

May 08, 2017

Via Mail & E-mail: wshort@ola.org

Mr William Short
Clerk, Standing Committee on the Legislative Assembly
Legislative Assembly of Ontario
Room 1405, Whitney Block
Queen's Park
Toronto ON M7A 1A2

Dear Mr Short:

Re: Bill 87, *Protecting Patients Act, 2016*

The Canadian Medical Protective Association ("CMPA") welcomes the opportunity to provide comments on Bill 87, the *Protecting Patients Act, 2016*. Bill 87 is a significant piece of legislation that proposes amendments to various statutes, but primarily would bring about changes to the *Regulated Health Professions Act ("RHPA")* and the *Health Professions Procedural Code ("HPPC")* as a result of the provisions set out in Schedule 4 of the Bill.

The CMPA is a not-for-profit organization that has delivered medical liability protection in a cost-effective and ethical manner since 1901. It is the principal provider of medical-legal assistance to Canadian physicians. The most obvious expression of the CMPA's assistance to its members is the provision of legal representation, including representing members when they are named in a legal action, and assisting members in College matters. In addition to providing legal representation to members, the CMPA also provides broader advisory services on a multitude of medico-legal issues. Consequently, any legislative changes to the regulation of health professionals will have important implications for the CMPA and its Ontario members.

Overview

The CMPA understands that the impetus for many of the proposed amendments in Bill 87 to the *RHPA* and *HPPC* is to respond to the recommendations of the Task Force on the Prevention of Sexual Abuse of Patients and the *Regulated Health Professions Act* ("Task Force"). We appreciate the overarching patient safety objectives that form the basis for the majority of the suggested changes to the *RHPA*. Indeed, the CMPA supports legislative measures that are appropriate and effective to address sexual abuse by regulated health professionals. At the same time, the CMPA is concerned that some of the proposed amendments in Bill 87 may not afford health care professionals with the necessary procedural fairness protections in accordance with the principles of natural justice.

It is the CMPA's sense that a few of the provisions in Bill 87 may be intended to address some of the recommendations of Mr. Stephen Goudge in his February 2016 Report: *Streamlining the Physician Complaints Process in Ontario*. The CMPA actively participated in the Review conducted by Mr Goudge. The CMPA was hopeful that the government would rely upon Mr Goudge's recommendations to propose amendments to the *RHPA* and *HPPC* that would improve the effectiveness and efficiency of College

processes, in particular investigations, complaints and discipline processes. As currently drafted, it is unlikely that any of the suggested changes contained in Bill 87 would fundamentally address the need to streamline College complaint processes. The timely resolution of investigations, complaints and discipline matters is in the interest of patients, the public and health professionals. Timely, proportionate and fair processes for the investigation and resolution of complaints – whether in relation to alleged sexual abuse or otherwise – are in the public interest. The CMPA would therefore be most disappointed if Bill 87 is intended to be the government's complete legislative response to the recommendations made by Mr Goudge.

The CMPA has restricted its comments below to the proposed amendments to the *RHPA* and *HPPC* set out in Schedule 4 of the Bill.

The CMPA makes the following specific recommendations regarding Schedule 4 of Bill 87 for consideration by the Standing Committee. Many of the CMPA's recommendations focus on mechanisms to encourage the timely resolution of College matters:

- Authorize the Registrar (or a newly created position of Complaints Director) to triage or conduct a preliminary review of complaints and dismiss those where there is insufficient or no evidence of professional misconduct or inadequate care, or where the complaint falls outside the jurisdiction/mandate of the College.
- Permit the Registrar (or Complaints Director) to summarily address certain complaints, proportionate to the significance of the issues and the College's mandate to protect the public, to avoid the matter having to be thoroughly investigated and formally considered by the Inquiries, Complaints and Reports Committee ("ICRC").
- Require one member of the Discipline Committee panel as being someone with legal expertise (*i.e.* lawyer or retired judge) who would, in the absence of the other panel members, hear and determine those evidentiary and procedural issues typically dealt with by a trial judge in the absence of the jury.
- Restrict the appointment of Discipline Committee panels from being composed solely of laypersons.
- Adopt the recommended ADR process set out by Mr Goudge in his February 2016 Report.
- Prohibit information related to a patient's eligibility for funding for counselling or therapy from being disclosed to panel members of the committee reviewing the allegations of sexual misconduct.
- Ensure the proportionality principle is reflected in any conduct that is prescribed by regulation to warrant mandatory revocation.
- Ensure the statutory provisions relating to sexual abuse continue to be clear, including the definition of "patient".
- Limit the Minister's collection of member information from the Colleges to that which is de-identified or

