

# Bill 87, the Protecting Patients Act, 2016

## A review of proposed amendments relative to Ontario psychologists

*On December 8, 2016, Bill 87 or the “Protecting Patients Act, 2016”, (the “PPA”) received its first reading in the Ontario Legislative Assembly. On March 27, 2017, the PPA received its second reading. The PPA amends a number of statutes in Ontario that are related to the provision of health care in Ontario, including the Regulated Health Professions Act (“RHPA”). The changes canvassed here are those found in the amendments to the RHPA.*

*Although there are numerous changes, the more significant amendments are highlighted below:*

### 1. THE PUBLIC REGISTER

Over the past few years, many Colleges in Ontario have been moving towards increased transparency with the public. This has resulted in the inclusion of more information about their members on the public register. Some Colleges have decided to expand the types of dispositions made by their Inquiries, Complaints and Reports Committees (“ICRC”) that are listed on the public register. In addition to referrals to the Discipline or Fitness to Practice Committees, the trend in the last few years has been to also list on the public register any decisions of the ICRC that ordered a caution in person, the imposition of a Specified Continuing Education and Remedial Plan (“SCERP”), or an undertaking entered into by a member.

The College of Psychologists of Ontario (“CPO”) has not yet implemented a policy to include cautions, SCERPs or undertakings on the public register. However, the proposed changes to the RHPA in Bill 87, when passed, will require the CPO to include this additional information on the public register.

Given that more expansive disclosure has been the direction adopted by some Colleges, Gowling WLG anticipates that these changes will become law in substantially the same form as drafted. In fact, the Federation of Health Regulatory Colleges of Ontario (the “FHRCO”) has recommended requiring that additional information be published to the Colleges’ public registers, such as pending charges, bail conditions and convictions. Further to this goal, the FHRCO has recommended that legislation require the Attorney General to promptly notify Colleges of these events when they relate to registered practitioners.

However, the FHRCO has also observed that the requirement to place a synopsis of incapacity determinations on the public

register may not be in compliance with the Ontario Human Rights Code and section 15 of the Canadian Charter of Rights and Freedoms since these determinations relate to whether the member has a disability that interferes with the safe practice of the profession.

### 2. COMPOSITION OF DISCIPLINE PANELS

The specific sections of the RHPA that address the composition of statutory committees, such as Discipline or Fitness to Practice Committees, will be repealed under this Bill. The Minister of Health will be given the ability to create a regulation that prescribes the composition of panels. It is expected there will be a desire from the Minister of Health to appoint more public members to sit on Discipline Committees specifically. While the Minister of Health has not provided any indication as to the plan for the composition of statutory committees, given this section is to be repealed, it should be assumed that there will be changes to the existing composition. In fact, as the FHRCO has observed, the potential exists for the Minister to significantly change the composition of statutory committees and, since the Minister’s regulations are presently unknown, it is impossible to assess the impact that introducing new regulations may have.

### 3. AMENDMENTS TO THE SEXUAL ABUSE PROVISIONS OF THE RHPA

The changes that are getting the most attention are those related to the sexual abuse provisions of the RHPA. The changes essentially take away a significant amount of the discretion that Discipline Committees presently have with respect to sexual abuse cases and expand the scope of what is considered sexual abuse.

**There will now be a definition of “patient” (which is not currently defined in the RHPA).** The current proposal provides that “patient” is defined as an individual who was a member’s patient within the last year. The practical effect of this definition is that a health care professional should wait at least a year before engaging in a personal/sexual relationship with a former patient.

However, it is important to note that this proposed amendment does not impact the standards that already exist for psychologists in Ontario. Standard 12.5 of the CPO Standards of Professional Conduct provides that a psychologist is not permitted to enter into a sexual

relationship with a former client where psychological services were provided within the previous two years and the term “Client” is defined in the CPO Standards of Professional Conduct. Therefore, CPO members are required to wait at least two years before engaging in a personal/sexual relationship with a former client. Noting that provider/patient interfaces are highly variable across health professions, the FHRCO has recommended prescribing criteria for defining “patient” for the purposes of sexual abuse, rather than a “one size fits all” approach.

**The Bill would also prohibit orders directing the Registrar to impose gender based terms, conditions or limitations on a member’s certificate of registration** (i.e. the health care professional is not permitted to see female patients/clients without a chaperone). In some cases where this type of term has been imposed, there has been criticism that the regulator is not taking the allegations (or findings) of sexual abuse seriously. It appears this prohibition has been proposed to address this criticism.

**The Bill also expands the list of enumerated sexual acts that would result in mandatory revocation by a College.** The list of acts currently set out in section 51(5) of Schedule 2 of the RHPA has been expanded to include touching of a patient’s genitals, anus, breasts or buttocks. The FHRCO has recommended a more flexible approach than a prescribed list of sexual acts in order to provide a higher level of protection to the public without unintentionally excluding acts that are potentially no less egregious than those listed.

It appears that the intent of these changes is to reduce the discretion that Discipline Committees have with respect to penalties in cases where sexual abuse has been alleged and proven. The change to the definition of “patient”, along with the expansion of the list of enumerated acts, will likely lead to more mandatory revocation orders being made by Discipline Committees.

#### 4. INTERIM RESTRICTION

There are also proposed changes to when interim suspensions may be made. The changes proposed in Bill 87 would provide that an ICRC can impose an interim restriction on a member’s certificate of registration immediately after the receipt of a complaint. Currently, an ICRC is permitted to issue an interim suspension only once a complaint has been investigated.

#### 5. FUNDING PROVIDED BY THE COLLEGE

Bill 87 also provides increased access to funding for therapy and counselling made available by regulatory Colleges to patients who were sexually abused by members. Presently, patients are entitled to this funding only after the Discipline

Committee has made a finding that the patient was sexually abused by a member.

Bill 87 proposes to make this funding available to any person who is alleged in a complaint or a report to the College to have been sexually abused by a member while a patient of that member. Both the current legislation and the amendments proposed in Bill 87 allow a College to recover the funds used to pay for therapy or counselling from the guilty member via proceedings in a court of competent jurisdiction.

The effect of this change is that a College may choose to provide funding to a patient prior to a finding being made against the member by the Discipline Committee. However, although it is not explicitly stated in the legislation, Gowling WLG does not believe that the College would seek to recover those funds from a member before the Discipline Committee has made a finding that the member had sexually abused the patient. An attempt to try and recover funds from a member prior to a decision being made by the Discipline Committee as to whether the member sexually abused a patient would be premature and unlikely to survive scrutiny from a court.

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The proposed changes appear to be in response to criticism about some of the discretionary decisions that have been released by Discipline Committees, particularly the College of Physicians and Surgeons of Ontario, in sexual abuse cases.

The government is attempting to take away a great deal of the discretion which Discipline Committees currently have. Nevertheless, every case referred to the Discipline Committee must be adjudicated in accordance with the particular facts of the case. While most cases of proven sexual abuse should lead to mandatory revocation, there is concern that the mandatory nature of the penalties set out in the proposed amendments will potentially lead to a more severe penalty than would have otherwise been ordered.

The FHRCO has noted that under the amendments Colleges will no longer be able to maintain or create alternative criteria for funding by way of regulation (e.g., in cases where there have been criminal findings of sexual assault of a patient) and this may prevent Colleges from implementing broader funding criteria than what is proposed in Bill 87.

Bill 87 is now at second reading. Gowling WLG anticipates that the government will want to continue to move this legislation forward in 2017 with a view to having it become law before the next provincial election in 2018.