⁵⁷⁴. The Council Rules 2056 further state that the health professionals must deal decently with the persons with whom they come into contact in the course of exercising a health profession and such health professionals should not disclose the information they come to know about the personal life or health of any person to any other person or authority except as required by the prevailing law⁵⁷⁵.

In accordance with the Nepal Medical Council Act, the Nepal Medical Council (NMC) passed the medical Code of Ethics which states the duty of the physicians to maintain confidentiality concerning individual or domestic life entrusted by the patients or observed during medical attendance and should never be divulged unless the laws of the country require its revelation, and even in such circumstances it should only be made after formal protest⁵⁷⁶. As part of proper conduct and personal behavior, a physician should not disclose any information obtained in confidence from or about a person except as required by law. The infirmity of the patient and prognosis should not be shared with anyone not directly concerned⁵⁷⁷. Serious professional misconduct may be charged by the NMC against any abuse of professional privileges or restriction of professional duty or serious breach of medical ethics by a Physician⁵⁷⁸ and in accordance with the Nepal Medical Council Act and Regulations, the NMC forms a professional conduct and health committee which recommends the gravity of the conviction to the Nepal Medical Council⁵⁷⁹. The Committee can also recommend that the NMC put a physician on probation for a specified period during the inquiry process⁵⁸⁰. After inquiry and conclusion the Committee may issue a warning or conclude the case and may recommend erasure of the physician's registration with the NMC⁵⁸¹.

⁵⁶⁸ Nepal Health Professional Council Act, 2053 (1997). Section 32 which states that the Government of Nepal may frame necessary Rules to implement the objectives of the Act.

⁵⁶⁹ Interpretation of Laws Act 2010 (1954). Section 2 (u). Official translation by Nepal Law Commission available at <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/10/interpretation-of-laws-act-2010-1954.pdf> (27.06.19).

⁵⁷⁰ The Nepal Health Professional Council Rules, 2056 (1999). Section 13 (1) (b). Official translation by Nepal Law Commission available at <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/nepal-health-professional-council-rules-2056-1999.pdf> (27.06.19).

⁵⁷¹ *Ibid.* Section 13 (1) (c).

⁵⁷² *Ibid.* Section 13 (1) (f).

⁵⁷³ *Ibid.* Section 13 (3).

⁵⁷⁴ *Ibid.* Chapter 5 - Procedures relating to deletion of name.

⁵⁷⁵ *Ibid.* Section 13 (1) (b) <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/nepal-health-professional-council-rules-2056-1999.pdf> (27.06.19).

⁵⁷⁶ The Nepal Medical Council. Code of Ethics. Chapter 3 (3.2) Available at <https://www.nmc.org.np/23> (27.06.10).

⁵⁷⁷ *Ibid.* Chapter 8. Professional Conduct and Personal Behaviour of the Physician. 8.1.2 (e) Professional Confidence.

⁵⁷⁸ *Ibid.* Chapter 7. Disciplinary Actions.

⁵⁷⁹ The Nepal Medical Council. Code of Ethics. Chapter 7. Disciplinary Actions.

⁵⁸⁰ *Ibid.* Chapter 10 (10.2).

⁵⁸¹ *Ibid.* Chapter 10. (10.1) and (10.3).

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

The recently adopted *Muluki Criminal Code Act, 2074 BS*⁵⁸² or the National Criminal Code 2017 AD replaced the previous *Muluki Ain (National Code) 2020 BS (1963)*. The National Criminal Code 2017 (hereafter Criminal Code 2017) has brought about many changes and reformed the codification of laws for more clarity and has addressed many new offences⁵⁸³ and sentencing. Chapter 4 of the Code, which states the conditions which increase or decrease the gravity of offence, includes the offence committed by carrying or using fire arms or toxic or explosives things or use of electronic or electronic equipment or helping the person who possess fire arm or toxic or explosives things⁵⁸⁴.

The Criminal Code 2017 on Offense related to Fire Arms and Ammunition prohibits the possession of firearms and ammunition without a license but this is not applicable in the case of government security personnel or other security officials who are legally allowed to possess firearms and ammunition⁵⁸⁵.

The Arms and Ammunition Act 2019 (1962) prohibits carrying fire arms without a license⁵⁸⁶ and it empowers the police personnel to arrest any persons, with or without a license, on the basis of suspicion of intention to commit any illegal act and to conduct search of the person or his belongings⁵⁸⁷. The data on misuse of firearms are recorded in every district police office and action is taken against those misusing the provisions of the legislations and license⁵⁸⁸. The Police Act 2012 (1955) also gives the police the power to arrest persons without a warrant at any public places if the person is known to have committed or attempted to commit any crime which is punishable by law with imprisonment for a term of three years or more⁵⁸⁹.

Other legal provisions may also place medical professionals in a situation which requires cooperation with the authorities in case of non-accidental injuries. According to the Criminal Code 2017, if anyone provides false information or false accusation to the authority, with the intention of harming or harassing others, such person will be liable for up to half of the punishment as provided in the sentencing of the crime in which false information or accusation was made but this provision shall not be applicable in the cases where the government of Nepal is the plaintiff⁵⁹⁰.

2.1. Conditions

In general practise a patient with accidental or non-accidental injuries of a serious nature (road accidents or similar injuries), is brought to the emergency ward of the government hospital. The physicians start the treatment and inform the police on duty at the hospital premise simultaneously.

⁵⁸² When it was first introduced on 17 August 2017, it was known as the *Muluki Criminal (Code) Act, 2074 BS*. It was recently amended on April 15, 2019 the *Muluki Criminal Code, 2074 BS*.

⁵⁸³ Pradhananga, Rajit Bhakta and Lama, Kunshang, 'An Analytical Study of Culpable Homicide (KartabyaJyan) under the Muluki Criminal (Code) Act, 2074' (2018) Volume 4. Prosecution Journal. p. 59. par. 2.

⁵⁸⁴ *Muluki Criminal Code 2074*. Part I General Provisions. Chapter 4 - Conditions that increase or decrease the gravity of offences, Section 38 (i).

⁵⁸⁵ *Ibid.* *Muluki Criminal Code 2074*. Part II. Chapter 6 on Offence related to Arms and Ammunition, Section 132 (1).

⁵⁸⁶ Arms and Ammunition Act 2019 BS (1962). Section 5 (1).

⁵⁸⁷ *Ibid.* Section 6 (1).

⁵⁸⁸ Response of the Government of Nepal on the Questionnaire related to Human Rights Council resolution 29/10 on "Human Rights and the regulation of civilian acquisition, possession and use of firearms". Retrieved from <https://www.ohchr.org/Documents/Issues/RuleOfLaw/CivilianAcquisition/States/Nepal.pdf> (27.06.19).

⁵⁸⁹ The Police Act, 2012 (1955). Section 17 (1) (a).

⁵⁹⁰ *Muluki Criminal (Code) Act 2074 BS*. Part 2 - Criminal Offences. Chapter 4 Offence against public justice. Section 98 (1) and (2).

Once the police arrive, they start their own inquiry regarding the injuries. The physicians follow the treatment process and fill in the treatment report. If the police ask the physician to fill in the Injury Examination Report, such report will be completed and shall be provided to the police together with the treatment report. The Injury Examination Report is also used in case of examination of detainees who are brought by the police for medical treatment. The doctors can only discharge such patient (minor injuries or the patient wants to go to another hospital or home) after notifying the police.

2.2. Scope

Physicians cooperate with the police in serious cases of both accidental and non-accidental injuries which may be related to a criminal offence. The police may require the Injury Examination Report from the doctors. The doctors provide all the information as required in this report. The Injury Examination report⁵⁹¹ has detailed information of the patient including the injuries and treatment, the name of the patient, age, date of birth, sex, his/her address, name of the accompanying police personnel (if brought by police), name of the hospital/ health centre, date, time and place of examination, identification mark of the examinee, consent for examination, whether given by the injured person or the family member or others. It also includes a brief history about the incident including how and when the injuries were produced, his/ her medical history, information on general physique and vitals such as height, weight, temperature, degree of consciousness, pulse, blood pressure, etc.⁵⁹².

Other information included is as follows: the details of the injuries such as size, color, site, marks, surrounding areas, any imprints and contents, etc., and what type of injury, *i.e.* whether it is simple, grievous, severe or other; the types of weapon or objects used; blunt or sharp force, pointed objects, projectiles, heat, chemical or any others; the condition of the patient at the time of examination, the severity in terms of existing conditions and possible complications, investigation and reports such as X-ray, USG, Blood, Urine, etc.⁵⁹³; the treatment provided, if a referral is made, where and why it was made and, if necessary, the follow-up; re-examination (*e.g.* where information is needed about the degree of disability); the examiner's opinion concerning the examinee and how to frame such opinion; the condition of the examinee, severity of the injury, age of the injury and possible causes, should be considered⁵⁹⁴.

The Injury Examination Report states that injury examination should be carried out by a Forensic Expert and, if such expert is not available, doctors trained in forensics should conduct the examination. Only the expert or the doctor who conducted the examination should prepare the report⁵⁹⁵.

2.3. Purpose

The information concerning the patient brought to the hospital due to accidental or non-accidental injuries of a serious nature, including gunshot wounds, should be provided to the police on duty at the hospital. There is a presence of police personnel at government hospitals. The police begins its inquiry of the accidental or non-accidental injuries for investigating criminal offences.

2.4. Consequences of non-compliance

There are no specific legal provisions as to non-compliance with duties of disclosure of gunshot wounds by health professionals. However, there are provisions in the Criminal Code 2017 which defines acts

⁵⁹¹ The National Criminal Procedure Code, 2074. Annex-16, Related to Section 22 Subsection 1. The Injury Examination Report is also used in case of examination of detainee.

⁵⁹² *Ibid.* No. 2 to 12.

⁵⁹³ *Ibid.* No. 13 A to E.

⁵⁹⁴ *Ibid.* No. 13 F to I.

⁵⁹⁵ *Ibid.*

constituting non-compliance with the authorized authority or government servants who are implementing their official duties. Such acts of non-compliance are punishable by imprisonment or penalty or both⁵⁹⁶.

The Offence related to disregard or disobedience of a public authority in Criminal Code 2017 states that if any authorized authority seeks the truth in relation to any matter from the person having a legal obligation in such matter, that person should not refuse to answer to such authority. However, no one shall be compelled to testify against himself/herself⁵⁹⁷. This offense carries a sanction of imprisonment for up to six months or a penalty of up to five thousand rupees or both⁵⁹⁸. Similarly there are provisions which prohibit any person from giving false information with the intention of obstructing any government servant in performing his/her duty as per the law⁵⁹⁹ and this offence carries a sentence of imprisonment of up to one year or ten thousand rupees or both⁶⁰⁰. Any person having a legal obligation should not refuse to provide support to any government servant who is implementing his/ her duty⁶⁰¹ and this offence carries a sentence of imprisonment of six months or a penalty of up to five thousand rupees or both⁶⁰².

3. Protection of Provision of Healthcare

There are no specific legal provisions which provide protection to healthcare professionals with regard to the obligation to report gunshot injuries. The Security of the Health Workers and Health Organizations Act, 2066 (2010) was introduced but it addresses the security concerns of health workers and health organization against casual incidents and economic liabilities that may arise in the course of medical treatment and to make health services regular and effective⁶⁰³. The Act has prohibited any acts such as manhandling or degrading treatment to any health worker on the issue of medical treatment, lock-out and destruction to any health organization or similar other acts⁶⁰⁴. Any health workers or health organization may request the local administration to provide security if any person commits or attempts to commit any act against them and, if required, the government of Nepal may arrange for security in such health organization permanently⁶⁰⁵.

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Many legislations⁶⁰⁶ (Acts, Regulations) exists that regulate the health sectors in Nepal. However, when it comes to gunshot injuries, the right of the patient to confidentiality is not applicable and reporting of gunshot wounds is mandatory as possession of a gun without a license is a criminal offence⁶⁰⁷. The possession of guns and any arms are illegal and the police deal with such cases as criminal offences. They follow the criminal procedures as required in criminal offences, which includes identification of the victim and inquiry concerning the incident. There is no strong legislation for the protection of medical professionals in such situation. Not cooperating with the authorities or concealing of

⁵⁹⁶ *Muluki Criminal Code 2074. Part II. Chapter 3 Offence related to disregard or disobedience of public authority.*

⁵⁹⁷ *Ibid.* Section 83.

⁵⁹⁸ *Ibid.* Section 83 (2).

⁵⁹⁹ *Ibid.* Section 84 (1).

⁶⁰⁰ *Ibid.* Section 84 (2).

⁶⁰¹ *Ibid.* Section 86 (1).

⁶⁰² *Ibid.* Section 86 (2).

⁶⁰³ Security of Health Workers and Health Organisations Act, 2066 (2010). Preamble.

⁶⁰⁴ *Ibid.* Sections 3 (a) and (b).

⁶⁰⁵ *Ibid.* Sections 4 (1) to (3).

⁶⁰⁶ Detail in Annex 1: List of legislations.

⁶⁰⁷ Fire Arms and Ammunition Act 2019 BS (1962) Section 5 (1).

information by health professionals may result in legal charges against them by the authority as discussed in the section on non-compliance.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

No specific legislation dealing particularly with disclosure of gunshot wounds and protecting medical ethics exists. Gunshot injuries, both accidental and non-accidental, are treated as possible criminal offences.

J. NIGER

1. Cadre général relatif à la confidentialité et aux devoirs de déclarer pour le personnel soignant

Le droit nigérien garantit la confidentialité et la non-discrimination dans la fourniture des services médicaux aux blessés et malades. Une telle garantie apparaît dans la Constitution mais également dans le code pénal ainsi que dans le décret ayant approuvé le code de déontologie médicale (article 7)⁶⁰⁸. Nos recherches n'ont pas permis d'identifier une obligation légale faite aux membres du personnel médical de déclarer les cas de patients blessés par arme à feu. Les seuls cas où l'obligation de secret professionnel pesant sur le médecin et le reste du personnel médical est levée, que ce soit par le biais d'une déclaration obligatoire ou facultative, sont ceux qui concernent l'apparition de maladies transmissibles, les naissances d'enfant viable et d'enfant mort-né ainsi que des avortements.

En l'absence de précision sur les conditions dans lesquelles les garanties susvisées s'appliquent, il convient de confirmer qu'elles s'appliquent en tout temps, que ce soit **en temps de paix ou en temps de guerre ou autres situations d'urgence**.

2. Devoir du personnel soignant de déclarer les cas de blessures par arme à feu

Le droit nigérien ne contient **pas d'obligation pour le personnel médical de déclarer les cas de blessures par arme à feu**. Comme annoncé plus haut, nos recherches montrent que les seuls cas où l'obligation de secret professionnel pesant sur le médecin et le reste du personnel médical est levée, que ce soit par le biais d'une déclaration obligatoire ou facultative, sont ceux qui concernent l'apparition de maladies transmissibles, les naissances d'enfant viable et d'enfant mort-né ainsi que des avortements. Ces cas ne concernent donc aucunement les cas de blessures par arme à feu, situation dans laquelle, selon la loi, **le secret professionnel médical**, tel qu'énoncé à l'article 221 du Code pénal, **reste entier**. Les médecins et agents de santé ont par contre l'obligation de soigner sans distinction, ni discrimination.

Toutefois, **dans la pratique**, malgré l'absence d'obligation légale en ce sens, **les agents de santé informent les autorités (civiles et militaires) des cas de blessés par arme à feu** de peur d'être impliqués dans des éventuels problèmes qui pourraient surgir en particulier par crainte d'être inquiétés par la justice, notamment par des poursuites judiciaires pour complicité de faits de terrorisme par exemple ou par des mesures de détention telles que des gardes à vues prolongées. C'est le cas notamment à Diffa⁶⁰⁹ (région où le groupe terroriste Boko Haram est actif, frontières du Niger avec le Nigeria et le Tchad), où le Centre hospitalier régional (CHR) traitent de tous les cas de blessures par arme à feu de la région puisqu'il est le seul à disposer du plateau technique capable de prendre en charge de telles blessures.⁶¹⁰

⁶⁰⁸ Décret n°88-206/PCMS/MSP/AS du 9 juin 1988, portant approbation d'un code de déontologie des médecins, Journal officiel de la République du Niger, du 1er juillet 1988, 55ème année, n°13, p. 572. Voir aussi en ce qui concerne le devoir de confidentialité des pharmaciens : articles 9 et 10 du Décret n°88-207/PCMS/MSP/AS du 9 juin 1988, portant approbation d'un code de déontologie des pharmaciens, Journal officiel de la République du Niger, du 1er juillet 1988, 55ème année, n°13, p.577 ; et en ce qui concerne le devoir de confidentialité des chirurgiens-dentistes : article 6 du Décret n°88-208/PCMS/MSP/AS du 9 juin 1988, portant approbation d'un code de déontologie des chirurgiens-dentistes, Journal officiel de la République du Niger, du 1er juillet 1988, 55ème année, n°13, p.580.

⁶⁰⁹ La région de Diffa est une des 7 régions composant les subdivisions administratives de la République du Niger, et une région où le groupe terroriste Boko Haram est actif.

⁶¹⁰ D'après entretien avec un juge de Tribunal de grande instance de Tahoua (une des 7 régions composant les subdivisions administratives de la République du Niger) et un médecin travaillant dans les zones de

2.1. Conditions

Pas applicable.

2.2. Champ d'application

Pas applicable.

2.3. But

Dans la pratique, les agents de santé informent les autorités des blessures par arme à feu, aux fins de permettre les poursuites judiciaires contre les personnes qui ont pris les armes contre l'autorité ou la population.

2.4. Conséquences du non-respect

La loi ne prévoit aucune sanction spécifique au fait pour un médecin de n'avoir pas déclaré aux autorités qu'il/elle a soigné un patient atteint d'une blessure par arme à feu. Cependant, dans la pratique, la sanction peut se traduire, par exemple, par des mesures de détention telles que des gardes à vues prolongées, et peut-être même des poursuites judiciaires pour complicité de terrorisme.

3. Protection de la fourniture des soins de santé

3.1. Législation spécifique protégeant la fourniture des soins de santé

Comme exposé sous la section 1, le droit nigérien garantit à plusieurs égards la confidentialité et la non-discrimination dans la fourniture des services médicaux aux blessés et malades.

Premièrement, la Constitution⁶¹¹ prévoit que l'État a l'obligation absolue de respecter et de protéger la personne humaine, et garantit à chacun **le droit à la santé et à l'intégrité physique et morale**, ainsi qu'à **la jouissance du meilleur état de santé physique et morale**. Enfin, la Constitution prévoit aussi que **nul ne sera soumis à la torture ni à des sévices ou traitements cruels, inhumains ou dégradants** et que tout agent de l'État qui se rendrait coupable de tels actes dans l'exercice ou à l'occasion de l'exercice de ses fonctions sera puni conformément à la loi.

En application de ces règles constitutionnelles, il serait inconstitutionnel de mettre en place des lois ou d'imposer autrement que le personnel médical déclare aux autorités policières ou autres autorités les cas de blessures par arme à feu si une telle obligation avait pour effet de causer des traitements inhumains ou dégradants ou d'empêcher le patient de jouir de son droit à la santé ou du meilleur état de santé physique et morale.

Ensuite, le décret n°88-206/PCMS/MSP/AS du 9 juin 1988 portant approbation d'un code de déontologie des médecins rappelle en outre que le respect de la vie et de la personne humaine constitue en toute circonstance le **devoir primordial du médecin**, et que **celui-ci doit soigner avec la même conscience tous les malades quels que soient leur condition**, leur nationalité, leur race, leurs opinions et les sentiments qu'ils inspirent⁶¹². En outre, ce décret prévoit que dans les limites de sa compétence,

conflit armé, en particulier la région frontalière entre le Niger, Nigéria et Tchad. Les deux interlocuteurs n'ont pas souhaité que leurs noms soient cités dans ce rapport.

⁶¹¹ Constitution de la République du Niger du 25 novembre 2010.

⁶¹² Art. 4, Décret n°88-206/PCMS/MSP/AS du 9 juin 1988, portant approbation d'un code de déontologie des médecins, Journal officiel de la République du Niger, du 1er juillet 1988, 55ème année, n°13, p. 572.

tout **médecin doit porter secours d'extrême urgence à un malade en danger immédiat**⁶¹³. Le décret prévoit que les infractions à ces dispositions sont susceptibles d'entraîner la responsabilité disciplinaire par l'Ordre des médecins, sans préjudice de poursuites pénales.

De plus, le Code pénal punit, à l'article 221, les membres du personnel médical qui, **dépositaires des secrets qu'on leur confie**, qui auront recelé des secrets, hors les cas où la loi les oblige ou les autorise à se porter dénonciateur. Les cas de dénonciation obligatoires ou facultatives n'incluent pas la situation où le médecin prend en charge un patient blessé par arme à feu.

Ces textes ne font pas état d'une différence de traitement en cas de guerre ou dans un état d'urgence. En l'absence de précision sur les conditions dans lesquelles ces garanties s'appliquent, il convient de confirmer qu'elles s'appliquent en tout temps, que ce soit **en temps de paix ou en temps de guerre ou autres situations d'urgence**.

En outre, le droit nigérien sanctionne les violations au droit des conventions de Genève en application de l'art. 49 et suivants de la convention (I) de Genève ainsi que les articles 139 et suivants de la convention III de Genève. Ainsi, par exemple, l'article 208.3 du Code pénal nigérien prévoit que constituent des **crimes de guerre**, les infractions graves suivantes, portant atteinte aux personnes protégées par les conventions de Genève de 1949 et leurs protocoles additionnels adoptés en 1977: « **le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique, à la santé** » ainsi que « **les actes et omissions, non légalement justifiés, qui sont susceptibles de compromettre la santé et l'intégrité physique mentale des personnes protégées par les conventions relative à la protection des blessés**, des malades et des naufragés, notamment tout acte qui ne serait pas justifié par l'état de santé de ces personnes ou qui ne serait pas conforme aux règles de l'art médical généralement reconnues». De même, la loi n°2003-010 du 11 mars 2003 portant code de justice militaire contient des dispositions similaires.

3.2. Moyens de résolution des litiges potentiels entre éthique médicale et obligation de déclarer les cas de blessures par arme à feu

En l'absence d'une obligation de déclarer les cas de blessures par arme à feu, il n'y a pas en théorie de conflit entre le devoir de déclarer les blessés par arme à feu d'une part et le devoir de confidentialité ou la non-discrimination d'autre part. On relève toutefois que le juge tranchera toujours en faveur de **l'éthique médicale qui est consacrée spécifiquement au travers des devoirs généraux des médecins**, tels que prévus par le **Code de déontologie des médecins**.

⁶¹³ Art. 5, Décret n°88-206/PCMS/MSP/AS du 9 juin 1988, portant approbation d'un code de déontologie des médecins, Journal officiel de la République du Niger, du 1er juillet 1988, 55ème année, n°13, p. 572.

K. NIGERIA

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

Generally, the National Health Act 2014⁶¹⁴ per Section 26 guarantees the confidentiality of patient's information; however, this guarantee allows for certain exceptions such as disclosure pursuant to a court order or in compliance with an obligation under a law, as well as where nondisclosure represents a serious threat to public health. Similarly, the Nigerian Constitution⁶¹⁵ also guarantees a right to privacy per Section 37, albeit with exceptions in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom or other persons.⁶¹⁶

Art. 44 of the Code on Medical Ethics in Nigeria, Rules of Professional Conduct for Medical and Dental Practitioners⁶¹⁷ provides that, ordinarily, a doctor's disclosure of information concerning a patient may only be made following an informed consent of the patient. However, that Article contains a specific exception to the necessity of consent where "statutory notification of disease is involved" and further specifies that "adherence to the ethic of confidentiality embraces [...] discretionary breach of confidentiality to protect the patient or the community from imminent danger."

The Compulsory Treatment and Care for Victims of Gunshots Act 2017⁶¹⁸ ("CTCVG") was enacted "to provide for the compulsory treatment and care for victims of gunshot." That Act, however, does require reporting of these injuries to the police.

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

A hospital that receives or accepts for treatment any person with a gunshot wound must keep adequate records of the treatment⁶¹⁹ and report to the nearest police station within two hours of commencement of treatment.⁶²⁰

⁶¹⁴ Available at: https://nigeriahealthwatch.com/wp-content/uploads/bsk-pdf-manager/2018/07/01_-_Official-Gazette-of-the-National-Health-Act-FGN.pdf (18.2.19).

⁶¹⁵ Available at: <https://www.wipo.int/edocs/lexdocs/laws/en/ng/ng014en.pdf> (2.12.19).

⁶¹⁶ *Ibid.*, Section 45(1).

⁶¹⁷ Available at: <http://www.mdcnigeria.org/Downloads/CODE%20OF%20CONDUCTS.pdf> (10.12.2018).

⁶¹⁸ Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiQkvbuxZXfAhUNzKQKHV3bBncQFJAegQICRAC&url=https%3A%2F%2Fihl-databases.icrc.org%2Fapplic%2Fihl%2Fihl-nat.nsf%2Fxp%2Fibmmodres%2Fdomino%2FOpenAttachment%2Fapplic%2Fihl%2Fihl-nat.nsf%2FF542F9B673CDF6FC12581850043D341%2FTEXT%2FCompulsory%2520Treatment%2520and%2520Care%2520for%2520Victims%2520of%2520Gunshot%2520Act%25202017.pdf&usg=AOvVaw3qOIHR6jj5GgmN-ORCuLDE> (10.12.2018).

⁶¹⁹ CTCVG § 12.

⁶²⁰ CTCVG § 3(1).

2.1. Conditions

Before 2017, notwithstanding the prohibition of refusal to treat for any reason⁶²¹, hospitals often refused to treat gunshot victims until police reports⁶²² and clearance were produced.⁶²³ The CTCVG however specifically provides that treatment is not conditional on having police clearance and must be made available regardless of whether such clearance has been obtained.⁶²⁴ Failure to treat which leads to or causes “substantial physical, mental, emotional and psychological damage to the victim” is punishable by imprisonment for a term of 5-15 years.⁶²⁵ The Act further provides for punishment of imprisonment for five years and/or a fine of Naira 500,000.00 of any person (including police officers and other security agents) or hospital that stands by and fails to perform his/its duty which results in the unnecessary death of any person with gunshot wounds.⁶²⁶

2.2. Scope

Prior to the enactment of the CTCVG, the police used to request that the reporter disclose such details on the incident as location, circumstance and identity of the victim. The CTCVG does not state the scope of information that must be disclosed, but in section 6 only makes reference to an obligation to furnish background information on the victim. While there is insufficient information on how the CTCVG has been applied in practice, it may be assumed that the police has continued to request the same information as prior to its enactment, especially given that the rationale for requiring such disclosure is for the purposes of investigation.

2.3. Purpose

The report must be made to the nearest police station to allow the police to investigate “the circumstances under which the person was shot.”⁶²⁷

2.4. Consequences of non-compliance

The hospital is liable on conviction to a fine of Naira 100,000.00 and any doctor “directly concerned with the treatment” is liable on conviction to imprisonment for a term of six months and/or a fine of Naira 100,000.00.⁶²⁸

According to the press, there have been several instances of hospitals refusing to treat gunshot wound victims without police clearance, notwithstanding the CTCVG, which have prompted the Lagos State Command of the Nigeria Police Force to state publicly that any hospital that does so will be “arrested and diligently prosecuted.”⁶²⁹

⁶²¹ National Health Act 2014 §2, available at: <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/104157/126947/F-693610255/NGA104157.pdf> (10.12.2018).

⁶²² Section 4 of Robbery and Firearms (special provisions) Act 1984, available at: <http://lawnigeria.com/LawsoftheFederation/ROBBERY-AND-FIREARMS-%28SPECIAL-PROVISIONS%29-ACT.html> (10.12.2018).

⁶²³ S.Ogundipe, “Treat gunshot wounds first, ask questions later — Buhari,” January 1, 2018, Vanguard, available at: <https://www.vanguardngr.com/2018/01/treat-gunshot-wounds-first-ask-questions-later-buhari/> (10.12.2018); E. Nnadozie and C. Obinna “Treatment of gunshot victims: Police, NMA disagree,” May 22, 2018, Vanguard, available at: <https://www.vanguardngr.com/2018/05/993550/> (10.12.2018).

⁶²⁴ CTCVG § 1.

⁶²⁵ CTCVG § 9.

⁶²⁶ CTCVG § 11.

⁶²⁷ CTCVG § 3(2).

⁶²⁸ CTCVG § 5.

⁶²⁹ Police Order Hospitals To Treat Gunshot Victims Without Police Report Or Face Jail Term, Sahara Reporters, New York, May 16, 2018, available at: <http://saharareporters.com/2018/05/16/police-order-hospitals-treat-gunshot-victims-without-police-report-or-face-jail-term> (10.12.2018).

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

The Compulsory Treatment and Care for Victims of Gunshots Act, 2017 §§1-2 specifically provides for the obligation of “every hospital in Nigeria whether public or private” to provide “immediate and adequate treatment” to any person with a gunshot wound.

The National Health Act, 2014 also makes it an offence for all healthcare providers/establishments to “refuse to provide emergency medical treatment for any reason”.⁶³⁰

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Art. 44 of the Code on Medical Ethics in Nigeria, Rules of Professional Conduct for Medical and Dental Practitioners⁶³¹ provides that, ordinarily, a doctor’s disclosure of information concerning a patient may only be made following an informed consent of the patient. However, that Article contains a specific exception to the necessity of consent where “statutory notification of disease is involved” and further specifies that “adherence to the ethic of confidentiality embraces [...] discretionary breach of confidentiality to protect the patient or the community from imminent danger.”

Generally, there is abundant case law on the right to privacy being a qualified right. In particular, Section 37 of the Constitution of the Federal Republic of Nigeria guarantees the right to privacy subject to certain exceptions such as in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons⁶³². It is clear that the duty to disclose in the circumstance of the CTCVG is occasioned by an obligation in law which is contemplated even under the National Health Act (Section 26 thereof.) Of note is also the fact that doctor-patient confidentiality is not an absolute obligation that admits of no exception.

⁶³⁰ National Health Act (2014) Section 20(1).

⁶³¹ Available at: <http://www.mdcnigeria.org/Downloads/CODE%20OF%20CONDUCTS.pdf> (10.12.2018).

⁶³² Constitution, *op. cit.*, Section 45(1).

L. PAKISTAN (Federal, Peshawar and Karachi)

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

Unlike the constitutions of many countries of the world, the Constitution of the Islamic Republic of Pakistan, 1973 does not explicitly recognize the **right to health** as a fundamental right. The Preamble of the Constitution and its Principles of Policy refer to socio-economic rights, but courts cannot enforce these socio-economic rights as only fundamental rights are enforceable.⁶³³ However, Constitutional Courts in Pakistan have previously handed down decisions in public interest litigations through the application of an expansive definition of the **right of life**.⁶³⁴ Other rights have been found to be fundamental as corollaries to the right of life. In a recent judgment,⁶³⁵ the Supreme Court of Pakistan, empowered under doctrines of **Judicial Review** and elementary duty of interpretation of the Constitution and statutes, while reminding readers of the responsibility of the Supreme Court as the custodian of the Constitution, designated the **right to clean water** as a fundamental right stemming from the right of life although there is no specific provision in the Constitution concerning a right to clean water. Under the 18th Amendment to the Constitution, the **right to education** has now been included as a fundamental human right. The **right of health**, however, has not yet been designated a fundamental right.

The Constitution has not, at any time – before or after the passage of the 18th Amendment⁶³⁶ – included “Health,” *per se*, as a specific legislative subject. However, reference has been made to several subjects related to health in the Constitution’s legislative lists.⁶³⁷ These lists laid down the distribution of legislative power between the Parliament and the four Provincial Assemblies.⁶³⁸ A series of changes relevant to “health” were introduced in the Constitution through the 18th Amendment approved on 18th April 2010. The Concurrent Legislative List was abolished in its entirety. Subjects related to health over which both the Parliament and the Provincial Assemblies were concurrently competent to legislate prior to the effectiveness of the 18th Amendment, have been omitted, with the exception of some entries on which the Federal Government is empowered to legislate such as Legal, Medical and Other Professions, National Planning and Economic Coordination including Planning and Coordination of Scientific and Technological Research or International Treaties, Conventions and Agreements and International Arbitration.

Health information and disease security are now international obligations assumed under the WHO-negotiated International Health Regulations, 2005 to which Pakistan is a signatory, Although the

⁶³³ Under the Constitution most of the fundamental rights fall within the domain of civil and political rights. Socio-economic rights are featured in two areas. First, the Objective Resolution makes an explicit reference to social justice as one of the five principles guiding the democratic state. Secondly, Articles 25 & 38 refer to “Equality of citizens” and “Promotion of social economic well-being of the people.” Other Articles of the Constitution relevant to “Health” include Article 9 on “Security of the Person” and Article 14 on “Inviolability of the dignity of man.” By convention, these covenants are referred to as being the basis of the “rights-based approach to Health in Pakistan,” with Articles 8 and 9, read together with Article 199, providing the basis for enforcement of fundamental rights.

⁶³⁴ *Miss Shehla Zia & others v. WAPDA* (PLD 1994 Supreme Court 693); *Syed Mansoor Ali v. Government of Punjab* (2007 CLD 533).

⁶³⁵ 2018 Supreme Court Monthly Review 2001.

⁶³⁶ See discussion below in this paragraph.

⁶³⁷ Prior to the 18th Amendment, the Constitution contained two lists: the Federal Legislative List and the Concurrent Legislative List. In the case of the former, only the Federal Parliament had exclusive power to enact legislation while in the latter, either Parliament or the four Provincial Assemblies could enact legislation on the subjects enumerated therein.

⁶³⁸ Chapter 1 of Part V of the Constitution.

decision to adhere to these regulations was concluded by the Federal Government, as a result of the 18th Amendment to the Constitution, the Provincial Governments are responsible for their implementation. In strict legal parlance, since the effectiveness of the 18th Amendment to the Constitution, the responsibility to regulate the **rights of patients and duties of Healthcare Professionals** lies with the Provincial Governments in addition to the implementation of treaties and international agreements which are negotiated and concluded by the Federal Government alone. Both the Police and Medical Professionals are under the administrative control of the Provincial Government of each province. Legislation pertaining to their respective duties, therefore, is generally adopted and regulated at the Provincial level through Provincial legislation and regulations.

The legal foundation for the purpose of our research is Article 9 of the Constitution of Pakistan, 1973, which guarantees the **“right of life and security of citizens”** as an integral part of fundamental human rights. This guarantee is the sole responsibility of the State.⁶³⁹ Criminal laws are adopted in keeping with this specific guarantee and acknowledgement of the State’s responsibility for the safety and security of human life as stipulated in the Constitution. It is solely the State’s responsibility to investigate any case in which any person is injured and is brought to Healthcare Professionals for medical treatment as a result. Healthcare Professionals are obliged to cooperate with the Police concerning the incident and the injured person to whom medical treatment is being, or is likely to be, provided.⁶⁴⁰ Previously, the general practice revealed that in gunshot injury cases, no one was willing to take on the responsibility of saving a dying man, perhaps fearing liability if the patient died whilst in their care. This could be the fear of facing the Police or even the fear of assuming another’s financial responsibility.

The absence of Good Samaritan laws means ordinary people and Healthcare Professionals are afraid of the consequences of interfering in another’s predicament, but, in the opinion of the author of this national report, clearly this ought to change. In this author’s opinion, what is required in Pakistan, and has been lacking for a very long time, is a statute along these lines, which would allow a bystander to intervene in case of a medical emergency and would define such person’s potential liabilities. Until the adoption and enforcement of several important pieces of legislation, the Pakistani legal system had no concrete legal framework of Good Samaritan laws or laws concerning Healthcare Professionals’ duties of disclosure and confidentiality. The only law relevant in some way to emergency services was the **Punjab Emergency Services Act, 2006**. That legislation, however, specifically focuses on **rescue workers** and does not apply to the ordinary layman who may have little or no knowledge whatsoever about first aid or medicine.

Pakistani legal history concerning the **duties of disclosure and confidentiality** of Healthcare Professionals can be divided into **two periods**, before and after the enactment of the significant federal law entitled **the Injured Persons (Medical Aid) Act, 2004** and approval of identical laws by three provinces. Even though the Province of Baluchistan did not adopt such a law, the Federal law will serve the same purpose until that province adopts such legislation at the provincial level. In this author’s opinion, momentum is strong for the creation of a comprehensive mechanism for Healthcare Professionals dealing with cases of gunshot injuries. In the past, Healthcare Professionals were under a mandatory **duty of disclosure** to report information to the Police **before** providing Medical treatment unless the health of the patient was seriously critical and the patient would die if medical treatment were not provided. The situation had further deteriorated – *inter alia* from a human rights perspective – as Healthcare Professionals, in addition to the **duty of disclosure**, were under a **duty to**

⁶³⁹ Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973.

⁶⁴⁰ Pursuant to the Constitution, the fundamental concept of criminal legislation provides that the State is solely responsible for bringing the culprit to justice in any case of gunshot injury occurring on Pakistani soil. The law would apply regardless of whether the victim of the incident or a third party comes forward to file a complaint in view of Section 4(h) of the Criminal Procedure Code, 1898.

obtain consent from a relative or the victim before providing medical treatment to the gunshot wound patient. This often caused incalculable losses. The third obligation for Healthcare Professionals providing medical treatment to gunshot wound patients was the **duty of medico-legal formalities** as a precondition to providing medical treatment.

The **duty of disclosure** is imposed by criminal law **statutes**⁶⁴¹. Since the enactment of the above-mentioned **new laws**, there has been a remarkable change in the practice of Healthcare Professionals and the Police. There is now a legal definition of an **injured person** in the statute. Previous laws were silent on this point and the Court had to import the meaning of that term from the Dictionary of Common Law traditions on interpretation of statutes.⁶⁴² Under Pakistani law, an **injured person** now means whoever suffers from injuries defined in the statute. The law does not require that an **injured person** be a **citizen of Pakistan**, rather the term extends to all persons including **foreigners, terrorists, spies or even enemies of the State** involved in anti-state activities whenever they sustain gunshot injuries on Pakistani soil. All healthcare institutions, hospitals, dispensaries or clinics are now bound to provide healthcare facilities and proper medical treatment to gunshot victims, which treatment was previously only available in Public Hospitals having a notified Medico-Legal Doctor appointed by the Provincial Government. Unlike under the previous laws, under the new laws, **essence of time** and **priority** is to be given to gunshot wound patients for medical treatment, and the Healthcare Professionals are required to postpone the medico-legal formalities, if necessary. Simultaneously, the Police are directed not to interfere during the medical treatment of a gunshot-wound patient in order that the victim may have uninterrupted medical care. The other important aspect of the new provisions is to save the Healthcare Professionals from having to wait for the Police to act and from answering (or patients having to answer) the interrogations of police officials before starting treatment.⁶⁴³

The elimination of the essential condition of **consent**⁶⁴⁴ from a patient or his/her relative before treatment is a change of great magnitude to simple harmonic law.⁶⁴⁵ In the absence of such consent, the Healthcare Professionals might have been subject to suit for **damages** (e.g. in **torts**) by the patient's family in case of irreparable loss. This legislation is meant to **indemnify** Healthcare Professionals against potential liability for failure to obtain **consent** to treat the patient. The law gives express protection to everyone involved even including a bystander who takes responsibility of the injured person and brings him or her to the Hospital.⁶⁴⁶

The **Injured Persons (Medical Aid) Act, 2004**⁶⁴⁷ has ushered in new convenience for Healthcare Professionals trying to overcome the obstacles to treatment posed by, and the contradictory provisions of, the **duties of disclosure and confidentiality**.⁶⁴⁸ This allows Healthcare professionals, in the first instance, to provide immediate and uninterrupted medical treatment to the injured person without first having to inform the Police and without observing formalities of medico-legal procedures. The Police Officer cannot exert influence during medical treatment nor can s/he use intimidation

⁶⁴¹ Criminal Procedure Code, 1898, Pakistan Penal Code, 1898 and Police Rules, 1934.

⁶⁴² See Section 2(d), which includes the following definition: "**injured person**" means a person injured due to traffic accident, assault or any other cause who is in need of an immediate treatment.

⁶⁴³ See Section 4 of the Injured Person (Medical Aid) Act, 2004.

⁶⁴⁴ In practice, Healthcare Professionals must use a prescribed form, to be signed by the relative of the injured person before starting medical treatment in order to fulfil the conditions of Consent.

⁶⁴⁵ Section 5 of the Injured Person (Medical Aid) Act, 2004.

⁶⁴⁶ Section 9 of the Injured Person (Medical Aid) Act 2004.

⁶⁴⁷ Section 3. **Injured persons to be treated on priority basis.** —Where an injured person is brought to a hospital, he shall be provided medical aid without delay on a priority basis over all other medico-legal formalities."

⁶⁴⁸ For instance, the Code of Ethics stipulates immediate medical treatment whereas criminal law demands that medico-legal formalities be observed first unless the patient's health condition is seriously critical, or the patient is dying.

against the Healthcare Professionals on the ground of lack of cooperation or concealment of a crime, delay in reporting facts, alleged abetment of the culprit or distorting important evidence.⁶⁴⁹ These statutes are strictly applied and have made the Police curb certain behavior as any contraventions of the law may result in prosecution and incarceration of the person violating such law.

1.1. Confidentiality

The Pakistan Constitutional guarantee of the “right of life and security of citizens”⁶⁵⁰ notwithstanding, there is no statutory law imposing a **duty of confidentiality** for Healthcare Professionals towards a patient. The only set of rules governing the practice of Healthcare Professionals is the **Code of Ethics**⁶⁵¹, which, in practice, is strictly followed. Although initially only an ethical duty, since the approval of this Regulation by the Pakistan Medical and Dental Council,⁶⁵² the Code of Ethics (and thus the duty of confidentiality) has force of law. The basic condition of confidentiality by the Healthcare Professional is an integral part of the Code of Ethics in Common Law countries throughout the world. The Healthcare Professional undertakes to abide by the Hippocratic Oath, which is reproduced below, at the time of issuance of his or her license:

Hippocratic Oath⁶⁵³ says:

“Whatever, in connection with my professional practice, or not in connection with it, I see or hear in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all should be kept secret.”

The Constitution of Pakistan enshrined certain principles of **Islamic Law**⁶⁵⁴ that are consistent with the principles of Common law. In addition to the Hippocratic Oath, on becoming a member of the medical profession at the time of obtaining a License, the Healthcare Professional is also required to swear another Oath⁶⁵⁵ that succinctly confirms Islamic legal principles (last two paragraphs). The Hippocratic

⁶⁴⁹ For instance bullets (or fragments) found in a body, which must be delivered after surgery to a Police Officer for seizure and production in Court at trial.

⁶⁵⁰ Article 14 (Fundamental Human Right) Inviolability of dignity of man, etc.—(1) the dignity of man and, subject to law, the privacy of home, shall be inviolable.

⁶⁵¹ Article 9, see: <http://www.pmdc.org.pk/LinkClick.aspx?fileticket=v5WmQYMvhz4%3d&tabid=292&mid=845> (24.6.19).

⁶⁵² Section 31(1) Pakistan Medical and Dental Council Ordinance, 1962.

⁶⁵³ Code of Ethics (Regulation).

⁶⁵⁴ Article 2-A of the Constitution stipulates that under the Objective Resolution, *inter alia*, any law which is contrary to the Holy book Quran or the practice of the Holy Prophet, is void. It is forbidden to kill or injure any human being under Islamic Laws, which laws are overwhelmingly framed in support of the victim or patient regardless of gender, ethnicity, or such person’s status as a spy, enemy or terrorist. Another way of looking at the principle is that refusal of medical treatment is strictly forbidden whether the patient is guilty or innocent, (a determination to be made only by a Court of law).

⁶⁵⁵ Clause 5.0-Oath of Medical and Dental Practitioners:

I solemnly pledge myself to consecrate my life to the service of humanity;

I will give to my teachers the respect and gratitude which is their due;

I will practice my profession with conscience and dignity;

The **health of my patient** will be my first consideration;

I will respect **the secrets which are confided in me**, even after the patient has died;

I will maintain by all the means in my power, the honor and the noble traditions of the medical profession;

My colleagues will be my sisters and brothers; and I will pay due respect and honor to them.

I will not permit considerations of **age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, or social standing** to intervene between my duty and my patient;

I will protect human life in all stages and under all circumstances, doing my utmost **to rescue it from**

Oath and the Oath for Healthcare Professionals under Islamic legal principles are consistent with each other in imposing a **duty of confidentiality**. Healthcare Professionals and Police cannot refuse medical treatment to [any] gunshot wound patient on the ground of **discrimination**⁶⁵⁶ based on being an enemy, a terrorist or part of a minority group. The underlying principle of non-discrimination is a fundamental human right under the Constitution and has also been incorporated in the Oath of Medical professionals, in addition to the Hippocratic Oath.

The Code of Ethics imposes a duty upon Healthcare Professionals not to violate the privacy of their patients⁶⁵⁷. That said, the contradiction between the **duty of confidentiality** imposed by Regulation and the **duty of disclosure** imposed by criminal laws is resolved easily: pursuant to rules of interpretation, statutory provisions prevail over Rules and Regulations, so the duty to disclose will prevail.⁶⁵⁸ As a general rule, then, the **duty of confidentiality** is applied throughout Pakistan in compliance with the Code of Ethics (Regulation). It is strictly applied in a civil context, however, in a criminal

death, malady, pain and anxiety. To be, all the way, an instrument of Allah's (God) mercy, extending medical care to **near and far, virtuous and sinner and friend and enemy.**"

I make these promises solemnly, freely and upon my honor.

⁶⁵⁶ Article 25 of the Constitution of Pakistan 1973.