in aggregate form.

- Make changes to the information to be included on the public register pursuant to the Minister's new regulation-making authority only after consultation with stakeholders.
- Expediently investigate and prosecute matters where an interim suspension order has been made.
- Routinely give notice and the right to make submissions before any interim suspension order is made.

Amendments Related to Goudge Recommendations

The CMPA's understanding is that Mr Goudge was engaged by the Ministry to make recommendations to the Minister respecting means by which:

- The complaints process could be streamlined to permit decisions to be made more efficiently and cost-effectively; and
- Hearings can be reduced in terms of numbers, length and cost while still maintaining a fair process.

The CMPA was encouraged by the recommendations in Mr Goudge's report and considered that the implementation of those recommendations would improve the overall efficiency and effectiveness of the complaints and disciplinary process. In the CMPA's view, the proposed amendments in Bill 87 are an underwhelming response to the recommendations made by Mr Goudge. It would certainly be troubling if Bill 87 was the sole legislative response to Mr Goudge's review. The CMPA urges the government to fully adopt Mr Goudge's recommendations regarding the efficiency and effectiveness of the complaints and discipline process to assist in the timely resolution of matters before the ICRC and Discipline Committee, which includes matters for which an interim suspension order has been made.

Composition of Committees and Qualification of Committee Members

Bill 87 proposes broad new Ministerial regulation-making powers, including the ability to make regulations respecting the composition of the Colleges' committees and their panels, as well as the qualification, selection and appointment and terms of office of members of committees. It is uncertain whether these proposed regulation-making powers are intended to address the recommendations in Mr Goudge's report related to the appointment of a Complaints Director and the selection of pre-hearing conference chairs for discipline matters. Mr Goudge identified these specific areas as those that would be in the public interest to seek efficiencies in the Colleges'.

The CMPA supports the use the Registrar (or newly created position of Complaints Director) to triage complaints into different streams to explore appropriate resolutions that avoid more minor matters having to be thoroughly investigated and formally considered by the ICRC. The triage, dismissal and resolution of complaints, where appropriate, at the outset of the complaints process would increase the availability of resources generally, and expedite the time required to move all other cases toward resolution.

In the CMPA's view, the College's disciplinary process would also benefit from one member of the Discipline Committee panel being someone with legal expertise (*i.e.* lawyer or retired judge) who would, in the absence of the other panel members, hear and determine those evidentiary and procedural issues typically dealt with by a trial judge in the absence of the jury. The CMPA also supports the recommendation made by Mr Goudge that pre-hearing conference chairs be selected on the basis of their skills and disposition to achieve resolution and that they receive additional training in mediation. Mr Goudge recommended - and the CMPA agrees - that non-physician chairs might be used in cases where credibility or other issues are raised in which non-physicians might be more effective.

The CMPA is aware that there have been suggestions made by some stakeholders that the Ministry might use this new regulation-making authority to appoint Discipline Committee panels composed solely of laypersons for hearings into alleged sexual abuse. The CMPA infers that such concerns stem from the fact that there is no reference in the Bill to the criteria that may be used to determine the composition and/or qualifications of committee members. Furthermore, the Bill would repeal subsection 38(3) of the *HPPC*, which currently provides that at least one member of the selected Discipline Committee panel must be a member of the College and a member of the Council.

Discipline Committee panels composed exclusively of laypersons who have no knowledge of or experience with the practices or regulation of the relevant health profession has the potential to jeopardize the procedural fairness to which health professionals are entitled. This concern may be heightened by virtue of there being limited ability under the *RHPA* to challenge the composition of a Discipline Committee panel.

