



THE
COLLEGE
OF
PHYSICIANS
AND
SURGEONS
OF
ONTARIO

**Submission to the Standing Committee on
Social Policy:
Bill 171, *The Health System Improvements
Act, 2006***

College of Physicians and Surgeons of Ontario
April 2007

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The College of Physicians and Surgeons of Ontario (CPSO) is pleased to make this submission to the Standing Committee on Social Policy, which is holding a public consultation on Bill 171, *The Health System Improvements Act, 2007*. Our submission focuses on Schedule M, *Amendments to the Regulated Health Professions Act (RHPA)*. We also have some recommendations to other health related schedules of the Bill.

Overall, we are supportive of the *RHPA* related aspects of the legislation. Amendments to the *RHPA* have been highly anticipated and long-awaited. We believe that the changes will allow health colleges to function more effectively, more efficiently and with greater transparency.

We are particularly pleased that Bill 171 includes:

- The creation of a new streamlined process within the Inquiries, Complaints and Reports Committee for dealing with complaints and reports made against members;
- Mandatory minimum requirements for Colleges to promote continuing evaluation and improvement of members through College standards and programs;
- A new ability for the College to disclose otherwise confidential information to the Coroner; and
- New powers for regulatory bodies to immediately suspend a member, on a temporary or “interim” basis and without notice, if an investigation determines that the conduct of a member exposes or is likely to expose his or her patients to harm or injury.

However, there are areas of the Bill where the intent of the legislation does not go far enough or where operational difficulties are created by the language used to effect the proposed changes. As a result, based on our many years of experience with the current legislation, we have a number of recommendations that would further improve the functionality of the *RHPA*, thereby allowing health colleges to take quicker and more decisive action to provide better protection for patients.

Recommendations

To address these concerns, we submit the following recommendations to Schedule M, *Amendments to the RHPA* and the *Health Professions Procedural Code (HPPC)* for the Committee’s consideration.

***Recommendation #1: Legal Chair Proposal to Chair Discipline Panels
Amend s. 38(2) of the HPPC to allow a judge or senior lawyer to chair some
or all of the College's discipline panels.***

The College's current discipline process has become increasingly litigious and procedurally demanding, as it faces growing pressure from defense lawyers and the courts. Contested hearings are prolonged as discipline panels confront issues and arguments that are progressively complex and strongly challenged.

Independent legal advice as currently structured is not designed to direct the panel, such that the panel is left to make procedural technical decisions without the requisite expertise. For example, when objections occur during the course of a case, the panel must receive advice from ILC, followed by submissions of counsel for both parties on the advice of ILC, and then make a decision in an area of expertise outside their own. Each ILC has a different approach to how directive they will be, with the result that there can be inconsistencies, thereby causing further confusion for the panel members. The panel then must be able to write written reasons that will withstand judicial scrutiny.

As a result, the College recommends that a small pool of three to four retired judges and/or experienced litigators be appointed by the Lieutenant Governor in Council to the Colleges' Discipline Committee. When appointed by the Discipline Committee to chair specific panels, the jurist would add value by making procedural decisions in consultation with the panel and by assisting with writing decisions. These individuals would be public non-Council appointments, ensuring that the existing ratio of professional/public members on College Discipline panels is maintained.

A legal chair would bring additional expertise to the discipline panel that would:

- Enhance collaborative decision-making and build greater capacity within a panel;
- Allow the medical panel members, at the same time, to focus on the medical care and professional conduct issues; and
- Enable the panel to be more proficient at deciding procedural issues and arguments during hearings, and at preparing its reasons.

This approach has successfully been in place in other jurisdictions, including Nova Scotia, Quebec, and Saskatchewan.

The College proposes a very small housekeeping amendment to s. 38(2) of the legislation, which would permit, but not require, the appointment of a jurist to a panel on a case by case basis. No College would be required to have members appointed and no Discipline Committee Chair would be required to appoint the jurist to any specific panel. The amendment could read:

- 38(2) A panel shall be composed of at least three and no more than five persons,
- (i) at least two of whom shall be persons appointed to the Council by the Lieutenant Governor in Council; or
 - (ii) at least one of whom shall be a person appointed to the Council by the Lieutenant Governor in Council and one of whom shall be a person
 - 1) appointed to the Discipline Committee by the Lieutenant Governor in Council; and
 - 2) who is a judge of the Federal Court, Supreme Court of Canada or of a superior, district or county court of a province or a person who is qualified for appointment to, or has retired from, such a judicial office.