⁶⁵⁷ See Clause 27 of the Code of Ethics. **Confidentiality.**- The physician has a right to and shall withhold disclosure of information received in a confidential context, whether this is from a patient or as a result of being involved in the management of the patient, or review of a paper, except in the following specific circumstances where he may carefully and selectively disclose information where health, safety and life of other individual may be involved, namely:

(a) The medical or dental practitioner cannot seek to gain from information. received in a confidential context (such as a paper sent for review) until that information is publicly available;

(b) There is. no legal compulsion on a doctor to provide information concerning a criminal abortion, venereal disease, attempted suicide, or concealed birth regarding his patients to any other individual or organization. When in doubt concerning matters, which have a legal implication. the medical or dental practitioner may consult his/her legal adviser;

(c) The professional medical record of a patient shall not be handed over to any person without the consent of the patient or his/her legal representative. No one has a right to demand information from the doctor about his patient, save when the notification is required under a statutory or legal obligation and when in doubt, the medical or dental practitioner or a dentist may consult a legal advisor;

(d) confidences concerning individual or domestic life entrusted by patients to a medical or dental practitioner and defects in the disposition or character of patients observed during medical attendance shall never be revealed unless their revelation is required by law;

(e) a medical or dental practitioner who gains access to medical records or other information without consent shall be guilty of invasion of privacy; and

(f) the medical or dental practitioner who grants access of an information of a patient to a third person except. Councillor law enforcing agencies, without consent shall be guilty of breach of confidentiality, but where a medical or dental practitioner is of the opinion to determine it his duty to society requiring him to employ knowledge about a patient obtained through confidence as a medical or dental practitioner, to protect a healthy person against a communicable disease to which he is about to be exposed, the Medical or dental practitioner shall give out information to concerned quarters.

⁶⁵⁸ 2001 Supreme Court Monthly Review 1806 (*Mehraj Flour Mills v. Provincial Government & others*) law laid down as:

"There is no cavil with the proposition that the rule shall always be consistent with the Act and no rule shall militate or render the provisions of the Act ineffective. The test of consistency is whether the provisions of the Act and that of rules can stand together. Main object of rules is to implement the provisions of the Act and in case of conflict between them the rule must give way to the provisions of the Act. In any case, the rules shall not be repugnant to the enactment under which they are made."

In another case 2003 Supreme Court Monthly Review 370 (*Secretary Finance v. Aryan Petro Chemical Industries & others*) held:

law context, the law provides for a **duty of disclosure** in many potentially criminal cases. The duty of confidentiality therefore varies in accordance with the specific obligation to disclose with which it might conflict, particularly in cases of gunshot injuries, assault, rape or murder where failure to disclose may result prosecution. The obvious reason is the Constitutional guarantee⁶⁵⁹ to its citizen of the right of life and security of person. Any deviation from the **duty of disclosure** would create an imbalance in the criminal administration system of justice. The two interdependent pre-conditions “Ocular evidence” and “Medical evidence” (to corroborate the ocular evidence) are essential to convict the shooter. The failure to comply with the duty of disclosure may result in failure to convict the shooter which explicitly circumvents the Constitutional guarantee and results in an untenable position with respect to law and human rights.

A breach of the **duty of confidentiality** may also subject a Healthcare Professionals to liability (**damages**) based on a suit for **breach of contract**⁶⁶⁰ for violation of an implied contract with the patient having legal privity. Failure to comply with the Code of Ethics (including the duty of confidentiality) may also constitute **professional negligence**,⁶⁶¹ which may result in **tort liability**. Under the Code of Ethics, itself, a **breach of confidentiality** is professional misconduct; as a result, the breaching Healthcare Professional may lose his or her professional license through departmental proceedings under the Administrative laws.⁶⁶²

The disclosure of information concerning a patient by the Healthcare Professional may also be exempted under the newly enacted **Right of Access to Information Act, 2017**.⁶⁶³ That law provides that it is not permissible to disclose information under the law if this would involve invasion of privacy of an identifiable individual, including a deceased individual. Healthcare Professionals are also exempted from the duty of disclosure of patients where to do so is likely to endanger the life, liberty, health or safety of any individual.⁶⁶⁴

“The rule making Authority cannot cloth himself with power which is not given to it under the statutes and thus the rules made under a statute, neither enlarge the scope of Act nor can go beyond the Act and **must not be in conflict with the provisions of statute or repugnant to any other law in force**.

In another case 1999 SCMR 1442 (*Central Board of Revenue v. Sheikh Spinning Mills*) further affirmed asunder:

“ Central Board of Revenue or for that matter even the Federal Government cannot control or curtail judicial adjudicative power vested in the forums provided under the relevant law by giving a particular interpretation to a particular provisions of the relevant law or by issuing notification/ S.R.O. for that purpose.”

In another case 2000 Monthly Law Digest 921 (*Asif Ali Zardari v. The State*) laid down as follow:

“it is well settled that rules are subordinate/subject to the Act. If any provision or rule is inconsistent with the provision of the Act then the provision of the Act is to be followed and rule is to be ignored.”

⁶⁵⁹ *Ibid.*, Article 9 life and security is guaranteed.

⁶⁶⁰ See Section 73 of the Contract Act, 1872, **Compensation for loss or damage caused by breach of Contract**: When a Contract has been broken the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it”.

⁶⁶¹ Inherited from English legal principles, there are three kinds of torts: intentional tort, negligence and strict liability.

⁶⁶² Departmental proceedings initiate under Pakistan Medical and Dental Council Ordinance, 1962, read with the Code of Ethics.

⁶⁶³ http://senate.gov.pk/uploads/documents/1510051317_684.pdf (24.6.19).

⁶⁶⁴ See Section 16 of the Right of Access to Information Act, 2017.

The Chairman of the Senate **Committee on National Health Services, Regulations and Coordination** has introduced a Bill in the Senate of Pakistan (Upper House of Parliament) in their Report No.10 of the Committees called **the National Health Care Bill, 2017**.⁶⁶⁵ In this proposed bill, a specific provision has been added concerning the **Right to privacy and confidentiality**. This provision states categorically that the Healthcare Professionals/practitioners who are involved in the treatment of a patient, and all those who have legitimate access to the patient's record, shall not divulge any information to a third party without the consent of the patient.⁶⁶⁶ In the event the prospective law is approved, this, in addition to the Code of Ethics, would be of considerable help towards imposing a duty of confidentiality through a legislative act.

1.2. Disclosure

Pakistani laws on **civil liability** do not impose on Healthcare Professionals a **duty of disclosure**; on the contrary, they provide for a strict **duty of confidentiality** in the **Code of Ethics**, through a sole regulation that prohibits a Healthcare Professional from disclosing information about his or her patient that is not accessible to the general public. Conversely, information that indicates that a **criminal law has been violated**, such as, gunshot injuries, assault, murder, rape, etc. **must be reported** to the Police by Healthcare Professionals in order to bring the criminal charge to its logical end. The mandatory **duty of disclosure** is intrinsic and vital under several **criminal laws** of Pakistan. Simultaneously, anything which is detrimental to the spirit of such **duty of disclosure**, for example **refusal to disclose** or **concealing the fact** of a gunshot injury, would result in serious penal consequences for the defendant. In case of gunshot injuries, murder, rape, assault, traffic accident, suicide or death due to poison or even strangulation, a Police Officer must investigate the incident and submit his or her report before the Judicial Magistrate of the area concerned. This investigation can be done by the Police on the information of a citizen or a victim of gunshot injuries, or even on his or her own initiative⁶⁶⁷. For Healthcare Professionals however the **duty of disclosure** is necessary whenever a victim of gunshot injuries is to be brought in for medical treatment.⁶⁶⁸

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

The duty of confidentiality and duty of disclosure are dependent on the nature of the laws (civil or criminal laws) that may apply based on the facts of the case. In practice, where a gunshot wound patient is brought in for medical treatment, a Healthcare Professional has a **duty of disclosure** to report the facts of the gunshot injury to the nearest police station while maintaining a **duty of confidentiality** about such information with respect to the general public.

⁶⁶⁵ http://senate.gov.pk/uploads/documents/1491817817_181.pdf (28.6.19).

⁶⁶⁶ See Section 6 of the proposed National Health Care Bill, 2017.

⁶⁶⁷ Section 154 of the Criminal Procedure Code, 1898.

"Information in cognizable cases"—every information relating to a cognizable offence if given orally to an Officer In charge of a Police Station, shall be reduced to writing by him under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf."

The registration of a case is the first step towards commencement of an Investigation. Certain crimes are deemed to be crimes against the State (Federation of Pakistan) and, in case of gunshot injuries or death due to gunshot injuries, the Police Officer, on his own initiative, can register the case and commence the investigation regardless of whether the victim or his/her relative comes forward to pursue charges due to fear or insecurity.

⁶⁶⁸ See Section 174 Criminal Procedure Code, 1898 and Rule 25.19(3) of Police Rules, 1934.

In the past, every Government Hospital had a Medical Officer or a Casualty Medical Officer. Based on the disclosure of the Healthcare Professional referred to above, the Provincial Government would then notify such Medical Officer and request him or her to perform a mandatory examination of the injured person. The details of this examination were required to be recorded in an Accident Register, which is a confidential record and could only be produced at a Court's direction. Generally, it may be said that in both situations⁶⁶⁹ of civil liabilities and criminal charge(s), Healthcare Professionals are under an ethical duty to keep confidential the information of the patient except in cases of Criminal charge(s) of gunshot injuries or murder of an injured person, where the information can and must be communicated to the Police.⁶⁷⁰

Interestingly, certain provisions appear to be consistent with both the Islamic legal principles of punishment and the principles of Common law. Thus, a synergy has developed in Pakistan criminal administration of justice. Based on Islamic legal principles, certain provisions of Pakistani criminal law essentially require a **duty of disclosure**. It is impracticable to award sentence or punishment without disclosure of the nature of an injury and its effect by a Healthcare Professional. The concept of Islamic legal principles as they apply to a case of injury or murder has remarkably increased the scope, concept and conditions of the **duty of disclosure** of Healthcare Professionals as compared to other Common law countries. The non-compliance with the duty of disclosure and failure to report gunshot injuries or resulting death gives rise to serious penal consequences.⁶⁷¹

Generally, there are two situations that can occur in the event of gunshot injuries. One is where the patient appears directly for medical treatment, in which case the Healthcare Professionals must report the facts to the Police under the **duty of disclosure**. The other situation is where someone (a patient and/or another person) approaches the Police directly rather than seeking treatment first. Upon receiving such information, the Police Officer would consider the nature of the offence, for instance, in case of Murder, Hurt, Wounds⁶⁷², Rape, Poison, Bomb blast, accident, suicide, etc., and refer the matter to the relevant expert, such as a Medical Practitioner, Chemical Examiner, Ballistics or Forensics

⁶⁶⁹ Examples of civil liability would include damages and torts cases in connection with a fatal accident or compensation in Medical negligence cases; examples of criminal charges would include gunshot injuries, murder etc.

⁶⁷⁰ Pakistani law makes a distinction between a Patient and an injured person. For Patients, Medical Professionals are not allowed to disclose information and any breach of this duty may give rise to proceedings under civil and administrative laws, whereas for an injured person, it is mandatory to disclose the information [but only to the Police].

⁶⁷¹ Section 202 Pakistan Penal Code, 1898:

⁶⁷² Injury and wound are usually used interchangeably in practice. In reality, however, these two terms are different from each other. The main difference between them is that all wounds can be injuries while not all injuries are wounds. There are various kinds of injury, and different punishments have been provided for each kind of injury.

Section 44 of Pakistan Penal Code The word injury denotes any harm whatever illegally caused to person in body, mind, reputation or property.

Meaning under Medical Jurisprudence: An injury means a solution or disruption of the anatomical continuity of any tissues of the body.

Section 332 of Pakistan Penal Code, 1898. Hurt (Islamic Laws for different injuries):

(1) Whoever causes pain, harm, disease, infirmity or injury to any person or impairs, disables or dismembers any organ of the body or part thereof of any person without causing his death, is said to cause hurt.

(2) The following are the kinds of hurt:

- (a) Itlaf-i-udw
- (b) Itlaf-i-salahiyyat-i-udw
- (c) shajjah
- (d) jurh and
- (e) all kinds of other hurts.

Expert.⁶⁷³ Sometime, due to imperceptible injuries, the Police Officer would wait for the report of the Healthcare Professional (Expert) providing medical treatment to the victim before invoking penal provisions. Section 174 of the Criminal Procedure Code, 1898 stipulates that the Officer in charge of a Police Station, on receiving information of facts regarding the commission of a suicide or murder, hurt, gunshot injuries, accidental death or injuries is bound to inspect the place at which the incident occurred and place the case before a Magistrate to refer the body or victim of injuries to the nearest Surgeon for examination (Ante-Mortem or Post-Mortem).⁶⁷⁴ The law imposed a mandatory obligation where the patient appeared to be dying, in which case the patient would immediately be referred to a Healthcare Professional without going through the formalities of preparation of a charge sheet, recording a statement, obtaining the permission of the Magistrate and complying with medico-legal formalities.

Conversely, prior to the Injured Persons (Medical Aid) Act, 2004, it was impracticable for a gunshot wound patient to obtain medical treatment in Private Hospitals notwithstanding a critical health condition; in case of emergency, instead of providing medical treatment, the injured person would be referred to a Public Hospital for Healthcare Medical treatment. The private Hospital's reasons for refusing patients and referring them to a Public hospital was two-fold. The first was a requirement of law, as only at a Public Hospital could one find a notified Medico Legal (Medical) Officer to provide medical treatment to gunshot wound patients and only such Medico Legal (Medical) Officers at a Public Hospital were competent and authorized by the Government to issue Medico-Legal Certificates. Moreover, the practice of Medical Professionals at Public Hospitals appears to have been that, based on the nature of the injury, the Medical Professionals either called a Police Official because of the **duty of disclosure** or demanded a Memorandum⁶⁷⁵ of Police from the patient or the person accompanying him or her in order to avoid potential liability for failure to comply with the **duty of disclosure**, which would have required forwarding information to the Police. However, as stated earlier, this practice was not followed where the patient's health condition was seriously critical, or the patient was dying. This practice could cause serious issues and life-threatening risks to the victim of gunshot injuries. The reason for refusal of Private Hospitals and Healthcare Professionals working in the private sector was that they were not authorized to issue Medico-Legal certificates as required under the Police Rules, 1934. The Medico-Legal Certificate could only be issued by the **notified** Healthcare Professional of a Government hospital appointed by the Health Department of the Provincial Government, and Private Hospitals were not allowed to keep Medico-Legal books (Registers). However, now a patient has the right to obtain examination of a wound from Healthcare Professionals of his or her choosing from the private sector (normally when the patient is not satisfied with the medical treatment received or wishes to have a second opinion from a family doctor).⁶⁷⁶ In practice, sometimes an acquaintance of a

⁶⁷³ For further information, See Judgment of Lahore High Court. <https://sys.lhc.gov.pk/appjudgments/2014LHC3312.pdf> (27.06.2019).

⁶⁷⁴ Healthcare Professionals must notify the Police whenever such type of cases are referred for medical treatment. Providing a report to the Police is a requirement of law. The purpose of this law is to prosecute the perpetrator before a Court of law, for which the Police Official must collect Medical Evidence. Hence, by law, it is the responsibility of both the Healthcare Professional and the Police Official simultaneously. The former must report to the Police, and the Police must collect Medical Evidence. Normally, the Healthcare Professional who issues the Medico-Legal Certificate appears before the Court of law to testify, however, in his or her absence due to extraordinary circumstances (if s/he has died or is abroad) the successor-in-office would appear to testify with the permission of the Court.

⁶⁷⁵ An Objective letter acknowledging information concerning the crime, issued by the Police with a recommendation of medical treatment and assessment of the injury.

⁶⁷⁶ **Rule 26.19 of the Police Rules, 1934,**
(3) Police Officers cannot legally compel injured persons to submit to medical examination, and such persons have a right to be examined privately at their own expense by medical practitioners. **"Injury Statements" [Form 25.39(1)] are intended solely for the use of the District Health Officer of the District or any Medical Officer subordinate to him**, on whom the police may call for a report. Such forms must

patient reports the facts and brings a memo from the Police for medical treatment; otherwise the duty of disclosure is essential under the law.

Since the promulgation of the **Injured Person (Medical Act), 2004**, all these conditions have been categorically omitted. Certain changes have been made concerning Healthcare Professionals' **duty of disclosure**. First, an exemption to the duty of disclosure before medical treatment of gunshot injuries has been added; second, immediate medical treatment is to be provided without medico-legal formalities on a priority basis; third, private hospitals and Healthcare Professionals are allowed to provide medical treatment to victims of gunshot injuries; fourth, the Police must categorically refrain from interfering during medical treatment; fifth, the Police may not approach the victim of gunshot injuries for his or her statement without the permission of the Healthcare Professional; and, sixth, the Police and Healthcare Professionals have a duty to ensure that the patient is not moved from Hospital unless his or her health condition is fully stabilized.

2.1. Conditions

In the past, the two types of cases were treated differently. Where the victim of a gunshot injury **was brought directly to a Healthcare Professional** for medical treatment, the Healthcare Professional was required to report the fact to the Police before providing medical treatment unless the patient's health condition was seriously critical or the patient appeared to be dying⁶⁷⁷; in which case, the Healthcare Professionals could provide immediate medical treatment and would be required to inform the Police within 24 hours.⁶⁷⁸ Where a gunshot wound patient **was brought directly to the Police**, the police authorities would first get permission from the Judicial Magistrate of the area concerned before taking the patient for medical treatment unless the health condition of the victim was in critical condition or the patient was likely to die, in which case, the police were required to provide medical treatment without obtaining prior permission from the concerned Judicial Magistrate. Otherwise, the injured person was required to help the Police by recording his or her initial statement of the facts and helping the Police to prepare a charge sheet. It was only then that the Police official would be permitted to bring the victim before the Magistrate/Court for an appropriate order of referral for medical treatment. After recording the statement of facts, the Police were required to inspect the place where the incident occurred and prepare a site sketch. The practice reveals that the extensive steps of preparation of a charge sheet and inspection of the place where the incident occurred by Police, or Healthcare Professionals informing the Police of facts were dependent on the health condition of the injured person; if the injured person was in critical condition or appeared to be dying, the Police and the Healthcare Professionals would defer the proceeding for uninterrupted medical treatment. Normally, where the health condition is critical or the patient is in need of first aid, the victim or relative directly approached the doctor instead of the Police, therefore, preparation of a charge sheet or inspection of site of the incident was carried out after medical treatment. The Healthcare Professionals had a **further duty of disclosure** to issue a Medico-Legal Report or Certificate⁶⁷⁹ to the Police Official⁶⁸⁰ and to testify to the facts of injuries before the Court in criminal cases. Healthcare Officials had a **further duty of**

not be given to injured persons for the purposes of examination at their private choice, nor must be sent with injured persons to Government Medical Officers of another District.

All Medical Officers in charge of hospitals and dispensaries are required to report to the nearest police station within 24 hours all cases of serious injury or of poisoning admitted by them for treatment, whether such cases have been brought in by the police or not.

⁶⁷⁷ See Sections 160 and 161 Criminal Procedure Code, 189.

⁶⁷⁸ See Rule 25.20 of the Police Rules, 1934.

⁶⁷⁹ A Medico-Legal report is issued concerning an autopsy. In addition, where a patient or an accused disputes the Medico-Legal certificate, a Medico-Legal report is issued by the Medical board appointed by the Health Department of the Provincial Government.

⁶⁸⁰ See Rule 25.47 of the Police Rules, 1934.

disclosure to provide oral evidence as to their knowledge of the facts and the production of medical records, as authors of these documents.⁶⁸¹

2.2. Scope

In Pakistan, from the perspective of criminal law, the basic scope of required disclosure is the information necessary to prepare a Medico-Legal Certificate to be used during the course of **investigation** and **prosecution**.⁶⁸² It is essential for the **determination of facts** and to ascertain the **type and extent of injuries to the human body** (in order to determine what crimes should be charged, which vary depending upon the nature of hurt and injuries). When a document is produced against the person accused of a crime, it is a requirement of law that the **author** of the document come into the witness box. Healthcare Professionals therefore frequently appear in Court, as “**Experts**,” both as required by law to confirm their authorship of the relevant document⁶⁸³, and in order to substantiate or assist the Court regarding determination of the **nature of the injuries**.⁶⁸⁴

A Medico-Legal Certificate must be prepared by the Healthcare Professionals in all cases of rape, accident, murder, gunshot injuries, bomb blast, suicide, etc. The Healthcare Professional must report the facts and establish a Medico-Legal certificate; the Police decide whether and what to charge and prepare the relevant charge sheet, if applicable. It is no longer necessary for the Healthcare Professional to prepare immediately the Medico-Legal Certificate or Report; it can now be prepared only when the Healthcare Professionals determine that the patient’s condition allows it; the facts of the gunshot injury are, however, still required to be reported to the Police within 24 hours. The newly enacted laws stipulate that priority must be given to medical treatment and, in practice, the requirement to report the facts within 24 hours is not followed rigidly. Eventually, the Healthcare Professional must refer the report of facts to the nearest Police station mentioning the incident of the gunshot injury and the **primary discussions held between the Healthcare Professional and the patient**.

The Report mainly consists of three parts:

1. Introduction or preliminary data of the victim including name, age, gender, address, identifying marks on the victim’s body, height, weight, fingerprints and footprints, hair and its distribution, and the date, time and place of examination;
2. Facts observed on examination;
3. Opinion or inference drawn based on these facts.

⁶⁸¹ See Articles 78 & 79 Law of Evidence (Qanoon-e-Shahadat) Ordinance, 1984—
Article 78 “**Proof of signature and handwriting of person alleged to have signed or written document produced**. If a document is alleged to be signed or have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting”.

Although the Healthcare Professional appears in Court as an ‘Expert Witness,’ pursuant to the Law of Evidence, a document, record or testimony is inadmissible unless its author appears and testifies about the description of the injured person and the nature of the injuries. Presentation of evidence comes after considerable delay and has nothing to do with uninterrupted medical treatment.

⁶⁸² Investigation is conducted by the Police Department while Prosecution is in charge of the procedure before a Court of law to substantiate charges based on the Investigation Report.

⁶⁸³ Article 50—Law of Evidence (Qanoon-e-Shahdat Ordinance, 1984)—
“**Opinions of experts**. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of person specially in such foreign law, science or art, or in question as to identity of handwriting or finger impressions are relevant facts.”

⁶⁸⁴ For instance, a Healthcare Professional confirms in a report that the blackening of the skin that occurs in gunshot injuries indicates the distance between the victim and the shooter.

The conclusions drawn by Medical Professionals based on the medical evidence has great corroborative value to the Prosecution to prove the charges before the Court of law. They may tend to prove that the injuries or death could have been caused in the manner the Prosecution has alleged and which may be consistent with and corroborative of, an eyewitness' evidence. Medical Certificates, Medical Legal Reports and Dying Declarations constitute medical documentary evidence. Medical Legal Certificates or Reports are the documents prepared by the Medical Practitioner in compliance with the demand of Police Officials and the Judicial Magistrate. They are the documents chiefly referred to in criminal cases relating to assault, rape, gunshot, murder and poisoning. These reports consist of three parts:

1. Introductory or preliminary data, *i.e.* full name, age, address of the victim, date, place, time of examination as well as any identifying marks, and the identity of the person as required under International law.⁶⁸⁵ The identification is based entirely on known fingerprints, birthmarks, DNA, or several personal impressions with regard to characteristics, gestures, movement, shape, or other features of the teeth, eyes and hair. The patient's teeth, height and weight, ossifications of bones and minor signs are used to form an accurate opinion about the age of a person (although the patient's consent is no longer required for treatment, in practice, it is usually obtained (from a relative where the patient is not able to give it) before using this evidence for identification.⁶⁸⁶
2. The facts observed on examination, and
3. The opinion or the inference drawn from the facts.

2.3. Purpose

The purpose of the duty of disclosure to the Police⁶⁸⁷ is to assist in the Investigation of a crime or offence. The Police Officer must submit the Medico-Legal Report or Certificate along with his final investigation report (charge sheet) to the Magistrate.⁶⁸⁸ Under the Pakistani legal system, the purpose of **Medical Evidence**⁶⁸⁹ is to corroborate **Ocular Evidence**⁶⁹⁰. The Healthcare Professional not only has a **duty of disclosure** of the gunshot injury to the Police Official but must also issue a **Medico-Legal Certificate**⁶⁹¹. Afterwards, the Healthcare Professional must appear before the Court of Law for his or her statement, to prove his or her execution and issuance of such Medico-Legal Certificate as well as the nature of the injuries, causes and damages to the human body or its organs. The Medico-Legal Certificate determines the site and location of injuries as well as the weapon used to commit the offence, but cannot prove the identity of assailants.⁶⁹² It cannot lend any support to the prosecution's case particularly when the prosecution has failed to prove its allegations against a defendant through

⁶⁸⁵ See Article 6 of the Universal Declaration of Human Rights, General Assembly Resolution 217-A(III), dated 10.12.1948 available at: <https://www.osce.org/odihr/elections/19132> (28.05.2019).

⁶⁸⁶ The Police Officials refer patients for medical treatment with Form No.25.39 containing a full description and identification. The "consent" of the patient is required by Rule 25.30 of the Police Rules, 1934.

⁶⁸⁷ *Ibid.*, Section 174 Criminal Procedure Code, 1898 and Police Rules, 1934.

⁶⁸⁸ See Section 173 Criminal Procedure Code, 1898

⁶⁸⁹ **Medical Evidence** comprises (a) the Medico-Legal Certificate issued to Police, (b) proof of execution of record (c) confirmation of medical treatment to same person, (d) Expert testimony before Court. The main object of Medical Evidence is to corroborate the version of the prosecution, complainant and/or victim.

⁶⁹⁰ It varies in every case depending upon the circumstances of each case, however, the Medical Evidence necessary to prosecute and convict depends upon the nature of the injury sustained.

⁶⁹¹ Rule 25.19, the Police Rules, 1934, **Medico-legal opinion:** (1) *When a medical opinion is required in police cases, the persons to be examined shall be produced before the highest medical authority available on the medical staff of the district. Persons requiring examination at the headquarters of a district shall be taken to the Civil Hospital and not to a branch dispensary; similarly in rural areas, where a hospital is accessible, medico-legal cases shall be sent there and not to a rural dispensary.*

⁶⁹² Pakistan Law Digest 2007 Supreme Court p. 637 & 2008 Supreme Court Monthly Review p. 1221.

trustworthy **Ocular Evidence**. Medical Evidence may confirm Ocular Evidence regarding the site of injury, the nature of the injury, or the kind of weapon used in the offence, but it would not connect the defendant with the commission of the crime unless ocular evidence is brought by the Police and is corroborated by the Medical evidence.⁶⁹³

The information required to be disclosed by Healthcare Professionals in gunshot injury cases does not determine the guilt or innocence of the accused person. However, it may lead to proof or disproof of the innocence or guilt of a defendant. It is not the function of the Healthcare Professional to determine the guilt or innocence of a patient (who may be a victim or an accused who is hurt during crossfire or in an encounter with the Police and has been brought for medical treatment). The role and functions of Healthcare Professionals towards the **duty of disclosure**, in cases of gunshot injuries, is not limited to appearing in court and giving evidence as an Expert during trial but in view of settled legal principles of corroboration of ocular evidence with medical evidence⁶⁹⁴ in criminal charge(s) of assault, rape, hurt, gunshot injury or murder, etc. brought against an individual; its importance is much broader.

The Healthcare Professionals issue the Medico-Legal Certificate of gunshot injuries and the police investigation depends mainly upon it in order to invoke criminal charges against a defendant.⁶⁹⁵ The Medico-Legal Certificate is issued immediately, however, in complicated cases, the Healthcare Professional may reserve it until the final determination of injuries and medical treatment. The Police and Medical Professionals are both under the administrative control of the Provincial Government. Before the enactment of the **Pakistan Injured Person (Medical Aid) Act, 2004** and its relevant provincial statutes, only the Government-appointed **Public Healthcare Professionals of Public Hospitals** (designated as the Medico-Legal Officers/Doctors) could provide medical treatment to the victims of gunshot injuries, and it was not possible for Private Hospitals and Healthcare clinics to treat or admit the victim of a gunshot wound, notwithstanding the fact that the victim had been brought there in a critical health condition.

2.4. Consequences of non-compliance

The Pakistan Medical and Dental Council is the National body that regulates the registration and cancellation of Healthcare Professionals' licenses as medical practitioners as well as recognition of Healthcare institutes and hospitals throughout Pakistan. It is empowered to approve the academic curriculum of Medical institutions throughout Pakistan and also acts as a sanctioning authority for accreditation of a foreign degree of foreign qualified Doctors before granting a license to practice in

⁶⁹³ 2009 Supreme Court Monthly Review p. 985.

⁶⁹⁴ The Expert Witness provides **Expert Testimony** on which a determination by the trier of facts and nature of injuries and distance of attacker etc may be based. Moreover, the Court may call other Experts (Senior Healthcare Professionals) or constitute a Medical Board of Healthcare Professionals in complicated case. Simultaneously, in the context of a criminal trial, one should bear in mind that **Medical Evidence** has a broad scope under the Pakistan Legal system, for instance to **prove execution** of Medico-Legal Certificate, to **prove the fact** of gunshot injuries, to prove that the **medical treatment** has been provided to the victim by a specific Healthcare Professional, or the extent of **damages to human organs**. These all help form the basis of a determination of **innocence or guilt** of the accused by **the Court**. Any contradiction or doubt would result in acquittal.

⁶⁹⁵ A Healthcare Professional may issue a Medico-Legal Certificate immediately or may reserve it for reasonable time while observing the health condition of the victim of injuries. Nevertheless, no timeframe is available, and no legal time restrictions are fixed. The Medico-legal Certificate is a form of proof to be produced in Court for the purpose of trial only.

Pakistan. Initially, the Council was established under the **Pakistan Medical and Dental Council Ordinance, 1962**⁶⁹⁶ It has undergone several modifications.⁶⁹⁷ The failure of a Healthcare Professional to comply with a duty of disclosure in gunshot patients may cause serious penal consequences and such non-compliance may bring the doctors within the ambit of criminal prosecution. The enabling provision of the Pakistan Penal Code, 1860 is as follows:

202. Intentional omission to give information of offence by person bound to inform:

“Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.”

In the event that the victim of a gunshot injury is charged under the **Terrorist Act, 1997**, failure to report facts concerning that victim may lead the Healthcare Professional to be tried in Terrorist Court for abetment and facilitation of terrorism (a most horrific result as the laws relating to terrorism are very harsh, beneath the dignity and nobility of Healthcare Professionals and punishment is comparatively very high (14 years rigorous imprisonment)). Recently, the Police have registered a case for abetment and facilitation of terrorists against the owner of a Hospital and Healthcare Professionals for medical treatment of terrorists without complying with the duty of disclosure to police.

Furthermore, a Medical Practitioner would face proceedings for “professional misconduct” under Administrative law⁶⁹⁸, which may culminate in cancellation of his or her license to practice as a Medical Practitioner.⁶⁹⁹ It should be noted that failure to prepare a Medico-Legal Report⁷⁰⁰, or to appear in court to confirm authorship of the report⁷⁰¹ could represent a procedural error which would result in acquittal of the accused.

⁶⁹⁶ See Section 23:

(1). The Council shall maintain a Register of medical practitioners possessing qualifications which are recognized medical qualifications for the purposes of this Ordinance, and may by a Regulation direct the necessary particulars to be entered in the Register:[...]

(2) on and after a date to be fixed by the Council, any person who is for the time being provisionally registered under this Ordinance and practices medicine, surgery, or midwifery, elsewhere than in an approved institution or approved hospital, shall, on enquiry made by the Council in this behalf, be liable to the removal of his name from the Register till such time as he produces a solemn undertaking to desist from such practice.

⁶⁹⁷ **Medical and Dental Council (Amendment) Act, 2012, Pakistan Medical and Dental Council (Amendment) Ordinance, 2014** and lastly by the **Pakistan Medical and Dental Council (Amendment) Act, 2019**.

⁶⁹⁸ **Section 31 of Pakistan Medical Council Ordinance, 1962—Removal of names from the Register—**

(1) The Council in its discretion may refuse to permit the registration of any person or direct the removal altogether or for a specified period from the Register of the name of any registered medical practitioner or registered dentist who has been convicted of any such offence as implied in the opinion of the Council a defect of character or who, after an inquiry at which opportunity has been given to such person to be heard in person or through advocate or pleader, has been held by the Council as guilty of infamous conduct in any professional respect or who has shown himself to be unfit to continue in practice on account of mental ill health or other grounds.

(2) The Council may also direct that any name removed from the Register under subsection (1) shall be restored.

⁶⁹⁹ **Section 3 of the Pakistan Medical and Dental Council Ordinance, 1962—**

For the purpose of an inquiry under subsection(1), the Council shall be deemed to be a Court within the meaning of the Evidence Act, 1872 (I of 1872) and shall exercise all the powers of a Commissioner appointed under the Public Servants’ (Inquiries) Act, 1850 (XXXVII of 1850).

⁷⁰⁰ See Section 509 Criminal Procedure Code, 1860. A Medico Legal Report is **primary evidence**, See Article 72 of the Evidence (Qanoon-e-Shahadat) Ordinance, 1984.

⁷⁰¹ See Article 78 of the Evidence (Qanoon-e-Shahadat) Ordinance, 1984.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Healthcare Professionals were afforded some protection in Pakistan⁷⁰² but this was insignificant and inadequate. After the entry into force of certain laws *e.g.* the **Pakistan Injured Person (Medical Aid) Act, 2004**, the systematic practice of refusing treatment pending reporting has been eliminated altogether. The new laws require all Hospitals and Medical Professionals throughout Pakistan⁷⁰³ to provide medical treatment on a priority basis without the delay that might be engendered because of medico-legal formalities.⁷⁰⁴ Henceforth, the ability of Healthcare Professionals to treat patients with gunshot injuries, without influence or coercion, is strenuously guaranteed by law. The newly promulgated laws vigorously restrain Police Officials from interfering during the medical treatment process, even with respect to interrogation of the patient and recording of his or her statement. Police Officials may not approach the patient without written permission from the Doctor.⁷⁰⁵ Significantly, Healthcare Professionals are intended to provide uninterrupted medical treatment without delay on any- pretext whatsoever. This is consistent with the Regulation *i.e.* Code of Ethics and Oath to be taken in order to receive a license to practice, which says that priority must be given to treatment of the patient.

Before the enactment of the new laws, there was a glaring contradiction between regulations *i.e.* the Code of Ethics, on the one hand, and Criminal Procedural law and Police Rules, on the other. The former stipulates that Healthcare Professionals are to provide immediate treatment whilst the latter requires certain formalities; in fact, Healthcare Professionals working in Private Hospitals were even forbidden to deal with gunshot wound patients. No law existed to help resolve the conflict between these norms. The new laws, however, make it clear that providing medical treatment to patients with gunshots injuries is the priority, and effective measures have been taken to insure uninterrupted treatment of certain patients, thereby providing some protection to Healthcare Professionals by bringing the laws into harmony with regulations (Code of Ethics).⁷⁰⁶ Moreover, it has also emphasized that Medical treatment should not be discontinued in the absence of **consent** of the patient or his/her relative.⁷⁰⁷ Additionally, under the Sindh and Punjab Provincial Statutes⁷⁰⁸, a new legal term, **medical negligence** has been introduced, which holds accountable Healthcare Professionals or hospital owners for refusal to treat gunshot wound patients. The other improvement under the new laws⁷⁰⁹ is to

⁷⁰² See Rule 20.19 (7) of Police Rules, 1934.

The unnecessary summoning as witnesses of medical subordinates, to the detriment of their proper activities, shall be avoided as far as possible, and, when the attendance of such an officer is necessary, as much notice as possible shall be given him. When the necessary evidence can be given by the Investigating Officer or by another Medical witness stationed at the place where the case is being prosecuted, a medical subordinate should not be summoned from a distance merely to give corroborative evidence.

⁷⁰³ Except for the Province of Baluchistan, although Federal law has changed the practice in the field. The Province of Baluchistan must however still enact a law for uniformity of practice.

⁷⁰⁴ Section 3 of the Sindh Injured Persons (Medical Aid) Act, 2014.

⁷⁰⁵ Section 4 of the Sindh Injured Persons (Medical Aid) Act, 2014.

⁷⁰⁶ See Section 3&4 of the (Federal) Injured Person (Medical Act), 2004, Punjab Injured Person (Medical Aid) Act, 2004, the Sindh Injured Person (Medical aid) Act 2014 and 2019, KPK Injured Person (Medical Aid), Act, 2019.

⁷⁰⁷ See Section 5 of the Sindh Injured Person (Medical Aid) Act, 2014 and 2019.

⁷⁰⁸ See Punjab Healthcare Commission Act, 2010 and Sindh Healthcare Commission Act, 2013.

⁷⁰⁹ **"8. the injured person not to be taken to a police station—**

(1) Under no circumstances is an injured person to be taken to a police station before necessary medical aid and treatment is given.

prevent the Police from making the patient **wait** for preparation of a charge sheet, recording of a statement, interrogation, or appearance before the Magistrate, before referring such person for Medical treatment, regardless of whether he or she is a **victim of an incident** or is **accused of creating the incident**.

The Witness Protection, Security and Benefit Act, 2017 was enacted with the intention to provide protection and security to witnesses at criminal trials in view of the recent wave of terrorism. The law has not only committed to provide protection, security and benefit to Healthcare Professionals but also to their families.⁷¹⁰ Even though the law has provided protection⁷¹¹ to Healthcare Professionals, however, recently, the Police in Karachi have filed a case against the owner of a Hospital and Healthcare Professionals for providing medical treatment to persons who are involved in cases registered by the police under the Terrorist Act, 1997 (belonging to a local ethnic political group) without reporting the facts to the Police. The case has been brought before the Anti-Terrorist Court charging the Hospital's owner and Healthcare Professionals together with suspected terrorists. The case is pending before the Court.⁷¹²

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Generally, Pakistani law does not provide a method for the resolution of a conflict between the duty of confidentiality as stipulated by Regulation under the Code of Ethics and the duty of disclosure under criminal laws. On the contrary, non-compliance with the **duty of disclosure** might have subjected the Healthcare Professional to prosecution, on the one hand, and to the risk of a finding of professional misconduct, on the other hand. Moreover, the established practice and settled law suggests that, in the event of a conflict between a Statute and a Regulation or Rule, a Statute must prevail. Therefore, in view of various statutory laws and cases, even at the level of the Supreme Court of Pakistan, it is clear that the **duty of disclosure** of gunshot wounds is mandatory, and **prevails over** the Code of Ethics, which provides for the **duty of confidentiality**.⁷¹³

The adoption of the **Injured Person (Medical Aid) Act, 2004** has, however, to a considerable extent, resolved the conflicts and problems previously faced by Healthcare Professionals with respect to patients, and has changed overall practice and harmonized the serious conflict between the Code of Ethics and laws. Notwithstanding the fact that the previous laws have not been repealed, the new laws have been drafted in accordance with the Code of Ethics. These new laws being Special Law, they prevail over the previous general laws wherever there are inconsistencies.

(2) The police officer is bound to ensure that the injured person is treated in a hospital as provided in this act before any medico-legal procedure is undertaken. The police Officer shall not in any way influence the doctor or give any opinion about the type and details of injury of the injured person.

⁷¹⁰ **Section-2(h) of the Witness Protection, Security and Benefit Act, 2017 “related person” means any member of the family or household of the witness or any other person in a close relationship to, or association with such witness.**

⁷¹¹ For instance, treatment of a gunshot wound patient by private healthcare professionals, deferment of Medico-legal formalities before treatment contrary to Regulation and oath, empowerment to restrain police from meeting with the patient during treatment are inserted throughout the newly added laws.

⁷¹² This case was brought against Healthcare Professionals for aiding and abetting Terrorism which, according to the Prosecution, falls within the definition of **facilitation or funding of terrorism** of Section 6 (3-A) (b) of the Anti-Terrorism Act, 1997. This case, if it goes to judgment, would eventually determine the interpretation of the statutes about Healthcare Professionals discussed in this national report.

⁷¹³ Judicial proceedings concerning gunshot injuries are based on **Ocular Evidence** which must be corroborated with **Medical Evidence**, [usually] in the form of a Medico-Legal Certificate which is required under the duty of disclosure.

M. PAPUA NEW GUINEA

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

Under the *Code of Ethics of the Medical Society*, doctors owe their patients absolute confidentiality on all matters, with exceptions for disclosures where the patient gives his/her consent; in the interest of all concerned; where required by law; and where there is a question of danger to society. The Code does not have the force of law, and any statutory or judicial requirements of disclosure will override the Code's duty to preserve confidentiality. *The Code of Ethics for Nurses* requires nurses to maintain confidentiality over any information obtained in a professional capacity and to use professional judgment in sharing such information: an exception to confidentiality is provided when required by law.

The English common law system as adopted imposes the equitable duty of confidentiality on medical practitioners, with the possibility of a tortious or contractual action for breach.

The Constitutional right to privacy in Papua New Guinea extends to communications between a patient and a health care worker. Case law has thus far made an exception where the patient brings the matter before the courts, in which case medical information should be subpoenaed and come within the custody of the court in the first instance.⁷¹⁴

Section 19 of the *Evidence Act 1975* provides that communications from a patient to a medical practitioner are privileged in civil proceedings (except where the sanity of the patient is in dispute); the *Public Health Act* also provides for closed proceedings on certain matters.

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

There is no duty to disclose gunshot wounds. The *Code of Ethics of the Medical Society* provides a possible exception to the duty of confidentiality under the question of danger to society exception.

2.1. Conditions

Not applicable.

2.2. Scope

Not applicable.

2.3. Purpose

Not applicable.

2.4. Consequences of non-compliance

Not applicable.

⁷¹⁴ S.C.R. No.2 of 1984; *Re Medical Privilege* [1985] PNGLR 247.

3. Protection of Provision of Healthcare**3.1. Existence of Specific Legislation to Protect Provision of Healthcare**

No, except in times of armed conflict to the extent that Papua New Guinea has implemented the Geneva Conventions under the *Geneva Conventions Act*.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Not applicable.

N. PHILIPPINES

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

Under Section 3 of the 1987 Philippine Constitution,⁷¹⁵ the right to privacy shall be inviolable, thus, the right of a patient to privacy is generally honoured even after death, with established exceptions:

- a. Upon patient consent or waiver – in exchange for insurance compensation, patient waives rights for insurer to access medical records
- b. In the interest of public safety – civil registries, reporting of treatment for physical injuries, child abuse, and prescription of dangerous drugs
- c. Other specific conditions, as indicated by law and/or upon lawful order of the court and other quasi-judicial bodies – medical examination of torture claims are considered public records, autopsy in criminal cases
- d. For research purposes – provided data are anonymized and are considered non-sensitive by institutional ethics review committees

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

Presidential Decree No. 169, issued April 4, 1973, on “Requiring Doctors, Hospitals, Clinics, etc. to Report Treatment for Physical Injuries” states that the health practitioner of any health facility who has treated any person **for serious or less serious physical injuries** (as defined in Articles 262-265 of the Revised Penal Code) shall report the fact of such treatment to the law enforcement agencies (at the time of issuance, it was to the Philippine Constabulary, now defunct).

This was amended in July 10, 1987 by Executive Order No. 212 which maintains supremacy of civilian authority over the military (PD 169 was imposed during Martial Law), so reporting is to the nearest government health authority, but can be made available to law enforcement agencies upon written request.

2.1. Conditions

Prevalent practice is that once a patient with apparent or presumed medico-legal injuries comes to the Emergency Room, the healthcare workers call the patient to the attention of the police desk nearby (the Philippine National Police is considered a civilian authority). The police, in turn, sends a representative to interview patients/family if they would like to file a case; if not, no action is taken but the case is filed in a “medico-legal logbook” at the hospital to which police have access at any time. Such practice is noted where healthcare workers believe there is mandatory reporting to police. In Department of Health (DOH)-run facilities and larger tertiary hospitals, they are aware that mandatory reporting is to be made to the government health authority (*e.g.*, DOH Regional Office).

Disclosure is not a prerequisite for care.

2.2. Scope

The report called should indicate:

- a) the name, age and address of the patient;
- b) the name and address of the nearest of kin of the patient;

⁷¹⁵ <http://www.chanrobles.com/article3.htm#XEGKCe8UkqM>.

- c) the name and address of the person who brought the patient for medical treatment;*
- d) the nature and probable cause of the patient's injury;
- e) the approximate time and date when the injury was sustained;
- f) the place where the injury was sustained;
- g) the time, date and nature of the treatment; and
- h) the diagnosis, the prognosis and/or disposition of the patient.

*This was an amendment from PD 169 which previously allowed for anonymous reporting.

2.3. Purpose

The purpose indicated was "to keep track of violent crimes".

2.4. Consequences of non-compliance

Penalty was reduced from 1-3 years jail time and/or fine of Php 1000-3000 (PD 169) to fine of Php 100-500 only, but with the possibility of cancellation of a physician's license upon a third violation (EO 212).

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Not applicable.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Not applicable.