To the extent that a panel is composed of entirely laypersons, it is also expected that evidence would need to be led about the particular health profession's practice and/or regulation of that health profession. Unlike a panel composed of the health professional's peers, the panel members would have no expertise in relation to these particular issues and would require that information to assist them in understanding these issues in order to make a reasoned decision.

Given the additional evidence that would need to be presented and considered by a panel composed solely of laypersons, the CMPA is concerned this could result in inefficient, lengthier and potentially more costly hearings. Such a consequence would undermine the stated objectives of Mr Goudge's review to develop ways to reduce the number, length, timeliness and cost of hearings.

Withdrawal of Complaint by Registrar

Currently, there is no legislative authority for the Registrar to dispose of a complaint without a referral to the ICRC for investigation, even if it is apparent that the complaint is frivolous or vexatious, falls outside the College's jurisdiction/mandate, or has no reasonable prospect of success. The investigation of such complaints consumes significant resources for both the College and the health professional and is often time consuming.

The CMPA is concerned and disappointed that Bill 87 has limited the Registrar's authority to withdrawing a complaint only at the request of the complainant at any time following receipt of the complaint and prior to

the ICRC taking any action in respect of the complaint. In addition to withdrawing a complaint at the request of the complainant, the Registrar should be authorized to triage or conduct a preliminary review of the complaint and dismiss those where there is insufficient or no evidence of professional misconduct or inadequate care, or where the complaint falls outside the jurisdiction/mandate of the College.

At the very least, the *RHPA* should be amended to adopt the recommendation by Mr Goudge that the Registrar (or newly created position of Complaints Director) be given the power to dismiss complaints where the Registrar is satisfied that there is no reasonable prospect of an outcome from the ICRC other than "no action". Even this slightly greater dismissal authority would have the potential of proportionally addressing complaints when the College's full investigative framework is not necessary.

The CMPA also recommends that the *RHPA* be amended to permit certain complaints to be addressed in a summary fashion, proportionate to the significance of the issues and the College's mandate to protect the public. Even if not considered frivolous or vexatious, some complaints are not sufficiently significant, relative to the costs associated with a full investigation and hearing, to warrant fully invoking the College's investigatory procedures. For example, complaints about a simple miscommunication or the alleged rudeness of a physician's staff member can be adequately addressed without a full investigation and hearing before the ICRC, as is currently required under the *RHPA*.

Alternative Dispute Resolution

The CMPA urges the government to adopt the recommended ADR process set out by Mr Goudge in his report. In particular, Mr Goudge recommended a replacement of the current ADR provisions with a process that can be initiated and approved by the investigator at any stage of the investigation without the complainant's consent. Mr Goudge also suggested that any proposed resolutions be presumed to be appropriate for approval absent "identifiable reasons to believe that resolution is not in the public interest." The CMPA agrees that there should be only exceptional circumstances for the ICRC to exercise its authority to continue with its investigation of a complaint notwithstanding a resolution reached between the complainant and the member.

Regrettably, Bill 87 proposes to make very minimal changes to the existing alternative dispute resolution ("ADR") provisions in the *HPPC*. In this regard, the suggested amendments are restricted to imposing time limits for resolving complaints and requiring proposed resolutions to be submitted to the Registrar, who may adopt the resolution or defer the decision to the ICRC. The ICRC would still have the authority to continue with its investigation irrespective of the parties reaching a resolution.

These amendments would not address the underlying problem that the current ADR provisions are rarely used. The ability of the ICRC to continue with an investigation despite a resolution having been reached by the member and the complainant seriously erodes the effectiveness and attractiveness of ADR. Not only is there a significant waste of resources if the College can disregard the resolution reached through ADR and continue with its investigation, but this would only serve to extend the time it takes to resolve these matters.

If Mr Goudge's recommendations were adopted, the CMPA anticipates that a significant number of complaints could be more expediently resolved on an informal basis without the member being subject to further investigation.