Recommendation #2: Search Warrants Must Allow Access to Dwellings
Remove “other than a dwelling or a part of a dwelling that is not the place of practise of the member” from the proposed new s. 77(1) of the HPPC.

Bill 171 proposes to change the search warrant provision such that a search warrant will no longer provide access to a dwelling or part of dwelling that is not the place of practise of the member.

The search warrant power is rarely used by the College but is extremely important in the exceptional cases in which it is relied upon. Often, members who practise in part of their homes maintain records or other relevant information in their basements or other portions of their homes that would not constitute part of their “place of practise”.

The current legislation allows access beyond the “place of practise” portion of the dwelling in these exceptional cases, by way of a search warrant authorized by a Justice of the Peace. Loss of this power, as proposed in the revised search warrant provisions, would significantly hamper the College’s ability to appropriately investigate these cases and thereby protect the public.

For example, the College has recently had two cases in which members were alleged to have been practising in contravention of orders or terms on their certificates, in which they practised out of “home offices but kept records, supplies and other evidence in other portions of their homes. One case involved a (now former) member who practised cosmetic surgery in contravention of an undertaking with and order by the College, out of an office attached to his home, and who kept significant evidence in the dwelling, not practise, portion of his home. Search warrants permitted the College to access the evidence, and it is

imperative that such an ability is maintained for these exceptional situations.

Recommendation #3: Exception Required for Time Provision for Notice of Complaints

Provide an exception to the provision in s. 25(6) of the HPPC requiring the Registrar to give notice to the member within 14 days of receiving the complaint where a longer period of time is required in order to preserve the integrity of the investigation.

Currently, the *RHPA* does not specify a set time period for the provision of notice to a member who is subject to a complaint. The College is supportive of a general provision imposing a time limit, but wishes to stress the importance of allowing for exceptions in certain cases where at least some investigation needs to be done prior to notifying the subject member.

For example, a sexual abuse, fraud or serious prescribing complaint may require the College to obtain an appointment of investigators by the ICR Committee and in some cases, perhaps even a search warrant, to obtain original medical records prior to notifying the member of the complaint out of concern for the preservation of the integrity of evidence. That is why in these types of cases, if the member under investigation is aware that a complaint against him/her has been submitted to the College before the investigation commences, the integrity of evidence may be jeopardized.

The appointment of investigators and the obtaining and execution of a search warrant will generally take more than 14 days and therefore, there needs to be a mechanism to allow for an exception to the 14 day general notice provision for these types of cases.

Recommendation #4: Allow Information Disclosure if Member Fails to Cooperate with QA Processes

Add, to the end of the newly drafted s. 83(2) of the HPPC “or failed to cooperate with the Quality Assurance Committee (QAC) or an assessor or to participate in the quality assurance programme or a specified program of assessment.”

Currently, the Bill includes a narrow provision which would allow otherwise protected information to be disclosed by the QAC or a QA assessor to another committee, where relevant to a proceeding before that committee. Specifically, the information that may be disclosed includes only an allegation of giving false information to QAC or an assessor. The other existing provisions that limit the sharing of quality assurance information could act to prohibit this flow of information, absent this provision.

Therefore, it is the CPSO's view that the exception allowing the disclosure of

information must also explicitly include information related to an allegation of failure to cooperate with the QAC or assessor, or to participate in the quality assurance program or a specified program of assessment. Without this important change, the College's ability to do anything about a member who fails to co-operate with the QAC or assessor may be severely compromised, as it may not be permitted to share the information underlying the failure to co-operate.

Recommendation #5: Award Funding for Therapy Retroactive to Date of Sexual Abuse

S. 85.7(10) of the HPPC should explicitly state that an award for funding for therapy can be made retroactively to the date of sexual abuse.