O. RUSSIA

Terminology

1. **Subjects of the Russian Federation, subjects of federation, federal subjects** — name of the [constituent entities of the Russian Federation](#).
2. **Functional bodies of the disaster medicine service of the Russian Federation** — these include:
 - departments of the Russian center of disaster medicine “Zaschita”⁷¹⁶ and its branches;
 - regional, territorial and local centers of disaster medicine;
 - ambulance bays/emergency departments;
 - clinical and therapeutic institutions designated for treatment of medical and sanitary consequences of emergency situations;
 - extraordinary medical groups: mobile medical squads, specialized medical aid brigades, sanitary-epidemiological squads and brigades, ambulance crews, first responder rescue squads, paramedic squads, medical aid posts, epidemiological intelligence etc.⁷¹⁷
3. **Organizations** — refers to organizations that exploit hazardous industrial facilities, extremely hazardous radiation or nuclear facilities, hazardous and highly hazardous hydraulic installations, as well as organizations **that belong to categories of civil defense** according to legislation.⁷¹⁸

Organizations that belong to categories of civil defense are defined by legislation as those having high defense or economic value, designated to act when **mobilization is declared** or/and those that pose a high potential threat of appearance of emergencies, as well as those, which have unique historical-cultural value.⁷¹⁹

Legislation defines “**mobilization assignment**” as a document which sets tasks for enterprises, institutions or organizations to produce particular goods or perform particular services defined by the relevant defense plan, or to create (preserve, develop) mobilization facilities for ensuring the aforementioned production or services.⁷²⁰ Our research revealed that healthcare facilities may be

⁷¹⁶ The Russian center of disaster medicine “Zaschita” (“Defense”) is a governmental institution responsible for coordination and operational management of the Disaster medicine services system. Source: http://www.vcmk.ru/vcmk/o_vcmk/ (02.01.2018).

⁷¹⁷ Regulation on functional bodies of the Russian disaster medicine service of the State system for prevention and liquidation of emergency situations, ratified by the Order of the Ministry of Healthcare and Social Development of the Russian Federation, Annex 1, 28.11.2006 N803, par. 9, available at: http://www.consultant.ru/document/cons_doc_LAW_117427/0b8e5198dfe67c97e87cafcd9c7d7d43794b46d2/ (14.01.2019).

⁷¹⁸ Regulation on civil defense in the Russian Federation, ratified by the Resolution of the Government of the Russian Federation, 26.11.2017, N 804, par. 6, available at: http://www.consultant.ru/document/cons_doc_LAW_72818/728eea9605aa399688599f3d711e5d44ee0f54ae/ (14.01.2019).

⁷¹⁹ Procedure of classifying organizations as categories of civil defense depending on their role in the state economy or their impact on public security, ratified by the Resolution of the Government of the Russian Federation, 16.08.2016, N804, p.2, available at: <https://fireman.club/normative-documents/postanovlenie-pravitelstva-rf-804-ot-16-08-2016-ob-utverzhenii-pravil-otneseniya-organizatsiy-k-kategoriyam-po-go/> (14.01.2019).

⁷²⁰ Measures for development and for increase of efficiency of system of the Moscow Territorial insurance documentation fund, ratified by the Resolution of the Moscow city administration, 27.04.2004 N 278-ПП, p.31, available at: <http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=MLAW;n=80135;dst=101424#032671364298332173> (14.01.2019).

given mobilization assignments for participation in civil defense measures.⁷²¹ Therefore, **references in the summary set forth below to the term “organizations” or “organizations which/that belong to categories of civil defense” might be treated as references to healthcare facilities having mobilization assignments.**

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

The legal status of information that falls within medical privacy and rules of its disclosure is regulated in the Russian Federation by acts of differing nature. This includes acts issued by the Parliament in the form of laws, as well as acts adopted by ministries and local authorities in the form of orders, regulations, resolutions, etc.

*The Federal Law on personal data*⁷²² establishes general rules for the treatment of information, which has the status of “personal data”. Information about a person’s state of health is regarded by this Law as a specific type of personal data,⁷²³ **processing of which is possible only in cases defined by the Law.** These cases include:

- 1) With the written consent of a subject of personal data.⁷²⁴
- 2) If processing is necessary for the protection of life, or health, or other vital interests of a subject of personal data, or for the protection of life, health, or vital interests of other people, provided that it is impossible to obtain consent of the subject of the data.⁷²⁵
- 3) If processing is necessary for determining or exercising rights of a data subject or rights of third parties, or for the administration of justice.⁷²⁶
- 4) If processing is performed due to the Russian defense legislation, legislation on security, fighting against terrorism, transport security, fighting against corruption, investigative activities, or enforcement proceedings, or due to provisions of penal law.⁷²⁷
- 5) If processing is performed by the prosecutor's office during the prosecutor's supervision.⁷²⁸

The legal regime of the information related to a person’s state of health is also regulated by *the Federal Law on the basic principles of healthcare in the Russian Federation*.⁷²⁹ This law is a cornerstone for governing relations in the sphere of healthcare. It defines the notion of “medical privacy” and establishes a legal regime for treating information of this type. In particular, the **law includes infor-**

⁷²¹ Order of the Ministry of Healthcare of the Republic of Tatarstan on the state of mobilization training and civil defense of healthcare in the Republic of Tatarstan in 2008 and tasks for 2009, 23.07.2009, N951, p.1, available at: <http://docs.cntd.ru/document/917034467> (14.01.2019).

⁷²² *Federal Law on personal data*, 27.07.2006 N 152-ФЗ, available at: http://www.consultant.ru/document/cons_doc_LAW_61801/ (01.10.2018).

⁷²³ *Ibid.*, Article 10 par. 1.

⁷²⁴ *Id.*, Article 10 par. 2 p.1.

⁷²⁵ *Id.*, Article 10 par. 2 p.3.

⁷²⁶ *Id.*, Article 10 par. 2 p.6.

⁷²⁷ *Id.*, Article 10 par. 2 p.7.

⁷²⁸ *Id.*, Article 10 par. 2 p.6.

⁷²⁸ *Id.*, Article 10 par. 2 p.7.1.

⁷²⁹ *Federal Law on the basic principles of healthcare in the Russian Federation*, 21.11.2011 N 323-ФЗ, available at http://www.consultant.ru/document/cons_doc_LAW_121895/ (02.12.2018).

mation concerning the fact of applying for medical assistance within the scope of “medical privacy”,⁷³⁰ stipulates that a patient has a right to medical privacy,⁷³¹ and prohibits the unauthorized disclosure of information of this type,⁷³² except in certain cases strictly defined by the law.

The aforementioned rules are of a general nature and are applicable to all cases of provision of medical care. However, some medical services and medical facilities, because of how they function, may have additional operating rules and procedures. This concerns specialized **military hospitals** providing medical aid to personnel of the Armed Forces, as well as **medical teams operating in regiments, garrisons or in other military formations**.⁷³³ The function of these healthcare facilities and medical teams is governed by general rules on healthcare in the Russian Federation, as well as by military charters⁷³⁴ and orders of the Defense ministry of the Russian Federation.

In the Russian Federation, there is a specific system of healthcare facilities that provide medical assistance in emergencies — **the Russian disaster medicine service**, which constitutes an integral part of the *State system for prevention and liquidation of emergencies*⁷³⁵ and consists of the following structural units:

- 1) the disaster medicine service of the Ministry of Healthcare of the Russian Federation;
- 2) the disaster medicine service of the Ministry of Defense of the Russian Federation;
- 3) the forces and facilities of the Ministry for Civil Defense, Emergencies and Liquidation of Consequences of Disasters, the Ministry of Internal Affairs, the Federal Service for Oversight of Consumer Protection and Welfare, other federal bodies, executive bodies of subjects of the Federation, municipal bodies, the Russian Academy of Medical Sciences, and other bodies dealing with protection of the population and territories from emergencies and elimination of their consequences.⁷³⁶

The **disaster medicine service** has several regimes of operation, which include a daily mode, a regime of high alarm and an emergency situation regime.⁷³⁷ Depending on the regime in effect, the supervisory and functional bodies of the disaster medicine service perform different functions and have different duties. The activities of the disaster medicine service and its functional bodies are governed by relevant legislative acts, as well as by internal commands and decisions of chiefs.⁷³⁸

⁷³⁰ *Ibid.*, Article 13 par. 1.

⁷³¹ *Id.*, Article 19 par. 5, p.7.

⁷³² *Id.*, Article 13 par. 2.

⁷³³ Моисеева Е.К., *Сборник лекций по дисциплине «Безопасность жизнедеятельности и медицина катастроф»*, 2016, available at: <http://medic.studio/meditsina-katastrof-kniga/zadachi-meditsinskoy-slujbyi-voorujennyih-sil-41980.html> (17.12.2018).

⁷³⁴ Decree of the President of the Russian Federation on ratification of military charters of the Armed Forces of the Russian Federation, 10.11.2007 N1495, available at: http://www.consultant.ru/document/cons_doc_LAW_72806/ (03.12.2018).

⁷³⁵ *Regulation on the Russian disaster medicine service*, ratified by the Resolution of the Cabinet of the Russian Federation, 26.08.2013, No734, p. 1, available at: <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102167419&rdk=&backlink=1> (09.01.2019).

⁷³⁶ *Id.*, p.5.

⁷³⁷ *Id.*, p.14.

⁷³⁸ The chief of the disaster medicine service of the Ministry of Healthcare of the Russian Federation is the Minister of Healthcare; chiefs of services acting on the regional level are representatives of the Minister of Healthcare in [federal districts](#); chiefs of services acting on the territorial and local levels are heads of relevant governing bodies responsible for healthcare concerning subjects of the Federation; and chiefs of facility-based services are managers of healthcare facilities. *Regulation on the disaster medicine service of the Ministry of Healthcare of the Russian Federation*, ratified by the Order of the Ministry of Healthcare of the Russian Federation, 27.10.2000, N 380, p.4.14, available at: <http://docs.cntd.ru/document/901776429> (09.01.2019).

In the event of a declaration of **martial law** in the Russian Federation, healthcare facilities are shifted from the peacetime operation regime to the a wartime regime. Civil defense in the Russian Federation is performed on different levels, depending on the characteristics of the threats and their anticipated consequences, and according to *civil defense plans*. Civil defense plans are adopted by different competent authorities, and have a different territorial scope of application. They include the Plan of civil defense of the Russian Federation, defense plans valid for territories of subjects of the Russian Federation, defense plans of municipalities, as well as defense plans of federal executive authorities and organizations that belong to categories of civil defense.⁷³⁹ These plans govern defense activities on the particular territories, or objects, and establish scope, procedures, methods and time limits for execution of defense measures in case of emergency.⁷⁴⁰

Healthcare professionals take part in civil defense **with the status of rescuers**⁷⁴¹ **forming a part of rescue services created for the purposes of civil defense.**⁷⁴² The rescue services may operate on a permanent basis,⁷⁴³ or extraordinary services may be created for performing specific tasks.⁷⁴⁴ Rescue services are created according to the territorial principle by decisions of competent authorities. These authorities may be the Government of the Russian Federation⁷⁴⁵, governments of subjects of the federation, local governments or managers of organizations.⁷⁴⁶ The compositional structure, goals, and duties of the rescue services, as well as the means of maintaining control over activities of the rescue services are determined by acts establishing the relevant services. Moreover, activities of medical rescue services are also governed by their **civil defense action plans** and by decisions and orders of their chiefs.⁷⁴⁷ Due to the specific character of the rescue services' activities, the legislation emphasizes the **necessity for rescuers to comply rigorously with the orders and instructions of the rescue services' chiefs.**⁷⁴⁸

The activities of healthcare professionals, including those participating in civil defense as professional or extraordinary rescuers, in addition to the legislation and ministerial acts, are governed by their employment contracts⁷⁴⁹ and by their job descriptions.⁷⁵⁰

The ethical rules of professional activity of medical personnel are embodied in *the Code of professional ethics of a doctor of the Russian Federation*.⁷⁵¹ In the Russian Federation, apart from this code, which is intended to have a national scope of application, codes of medical ethics may also be adopted on

⁷³⁹ *Regulation on civil defense in the Russian Federation*, op. cit., par. 5.

⁷⁴⁰ *Defense Id.*, par. 6.

⁷⁴¹ *Law on emergency services and status of rescuers*, 22.08.1995 N 151-ФЗ, Article 6, available at: http://www.consultant.ru/document/cons_doc_LAW_7746/ (09.01.2019).

⁷⁴² *Regulation on civil defense in the Russian Federation*, op .cit., p.12.

⁷⁴³ *Law on emergency services and status of rescuers*, op. cit., Article 7 (2).

⁷⁴⁴ *Id.*, Article 7 (3).

⁷⁴⁵ Official name of the highest executive body of the Russian Federation.

⁷⁴⁶ *Id.*, Article 7 (2).

⁷⁴⁷ *Regulation on medical rescue service of civil defense*, ratified by the Resolution of the Governor of the Vologda Oblast, 15.03.2012, N 108, p.1.7, available at <http://docs.cntd.ru/document/460300177> (10.01.2019).

⁷⁴⁸ *Law on emergency services and status of rescuers*, op. cit., Article 11 (2).

⁷⁴⁹ *Id.*, Article 27 (2).

⁷⁵⁰ Коренков Г.П, *Должностные инструкции специалистов по гражданской обороне и чрезвычайным ситуациям*, Гражд.оборона и защита от чрезв. ситу. в учрежд., организ. и на предпр., 08.09.2016, available at <http://гражданская-оборона-и-защита-от-чс.рф/publ/organizacija-go/dolzhnostnye-instrukcii-specialistov-po-grazhdanskoj-oborone-i-chrezvychajnym-situacijam/2-1-0-3> (10.01.2019).

⁷⁵¹ *Code of professional ethics of a doctor of the Russian Federation*, adopted by the First national congress of doctors of the Russian Federation, Moscow, 05.10.2012, *Preamble*, available at <http://www.nacmedpalata.ru/?action=show&id=11268> (15.01.2019).

the level of subjects of the federation. This stems from the fact that healthcare issues belong to the shared competence of federal and regional authorities of the Russian Federation,⁷⁵² therefore, these issues may also be regulated by acts of subjects of the Federation, providing that they do not contradict the federal legislation.⁷⁵³ Executive authorities of the subjects of the Federation issue codes that are valid in the territory of a particular constituent entity.⁷⁵⁴ However, local authorities or separate healthcare facilities may also adopt their own codes of medical ethics,⁷⁵⁵ providing that they do not contravene legislation concerning/applicable to the subjects of the Russian Federation.

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

Generally, disclosure of information about patient's state of health is only allowed for the purposes of his/her medical treatment, scientific research or educational activity, providing that there is a written consent of the patient or patient's legal representative.⁷⁵⁶ However, the *Law on basic principles of healthcare* stipulates some exceptions to this rule. This list of cases in which disclosure is allowed without having prior consent of the subject of the protected information, is exhaustive and includes, among others, the following grounds for disclosure:

- 1) Necessity to report to law-enforcement bodies **about patients if there are reasonable grounds to suppose that such patients' health impairments are the result of illegal actions.**⁷⁵⁷
- 2) Requirement to report based on a **written request** from the inquiry bodies, investigative authorities, prosecutor or court, providing that **requested information is necessary for an investigation or judicial proceedings, a prosecutor's supervision, the execution of a sentence, or monitoring behavior of, persons released on bail, paroled or having received a suspended sentence.**⁷⁵⁸

Members of an ambulance crew, in addition to the aforementioned requirements, must also report to an officer of the ambulance station's call-center about **each case of a patient's death in an ambulance.**⁷⁵⁹ If the patient's **death was [due to a] violent [act], or there are suspicions that this may be the case [death was violent or suspicious],** a reporting member of an ambulance crew must also indicate these facts in the process of reporting.⁷⁶⁰ All this information must then immediately be transferred by the officer of the call-center to the police (**territorial bodies of the Ministry of Internal Affairs** of the Russian Federation).⁷⁶¹

⁷⁵² *Constitution of the Russian Federation*, Article 72, available at <http://www.constitution.ru/en/10003000-03.htm> (28.12.2018).

⁷⁵³ Лилит Маилан, *Соблюдение принципов этики медицинскими работниками*, *op. cit.*.

⁷⁵⁴ *Code of professional ethics of healthcare practitioners of the Krasnodar Krai*, ratified by the Ministry of Healthcare of the Krasnodar Krai, Labour union of healthcare practitioners of Krasnodar Krai, Public organization of healthcare practitioners of the Krasnodar Krai, available at http://kkoomr.ru/files/public/user_2/files/etika.PDF (15.01.2019).

⁷⁵⁵ *Code of professional ethics of a doctor of the Regional clinical anti-tuberculous health center in Tver Oblast*, ratified by the Order of the State medical institution "Regional clinical anti-tuberculous health center in Tver Oblast", 23.03.2018 N25-П, p.1.5, available at http://ptd-tver.ru/kodeks_etiki/etika_vracha (15.01.2019).

⁷⁵⁶ *Federal Law on basic principles of healthcare in the Russian Federation*, *op. cit.*, Art. 13 par. 3.

⁷⁵⁷ *Id.*, Art. 13 par. 4 (5).

⁷⁵⁸ *Id.*, Art. 13 par. 4 (3).

⁷⁵⁹ *Procedure of providing emergency medical aid including specialized medical aid*, ratified by the Order of the Ministry of Healthcare of the Russian Federation, 20.06.2013 N 388н, p. 15, available at http://www.consultant.ru/document/cons_doc_LAW_151082/d6ba3fa13652168a2d25a254ea280988_235401d3/ (26.11.2018).

⁷⁶⁰ *Id.*

⁷⁶¹ *Id.*

The announcement of a state of emergency or martial law in the Russian Federation alerts all state and public forces to supply a quick response to an emergency which has occurred, to reduce its adverse effects, and to eliminate its consequences. Therefore, the legislation obliges competent federal, territorial and local authorities, organizations, and other forces participating in rescue operations constantly to collect information about the event of an emergency and its impact, to exchange this information and to maintain cooperation amongst themselves, as well as with other rescue and defense forces.⁷⁶² These duties are mostly expressed by prescribing a **general duty to inform, or to cooperate**, without explicitly indicating the specifics of reporting or cooperation.

In particular, **the disaster medicine service and its functional bodies** must collect, process and exchange information in the sphere of protection of the population and the territories from emergencies and the elimination of their medical-sanitary consequences,⁷⁶³ **in order to timely submit reports, accounting documents and other reporting medical documentation.**⁷⁶⁴

Federal, territorial and municipal authorities, as well as organizations participating in civil defense during martial law are required by legislation to cooperate, to coordinate their activities, **to collect and exchange information related to defense issues**,⁷⁶⁵ and **to organize cooperation** of civil defense forces with the Armed Forces of the Russian Federation, with other military formations and bodies, and with special formations, created specifically for the duration of martial law.⁷⁶⁶ Correspondingly, **medical rescue services of civil defense** are required **to cooperate** with regional departments of the Ministry for Civil Defense, Emergencies and Elimination of Consequences of Natural Disasters,⁷⁶⁷ with local authorities, with other rescue services of a region and with military authorities.⁷⁶⁸ Our research has revealed no provisions in legislation concerning reporting duties of healthcare professionals during martial law. However, the existence of an imperative for governmental and municipal authorities **to collect** information related to civil defense, and the existence a duty of rescue services **to cooperate**, gives rise to the hypothesis that **information regarding patients with injuries of a specific type may be revealed on the basis of an order or command of competent authorities issued during martial law**. Moreover, a duty to report and reporting rules may be included in employment contracts⁷⁶⁹ or job descriptions of rescuers participating in civil defense measures on a professional (as a member of rescue services created functioning on a permanent basis) or an *ad hoc* basis.

Communication of information about treatment of injured patients during martial law **potentially** could also be performed by the relevant **civil defense unit**, which is a managing body of **medical rescue services**, subordinated and accountable to the head of the medical rescue service,⁷⁷⁰ and responsible for administering civil defense issues of rescue services. The duties of such units are generally determined in their constitutive instruments (*e.g.* charters, governmental acts establishing headquarters, etc.), as well as in job descriptions of their members, and may include, among others:

⁷⁶² *Regulation on civil defense in the Russian Federation, op. cit., par. 6.*

⁷⁶³ *Regulation on functional bodies of the Russian disaster medicine service of the State system for prevention and liquidation of emergency situations, op. cit., par. 16.*

⁷⁶⁴ *Regulation on disaster medicine service of the Vladimir region, Annex to the Order of the healthcare department of the Vladimir Oblast's administration, 13.07.2012, N408, p.6, available at <http://docs.cntd.ru/document/444949699> (21.12.2018).*

⁷⁶⁵ *Regulation on civil defense in the Russian Federation, op. cit., p.6.*

⁷⁶⁶ *Id., p.12.*

⁷⁶⁷ *Regulation on medical rescue service of civil defense in Vologda Oblast, op. cit., p.1.7.*

⁷⁶⁸ *Id., p.2.*

⁷⁶⁹ *Law on emergency services and status of rescuers, op. cit., Art. 27 (2).*

⁷⁷⁰ *Regulation on medical rescue service of civil defense, op. cit., pp.3.3-.4.*

- 1) elaboration of an entity's civil defense plan, action plan for prevention of emergencies;
- 2) monitoring compliance with the rules of the aforementioned plans, legislation and orders (instructions) of the higher civil defense authorities;
- 3) reporting to higher civil defense authorities on civil defense matters which appeared in a subordinate entity;
- 4) cooperation with a higher civil defense authority on matters of information collection and exchange.⁷⁷¹

Therefore, being responsible for maintaining defense readiness of a subordinate medical rescue service, civil defense units and their officials **may bear the duty of reporting to commanding authorities about specific events that happen in the controlled entity.**

2.1. Conditions

The modalities of reporting about patients with injuries of a criminal character are determined by the Act issued by the Ministry of Healthcare and Social Development of the Russian Federation.⁷⁷² The Act requires healthcare professionals **immediately to communicate to the police information about a patient with injuries of a criminal character.** This reporting must be performed by means of **telecommunication, followed by a written report**, sent within one business day. Moreover, healthcare facilities are required **to keep a Record Book** for recording and accounting for cases of provision of medical support to patients with injuries of a criminal character.⁷⁷³

Under the aforementioned Act injuries of a criminal character include the following examples:

- 1) gunshot wounds;
- 2) wounds and injuries resulting from explosions;
- 3) stab wounds, slash wounds, lacerations;
- 4) bone fractures, hematomas, soft tissue injuries etc.⁷⁷⁴

This list is not exhaustive and the Act leaves open the possibility for healthcare professionals **to decide in each particular case about the character of the injuries** after examination (*i.e.* whether they are of a criminal nature).

Healthcare facilities and medical services responsible for medical assistance to the personnel of the Armed Forces of the Russian Federation have some peculiarities in reporting duties.

Managers of military hospitals are required to report about **all soldiers** admitted to or discharged from a hospital **to the commanders of the soldiers' regiments.**⁷⁷⁵ When soldiers have injuries resulting in

⁷⁷¹ *Model regulation on the civil defense headquarters in organization (institution, enterprise),* Примерное положение о штабе гражданской обороны организации (учреждения, предприятия), Гражданская оборона и защита от чрезвычайных ситуаций, 11.12.2016, available at http://гражданская-оборона-и-защита-от-чс.пф/ publ/organizacija_go/primernoe_polozhenie_o_shtabe_grazhdanskoj_oborony_organizacii_uchrezhdenija_predprijatija/2-1-0-40 (22.01.2019).

⁷⁷² *Procedure for reporting by healthcare facilities about patients in relation to whom there are reasonable grounds to suppose that their health impairment results from illegal actions,* ratified by the Order of the Ministry of Healthcare and Social Development of the Russian Federation, 17.05.2012 No565H, available at http://www.consultant.ru/document/cons_doc_LAW_133310/ (28.12.2018).

⁷⁷³ *Id*, p.4.

⁷⁷⁴ *Id*, p.2.

⁷⁷⁵ *Charter on routine duties in the Armed Forces of the Russian Federation,* ratified by the Decree of the President of the Russian Federation on ratification of military charters of the Armed Forces of the Russian Federation, 10.11.2007 N1495, (as amended on 01/26/2019), p. 363, available at

disabilities, managers of hospitals must also report this to the **relevant military prosecutor's office, to bodies of the military police, and to military investigatory bodies of the Investigation Committee of the Russian Federation.**⁷⁷⁶

Moreover, according to the *Charter of garrison and sentry duties in the Armed Forces of the Russian Federation*, duties of a **chief of garrison's medical service** include immediate reporting to a **garrison's commander and to a military commander's office** about any accidents that caused injuries or deaths of military personnel.⁷⁷⁷

Our research also revealed the existence of a legal act⁷⁷⁸ that is entirely devoted to regulation of medical support to the Armed Forces of the Russian Federation during times of peace. However, access to this act is limited and currently it does not seem possible to familiarize ourselves with the text of the document. Our hypothesis regarding the subject-matter of the act is based on a previous edition of the document, which contains rules for various medical units on the procedure of medical assistance to soldiers and on the procedure of reporting about injured soldiers.⁷⁷⁹

The tasks of the Russian disaster medicine service and its functional bodies vary depending on the operation regime. All regimes stipulate some reporting obligations for the personnel of the disaster medicine service. However, different types and scope of information must be collected and transferred to competent authorities, depending on the regime in effect.

The daily regime of operation requires forces of the disaster medicine service to collect, process and exchange among themselves information related to the protection of the territories and the population from emergencies.⁷⁸⁰ The legislation does not specify exactly what information must be collected, however, it is reasonable to suppose that these instructions might be contained in internal regulations of the disaster medicine service. **During the regime of high alert** collected and processed data must include the anticipated consequences of potential emergencies.⁷⁸¹ Collected and analyzed data then must be transferred to the managing authorities of the functional bodies of the disaster

http://www.consultant.ru/document/cons_doc_LAW_72806/c3db651c3ec88998f4d1d2260fa9c6f831316e3f/ (11.12.2018).

⁷⁷⁶ *Id.*

⁷⁷⁷ *Charter of garrison and sentry duties in the Armed Forces of the Russian Federation* ratified by the Decree of the President of the Russian Federation on ratification of military charters of the Armed Forces of the Russian Federation, 10.11.2007 N1495, p.42, (as amended on 01/26/2019) available at http://www.consultant.ru/document/cons_doc_LAW_72806/f72c9d62a5dec361d01ae943c012c01bae182ee/ (26.11.2018).

⁷⁷⁸ Guidelines for medical assistance to the Armed Forces of the Russian Federation during peacetime, ratified by the Order of the Defense ministry of the Russian Federation, 25.11.2016, N999дсп. Reference to the document was found in several articles, in particular: O.G. Biryukov, *Problematic issues of internal control of the quality and safety of medical activities in the medical units of the security services at the level of the primary military unit*, Вестник общественного здоровья и здравоохранения Дальнего Востока России, 2018, N1, available at <http://www.fesmu.ru/voz/20181/2018106.aspx#ls3> (27.12.2018). This document is also mentioned by the Defense ministry in a list of acts that need to be taken into consideration in the process of federal sanitary-epidemiological inspection. Source: http://mil.ru/open_ministry/control_npa/more.htm?id=12157830@cmsArticle (22.01.2019).

⁷⁷⁹ *Guidelines for medical assistance to the Armed Forces of the Russian Federation during peacetime*, ratified by the Order of the Deputy Defense minister of the Russian Federation, 15.01.2001, N1, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEwj0l-HCXuTfAhVCmYsKHYzkD4MQFjADegQIBhAC&url=http%3A%2F%2Fwww.compancommand.com%2Fliteratura%2FOrder1_2001.doc&usg=AOvVaw2nhmnMoPlhRxwB1dM4lsV (10.01.2019).

⁷⁸⁰ Regulation on functional bodies of the Russian disaster medicine service, *op. cit.*, p.16 (a).

⁷⁸¹ *Id.*, p.16 (6).

medicine service.⁷⁸² In case of **appearance of an emergency event**, the forces of the disaster medicine service must report about this event to the competent governmental authorities, and must continuously monitor the medical-and public health environment in the area of emergency.⁷⁸³

Centers of disaster medicine (regional, territorial etc.) must also maintain accounting documentation, where information about emergencies, their victims and measures taken is entered.⁷⁸⁴ These documents include among others *the accompanying document of a victim of an emergency*, which is issued by centers of disaster medicine for each hospitalized patient.⁷⁸⁵ Moreover, such centers are also required to keep a **Record Book** for registering rescue operations in which the center's ambulance crews are involved and for registering victims treated at the institution.⁷⁸⁶

Russian legislation does not treat reporting about gunshot wounds **as a precondition for providing medical assistance**. Russian legislation grants the possibility of equal and unconditional access to medical assistance for everyone⁷⁸⁷ and grants priority of the patient's interests in the process of medical treatment.⁷⁸⁸ Moreover, legislation governing the activities of rescue services proclaims that **humanism and clemency** are among the principles that govern rescuers' activities, and emphasizes that **saving lives, health maintenance and environmental protection constitute priority tasks for rescuers at the time of emergencies**.⁷⁸⁹

Moreover, *the Criminal Code of the Russian Federation* establishes criminal liability for healthcare professionals in case of failure to provide appropriate aid to a person in need, providing that they had sufficient knowledge and a real capacity to do this.⁷⁹⁰

2.2. Scope

Reporting to police about patients with injuries of a criminal character must be performed according to the procedure stipulated by the Ministry of Healthcare of the Russian Federation.⁷⁹¹ Although the act does not specify the data necessary that must be delivered by means of telecommunications, it requires a **written report**, sent within 24 hours of verbal reporting, that includes the information set forth below:

⁷⁸² *Id.*

⁷⁸³ *Id.*

⁷⁸⁴ *Order on statistical documentation of the Disaster medicine service of the Ministry of Healthcare and Social Development of the Russian Federation, 03.02.2005, N112, available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&cacheid=97F6C81C6061D0747E475AE25B2D62F0&mode=backrefs&dirRefId=65532&SORTTYPE=0&BASENODE=50-1&ts=180154602669311880&base=EXP&n=403487&rnd=0.6785517303726781#08244466735543278> (18.02.2019)*

⁷⁸⁵ *Accompanying document of a victim of an emergency, Annex 3 of the Order on statistical documentation of the Disaster medicine service of the Ministry of Healthcare and Social Development of the Russian Federation, op. cit.*

⁷⁸⁶ *Guidance for services of disaster medicine for filling in accounting documents, ratified by the Order of the Ministry of Healthcare of the Russian Federation, 23.04.2002, N 131, available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=EXP&n=343152#07078829140677398> (02.01.2019).*

⁷⁸⁷ *Constitution of the Russian Federation, op. cit., Article 41.*

⁷⁸⁸ *The Federal Law on the basic principles of healthcare in the Russian Federation, op. cit., Article 4.*

⁷⁸⁹ *Law on emergency services and status of rescuers, op. cit., Article 3.*

⁷⁹⁰ *Criminal Code of the Russian Federation, 13.06.1996, N 63-Φ3, Article 124, available at http://www.consultant.ru/document/cons_doc_LAW_10699/ (02.10.2018).*

⁷⁹¹ *Procedure for reporting by healthcare facilities about patients in relation to whom there are reasonable grounds to suppose that their health impairment results from illegal actions, op. cit.*

- 1) about the patient: his/her name, surname, date of birth, place of residence;
- 2) the date and time of application for medical assistance;
- 3) the patient's state of health and assumptions of what could cause this state.⁷⁹²

In addition, medical treatment facilities are required to record data about patients with injuries of a criminal character in ***the Record Book***.⁷⁹³ This Book includes the following information about patients:

- 1) the patient's personal data: name, surname, age, place of residence;
- 2) date and time of patient's arrival at medical treatment facility (or request for medical assistance);
- 3) description of patient's state of health and assumptions concerning what might cause this state;
- 4) date, time and means of reporting about patients with injuries of a criminal character to police;
- 5) personal data of a reporting person;
- 6) personal data of a police officer who received notification;
- 7) date and time of sending a written report.⁷⁹⁴

Our research revealed no specific rules for reporting about patients with injuries of a criminal nature made by members of an ambulance crew to the responsible person of a call-center. However, there is an accounting document, which emergency medical centers are required to fill in for each request for medical treatment. This document, ***the Emergency call sheet***, contains detailed information about the patient, the patient's state of health, medical aid provided and its results.⁷⁹⁵ Taking into account the right of the police to apply to medical institutions for information regarding patients with wounds or with injuries of a criminal nature,⁷⁹⁶ one may suppose that the aforementioned ***Emergency call sheet*** **may be provided to the police on demand**.

Data entered on *the Emergency call sheet* includes the following information:

- 1) the patient's personal data: name, age, gender, place of work, registered domicile
- 2) reason for an emergency call (accident, pathology, childbirth etc.);
- 3) in case of accident: nature of the accident (criminal nature, accident on the road, industrial accident, fire accident etc.);
- 4) the patient's state of health: general state, behavior, consciousness, state of pupils, respiration, heart rate etc.;
- 5) medical assistance provided at the scene and in transit to the medical institution, etc.⁷⁹⁷

In the event of an **emergency situation**, the head of a rescue crew of the disaster medicine service that first arrived at the scene of the emergency event, must draw up ***the Emergency reporting notice***. *The Emergency reporting notice*, being a primary accounting document related to the event of emergency,

⁷⁹² *Id*, p.5.

⁷⁹³ *Id*, p.6.

⁷⁹⁴ *Id*.

⁷⁹⁵ *Emergency call sheet*, accounting form N110/y, medical documentation ratified by the Order of the Ministry of Healthcare and Social Development of the Russian Federation, 02.12.2009, N942, available at http://www.consultant.ru/document/cons_doc_LAW_96009/6d11b23889d79ac84f07896c81771bb6992d0abf/ (03.01.2019).

⁷⁹⁶ *Federal Law on the police*, 07.02.2011 N 3-Φ3, Article 13 (para 1 (4)), available at http://www.consultant.ru/document/cons_doc_LAW_110165/cdde38fe25c37368ccc014de994e36cf128d5318/ (03.01.2019).

⁷⁹⁷ *Emergency call sheet*, accounting form N110/y, *op. cit.*

must comprise data regarding the characteristics of this event, measures taken by the rescue team(-s), number of victims and death toll, and characteristics of medical assistance provided.⁷⁹⁸

In addition to *the Emergency reporting notice*, the head of a rescue crew working in the field must fill out **the accompanying document of a victim of an emergency** for each victim of an emergency situation who received medical assistance and was transported to the center of disaster medicine. *The accompanying document of a victim of an emergency* must contain the following information:

- 1) Identity of a patient with an indication of the source of the information (e.g. patient's ID or patient's statements).
- 2) Information about the event of emergency (source, place).
- 3) Patient's state at the time of evacuation and after.
- 4) Data on medical care provided during evacuation.
- 5) Data on healthcare professionals who provided medical assistance to a patient.
- 6) Evacuation point.⁷⁹⁹

The accompanying document is sent together with the patient to a healthcare facility and is required for hospitalization.

Another accounting document of centers of disaster medicine is **the Emergency Record Book**. *The Emergency Record Book* comprises data about emergency events, their victims, forces that took part in the elimination of the consequences of an emergency situation and measures that have been taken.⁸⁰⁰ Data in *the Record Book* is entered by a responsible officer of a center of disaster medicine upon receiving notification about the occurrence of an emergency and its victims.⁸⁰¹

Recorded data about victims includes information about the total number of victims, death toll, number of children affected (age 0 –17),⁸⁰² and information about their state of health and place of hospitalization.⁸⁰³ There are also requirements to enter in *the Emergency Record Book* information about a person who has reported of the occurrence of an emergency and his/her contact data,⁸⁰⁴ and information about the governmental or local authority to which notification of the emergency situation has been communicated.⁸⁰⁵

2.3. Purpose

The main purposes of reporting about patients with injuries that may have been caused by illegal actions are **criminal prosecution of a guilty person and prevention of crimes**.

⁷⁹⁸ *Emergency reporting notice*, op. cit, **Annex 2** of the Order on statistical documentation of the Disaster medicine service of the Ministry of Healthcare and Social Development of the Russian Federation.

⁷⁹⁹ *Accompanying document of a victim of an emergency*, **Annex 3** of the Order on statistical documentation of the Disaster medicine service of the Ministry of Healthcare and Social Development of the Russian Federation, op. cit.

⁸⁰⁰ *Guidance for filling in an accounting document N168/Y-01 "Record Book of disaster medicine center's duty officer"*, ratified by the Order of the Ministry of Healthcare of the Russian Federation, 23.04.2002, N 131, Annex 3, available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=EXP&n=343152#07078829140677398> (02.01.2019).

⁸⁰¹ *Guidance for filling in an accounting document N168/Y-01 "Record Book of disaster medicine center's duty officer"*, op .cit.

⁸⁰² *Id*, columns 8–11.

⁸⁰³ *Id*, column 16.

⁸⁰⁴ *Id*, column 4.

⁸⁰⁵ *Id*, column 17.

The first stems from fundamentals of Russian criminal procedural law. The Russian criminal proceedings may be of a private, public or private-public nature,⁸⁰⁶ each of which has specific rules and procedures. The essence of the private prosecution is that it can only be commenced on the basis of a statement of the victim or his/her authorized representative.⁸⁰⁷ The role of the state in such cases is limited only to the administration of justice.⁸⁰⁸ **A public prosecution, unlike a private one, is based on a duty of law enforcement bodies to investigate crimes, acting *sua sponte* and in the name of the state.**⁸⁰⁹ **By doing so, they act not so much in the interests of a victim, but in the interests of society as a whole.**⁸¹⁰ **That is why criminal proceedings of a public prosecution are independent from the position of a party to a procedure⁸¹¹ and represent a duty of the state to detect cases of violation of the legal order, to eliminate them and to prevent their further occurrence.** Thus, the *Criminal Procedural Code* requires prosecutors, investigators and other law enforcement bodies, in the event they discover elements of a crime, to take all necessary measures for conviction of the person(s) having committed the crime.⁸¹² In order to facilitate their public prosecution, the Code assigns a number of procedural duties to victims and witnesses who hold valuable information about an aspect of the crime. These duties include, among others, prohibition of a refusal to testify (except testifying against one's self, spouses and relatives) and prohibition of willful misstatement.⁸¹³

Identification of persons affected by crimes or who are at risk of becoming victims of crimes is considered to be one of the main steps necessary for the prediction and prevention of crimes.⁸¹⁴ To that end, the Russian legislation provides for **preventive accounting and assistance to victims of wrongdoings** (or potential victims)⁸¹⁵ as measures to be performed by competent bodies as a part of the maintenance of law and order and the prevention of crimes. Preventive accounting provides for the collection, registration, processing, storage and delivery of information⁸¹⁶ by the competent authorities (prosecutors, police, federal executive authorities, municipal authorities etc.)⁸¹⁷ in the sphere of prediction and prevention of crimes. Assistance to victims of wrongdoings includes legal, social, psychological, medical and other aid, which is provided to minimize the consequences of offences or to reduce the risks of becoming a victim.⁸¹⁸

In addition to the aforementioned goals of **investigation and prevention of crimes**, reporting about injured soldiers of the Armed Forces of the Russian Federation also aims to **maintain order and military discipline in the Armed Forces**. For these purposes, reporting must be made to the direct commander of the injured soldier⁸¹⁹ alongside reporting to the **relevant military prosecutor's office, bodies of the**

⁸⁰⁶ *Criminal Procedural Code of the Russian Federation*, 18.12.2001 N 174-ФЗ, Article 20 (1), available at http://www.consultant.ru/document/cons_doc_LAW_34481/ (03.01.2019).

⁸⁰⁷ *Criminal Procedural Code of the Russian Federation*, *Ibid.*, Article 20 (2).

⁸⁰⁸ Безлепкина Б.Т., Комментарий к уголовно-процессуальному кодексу Российской Федерации (постатейный), 12-е изд., перераб. и доп. – Москва: Проспект, 2014 – p.40.

⁸⁰⁹ *Id.*, p.42.

⁸¹⁰ *Id.*

⁸¹¹ *Id.*

⁸¹² *Criminal Procedural Code of the Russian Federation*, *op. cit.*, Art. 21 (2, 3).

⁸¹³ *Id.*, Art. 42 (5), Art. 56 (6).

⁸¹⁴ *Federal Law on fundamentals of the system for prevention of wrongdoings in the Russian Federation*, 23.06.2016, N 182-ФЗ, Art. 6 (par. 2 p.7), available at http://www.consultant.ru/document/cons_doc_LAW_199976/ (03.01.2019).

⁸¹⁵ *Id.* Art. 17.

⁸¹⁶ *Id.* Art. 21.

⁸¹⁷ *Id.* Art. 5.

⁸¹⁸ *Id.* Art. 27.

⁸¹⁹ *Charter on routine duties in the Armed Forces of the Russian Federation*, *op. cit.*, p. 363.

military police, and military investigatory bodies of the Investigation Committee of the Russian Federation.⁸²⁰

The purposes of collection and exchange of information **in the sphere of protection of territories and the population from emergency situations** are defined by local acts governing these procedures. Although the wording of the provisions of the aforementioned acts may differ, their essence seems to be similar in terms of the reasons behind the collection and exchange information of this type. These reasons include, among others:

- 1) planning and performing measures for prevention of emergencies, reducing costs and material losses;⁸²¹
- 2) promptly informing competent authorities and bodies⁸²² about threats or about the occurrence of an emergency situation, and about measures necessary for the protection of people's lives and health, and for the preservation of material values.⁸²³

Different regimes of operation of the system for prevention and liquidation of emergencies have different target authorities, to which collected information is transferred and who bear responsibility for taking the necessary actions. The reporting duty is included in the scope of all operations regimes, however, each regime requires a different type and scope of information to be collected and transferred to competent authorities. The **daily regime of operation** requires the forces of the disaster medicine service to exchange information among themselves.⁸²⁴ **During the regime of high alert**, data collected on potential emergencies must be transferred to the managing authorities of the functional bodies of the disaster medicine service.⁸²⁵ **When announcing a state of emergency**, the forces of the disaster medicine service must organize the transfer of the collected data to the managers of the federal executive authorities, managers of the executive authorities of subjects of the Russian Federation, municipal authorities and managers of organizations.⁸²⁶

More specifically, *the Emergency reporting notice* has a complex procedure of communication to the competent authorities, which includes the following steps:

- 1) the head of the Disaster medicine service's rescue crew that first arrived at the scene of an emergency event must report to the territorial center of the disaster medicine service;
- 2) the head of the territorial center of the Disaster medicine service must report to the regional center of the Disaster medicine service, and to the Russian center of disaster medicine "Zaschita" (or to its territorial bodies);

⁸²⁰ *Id.*

⁸²¹ *Procedure of collection and exchange of information in the sphere of protection of territories and population from natural and anthropogenic emergency situations*, ratified by the Resolution of the Administration of the Morkovsky rural settlement of the Puchezhsky municipal district of the Ivanovo region, 06.09. 2010, N73, p.3, available at <http://admmortki.ru/documents/26.html> (03.01.2019).

⁸²² The competent authorities and bodies are: executive personnel of civil defense forces and of the state system for prevention and liquidation of emergencies, civil defense forces, rescue formations created specifically for the purposes of prevention and liquidation of emergencies, and organizations exploiting dangerous objects or having important defense or economic potential.

⁸²³ *Procedure of collection and exchange of information in the sphere of protection of territories and population from natural and anthropogenic emergency situations on the territory of municipality "city Orenburg"*, ratified by the Resolution of the City administration of Orenburg, 03.06.2016, N1671-п, p.2, available at <http://docs.cntd.ru/document/441702686> (03.01.2019).

⁸²⁴ *Regulation on functional bodies of the Russian disaster medicine service*, op. cit., p.16 (a).

⁸²⁵ *Id.*

⁸²⁶ *Id.*, p.16 (b).

- 3) the Russian center of disaster medicine “Zaschita” must report to the Ministry of Healthcare of the Russian Federation.⁸²⁷

The purposes of collection and exchange of information **in the sphere of civil defense** are similar to those that exist in the sphere of prevention and elimination of emergencies, and include the necessity to plan civil defense at a certain level, the necessity of organized and systematic implementation of civil defense measures, adequate reaction to emerging threats, and to inform the population about anticipated and actual dangers in a timely manner.⁸²⁸

2.4. Consequences of non-compliance

Non-compliance with the duties of disclosure of gunshot wounds according to the Russian legislation may result in **disciplinary and/or criminal liability** of healthcare professionals.

Current Russian legislation stipulates that **medical facilities have a duty** to report about patients with injuries of a criminal character.⁸²⁹ This prescription makes it reasonable to suppose that the aforementioned duty may also be regarded as a direct duty of healthcare professionals. In particular, the managers of medical facilities are required to organize and to facilitate the reporting process in the subordinate unit, and to designate persons responsible for direct implementation of the aforementioned duty.⁸³⁰ Moreover, a duty to report, as well as the procedure for reporting, may also be included in the job description or employment agreement (working contracts) of healthcare professionals.

Taking into account all the aforementioned, the failure of healthcare professionals to perform a duty to report, or inappropriate performance of this duty may result in **disciplinary liability**.⁸³¹

The Criminal Code of the Russian Federation **establishes criminal liability for concealment of information about events and facts that pose threats to life or health of individuals, or to the environment**.⁸³² In order to fall within the scope of application of this article, concealment must be made by a **person who is obliged by the legislation or his job description to inform the public or the competent authorities about such occurrences**.⁸³³ There is little or no case law concerning application of this provision, and currently there are no cases about disclosure to police of information regarding patients' state of health. However, the essence of this information and its importance for maintaining the security of society, make it reasonable to assume that its concealment could endanger values protected by the aforementioned article of *the Criminal Code*. A person who committed a crime without being apprehended poses a threat to society due to the probability that such a person will continue his/her unlawful behavior, thus, putting at risk the entire complex of social relations protected by the criminal law.⁸³⁴ Therefore, in spite of the absence of a relevant court practice, the

⁸²⁷ *Emergency reporting schedule of the Disaster medicine service, Annex 1* of the Order on statistical documentation of the Disaster medicine service of the Ministry of Healthcare and Social Development of the Russian Federation, *op. cit.*

⁸²⁸ *Regulation on civil defense in the Russian Federation, op. cit.*

⁸²⁹ *Federal Law on basic principles of healthcare in the Russian Federation, op. cit.*, Art. 79 (1).