Prevention of Sexual Abuse Provisions

The CMPA does not tolerate the sexual abuse of patients by physicians, nor does it enable such behaviour in the assistance it provides to members. The CMPA supports efforts to ensure that there are appropriate statutory and regulatory measures in place to ensure that such cases are properly investigated and adjudicated in a way that protects patients and appropriately deals with those found to have committed these acts.

Members of the CMPA are eligible for assistance in College investigations and disciplinary proceedings, including those arising from allegations of sexual abuse arising out of the practice of medicine. While the nature and scope of the CMPA's assistance varies based on the circumstances of each case, the CMPA's primary role in College cases is to ensure that members are provided with an opportunity to address any such allegations in a procedurally fair manner.

Given the potentially significant consequences for those found to have engaged in inappropriate sexual behaviour with a patient, it is extremely important that the legislative provisions relating to the investigation and regulatory prosecution of professionals accused of sexual abuse of a patient do not compromise the procedural fairness guaranteed by law and the current statutory framework established by the *RHPA*.

The CMPA is concerned that, as currently written, some of the proposed provisions in Bill 87 to deal with sexual abuse may compromise procedural fairness and/or potentially raise constitutional issues.

Funding for Therapy and Counselling

While access to funding for therapy and counselling is a laudable concept, the CMPA is concerned with the prospect of the College being entitled to recover from a member money paid by the College to fund therapy and counselling of patients in circumstances where the allegations have not been substantiated. In this regard, Bill 87 provides that a patient would be eligible for funding any time it is *alleged* in a complaint or report that the patient was sexually abused by the member.

It is important that the Bill specifies that the determination of a patient's eligibility for funding does not constitute a finding against the member and shall not be considered by any other committee of the College dealing with the member. That being said, a patient's eligibility to receive funding could create a risk or perception of institutional bias insofar as the College may have an incentive to find against the physician given its financial interest in the outcome of the Discipline Committee hearing. Accordingly, in addition to the prohibition on a College committee considering information related to a patient's eligibility for funding, the CMPA recommends that there should be a prohibition on this information being disclosed at all to the panel members of the committee reviewing the allegations.

The CMPA also expects that because Bill 87 would require the College to bring a court proceeding to recover money paid to an eligible patient for counselling and therapy, the College is unlikely to attempt to recover such monies unless there has been a finding that a member sexually abused the patient. Indeed, it would be a contravention of the principles of procedural fairness and potentially a violation of a health professional's *Charter* rights if such proceedings were brought prior to any finding that the member sexually abused the patient.

Definition of "Patient"

The CMPA submits that the statutory provisions relating to sexual abuse must continue to be clear, including the definition of "patient".

Bill 87 proposes that the *RHPA* define the term "patient" for the purpose of the sexual abuse provisions to include an individual who "was a member's patient within the last year or within such longer period of time as may be prescribed by regulation" and "is determined to be a patient in accordance with any criteria in any regulations".

The CMPA is concerned that the language used to define "patient" will not be clear and understandable to health professionals. For example, the Bill does not specify when the one-year period commences. Would this period be calculated from the last time the health professional saw the patient or when the health professional-patient relationship was officially terminated?

Certainty and clarity are requirements of procedural fairness. Health professionals must know in advance what is expected of them so that they have reasonable notice of conduct that is considered to be inappropriate or impermissible, and the potential sanctions for failing to meet those expectations.

Such certainty helps to prevent sexual abuse by acting as a deterrent in educating health professionals about expected conduct. Clearly understandable provisions also assist the College in applying the standards to individual members in the context of complaints or discipline.

Other Regulatory Reforms

Interim Suspension

The CMPA is concerned that the proposed lower threshold in Bill 87 to permit the ICRC to order interim suspensions, in conjunction with the existing inefficiencies in the College's processes, will result in increased delays in resolving these matters. The expedient resolution of these matters is of benefit to health professionals and patients. The CMPA further submits that the right to make submissions while an interim order is in place is not sufficient to remedy the procedural fairness problems with the proposed interim suspension provisions in Bill 87. Members should always be given notice and the right to make submissions before an interim suspension order is made.