The Bill proposes to allow a person who has become eligible for funding to pay for therapy or counselling to use that funding to pay for therapy received before the person became eligible, but after a complaint was filed. The legislation needs to explicitly state that funding to pay for therapy or counselling is allowed to be made retroactively to the date of sexual abuse, irrespective of whether or when a complaint or report is made to the College.

For example, criminal convictions against a member may have been made, a member may have died, and the victim may not wish to complain to the College, but should still be able to access funding for therapy, even if the therapy has already commenced. If eligibility requirements specified in the regulations are met, victims should be able to access funding for therapy they received anytime after the sexual abuse occurred, even if they choose not to complain to the College as they do not wish to go through a hearing again.

Currently, the drafting would prevent these individuals from accessing needed funding. The retroactivity date should not be tied to the College processes, but rather, to the date the sexual abuse occurred.

Recommendation #6: Allow Disclosure of Member Information of a Serious Nature after Six Years

Add "if the information regarding the member was a discipline finding in respect of which the penalty ordered was only a fine or reprimand" to the end of s. 23(6)(a) of the HPPC. This would allow the Registrar to disclose to the public or post on the College website serious information if more than six years has passed since the information was prepared or last updated.

The Bill proposes to provide the Discipline Committee with a new ability to order that the Registrar not disclose certain information to the public or post it on the College website if more than six years has passed since the information was prepared or last updated. The public would be better protected if the information

regarding the member that would not be disclosed after six years had passed was limited to a discipline finding in respect of which the penalty ordered was only a fine or a reprimand, and if all serious penalties remained on the register indefinitely, as they do now under the combined effects of the legislation and CPSO by-laws.

Recommendation #7: Remove Provision for Separate Pre-Hearing Panels
Remove s. 38(1)1 of the HPPC from the Bill.

The proposed amendment would allow the chair of the Discipline Committee to select a separate panel from among the Committee members to consider pre-hearing matters.

There is a possible problem with specifying that different pre-hearing panels may be appropriate for some motions. Due to the shortage of available Council members, requiring separate pre-hearing panels would make it more difficult to obtain panels for hearings. Currently, common law principles must be followed in this regard, and these suffice to ensure a fair process.

Recommendation #8: Require Someone Other Than ICR Committee to Reduce the Time Period for a Member's Reply to Complaint or Report
Amend s. 25.2(2) of the HPPC so that someone other than the ICR Committee, such as the Committee Chair, reduces the time period for the reply from a member who is the subject of a complaint or a report.

The ICR Committee may specify a period of time of less than 30 days in which the member who is the subject of a complaint or a report may make written submissions, and inform the member to that effect, if the Committee is of the opinion, on reasonable and probable grounds, that the conduct of the member exposes or is likely to expose his or her patients to harm or injury.

It would be important to enable an entity other than the ICR Committee, which operates through panels, to reduce the time period for reply in these exceptional cases. If a panel of the ICR Committee needs to be struck, the 30 day time period that is sought to be abridged would be subsumed in the time period it takes to strike a panel. A workable alternative would be to specifically provide that this function may be performed by the Chair or other single member of the ICR Committee.

Recommendation #9: Require the ICR Committee to Receive a Report from QAC

Amend s. 75(1)(b) of the HPPC to state, "the ICR Committee has received a report from the QAC, and the ICR approves of the appointment."

S. 75 should reflect that it is the ICR Committee, not the Registrar, who gets the report. This would mirror the current provisions of who receives the report but changes the Executive Committee to the ICR Committee.

Recommendation #10a: Require an Investigation to Commence Only After the Alternative Dispute Resolution (ADR) Process is Complete

Amend s. 28(2) of the HPPC so that a referral to an ADR process does affect the time requirements under s. 28; such that the computation of time shall not start unless and until the ADR process fails. Separate timelines can be introduced for the ADR process, if desired. As a result, add to s. 25.1 of the HPPC, “an ADR with respect to a complaint should not run concurrently with an investigation.”