⁸³⁰ *Procedure for reporting by medical treatment facilities about patients in relation to whom there are reasonable grounds to suppose that their health impairment results from illegal actions, op. cit.*, p.3.

⁸³¹ Labor Code of the Russian Federation, 30.12.2001 N 197-ФЗ, Article 192 (1), available at: http://www.consultant.ru/document/cons_doc_LAW_34683/ (13.01.2019).

⁸³² *Criminal Code of the Russian Federation, art.237*, 13.06.1996 N 63-ФЗ (as of 29.07.2018), Art.: 237, available at: http://www.consultant.ru/document/cons_doc_LAW_10699/ (05.10.2018).

⁸³³ *Id.*

⁸³⁴ Кириенко М.С. *Несообщение о преступлении: старый состав в новых условиях*, available at: <http://www.justicemaker.ru/view-article.php?id=21&art=5959> (26.09.2018).

reasonable interpretation of the aforementioned provision of *the Criminal Code* would be to include information about violence against person(s) within its scope of application.

The Criminal Code of the Russian Federation has a specific provision (**Article 205.6**) that establishes **criminal liability for failure to report about particular crimes**. This article stipulates that a **person having reliable knowledge** about (a) person(s), who is(are) preparing, committing or has(ve) already committed at least one of the crimes mentioned in the article, who **has not informed competent authorities about this illegal behavior would be held liable**. The crimes set forth below are listed by the article as those requiring mandatory reporting:

- 1) committing a terrorist act (Article 205);
- 2) assisting in terrorist activity (Article 205.1);
- 3) public invitation to participate in a terrorist activity, public advocacy of the terrorist activity, propaganda about terrorism (Article 205.2);
- 4) training for the purposes of performing a terrorist activity (Article 205.3);
- 5) organizing a terrorist association and participating in its activities (Article 205.4);
- 6) establishment of a terrorist organization and participation in its activities (Article 205.5);
- 7) taking of hostages (Article 206);
- 8) organizing an illegal armed formation and participating in its activities (Article 208);
- 9) hijacking of air or water transport, or railway vehicles (Article 211);
- 10) illegal circulation of nuclear materials or radioactive materials (Article 277);
- 11) theft or extortion of nuclear materials or radioactive materials (Article 278);
- 12) armed rebellion (Article 279);
- 13) assault on persons and institutions which are under international protection (Article 360);
- 14) an act of international terrorism (Article 361).⁸³⁵

An important issue for the application of **Article 205.6** of *the Criminal Code* is that such **non-disclosure of information must not have been promised in advance**, because in that case it could be qualified as **aiding and abetting a crime**, or could constitute a **separate type of crime** under *the Criminal Code*.

The failure of healthcare professionals to report about patients with injuries of a particular type is not a typical example of aiding and abetting crimes. However, if such non-disclosure is promised in advance to a person who has the intention to commit a crime, it strengthens the desire of the person to turn the intention into action,⁸³⁶ thus creating a necessary condition for a crime to be committed. According to *the Criminal Code*, activities accessory to a crime include: giving advice, instructions, information, facilities and instruments for committing a crime, removing obstacles, as well as promising in advance to hide a criminal and instruments of a crime, evidence of a crime, or objects obtained, or to acquire or assist in the sale of these objects.⁸³⁷ However, the Plenum of the Supreme Court of the Russian Federation, in one of its resolutions, deemed **to be an accessory to activities of a criminal association (organization) a person, who, although not being a member** of this association (organization), **provided its members with medical, legal or other assistance**.⁸³⁸

⁸³⁵ *Criminal Code of the Russian Federation*, op. cit., Art. 205.6.

⁸³⁶ Комментарий к Уголовному кодексу Российской Федерации, отв.ред. В.М.Лебедев, 8-е изд., перераб. и доп., Юрайт, Москва 2008, p.109.

⁸³⁷ *Criminal Code of the Russian Federation*, op. cit., Art. 33 (5).

⁸³⁸ *On the court practice of criminal trials concerning organization of criminal association (organization) or membership in it*, Resolution of the Plenum of the Supreme Court of the Russian Federation, 10.06.2010, №12, p.15, available at: <https://rg.ru/2010/06/17/prest-org-dok.html> (29.06.2018).

The same type of assistance performed on a **regular basis for a criminal or terrorist association (organization) by a healthcare professional who is a member of this association (organization)**, would not fall within the scope of assistance to a crime, and **would constitute a separate ground for criminal liability**. These grounds are: participation in activities of a criminal association⁸³⁹ (organization), terrorist association⁸⁴⁰/organization,⁸⁴¹ or illegal armed formation.⁸⁴²

Similarly, we cannot exclude the possibility that **intentionally concealing or failing to report** to competent state authorities the provision of medical aid to an enemy soldier or to a person who poses a threat to state sovereignty or state interests of the Russian Federation, might constitute **treason** under **Article 275 of the Criminal Code of the Russian Federation**. Treason takes place when a citizen of the Russian Federation provides financial, material and technical, consultative or **other assistance** to a foreign state, international or foreign organizations, or their representatives, in activity aimed against national security of the Russian Federation.⁸⁴³ We have identified no relevant practice of application of this provision of *the Criminal Code*. However, in our opinion, concealment of the fact of providing medical aid to a state enemy might, at least in theory, lead to such liability. It is important to note, however, that IHL has priority over national law in Russia and IHL states that “Persons engaged in medical activities” should report if the legislation says so. Therefore there is very little chance of inconsistency or a charge of treason in this context.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

The Code of professional ethics of a doctor of the Russian Federation is the newest edition of the act comprising rules on ethical aspects of doctors’ activity. It was adopted by the First national congress of doctors of the Russian Federation, initiated by the Ministry of Healthcare of the Russian Federation.⁸⁴⁴ However, notwithstanding the official character of the congress, and a Preamble of the Code saying that its provisions are binding for all healthcare professionals and for students of medical faculties, temporarily replacing or assisting a doctor,⁸⁴⁵ **the procedure of adoption of the Code is recommended and therefore usually followed but is not enforceable from a legal perspective.**⁸⁴⁶ This assumption is based on the fact that the Code has been ratified by no normative act either of the Ministry of Healthcare of the Russian Federation, or of the Government of the Russian Federation, and has not been registered in the Ministry of Justice of the Russian Federation,⁸⁴⁷ which would ordinarily be the case for any act with legal force.

However, according to the same authors, the *Code of professional ethics* is widely applicable for assessment of healthcare professionals’ behavior.⁸⁴⁸ Moreover, the problem of absence of a federal act regulating issues of medical ethics is usually addressed by issuing an act of similar nature on the

⁸³⁹ *Criminal Code of the Russian Federation, op. cit.*, Art. 210 (2).

⁸⁴⁰ *Id.*, Art. 205.4 (2).

⁸⁴¹ *Id.*, Art. 205.5 (2).

⁸⁴² *Id.*, Art. 208 (2).

⁸⁴³ *Id.*, Art. 275.

⁸⁴⁴ Лилит Маилян, *Соблюдение принципов этики медицинскими работниками*, Brace Law Firm, available at: <http://brace-lf.com/informaciya/farmatsevticheskoe-i-meditsinskoe-pravo/329-soblyudenie-principov-etiki-meditsinskimi-rabotnikami> (06.12.2018).

⁸⁴⁵ *Code of professional ethics of a doctor of the Russian Federation, op. cit.*, Preamble.

⁸⁴⁶ Лилит Маилян, *Соблюдение принципов этики медицинскими работниками, op. cit.*

⁸⁴⁷ *Id.*

⁸⁴⁸ *Id.*

regional level,⁸⁴⁹ i.e. on the level of federal subjects, be they republics, regions, districts, cities or other units. Our research revealed the existence of various codes of medical ethics ratified by healthcare ministries of federal subjects.⁸⁵⁰ **Upon receiving this ratification, the code obtains the status of a legal act within the territory of the particular constituent entity, and, thus, becomes binding for healthcare facilities and healthcare professionals operating in that territory.**

Other possibilities for the code of medical ethics to have a binding force include cases where compliance with the standards of the code is a requirement under an employment agreement,⁸⁵¹ or a job description⁸⁵² of a healthcare professional.

Since *the Code of professional ethics of a doctor of the Russian Federation* does not have the status of a federal legal act, **there is no obligation for regional ethics codes to comply with federal rules.**

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

The Code of professional ethics of a doctor of the Russian Federation provides for a duty of healthcare professionals to provide medical assistance *bona fide*, irrespective of patient's gender, age, race, nationality, social status, religion, or political opinions.⁸⁵³ The Code also requires doctors **to be aware of legislation governing their professional activity,⁸⁵⁴ to comply with such legislation,⁸⁵⁵ and to reject any offers or pressure aimed at persuading them to act contrary to ethical principles, professional duty or law.⁸⁵⁶** Information that constitutes medical secrecy according to the Code may only be disclosed if there is an authorization of a patient (or the patient's legal representative), or if disclosure is required by the law.⁸⁵⁷ Therefore, *the Code of professional ethics of a doctor of the Russian Federation* **includes the requirement to comply with the legislation concerning the scope of the professional duties of healthcare practitioners, and does not envisage the possibility of inconsistencies between legislation and ethical standards.**

The regional codes of doctors' professional ethics provide for similar regulation of the issue in question. **The codes⁸⁵⁸ examined present a duty to comply with legislation governing a doctor's professional**

⁸⁴⁹ *Id.*

⁸⁵⁰ *Code of professional ethics of healthcare practitioners of the Krasnodar Krai* (available at: http://kkoomr.ru/files/public/user_2/files/etika.PDF (10.12.2018), *Code of professional ethics of healthcare practitioners of the Sverdlovsk Oblast* (available at: <http://medkamensk.ru/ohrana-truda/httpminzdrav-midural-ruuploadsdocument1550412-p-pdf/> (10.12.2018), *Code of professional ethics and professional behavior of personnel of medical organizations that belong to the State healthcare system, which operate on the territory of the Zabaykalsky Krai* (available at: <http://docs.cntd.ru/document/432841621> (10.12.2018).

⁸⁵¹ *Code of professional ethics of a doctor of the Regional clinical anti-tuberculous health center in Tver Oblast, op. cit., p.1.5.*

⁸⁵² The Order of the Ministry of Healthcare of the Zabaykalsky Krai on ratification of the *Code of professional ethics and professional behavior of personnel of medical organizations that belong to the State healthcare system, which operate on the territory of the Zabaykalsky Krai* **requires all healthcare facilities operating in the territory of the Zabaykalsky Krai to include in all job descriptions of their personnel an obligation to comply with the rules of the Code**, Order, 23.12.2015 N776, available at: <http://docs.cntd.ru/document/432841621> (11.12.2018)

⁸⁵³ *Code of professional ethics of a doctor of the Russian Federation, op. cit., Art. 2.*

⁸⁵⁴ *Id.*, Art. 11.

⁸⁵⁵ *Id.*

⁸⁵⁶ *Id.*, Art. 6.

⁸⁵⁷ *Id.*, Art. 8.

⁸⁵⁸ *Code of professional ethics of healthcare practitioners of the Krasnodar Krai, Code of professional ethics of healthcare practitioners of the Sverdlovsk Oblast, Code of professional ethics and professional*

activity as an ethical standard. Some codes contain provisions that encourage healthcare practitioners to reveal cases of violation of the Russian legislation and to report them to the competent authorities.⁸⁵⁹ Disclosure of the information that constitutes medical secrecy according to the examined codes is possible **where there is a statutory provision authorizing this disclosure.** Some codes require the proper and timely preparation of medical documentation.⁸⁶⁰ The codes examined stipulate a duty of equal treatment of all patients regardless of any non-medical factors. Some of them emphasize that the **duty to provide medical aid to all in need is equally valid in peacetime and in times of war.**⁸⁶¹

Therefore, the Russian ethical codes treat the duty to comply with legislation as one of the ethical principles governing the professional activities of healthcare workers. We understand that, by doing this, the Russian legislation stresses that illegal behavior cannot be justified by virtue of its adherence to ethical standards, and, thus, requires that **all tensions between legislation and ethics be interpreted in favor of the rules of law.**

behavior of personnel of medical organizations that belong to the State healthcare system, which operate on the territory of the Zabaykalsky Krai, Code of professional ethics of a doctor of the Regional clinical anti-tuberculous health center in Tver Oblast, Code of medical ethics of the Tomsk Oblast, available at: <https://zdrav.tomsk.ru/storage/107044/доктор.pdf> (12.12.2018).

⁸⁵⁹ *Code of professional ethics of healthcare practitioners of the Krasnodar Krai, Ibid., Art. 3.*

⁸⁶⁰ *Code of professional ethics and professional behavior of personnel of medical organizations that belong to the State healthcare system, which operate on the territory of the Zabaykalsky Krai, op. cit., Art. 5 par. 11.*

⁸⁶¹ *Code of medical ethics of the Tomsk Oblast, 2017, Art. 2.2, available at: <https://zdrav.tomsk.ru/storage/107044/доктор.pdf> (12.12.2018).*

P. SOUTH AFRICA

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

The general framework establishing duties of confidentiality of healthcare professionals and patients' rights to privacy in South Africa is characterised by a **mix of constitutional law, statute, common law and professional ethics rules and conduct guidelines**.

1.1. Confidentiality

Legal duties of healthcare professionals with regard to confidentiality arise under the common law, the Constitution and legislation. The **modern right to privacy** in South Africa has historically been developed through principles of common law. An invasion of the patient's private sphere or disclosure of his or her private affairs may constitute a civil and/or criminal assault and/or *injuria*. South African courts have recognised that an impairment of a person's privacy may constitute an impairment of his or her dignity under what is known as the *actio injuriarum*.⁸⁶² Following the coming into force of the interim Constitution of the Republic of South Africa in 1994, the **right to privacy has also been afforded express recognition**.⁸⁶³ Section 14 of today's Constitution guarantees, as part of a Bill of Rights, a general right to privacy, including the right of a person not to have the privacy of his or her communications infringed.⁸⁶⁴

The duty of confidentiality in the context of healthcare is specifically provided for by the **National Health Act 61 of 2003**.⁸⁶⁵ Section 14(1) states that, "*all information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment is confidential.*" Section 14(2) provides that no person may disclose any information contemplated in section 14(1) unless (a) the user consents to the disclosure in writing, or unless (b) a court order or any law requires the disclosure or unless (c) the non-disclosure will represent a serious threat to public health.⁸⁶⁶ Disclosure of such information is subject to principles set out in legislation designed to protect personal data and to promote access to information held by the State.⁸⁶⁷ These exceptions are discussed in more detail below.⁸⁶⁸

A patient's right to privacy is also protected by **ethical duties of medical confidentiality**: healthcare professionals are subjected to professional ethics rules and guidelines. All individuals who practise any of the healthcare professions falling within the scope of the *Health Professions Council of South Africa*

⁸⁶² See, for example, *Minister of Police v. Mbilini* 1983 (3) South African Law Reports 705 (A) at 715G-716A and *S v. A and Another* 1971 (2) South African Law Reports 293 (T) at 297.

⁸⁶³ Now known as the Constitution of the Republic of South Africa 1996, previously "Constitution of the Republic of South Africa, Act 108 of 1996" (substituted by s.1(1) of the *Citation of Constitutional Laws, 2005 (Act No. 5 of 2005)*), available at <https://www.gov.za/documents/constitution-republic-south-africa-1996> (17.01.2019).

⁸⁶⁴ It is said that the leading case on medical confidentiality is that of *Jansen van Vuuren and Another NNO v Kruger* (1993 (4) South African Law Reports 842 (AD)), in which the defendant owed the patient a duty of confidentiality regarding the patient's medical condition. The defendant, who had learned of the patient's HIV status disclosed it to their parties. The court ruled that the claimant had suffered an invasion of his rights of personality, and in particular his right to privacy.

⁸⁶⁵ *National Health Act, 61 of 2003*, available at https://www.gov.za/sites/default/files/gcis_document/201409/a61-03.pdf (16.01.2019).

⁸⁶⁶ For more detail, see further below.

⁸⁶⁷ *Protection of Personal Information Act 4 of 2013* (available at <http://www.justice.gov.za/inforeg/docs/InfoRegSA-POPIA-act2013-004.pdf> (16.01.2019) and the *Promotion of Access to Information Act 2 of 2000*.

⁸⁶⁸ See section 1.2. of this country report, below.

(the “HPCSA”) are required by legislation to register with the HPCSA. The HPCSA is a statutory body established by the *Health Professions Act No. 56 of 1974*,⁸⁶⁹ and its Professional Board sets, maintains and applies standards of professional conduct and practice.

Ethical rules regarding professional conduct, against which complaints of professional misconduct will be evaluated, are set out in its ***Ethical and Professional Rules of the Health Professions Council of South Africa (the “Ethical Rules”)***.⁸⁷⁰ The Ethical Rules are established pursuant to the *Health Professions Act, 1974*.⁸⁷¹ Rule 13 reiterates that a practitioner may only divulge information regarding a patient (a) where permitted by statute, (b) at the instruction of court of law, or (c) where justified in the public interest. The HPCSA also operates guidelines (“Confidentiality Guidelines”) specific to confidentiality, forming an integral part of the standards of professional conduct against which a complaint of professional misconduct will be evaluated. These confirm the principles established by the *National Health Act* and rule 13 of the Ethical Rules, and offer guidance on the circumstances in which disclosures of personal information without consent may be justified to protect the patient or others.⁸⁷²

1.2. Disclosure

A patient’s right to privacy and a healthcare professional’s duty of confidentiality are considered as not being absolute, but relative,⁸⁷³ and there are a **number of situations where a healthcare provider is permitted, or may even be required, to disclose information**, even if it is against the patient’s wishes. These exceptions are recognised variously through common law principles of privacy law and legislation, and are acknowledged in the Ethical Rules.

Indeed, the **right to privacy** contained in the South African Constitution⁸⁷⁴ is, like other rights contained in the Bill of Rights,⁸⁷⁵ **subject to the limitations set out at section 36 of the Constitution**. This provides that the rights in the Bill of Rights may be limited:

“...only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...”

This provides the constitutional basis on which healthcare professionals may depart, where appropriate, from the duty to uphold a patient’s right to privacy.

Perhaps the most obvious **exception to the rule of confidentiality** is disclosure made with the patient’s consent. This is expressly provided for by section 14(2)(a) of the *National Health Act*,⁸⁷⁶ and principles

⁸⁶⁹ *The Health Professions Act, no. 56 of 1974*, available at https://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/legislations/acts/health_professions_ct_56_1974.pdf (29.01.2019).

⁸⁷⁰ HPCSA, *Guidelines for Good Practice in the Healthcare Professions - Ethical and Professional Rules of the Health Professions Council of South Africa*, Booklet 2, Pretoria, September 2016, available at https://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/conduct_ethics/Booklet%202.pdf (17.01.2019).

⁸⁷¹ *The Health Professions Act, no. 56 of 1974, op. cit.*, section 49. The Ethical Rules are made by the HPCSA, and promulgated under a Government Notice (No. R 717 of 4th August 2006, as amended by Government Notice No. R 58 of 2nd February 2009).

⁸⁷² HPCSA, *Guidelines for Good Practice in the Healthcare Professions – Confidentiality: protecting and providing information*, Booklet 5, Pretoria, September 2016, available at https://www.hpcsa.co.za/Uploads/editor/UserFiles/downloads/conduct_ethics/Booklet%205.pdf (17.01.2019).

⁸⁷³ See *Jansen van Vuuren and Another NNO v Kruger, op. cit.*, at [15].

⁸⁷⁴ At section 14 of the Constitution of the Republic of South Africa, 1996, *op. cit.* See section 1.1. of this country report, above.

⁸⁷⁵ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

⁸⁷⁶ *National Health Act, op. cit.*, section 14(2)(a). See above.

of privacy law and the HPCSA's Ethical Rules⁸⁷⁷ also recognise that a **patient's express consent may justify his or her private information being divulged**. Specific guidance is provided in the HPCSA's Confidentiality Guidelines on the manner in which consent for disclosure should be obtained.⁸⁷⁸

In the absence of absolute privilege for communication between healthcare professional and patient,⁸⁷⁹ disclosure of a patient's private information will also arise where there is a **legal imperative** to do so.

First, the judiciary has also long held that disclosure of a patient's private affairs may be justified by a court ordering a doctor who has been called a witness in a civil or criminal trial to give evidence on the patient's private affairs.⁸⁸⁰ This is reflected in section 14(2)(b) of the *National Health Act* and the HPCSA's Ethical Rules,⁸⁸¹ which state that a **practitioner shall divulge information at the instruction of a court of law**.⁸⁸²

Secondly, as part of the same provision, it is also stated that disclosure must occur where, "*...any law requires that disclosure.*" Rule 13 of the HPCSA's Ethical Rules confirms that a practitioner may divulge information regarding a patient only if this is done, among others, "*in terms of Statutory provision.*"⁸⁸³ A key responsibility of healthcare providers, set out in legislation, is that they **must report notifiable medical conditions** without delay. Regulations⁸⁸⁴ made by the Minister of Health pursuant to the *National Health Act* of 2003⁸⁸⁵ require a healthcare provider who diagnoses a patient with one or more of a list of notifiable medical conditions listed in the Regulations, to,

"...report to the focal person of the health sub-district level by the most rapid means available upon diagnosis, even before the case is laboratory confirmed in order to facilitate the implementation of public health measures and response;..."⁸⁸⁶

Listed in the Schedule of the Regulations at present are 22 notifiable diseases, including botulism, cholera, diphtheria, malaria and smallpox.

Other legislation stipulating confidentiality requirements for certain types of medical information include: National Directives and instructions on conducting a forensic examination on survivors of

⁸⁷⁷ HPCSA, the Ethical Rules, *op. cit.*, rule 13(2).

⁸⁷⁸ HPCSA, Confidentiality Guidelines, *op. cit.*, paragraph 8.2. This notion is also recognised in section 14(2) of the *National Health Act*, *op. cit.*, referred to above.

⁸⁷⁹ See Melodie Nöthling Slabbert, *South Africa*, in Medical Law, Supplement 81(2014) of Wolters Kluwer Law & Business, at para. 193.

⁸⁸⁰ *Ibid.*, at para. 193, with reference to various cases, including *Parkes v. Parkes* 1916 Cape Provincial Division Reports 702, *Ex parte James* 1954(3) South African Law Reports 2070 (SR), *Botha v. Botha* 1972(2) South African Law Reports 559(N) and *Jansen van Vuuren and Another NNO v Kruger*, *op. cit.*

⁸⁸¹ HPCSA, the Ethical Rules, *op. cit.*, rule 13(1)(b).

⁸⁸² Section 10.2 of the HPCSA's Confidentiality Guidelines (*op. cit.*) also state that, "*Healthcare practitioners must also disclose information if ordered to do so by a judge or presiding officer of a court.*"

⁸⁸³ This is reiterated by section 10.1 of the HPCSA's Confidentiality Guidelines (*op. cit.*), which state that: "*Healthcare practitioners may be required to disclose information to satisfy a specific statutory requirement, such as notification of a notifiable disease or suspected child or elder abuse.*"

⁸⁸⁴ Government Notice no. 1434, *National Health Act, 2003 (Act No. 61 of 2003) Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions*, Department of Health, 15th December 2017, Regulation 8, available at https://www.gov.za/sites/default/files/gcis_document/201712/41330gon1434.pdf (21.01.2019).

⁸⁸⁵ *Op. cit.*, sections 90(1)(j)(k) and (w).

⁸⁸⁶ *Ibid.*, Regulation 13.

sexual offence cases with regard to the *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007*,⁸⁸⁷ the *Choice on Termination of Pregnancy Act, 92 of 1996*⁸⁸⁸ and the *Children's Act, 35 of 2005*.⁸⁸⁹ In particular, those holding certain professional roles, including medical practitioners, nurses and traditional health practitioners, are **required to report suspected child abuse**;⁸⁹⁰ and any person who knows or who has a reasonable suspicion or belief of any form of **sexual abuse against a child or mentally challenged individual** are required to report it to the police.⁸⁹¹ Generally, where such disclosures are made in good faith, the person reporting cannot be held liable in criminal or civil proceedings.⁸⁹² It should also be noted that there is a **general statutory duty on individuals to report what is termed "terrorist activity"**.⁸⁹³ Those who fail to report such activity to the police as soon as reasonably possible where they suspect or ought reasonably to suspect that another person is linked to "terrorist activities" will commit a criminal offence.⁸⁹⁴

Disclosure of personal information without consent may also be justified where it is **to protect the patient or where it is in the public interest**. This principle, with similarities to that developed by the courts in privacy law as a common law duty to protect third parties,⁸⁹⁵ is **expressly recognised in section 14(2)(c) of the National Health Act**.⁸⁹⁶ This third and final exception to the duty on healthcare professionals to maintain patient confidentiality refers to situations where, "*non-disclosure of the information represents a serious threat to public health*."⁸⁹⁷ **The HPCSA's Ethical Rules**⁸⁹⁸ also provide that such information may be divulged where it is in the public interest; the HPCSA's Confidentiality Guidelines expand on this:

"Where third parties are exposed to a risk so serious that it outweighs the patient's right to confidentiality, healthcare practitioners should seek consent to disclose where practicable. If it is not practicable, they should disclose information promptly to an appropriate person or authority. They should generally inform the patient before disclosing the information."⁸⁹⁹

Three examples of the kinds of **circumstances which may justify disclosure of personal information** are provided by the HSPCA Confidentiality Guidelines: where a colleague is placing patients at risk as

⁸⁸⁷ *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007*, available at https://www.saps.gov.za/resource_centre/acts/downloads/sexual_offences/sexual_offences_act32_2_007_eng.pdf. This sets out rules on accessibility to results of HIV tests conducted on alleged sexual offenders.

⁸⁸⁸ *Choice on Termination of Pregnancy Act, 92 of 1996*, available at http://www.saflii.org/za/legis/num_act/cotopa1996325/ (21.01.2019). This requires records of terminations of pregnancy to be notified within one month to the Director-General of Health but without including the name or address of the woman concerned.

⁸⁸⁹ *Children's Act, no. 35 of 2005*, available at http://www.saflii.org/za/legis/num_act/ca2005104.pdf (21.01.2019). This protects confidentiality of information regarding the HIV status of a child except where maintaining such confidentiality is deemed not to be in the best interests of the child.

⁸⁹⁰ *Children's Amendment Act, no. 41 of 2007*, available at https://www.gov.za/sites/default/files/gcis_document/201409/a41-070.pdf (21.01.2019), section 110.

⁸⁹¹ *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, op. cit.*, section 54

⁸⁹² *Ibid.*, section 54(2)(c) and *Children's Amendment Act, no. 41 of 2007, op. cit.*, section 110(3)(b).

⁸⁹³ As defined in section 1 of the *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004*, available at https://www.saps.gov.za/resource_centre/acts/downloads/juta/terrorism_act.pdf (22.01.2019).

⁸⁹⁴ *Ibid.*, section 12.

⁸⁹⁵ See, for example, *Carmichele v. The Minister of Safety and Security and Another* 2001 (4) South African Law Reports 938 (Constitutional Court).

⁸⁹⁶ *National Health Act, op. cit.*

⁸⁹⁷ *National Health Act, op. cit.*, section 14(2).

⁸⁹⁸ HPCSA, the Ethical Rules, *op. cit.*, rule 13(1)(c).

⁸⁹⁹ HPCSA, Confidentiality Guidelines, *op. cit.*, para. 9.3.1.

a result of his or her illness or some other medical condition;⁹⁰⁰ a patient who continues to drive against medical advice when unfit to do so;⁹⁰¹ and a disclosure that may assist in the prevention or detection of a serious crime.⁹⁰²

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

There is **no specific legal duty** placed on healthcare professionals to disclose to the authorities or other third parties information about **gunshot wounds of patients**.⁹⁰³ As referred to above, healthcare professionals are under a statutory obligation to report to authorities notifiable medical conditions and incidents of suspected sexual abuse. There is, however, no equivalent statutory requirement concerning gunshot wounds.

There may, nevertheless, be **circumstances in which a healthcare professional may lawfully divulge information** concerning the injuries of the victim of a gunshot wound to the appropriate authorities. As discussed above, permitted breaches of medical confidentiality are recognized by common law principles of privacy law which protect third parties and health legislation providing for the justification of such breaches made in the public interest. The *National Health Act* states that, in addition to situations **where the patient consents to disclosure**, or where a **court order or any law requires disclosure**, confidentiality may be breached if, *“the non-disclosure of that information represents a serious threat to public health.”*⁹⁰⁴ Moreover, the HPCSA’s Confidentiality Guidelines, provide that:

“A **disclosure that may assist in the prevention or detection of a serious crime**: in this context, serious crimes, means crimes that will put someone at risk of death or serious harm, and will usually be crimes against the person, such as abuse of children.”⁹⁰⁵

Section 10.3 of the Confidentiality Guidelines clarifies that this is one of the circumstances which will constitute an exception to the general rule that healthcare practitioners should not disclose information to a third party such as a lawyer, police officer or officer of a court without the patient’s express consent.⁹⁰⁶ Although **not amounting to a specific duty to disclose private information**, it is therefore nevertheless conceivable that details pertaining to a gunshot wound *may* legitimately be divulged in the context of a serious crime having been committed.

2.1. Conditions

There is **no known rule** under South African law, according to which the **disclosure of any medical condition or other information about a patient constitutes a precondition** to his or her treatment by

⁹⁰⁰ *Ibid.*, para. 9.3.1.1.

⁹⁰¹ *Ibid.*, para. 9.3.1.2.

⁹⁰² *Ibid.*, para. 9.3.1.3. For more detail, see section 2.4. of this country report, below.

⁹⁰³ It may be noted that section 47 of the *Criminal Procedure Act, no. 51 of 1977* (available at <http://www.justice.gov.za/legislation/acts/1977-051.pdf> (24.02.2019)), places an obligation on any male between the ages of 16 and 60 to assist the police, if requested, in the apprehension of a criminal. It is unlikely, however, that this section can be used to justify reporting bullet wounds to the police: see Professor Dennis Davis, *Confidentiality: Medico-legal Aspects*, South Africa Family Practice, 1988, Volume 9, pp. 362-6, at p. 366.

⁹⁰⁴ *National Health Act, op. cit.*, section 14(2)(c).

⁹⁰⁵ HPCSA, Confidentiality Guidelines, *op. cit.*, para. 9.3.1.3.

⁹⁰⁶ It should also be noted that section 10.4 of the HPCSA Confidentiality Guidelines states that healthcare practitioners may also disclose personal information in response to an official request from a statutory regulatory body for any of the healthcare professions, where that body determines that this is necessary in the interest of justice and for the safety of other patients.

a healthcare professional. To the contrary, the refusal of emergency medical treatment is prohibited under the South African Constitution.⁹⁰⁷ The *National Health Act* reiterates this constitutional principle:

“A healthcare provider, health worker or health establishment may not refuse a person emergency medical treatment.”⁹⁰⁸

Where the fact of a gunshot wound is disclosed to authorities in the context of assisting the police in the prevention and detection of a serious crime, it may not be necessary to provide access to medical records themselves.⁹⁰⁹ Where medical records are disclosed however, a **form known as the J88**⁹¹⁰ – published by the South African Department of Justice and Constitutional Development – is normally used by healthcare professionals **to document the medico-legal examination of the injuries of a patient** for the purposes of presenting those medical records in court.⁹¹¹ The conditions which apply to the completion of a J88 form are discussed below.

It is said that the J88 form plays a crucial role in the criminal justice system, often providing the only objective information in a legal case.⁹¹² The victim or family of the victim will open a case at the police station in the district where the injuries were sustained. The case will be issued a case number and an investigating officer will, as part of his or her investigation, ask the healthcare practitioner to complete the J88 form to record the injuries sustained by the victim. The completed document will then be added to the court’s file.⁹¹³ Although there is **no legal obligation to use the form**, a fully completed legible form is said to more often than not obviate the need for the doctor or other healthcare professional to testify in person in a court of law.⁹¹⁴ The form is widely used in most clinical forensic examinations in South Africa, and misinformed police officials, presiding officials and prosecutors may regard the J88 form as the only format for medico-legal documentation.⁹¹⁵

As discussed above, the release of information about a patient is only legal when that person consents to the disclosure in writing, if there is a court order or law that requires disclosure, or if non-disclosure

⁹⁰⁷ Constitution of the Republic of South Africa 1996, *op. cit.*, section 27(3) states that, “no one may be refused emergency medical treatment.”

⁹⁰⁸ *National Health Act*, *op. cit.*, section 5.

⁹⁰⁹ See, for example, guidance from the Medical Protection Society (“MPS”) which states that, “in some cases, you might have a statutory duty to share certain information – such as reporting notifiable diseases or disclosing information concerning the commission of offences that may assist the police in the prevention and detection of serious crime – but in these cases, it is unlikely that you will also need to provide access to the medical records themselves.” (MPS, *Medical Records in South Africa – and MPS Guide*, June 2016 (reviewed), available via <https://www.medicalprotection.org/southafrica/advice-booklets/medical-records-in-south-africa-an-mps-guide> (24.01.2019), p. 16).

⁹¹⁰ Department of Justice and Constitutional Development, *J88 - Report on a Medico-Legal Examination by a Healthcare Practitioner*, available at <http://www.justice.gov.za/forms/other/J088.pdf> (24.01.2019).

⁹¹¹ See Ruxana Jina and J. M. Kotzé, *Improving the recording of clinical medicolegal findings in South Africa*, *South African Medical Journal*, 2016; Volume 106, no. 9, pp.872-873 at p.872.

⁹¹² See Medical Protection Society, *The J88 – Not just another medical form*, *Junior Doctor*, Volume 5, Issue 2, October 2014, pp.8-10 at p. 8, available at <https://www.medicalprotection.org/docs/default-source/pdfs/sa-junior-doctor-pdfs/junior-doctor-october-2014.pdf?sfvrsn=0> (24.01.2019).

⁹¹³ *Ibid.*

⁹¹⁴ K. Müller and G. Saayman, *Clinical Forensic Medicine: Completing the Form J88 – what to do and what not to do*, *South African Family Practice*, 2003, Volume 45, no. 8, pp. 39-43 at p.39. There may also be circumstances, such as a medical emergency, where the medical practitioner is not able to examine the patient accordingly and will therefore not be in a position to complete a J88 form: see Marli Smit, *J88: Are you allowed to refuse*, in *South African Medical Association Insider*, June 2016, p. 5, available at <http://www.samainsider.org.za/index.php/SAMAINsider/article/download/54/34> (24.01.2019).

⁹¹⁵ See J.M. Kotze, H. Brits, B.A. Botes, *Part 1: Medico-legal documentation – South African Police Service forms*, *Department of Justice forms and patient information*, in *South African Family Practice*, 2014, Volume 56, no. 5, pp. 16-22 at p. 20.

of the information represents a serious threat to public health.⁹¹⁶ **Medico-legal consent for an examination** (save in emergency situations)⁹¹⁷ and to disclose the information in a J88 form to the police for investigative and court purposes is **provided voluntarily by the patient**. This consent is documented in a South African Police Service form, the “SAPS 308”.⁹¹⁸ Detainees or suspects, however, do not have the right to refuse an examination, and authorization may be documented through the completion of a form “SAPS 308A” by a law enforcement officer.⁹¹⁹

2.2. Scope

As discussed above,⁹²⁰ there is, under South African law, no specific duty on healthcare professionals to report gunshot wounds. However, where a medical examination is undertaken with appropriate consent, and recorded in a J88 form, the **information it is expected will be provided is very broad**. It includes the following:

- **Demographic information**, including the name of the police station and investigating officer; place of examination; full name of person examined as it appears on identity document or birth certificate; the age and date of birth of the person examined;
- **General history** stating whether the source of the information was the complainant himself/herself or a third party; relevant medical history; medication and drugs/alcohol taken by the person examined;
- **General examination**: condition of clothing of the person examined; general body build; clinical findings, including wounds and injuries, individually described in detail; emotional status of the person examined and his or her mental health; clinical evidence of drugs or alcohol;
- **Conclusions**, including a short history providing facts necessary to support a conclusion as to whether clinical findings are compatible with the time and circumstances of the alleged incident.⁹²¹

In the **case of gunshot wounds**, experts recommend that specific mention should be made of important features, such as entrance and exit wound features, probable distance of firing where possible; accurate anatomic notation with reference to anatomic landmarks may also be of value in subsequent reconstructions for ballistic investigation.⁹²²

2.3. Purpose

The information requested in a J88 form is for judicial purposes and the form itself is specifically **designed to document medical findings for a court**. Although any kind of medical record may potentially be accepted in evidence, the J88 form is described as the preferred method of adducing

⁹¹⁶ *National Health Act, op. cit.*, section 14(2).

⁹¹⁷ Where there is a duty to intervene both under common law and under the Constitution. See section 3.1. of this country report, below. See also section 7(1)(e) of the *National Health Act, op. cit.*

⁹¹⁸ See J.M. Kotze, H. Brits, B.A. Botes, *Part 1: Medico-legal documentation – South African Police Service forms, Department of Justice forms and patient information*, in *South African Family Practice, op. cit.*, at p. 17.

⁹¹⁹ *Criminal Procedure Act 51 of 1977, op. cit.*, section 37.

⁹²⁰ See sections 2. and 2.1. of this country report.

⁹²¹ With reference to K. Müller and G. Saayman, *Clinical Forensic Medicine: Completing the Form J88 – what to do and what not to do*, *South African Family Practice*, pp.41-43.

⁹²² *Ibid.*, p 42. Further detail about the nature of evidence collection in the case of a gunshot wound can be found at J.M. Kotze, H. Brits, B.A. Botes, *Part 2: Medico-legal documentation – Practical completion of pages 1 and 4 of the J88 form*, in *South African Family Practice*, 2014, Volume 56, no. 6, pp. 32-37 at p. 35.

evidence in a criminal matter with regard to the injuries a complainant has sustained in an incident forming part of a criminal investigation.⁹²³

The J88 form is to be handed by the health professional who completed it to the relevant police investigator (or, if requested, the court), and it may not be released to the patient.⁹²⁴ It **remains legally privileged while a police investigation is underway**, although it may be disclosed to the defence lawyer with the consent of the police investigator and the public prosecutor where he or she has obtained a court order.⁹²⁵

2.4. Consequences of non-compliance

In the absence of a specific legal duty to disclose gunshot wounds, there are **no consequences for non-compliance**.

Moreover, there is **no specific legal duty on a healthcare professional to conduct a medico-legal examination** of a patient nor to complete a J88 form in the event of treating a patient with a gunshot wound. One of the purposes of completing a J88 form, however, is **to allow victims** who have been assaulted, physically, sexually or otherwise, **to initiate prosecution** against the perpetrator. The South African Director-General of Health has, in the past, drawn attention to *The Charter for Victims of Crime in South Africa*⁹²⁶ and the *Minimum Standards on Services for Victims of Crime*,⁹²⁷ pointing out that **a refusal to complete a J88 form**, particularly by doctors receiving patients in private facilities, would **serve to deny the victim his or her right to access the judicial system**. In such circumstances, doctors are advised to stabilize their patient and refer them to a centre, health establishment or service provider that will complete the J88 form.⁹²⁸

Moreover, as discussed above,⁹²⁹ paragraph 9.3.1.3 of the **HPCSA's Confidentiality Guidelines** state that disclosure of personal information without consent may be justified where that disclosure could assist in the **prevention or detection of a serious crime**. This does not, however, place an obligation on a healthcare practitioner to make such a disclosure in these circumstances.⁹³⁰ Nevertheless, a **failure by a healthcare practitioner to disclose to law enforcement a gunshot wound** in a situation where, in the wording of the HPCSA Confidentiality Guidelines, "*third parties are exposed to a risk so serious that it outweighs the patient's right to confidentiality*," **would be inconsistent with HPCSA guidance**. This may, in turn, constitute a breach of the HPCSA's Ethical Rules, against which complaints of professional misconduct are evaluated. These state that a practitioner "*shall*" divulge information which he or she ought to divulge only where, among other things, it is justified in the public interest.⁹³¹ Where a practitioner is found guilty of misconduct, a **number of potential penalties can be imposed**. These are as follows:

⁹²³ Marli Smit, *J88: Are you allowed to refuse*, in South African Medical Association Insider, *op. cit.*, p.5.

⁹²⁴ J.M. Kotze, H. Brits, B.A. Botes, *Part 1: Medico-legal documentation – South African Police Service forms, Department of Justice forms and patient information*, in South African Family Practice, *op. cit.*, p.22.

⁹²⁵ MPS, *Medical Records in South Africa – and MPS Guide*, *op. cit.*, p.15.

⁹²⁶ The Department of Justice and Constitutional Development, *Service Charter for Victims of Crime in South Africa*, undated, available at <http://www.justice.gov.za/VC/docs/vc/vc-eng.pdf> (28.01.2019).

⁹²⁷ The Department of Justice and Constitutional Development, *Minimum Standards on Service for Victims of Crime – For Implementing the Service Charter for Victims of Crime in South Africa*, undated, available at <http://www.justice.gov.za/VC/docs/vcms/vcms-eng.pdf> (28.01.2019).

⁹²⁸ See Marli Smit, *J88: Are you allowed to refuse*, in South African Medical Association Insider, *op. cit.*, p.5.

⁹²⁹ See section 1.2. and section 2 of this country report.

⁹³⁰ Although some commentators do refer to this as "mandatory" in circumstances where the police are unaware of the event: see J.M. Kotze, H. Brits, B.A. Botes, *Part 2: Medico-legal documentation – Practical completion of pages 1 and 4 of the J88 form*, in South African Family Practice, *op. cit.*, at p. 35.

⁹³¹ HPCSA, *Guidelines for Good Practice in the Healthcare Professions - Ethical and Professional Rules of the Health Professions Council of South Africa*, Booklet 2, *op. cit.*, Rule 13(1).

- a caution, reprimand or a reprimand and caution;
- suspension for a specified period from practicing or performing acts specially pertaining to his or her profession;
- removal of his or her name from the register;
- a prescribed fine;
- a compulsory period of professional service as may be determined by the professional board;
- the payment of costs of the proceedings or a restitution (or both).⁹³²

The HPCSA cannot, however, institute criminal sanctions.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

As referred to above, section 27(3) of the South African Constitution⁹³³ establishes that **no one may be refused emergency medical treatment**. As a constitutional right, this may only be limited in accordance with section 36 of the Constitution, which permits **limitations to those rights**, where they are established by law of general application and where it is reasonable and justifiable to do so.⁹³⁴

As discussed above, the **National Health Act**, establishing the framework for a uniform health system and the regulation of national health, also provides that **no one may be refused emergency medical treatment**.⁹³⁵

It may also be said that a **duty to intervene exists in emergency situations under common law principles**.⁹³⁶ A failure by a doctor to render assistance in such circumstances may render him or her civilly liable.

More broadly, the State is required by **section 27(2) of the Constitution** of the Republic of South Africa to take reasonable legislative and other measures within its available resources to achieve the progressive realization of the **right of the people of South Africa, under section 27(1), to have access to healthcare services**. Every child also has the right to basic healthcare services.⁹³⁷

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

In the absence of a specific legal duty on healthcare professionals to disclose information concerning gunshot wounds of patients, there is **no automatic contradiction** with obligations owed under professional ethics rules on medical confidentiality.

In any event, although a doctor's duty of confidentiality is to protect patients' privacy and to secure public health, it is said that the notion of an absolute privilege which considers any departure from the doctor's duty of confidentiality required by law as being in conflict with the ethics of the profession is

⁹³² Section 41 of the *Health Professions Act, 56 of 1974*, *op. cit.* See also HPCSA webpage, *Professional Conduct & Ethics – Complaints*, available at <https://www.hpcsa.co.za/Conduct/Complaints> (28.01.2019).

⁹³³ Constitution of the Republic of South Africa, 1996, *op. cit.*

⁹³⁴ See section 1.2. of this country report, above.

⁹³⁵ *National Health Act*, *op. cit.*, section 5. See section 1.2. of this country report, above.

⁹³⁶ See Melodie Nöthling Slabbert, *South Africa*, in *Medical Law*, *op. cit.*, para. 105.

⁹³⁷ Constitution of the Republic of South Africa, 1996, *op. cit.*, section 28(1)(c).

unconvincing.⁹³⁸ Indeed, the **patient's right to privacy and the doctor's duty of confidentiality** have long been considered by South African courts **not as absolute, but as relative**.⁹³⁹ Accordingly, there are a **number of justifications**, as discussed above,⁹⁴⁰ which operate as defences to the invasion by a doctor (or other healthcare professional) of a patient's private sphere or the disclosure of his or her private affairs.⁹⁴¹

One such defence, which a healthcare professional may be able to rely on in reporting a gunshot wound of a patient in his or her care, is that recognised by the *National Health Act*, namely where a **failure to disclose such information may represent a serious threat to public health**.⁹⁴² As discussed above,⁹⁴³ HPCSA Confidentiality Guidelines reinforce this, expressly recognizing that the disclosure of personal information without consent may be justified where not doing so may expose the patient or others to risk of death or serious harm; one example given by the Guidelines is a **disclosure that may assist in the prevention or detection of a serious crime**.⁹⁴⁴

Accordingly, although medical professionals owe an ethical duty to maintain medical confidentiality, the guidelines that supplement and clarify the ethical rules set by the regulatory body for healthcare professionals in South Africa make it clear that **circumstances may arise which legitimately justify a departure from such obligations**.