In particular, Bill 87 would permit the ICRC to make an order for the interim suspension of a member's certificate of registration, or imposing terms, conditions or limitations to the certificate of registration *at any*

time following the receipt of a complaint or report, if it is of the opinion that the conduct of the member or the member's physical or mental state exposes or is likely to expose the member's patients to harm or injury. Currently, interim suspensions are only available when the ICRC refers a matter to the Discipline or Fitness to Practice Committees. As with the existing interim suspension provisions under the *RHPA*, Bill 87 would allow the ICRC to make an interim suspension order without notice to the member or without providing the member with the opportunity to make submissions prior to the decision being taken.

The CMPA has previously expressed its concern that imposing interim suspensions without notice can represent an unjustifiable incursion into procedural fairness rights. In the CMPA's experience, the CPSO already has a very low threshold for referring matters involving allegations of sexual impropriety to the Discipline Committee in order to invoke the existing interim suspension provisions under the *RHPA*. The CMPA is concerned that establishing a lower threshold for imposing interim suspensions has the potential for the Colleges to use this authority unsparingly without full consideration to the devastating consequences of doing so.

The CMPA's concern regarding the increased use of interim suspensions is accentuated by the existing inefficiencies of the Colleges' complaints, investigation and disciplinary processes. Although Bill 87 would require the College to "expeditiously" investigate and prosecute matters for which an interim suspension order has been made and give precedence to hearing such matters, it is the CMPA's experience that these matters often languish. If the recommendations made by Mr Goudge were adopted, the CMPA would have more confidence that interim suspension orders would be resolved in a more timely manner. The expedient resolution of these matters is necessary to minimize the personal and professional effects of an interim suspension on health professionals, as well as spare health professionals and patients from the anxiety associated with protracted proceedings.

Personal Information in Reports to the Minister

The CMPA has significant concerns about the proposed amendment in Bill 87 that would allow the Minister to collect from Colleges personal information and personal health information about any member to the extent it is necessary to determine whether the College is fulfilling its duties and carrying out its objects. In the CMPA's view, de-identified information or information in aggregate form would be sufficient for the Minister's purposes. The CMPA is concerned that this proposed new Ministerial authority may give rise to potential violations of health professionals' constitutional and privacy rights.

The Bill specifies that the information provided would be limited to that which is necessary for the intended purpose, and only permissible if other information will not suffice. We are uncertain of any circumstance where it would be necessary for the purpose of the Minister's objectives to require identifiable information about members. Indeed, it is not within the Minister's authority to take action against specific health professionals.

Content of the Register

The CMPA's experience to date suggests that health professionals' privacy is generally outweighed by the desire to make more information available to the public. The CMPA would be concerned if the Minister

used its new regulation-making authority under Bill 87 to pass regulations to expand the information to be included on the register without any consultation with stakeholders and further evidence on the utility of further expansion of the public register. Changes to the public register should only be permitted after full opportunity for dialogue with and comment from stakeholders. Such an approach would more fairly balance the interests of the public in having access to relevant information against the privacy and professional interests of health professionals.


The CMPA acknowledges that in order to satisfy their mandate to protect the public, the Colleges may be required to disclose certain relevant information on their public registers. The CMPA also recognizes that much of the information proposed to be included under Bill 87 is already published by the College of Physicians and Surgeons of Ontario on its public register pursuant to the CPSO's by-laws and as a result of its transparency initiative.

That being said, any demonstrable benefit of increased transparency should at the same time respect health professionals' privacy rights. Indeed, certain information may be subject to misunderstanding and misuse by the public, and could be highly prejudicial to health professionals' reputations and their ability to practice.

Conclusion

We trust that the CMPA's comments on Bill 87 will be of assistance to the Standing Committee as it conducts its review of the legislation. The CMPA would be pleased to provide additional input on proposed revisions to Bill 87, if that would be of assistance to the Standing Committee.

Yours sincerely,



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HSS/lg

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