The ADR process with respect to a complaint should not run concurrently with an investigation as it would be extremely resource-intensive for the College, the member, and the complainant to have two very similar concurrent processes. The College, the complainant and the member would all be duplicating efforts and doubling the use of resources if required to undergo two processes about the exact same matter concurrently.

Thus, the investigation should not commence until the ADR process is complete and then will only need to proceed if the ADR process has failed.

Recommendation #10b: Do Not Require Information Obtained During ADR Process to Remain Confidential

Remove confidentiality provision in s. 25.1(2) of the HPPC.

Requiring all information obtained during the course of the ADR process to remain confidential places the regulator in an untenable position should it become aware of serious information during the ADR process and be precluded from further investigating or acting upon it.

The College, as regulator and in order to protect the public, cannot ignore information that it has been given, regardless of where it comes from. For example, during the course of ADR, a member could inform the College that his/her misconduct had extended to several other patients. The current version of the Bill would prohibit the College from acting upon this very serious information in the public interest.

Recommendation #11: Require Members to Continue to Be Subject to Misconduct or Discipline if their Certificates of Registration Have Expired

Add “persons whose certificates of registration have expired or terminated” to s. 14(1) of the HPPC to continue to be subject to the

jurisdiction of the College for misconduct or incompetence referable to the time when the person was a member.

The Bill proposes to allow a person whose certificate of registration has been revoked or who has resigned to continue to be subject to the jurisdiction of the College for misconduct or incompetence referable to the time when the person was a member and may be investigated.

Currently, members who were revoked or who have resigned are subject only to misconduct, not incompetence, proceedings. However, there have been circumstances where the College has sought to take action against a member regarding a concern related to incompetence, only to find that the member had allowed their certificate to expire. Thus, a person whose certificate of registration “has expired or terminated” should also be included in this provision.

Recommendation #12: Allow the QAC to Direct the Registrar to Impose Terms, Conditions or Limitations to a Member’s Certificate for a Specified or Indefinite Period of Time.

Add “or indefinite” to s. 80.2(1)2. of the HPPC. This would ensure that the QAC can direct the Registrar to impose terms, conditions or limitations for a specified “or indefinite” period to be determined by the Committee on the certificate of registration of a member.

It would be helpful to expressly state that terms, conditions or limitations imposed in this context may be for an indefinite period of time. The indefinite period of time may be required in cases in which the QAC wishes to impose restrictions until a member has shown that s/he has sufficiently remedied any deficiencies that it is safe for the restriction to be removed. It is unclear if this could be accomplished under the current wording of the amendment. Thus, it would be clearer if the word “indefinite” were added.

Recommendation #13: Clarify the Purpose of Requiring the College to Identify and Record the Language of Members and the Public

Provide clarification to the proposed amendment to s. 86(1)1 of the HPPC which would require the College to identify and record the language of each member of the College and public.

In the current draft, this process would be highly cumbersome and its purpose is unclear. Thus, further clarification is required.

Recommendation #14: Allow for the Facilitation of Joint Investigation, Resolutions and QA

Add a provision to allow for the facilitation of joint investigation, resolutions and QA with other regulatory bodies.

HPRAC's proposal to facilitate resolutions, joint investigations and QA activity with other regulatory bodies has not been included in the Bill. While there is a new object on inter-professional care, it may not be permissive enough to foster broader QA activities (such as a joint QA program in a facility where multiple professionals provide care).

Recommendation # 15: Enhance the Public Appointments Process
Legislative amendments that should be made to enhance the public appointments process are as follows:

- ***Ensure that boards have adequate public representation at all times;***
- ***Extend public members' terms until they are reappointed or replaced; and***
- ***Appoint a pool of public members available to participate as public members of College committees who are not members of Council. It is envisioned that this new pool of public members would serve on panels as public members, fulfilling statutory quorum requirements.***

Members of the public are central to the work of the College. Thousands of members of the public, appointed by government, sit on various boards, agencies and commissions. All of these organizations rely on the contribution of public members in order to conduct their business.

The College of Physicians and Surgeons is no exception. Between 13 and 15 public members serve on the Council of the College at any given time. In fact, two public members are required for every College Discipline hearing under the HPPC. It is imperative that the voice of the public be fully present within our College Council.