⁹³⁸ Melodie Nöthling Slabbert, *South Africa*, in *Medical Law*, *op. cit.*, at para. 184 referring to I. Gordon, R. Turner and T.W. Price, *Medical Jurisprudence*, 3rd edition, 1953, Livingston, London & Edinburgh at p. 50, states, "as citizens of society, doctors also owe a general duty which is as much a matter of ethics as are the requirements of the profession and which renders an excessive insistence on professional secrecy socially and ethically unwarranted. The conflict is one between different ethical principles rather than between law and ethics."

⁹³⁹ *Jansen van Vuuren and Another NNO v Kruger*, *op. cit.*, at [15].

⁹⁴⁰ See section 1.2. of this country report, above.

⁹⁴¹ Melodie Nöthling Slabbert, *South Africa*, in *Medical Law*, *op. cit.*, at para. 190.

⁹⁴² *National Health Act*, *op. cit.*, section 14(2).

⁹⁴³ See section 1.2. and 2. of this country report, above.

⁹⁴⁴ HPCSA Confidentiality Guidelines, paras. 9.3.1.3. and 10.

Q. SOUTH SUDAN⁹⁴⁵

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

This obligation of confidentiality is deontological only. Based on their college studies, doctors are ethically prohibited from disclosing medical information concerning their patients unless required by law, however, the legal framework is silent on this point. There is no legal obligation of disclosure although we are informed that, in practice, care is often refused pending notification of the police.

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

There is no direct obligation for medical personnel to report gunshot wounds as such. There is, however, a Police Criminal Form (Form 8) that asks for information from 1) the police, 2) the prosecutor and 3) the doctor, concerning death or injury which may have occurred in connection with a crime. The form appears to have been designed for cases in which a person, injured under circumstances that the police suspect may constitute a crime, has been in contact with the police, who then send such person for medical assistance. The healthcare professional providing such assistance would then complete the form.

We are informed that, although there is no legal obligation to obtain or complete a Form 8, in practice, healthcare professionals will not provide medical assistance to a patient with accidental or violence-related injuries before the patient supplies a Form 8.

2.1. Conditions

Not applicable.

2.2. Scope

Not applicable.

2.3. Purpose

Form 8 is intended to serve as official documentary medical evidence concerning death or injury, which may have occurred in connection with a crime, in the event of prosecution for such crime. Form 8 may be used as exclusive evidence before a criminal court. This means, on the one hand, that Form 8 is sufficient to establish the injury, without any corroborating evidence and, on the other, it is the only medical evidence to be considered by the court, as no evidence of information not recorded in the Form will be admissible.

2.4. Consequences of non-compliance

In the case of major injuries (such as most, if not all, gunshot wounds) the police will accompany the victim to the hospital; as a result, the victim will not be able to avoid the Form 8, however, for minor injuries the victim can seek medical assistance on his or her own. There are no legal sanctions for failure to provide or obtain a Form 8.

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The information in this report has been provided to the ISDC by the ICRC.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Not applicable.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Not applicable.

R. SPAIN

1. Cadre général relatif à la confidentialité et aux devoirs de déclarer pour le personnel soignant

La **violation du secret professionnel par un médecin est punie** à l'article 199 alinéa 2 du Code pénal (ci-après le CP). En effet, à teneur de cette norme, le professionnel qui, en violation de son obligation de secret et réserve, dévoile les secrets d'une autre personne, sera puni d'une peine de prison d'un an à quatre ans, amende de douze à vingt-quatre mois et une interdiction spéciale pour la pratique de cette profession pour une période de deux à quatre ans⁹⁴⁶.

Par le *Real Decreto* 1018/1980 du 19 mars 1980, le législateur a approuvé les statuts du Conseil général des ordres officiels des médecins. Ce Conseil a adopté un Code de déontologie médicale (ci-après CDM)⁹⁴⁷ dont le Chapitre V traite du secret professionnel du médecin. L'article 27 alinéa 2 du CDM prévoit que le secret professionnel inclut pour le médecin l'obligation de maintenir une réserve et la confidentialité sur tout ce que le patient lui a révélé et confié, ce qu'il a vu et déduit comme conséquence de son travail et ait un rapport avec la santé et l'intimité du patient y compris le contenu de l'historique clinique.

Enfin, dans le cadre de l'administration publique de la santé, l'article 10 alinéa 3 de la Loi Générale de la santé du 25 avril 1986 prévoit que tout et chacun a droit à la confidentialité de toute l'information en relation avec le processus et son séjour dans les institutions sanitaires publiques et privées qui collaborent avec le système public⁹⁴⁸.

Cependant, **le secret professionnel des médecins n'est pas absolu**. En effet, l'article 30 du CDM prévoit un certain nombre de cas où le médecin *peut* révéler le secret professionnel sous certaines conditions et dans les justes limites. L'article énumère les cas :

- Les maladies de déclaration obligatoire ;
- Les certificats des naissances et de décès ;
- Dans les situations où son silence met en danger le patient ou d'autres personnes ou un danger collectif ;
- Lorsque le médecin a injustement subi un préjudice en gardant le secret du patient et ce dernier permet cette situation ;
- Les mauvais traitements, spécialement à des enfants, personnes âgées et handicapés psychiques ou des agressions sexuelles ;
- Lorsqu'il est appelé par l'ordre des médecins à témoigner en matière disciplinaire ;
- Lorsque le patient autorise le médecin à lever son secret professionnel, ce dernier doit garder le secret professionnel en raison de l'importance que la société a dans la confidentialité professionnelle.

L'article précité prévoit également que **le secret professionnel est levé par des impératifs légaux**. Ces derniers sont prévus par la Loi sur la procédure pénale (ci-après LPP)⁹⁴⁹ et en particulier à son article 262⁹⁵⁰.

⁹⁴⁶ Disponible sous : <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444#a199> (25.06.2019).

⁹⁴⁷ Dont la dernière version de juillet 2011 est disponible sous : https://www.cgcom.es/sites/default/files/codigo_deontologia_medica.pdf (25.06.2019).

⁹⁴⁸ Disponible sous : <https://www.boe.es/buscar/act.php?id=BOE-A-1986-10499#adiez> (25.06.2019).

⁹⁴⁹ Disponible sous : <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036> (25.06.2019).

⁹⁵⁰ Comentarios al Código Penal Español, Tomo I, Cizur Menor 2011, p. 1333.

2. Devoir du personnel soignant de déclarer les cas de blessures par arme à feu

Le LPP ne prévoit **pas une obligation spécifique de levée du secret professionnel du médecin lorsqu'il traite un patient blessé par arme à feu**. L'article 262 de la LPP prévoit une obligation générique à teneur de laquelle, **le médecin doit dénoncer immédiatement** au Ministère public, au Tribunal compétent ou au Juge d'instruction **la connaissance d'une quelconque infraction publique**⁹⁵¹.

L'obligation prévue à l'article 262 de la LPP a été reprise à l'article 30 alinéa 1 lettre h du CDM qui prévoit que **le médecin est obligé de transmettre au juge le rapport qui mentionne que son patient a été blessé**. D'après nos recherches, l'obligation prévue à l'article 30 alinéa 1 lettre h du CDM doit être lue comme une mise en œuvre de l'obligation générale prévue à l'article 262 de la LPP.

2.1. Conditions

En vertu de l'article 262 de la LPP et l'article 30 alinéa 1 lettre h du CDM, le médecin est tenu de dénoncer l'infraction commise ou la blessure **immédiatement**. Nos recherches n'ont toutefois pas permis d'identifier quelle est ou serait la pratique concernant le délai. **Il ne ressort pas de nos recherches, que la dénonciation serait considérée comme une précondition au traitement de la personne concernée.**

2.2. Champ d'application

De plus, le médecin est tenu de **dénoncer la commission d'une infraction publique et/ou la blessure du patient**, ce qui inclut nécessairement l'existence d'une blessure par arme à feu.

En vertu de l'article 30 du Code de Déontologie médicale, le médecin est tenu de communiquer **le rapport médical** qui mentionne que son patient est blessé.

2.3. But

La dénonciation devant se faire au Ministère Public, au Tribunal compétent ou au Juge d'instruction, ou à défaut, l'autorité municipale ou le fonctionnaire de police le plus proche en cas de flagrant délit, il ressort des termes de l'article 262 LPP que l'objectif est **la poursuite judiciaire des auteurs d'infractions pénales**.

2.4. Conséquences du non-respect

Le médecin qui viole l'obligation précitée sera puni d'une **amende** de 25 à 250 pesetas (art. 259 LPP) et 125 à 250 lorsque le médecin est un professeur en médecine (art. 262 alinéa 2 LPP). Selon une instruction du *Fiscal General del Estado* (5/2001 du 23 décembre) portant sur les effets de l'introduction de l'euro dans le champ pénal, les infractions prévues à l'article 259 et 262 n'ont pas été adaptées à l'euro.

3. Protection de la fourniture des soins de santé

3.1. Législation spécifique protégeant la fourniture de soins de santé

D'après la loi, le médecin doit traiter tous ses patients de la même manière **sans discrimination** (art. 5 al. 2 CDM).

⁹⁵¹ Disponible sous : <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036#a262> (25.06.2019).

3.2. Moyens de résolution des conflits potentiels entre éthique médicale et obligation de déclarer les cas de blessures par arme à feu

L'article 24 alinéa 2 in fine de la Constitution prévoit que la loi réglera les cas dans lesquels, pour des raisons de rapports de parenté ou de secret professionnel, on ne sera pas obligé de déclarer sur des faits qui sont présumés délictuels. Toutefois, à ce jour, le législateur espagnol n'a pas adopté une norme spécifique portant sur l'exercice du secret professionnel des médecins dans ces circonstances.

Nous n'avons pas trouvé de telles directives dans la législation nationale. Toutefois, il ressort des dispositions applicables que le législateur a considéré que l'obligation de dénoncer les infractions connues par le médecin dans le cadre de ses fonctions protégées par le secret professionnel est prioritaire sur le devoir de conserver le secret professionnel, si bien que les conflits potentiels entre les deux intérêts contradictoires sont résolus en faveur de **l'obligation de dénoncer**.

S. TUNISIA

1. Cadre général relatif à la confidentialité et aux devoirs de déclarer pour le personnel soignant

1.1. Textes relatifs à la confidentialité des données en rapport avec la santé

Plusieurs textes peuvent être cités à propos de la confidentialité des données relatives à la santé des personnes. Leur ensemble forme le cadre juridique relatif aux devoirs des professionnels de la santé à l'égard des malades. Nous ne traitons dans cette rubrique que des dispositions contraignant (positivement ou par une interprétation a contrario) les professionnels de la santé à garder le silence, à respecter la confidentialité des données dont ils auraient eu connaissance.

1.1.1. Textes généraux

Nous entendons par « textes généraux » les textes qui n'ont pas été élaborés spécifiquement pour le domaine médical mais qui peuvent être utilisés dans un but de protection des données des patients.

Il s'agit de la Constitution, de certains traités et conventions que la Tunisie a signé et ratifié et de certaines lois.

- La **Constitution**⁹⁵² de la République tunisienne du 27 janvier 2014. Son article 24, inséré dans le Chapitre II « *Des droits et libertés* », stipule que « *L'Etat protège la vie privée, l'inviolabilité du domicile et le secret des correspondances, des communications et des données personnelles* », en même temps que d'autres articles reconnaissent le droit de tous les citoyens à la santé (« *Tout être humain a droit à la santé. L'Etat garantit la prévention et les soins de santé à tout citoyen et assure les moyens nécessaires à la sécurité et à la qualité des services de santé (...)* ». Art.38) et à la protection de sa dignité (« *L'Etat protège la dignité de l'être humain et son intégrité physique. (...)* », Art.23). La lecture conjuguée de l'ensemble de ces articles de la Constitution nous permet d'affirmer que la protection de la santé de l'individu, dans des conditions préservant sa dignité, sont prééminentes par rapport à d'autres obligations pouvant incomber aux personnes chargées de les protéger, dont le personnel de santé, d'autant que toute forme de torture morale ou physique est interdite par la Constitution (Art.23).
- Les traités et autres textes à **caractère international**. « *Les conventions approuvées par le Parlement et ratifiées sont supérieures aux lois et inférieures à la constitution* » (Art.20 Constitution). Il se trouve que la Tunisie a ratifié la plupart des conventions relatives à la protection des droits des patients, au respect de sa dignité et de sa vie privée : *Pacte international relatif aux droits civils et politiques* de 1966⁹⁵³, *Conventions de Genève* et ses *Protocoles additionnels* de 1977, ainsi que toutes les *conventions relatives au droit humanitaire*⁹⁵⁴.
- **Les lois**.
Le **code pénal**⁹⁵⁵. Son article 254 érige en délit la violation du secret professionnel par les personnels de santé : « *Sont punis de six mois d'emprisonnement et de 120 dinars d'amendes,*

⁹⁵² Disponible sur <http://www.legislation.tn/sites/default/files/news/constitution-b-a-t.pdf> (25.03.19).

⁹⁵³ Signé le 30 avril 1968 et ratifié le 18 mars 1969 par la Tunisie.

⁹⁵⁴ Disponibles sur https://ihl-databases.icrc.org/applic/ihl/dih.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=TN (25.03.19).

⁹⁵⁵ Décret beylical du 9 juillet 1913, plusieurs fois modifié, disponible sur <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61250/60936/F1198127290/TUN-61250.pdf> (25.03.19). Avant la proclamation de la République tunisienne, les décrets du Bey avaient valeur de loi.

les médecins, chirurgiens et autres agents de santé, les pharmaciens, sages-femmes et toutes autres personnes qui, de par leur état ou profession, sont dépositaires de secrets, auront, hors le cas où la loi les oblige ou les autorise à se porter dénonciateurs, révélé ces secrets »⁹⁵⁶.

Loi relative à la protection des données personnelles⁹⁵⁷ autorise le **traitement des données de santé du patient par le médecin** dans certaines hypothèses, notamment **lorsque le traitement est nécessaire à la réalisation de finalités** prévues par la loi. Parmi ces finalités, on relève, en application de l'article 53 de la même loi, **la sécurité publique ou de la défense nationale, ou celle de poursuites pénales**. Cette loi est critiquable. Les cinq cas énumérés par l'article 62 de possibilité de traitement des données personnelles individuelles sont extrêmement larges⁹⁵⁸, même si l'article 63 prévoit qu'il [le traitement] « *ne peut être mis en œuvre que par des médecins ou des personnes soumises, en raison de leur fonction, à l'obligation de garder le secret professionnel* ». L'alinéa 2 de l'article 63 vide cette condition de son sens puisque « *les médecins peuvent communiquer les données à caractère personnel en leur possession à des personnes ou des établissements, et sur la base d'une autorisation de l'Instance nationale de protection des données à caractère personnel* ». De plus, la loi élargit les possibilités de transmission des données personnelles pour les personnes publiques, dont les établissements publics de santé et prévoit que, dans ce cas, le droit d'accès des personnes concernées à leurs données personnelles n'est prévu que pour la correction desdites données (Art. 53)⁹⁵⁹.

Un **projet de loi** nettement plus protecteur des données personnelles est en cours de discussion. Le nouveau texte exige que **les données de santé ne soient exploitées que par des médecins ou des personnes soumises au secret professionnel, avec l'autorisation systématique et préalable de l'Instance**. Le projet de loi pose clairement les **principes d'information, de droits de consentement, d'accès, d'opposition, de déréférencement, à l'oubli, à la portabilité**.

1.1.2. Textes spécifiques

Nous entendons par « *textes spécifiques* » les textes spécialement élaborés pour encadrer des activités que ne peuvent exercer que des professionnels de santé.

- Au niveau législatif, nous trouvons peu de dispositions relatives au secret médical ou alors de manière indirecte et laconique. Les textes d'application des lois sont parfois plus explicites. La **loi relative à la profession médicale**⁹⁶⁰ ne contient rien de particulier par rapport au secret médical. Seule la **loi relative à l'organisation sanitaire** (⁹⁶¹, sans évoquer spécifiquement l'obligation au secret médical, pose en principe le droit à la protection de la santé (« *Toute*

⁹⁵⁶ Nous revenons par la suite (Question I.2), aux cas d'exonération du secret médical par le code pénal.

⁹⁵⁷ Loi organique n° 2004-63 du 27 juillet 2004, disponible sur : <http://www.ins.tn/sites/default/files/Loi%2063-2004%20Fr.pdf> (25.03.19).

⁹⁵⁸ La personne a donné son consentement ; le traitement est nécessaire à la réalisation de finalités prévues par la loi ou les règlements ; le traitement est nécessaire pour le développement et la protection de la santé publique ; le traitement est bénéfique pour la santé de la personne, au point de vue préventif ou thérapeutique ; le traitement s'effectue dans le cadre de la recherche scientifique.

⁹⁵⁹ Non application des articles relatifs au consentement, à l'autorisation préalable de l'Instance, au droit d'opposition.

⁹⁶⁰ Loi 91-21 du 13 mars 1991 relative à l'exercice et à l'organisation des professions de médecin et de médecin dentiste, disponible sur <http://www.legislation.tn/sites/default/files/journal-officiel/1991/1991F/Jo01991.pdf> (26.03.19). Nous y revenons en (II.7) pour la sanction des infractions commises par les médecins.

⁹⁶¹ Loi 91-63 du 29 juillet 1991, disponible sur <http://www.cnudst.rnrt.tn/jortsrc/1991/1991f/jo05591.pdf> (26.03.19).

personne a droit à la protection de sa santé dans les meilleures conditions possibles », Art. 1^{er}) et la nécessité que le fonctionnement des structures sanitaires garantissent « Les droits fondamentaux de la personne humaine et la sécurité des malades (...) » (Art.5-1).

La loi relative à la **médecine de la reproduction**⁹⁶² prévoit que « *Les informations relatives aux activités de médecine de la reproduction doivent être conservés dans des **conditions garantissant leur aspect confidentiel*** » (Art.24). Ces exigences concernent notamment le registre consignait l'ensemble des actes effectués au sein d'une unité de médecine de la reproduction (Art.21, art.27). Ce registre « *doit être tenu dans un local qui ferme à clé au sein de l'unité de la médecine de la reproduction **dans des conditions garantissant la confidentialité des informations personnelles qui y sont consignées** et ce, sous la responsabilité du médecin coordinateur* »⁹⁶³.

Concernant les **prélèvements d'organes** (Loi 91-22 du 25 mars 1991 relative au prélèvement et à la greffe d'organes humains), la loi pose explicitement le principe du consentement libre et exprès, l'interdiction de toute contrepartie mais est muette concernant l'anonymat des personnes concernées. Seul l'arrêté du ministre de la santé publique du 28 juillet 2004⁹⁶⁴ prévoit que « *Les informations [nécessaires à la traçabilité du prélèvement jusqu'à l'attribution d'un organe] sont établies sur la base d'un codage préservant l'anonymat des personnes* » (Art.2). Sur le récipient de transport du greffon, le donneur est identifié par un numéro (Art.16). Toutes les données concernant le prélèvement et la greffe d'organes sont enregistrées dans un système de traitement informatisé, protégé par un mot de passe « *ou tout autre moyen propre à assurer la confidentialité des données recueillies* » (Art.20).

Les textes à caractère réglementaire sont plus explicites quant au secret médical.

- Le **code de déontologie médicale**⁹⁶⁵. « *Le secret professionnel s'impose à tout médecin, sauf dérogations établies par la loi* » (Art.8). Cette obligation s'étend aux personnes qui assistent le médecin dans son travail, qu'il doit aviser de l'exigence du secret et il les contrôle pour s'assurer qu'elles le respectent (Art.9). Il devra taire le pronostic grave ou fatal à la famille du malade, si celui-ci lui aurait interdit de le faire (Art.36).

Concernant certains modes particuliers d'exercice de la médecine, le **médecin contrôleur** doit être « *circonspect dans son propos et s'interdire toute révélation ou toute interprétation* » (Art.69 al.2), et il est « *tenu au secret vis-à-vis de l'organisme qui l'a mandaté (...). Les renseignements d'ordre médical contenus dans le dossier établi ne peuvent être communiqués aux personnes autres que le médecin responsable du service médical (...)* » (Art.71).

Le **médecin expert, quant à lui**, ne doit révéler, dans la rédaction de son rapport, « *que les éléments de nature à fournir les réponses aux questions posées dans la décision qui l'a nommé* » (Art.74 al.2).

Le **médecin salarié** est tenu aux mêmes obligations de secret professionnel (Art.75), et les renseignements contenus dans les *dossiers médicaux* ne peuvent être communiqués qu'au médecin chef de service (Art.78).

⁹⁶² Loi 2001-93 du 7 août 2001, disponible sur <http://www.legislation.tn/sites/default/files/fraction-journal-officiel/2001/2001F/063/TF2001931.pdf> (26.03.19).

⁹⁶³ Article 5 de l'arrêté du ministre de la santé publique du 16 juillet 2003, relatif au registre des actes de la médecine de la reproduction. L'alinéa 2 de cet article réitère les mêmes exigences pour les informations consignées sur support informatique, dont le code d'accès. Disponible sur <http://www.legislation.tn/sites/default/files/fraction-journal-officiel/2003/2003F/059/TF20036514.pdf> (26.03.19)

⁹⁶⁴ Arrêté fixant les critères et les modalités pratiques relatifs au prélèvement d'organes et de tissus humains, à leur conservation, leur transport, leur distribution, leur attribution et leur greffe. Disponible sur <http://www.legislation.tn/sites/default/files/fraction-journal-officiel/2004/2004F/063/TF20046024.pdf> (26.03.19)

⁹⁶⁵ Décret 93-1155 du 17 mai 1993, disponible sur : <http://www.atds.org.tn/Decretdeontologiemedicale93.pdf> (25.03.19)

- Le **règlement général intérieur des hôpitaux** ⁹⁶⁶. La lettre du médecin de consultation, nécessaire pour l'admission d'un malade à l'hospitalisation doit être *cachetée* (Art.11 al.2). Pour que le médecin puisse informer la famille du diagnostic et de l'évolution de la maladie, *il ne faut pas qu'il y ait opposition du malade* (Art.35). Enfin, « *le personnel doit surveiller la tenue des documents du service et les dossiers médicaux des malades en particulier* » (Art.72). Venue en application de ce Règlement, une circulaire du ministre de la santé, en date du 19 mai 2009 ⁹⁶⁷ portant **Charte du malade** garantit un certain nombre de droits aux patients. Parmi ces droits, celui du secret médical par rapport au contenu de son dossier qui « *est la propriété du patient* » et dont le contenu « *ne doit être divulgué à une tierce personne que sur autorisation du patient ou dans les cas prévus par la loi* » (V- La préservation du secret médical et des données à caractère personnel) et rappelle que « *dans les cas d'urgence, la priorité est donnée à la dispensation des prestations sanitaires* » (I- Principes généraux).
- Les textes réglementaires relatifs aux **essais cliniques** qui peuvent être menés sur l'homme, à but thérapeutique ou non thérapeutique (code de déontologie médicale Titre VI, décret 90-1401 du 3 novembre 1990⁹⁶⁸, arrêtés du ministre de la santé) sont peu explicites en ce qui concerne le secret médical. Il y est posé que « *l'expérimentation doit se faire conformément aux conventions internationales relatives à la santé et aux droits de l'homme, dûment ratifiées par la Tunisie, et aux règles de la déontologie médicale et de l'éthique, relatives à l'expérimentation sur l'homme* » (Art.1^{er} du décret). Le secret professionnel ne concerne que « *la nature des produits essayés, les essais eux-mêmes et leurs résultats* » (Art.13), sans mention expresse de l'identité des personnes se prêtant à l'essai. Au contraire, le cahier des charges nécessaire pour toute expérimentation, communiqué au ministère de la santé, doit *comporter le nom de tous les participants à l'essai clinique* (Art.6 nouveau). Seul un arrêté⁹⁶⁹, venu en application du décret 90-1401, impose aux membres et différents intervenants aux travaux des comités de protection des personnes⁹⁷⁰ qui doivent donner leur avis, l'obligation de *garder secrètes les informations qui viennent à leur connaissance* relativement à l'essai clinique (Art.9).
- Le **certificat médical prénuptial** ⁹⁷¹. Obligatoire pour tout contrat de mariage, il est établi par un médecin qui ne doit informer des résultats des analyses et de certaines maladies⁹⁷² *que la personne intéressée* (Art.3), non le futur conjoint, attirant l'attention de la personne sur le risque de certaines maladies. Mais le médecin peut refuser la délivrance de ce certificat ou y surseoir jusqu'à ce que la personne se soigne. Le problème de la transmission d'informations

⁹⁶⁶ Décret 81-1634 du 30 novembre 1981, disponible sur : <http://www.atds.org.tn/DecretReglemlntHopitaux81.pdf> (25.03.19)

⁹⁶⁷ Circulaire du Ministre de la Santé Publique n° 36/2009, disponible sur : <http://www.santetunisie.rns.tn/images/articles/chartepatient.pdf> (25.03.19)

⁹⁶⁸ Modifié en 2001 et en 2014. Disponible sur http://www.dpm.tn/images/pdf/decret_90_1401_consolide.pdf (26.03.19)

⁹⁶⁹ Arrêtés du ministre de la santé du 13 janvier 2015 relatifs à la création des comités de protection des personnes se prêtant à l'expérimentation médicale ou scientifique des médicaments destinés à la médecine humaine. Disponibles sur <http://www.legislation.tn/sites/default/files/fraction-journal-officiel/2015/2015F/009/Tf201500794.pdf> et sur http://www.dpm.tn/images/pdf/formulaire_consentement.pdf (26.03.19)

⁹⁷⁰ Le collège scientifique et technique est composé de personnels de santé, dont moitié de médecins (Art.4).

⁹⁷¹ Loi 64-46 du 3 novembre 1964, disponible sur : <https://www.jurisitetunisie.com/tunisie/codes/csp/L1964-0046.htm> (26.03.19).

⁹⁷² Notamment les « *affections contagieuses, troubles mentaux, alcoolisme et toutes maladies dangereuses pour le conjoint ou la descendance* » (Art.2).

médicales concernant un des deux conjoints reste entier dans le cas de découverte d'une maladie contagieuse à déclaration obligatoire⁹⁷³.

1.2. Obligation de signalement des professionnels de la santé

L'obligation de signalement des professionnels de la santé envers les autorités de l'Etat est prévue par les textes et s'impose aux professionnels de santé dans certains cas particuliers. **Nous ne traitons pas dans cette rubrique de tout ce qui peut être rattaché aux blessés par arme à feu, étudié de manière détaillée sous la section (2). Nous traitons uniquement du devoir de signalement hors cas de blessure pouvant avoir été causée par arme à feu.**

Code pénal. Son art. 254, relatif au secret professionnel des personnels de santé pose des exceptions par rapport à l'**avortement pratiqué en-dehors des prescriptions légales**⁹⁷⁴ : les professionnels de santé peuvent dénoncer les avortements qu'ils jugent criminels et témoigner devant la justice en ce sens. Ils ne peuvent alors être incriminés de violation du secret professionnel.

Les cas de traitement obligatoire. Ils sont rattachables à une conception plus ou moins large de l'ordre public sanitaire. Il s'agit d'abord des **maladies transmissibles à déclaration obligatoire**⁹⁷⁵ qui *oblige toute autorité sanitaire*⁹⁷⁶ à déclarer (Art.5), sans qu'il y ait violation du secret professionnel et sous peine de sanction pécuniaire (Art.7 N.), *un certain nombre de maladies transmissibles* figurant en annexe de la loi (dont les maladies et infections par le VIH/SIDA). En cas d'urgence, un décret peut même assimiler une maladie épidémique à une maladie transmissible (Art.11 bis). La même obligation s'impose pour les cas de **toxicomanie**⁹⁷⁷ : « *les médecins doivent déclarer au bureau national des stupéfiants les cas de toxicomanie qu'ils pourraient constater dans l'exercice de leur profession* ». Ce même Bureau soumet les cas de toxicomanie à une commission comportant trois médecins, et cette commission a pouvoir de soumettre les toxicomanes à un traitement obligatoire (Art.118 al.3, 119, 120 de la loi 69-54), dont elle contrôlera le déroulement (Art.19 al.4 N. loi 92-52)⁹⁷⁸. Il faudrait également citer l'article 10 du décret beylical du 5 mai 1922 relatif aux **vaccinations obligatoires**⁹⁷⁹ (toujours en vigueur) dont les médecins ont la charge de constater les infractions en la matière (Art.10)⁹⁸⁰. Enfin, nous citerons le médecin psychiatre dans le cas des **malades mentaux**, auparavant hospitalisés d'office, qui ne se présentent pas aux visites de contrôle après leur sortie de l'hôpital, telles que fixées par leur médecin traitant. Ce médecin traitant peut alors demander au tribunal

⁹⁷³ Cf. infra, I.2.

⁹⁷⁴ L'interruption volontaire de grossesse est légale en Tunisie durant les trois premiers mois de la grossesse, et en-dehors de ce délai, si la santé de la mère ou de l'enfant à naître est menacée (Art.214 du Code pénal, alinéas 3,4,5).

⁹⁷⁵ Loi 92-71 du 27 juillet 1992, telle que modifiée en 2007, Disponible sur <http://www.legislation.tn/sites/default/files/journal-officiel/1992/1992F/Jo05092.pdf> et <http://www.legislation.tn/sites/default/files/fraction-journal-officiel/2007/2007F/014/TF2007121.pdf> (25.03.19).

⁹⁷⁶ Entendue extensivement : médecin, médecin-dentiste, pharmacien, biologiste.

⁹⁷⁷ Loi 92-52 du 18 mai 1992 relative aux stupéfiants et loi 69-54 du 26 juillet 1969 relative aux substances vénéneuses, disponibles sur : <https://legislation-securite.tn/fr/node/44463> et <http://www.legislation.tn/sites/default/files/journal-officiel/1969/1969F/Jo02969.pdf> (25.03.19).

⁹⁷⁸ Seuls les toxicomanes qui se seraient présentés spontanément à la cure de désintoxication pourront garder, la première fois uniquement, l'anonymat et ne risqueront pas de poursuites judiciaires (Art.21 loi 92-52).

⁹⁷⁹ Décret beylical du 5 mai 1922 relatif aux vaccinations obligatoires, Journal officiel de Tunisie (J.O.T.) du 13 mai 1922 (n°38) page 654.

⁹⁸⁰ Jamais appliqué, semblerait-il.

d'ordonner leur présentation pour poursuivre leur traitement (Art.30 de la loi 92-83 du 3 août 1992 relative à la santé mentale et aux conditions d'hospitalisation en raison de troubles mentaux)⁹⁸¹.

Concernant les **violences faites aux femmes**, la loi 2017-58 du 11 août 2017 relative à l'élimination de la violence à l'égard des femmes⁹⁸² oblige « *toute personne, y compris celle tenue au secret professionnel, à alerter les autorités compétentes de tout cas de violence (...) dès qu'elle en a pris connaissance, l'a observé ou en a constaté les effets* » (Art.14). Cette dénonciation doit demeurer anonyme (sauf dans le cas de poursuites juridictionnelles) et n'est passible d'aucune poursuite.

Concernant la **protection de l'enfance**, la loi 95-92 du 9 novembre 1995⁹⁸³ pose de manière contraignante le devoir de signalement à l'égard de « *toute personne, y compris celle qui est tenue au secret professionnel, est soumise au devoir de signaler au Délégué à la protection de l'enfance tout ce qui est de nature à constituer une menace à la santé de l'enfant, ou à son intégrité physique ou moral* » (Art.31), les médecins étant explicitement désignés par l'alinéa 2 du même article.

Le devoir de signalement des médecins s'applique aussi, depuis 2004, aux cas d'**émigration clandestine** (Loi organique 2004-6 du 3 février 2004⁹⁸⁴). Toute personne, *même soumise au secret professionnel*, qui s'abstient « *de signaler immédiatement aux autorités compétentes les informations, renseignements et actes dont il a eu connaissance* » concernant une tentative d'émigration ou d'aide apportée risque une peine de prison et une amende (Art.45).

Les textes que nous avons cités et qui sont relatifs au devoir de signalement posent de manière claire une obligation mais sans entrer dans les détails des modalités et procédures de ce signalement ; tout au plus, il donnera une indication relative à l'autorité compétente pour recevoir ce signalement.

Il n'y a pas, à notre connaissance, de jurisprudence relative au devoir de signalement ou aux exceptions au secret médical.

Les principes de base concernent la protection de certaines personnes vulnérables, la recherche de concrétisation d'un ordre public sanitaire ou la sauvegarde de la sécurité nationale.

2. Devoir du personnel soignant de déclarer les cas de blessures par arme à feu

Remarque préliminaire. Face à l'absence de textes spécifiques envisageant le cas des blessures par arme à feu, nous sommes partis d'une interprétation des textes existants, pouvant être utilisés par extrapolation, puisque prévus pour toutes les formes de violences, blessures, atteintes à l'intégrité physique des personnes.

Les textes suivants prévoient une **obligation de signalement**, qui est toujours en rapport avec la sécurité publique ou, plus généralement, le maintien de l'ordre public.

⁹⁸¹ Pour des raisons compréhensibles, les psychiatres n'utilisent cette possibilité de poursuite du traitement par leurs malades que de manière rarissime. Loi disponible sous <http://www.legislation.tn/sites/default/files/journal-officiel/1992/1992F/Jo05292.pdf> (26.03.19).

⁹⁸² Loi 2017-58 du 11 août 2017 relative à l'élimination de la violence à l'égard des femmes, disponible sur <http://www.legislation.tn/sites/default/files/news/tf2017581.pdf> (26.03.19).

⁹⁸³ Disponible sur <https://www.ilo.org/dyn/natlex/docs/WEBTEXT/42904/64989/F95TUN01.htm> (26.03.19).

⁹⁸⁴ Cette loi modifie et complète la loi 75-40 du 14 mai 1975 relative aux passeports et aux documents de voyage. Disponible sur <https://www.jurisitetunisie.com/tunisie/codes/passeport/passeport2000.htm> (25.03.19).

- Le texte général applicable en la matière est le **code de procédure pénale**⁹⁸⁵. « *Toutes les autorités et tous les fonctionnaires publics*⁹⁸⁶ *sont tenus de dénoncer au procureur de la République les infractions qui sont parvenues à leur connaissance dans l'exercice de leurs fonctions et lui transmettre tous renseignements, procès-verbaux et actes y relatifs. En aucun cas, ils ne peuvent être actionnés en dénonciation calomnieuse, ni en dommages-intérêts, en raison des avis qu'ils sont tenus de donner par le présent article, à moins d'établir leur mauvaise foi* » (Art.29). Ce texte est à mettre en rapport avec un texte à caractère plus spécifique, le Règlement général intérieur des hôpitaux (op. cit.) : « *Dans le cas de signes ou d'indices de mort violente ou suspecte d'un hospitalisé, le directeur [de l'hôpital] prévenu par le médecin chef de service, avise sans délai l'autorité judiciaire (...)* ». (Art.28). Il ressort de ces dispositions que **le médecin exerçant une mission publique (au sein d'un établissement hospitalier public ou privé) a l'obligation de signaler, le cas échéant par le directeur de l'hôpital, les infractions dont il a eu connaissance dans le cadre de ses fonctions.**
- Loi 2004-63 relative à la protection des données à caractère personnel (Op. cit.), article 53 : « *Les disposition de la présente section s'appliquent au traitement des données à caractère personnel réalisé par les autorités publiques, les collectivités locales et les établissements publics à caractère administratif dans le cadre de la sécurité publique ou de la défense nationale, ou pour procéder aux poursuites pénales, ou lorsque ledit traitement s'avère nécessaire à l'exécution de leurs missions conformément aux lois en vigueur* ». L'exigence posée par l'article 53 se situe dans une section de la loi intitulée « Du traitement des données à caractère personnel par les personnes publiques », qui inclut les établissements publics de santé, et donc les dossiers de leurs patients, il devient dès lors obligatoire pour lesdits établissements de transmettre des données les concernant dans le cadre d'une enquête pénale ou pour des motifs de sécurité publique. Concernant le devoir de signalement dans le cadre de la **lutte contre le terrorisme et le blanchiment d'argent**, lutte qui constitue un cadre possible d'une blessure par arme à feu, une évolution relative s'est opérée entre 2003 et 2015. En 2003 (loi 2003-75 du 10 décembre 2003⁹⁸⁷) **toute personne, même tenue au secret professionnel, qui ne signalait pas des faits ou renseignements relatifs aux infractions terroristes était passible de sanctions.** Aujourd'hui, sous l'empire de la loi organique 2015-26 du 7 août 2015 relative à la lutte contre le terrorisme et la répression du blanchiment d'argent⁹⁸⁸, les choses sont moins claires : **les médecins sont exceptés de ce devoir de signalement – qui s'impose à tous en principe - mais uniquement « en ce qui concerne les secrets dont ils ont pris connaissance au cours ou à l'occasion de l'exercice de leur mission »** (Art.37 al.3) et sous certaines autres conditions. En effet, en application de l'art. 37 alinéa 5 de la même loi, l'exception à l'obligation de signalement ne concerne pas **les informations dont le médecin aurait pris connaissance dans le cadre de sa mission mais dont le signalement aux autorités aurait permis d'éviter la commission d'infractions terroristes dans le futur.**

⁹⁸⁵ Loi 68-23 du 24 juillet 1968, disponible sur <https://www.jurisitetunisie.com/tunisie/codes/cpp/cpp1000.htm> (25.03.19).

⁹⁸⁶ Remarque explicative importante : l'expression « Fonctionnaires publics » utilisée dans le code de procédure pénale tunisien est reprise du code pénal. C'est une expression générique, recouvrant l'ensemble des salariés du secteur public et du secteur privé, des professionnels tels que les avocats experts, huissiers notaires et huissiers de justice... et toute personne désignée par une autorité publique à exercer une mission bien déterminée. Cette inclusion est destinée à les rendre passibles de sanctions pour certaines infractions du code pénal.

⁹⁸⁷ Disponible sur <https://www.imolin.org/doc/amlid/Tunisia/Tunisia Loi No. 2003-75 relative au soutien des efforts internationaux de lutte contre le terrorisme et a la repression du blanchiment dargent.pdf> (25.03.19).

⁹⁸⁸ Loi organique 2015-26 du 7 août 2015 relative à la lutte contre le terrorisme et la répression du blanchiment d'argent, disponible sur <http://www.legislation.tn/sites/default/files/news/tf2015261.pdf> (25.03.19).

Ainsi, dans l'hypothèse où le médecin prend connaissance d'informations dont le signalement est susceptible d'éviter la commission d'infractions terroristes futures, il reste tenu de divulguer les informations confidentielles, sous peine d'être tenu coupable d'infraction terroriste lui-même ou elle-même. Enfin, la même disposition précise qu'aucune action en dommage ou en responsabilité pénale ne peut être engagée contre celui qui a accompli, de bonne foi, le devoir de signalement. Ainsi, le dispositif mis en place par **la loi anti-terrorisme encourage très fortement les médecins**, qu'ils exercent dans des établissements publics ou privés, **à signaler les informations confidentielles puisqu'ils y sont tenus par la loi dès que le signalement est « susceptible » d'éviter la commission d'infraction terroristes à venir et que, s'ils le font de bonne foi, ils ne seront pas punissables, mais s'ils ne le font pas, ils risquent d'être reconnus coupable d'infraction terroriste**. Aussi, en pratique, **les services d'urgence des hôpitaux publics et des cliniques privées signalent systématiquement aux autorités de police les blessés s'adressant à eux**.

- L'existence d'une blessure par arme à feu peut également être révélée par **le médecin réquisitionné dans le cadre d'une instruction**. La réquisition obéit aux règles des articles 101 à 103 du code de procédure pénale. *« Le juge d'instruction peut, lorsque les circonstances paraissent l'exiger, commettre un ou plusieurs experts, pour procéder à des vérifications d'ordre technique qu'il précise »* (Art.101), dans un délai imparti (Art.102). Le médecin expert est alors assimilé, pour l'établissement du certificat médical initial à un auxiliaire de la justice et il doit tenir le juge instruction constamment informé du développement de leurs opérations (Art.102). Le rapport du médecin expert doit contenir ses conclusions (Art.103) et se conformer aux exigences du code de déontologie médicale. *« Dans la rédaction de son rapport, le médecin expert ne doit révéler que les éléments de nature à fournir les réponses aux questions posées dans la décision qui l'a nommé. Hors de ces limites, le médecin expert doit taire ce qu'il a pu apprendre à l'occasion de sa mission »* (Art.74).

2.1. Conditions

Lorsque le blessé par arme à feu est soigné dans un **établissement sanitaire**, public ou privé, le médecin prévient l'administration de l'établissement qui prend attache avec les services de la police judiciaire ou directement le procureur de la République territorialement compétent. Ce rapportage par l'établissement sanitaire sera inutile dans le cas où ce seront les services de la protection civile qui auront eux-mêmes amené le blessé (*« L'admission d'un malade peut être prononcée d'office par le ministre de la santé ou le directeur régional de la santé publique. Dans ce cas, notification en est faite à l'administration de l'hôpital et au médecin chef de service intéressé »*). Art. 17 du Règlement général intérieur des hôpitaux). Dans ce premier cas de figure, le médecin n'a pas de contact direct avec les services de la police judiciaire. Par contre, il peut arriver, même si cette hypothèse est rarissime, qu'une blessure par arme à feu soit soignée, par exemple en cas d'urgence et de proximité, au cabinet d'un médecin. Dans quelle mesure sera-t-il obligé de rapporter cela ? Il s'agit là qu'un questionnement éthique mais l'on peut penser que la réponse peut être positive puisque, dans le cas le plus anodin de blessure par arme à feu il s'agira toujours d'une infraction pénale (Art.316-3° du code pénal) et que le port d'armes est prohibé en Tunisie sauf autorisation spéciale (Loi n° 69-33 du 12 juin 1969, réglementant l'introduction, le commerce, la détention et le port d'armes). De plus, l'existence de la loi antiterroriste avec les sanctions lourdes qu'elle comporte peut mener le médecin à informer.

La divulgation aux autorités des blessures par arme à feu des patients n'est pas présentée comme une condition préalable au traitement, et ce, sur la base de l'interprétation conjointe de deux textes réglementaires : le Règlement général intérieur des hôpitaux et le code de déontologie médicale.

Le règlement général intérieur des hôpitaux contient nombre de dispositions qui nous permettent d'affirmer que le devoir de soigner les blessés admis en urgence (cas d'une blessure par arme à feu) est primordial : leur mission première est de *soigner toutes les personnes dont l'état requiert leurs*

services (Art.3 et 7), citant les *blessés admis en urgence* (Art.1^{er}) qui peuvent être admis, sur décision du directeur de l'hôpital, *même sans pièces d'état-civil et sans condition de remboursement* (Art.12). Lorsque les soins urgents relèvent d'une discipline n'existant pas dans l'établissement, le patient le dirige rapidement vers un autre établissement (Art.13).

Le code de déontologie médicale reprend ces exigences de soins par rapport au médecin lui-même. « *Le respect de la vie et de la personne humaine constitue en toute circonstance le devoir primordial du médecin* » (Art.2). Hors le cas de force majeure, « *tout médecin doit porter secours d'extrême urgence à un malade en danger immédiat (...)* » (Art.5), il est « *tenu d'assurer les soins aux malades* » (Art.31), même sans le consentement du tuteur légal en cas d'urgence (Art.35). Il manquerait sinon à ses devoirs essentiels et tomberait sous le coup d'inculpation d'*abstention délictueuse* (Loi 66-48 du 3 juin 1966) si le blessé venait à mourir ou souffrirait d'un préjudice corporel, ou verrait son état s'aggraver (Art.2). Le code de déontologie évoque spécifiquement le cas des **conflits armés** durant lesquels « *la mission essentielle du médecin est d'assurer la sauvegarde de la vie et de la santé humaine* » (Art.29).

2.2. Champ d'application

La totalité de l'identité doit être révélée, dans la mesure où elle est connue (Voir supra, II.3). Aucune autre information concernant le nombre et la localisation des blessures, ou le type de balle utilisée n'est fourni aux services de police⁹⁸⁹.

2.3. But

C'est essentiellement dans un but de **détermination des responsabilités**, et aussi dans le cadre de la **lutte antiterroriste**. Le but est principalement la poursuite pénale subséquente à la blessure par arme à feu, et le cas échéant, le déclenchement de l'enquête du pôle antiterroriste.

C'est le procureur de la République qui « *apprécie la suite à donner aux plaintes et dénonciations qu'il reçoit ou qui lui sont transmises* » (Art.30 Code de procédure pénale), ces plaintes ayant été reçues par les officiers de police judiciaire (Art.13).

C'est à l'administration de la structure sanitaire concernée, ou pour le médecin s'il s'agissait d'un libre praticien, d'informer les services territorialement compétents du **ministère de l'intérieur, soit le poste de police territorialement compétent**. La direction régionale de la santé et l'administration en charge de la tutelle des structures sanitaires au sein du ministère de la santé sera également informée par la suite.

2.4. Conséquences du non-respect

Chaque texte spécial qui exige du médecin de porter à la connaissance des autorités compétentes une information précise comporte des sanctions pénales.

Ainsi, en cas de non-signalement de l'infraction terroriste par le médecin qui en a eu connaissance dans le cadre de ses fonctions, alors que le signalement aurait été susceptible de permettre d'éviter la commission d'infraction terroriste future, le médecin est susceptible d'être reconnu coupable de l'infraction terroriste future. Il s'agit d'une amende dont le montant varie entre 5.000 et 10.000 dinars et d'un emprisonnement d'une durée variant de un à cinq ans.

Les sanctions ordinales ne semblent pas devoir s'appliquer ici car il n'y a pas de violation d'un devoir déontologique.

⁹⁸⁹ D'après nos investigations auprès des services d'urgence des hôpitaux publics et des cliniques privées et des services de police.

3. Protection de la fourniture des soins de santé

3.1. Législation spécifique protégeant la fourniture de soins de santé

Il n'existe pas une législation spécifique protégeant explicitement l'exercice des activités de soins de santé en reprenant les principes éthiques. Cependant, l'ensemble du corpus textuel existant, et notamment **le code de déontologie ou la loi relative à l'organisation sanitaire laissent entendre que les activités de soins sont primordiales**. Plusieurs dispositions du code de déontologie sont des transpositions de principes éthiques⁹⁹⁰. Nous rappellerons notamment **l'obligation de soins des médecins, notamment des malades admis en urgence**, sans besoin de pièce d'identité ou d'informations concernant leur prise en charge financière. Le code de déontologie débute en rappelant que « *Le respect de la vie et de la personne humaine constitue en toute circonstance le devoir primordial du médecin* » (Art. 2 du décret 93-1155, précité).

3.2. Moyens de résolution des conflits potentiels entre éthique médicale et obligation de déclarer les cas de blessures par arme à feu

Aucune des lois que nous avons citées ne résout ou même n'évoque ce problème bien réel de tension entre l'obligation de divulgation et les devoirs éthiques du médecin (obligation de soins, obligation de garder le secret, obligation de respecter la volonté du malade...).

Par recoupements, nous pouvons citer certaines dispositions textuelles, de rangs divers, qui peuvent orienter la réflexion éthique d'un médecin confronté à ses obligations de soins et à un devoir d'aide à la préservation de la sécurité nationale. Les pistes d'une véritable réflexion éthique se situent dans le code de déontologie médicale qui place les soins au malade au-dessus de tout. Ce code lui impose en effet⁹⁹¹ comme **devoir primordial** « *Le respect de la vie et de la personne humaine* » (Art.2). Mais tout en respectant ce devoir fondamental pour lui, le médecin doit cependant tenir compte de certains impératifs qu'il doit savoir adapter selon le degré de gravité qu'impliquerait son silence (non divulgation). Mis à part les cas en rapport direct avec la sécurité nationale, les autres cas de divulgation relèvent plutôt d'une réflexion personnelle du médecin.

Les avis du **Comité national d'éthique médicale** sont particulièrement instructifs en matière de tensions entre l'obligation de divulgation et l'éthique du médecin qui se doit d'être un soignant avant tout (Avis n°2 sur les comités d'éthique locaux, avril 1997⁹⁹²). La mise en place de comités d'éthique locaux est destinée à permettre la formation et l'éducation du personnel de santé aux questions éthiques ainsi qu'à **informer et assister le médecin dans la prise de décision sur des questions qui touchent à l'éthique**. Ces comités d'éthique locaux, qui ne procèdent d'aucun texte officiel, existent dans plusieurs hôpitaux et leur mission est d'amorcer une réflexion éthique collective sur des questions biomédicales mais qui peut être extrapolée à toute autre question soulevant des problèmes déontologiques. Le Comité national d'éthique médicale recommande dans son avis n°2 de renforcer leur action et d'élargir leur champ de compétence⁹⁹³.

⁹⁹⁰ Concernant le code de déontologie médicale, et son esprit protecteur des devoirs du médecin, voir *supra*, II.3 in fine.

⁹⁹¹ Comme nous l'avons relevé *supra* III.1.

⁹⁹² <http://www.comiteethique.rns.tn/ethique/avis/avis2.pdf>. Le Comité d'éthique médicale organise chaque année une journée d'information et de réflexion ouverte au public. Certaines portent directement sur le dilemme éthique du médecin comme *La médecine en milieu carcéral* (2015) ; *Ethique et grève de la faim* (2013).

⁹⁹³ Sur une vue synthétique du rôle des comités d'éthique locaux, voir notre contribution disponible sur <http://www.comiteethique.rns.tn/ethique/seminaire.html> (15.05.19). Il faut aussi signaler que ces comités d'éthique dont le rôle est d'initier et d'instaurer une réflexion éthique collective du personnel de santé existent dans un certain nombre de cliniques privées.

T. UKRAINE

Terminology

The Ukrainian legal system includes a hierarchy of various types of legal instruments, which have different normative force; where a governmental body is indicated, that body has sole authority to impose these norms. They include, in the order of decreasing force.

1. The Constitution
2. International treaties and conventions
3. Laws adopted by the Parliament. These include (in order of decreasing importance)
 - a. Fundamentals of Legislation
 - b. Laws
4. Regulations of the Parliament of Ukraine
5. Decrees issued by the President
6. Resolutions issued by the Cabinet
7. Acts of ministries and other central executive bodies etc.

Acts of ministries (which have normative force) are first adopted by the competent authority, and then are put into effect by an order of the relevant ministry.

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

The Fundamentals of the Legislation of Ukraine on Healthcare is a basic and essential legislative act that defines the legal, economic and social principles of healthcare in the Ukraine⁹⁹⁴ on which subsequent legislation and regulations can be based. It characterizes the **fact of applying for medical assistance as confidential information of a patient**⁹⁹⁵ and prohibits healthcare professionals and other officials who have access to such information from disclosing it, except where specifically permitted **by a legislative act**.⁹⁹⁶

There are also two laws that are relevant here. The *Law on Information* qualifies information about a person's state of health as confidential, and prohibits its unauthorized collection, storage, use and disclosure, except where specifically permitted by **law and only to the extent that such collection, storage, use and/or disclosure is in the interest of national security, economic welfare and/or protection of human rights**.⁹⁹⁷ The same provision is contained in the *Law on protection of personal data* regarding processing of a person's confidential information.⁹⁹⁸

In each case, healthcare information may only be disclosed if there is a specific legislative exception to the general prohibition concerning treatment of personal data. The two laws described in the

⁹⁹⁴ *Fundamentals of the Legislation of Ukraine on Healthcare*, 19.11.1992 № 2801-XII, available at: <http://zakon.rada.gov.ua/laws/show/2801-12#n2> (16.11.2018).

⁹⁹⁵ *Ibid.*, Article 39-1.

⁹⁹⁶ *Ibid.*, Article 40.

⁹⁹⁷ *The Law of Ukraine on Information*, 02.10.1992 № 2657-XII, Article 11 (1,2), available at: <http://zakon.rada.gov.ua/laws/show/2657-12#o182> (16.11.2018).

⁹⁹⁸ *Law on protection of personal data*, 01.06.2010 № 2297-VI, Article 6 par. 6, available at <http://zakon.rada.gov.ua/laws/show/2297-17#n40> (19.11.2018).

preceding paragraph refer to “laws” whereas the Fundamentals of Legislation on Health Care uses the broader term “legislative act”. The term “legislative acts” may be interpreted broadly or narrowly, *i.e.* as referring either to a selection of acts of different normative force,⁹⁹⁹ or only to **laws** (which may only be adopted by the Parliament of the Ukraine). Despite the absence of an established practice, in our opinion, the reasonable interpretation of the term “legislative acts” for the purposes of the *Fundamentals of the Legislation of Ukraine on Healthcare* would be that it refers **not only to the laws of the Ukraine, but to the whole system of legal instruments**. This should be the case because *the Fundamentals of the Legislation of Ukraine on Healthcare* (1993) was adopted after *the Law on Information* (1992); moreover, the current edition of *the Fundamentals on Healthcare* is more recent than those of the *Law on Information* and the *Law on protection of personal data* (2018 as opposed to 2017). Therefore, in the case of a conflict between provisions of these two laws and those of the *Fundamentals*, the general rule that the most recent instrument takes precedence should be applied. Additionally, such interpretation would correspond to the rules concerning precedence of general and special legal rules.¹⁰⁰⁰ The theory of law, as well as explanations¹⁰⁰¹ of the Ukrainian Ministry of justice, recognize the primacy of provisions of a special act, unless they are altered by a newly adopted general act of the same or higher legal force.¹⁰⁰² Another reason for this hypothesis is that such an interpretation would be in line with current legislation. In particular, the duty of healthcare professionals to inform police about a patient with injuries of a criminal nature is stipulated not by law, but **by acts of ministries**. Therefore, it is reasonable to suppose that such acts are based on provisions of *the Fundamentals on Healthcare*, even though this is not explicitly mentioned.

The following acts stipulate a requirement for healthcare professionals to report patients with injuries of a specific type:

- 1) Resolution of the Cabinet of Ministers *on the ratification of guidance for investigation and accounting of accidents not related to working activities* (requires reporting of injuries resulted from the use of weapons, ammunitions or explosives, or caused by other people);¹⁰⁰³
- 2) Order of the Ukrainian Ministry of Internal Affairs and the Ukrainian Ministry of Health Protection *on the procedure for accounting of applications and arrivals to medical treatment facilities of persons with physical injuries of a criminal character and informing police*;¹⁰⁰⁴

⁹⁹⁹ Decision of the Constitutional Court of Ukraine in Case about interpretation of the word “legislation” within the meaning of the Labor Code of Ukraine, <http://zakon.rada.gov.ua/laws/show/en/v012p710-98> (20.09.2018).

¹⁰⁰⁰ General legal rules regulate all relations of a particular class, while special rules are designed to regulate specific type of relations within the scope of this class. In our case, provisions of the Law on Information are general rules because they are applied to any legal relations concerning information. *The Fundamentals of the legislation on Healthcare* represents a legal rule of a special type, since it does not regulate all relations with information involved, but only those that concern medical secrecy. Source: *Загальнотеоретична характеристика спеціальної правової норми та її конкуренції із загальною нормою*, В. В. Бойко, Часопис Національного університету “Острозька академія”, Серія “Право”, 2013, № 1(7), available at <http://lj.oa.edu.ua/articles/2013/n1/13bvivzn.pdf> (16.11.2018)

¹⁰⁰¹ Information notice on the practice of implementation of legal rules in case of conflicts of laws, Ministry of Justice of the Ukraine, 26.12.2008, N 758-0-2-08-19, available at: <http://zakon.rada.gov.ua/laws/show/v0758323-08> (29.10.2018).

¹⁰⁰² *Ibid.*

¹⁰⁰³ Resolution of the Cabinet of Ministers *on the ratification of guidance for investigation and accounting of accidents not related to working activities*, 22.03.2001 № 270, available at: <http://zakon.rada.gov.ua/laws/show/270-2001-%D0%BF> (18.09.2018).

¹⁰⁰⁴ Order of the Ministry of Internal Affairs of the Ukraine and the Ministry of Health Protection of the Ukraine *on the procedure of accounting of applications and arrivals to medical treatment facilities of persons with physical injuries of a criminal character and informing police about such cases*, 06.07.2016 № 612/679, available at: <http://zakon.rada.gov.ua/laws/show/z1051-16> (04.06.2018).

- 3) Order of the Ukrainian Ministry of Defense *on ratification of guidance for investigation and accounting of accidents, professional illness and emergencies with military personnel of the Armed Forces of the Ukraine involved*;¹⁰⁰⁵
- 4) Order of the Ukrainian Ministry of Internal Affairs *on the ratification of guidance for investigation and accounting of accidents, professional illness and emergencies in bodies and subdivisions of the Ukrainian Ministry of Internal Affairs*.¹⁰⁰⁶

The aforementioned acts regulate procedures for investigation of accidents which have a specific character, or which happened to a person performing specific functions, be it serving in the Ukrainian Armed Forces or working for one of the bodies of the Ukrainian Ministry of Internal Affairs. The stipulation of a duty of healthcare professionals to report about patients in these situations plays a transitional role, necessary to duly commence and run the investigation. Therefore, acts lay down requirements for such reporting and designate the authorities competent to investigate such accidents. In addition, acts require medical treatment facilities to register in a Record Book each case of a patient with injuries of a specific type, and provide a model form for such recording.

Some requirements of disclosure of information about a person's state of health are contained in other legislation. They include, in particular:

- 1) If there are reasonable grounds to suggest that injuries have been caused as a result of domestic violence, there is an obligation to report such incidents to the police or to the office of children's services;¹⁰⁰⁷
- 2) If information about the mental health of a person is necessary for pre-trial investigation or for trial proceedings, and there is a **written request** of an investigator, prosecutor, representative of court or other authorized body.¹⁰⁰⁸

This list of exceptions is not exhaustive and legislation may identify other cases where disclosure of medical secrecy is dictated by social needs.

In case of appearance of an emergency situation the public order in the Ukraine switches to a one of certain specific operating modes: the regime of high alert, the regime of an emergency situation, or the regime of a state of emergency.¹⁰⁰⁹ Each regime stipulates special competences and functions for the state uniform system of civil defense of the Ukraine,¹⁰¹⁰ and may introduce changes to the legal

¹⁰⁰⁵ Order of the Ministry of Defense of the Ukraine *on ratification of guidance for investigation and accounting of accidents, professional illness and emergencies with military servants of the Armed Forces of Ukraine involved*, 06.02.2001 № 36, available at: <http://zakon.rada.gov.ua/laws/show/z0169-01> (14.09.2018).

¹⁰⁰⁶ Order of the Ministry of Internal Affairs of Ukraine *on the ratification of guidance for investigation and accounting of accidents, professional illness and emergencies in bodies and subdivisions of the Ministry of Internal Affairs of Ukraine*, 27.12.2002 № 1346, <http://zakon.rada.gov.ua/laws/show/z0083-03> (14.09.2018).

¹⁰⁰⁷ *Law on prevention and fighting against domestic violence*, 2018, Article 12, available at: <http://zakon.rada.gov.ua/laws/show/2229-19?lang=uk> (19.11.2018).

¹⁰⁰⁸ *Law on psychiatric aid*, 2000, available at <http://zakon.rada.gov.ua/laws/show/1489-14> (04.06.2018).

¹⁰⁰⁹ *Code of Civil Defense of the Ukraine*, 02.10.2012, № 5403-VI, Article 11, available at: <http://zakon.rada.gov.ua/laws/show/5403-17#n51> (19.11.2018).

¹⁰¹⁰ The state uniform system of civil defense of the Ukraine comprises various governmental, territorial and local bodies that are divided into four groups according to their competences: permanent bodies, coordinating bodies, functional and territorial subsystems. Source: Resolution of the Cabinet of Ministers of the Ukraine *on ratification of regulation of the state uniform system of civil defense*, 09.01.2014 № 11, p.1, available at: <http://zakon.rada.gov.ua/laws/show/11-2014-%D0%BF#n10> (19.11.2018).

regime in particular territories or in the country as a whole. The legal regimes of a state of emergency and of martial law have separate laws¹⁰¹¹ that regulate the procedure for their introduction, peculiarities of their functioning and specific limitations on constitutional rights and freedoms that operate during these periods.

Medical assistance in emergencies is provided by centers, stations and departments of emergency medicine and medicine of disasters and their ambulance crews.¹⁰¹² They operate on a daily basis, helping patients in a critical state, as well as in extraordinary situations, which pose (or may pose) threats to life or the health of people, or lead (or may lead) to numerous deaths or injured people.¹⁰¹³

In the Ukraine there is also a system of military healthcare facilities. These hospitals operate on a regular basis, providing personnel of the Ukrainian Armed Forces, National Guards and other law enforcement bodies with appropriate medical, rehabilitative or other types of assistance. At the time of martial law, military hospitals merge their activities with civilian healthcare facilities for joint performance of rescue operations.¹⁰¹⁴ The Parliament of the Ukraine may also grant to civilian medical treatment facilities some competences of military hospitals, so they can treat victims of an armed conflict, even in the absence of a declaration of martial law.¹⁰¹⁵

The Code of Civil Defense of the Ukraine stipulates the possibility of creating **voluntary forces** in case of an emergency (or threats of its appearance). These forces are composed of citizens of the Ukraine, who have expressed their willingness to participate in their activities.¹⁰¹⁶ Currently, due to an armed conflict in the Eastern part of the Ukraine, and the lack of military medical resources, **the Pirogov First Volunteer Mobile Hospital (PFVMH)** was created to assist local healthcare professionals in providing medical aid. PFVMH is a **nongovernmental** project involving civilian healthcare professionals, who expressed their wish to work in the zones of armed conflict.¹⁰¹⁷ According to the legal acts regulating its activity, PFVMH has the status of a **mobile division of emergency medicine**.¹⁰¹⁸ Ukraine recognizes standards proclaimed by various international conventions and agreements, as well as by *the International Code of medical ethics*, and other declarations of the World Medical Association.¹⁰¹⁹ However, current Ukrainian legislation does not have an official document of a similar nature. *The Ethical Code of Doctors of the Ukraine*¹⁰²⁰ does not have binding normative force.

¹⁰¹¹ *Law on the legal regime of martial law*, 12.05.2015 № 389-VIII, available at: <http://zakon.rada.gov.ua/laws/show/389-19> (16.11.2018); *Law on the legal status of the state of emergency*, 16.03.2000 № 1550-III, available at <http://zakon.rada.gov.ua/laws/show/1550-14> (16.11.2018).

¹⁰¹² The Law on emergency medicine, 05.07.2012 № 5081-VI, Article 5, available at: <http://zakon.rada.gov.ua/laws/show/5081-17#n42> (07.11.2018).

¹⁰¹³ Resolution of the cabinet of ministers of the Ukraine *on ratification of the model provisions of the center of emergency healthcare and medicine of disasters*, 21.11.2012 № 1116, available at: <http://zakon.rada.gov.ua/laws/show/1116-2012-%D0%BF> (19.11.2018).

¹⁰¹⁴ *Ibid.*

¹⁰¹⁵ Regulation of the Verkhovna Rada of the Ukraine *on providing military servants who are injured, contused or having other health impairments obtained as a result of participation in events in the East of the Ukraine*, 29.05.2014 № 1286-VII, available at: <http://zakon.rada.gov.ua/laws/show/1286-18> (06.11.2018).

¹⁰¹⁶ *Code of Civil Defense of the Ukraine*, *op. cit.*, Article 27 par. 3.

¹⁰¹⁷ Source: <http://www.medbat.org.ua/en/about-pfvmh/> (01.11.2018).

¹⁰¹⁸ Memorandum on cooperation for the project Pirogov First Volunteer Mobile Hospital, Ministry of Health of the Ukraine, Ministry of Defense of the Ukraine, the General Staff of the Armed Forces of the Ukraine and the PFVMH Charitable Foundation, 05.02.2016, available at: http://www.medbat.org.ua/wp-content/uploads/2017/04/2016_Memorandum_Signed_Eng.pdf (01.11.2018).

¹⁰¹⁹ Source: <http://zakon.rada.gov.ua/laws/main/c433> (19.11.2018).

¹⁰²⁰ *Ethical Code of Doctors of Ukraine*, Ukrainian Medical Association, 2009, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKEwiJwenOzcvdAhvI2xoKHY3xDgMQFjACegQICBAC&url=http%3A%2F%2Fwww.vitapol.com.ua%2Fuser_files%2Fpdfs%2

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

Healthcare professionals **are required to record** facts concerning treatment of patients with injuries of a criminal character **and to report** them to the police, prosecutor or other competent authorities defined by the respective act. Recording requires filling out a special **Record Book** including the information, and in the manner, described by the relevant ministerial act. This Record Book must be provided to the police or other competent governmental authorities on demand.¹⁰²¹ Modalities of reporting vary depending on the governing act. One might set up a model form for such reporting, while others may simply require that information about an accident be provided by any means of communication.

In case of an emergency, **an officer of an ambulance station's call-center**, upon receiving information, must **register** the call and data about an accident, **report** information to the chief officer of the station's call-center and to the chief of station's operating department, and **dispatch** an emergency ambulance crew to the scene of the event.¹⁰²² The officer of the call-center also must report information received from ambulance crews in the field to a senior medical officer of the ambulance station on duty.¹⁰²³

The **ambulance crew** upon arrival on the scene of an event must report to a senior medical officer of an ambulance station the approximate amount of victims and their condition.¹⁰²⁴

The Senior medical officer of the ambulance station must report an emergency situation and measures taken to:

- 1) The chief physician of the ambulance station;
- 2) The responsible officers of:
 - a. the Ministry of Health of the Autonomous Republic of Crimea;
 - b. territorial health authorities;
 - c. territorial bodies of the Ministry of Internal Affairs;
 - d. the State Emergency Service of the Ukraine;
 - e. the command center of civil defense;
 - f. the chief sanitary inspector of a territory where the emergency occurred (if necessary).¹⁰²⁵

In addition, the senior medical officer must inform other healthcare facilities about the approximate number of injured, their conditions and medical consequences caused by an emergency situation in order for them to be prepared for treatment of the victims.¹⁰²⁶

[Fmtu%2F615651495680396_14012010190217.pdf&usg=AOvVaw1dby8GghSHhQhZ7v1hTEpg](http://zakon.rada.gov.ua/laws/show/z1051-16)
(04.06.2018).

¹⁰²¹ Order of the Ministry of Internal Affairs of the Ukraine and the Ministry of Health Protection of the Ukraine *on the procedure of accounting of applications and arrivals to medical treatment facilities of persons with physical injuries of a criminal character and informing police about such cases*, 06.07.2016 № 612/679, available at: <http://zakon.rada.gov.ua/laws/show/z1051-16> (04.06.2018).

¹⁰²² *Guidance for healthcare professionals of an emergency medicine for liquidation of medical consequences of an emergency situation or mass destruction*, ratified by the Ministry of Health of the Ukraine, 01.06.2009 № 370, p.2.1, available at: <http://zakon.rada.gov.ua/laws/show/z0867-09> (18.11.2018).

¹⁰²³ *Ibid.*, p.2.4.

¹⁰²⁴ *Ibid.*, p.3.1.

¹⁰²⁵ *Ibid.*, p.1.2.

¹⁰²⁶ *Ibid.*, p.1.4.

Our research has not revealed the existence of specific rules for reporting about injured people in zones of armed conflict or rules for providing members of illegal militant groups with medical treatment. However, since the PFVMH acts with the status of a mobile division of emergency medicine, it is reasonable to suppose that the aforementioned rules for ambulance crews are applicable also to personnel of the PFVMH.

2.1. Conditions

Conditions of reporting vary depending on the Act that governs the events in question. One act may simply require reporting the fact of having patients with injuries of a particular type, while others may establish a model form for such reporting. Moreover, each of the Acts requires medical treatment facilities to additionally record information about such patients in official Record Books and prescribes modalities for such recording.

The Order of the Ukrainian Ministry of Internal Affairs and the Ukrainian Ministry of Health Protection¹⁰²⁷ requires healthcare professionals to report to police patients with injuries of a criminal character by means of telecommunication immediately after examination of such patients. At the same time, the Order requires medical treatment facilities to keep a Record Book where information about treatment of patients with injuries of a criminal character is stored. This Book is available for police on demand and is used for verification of conformity of information recorded in the Record Book with registered reports on the commission of crimes.¹⁰²⁸

The Resolution of the Cabinet of Ministers defines cases that fall within its scope and requires reporting to be made in writing and according to the provided model form. It also requires recording of information about accidents in the Record Book in accordance with the established model form.¹⁰²⁹

The Order of the Ministry of Defense of Ukraine¹⁰³⁰ regulates the procedure for reporting accidents involving personnel of the Ukrainian Armed Forces. The Order covers accidents that cause health impairment to soldiers, including poisoning, sun or heat stroke, burns or frostbite injuries, wounds, mutilations, deaths etc. However, wounds and deaths of military personnel resulting from hostile operations in the area of warfare or in the area of an antiterrorist operation are not covered by the Order and are regarded as battlefield casualties.¹⁰³¹

*The Law on emergency medical aid*¹⁰³² **grants to everyone in the territory of the Ukraine** rights to apply for and to receive emergency medical assistance. Citizens of the Ukraine, as well as foreign citizens and stateless persons, who permanently reside in the territory of the Ukraine, refugees and people granted subsidiary protection, have a right to emergency medical aid **free of charge**. However, foreign citizens and stateless persons that temporarily reside in the territory of the Ukraine, **are**

¹⁰²⁷ *Procedure of accounting of applications and arrivals of persons with injuries of a criminal character* ratified by the Order of the Ministry of Internal Affairs and the Ministry of Health Protection, *op. cit.*, p.4.

¹⁰²⁸ Order of the Ministry of Internal Affairs of Ukraine and the Ministry of Health Protection of Ukraine *on the procedure of accounting of applications and arrivals of persons with injuries of a criminal character*, *op. cit.*, p.4 (2).

¹⁰²⁹ Resolution of the Cabinet of Ministers *on guidance for investigation and accounting of accidents not related to working activities*, *op. cit.*, Annex 2.

¹⁰³⁰ Order of the Ministry of Defence of the Ukraine *on investigation of accidents, professional illness and emergencies*, *op. cit.*

¹⁰³¹ *Ibid.*, p.3.

¹⁰³² *The Law on emergency medical aid*, 05.07.2012 № 5081-VI, Article 3, available at: <http://zakon.rada.gov.ua/laws/show/5081-17> (18.11.2018).

provided with medical assistance on a paid basis.¹⁰³³ They may also have funding from the state budget, providing that the funds spent will be reimbursed later in full by the patient.¹⁰³⁴

Ukrainian legislation does not **treat reporting gunshot wounds as a precondition** for a healthcare professional to provide a patient with medical assistance. On the contrary, the Criminal Code of the Ukraine establishes **criminal liability** of healthcare professionals **for refusal to provide a patient with appropriate medical aid**, provided that they were able to do so, and had a reasonable degree of understanding that such inactivity could cause grave consequences for the health and life of a person requiring help.¹⁰³⁵ Moreover, being a contracting state to four Geneva Conventions¹⁰³⁶ and their three additional protocols,¹⁰³⁷ the Ukraine **adheres to international standards of humanitarian law**, and, thus, undertakes an obligation to treat humanely wounded and sick soldiers who are outside the battle.

This adherence to international standards of humanitarian law is emphasized in a new Military Medical Doctrine of the Ukraine.¹⁰³⁸ Moreover, the Constitution of the Ukraine indicates a list of rights and freedoms that cannot be limited even in case of announcement of an emergency or martial state.¹⁰³⁹ They are:

- 1) prohibition of discrimination based on race, color, political opinion, religion, sex, national or social origin, property, place of residence, language or other status;¹⁰⁴⁰
- 2) prohibition of deprivation of citizenship and expulsion of Ukrainian citizens, or their extradition to another state;¹⁰⁴¹
- 3) right to life and prohibition of arbitrary deprivation of life, right to defend life from illegal actions of other people;¹⁰⁴²

¹⁰³³ Resolution of the Cabinet of Ministers of the Ukraine on the ratification of procedure of providing medical support to foreigners and stateless persons, who permanently reside on the territory of the Ukraine, or who applied for status of refugee or subsidiary protection, or persons regarding whom a decision for granting status of a refugee or subsidiary protection has been adopted, or to whom this statuses have been granted, and on compensation of costs of medical support provided to foreigners and stateless persons, who temporarily reside on the territory of the Ukraine, the Cabinet of Ministers of the Ukraine, 19.03.2014, No121, p.2, available at: <http://zakon.rada.gov.ua/laws/show/121-2014-%D0%BF> (18.11.2018).

¹⁰³⁴ *Ibid.*, p. 2-1.

¹⁰³⁵ *The Criminal Code of Ukraine, op. cit., Article 139.*

¹⁰³⁶ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War, ICRC, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (18.11.2018).

¹⁰³⁷ Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, Protocol III (2005) relating to the Adoption of an Additional Distinctive Emblem, ICRC, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (18.11.2018).

¹⁰³⁸ *Military Medical Doctrine of the Ukraine*, ratified by the Resolution of the Cabinet of Ministers of the Ukraine, 31.10.2018, № 910, available at: <https://www.kmu.gov.ua/ua/npas/pro-zatverdzhennya-voyenno-medichnoyi-doktrini-ukrayini> (18.11.2018).

¹⁰³⁹ *Constitution of the Ukraine*, the Verkhovna Rada of the Ukraine, Article 64 (2), available at: <http://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#n4381> (05.11.2018).

¹⁰⁴⁰ *Ibid.*, Article 24 (2).

¹⁰⁴¹ *Ibid.*, Article 25 (1, 2).

¹⁰⁴² *Ibid.*, Article 27.

- 4) right to honor and dignity and prohibition of torture, inhuman or degrading treatment or punishment etc.¹⁰⁴³

Legislation on legal regimes of emergency and the state of martial law directly prohibits torture, inhuman or degrading treatment and punishment.¹⁰⁴⁴

2.2. Scope

Although the aforementioned Orders establish different requirements concerning the process of reporting about accidents, the scope of information that must be furnished is quite similar. Thus, in almost all cases the rules require a protocol to be drawn up that includes the following information:

- 1) about the patient (given name, surname, date of birth, place of residence and work, contact details);
- 2) about the circumstances of the accident (date and time of occurrence, place of occurrence);
- 3) about the date and time of application to a medical treatment facility for assistance/hospitalization;
- 4) about the character and location of the injuries;
- 5) about the person who has caused the injuries.

The person drawing up the protocol must be identified and must sign the document.

The procedure may vary as to whether such information must be reported directly to the competent authorities, or must be inserted in the Record Book, whereas the authorities need simply be informed by means of telecommunication that a patient has arrived with wounds of a specific character.¹⁰⁴⁵

The Order of the Ministry of Defense of Ukraine establishes a two-fold procedure for reporting accidents involving personnel of the Ukrainian Armed Forces. The first phase requires reporting to a commanding officer of the military unit to which the injured person belongs.¹⁰⁴⁶ The healthcare professionals who provided victim with medical assistance, or witnesses to the accident perform this reporting requirement. The commanding officer of the military unit must then inform and send an emergency report to his or her superior officer.¹⁰⁴⁷ In the case of death of personnel of the Armed Forces, or serious injuries, or an accident affecting several persons, the commanding officer must submit such written report not only to the relevant superior officer, but also to the relevant **military prosecutor and to the Ukrainian Military Law-enforcement Service**.¹⁰⁴⁸

Similarly, a two-fold procedure exists for reporting accidents involving officers of the Ministry of Internal Affairs of Ukraine; however, it differs with respect to the authorities to which these events must be reported. Medical treatment facilities must inform the head of the patient's division, who, in turn, in case of death or serious injuries, must file a notice with the prosecutor's office, the supervisory

¹⁰⁴³ *Ibid.*, Article 28 (1, 2).

¹⁰⁴⁴ *Law on the legal status of the state of emergency, op. cit.*, Article 24; *Law on the legal regime of martial law, op. cit.*, Article 22.

¹⁰⁴⁵ Order of the Ministry of Internal Affairs of the Ukraine and the Ministry of Health Protection of the Ukraine *on the procedure of accounting of applications and arrivals to medical treatment facilities of persons with physical injuries of a criminal character and informing police about such cases*, 06.07.2016 № 612/679, available at: <http://zakon.rada.gov.ua/laws/show/z1051-16> (04.06.2018).

¹⁰⁴⁶ Order of the Ministry of Defense of Ukraine, *op. cit.*, p. II (2).

¹⁰⁴⁷ *Ibid.*, p. II (2).

¹⁰⁴⁸ *Ibid.*, p. III (2).

body of the Ministry of Internal Affairs for protection of workers and (where necessary) the relevant authority responsible for protection of the population and the territories in emergencies.¹⁰⁴⁹

2.3. Purpose

The purpose of the reporting and recording processes stipulated by the Acts is the **investigation of the circumstances of an accident**. Each Act designates a specific authority to which information must be reported. This could be the police,¹⁰⁵⁰ the prosecutor¹⁰⁵¹ or a regional state administration¹⁰⁵², depending on the Act applied.

In case of an emergency, personnel of the emergency medical stations must organize transmission of information about any accident, its consequences and any victims to various healthcare facilities in order to ensure their capacity and readiness to accept and treat the injured.¹⁰⁵³

Reporting to territorial health authorities and other responsible officers of ministries and state agencies is necessary to put the system of civil defense on alert to handle an emergency and its consequences, and to prevent such a situation from happening again.

2.4. Consequences of non-compliance

The Order of the Ministry of Internal Affairs and the Ministry of Health Protection of the Ukraine requires managers of medical treatment facilities to appoint a person responsible for reporting to the police cases of treatment of patients with injuries of a criminal character, and for proper filling out of the Record Book.¹⁰⁵⁴ Apart from this, there is no provision in the legislation that deals explicitly with liability of healthcare professionals for failure to perform a duty of such kind.

Since the Order comes from the Ukrainian Ministry of Health, one may suppose that failure to comply with requirements of the Act may lead to **disciplinary liability**. However, our research revealed no practical cases to illustrate the procedure leading to such liability.

Due to the current political situation in the Ukraine, such misconduct could now give rise to liability for **participation in activities of illegal armed militarized groups** (Article 260),¹⁰⁵⁵ or liability for **assistance to a terrorist organization** (Article 258-3).¹⁰⁵⁶ Both these provisions are applied to persons who actively took part in the armed conflict on the side of proponents of the self-proclaimed Donetsk and Luhansk People's Republics (hereinafter referred to as the DNR and LNR). The court practice does not have a coherent approach for qualification of offences of this type due to the ambiguous status of these organizations in the Ukrainian legislation. Although the territories involved in the armed conflict were given the status of **temporarily occupied territories**¹⁰⁵⁷ (together with the Crimea and the city of Sevastopol), and legislation explicitly qualified these events as **armed aggression of the Russian**

¹⁰⁴⁹ Order of the Ministry of Internal Affairs of Ukraine, *op. cit.*, pp.3.4, 4.2.

¹⁰⁵⁰ Order of the Ministry of Internal Affairs of Ukraine and the Ministry of Health Protection of Ukraine, *op. cit.*

¹⁰⁵¹ Order of the Cabinet of Ministers, *op. cit.*

¹⁰⁵² *Ibid.*

¹⁰⁵³ *Guidance for healthcare professionals of an emergency medicine*, *op. cit.*, p.1.4.

¹⁰⁵⁴ Order of the Ministry of Internal Affairs of Ukraine and the Ministry of Health Protection of Ukraine, *op. cit.*

¹⁰⁵⁵ *Criminal Code of the Ukraine*, *op. cit.*, article 260, available at: <http://zakon.rada.gov.ua/laws/show/2341-14#n1756> (13.11.2018).

¹⁰⁵⁶ *Ibid.*, article 258-3, available at: <http://zakon.rada.gov.ua/laws/show/2341-14#n1728> (13.11.2018).

¹⁰⁵⁷ *Law on ensuring rights and freedoms of citizens and on the legal regime on the temporarily occupied territories of the Ukraine*, 15.04.2014 № 1207-VII, **Article 3**, available at: <http://zakon.rada.gov.ua/laws/show/1207-18> (20.11.2018).

Federation against the territorial integrity and sovereignty of the Ukraine, the operation conducted by the Ukrainian military forces was referred to as “**the Anti-Terrorist Operation**”.¹⁰⁵⁸ Moreover, the territories involved in the conflict, in addition to being subject to the regime of temporary occupation, are also under the regime of **an emergency situation**.¹⁰⁵⁹ The Cabinet of Ministers explained this step as being necessary to organize rescue operations of civilians and for the coordination of efforts of different state agencies.¹⁰⁶⁰ However, some experts pointed out that this could lead to a conflict of competences of different governmental authorities.¹⁰⁶¹ Thus, the current court practice varies as to whether events in the East of the Ukraine should be seen as activities of a terroristic organization or of an armed militarized group. One judge claims that it has not yet been duly affirmed that either the DNR or the LNR has the status of a terrorist organization.¹⁰⁶² Others insist that no such recognition in a law or by the international community is required in such cases, and that an individual evaluation must be made by a judge in each case as to whether the activities of a particular group correspond to the definition of “terrorist activities” in *the Law on the fight against terrorism*,¹⁰⁶³ and whether this group has the particular features of a terrorist organization.¹⁰⁶⁴

Providing medical assistance in and of itself would not be treated as providing assistance to illegal armed groups or terrorist organizations. However, failure to report a patient, if there are reasonable grounds to suppose that this person belongs to a group fighting against the territorial integrity and sovereignty of the Ukraine, may raise concerns about assisting in such subversive activities. *The Law on the fight against terrorism* provides for various forms of assistance to activities of a terrorist organization, including “assistance to people who took part in committing a terrorist act”¹⁰⁶⁵ but does not explain what exactly this provision implies. Therefore, it is reasonable to suppose that any action that in any way contributes to the activities of a terrorist organization, that facilitates the continuation of its existence or helps its members to avoid liability might be treated as assistance in the activities of such organization.

Such acts might also be punishable¹⁰⁶⁶ as felonies under the Ukrainian Criminal Code¹⁰⁶⁷. That Code provides for criminal liability for (i) actions aimed at forceful change or overthrow of the constitutional order or take-over of government (Art. 109), (ii) trespass against territorial integrity and inviolability of

¹⁰⁵⁸ Decree of the President of the Ukraine on the Decision of the National Security and Defense Council of the Ukraine from 13.04.2014 *on urgent measures for fighting terroristic threat and preservation of the territorial integrity of the Ukraine*, 14.04.2014, No 405/2014, available at: <http://zakon.rada.gov.ua/laws/show/405/2014> (08.11.2018).

¹⁰⁵⁹ Resolution of the Cabinet of Ministers of the Ukraine *on declaring some districts, cities, villages of the Donetsk and Lugansk regions as temporarily occupied territories*, 17.03.2015 № 254-VIII, available at: <http://zakon3.rada.gov.ua/laws/show/254-19> (14.11.2018).

¹⁰⁶⁰ Сергій Слободчук, *Що означає режим "надзвичайної ситуації" на Донбасі*, 112.ua, 28.01.2015, available (in Ukrainian) at: <https://ua.112.ua/statji/shcho-oznachaie-rezhym-nadzvychainoi-sytuatsii-na-donbasi-180506.html> (13.11.2018).

¹⁰⁶¹ Сергій Слободчук, *Що означає режим "надзвичайної ситуації" на Донбасі*, *Ibid.* (Sergej Slobodchuk, *What does it mean "an emergency situation" in Donbas*, (in Ukrainian) Case №1-кп/229/41/2017,

¹⁰⁶² Drugivskiyi city court of the Donetsk region, 21.09.2017, available at: <https://opendatobot.ua/court/70297188-8f2b72515cd1fe1b3e4c351a5002e716> (13.11.2018).

¹⁰⁶³ Law on fight against terrorism, 20.03.2003 № 638-IV, Article 1, available at: <http://zakon.rada.gov.ua/laws/show/638-15> (14.11.2018).

¹⁰⁶⁴ Case № 326/195/16-к, Appellate court of the Zaporizhia region, 27.07.2017, available at: <https://opendatobot.ua/court/68079402-f7c2255779dbce0d502d2403d9c33c3f> (14.11.2018).

¹⁰⁶⁵ *Law on fight against terrorism*, Article 25 (p.5), available at: <http://zakon.rada.gov.ua/laws/show/638-15#n152> (15.11.2018).

¹⁰⁶⁶ Case № 129/3415/15-к, Vinnytskyi city court of the Vinnytsia region, 22.09.2016, available at: <https://opendatobot.ua/court/61460859-e24495d37f7ff3716c5a8ad12891728f> (15.11.2018).

¹⁰⁶⁷ *Criminal Code of the Ukraine*, English version, WIPO, available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=438599 (15.11.2018).

Ukraine (Art.110), (iii) high treason (Art.111), (iv) (v) sabotage (Art. 113) and espionage (Art. 114). Article 111 of the Criminal Code specifically provides that joining an enemy in a time of martial law or armed conflict, espionage, and assistance in subversive activities against Ukraine provided to a foreign state, a foreign organization or their representatives are examples of treason. There are thus two elements required for prosecution under Article 111 for assistance the activities of a terrorist organization: an offence must be committed (1) by **a citizen of the Ukraine and (2) in a time of martial law or armed conflict**.

The procedure for announcement of a state of martial law is complex. The decision to do so is adopted by the President on the basis of a motion/proposal of the National Security and Defense Council; this decision must then be ratified by the Parliament.¹⁰⁶⁸ Legal recognition of the existence of an armed conflict does not require any formal announcement. Armed conflict, for the purposes of Article 111 of the Criminal Code, means a particularly harsh form of resolving conflicts between states that involves mutual employment of military force.¹⁰⁶⁹

This article of the Criminal Code of the Ukraine has quite seldom been used; however, it appears that it deserves attention due to the recent (April 30, 2018) accomplishment of the Anti-Terrorist Operation and the beginning of the Operation of the Joint Forces.¹⁰⁷⁰ Although the text of the Order¹⁰⁷¹ introducing the Operation of Joint Forces is classified, the official website of the Ukrainian President announced that this is a military operation and that its main aim is the protection of the territorial integrity, sovereignty and independence of the Ukraine from military aggression by the Russian Federation.¹⁰⁷² Since that time, the Ukraine is officially involved in confrontation with the Russian Federation, therefore, failure to report the treatment of a patient who took an active part in hostile activities on the side of an enemy, may be regarded as assistance to adversary forces.

It is not yet clear to what extent court practice will change due to the aforementioned change of character of the Operation, as the current practice is based on crimes committed during the period of the Anti-Terrorist Operation.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

The only provision in the Ukrainian legislation dealing with the issue of the correlation between a duty to report and ethical principles is an article of *the Fundamentals of the Legislation of the Ukraine on Healthcare*, which stipulates a duty of healthcare and pharmaceutical professionals to adhere to the requirements of medical ethics and medical deontology, and to keep medical secrecy.¹⁰⁷³

¹⁰⁶⁸ *Law on legal regime of martial law*, article 5 (1,2), available at: <http://zakon.rada.gov.ua/laws/show/389-19#n29> (15.11.2018).

¹⁰⁶⁹ Баулін Ю.В., Борисов В.І., Тютюгін В.І. та ін. Кримінальний кодекс України. Н-п коментар Особл част, 5-те вид., допов. – Х.: Право, 2013, 1040 с. – р.12. (Baulin J.V., Borisov V.I., Tutugin V.I. and coll., Criminal Code of Ukraine, Commentary, Special Part, 5th ed. Pravo, 2013, p.12,

¹⁰⁷⁰ *President signed a Decree: The Joint Forces Operation on deflection and deterrence of Russia's armed aggression in the Donbas began on April 30, 2018*, available at: <https://www.president.gov.ua/en/news/30-kvitnya-rozpochalas-operaciya-obyednanih-sil-iz-vidsichi-47206> (15.11.2018).

¹⁰⁷¹ On the official website of the President of the Ukraine it is written that the Head of the State signed the Order of the Supreme Commander-in-Chief of the Armed Forces of Ukraine on the beginning of the Joint Forces Operation on ensuring the national security and defense, deflection and deterrence of Russia's armed aggression in the territory of Donetsk and Luhansk regions, Source: <https://www.president.gov.ua/en/news/30-kvitnya-rozpochalas-operaciya-obyednanih-sil-iz-vidsichi-47206> (15.11.2018).

¹⁰⁷² *Ibid.*

¹⁰⁷³ *Fundamentals of the Legislation of Ukraine on Healthcare*, op. cit., Article 78.

There is no single official or authoritative source for principles of medical ethics and deontology; they are mostly found in books or are included in the program of study of medical schools. *The Ethical Code of Doctors of the Ukraine*¹⁰⁷⁴ is the only Act devoted to issues of medical ethics that applies in the Ukraine, however it does not have binding force and has an ambiguous procedure for declaring adherence to its rules. The Code was adopted by the non-governmental professional organization “Ukrainian Medical Association”,¹⁰⁷⁵ and it stipulates that in order for personnel of a particular medical treatment facility to be bound by its provisions, they must make an official declaration to the Bioethics Commission of the Ministry of Health Protection of the Ukraine of their willingness to adhere to the standards of the Code.¹⁰⁷⁶ Our research however revealed no information concerning the current status of this Commission, or its past practices. There may be some ethical commissions at medical scientific institutions¹⁰⁷⁷ and at medical treatment facilities involved in medical trials.¹⁰⁷⁸ However, the goals of these ethical commissions are not reconciling ethical and legal norms, but, rather, maintenance of human dignity during medical research and clinical trials.¹⁰⁷⁹

The Ethical Code of Doctors of the Ukraine contains a declaration that it was adopted **on the basis of international values as declared by the International Code of Medical Ethics, the Declaration of Helsinki, the Universal Declaration on the Human Genome and Human Rights**, as well as on the basis of *the Convention on Human Rights and Biomedicine*. It requires doctors to base their professional activities on universal standards of ethics and morality, on the Oath of the Doctors of the Ukraine, and on the doctor’s deontology.¹⁰⁸⁰ In addition, the Ethical Code requires **doctors to be aware of current Ukrainian legislation and to adhere to its rules and principles**.¹⁰⁸¹

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

Ukrainian legislation does not explicitly address issues of resolving contradictions between legal and moral norms in the sphere of healthcare. One example that could be mentioned in this regard is a provision of *the Ethical Code of Doctors of the Ukraine*, which stipulates that in the event of doubts concerning the implementation or interpretation of rules of the Code, such point shall be raised before the Bioethics Commission.¹⁰⁸² However, our research revealed no information about the activity of the afore-mentioned Commission in this regard.

¹⁰⁷⁴ *Ethical Code of Doctor of the Ukraine*, Ukrainian Medical Association, *op. cit.*

¹⁰⁷⁵ Source: <http://www.vult.org.ua/> (30.10.2018).

¹⁰⁷⁶ *Ethical Code of Doctor of the Ukraine*, *op. cit.*

¹⁰⁷⁷ Sources: <http://www.amnu.gov.ua/content/21/kom-tet-z-b-oetiki-pri-prezid-namn-ukra-ni/1/#>;
<http://www.dsma.dp.ua/ua/diyalnist/nauka/radi-komisiji-tovaristva1/komisiya-z-bioetiki> (19.09.2018).