However, the College's regulatory function is often threatened by the flaws in the public appointment process. For example, many public members are initially unaware of, and are unable to commit to, the amount of time required to serve on the College Council. They are also not adequately compensated for their work. They may also be fully employed and may not want to experience the loss of income that could result by participating in a lengthy discipline hearing, for example. The College simply cannot proceed with a hearing without two public members. Delaying a hearing can potentially pose a risk to the public and impedes the College's ability to carry out its regulatory function.

We believe that these problems are strong indicators of the need for a serious re-examination of the overall public appointments process.

In its 2006 report, the Health Professions Regulatory Advisory Council (HPRAC) made some observations and recommendations to address the flaws in the public appointment process - which included the following:

- public members should be selected on the basis of relevant education and experience;
- they must have the necessary knowledge, ability, willingness, and commitment to fulfill their responsibilities as public members;
- public appointee compensation should be thoroughly reviewed and subsequently increased; and
- extend public members' terms until they are reappointed or replaced.

We support HPRAC's findings and suggest that the Bill be amended in a way that incorporates these recommendations.

Recommendations to Other Health Related Schedules of the Bill

We also submit the following recommendations to some of the other health related schedules in Bill 171.

Specifically, we urge the government to:

Recommendation #16: Allow College Members Practising Psychotherapy to Use the Psychotherapy Title
Amend S. 8 of Schedule Q, The Psychotherapy Act so that any member of a regulated health profession who is entitled to perform the controlled act of psychotherapy be allowed to use the title "psychotherapist".

If passed, Schedule Q, *The Psychotherapy Act, 2006* would regulate the new profession of psychotherapy and create the College of Psychotherapists of Ontario. S. 8 of Schedule Q provides that no person other than a member of the Psychotherapists College shall use the title "psychotherapist."

At the same time, the Bill allows certain members of regulatory colleges other than the Psychotherapist College to perform the controlled act of treating by means of psychotherapy. These include doctors (medical), nurses, psychologists and occupational therapists (the latter only in accordance with regulations).

We believe it is contradictory to allow certain regulated health professions to practise psychotherapy yet only allow members of the Psychotherapy College to use the title "psychotherapist".

Recommendation #17: Ensure Naturopath Practitioners Using the Doctor Title Have Rigorous Education and Training
Add a provision to Schedule P, The Naturopathy and Homeopathy Act 2006, to ensure naturopath practitioners are subject to a vigorous

educational and training process that is consistent with other health professions who are permitted to use the title “doctor”.

If passed, Schedule P would regulate the new professions of naturopathy and homeopathy and create the College of Naturopaths and Homeopaths of Ontario. S. 20(1)(1.2) would permit naturopaths to use the title of doctor, but they may only do so if the phrase “doctor of naturopathy” immediately follows his/her name.

Currently under the *RHPA*, chiropractors, optometrists, physicians, psychologists and dentists are permitted to use the title “doctor”. All of these professions have a number of characteristics in common which differentiate them from other non-doctor practitioners. They all require a minimum of 7 years of post-secondary education, including some university prerequisite for entry into a professional school or program.

However, allowing members of the Naturopaths and Homeopaths College who practises naturopathy to use this title may cause confusion amongst the public about the differences between a medical “doctor”, other professions who use “doctor” and a doctor of naturopathy.

In addition, we agree with HPRAC’s analysis in its review of the *RHPA*, which presumes that it is important to recognize that the title “doctor” connotes to the public that the person has achieved a certain level of education.

Thus, we recommend that if naturopath and homeopath practitioners are to be called “doctors”, they must be subject to a vigorous educational and training process that is consistent with other health professions who are permitted to use the title “doctor” to ensure high standards of care and patient safety.

We also strongly recommend that those parts of the Bill with respect to the “doctor” title be not proclaimed until the educational standards for these practitioners are in place.

Summary

While we are very supportive of the *RHPA* related aspects of the Bill we have made a number of recommendations that would improve the impact of the legislation on patients as well as the overall regulatory structure. On balance, Bill 171 will allow health colleges to take quicker and more decisive action to provide better protection for patients.