¹⁰⁷⁸ Model regulation on ethical commissions at medical facilities engaged in clinical trials, ratified by the Order of the Ministry of Health Protection of Ukraine, 2012, available at: <http://zakon.rada.gov.ua/laws/show/z1011-09?lang=en> (18.09.2018).

¹⁰⁷⁹ Model regulation on ethical commissions at medical facilities, *op. cit.*

¹⁰⁸⁰ *Ethical Code of Doctor of Ukraine*, *op. cit.*

¹⁰⁸¹ *Ibid.*

¹⁰⁸² *Ibid.*

U. UNITED KINGDOM

1. General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals

In the UK,¹⁰⁸³ a medical professional's **duty of confidentiality** towards patients has historically derived from a mixture of case law and ethics.¹⁰⁸⁴ There is **no specific legislation or common law body of laws governing confidentiality**,¹⁰⁸⁵ and it is only in recent decades that a right to respect for private and family life has been enshrined in statute in the form of the *Human Rights Act 1998*.¹⁰⁸⁶ A number of specific statutory duties of confidence attach to health professionals.¹⁰⁸⁷ The **precise legal basis for the duty of confidentiality is uncertain** apart from in circumstances where a contractual relationship exists. Any legal action for breach of confidentiality is *sui generis*, rooted in principles of equity, contract, property and tort.¹⁰⁸⁸ **Of practical importance are confidentiality guidelines** issued, among others, by the *General Medical Council* ("GMC"),¹⁰⁸⁹ the UK's standards-setting body for the medical profession, and the *National Health Service* ("NHS") code of practice.¹⁰⁹⁰

The legal framework surrounding **duties of disclosure** of healthcare professionals is composed of a **combination of legislation, case law and professional guidance**.¹⁰⁹¹ **Specific duties of disclosure** can be found in a variety of **statutory provisions**, targeted both at the public in general, as well as in laws specifically aimed at the healthcare profession. These include obligations to disclose information relating to suspected terrorist activity and road traffic accidents and, for medical professionals, notifications concerning abortions and certain infectious diseases. **Jurisprudence** has also contributed to the development of the law in this area. Court decisions have established not so much a duty to disclose, but, rather, **recognition of circumstances in which breaches of confidentiality may be justified**, such as where it is in the public interest. These defences to breaches of confidentiality are reflected in guidance issued by the GMC. As will be seen, this includes **specific guidelines on the reporting of gunshot and knife wounds**.

1.1. Confidentiality

It may be said that there is both an **ethical and legal duty to respect the confidences of patients**. Described as one of the most fundamental ethical obligations owed by a doctor to his patient, the **Hippocratic Oath** says:

"Whatever, in connection with my professional practice, or not in connection with it, I see or hear in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all should be kept secret."¹⁰⁹²

¹⁰⁸³ The United Kingdom consists of four countries and has three separate legal systems: one each for England and Wales, Scotland and Northern Ireland. Legislation referred to in the current report will normally apply to the whole of the UK, unless indicated otherwise. This report will primarily concern the legal system of England and Wales but will make reference to other parts of the UK where relevant.

¹⁰⁸⁴ For further information, see Section 1.1. of this country report, below.

¹⁰⁸⁵ Jonathan Herring, *Medical law and ethics*, 5th edition, 2014, Oxford University Press, p. 223.

¹⁰⁸⁶ *Human Rights Act 1998*, available at <https://www.legislation.gov.uk/ukpga/1998/42/contents> (14.02.2019).

¹⁰⁸⁷ See Section 1.1. of this country report, below.

¹⁰⁸⁸ David Price, *Medical Law – United Kingdom*, International Encyclopaedia of Laws, Kluwer International, Supplement 27, August 2002, para. 393.

¹⁰⁸⁹ See Sections 1.1. and 1.2. of this country report, below.

¹⁰⁹⁰ See Sections 1.1. and 1.2. of this country report below.

¹⁰⁹¹ For further information, see Section 1.2. of this country report, below.

¹⁰⁹² Ian Kennedy and Andrew Grubb, *Medical law*, 3rd edition, London, Butterworths, 2000, p.1047.

The exact basis for the legal duty of confidentiality, on the other hand, is, unclear.¹⁰⁹³ In fact, a medical professional who improperly discloses private information may be found to have acted illegally on the basis of a wide range of legal obligations.¹⁰⁹⁴ It is widely acknowledged that there is **no freestanding right to privacy in common law**. There may, however, be a potential legal action available under tort law: divulging a patient's confidential information **could amount to negligence**, although damages are generally only available for financial or physical loss; case law over recent decades has also shown an increasing willingness by the judiciary to entertain claims founded on privacy protection – this remains an evolving area of tort law however, and no clear principles have been established.¹⁰⁹⁵

Commentators report that the best option for a patient who seeks to take legal action in respect of a breach of confidentiality is to rely on the **equitable¹⁰⁹⁶ obligation to respect confidential information**.¹⁰⁹⁷ This duty, developed by the courts in recent decades, is recognised as having notable application in circumstances where there is a confidential relationship between the parties. In *Attorney-General v. Guardian Newspapers (No.2)*, it was said:

“The law has long recognised that an obligation of confidence can arise out of particular relationships: Examples are the relationship of doctor and patient, priest and penitent, solicitor and client, banker and customer.”¹⁰⁹⁸

There is therefore little doubt that information provided to a doctor would be protected by this duty, and that this would also extend to the relationship between patients and other healthcare professionals. Moreover, confidential information would not just include information which the doctor receives from the patient in the course of the professional relationship, but also information about the patient which the doctor receives by virtue of his or her professional position, such as test results.¹⁰⁹⁹ In practice, however, **equitable remedies are limited**: the primary remedy is an injunction, where necessary in the public interest. This only serves to prohibit the disclosure of information that has not yet been divulged. Where the breach of confidence has already occurred, compensation is the usual remedy; in the absence of financial loss, this is normally limited.¹¹⁰⁰

The duty of confidentiality has also been confirmed in recent years as being underpinned by the **right to respect for private and family life** under Article 8 of the European Convention on Human Rights (“ECHR”). Incorporated into UK law since October 2000 by the **Human Rights Act 1998**,¹¹⁰¹ case law has established that in deciding whether the information is protected by law, it would be necessary to consider whether the information is protected under Article 8 and then whether infringement of the

¹⁰⁹³ One exception to this is in circumstances where a contractual relationship exists, such as in the case of private healthcare treatment.

¹⁰⁹⁴ See Jonathan Herring, *Medical law and ethics*, *op. cit.*, p. 223.

¹⁰⁹⁵ Examples include *Campbell v MGN Ltd* ([2004] UK House of Lords 22), where [15] Lord Nicholls referred to the tort of misusing private information and *Douglas v Hello!* ([2007] UK House of Lords 21), where [25] Lord Nicholls indicated that there were two causes of action: protecting privacy and protecting confidential information.

¹⁰⁹⁶ This refers to equity, a regulated scheme of legal principles, including equitable remedies, developed in the Middle Ages as a response to the limited scope and flexibility of the common law: Jonathan Law (ed.), *The Oxford Dictionary of Law*, 8th edition, 2015, Oxford University Press, pp. 231-232.

¹⁰⁹⁷ See Jonathan Herring, *Medical law and ethics*, *op. cit.*, p. 223, and David Price, *Medical Law – United Kingdom*, International Encyclopaedia of Laws, *op. cit.*, par. 393.

¹⁰⁹⁸ Lord Keith, [1990] Law Reports, Appeal Cases (Third Series) 109 at 255 (House of Lords).

¹⁰⁹⁹ David Price, *Medical Law – United Kingdom*, International Encyclopaedia of Laws, *op. cit.*, par. 396.

¹¹⁰⁰ See *Campbell v MGN Ltd*, *op. cit.* and *Cornelius v. de Taranto* (2001) 68 Butterworths Medico-Legal Reports 62.

¹¹⁰¹ *Human Rights Act 1998*, *op. cit.*

confidence is justified under Article 8(2).¹¹⁰² Indeed, as public bodies, it is unlawful under the *Human Rights Act 1998*¹¹⁰³ for courts to act in a way which is incompatible with Convention rights.

In the context of healthcare, a number of specific statutory duties of confidentiality relevant to health professionals can be found in legislation. These include: the duty imposed on health authorities under the with regard to protecting the identity of individuals being examined for sexually transmitted diseases;¹¹⁰⁴ duties imposed under the *Human Fertilisation and Embryology Act 1990* on Human Fertilisation and Embryology Authorities with regard to a patient's attendance at a fertility clinic;¹¹⁰⁵ the requirement emanating from the *Police and Criminal Evidence Act 1984* to exclude personal records (including health records) created or acquired for professional purposes from special orders which may be made by courts for the production of documents needed in criminal investigations;¹¹⁰⁶ and the duties of the European Union's *General Data Protection Regulation* (incorporated into and supplemented by the *Data Protection Act 2018*)¹¹⁰⁷ relating to the "processing" of personal data.¹¹⁰⁸

In addition to the law, professional bodies in the healthcare sector have also published **guidelines on duties of confidentiality** owed by medical professionals to patients. These include the GMC,¹¹⁰⁹ the *British Medical Association*¹¹¹⁰ and the *Nursing and Midwifery Council*.¹¹¹¹ There is also an NHS Code of Practice with regard to confidentiality, issued by the Department of Health.¹¹¹² This is accompanied by supplementary guidance on public interest disclosures.¹¹¹³ These sit alongside a range of other codes of practice for handling information in healthcare recognised by *NHS Digital*, the trading name of the *Health and Social Care Information Centre*, the national provider of information, data and IT systems for commissioners, analysts and clinicians in health and social care in England.¹¹¹⁴ **Guidelines of the**

¹¹⁰² *Campbell v MGN Ltd* [2004] UK House of Lords 22, per Lord Hoffman [17].

¹¹⁰³ *Human Rights Act 1998*, op. cit., Section 6.

¹¹⁰⁴ *National Health Service (Venereal Diseases) Regulations 1974*, available at <http://www.legislation.gov.uk/ukxi/1974/29/made> (18.02.2019).

¹¹⁰⁵ *Human Fertilisation and Embryology Act 1990*, available at <https://www.legislation.gov.uk/ukpga/1990/37/contents> (18.02.2019), Section 33A.

¹¹⁰⁶ *Police and Criminal Evidence Act 1984*, available at <https://www.legislation.gov.uk/ukpga/1984/60/contents> (18.02.2019), Section 11.

¹¹⁰⁷ *Data Protection Act 2018*, available at <http://www.legislation.gov.uk/ukpga/2018/12/contents/enacted> (18.02.2019). In particular, the first principle of the *General Data Protection Regulation* ("GDPR") states that data must be processed lawfully and fairly, and special category data (which includes health data) must be treated in accordance with Article 9(2) of the GDPR.

¹¹⁰⁸ See David Price, *Medical Law – United Kingdom*, International Encyclopaedia of Laws, op. cit., par. 398.

¹¹⁰⁹ General Medical Council, *Confidentiality: good practice in handling patient information*, January 2017, available at https://www.gmc-uk.org/-/media/documents/confidentiality-good-practice-in-handling-patient-information---english-0417_pdf-70080105.pdf (18.02.2019).

¹¹¹⁰ BMA, *Guidance on confidentiality*, last updated 6th December 2018, available at <https://www.bma.org.uk/advice/employment/ethics/confidentiality-and-health-records/confidentiality-and-health-records-tool-kit/1-guidance-on-confidentiality> (18.02.2019).

¹¹¹¹ Nursing & Midwifery Council, *The Code – Standards of conduct, performance and ethics for nurses and midwives*, 1st May 2008, available at <https://www.nmc.org.uk/globalassets/sitedocuments/standards/nmc-old-code-2008.pdf> (18.02.2019).

¹¹¹² Department of Health, *Confidentiality – NHS Code of Practice*, November 2003, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/200146/Confidentiality_-_NHS_Code_of_Practice.pdf (18.02.2019).

¹¹¹³ Department of Health, *Confidentiality: NHS Code of Practice – Supplementary Guidance on Public Interest Disclosures*, November 2010, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/200147/Confidentiality_-_NHS_Code_of_Practice_Supplementary_Guidance_on_Public_Interest_Disclosures.pdf (18.02.2019).

¹¹¹⁴ The *Health and Social Care Information Centre* publishes its own code of practice, pursuant to section 263 of the *Health and Social Care Act 2012*, the *Code of Practice on Confidential Information*, Version

GMC and the NHS are discussed below, particularly with regard to the circumstances in which personal information may be disclosed without breaching duties of confidentiality.¹¹¹⁵

It should be noted that **such guidance does not have the force of law** but may lead to disciplinary action by the relevant professional body or organisation where not followed by those to whom they apply. It is also reported that courts have, on occasion, relied upon professional guidelines when determining the legal position – for example, in deciding what standard to apply in a case of negligence.¹¹¹⁶ Indeed, they are **likely to play an important role in the interpretation of the law** on confidential information in the context of healthcare provision.¹¹¹⁷

The GMC receives its mandate under the *Medical Act 1983*,¹¹¹⁸ and among other functions, maintains the official register of medical practitioners and has the **role of setting standards** which doctors need to follow throughout their careers.¹¹¹⁹ Its guidelines on confidentiality emphasise that doctors are under both ethical and legal duties to protect patients' personal information from improper disclosure. Serious or persistent failure to follow the guidance will, it says, put that medical practitioner's registration at risk.¹¹²⁰

The NHS is responsible for the majority of healthcare in the UK, with its services in England remaining free at the point of use for all UK residents. It employs more than 1.5 million people, putting it in the top five of the world's largest workforces.¹¹²¹ This is significant given that the principles contained in the confidentiality guidelines of its Code of Practice apply not just to doctors but to all staff of the NHS, as well as those carrying out functions on behalf of the NHS. Indeed, the duty of confidence is described not just as a legal obligation derived from case law and a requirement established within professional codes of conduct but also one which must be included within NHS employment contracts as a specific requirement linked to disciplinary procedures.¹¹²²

1.2. Disclosure

Various **statutory duties to report information exist under UK law**, some applying to individuals and organisations generally, others specific to healthcare professionals.

1.0, December 2014, available at https://digital.nhs.uk/binaries/content/assets/legacy/pdf/8/9/cop_confidentialinformation.pdf (18.02.2019).

¹¹¹⁵ See Section 1.2. of this country report, below.

¹¹¹⁶ See *Re C* [1996] Family Court Reporter 605, *W v. Egde* [1990] 1 All England Law Reports, *Lewis v. Secretary of State for Health* [2008] England and Wales High Court (Administrative Court) 2196.

¹¹¹⁷ Jonathan Herring, *Medical law and ethics*, *op. cit.*, p. 230.

¹¹¹⁸ *Medical Act 1983*, available at <https://www.legislation.gov.uk/ukpga/1983/54/contents> (14.02.2019).

¹¹¹⁹ See GMC website, *Our role and the Medical Act 1983*, available at <https://www.gmc-uk.org/about/what-we-do-and-why/our-mandate>.

¹¹²⁰ General Medical Council, *Confidentiality: good practice in handling patient information*, *op. cit.*, p.9.

¹¹²¹ See NHS.uk, *About the NHS*, last reviewed 13.04.2016, available at <https://www.nhs.uk/using-the-nhs/about-the-nhs/the-nhs/> (18.02.2019).

¹¹²² Department of Health, *Confidentiality – NHS Code of Practice*, *op. cit.*, par. 9.

Although there is **no general obligation on individuals to report a crime**,¹¹²³ specific duties, established by legislation, to report information **usually apply in the context of criminal behaviour**.¹¹²⁴ These include: the **Road Traffic Act 1988**,¹¹²⁵ under which there is a requirement on a person other than the keeper of a vehicle to give information which may lead to the identification of a driver alleged to be guilty of a road traffic offence; the **Modern Slavery Act 2015**,¹¹²⁶ which requires public authorities to report to the Home Office any individual they believe to be a victim of human trafficking or slavery; and the **Terrorism Act 2000**, which in addition to placing a duty on individuals in the course of their employment to report information about the financing of terrorist offences, now also imposes an obligation on individuals to report any information which he or she knows or believes might be of material assistance in preventing the commission of an act of terrorism or securing the apprehension, prosecution or conviction of another person involved in terrorism.¹¹²⁷

As to **healthcare professionals, a number of specific duties apply**, including: under the **Public Health (Control of Disease) Act 1984**,¹¹²⁸ a doctor who is confronted with a patient with a notifiable disease (namely, cholera, plague, relapsing fever, smallpox or typhus) must notify the government;¹¹²⁹ under the **Abortion Act 1967**, details of terminations of pregnancies must be given to the Chief Medical Officer, although since 2002, only a patient's NHS number, date of birth and full postcode are required, not her name;¹¹³⁰ and more recently, the **Female Genital Mutilation Act 2003**¹¹³¹ has been amended to include a new duty on those working in regulated professions, including healthcare professionals, to notify the chief officer of police of any act of female genital mutilation that appears to have been carried out on a girl under the age of 18.

Outside of these statutory duties to disclose information, there are a number of areas where the law will generally permit a breach of a patient's confidence in particular circumstances. In other words, a **healthcare professional will have a discretion to disclose information** and may be justified in breaching a patient's confidence. These **exceptions to rights to privacy and duties of confidentiality**, referred to below, are variously taken into account by the common law, principles concerning the protection of human rights, legislative provisions applying in particular circumstances, data protection rules and professional guidance. The GMC's confidentiality guidelines identify the following situations:

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- ¹¹²³ The former common law offence of "misprision of felony" (the concealment of a serious crime) was effectively abolished by the *Criminal Law Act 1967* (available at <https://www.legislation.gov.uk/ukpga/1967/58/part/I> (06.03.2019)). In its place, three new offences were established, providing for penalties against those who assist offenders or who conceal offences or give false information (Sections 4 and 5, respectively). However, none of the offences places a positive duty on an individual to report a crime.
- ¹¹²⁴ Section 115 of the *Crime and Disorder Act 1998* permits disclosure, but does not create a legal obligation to do so. Available at <https://www.legislation.gov.uk/ukpga/1998/37/contents> (18.02.2019).
- ¹¹²⁵ *Road Traffic Act 1988*, available at <http://www.legislation.gov.uk/ukpga/1988/52/contents> (18.02.2019), Section 172(2).
- ¹¹²⁶ *Modern Slavery Act 2015*, available at <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (18.02.2019), Section 52.
- ¹¹²⁷ The *Terrorism Act 2000*, available at <http://www.legislation.gov.uk/ukpga/2000/11/contents> (18.02.2019), section 38B.
- ¹¹²⁸ *Public Health (Control of Disease) Act 1984*, available at <https://www.legislation.gov.uk/ukpga/1984/22> (19.02.2019). See also the *Public Health (Infectious Diseases) Regulations 1988*, available at <http://www.legislation.gov.uk/uksi/1988/1546/contents/made> (21.02.2019).
- ¹¹²⁹ *Abortion Act 1967*, available at <https://www.legislation.gov.uk/ukpga/1967/87/contents> (19.02.2019), Section 2. See also the *Abortion Regulations 1991* (Statutory Instrument no. 499 of 1991), available at <http://www.legislation.gov.uk/uksi/1991/499/contents/made> (21.02.2019).
- ¹¹³⁰ See Jonathan Herring, *Medical law and ethics*, op. cit., p. 248.
- ¹¹³¹ *Female Genital Mutilation Act 2003*, available at <https://www.legislation.gov.uk/ukpga/2003/31/contents> (19.02.2019), section 5B, as amended by the *Serious Crime Act 2015*, available at <https://www.legislation.gov.uk/ukpga/2015/9/contents> (27.02.2019).

- the patient consents, whether implicitly or explicitly, for the sake of their own care or for local clinical audit;
- the patient has given their explicit consent to disclosure for other purposes;
- the disclosure is of overall benefit to a patient who lacks the capacity to consent;
- the disclosure is required by law, or the disclosure is permitted or has been approved under a statutory process that sets aside the common law duty of confidentiality;
- the disclosure can be justified in the public interest.¹¹³²

That **information can be divulged where the patient has given his or her consent** is self-evident, and professional guidance, such as that issued by the GMC places considerable weight on doctors relying on express or implied consent from the patient.¹¹³³

Notable **situations in which disclosure is required by legislation** are referred to above; a further instance where a disclosure is required by law, however, is **where a judge or presiding officer of a court has ordered such information to be disclosed**. This may be in civil or criminal cases. To fail to provide such information would amount to contempt of court.¹¹³⁴

Some circumstances in which **a disclosure, although not required, may still amount to a justifiable breach of confidentiality**, are expressly acknowledged by statute. In the context of healthcare, section 251(1) of the *National Health Service Act 2006*, for example, permits the **disclosure of medical information for research purposes** without a patient's consent.¹¹³⁵ The *Access to Health Records Act 1990*¹¹³⁶ provides **rights of access to a deceased patient's personal representative** and any person who may have a claim arising out of a patient's death. The *Access to Medical Reports Act 1988*¹¹³⁷ gives **patients the right to see medical reports written about them** for employment or insurance purposes. Other legislation allows for information **sharing between authorities** and other representatives with regard to **adult safeguarding and support and mental health**.¹¹³⁸

More generally, Article 8(2) of the European Convention of Human Rights, as incorporated into domestic law by the *Human Rights Act 1998*,¹¹³⁹ provides for the **possibility for the right to respect for private and family life to be interfered with** where done so in accordance with law and where, "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others." Section 115 of the *Crime and Disorder Act 1998* provides an example of where the disclosure of **confidential information regarding criminal behaviour**

¹¹³² General Medical Council, *Confidentiality: good practice in handling patient information*, *op. cit.*, par. 9.

¹¹³³ *Ibid.*, par. 13.

¹¹³⁴ See *ibid.*, par. 90.

¹¹³⁵ *National Health Service Act 2006*, available at <https://www.legislation.gov.uk/ukpga/2006/41/contents> (19.02.2019).

¹¹³⁶ *Access to Health Records Act 1990*.

¹¹³⁷ *Access to Medical Reports Act 1988*.

¹¹³⁸ In England, the *Care Act 2014* requires "relevant partners" (such as NHS trusts, foundation trusts and clinical commissioning groups in the local authority's area) to cooperate with local authorities making enquiries about adults at risk unless to do so would be incompatible with their own duties, or would otherwise have an adverse effect on the exercise of its functions. In Scotland, the *Adult Support and Protection (Scotland) Act 2007* goes further, requiring health boards to report to local authorities if they know or believe that an individual is an "adult at risk" and action needs to be taken to protect them. See General Medical Council guidance factsheet, *Confidentiality: key legislation*, undated, available at <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality/~/-/media/59240e8f25da48d4b56c6fd93069e5d8.ashx> (20.02.2019).

¹¹³⁹ *Op. cit.*

may legitimately be disclosed to a chief officer of police or other relevant authority.¹¹⁴⁰ It should be noted, however, that professional guidelines suggest that doctors should consider disclosing information only to the extent that it is necessary and only with regard to serious offences.¹¹⁴¹

The common law also stops short of placing a duty on healthcare professionals to disclose information. It should be noted that some commentators have, however, speculated whether a duty may arise in circumstances where preventative measures are called for in order **to protect an identifiable person whose life is at risk from the criminal acts of another person**.¹¹⁴² That such a positive obligation exists had been rejected in a 2000 case on the grounds that the eventual murder victim of a mentally-disturbed patient whose condition had not been reported by the defendant health authority, was unidentifiable. According to the judge at the initial trial, for a duty of care to arise, it was, “*not sufficient to show that the victim or injured party was one of the wide category of members of the general public.*”¹¹⁴³ Although such a duty has been found to exist in a California case,¹¹⁴⁴ whether it would arise under English law is a question which has not been resolved. The general view is that it would not, on the basis that under tort law, a person is not responsible for the acts of a third party.¹¹⁴⁵

What is clear is that the common law does, however, recognise **breaches of confidentiality as being justified where they are in the “public interest”**; there is, in effect, a discretion to disclose in certain circumstances. Examples from case law where such a public interest has been found to operate typically concern the following situations: where there has been a **threat of serious harm to others**,¹¹⁴⁶ where there is **evidence that a patient may have been abusing a child**¹¹⁴⁷ and, as mentioned above, where such disclosure has been made for the **purposes of assisting a police investigation**.¹¹⁴⁸ Threats of serious harm to third parties and assisting police investigations are discussed in more detail below.¹¹⁴⁹

Professional guidance, including that published by the **GMC**¹¹⁵⁰ and the **Department of Health**,¹¹⁵¹ offer practical advice on disclosing confidential information where it is in the public interest or where it is done for the protection of children, patients and others. In particular, it is emphasised that divulging personal information should only occur where it is not practicable or appropriate to seek

¹¹⁴⁰ For more information on this, see Section 2. of this country report, below.

¹¹⁴¹ For more information on this, see Section 2. of this country report, below.

¹¹⁴² David Price, *Medical Law – United Kingdom*, International Encyclopaedia of Laws, para. 405; A. Frampton, *Review – Reporting of gunshot wounds by doctors in emergency departments: A duty or a right? Some legal and ethical issues surrounding breaking patient confidentiality*, Emergency Medical Journal (2005), Volume 22, pp. 84-86 at p. 86; Jonathan Herring, *Medical law and ethics*, op. cit., p. 243.

¹¹⁴³ Judge Gage at initial trial, as reported in *Palmer v. Tees Health Authority* [2000] Personal Injuries and Quantum Reports 1.

¹¹⁴⁴ *Tarasoff v. The Regents of the University of California* (1976) 17 Cal 3d 358.

¹¹⁴⁵ See Jonathan Herring, *Medical law and ethics*, op. cit., p. 243.

¹¹⁴⁶ See *W. v. Egdeell* ([1990] 1 All England Law Reports 835) in which it was said, “*The decided cases very clearly establish: 1) that the law recognises an important public interest in maintaining professional duties of confidence; but 2) that the law treats such duties not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure.*” (per Lord Justice Bingham)

¹¹⁴⁷ *Re M* [1990] 1 All England Law Reports 205.

¹¹⁴⁸ See *Initial Services Ltd v. Putterill* ([1968] 1 Law Reports, Queen’s Bench Division 396 at 405), in which Lord Denning is said to have indicated that disclosure of any crime committed or contemplated is permitted.

¹¹⁴⁹ See Section 2 of this country report, below.

¹¹⁵⁰ General Medical Council, *Confidentiality: good practice in handling patient information*, op. cit., par. 50 et seq.

¹¹⁵¹ Department of Health, *Confidentiality: NHS Code of Practice – Supplementary Guidance: Public Interest Disclosures*, November 2010, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216476/dh_122031.pdf (20.02.2019).

consent, and in cases where the patient has refused consent, such disclosure may only be justified in the public interest if a failure to reveal the information may expose others to a risk of death or serious harm. In particular, the benefits to an individual or to society of the disclosure must outweigh both the patient's and the public interest in keeping the information confidential.¹¹⁵²

2. Duty of Healthcare Professionals to Disclose Gunshot Wounds

There is, under UK law, **no specific legal duty** placed on healthcare professionals to disclose information concerning gunshot wounds.

As mentioned above,¹¹⁵³ however, **healthcare professionals may be justified in disclosing information where it is in the public interest**, particularly where a failure to do so may expose others to a threat of serious harm or where it may assist with police investigations. In the absence of specific legal or ethical requirements to report gunshot wounds, healthcare professionals are expected to act in accordance with relevant professional guidelines on the disclosure of confidential information where it is in the public interest.

The **GMC**, which is mandated to establish guidelines on good medical practice for doctors, has published **specific guidance on how to apply the principles of its confidentiality guidelines in circumstances where a patient presents with a gunshot wound** or a knife wound that is not self-inflicted. Entitled, "*Confidentiality: reporting gunshot and knife wounds*",¹¹⁵⁴ this explanatory guidance is said to apply to all violent injuries, and that special consideration of gunshot and knife wounds is warranted in view of the potential immediacy of risk to others.¹¹⁵⁵ Particular reference is made to this guidance below.

2.1. Conditions

In the absence of a specific duty to report gunshot wounds, there are **no conditions attached to the disclosure of such information** by healthcare professionals. Guidance issued by the GMC specific to the reporting of gunshot wounds does however advise that, "***the police should usually be informed whenever a person presents with a gunshot wound.***"¹¹⁵⁶ The reasons for providing such information are two-fold: first, that the police are responsible for assessing the risk posed by a member of the public who is armed with, and has used, a gun (or knife) in a violent attack; secondly, the police need statistical information about the number of gunshot and knife injuries in order to inform their own and their crime reduction partners' operational and strategic priorities.¹¹⁵⁷

According to the GMC guidelines, when the police arrive, they **should not be allowed access to the patient if this will delay or hamper treatment** or compromise the patient's recovery. Where it is likely that a crime has been committed and the police make enquiries, personal information should only be disclosed by the healthcare professional, where practicable, with the **consent of the patient**; the only **exceptions to this** are where seeking consent may put the healthcare professional or others at **risk of serious harm** or where it would be likely to undermine the purpose of the disclosure, by **prejudicing**

¹¹⁵² General Medical Council, *Confidentiality: good practice in handling patient information*, op. cit., par. 64.

¹¹⁵³ See Section 1.2. of this country report, above.

¹¹⁵⁴ General Medical Council, *Confidentiality: reporting gunshot and knife wounds*, available at <https://www.gmc-uk.org/-/media/documents/confidentiality---reporting-gunshot-and-knife-wounds-pdf-70063779.pdf> (20.02.2019).

¹¹⁵⁵ *Ibid.*, par. 2 and 3.

¹¹⁵⁶ *Ibid.*, par. 5.

¹¹⁵⁷ *Ibid.*, par. 4.

the prevention, detection or prosecution of a serious crime.¹¹⁵⁸ Where the patient refuses to give consent or cannot give it, the healthcare professional should only disclose the information if it is required by the law or if he or she believes that the disclosure is justified in the public interest.¹¹⁵⁹

The conditions as to what constitutes the public interest can only be decided by a court. The limited case law on this question reveals **various interpretations of what amounts to the public interest**. Different professional guidelines have attempted to bring these together. For example, the **British Medical Association (the “BMA”)**, the trade union and professional association for doctors and medical students in the UK, states in its **guidance on public interest disclosures** that:

“Disclosures in the public interest based on the common law are made where disclosure is essential to prevent a serious and imminent threat to public health, national security, the life of the individual or a third party or to prevent or detect a serious crime.”¹¹⁶⁰

Guidance from the **GMC** states that:

“Disclosures in the public interest may be justified when:

- failure to disclose information may put someone other than the patient at risk of death or serious harm (you should not usually disclose information against the wishes of an adult patient who has capacity if they are the only person at risk of harm);
- disclosure is likely to help in the prevention, detection or prosecution of a serious crime.”¹¹⁶¹

Case law has provided limited commentary as to **what amounts to “serious harm”**. The seminal case in this area, dating from 1990, is said to reveal some important limitations on the justification based on a threat of death or serious harm to another.¹¹⁶² First, it must be shown that there is a **real and serious risk of danger to the public**. The risk must be of significant harm, probably of a physical kind to a victim; secondly, the **risk must be an ongoing one**. The fact that there was a past risk to the public would not, it seems, be sufficient; thirdly, the **disclosure has to be to appropriate people** with a legitimate interest in the matter; fourthly, any disclosure must be **restricted to the minimum necessary to protect the public**.¹¹⁶³

As to **disclosures made with a view to assisting police investigations**, professional guidelines suggest that this must generally concern serious crime only. BMC guidance points out that there is **no legal definition as to what constitutes a “serious crime”**; for the purpose of the guidelines, reliance is made on the *Police and Criminal Evidence Act 1984*,¹¹⁶⁴ which previously spelt out what was considered as a **“serious arrestable offence”**.¹¹⁶⁵ This is one which has caused or may cause:

- serious harm to the security of the state or to public order;
- serious interference with the administration of justice or with the investigation of an offence;
- death;

¹¹⁵⁸ *Ibid.*, par. 12.

¹¹⁵⁹ *Ibid.*, par. 13.

¹¹⁶⁰ BMA, *Confidentiality and health records toolkit*, 10. Public Interest, 6th December 2018, available at <https://www.bma.org.uk/advice/employment/ethics/confidentiality-and-health-records/confidentiality-and-health-records-tool-kit/10-public-interest> (21.02.2019).

¹¹⁶¹ General Medical Council, *Confidentiality: reporting gunshot and knife wounds*, *op. cit.*, par. 14.

¹¹⁶² *W. v. Egdell*, *op. cit.*

¹¹⁶³ Jonathan Herring, *Medical law and ethics*, *op. cit.*, p. 242, with reference to the case of *W v. Egdell*, *op. cit.*

¹¹⁶⁴ *Police and Criminal Evidence Act 1984*, available at <https://www.legislation.gov.uk/ukpga/1984/60/contents> (25.02.2019), section 116 (now repealed).

¹¹⁶⁵ However, the term, “serious arrestable offence” is no longer used, with relevant legislation now simply referring to “indictable” offences: see *Serious Organised Crime and Police Act 2005*, available at <https://www.legislation.gov.uk/ukpga/2005/15/contents> (25.02.2019).

- serious injury; or
- substantial financial gain or serious loss.

Insofar as **criminal acts** are concerned, Department of Health guidance indicates that **decisions about disclosures must be made on a case-by-case basis**.¹¹⁶⁶ Given that most injuries involving gunshot wounds are likely to be considered as serious, it might be supposed that healthcare professionals will usually be justified in breaching a patient's confidentiality to assist with police enquiries into the commission of a suspected criminal offence which has resulted in a gunshot wound. Indeed, guidance states that it will be important to take into account the **nature and the impact of the crime or harm** and that the disclosure of information relating to a physical attack will be easier to justify than shoplifting for example. It must also be considered whether the **disclosure is for the detection or prosecution of crime or harm to others** or whether it is merely preventative: "*it may be more justifiable to disclose information to support prosecution in relation to a crime that has occurred than to prevent a crime which has not yet occurred.*"¹¹⁶⁷

GMC guidance additionally recommends to doctors that reasons for disclosing information without consent and any steps taken to seek a patient's consent or to inform them about the disclosure, including reasons for not seeking consent, **should be documented in the patient's record**.¹¹⁶⁸ Moreover, unless it is not practicable or safe to do so, it is recommended that the **patient should be told about any disclosures** that have been made as soon as possible after the disclosure.¹¹⁶⁹

2.2. Scope

In the absence of any specific duty on healthcare professionals to report gunshot wounds, there is no legal regulation of the scope of such disclosures. There are also **no known rules with regard to the scope of information to be disclosed** in cases of public interest or police investigations. However, as a general proposition, even if there is a justifiable ground for disclosure, it must be shown that:

- the person to whom the disclosure was made was an **appropriate person**,¹¹⁷⁰
- the disclosure was to the **minimum amount necessary** under justification – so if anonymized disclosure would have adequately protected the public interest, then only anonymized disclosure is permitted.¹¹⁷¹

Professional guidelines which deal with making such reports focus primarily on the **scope of police access to the patient once the police have been notified**. GMC guidance on reporting gunshot and knife wounds states that: "*personal information, such as the patient's name and address, should not usually be disclosed in the initial contact with the police.*"¹¹⁷² The police, it points out, will respond even if the patient's identity is not disclosed. Crucially, it is also emphasised that when the police arrive, they should not be given access to the patient if this will delay or hamper treatment or compromise the patient's recovery.¹¹⁷³

¹¹⁶⁶ Department of Health, *Confidentiality: NHS Code of Practice – Supplementary Guidance: Public Interest Disclosures*, *op. cit.*, par. 2.

¹¹⁶⁷ *Ibid.*

¹¹⁶⁸ General Medical Council, *Confidentiality: reporting gunshot and knife wounds*, *op. cit.*, par. 16.

¹¹⁶⁹ *Ibid.*, par. 17.

¹¹⁷⁰ An example given is that whereas disclosure to the police may be justified, if the disclosure is to a journalist, this may be unlawful: see *ibid.*

¹¹⁷¹ Jonathan Herring, *Medical law and ethics*, *op. cit.*, p. 249.

¹¹⁷² General Medical Council, *Confidentiality: reporting gunshot and knife wounds*, *op. cit.*, par. 9.

¹¹⁷³ *Ibid.*, par. 10.

In circumstances where there is no immediate reason for disclosing personal information in the public interest, GMC guidelines on reporting gunshot wounds say that **no further information should be given to the police**; it is always open to the police to seek an order from a judge or a warrant for the disclosure of confidential information.¹¹⁷⁴

2.3. Purpose

In the absence of any specific duty on healthcare professionals to report gunshot wounds, it **cannot be said definitively what the purpose of any such disclosure might be**. Professional guidelines and jurisprudence have, however, offered indications as to the **circumstances in which a disclosure might legitimately be made**. As referred to above,¹¹⁷⁵ in the context of patients presenting with gunshot or knife wounds, disclosures of personal information without the consent of the patient will generally only be justified in the public interest where:

- a failure to disclose such information may put someone other than the patient **at risk of death or serious harm**;
- such disclosure is **likely to help in the prevention, detection or prosecution of a serious crime**.

2.4. Consequences of non-compliance

In the absence of a specific duty on healthcare professionals to report gunshot wounds, there are **no formal consequences arising from a failure to disclose such information**. A failure to follow professional guidelines, however, can lead to **disciplinary action**. For example, the confidentiality guidelines of the GMC, which include specific guidance on reporting gunshot wounds, state:

“You must be prepared to explain and justify your decisions and actions. Serious or persistent failure to follow this guidance will put your registration at risk.”¹¹⁷⁶

Professional misconduct is, however, **more likely to arise in circumstances where a doctor has breached patient confidentiality**, rather than where he or she has failed to disclose confidential information.¹¹⁷⁷ Even then, case law suggest that it would be **difficult to establish serious professional misconduct for a breach of confidence**, unless such disclosure had been made in bad faith, on the basis of an improper motive or some other special circumstance.¹¹⁷⁸

As discussed above, it is also **unlikely that a healthcare professional could be held liable for negligence**, even in circumstances where a failure to disclose information to authorities about a patient who poses a serious risk of harm to the public in general.¹¹⁷⁹ It remains a central principle of tort law that a person may not be held responsible for the actions of a third party.

3. Protection of Provision of Healthcare

3.1. Existence of Specific Legislation to Protect Provision of Healthcare

Regulation of the provision of healthcare in the UK is established through a **wide-ranging framework of primary and secondary legislation**. Of principal importance is the operation of the NHS. In England,

¹¹⁷⁴ *Ibid.*, par. 18.

¹¹⁷⁵ See Section 2.1. of this country report, above.

¹¹⁷⁶ General Medical Council, *Confidentiality: good practice in handling patient information*, *op. cit.*, p. 9.

¹¹⁷⁷ See Joanna Glynn Q.C. and David Gomez, *The Regulation of Healthcare Professionals: Law, Principle and Process*, Sweet & Maxwell, 2012, London, par. 22-030.

¹¹⁷⁸ See *A. v. General Medical Council* [2004] England and Wales High Court (Administrative Court) 880, at par. 111, *per* Judge Charles.

¹¹⁷⁹ See Section 1.2. of this country report, above.

this is overseen by *NHS England*, an executive non-departmental body of the Department of Health and Social Care. Section 1 of the *National Health Service Act 2006* provides that the Secretary of State is under **a duty to promote a comprehensive health service** designed to secure the improvement in the physical and mental health of the people of England, and in the prevention, diagnosis and treatment of illness.¹¹⁸⁰ It also sets out the structure of the NHS in England and effectively places *NHS England* under a statutory duty to secure the provision of medical services throughout England.¹¹⁸¹

Unlike continental European legal systems, however, there is **no general duty on anyone under UK law to take positive steps to assist in an emergency**.¹¹⁸² This also applies to doctors, who, it is said are not in general terms expected to act as Good Samaritans. The courts have confirmed that a doctor even has no obligation to help in the case of a road traffic accident that he or she witnesses.¹¹⁸³

Nevertheless, the regulations referred to in the *National Health Service Act 2006* establish that **general practitioner practices (“GP practices”) must provide a range of medical services** as part of NHS-funded treatment. This secondary legislation includes duties on practices to provide a limited range of emergency services.¹¹⁸⁴ GP practices are, in effect, under a **contractual obligation to provide emergency primary care services where requested to do so**, in the event of an accident or emergency taking place anywhere in the practice area.¹¹⁸⁵ There is also a **limited duty to provide “immediate necessary treatment”** to someone who is not on the list of patients for the practice, but who comes within certain specified categories.¹¹⁸⁶ This, however, is not a duty to provide a full primary care service to these patients, but only to provide necessary treatment.

3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duties of Disclosure of Gunshot Wounds

In the absence of a specific duty on healthcare professionals to report patients who present with gunshot wounds, there is **no particular contradiction of medical ethics rules on maintaining patient confidentiality**. Indeed, it is generally recognized that the duty of confidentiality is relative and not absolute. As discussed above, **professional ethics guidance**, such as that published by the Department of Health¹¹⁸⁷ and the GMC,¹¹⁸⁸ reflect the legal position that, save where there is a statutory duty to do so, **the disclosure of information**, including personal details about the patient, is not required as such but, rather, is **permitted in circumstances where the public interest may justify it**.¹¹⁸⁹

Practical guidance and examples of good practice are provided to aid the doctor or other healthcare professional in deciding whether to report information where they consider it to be in the public interest. As discussed above, **specific guidelines are published by the GMC for doctors dealing with**

¹¹⁸⁰ *The National Health Service Act 2006*, available at <https://www.legislation.gov.uk/ukpga/2006/41/part/1> (26.02.2019).

¹¹⁸¹ *Ibid.*, section 83(1).

¹¹⁸² See David Price, *Medical Law – United Kingdom*, International Encyclopaedia of Laws, *op. cit.*, para. 322.

¹¹⁸³ A. Frampton, *Review – Reporting of gunshot wounds by doctors in emergency departments: A duty or a right? Some legal and ethical issues surrounding breaking patient confidentiality*, *op. cit.*, p. 86.

¹¹⁸⁴ *National Health Service (General Medical Services Contracts) Regulations 2004* (as amended), available at <http://www.legislation.gov.uk/uksi/2004/291/contents/made> (26.02.2019) and the *National Health Service (Personal Medical Services Agreements) Regulations 2004* (as amended), available at <https://www.legislation.gov.uk/uksi/2004/627/contents/made> (26.02.2019).

¹¹⁸⁵ *National Health Service (General Medical Services Contracts) Regulations 2004* (as amended), *op. cit.*, regulations 15(6) and 15(7).

¹¹⁸⁶ *Ibid.*, regulations 15(8) to 15(10).

¹¹⁸⁷ Department of Health, *Confidentiality: NHS Code of Practice – Supplementary Guidance on Public Interest Disclosures*, *op. cit.*

¹¹⁸⁸ General Medical Council, *Confidentiality: good practice in handling patient information*, *op. cit.*

¹¹⁸⁹ See, in particular, Section 2.1. of this country report, above.

the treatment of gunshot wounds.¹¹⁹⁰ Where a healthcare professional is inclined to disclose confidential information on public interest grounds, professional guidelines set out the appropriate steps to take in order to reduce the possibility that such disclosure will constitute an unethical or unlawful breach of patient confidentiality.¹¹⁹¹

¹¹⁹⁰ General Medical Council, *Confidentiality: reporting gunshot and knife wounds*, *op. cit.*

¹¹⁹¹ See, for example, *ibid.*, and Department of Health, *Confidentiality: NHS Code of Practice – Supplementary Guidance on Public Interest Disclosures*, *op. cit.*

V. COMPARATIVE ANALYSIS

Preliminary remarks

Given the wide variety of treatment of the issues of confidentiality and disclosure, the legal experts who prepared the national reports made different choices concerning how broadly they defined the research to be done, particularly with respect to norms not specifically directed at gunshot wounds but which could apply to patients with gunshot wounds under appropriate circumstances. As a result, a proper in-depth comparison of the legal norms that might apply in cases of gunshot wounds was not possible. The purpose of this comparative analysis, then, is to provide an outline of certain tendencies and types of approach taken to the issues of confidentiality and disclosure, in general, as well as to the conditions and modalities of the duty to report gunshot wounds, in particular, as well as highlighting interesting examples where provided by the authors of the national reports.

Moreover, it should be noted that the study covers 22 countries, reflecting, on the one hand, a variety of continents and legal traditions and, on the other, a number of jurisdictions of particular interest because of their past or present experience with the issues examined. As a result, the conclusions in the present comparative analysis apply only to the countries studied.

The single generalization that we can draw from this comparative study is that **the existence of an obligation of doctor-patient confidentiality is essentially universal**. Other than that aspect, however, there is little uniformity amongst the countries studied – be it in form, substance, extent, limitations or even the existence of norms – concerning the duty to report and its interplay with the duty of confidentiality. In particular, **the duty to disclose confidential information to governmental authorities, especially with respect to gunshot wounds, varies from one country to another**. Moreover, there is little clarity concerning how to balance competing norms, and **no country provides for a specific procedure** for resolving these conflicts.

For ease of comprehension, this comparative analysis follows the same general structure as that of the national reports. First, the present comparative analysis will present the general framework regarding confidentiality and reporting duties; the second section will discuss the details of the duty to report gunshot wounds; finally, section 3 focuses on the specific legislation protecting the provision of healthcare as well as on the means to resolve conflicts between the duties of disclosure and confidentiality, on the one hand, and medical ethics in general, on the other.

1. General Legal Framework for Confidentiality and Disclosure

When looking at the General Legal Framework, the legal systems of the countries studies can be divided into groups according to the three following major issues: (i) the existence of a systematic framework¹¹⁹² of provisions concerning the duties of confidentiality and disclosure; (ii) whether, and under what circumstances, the respective regulations have force of law, and (iii) whether the duty or permission to report represents an exclusion from, or an exception to, the duty of confidentiality.

1.1. Countries with a Systematic Framework on Confidentiality and Disclosure

Nine of the countries studied (Egypt, El Salvador, Lebanon, Mexico, Nigeria, Philippines, Spain, South Africa, and the Ukraine) have a **systematic framework for the respective duties of confidentiality and disclosure** (although not necessarily of gunshot wounds, in particular) whereas, in five (Australia, Colombia, Russia, Tunisia and the United Kingdom) potentially applicable provisions appear sprinkled

¹¹⁹² The term “systematic framework” here refers to a single set of rules that govern most, if not all, of the issues surrounding either duties of disclosure or confidentiality, or both.

throughout the relevant legal orders. Other legal orders fall somewhere on the spectrum between these two poles.

In all countries studied, there is some form of obligation – either legal, deontological, or both – for doctors to maintain confidentiality concerning information learned in the process of providing medical treatment. In some cases, however, the **duty of confidentiality** may not be **explicit** but, rather, is **derived** from more general notions such as the right to privacy. Australia, for example, has both a legal duty of confidentiality that flows from notions of privacy, and an ethical duty of confidentiality for the health professions; in South Africa, doctor-patient confidentiality may fall under the Constitutional right to privacy of communications. In France, the patient's right to confidentiality is provided for in the French Code of Public Health and is deemed to be of both private and public concern. In Nepal, there is a Constitutional right to privacy which, *inter alia*, provides that information concerning a patient can be disclosed only (i) if the concerned individual gives consent, (ii) if there is a need for an identity card disclosing the identity of the person in order to receive public services from the government (free governmental medical treatment, medicine, scholarships, etc.), or (iii) by an order of the Court or a concerned authority regarding any case, for the purpose of investigation and prosecution of any offense.

Similarly, the **duties to disclose confidential information** in some countries are expressly stated in the code of criminal procedure, the legislation regulating medical ethics, or another piece of legislation. This is the case for instance in Egypt, Lebanon or Mexico. However, in other countries, **duties to disclose must be derived** from the interplay of different rules on duties of confidentiality as well as rules on criminal and professional liability.

1.2. Whether Duties of Confidentiality and Disclosure Have Force of Law

In seventeen countries (certain legal orders in Australia, China, Columbia, Egypt, El Salvador, France, Lebanon, Mexico, Nepal, Niger, Papua New Guinea, Philippines, Spain, South Africa, Tunisia, Ukraine and the United Kingdom (notwithstanding the absence of a specific legislative provision)), **the duty of confidentiality has force of law**, whereas in four (Nigeria, Pakistan, Russia¹¹⁹³ and South Soudan) it represents an **ethical duty** rather than a legal one. In fourteen countries (Australia, China, Colombia, Egypt, El Salvador, Lebanon, Mexico, Nigeria, Pakistan, Philippines, Spain, South Africa, the Ukraine, and the United Kingdom) there is a **legal duty to disclose** which would generally include information concerning gunshot wounds.

In Tunisia, the duty of confidentiality appears in the Constitution and in the Penal code. The duty to disclose applies only where the doctor knows a crime has been committed, where disclosure is “likely to prevent a terrorist act in the future,” or in the context of an expert opinion at trial.

Colombia law provides for criminal sanctions both for failure to inform the authorities of criminal activity and for violation of professional secrecy, as defined in the Constitution, whereas in El Salvador, violation of the duty of confidentiality is deemed a “serious infringement against health”¹¹⁹⁴. Niger also recognizes a Constitutional right to non-discriminatory healthcare and confidentiality, as well as a legally recognized deontological code, but imposes no legal obligation to report gunshot wounds (although this is done in practice).

¹¹⁹³ In Russia, there are general provisions concerning confidentiality in the federal law, however, there are also multiple types of medical services and facilities with their own operating rules and procedure which are not necessarily consistent.

¹¹⁹⁴ Provisions requiring disclosure are found under the Criminal Code, Code of Criminal Procedure and the Health Code.

In Papua New Guinea, although the Code of Ethics, where the obligation of confidentiality appears, does not have force of law, cases have held that the Constitutional right to privacy extends to the doctor/client relationship. This is also the approach in Colombia; however, as is the case in Niger, there is no duty to disclose in that country.

In the Ukraine, the “simple act of seeking medical assistance” is deemed confidential information, which may only be disclosed where specifically permitted by law. Disclosure is required for physical injuries of a criminal character and injuries resulting from the use of weapons, ammunitions or explosives. The rules change under the regime of high alert, as well as under the regime of an emergency situation, or the regime of a state of emergency. There are also separate rules under martial law. In the UK, whereas the duty of confidentiality has legal force (although its origin is not clear), disclosure is not specifically required except for terrorist acts (although professional guidance¹¹⁹⁵ suggests disclosure should be allowed where there is a public danger, or in connection with the investigation of a “serious crime”).

1.3. Whether the Duty or Permission to Report Represents an Exclusion from or an Exception to the Duty of Confidentiality

In El Salvador and Nepal, information that must be disclosed about gunshot wounds does not benefit from the duty of confidentiality – the information is simply **excluded from the category of confidential information**. As a result, there is no conflict between the obligations of disclosure and confidentiality. Other countries provide for **duties to disclose as an exception to the obligation of confidentiality**. For example, many provide for exceptions to the obligation of confidentiality in the form of an **authorization** for medical professionals to disclose confidential information, or in the form of an **obligation** to do so. Such exceptions are provided in specific circumstances, in particular where ordered by a court (*e.g.* Colombia), where there is the threat of serious harm to a third party (*e.g.* France), where there is a significant risk to public health (*e.g.* South Africa) or a danger to society (*e.g.* Papua New Guinea), where there is a link to terrorism (*e.g.* the United Kingdom, Russia, Tunisia), or the information may lead to the prevention or prosecution of a crime (*e.g.* Australia, Lebanon, Mexico, Russia).

In El Salvador, the doctrine differentiates between cases where a person was shot by someone else (in which case the medical doctor *must* inform the authorities of the injury), and cases where the injury is self-inflicted (in which case the medical doctor is not obliged to report, since he is still bound by his duty of confidentiality, but he *may* disclose if failure to do so would cause a prejudice to himself or to third parties). Where the patient is the victim of a crime, such as in the case of an assault and battery, attempted homicide or sexual abuse, there is a **judicial presumption** that the victim has agreed that the service provider should disclose the professional secret.

In France, medical doctors must take measures (*i.e.* notify the appropriate authorities) to assist any third party in danger or to prevent a crime involving bodily harm without necessarily revealing that they are treating a patient with a gunshot wound. We are informed that in Niger (where there is no obligation to report) and Tunisia (where there is an obligation to report crimes of terrorism only where to do so is likely to prevent a future terrorist attack), both public hospitals and private clinics notify the authorities systematically for fear of being accused of terrorism themselves.

¹¹⁹⁵

General Medical Council Guidelines; see Section 2 of the national report on the United Kingdom.

2. Duty to Report Gunshot Wounds

The second section of this study focuses on the existence of, and the conditions and modalities applicable to, the duty of health professionals to report gunshot wounds to governmental authorities. Among the 22 countries covered by this study, **all but a few countries (i) provide for a duty of healthcare professionals to report gunshot wounds, or (ii) have more general reporting obligations that might include the reporting of gunshot wounds.**¹¹⁹⁶

2.1. Countries that Impose No Legal Duty to Report Gunshot Wounds

Only four countries impose no duty to disclose gunshot wounds: France, Niger, Papua New Guinea, and South Sudan. It would therefore appear that in these countries, a medical doctor, in principle, would only be required to disclose confidential information relating to a patient suffering from gunshot wounds if ordered by a Court to do so. However, even where there is no obligation for healthcare professionals to disclose gunshot wounds, there are indications that, **in practice, healthcare professionals in some of these countries actually do disclose gunshot wounds to governmental authorities.**

In some instances, the law offers an exception to the duty of confidentiality and **allows** health care professionals to disclose confidential information relating to their patients with gunshot wounds where there is a legal or ethical justification to do so. For example, in the Common Law tradition, disclosure of confidential medical information is generally permitted where to do so is **in the public interest**. Hence, in the United Kingdom, disclosure of such information is permitted where a failure to disclose this information may expose others to a threat of serious harm, or where it may assist with police investigations.¹¹⁹⁷ Medical professionals are similarly released from their duty of confidentiality pursuant to professional guidelines in Papua New Guinea. Indeed, in Papua New Guinea, an exception to the duty of confidentiality may arise where non-disclosure may result in a danger to society. The civil law countries covered by this study also allow for exceptions to the duty of confidentiality. French law, for example, allows disclosure of confidential information where the patient, who owns a weapon or intends to acquire one, appears to **pose a danger to him/herself or to others**, as well as where the patient's injuries appear to be the result of **abuse** (*séviçes*) and the patient is a minor, is *non compos mentis* or consents to such disclosure.

Despite the absence of an obligation to report confidential information regarding gunshot wounds, in some countries, healthcare professionals are still **encouraged to disclose such confidential information**. Such recommendation to disclose confidential information is generally contained in professional guidelines regarding the duty of confidentiality of healthcare professionals. For instance, in the United Kingdom, even if there is no specific legal duty to disclose gunshot wounds (except in the framework of the Terrorism Act) but merely a possibility to do so in specific circumstances, confidentiality guidelines do recommend that healthcare professionals inform police authorities whenever a person seeks treatment for a gunshot wound. Similarly, in South Sudan, despite the absence of a legal obligation to disclose gunshot wounds, medical doctors are encouraged to fill in a form issued by the

¹¹⁹⁶ Some countries require healthcare professionals to report confidential information regarding crimes that have been committed and/or crimes that are planned. For the purpose of the present study, where the information reported may include the fact that the doctor's patient has a gunshot wound, such countries are considered as providing for a duty to report gunshot wounds.

¹¹⁹⁷ The United Kingdom goes even further with respect to the fight against terrorism. The Terrorism Act imposes an obligation on individuals to report any information that such individual believes might be of assistance in preventing the commission of an act of terrorism or securing the apprehension or prosecution or conviction of another person involved in terrorism. A similar duty applies in South Africa. For more information see below, section 2.2.1 of the present comparative analysis. Because there is a duty to report in specific – *albeit* restricted – circumstances, these two countries qualify as countries that provide for a duty to report gunshot wounds.

Police authorities with medical information on patients that demonstrate an injury which may have been sustained in connection with a crime. Finally, in Niger, healthcare professionals report gunshot wounds to governmental authorities despite the fact that there is neither a legal duty nor legal permission to do so, for fear of being charged with complicity with the author of the crimes that caused the gunshot wounds.

2.2. Countries that Impose a Legal Duty to Report Gunshot Wounds

The larger group of countries studied do provide for a duty for health professionals to report to governmental authorities, gunshot wounds which they treat, or of which they happen to obtain knowledge within the framework of the exercise of their functions. The following discussion will focus on the grounds for such obligation to report and its modalities, as well as applicable sanctions for non-compliance.

2.2.1. Conditions on the Obligation to Report Gunshot Wounds

In most countries, the **presence of a gunshot wound is not expressly mentioned** as a normative ground for an obligation to report confidential information. Only in the United Kingdom¹¹⁹⁸, in certain States of Australia (Tasmania and South Australia), and in Nigeria, do the applicable legislation or professional guidelines specifically and expressly refer to gunshot wounds¹¹⁹⁹.

In the vast majority of countries examined, the obligation for healthcare practitioners to report confidential information regarding their patient – including the fact that s/he has a gunshot wound – exists in the case where there is a **suspicion that a crime has been committed**. However, the type of criminal offences covered by the obligation to report is defined more or less clearly, depending on the country. In Tunisia, the legislation provides that the obligation to report exists with respect to any criminal offense, which becomes known to the healthcare professional within the framework of his or her functions. Other countries' legislations refer to the suspicion of the commission of a crime that is prosecuted *ex officio* or that is punished by a minimum period of imprisonment. This is the case in Egypt and Lebanon, in El Salvador and in the Australian State of New South Wales.

Although these normative provisions are designed to limit the scope of the obligation to report to cases of serious criminal offenses only, they appear to be difficult to put into practice. Indeed, the healthcare professionals in question are forced into a situation where they are required to **assess the gravity of the criminal offence that they suspect has occurred**, even though they may have no legal or criminal experience or knowledge. As a result, this may create a certain level of uncertainty as to the existence of the obligation to report in a given case. Moreover, since it relies on the existence of a suspicion or assumption on the part of the healthcare professional, the existence of the reporting obligation appears to depend on a **subjective criterion**, which is likely to be uncertain and less practicable. As a result of such uncertainty, and based on the possible sanctions applied in the event of non-compliance (see below, section 2.2.4), healthcare practitioners might be more inclined to “err on the side of caution” and report confidential information, in particular gunshot wounds, than they might in other circumstances.

In certain other countries, the legislation refers to a more objective criterion than the suspicion that a serious criminal offence has been committed. Indeed, the legislations in several countries refer to the existence of **an injury, the criminal character of which is apparent**, without providing further details. This is, for instance, the case in Mexico, Colombia, China, and the Philippines, as well as Russia and the

¹¹⁹⁸ With respect to the United Kingdom, the authors refer to the permission to report gunshot wounds.

¹¹⁹⁹ The national report on Pakistan refers to the obligation to disclose gunshot wounds but we have been unable to determine whether the legislation specifically refers to gunshot wounds, or only that it is clear for the author that the statutory provisions would apply to gunshot wounds.

Ukraine. Hence, in these countries, the existence of a reporting obligation depends on a **less subjective criterion**, namely the injury of the patient. Such a criterion might be easier for the healthcare professionals in question to apply, since they are dealing with the specific medical situation. As a result, however, the scope of the obligation to report appears less restricted, since it is not specifically limited to “serious” offences.

Other obligations to disclose are **likely to be triggered** by a patient having suffered a gunshot wound and that hypothetically would include the fact of the patient’s wound. In particular, some countries provide for specific obligations to report confidential information—including, hypothetically, the circumstances of a criminal offence involving a patient’s gunshot wound – in cases where such information may **contribute to preventing other crimes from being committed**. For instance, in Lebanon, medical practitioners are required to report confidential information to governmental authorities when they learn of the commission of a criminal offence in the framework of the examination of the patient, as well as if they are convinced that such reporting is likely to contribute to preventing the commission of a criminal offence. In other countries, the prevention of the commission of other crimes merely justifies relieving the medical practitioner of his or her duty of confidentiality to allow the practitioner to take the action s/he believes appropriate without incurring his/her professional liability. This is the case in Egypt, as well as in the United Kingdom with respect to the threat of a serious crime.

Some variation may occur concerning the gravity of the criminal offenses that could possibly be prevented. In particular, some countries impose specific reporting obligations with respect to acts of **terrorism**. For instance, in China, any individual or entity, including a healthcare practitioner, is under a duty to report to the public security authorities any suspected terrorist activity or any person suspected of engaging in terrorist activities. Hypothetically, this may include reporting of gunshot wounds. In Tunisia, medical doctors – like any other citizens - are required to report to the police authorities any fact, of which they have learned in the exercise of their functions, where such information may contribute to preventing the commission of acts of terrorism. As part of the Common Law tradition concerning the public interest, Australia, the United Kingdom and South Africa also impose an obligation to inform the authorities about potential terrorist acts. Such obligation would also apply to healthcare professionals. In France, however, although there is a general obligation to report to police authorities information regarding planned terrorist attacks, medical practitioners are exempted from this general obligation.

It is interesting to note that in **most countries** there is **no specific deadline** for the performance of the obligation to report gunshot wounds. As a result, the healthcare institutions organize the performance of the reporting obligation as they see fit. The legislations of **only a few countries** provide for a **specific deadline for the performance of the obligation to report**. In Colombia, for example, the law provides that the healthcare practitioner shall *immediately* inform the police authorities of the admission of a patient presenting “bodily or health injury.” In Russia, the law provides that the medical practitioner is required to report to the police authorities *immediately* by means of telecommunication, and subsequently in a written form within one business day. In Mexico, the law provides that the medical practitioners shall report as soon as possible. El Salvador imposes an 8-hour deadline. Even where this is not provided in an express manner, it appears that the obligation to report is designed to be performed as soon as practicable, especially where the purpose of such reporting is the investigation and prosecution of the authors of the criminal offences.

It is also interesting to note that some countries have set up **specific means for the performance of the obligation to report gunshot wounds**. Indeed, as mentioned above, in some countries, the reporting must be done both by **telecommunications** and then **in writing**. In some countries, medical professionals use **specific forms**, which need to be completed with the relevant information. Other countries have developed guidelines concerning the information that must be communicated as well

as, more broadly, concerning the preservation of evidence, such as all or part of a bullet collected from the patient's body. In other countries, medical practitioners are required to provide the entire medical report to the police authorities. What constitutes performance of the reporting obligation, then, is a function of the information that must be included in the report (see section 2.2.2. below).

Actual practice notwithstanding, it is interesting to note that, in none of the countries concerned is there an express provision in the law requiring reporting as **a precondition to the emergency treatment** of the patient. That said, only a few countries have addressed the **specific issue of delaying emergency treatment in order to report**. This is the case of Nigeria and Pakistan (see below, section 3.2 of this comparative analysis). Most countries however include in their legislation a duty for healthcare professionals to provide emergency treatment. Indeed, in some countries, the medical ethics legislation provides for the duty of the medical practitioner to provide **emergency treatment immediately** as well as the right of the patient to receive such treatment. This is the case in China, Egypt, Lebanon, El Salvador, Colombia, Russia and Tunisia. In other countries, such as the Ukraine, medical practitioners are subject to criminal liability for refusing to provide a patient with the appropriate medical aid when they were able to do so.

2.2.2. Scope of the Obligation to Report Gunshot Wounds

In most countries that have an obligation to report gunshot wounds, medical practitioners are required to **disclose complete and detailed information regarding the patient**, *i.e.*, generally speaking: the identity of the patient, his/her injury and its circumstances, the place and date he/she was injured as well as when and how the person was admitted for medical treatment. In many countries, the medical practitioners appear to be implicitly required even to produce a copy of their medical report regarding the patient concerned. This is the case, for instance, in China and in Spain. In other countries, medical practitioners are also required to collect and preserve possible evidence, such as bullets, for the police and judicial authorities.

Nonetheless, few limitations exist. In a few countries, in order not to violate the duty of confidentiality of medical practitioners, the information reported to the police authorities is **anonymized**: this is the case in Colombia. Moreover, in some countries, there is no obligation to report confidential information, including gunshot wounds, if this would result in **self-incrimination of the patient**. This is the case in Colombia and El Salvador.

2.2.3. Purpose of the Obligation to Report Gunshot Wounds

The national reports that form the present study are fairly uniform as to the question of the purpose of the obligation to report gunshot wounds. The obligation to report gunshot wounds is designed to contribute to the **investigation of possible criminal offences as well as the prosecution of the suspected authors of such crimes**. More rarely, national legislation provides that the obligation to report gunshot wounds is designed to **maintain statistics** on criminal activity in the country concerned. This is the case in the Philippines, for example. More rarely still, when the obligation to report concerns a crime that has not yet been committed but that may still be prevented, the purpose or the obligation to report appears to be **prevention**, in addition to those of investigation and prosecution, of such criminal offences. Other purposes may be **preventing danger** to other individuals, preserving the **public order** or **public health**, or other reasons pertaining to the **public interest**.

2.2.4. Consequences of Non-compliance with the Obligation to Report Gunshot Wounds

The countries that provide for an obligation to report gunshot wounds punish the noncompliance with this obligation. These sanctions target the medical practitioner as well as, in some cases, the institutional structure, such as the hospital where the healthcare professional practises. In most countries, the legislation – *i.e.* usually the criminal code – provides for specific sanctions such as a fine, as well as,

in certain cases, imprisonment. This is the case in Colombia, certain States of Australia (Tasmania, New South Wales), Mexico, El Salvador, Tunisia, China and Nigeria. In other countries, the possible sanctions are exclusively of a disciplinary nature. This is the case in Egypt and in the state of South Australia (Australia), and may also be the case in the United Kingdom. Other countries provide that noncompliance with the duty to report will be sanctioned by both disciplinary and criminal sanctions. This is the case in Lebanon, the Philippines, and Russia.

Finally, it appears important to note that some legal orders provide for the possibility of prosecution of the medical professional for complicity with terrorist activities if disclosure of certain confidential information to the competent authorities would have contributed to preventing the commission of terrorist acts. This could be the case in Tunisia as well as – based on the current political tensions – in the Ukraine.

3. Protection of Healthcare and Healthcare Professionals

3.1. Legislation to Protect Provision of Healthcare

As a preliminary remark, all but five of the countries studied (Iran, Mexico, Nepal, Pakistan and Papua New Guinea) have adopted the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, in particular, its article 10 regarding the protection of medical activities. Nevertheless, **very few specifically and directly protect the provision of healthcare in line with medical ethics**. Colombia, for example, has a specific framework for the provision of healthcare to victims of armed conflict. A law, which applies in times of armed conflicts and other situations of violence, recognizes a practitioner's right not to be punished for providing medical care, as well as the right not to be obliged to act in any manner contrary to medical ethics. In practice however, it appears that some practitioners have been prosecuted for having treated guerrillas. Colombian physicians have been condemned by courts for having provided repeated medical care to FARC members for combat wounds and referral to specialists, while other medical providers have faced charges for treating members of the guerrilla, even though the healthcare professionals provided the care in question under coercion or false pretense.

In most of the countries covered in this study, provision of healthcare is offered some level of protection in an indirect manner, by focusing on the **patient's right of access to healthcare** as well as through the medical professional's **duty to provide medical assistance**. In such cases, the medical professional will be in a position to justify treatment based on the recognition of a fundamental right of access to healthcare and/or of a duty to assist a person in danger as well as the obligation for medical professionals to treat patients, at least in cases of emergency.

For example, in Mexico, health is a Constitutional right and medical practitioners must, first and foremost, give medical assistance to the victims; in Nepal there is a Constitutional right to health, which specifically includes the right to emergency healthcare. In Egypt, failure by a health care professional to provide medical care in an emergency, or where there is a life-threatening situation, is a crime. In France, as well, failure to provide assistance to a person in danger (which would clearly be the case of the victim of a gunshot wound) is punishable. Similarly, the Criminal Code of the Ukraine imposes criminal liability on healthcare professionals who refuse to provide a patient with appropriate medical aid, if they were able to do so, and had a reasonable degree of understanding that such inactivity could cause grave consequences for the health and life of a person requiring help.

3.2. Resolution of Potential Conflicts

We have seen that the obligations of disclosure may conflict with both the obligation of confidentiality and the obligation to treat. When these contradictions arise, in some of the countries under examination, medical professionals may find themselves subject to potential liability regardless of their course of action. **Only a few of the countries studied** have provided for criteria **to help medical professionals resolve these competing interests**, two of which (Nigeria and Pakistan) have directly addressed the notification v. treatment problem. None of the countries, however, have provided for a **specific procedure** for resolution of these conflicts.

Only two countries (Nigeria and Pakistan) have directly addressed the issue of delaying medical treatment of gunshot wounds in order to comply with the reporting obligation. Pakistan has adopted legislation specifically aimed at insuring that the duty of disclosure does not interfere with essential medical treatment. It provides, *inter alia* that **emergency medical treatment has priority** over reporting requirements and that **police may not interfere** with medical treatment or even **approach a gunshot wound victim without the doctor's permission**. Criminal sanctions apply to violations of this law.

Nigeria has the most recent and the most specific legislation. Although protections of patient confidentiality existed previously in the National Health Act and the Constitution, this did not suffice, and patients were denied treatment. Nigeria then adopted the Compulsory Treatment and Care for Victims of Gunshots Act 2017 to specifically address the questions posed in this opinion. That Act provides that “every hospital in Nigeria whether public or private” **must provide “immediate and adequate treatment”** to any person with a gunshot wound without waiting for notification of the authorities. As is the case in Pakistan, non-compliance is punishable.

Several countries appear to resolve these competing interests by providing in their legislation that any conflict between legal obligations and ethical obligations shall be interpreted in favor of the rule of law. As a result, in countries like Russia, the duty to report, which is a legal obligation, is to be interpreted in a way that enables it to have full effect.

Finally, in some countries like Tunisia or the Ukraine, institutional consultative bodies have been put into place in order to facilitate conciliation of potential conflicting interests.

In most countries, however, a conflict between obligations of confidentiality/treatment and reporting will be resolved on a case-by-case basis before national courts. In Colombia, for instance, courts have determined that the protection of healthcare is limited to emergency treatment and that treatment, without notification, falling outside this scope may be subject to prosecution. In El Salvador, the Supreme Court has held that, in cases where the gunshot-wound patient is the victim of a crime, the patient is presumed to have agreed to the medical practitioner's disclosure of confidential information, such that there is no breach of the duty of confidentiality.

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ANNEX

Country	1.General Framework for Confidentiality and Duties of Disclosure of Healthcare Professionals	2.1. Duty to Disclose Gunshot Wounds: Conditions	2.2. Duty to Disclose Gunshot Wounds: Scope	2.3 Duty to Disclose Gunshot Wounds: Purpose	2.4 Duty to Disclose Gunshot Wounds: Sanctions	3.1. Specific Legislation Protecting Provision of Healthcare	3.2. Means of Resolution of Potential Conflicts between Medical Ethics and Duty to Disclose
Australia	Professionals must maintain patient confidentiality unless disclosure is required by law. Professionals must disclose evidence of serious crimes generally and all crimes in certain categories. Out of ten jurisdictions, only SA and TAS expressly require reporting of all gunshot wounds, NSW requires it implicitly.	In no jurisdiction is reporting a precondition to treatment. SA: doctor or nurse must report as soon as practicable after seeing patient. TAS: doctor must report as soon as practicable after seeing patient. NSW: health service providers must report suspicions that crimes have been committed.	Victim's identity, or a description of the victim, must be reported in SA, TAS and NSW. TAS: also details of wound and any information about circumstances of shooting. SA: <i>idem</i> and whether ammunition recovered from wound. NSW: only report victim's identity; also "limited clinical information" in exceptional cases.	Reports to be made primarily to police, in NSW also designated authorities. Information reported to be used for purposes of: prosecuting criminals; enforcing legislation for control of firearms; reducing risk of (further) harm to victims of child abuse or domestic violence.	TAS: non-compliance is a criminal offence punishable with a fine upon conviction by a court. SA: non-compliance is not punishable by law, but may have disciplinary consequence for public health service employees. NSW: non-compliance is a criminal offence punishable with imprisonment upon conviction by a court.	None	Generally: statutory disclosure duties prevail. In NSW public hospitals: public interest analysis required.

China	Constitutional Law, Law on Licensed Doctors of the PRC, Regulation of Nurses, Judicial Interpretation documents, Counterterrorism Law of the PRC	Where a patient appears to have been the victim of a perpetrator of violence or where a patient dies of an abnormal cause; Criminal cases; terrorist activities	All the necessary information for counterterrorism. The medical institutions may decide the scope of disclosure of medical records where the relevant authorities provide statutory certificates	The purpose may vary, depending on the needs of the relevant authorities	Administrative sanctions and criminal sanctions for failing to disclose	Yes. "Opinions" and "Memorandum"	Confidentiality is a general principle, disclosure constitutes an exception.
Colombia	Law on medical ethics provides for permission to reveal confidential information "with prudence" in cases provided by law. Code of Criminal Procedure contains obligation on practitioners to inform the police, whenever a person with bodily or health injuries is admitted for medical treatment	Duty to disclose only the fact of the admission for healthcare services of a patient (who appears to be the victim of a crime) showing "damage caused in the body or in health". Not a precondition to medical treatment. Denunciation through any means allowing identification of its author and date/time. Precise rules exist regarding collection of evidence	Duty to disclose to judicial or health and hygiene authorities gunshot wounds only to the extent that: It does not result in self-incrimination of the patient and it will not be possible to identify the patient. Applies in peacetime and during armed conflicts. Concerns any professional of a hospital, a medical practice or similar establishment, either public or private	Allow investigation and prosecution (part of general obligation to report suspicion of a crime)	For health centers, the sanction is a fine; for individual practitioners it can be arrest for up to one month.	Legal provisions protecting provision of healthcare in all situations (duty to provide assistance to endangered person) but especially in times of war/emergency: medical personnel as protected persons / right not to be punished for performing medical care and not to be obliged to act contrary to medical ethics	National Tribunal of Professional Ethics. Sometimes the Constitutional Court is called upon to intervene

Egypt	Devoir de confidentialité / secret professionnel mais obligation pour le médecin de dénoncer les cas de blessures ou accidents vraisemblablement d'origine criminelle : Code pénal; Code de procédure pénale; Règlement de déontologie de la profession (en temps de paix et de guerre et autres situations d'urgence)	Le règlement de déontologie de la profession ne prévoit pas que la dénonciation des blessures par armes à feu soit une condition préalable pour traiter celles-ci.	Le règlement de déontologie de la profession (art. 33) ne prévoit rien d'autre que le fait que le médecin doit rédiger un rapport médical détaillé au moment du diagnostic	La dénonciation doit se faire auprès du Ministère public ou à un officier de police judiciaire	Sanction administrative ou disciplinaire	pour les cas urgents, le médecin ne peut pas refuser de s'occuper d'un patient (Article 24 Règlement de déontologie de la profession)	Pas de précision dans la loi
El Salvador	Duty of Confidentiality (Art. 23 Constitution; Art. 187 Criminal Code, Art. 187 Code of Criminal Procedure, Art. 64 Laws on ethics and medical deontology) Doctors and other related personnel have a Duty to report cases that are reasonably considered as	No specific provision on gunshot wounds. Art 232 CCP provides for an exception to the duty of confidentiality, by stating that in crimes prosecuted by public action, doctors, nurses and other persons exercising related tasks who acquire information related to a	The denunciation of a crime must contain, when possible, the relevant facts, including the names of the participants, in order to allow the authorities to check the circumstances of the commission of a criminal act	Investigation and prosecution	In case of non-disclosure: "fine days"(Art 312 CSS).	Specific provisions on the rights of patients. Obligation for medical doctors to provide to all patients medical attention of quality	According to the Supreme Court, the fulfilment of the professional duties of assistance is not incompatible with the legal obligation to communicate the ' <i>notitia criminis</i> ' to the authorities in charge of the prosecution. The victim of a crime is presumed to

	<p>crime, unless they are protected by duty to keep professional secrets. (Art. 312 Criminal Code; Art. 232 Code of Criminal Procedure)</p> <p>Law on ethics and medical deontology provides for accepted justifications for breaking the duty of confidentiality.</p>	<p>prosecution are obliged to provide it to authorities. Reporting is never a precondition. Application of criminal sanctions if omission to inform the competent authority that injured person was admitted for treatment more than 8 hours from the arrival of injured person.</p>					have agreed to disclosure of confidential information
France	<p>Pas d'obligation générale de révéler les blessures par arme à feu : Exceptions au principe de l'obligation du secret médical dans certains cas spécifiques (permissions de révéler)</p>	<p>Divulgarion des informations nécessaires pour protéger ou porter assistance à des tiers en danger. Libération de l'obligation de respecter le secret médical si une blessure par arme à feu sur mineur ou une personne qui n'est pas en mesure de se protéger, voire un majeur avec son</p>	<p>Pas de précision dans la loi</p>	<p>Mettre hors de danger des personnes, et éviter qu'il soit porté atteinte à l'intégrité des personnes ou à la sécurité de leur mission</p>	<p>Sanctions pénales seulement dans des cas particuliers (si a empêché de porter assistance à des personnes en danger)</p>	<p>Obligation légale de porter assistance à un blessé</p>	<p>Consultation des instances ordinales</p>

		accord, constitue des sévices, ou pour avertir du caractère dangereux pour lui-même ou pour autrui d'un patient détenant une arme ou ayant manifesté son intention d'en acquérir une.					
Lebanon	Devoir de confidentialité / secret professionnel / obligation de soigner à une personne en situation d'urgence et exceptions pour les cas de blessures par armes à feu notamment : Code pénal, loi sur l'éthique médicale, Code de procédure civile (en temps de paix et de guerre et autres situations d'urgence)	Principe du secret médical avec exception lorsque le blessé paraît avoir été la victime d'un crime ou d'un délit poursuivi d'office	Pas de précision dans la loi	Pas de précision dans la loi	Peine d'amende de vingt mille à deux cent mille livres; éventuellement sanction disciplinaire	La loi sur l'éthique médicale prévoit notamment que le médecin doit traiter tout patient, que ce soit en temps de guerre ou de paix et quelle que soit sa situation financière et sociale, et ceci sans égard à son ethnie, sa nationalité, ses croyances, ses opinions politiques, ses sentiments ou sa réputation	Pas de précision dans la loi
Mexico	Constitutional right for victims of crimes to receive	The obligation of medical personnel to report gunshot	Practitioners must communicate to the authorities	Investigation of crimes and prosecution	Sentence of imprisonment (from six months to 3 years)	Art. 27 of the Code of Criminal	No direct references to this question.

	<p>urgent medical assistance; ethical duty of confidentiality for medical doctors;</p> <p>Legal duty not to disclose confidential information (Criminal Procedure Code);</p> <p>Obligation for medical personnel to report to public prosecutor possible commission of crime, including gunshot wounds</p>	<p>wounds and other possible crimes to office of public prosecutor is not a precondition for providing medical treatment:</p> <p>reporting is done electronically as soon as possible.</p>	<p>the identity of the person treated, the place and circumstances where the victim was found, the nature of the wounds and their possible cause, the type of medical treatment given, or the precise place where the victim will be at the disposal of the authorities.</p>		<p>will be imposed on practitioners who, having treated a victim, did not communicate immediately to the competent authority the information requested in the reporting obligation.</p>	<p>Procedure protects the provision of healthcare by expressly establishing that healthcare professionals must first and foremost give medical attention to the victims.</p>	
Nepal	<p>The right to privacy is guaranteed in the Constitution as a fundamental right (Article 28). The Individual Privacy Act 2018 deals specifically with the protection of the right to privacy of an individual. It includes the provision of a right to personal documents including medical history, certificate or</p>	<p>The possession of arms and ammunition without a license is illegal. Cases of gunshot wounds whether accidental or non-accidental are considered serious criminal offences and are reported to the police. Possession of firearms without a license is illegal under the Arms and Ammunition</p>	<p>The physicians provide treatment to the gunshot wound patient and inform the police simultaneously. The Injury Examination Report is provided if required by the police. The report has detailed information of the patient including the details of the injuries and treatment. Such report should be</p>	<p>The patient with accidental or non-accidental gunshot injuries are reported to the police. The police begins its inquiry of the incident for investigating the criminal offence. There is no legal provision that states the legal rights of such patient against disclosure of identity or a gunshot incident.</p>	<p>No specific legal provisions as to non-compliance with the duty of the health professional to disclose gunshot wounds. However, Under the National Criminal Code 2017, there are acts that constitute non-compliance towards the authorized authority or government servants who are implementing their official duties. Such acts of non-</p>	<p>There are no specific legal provisions which provide protection to healthcare professionals with regard to the obligation to report gunshot injuries. The Security of the Health Workers and Health Organizations Act, 2010 was introduced but it addresses the security concerns</p>	<p>No specific legislation dealing particularly with disclosure of gunshot wounds and protecting medical ethics. The gunshot injuries, both accidental and non-accidental, are treated as possible criminal offences.</p>

	<p>report and can only be disclosed on certain conditions as provided in the Act.</p> <p>The Public Health Act 2018 also protects the privacy of the patient's details and treatments.</p> <p>The Nepal Health Professional Council Rules 1999 state the professional conduct of the health professionals in general such as maintaining decency and secrecy of the patient (Section 13 (1) (b)). The Medical Code of Ethics of the Nepal Medical Council (NMC) also states the duty of the physicians to maintain privacy of the patient (Chapter 3 (3.2))</p> <p>However, there is no specific legal provision that</p>	<p>Act 1962 (Section 31 (1)). A similar provision is also included in the National Criminal Code 2017 (Section 132 (1) of Offence related to Arms and Ammunition)</p> <p>The Public Health Act 2018 requires the health organization to inform the authority if the identity of the patient (accident or any other cause) is unknown and any information available about the patient should be provided (Section 17 (1) (2)).</p>	<p>carried out by a Forensic Expert or doctors trained in forensics.</p>		<p>compliance are punishable by imprisonment or penalty or both for instance, authority seeking the truth in relation with any matter from the person having a legal obligation, the person should not refuse to answer to such authority.</p> <p>Refusal to cooperate may result in imprisonment for up to six months or a penalty of up to five thousand rupees or both (Section 83 (2))</p>	<p>of health workers and health organizations against casual incidents and economic liabilities that may arise in the course of medical treatment and to make health services regular and effective (Preamble)</p>	
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	deals with duties of disclosure of gunshot wounds by health professionals.						
Niger	<p>Pas obligation d'information spécifique en cas de soin d'une blessure par arme à feu.</p> <p>Devoir de confidentialité et protection légale de ce devoir de confidentialité dans le code de Déontologie des Médecins</p>	<p>Pas d'obligation légale d'information spécifique en cas de soin d'une blessure par arme à feu.</p> <p>Dans la pratique, les agents de santé informent les autorités de peur d'être impliqués ou assimilés à des complices des combattants</p>	Pas d'information	<p>Dans la pratique, les agents de santé informent les autorités des blessures par arme à feu, aux fins de permettre les poursuites judiciaires contre les personnes qui ont pris les armes contre l'autorité ou la population</p>	<p>La loi ne prévoit aucune sanction spécifique. Mais, dans la pratique la sanction peut se traduire, par exemple, par des mesures de détention (gardes à vues prolongées) et peut-être même des poursuites judiciaires pour complicité de terrorisme</p>	<p>Le code de déontologie des médecins garantit de manière spécifique les soins de santé dans la législation nigérienne. La Constitution du 25 Novembre 2010 et les Conventions internationales ratifiées par le Niger dans le domaine de soins de santé en constituent les règles générales</p>	<p>En cas de conflit entre l'obligation pratique d'informer et l'éthique médicale, le juge tranchera en faveur de l'éthique qui fait l'objet des devoirs généraux des médecins tels que prévus par le Code de déontologie des médecins</p>
Nigeria	<p>The National Health Act, the Code of Medical Ethics and The Compulsory Treatment and Care for Victims of Gunshots Act 2017 all allow for disclosure</p>	<p>Hospitals must report to nearest police station within 2 hours of commencement of treatment</p>	Background information on patient	Investigation	<p>Hospital: a fine of Naira 100,000.00; doctor "directly concerned with the treatment": imprisonment for a term of six months and/or a fine of Naira 100,000.00</p>	<p>Compulsory Treatment and Care for Victims of Gunshots Act 2017</p>	<p>Statutory duty to disclose pre-empted duty of confidentiality.</p>

	notwithstanding confidentiality obligations						
Pakistan	General framework is divided into civil and criminal liabilities. The duty of confidentiality is requirement by regulation <i>i.e.</i> Code of Ethics which is a regulation with force of law. The duty of disclosure is mandatory and prevails over the duty of confidentiality in the criminal context. The concept of duty of disclosure is based on Constitutional provision specifying that the life and security of individuals is the responsibility of the State	The primary obligations of Healthcare Professionals are to provide medical treatment and to report to police within 24 hours about the patient's identity including his name, age, identity mark, place of residence or work, professional engagements, the incident, health condition of patient, and type of weapon used against patient	The scope of the duty of disclosure by the Healthcare Professional is the information necessary to prepare a Medico-Legal Certificate to be used during the course of investigation and prosecution	The purpose of disclosure is to enforce the law as it is a criminal offence and the Constitution bestows responsibility of life on the State. The State machinery comes into motion to charge the accused person before the Court of law and to get conviction for the offence	Failure to disclose about patient of gunshot wounds would result in prosecution for violation of criminal laws, disciplinary proceedings for professional misconduct (loss of license) and potential civil liability in tort and/or contract	The Code of Ethics stipulates confidentiality is mandatory but in criminal cases particularly gunshot injuries, no specific legislation exists to prevent Medical professionals from disclosing information or to protect Medical professionals in case of non-disclosures. On the contrary, Healthcare Professionals could be prosecuted for concealment and abetment of the culprit	Duty to disclose under criminal law prevails over duty of obligation in the Regulation of Code of Ethics. In practice, there is no conflict between the Medical Ethics and duty of disclosure as duty of disclosure is only for Police
Papua New Guinea	Constitutional privacy excepts case where	No such duty: Code of Ethics may allow	N/A	N/A	N/A	N/A	N/A

	patient sues; Tort and Contract liability for breach; Evidence Act protects privilege in civil actions; Code of Ethics allows disclosure where required by law	exception to confidentiality where there is a “danger to society”					
Philippines	Constitutional privacy protections	Patient with “medico-legal” injuries referred to nearby police desk	Patient data, info on: injury, treatment, person who brings in patient	“to keep track of violent crimes”	Php 100-500; loss of physicians’s license for 3rd offense	N/A	N/A
Russia	Duty of disclosure is stipulated by the law. Specific obligations and procedures may be stipulated by acts of federal, regional or local authorities, by employment contracts, job description, etc.	Injuries that might have been caused by illegal actions	Broad scope of disclosure: patient’s personal data, place of work and residence, state of health, diagnosis etc.	Criminal prosecution. Prevention of crimes. Specific purposes: maintenance of discipline in the Armed Forces, investigation of accidents in the Armed Forces, quick and effective response to emergencies	Criminal and disciplinary liability	Code of Medical Ethics of a doctor of the Russian Federation (does not have a binding normative force) and regional codes of medical ethics	Duty to comply with requirements of legislation is included to the ethical standards of healthcare professionals
South Africa	Constitution, legislation, common law and professional ethics rules	No specific duty. Healthcare professionals may disclose with consent or where	N/A. Disclosure of medico-legal examination usually performed through completion of	N/A. Where disclosure is made using government form, this is strictly for judicial purposes	N/A	South African Constitution and National Health Act prohibit refusal of emergency	No specific duty to disclose. Law permits disclosure where serious risk to public health

		serious risk to public health	government-issued form			medical treatment	
South Sudan	Deontological obligation but no legal obligation	No direct obligation	N/A	Medical report provides evidence in criminal prosecution	N/A	No	N/A
Spain	Obligation générale de révéler au Ministère public la commission de toute infraction sans référence particulière à des éventuelles blessures par arme à feu.	Le code de déontologie médicale et le code de procédure pénale obligent le médecin à transmettre le rapport sur les blessures du patient qu'il a traité lorsqu'elles résultent d'une infraction commise.	Pas de précision spécifique dans la loi. Le médecin peut être amené à communiquer son rapport sur les blessures constatées sur son patient.	Lutte contre la criminalité	Amende pénale	Le médecin doit traiter tous ses patients de la même manière sans discrimination.	La loi oblige le médecin qui dans l'exercice de sa profession a connaissance d'une infraction de le dénoncer immédiatement au Ministère public. En cas de doute il peut faire appel à l'Ordre des médecins.
Tunisia	Textes nombreux, de valeurs diverses, exigeant le secret médical, sauf dans des cas précis, déterminés par des lois, où il existe une obligation de signaler des cas aux autorités compétentes.	Obligation légale pour les médecins exerçant une mission publique de signaler auprès des services de police les infractions connues dans le cadre de leurs fonctions. Obligation légale générale de dénoncer les	L'identité complète de la victime doit être communiquée.	Essentiellement pour déterminer les circonstances d'un accident, d'une infraction et les responsabilités respectives. Peut être mis en rapport aussi avec la lutte antiterroriste.	En cas de non signalement d'une infraction terroriste dont le signalement aurait éventuellement permis d'éviter la commission d'infraction terroriste futures, le médecin est susceptible d'être reconnu coupable d'infraction terroriste.	La Constitution de 2014 garantit le droit à la santé et aux soins de santé. Le code de déontologie médicale pose le devoir primordial de soigner qui pèse sur tout médecin. Il en est de même de la loi	

		<p>infractions terroristes et obligation des médecins de signaler les infractions terroristes, même s'il s'agit d'une information confidentielle, pour autant que le signalement est susceptible de permettre d'éviter la commission d'autres infractions. Dans les structures sanitaires, c'est l'administration qui se charge de l'information. En cabinet de ville, c'est le médecin. La divulgation n'est jamais une condition pour assurer les soins. Le médecin a pour devoir primordial de soigner les blessés.</p>			Amende et/ou emprisonnement.	relative à l'organisation sanitaire, du règlement général des hôpitaux.	
Ukraine	Disclosure is allowed upon having respective prescription in	Established in ministerial acts. Requirement is triggered by the	Broad scope of disclosure. Personality of a patient, data	Criminal prosecution; investigation of accident by	No definitive sanctions. Maybe disciplinary liability.	Ethics Code requires doctors to act in accordance with	No means

	legal acts and only in the interests of national security, economic welfare and protection of human rights	fact of arrival of a patient with injuries of a criminal nature . No precondition for treatment	about place of residence and work, circumstances of an accident, information about person who caused injuries	special commissions established according to the relevant act	Assistance to terrorist organization/military formations, or state treason (at the time of armed conflict)	provisions of legislation	
United Kingdom	Specific legislative provisions, case law and professional ethics guidelines	No specific duty. Healthcare professionals are permitted to disclose confidential information where in the public interest (including assisting in police investigation of serious crime)	N/A. No specific scope; professional guidelines provide general advice on scope of disclosed information where doctor chooses to disclose	N/A. Where doctor chooses to disclose, purpose should be where it is in the public interest to reveal the information (including assisting in police investigation of serious crime)	N/A. Professional misconduct or disciplinary action may arise where healthcare professional fails to follow professional ethics guidance	General duty on government minister to promote the provision of healthcare. Healthcare professionals under no obligation to act in an emergency	No specific duty to disclose, so no potential conflict as such. Law permits disclosure where in the public interest