

Bill 87, the Protecting Patients Act, 2016

A review of amendments relative to Ontario psychologists

On May 30, 2017, Bill 87 or the “Protecting Patients Act, 2016”, (the “PPA”) received Royal Assent in the Ontario Legislative Assembly. 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”) and Schedule 2 to the RHPA, the Health Professions Procedural Code (the “Code”). The changes canvassed here are those found in the amendments to the RHPA and the Code. Although there are numerous changes, the more significant amendments are discussed 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 historically implemented a policy to include cautions, SCERPs or undertakings on the public register. **However, the changes to the RHPA in Bill 87 require all Colleges to include this additional information on the public register.** In addition, the public register must now include a copy of the specified allegations against a member for every matter referred to the Discipline Committee under section 26 of the Code that has not been finally resolved and every result of a disciplinary or incapacity proceeding unless the result was that no finding of professional misconduct or incompetence was made against the member.

Bill 87 also introduces a mechanism for allowing members to have information on the public register corrected in cases where the member can demonstrate the information is inaccurate or incomplete and provides the Registrar with the information necessary to make the correction.

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, have been repealed under this Bill. The Minister of Health has been 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 now repealed, it should be assumed that there will be changes to the existing composition. 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.

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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). Under the new definition, a “patient” is either:

- i) an individual who was a member’s patient within the last year or such longer period of time as may be prescribed from the date on which the individual ceased to be the member’s patient; or
- ii) an individual who is determined to be a patient in accordance with the criteria in any regulations made under clause 43 (1) (o) of the RHPA.

The practical effect of this definition is that a healthcare professional should wait at least a year before engaging in a personal/sexual relationship with a former patient and should be aware of the applicable regulations before doing so.

However, it is important to note that this amendment does not impact the standards that already exist for psychologists in Ontario. Standard 12.5 of the College of Psychologists of Ontario (“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.**

Bill 87 also prohibits orders directing the Registrar to impose gender based terms, conditions or limitations on a member’s certificate of registration (i.e. “The healthcare 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 the Code has been expanded to include touching of a patient’s genitals, anus, breasts or buttocks.

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.

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INTERIM RESTRICTION

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

- i) the receipt of a complaint or after the appointment of an investigator if the ICRC is of the opinion that the conduct of the member exposes or is likely to expose the member’s patients to harm or injury; or
- ii) if it is of the opinion that the physical or mental state of the member exposes or is likely to expose his or her patients to harm or injury.

Interim suspension is required immediately after a finding of professional misconduct is made that is relevant to the member’s suitability to practice and the offence is prescribed under the regulation as requiring mandatory revocation, or a finding of sexual offence requiring suspension or revocation of the member’s certificate.

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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 has made 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. Prior to Bill 87 receiving Royal Assent, amendments were made so that, in addition to these new eligibility requirements, a College's Council may make regulations allowing alternative requirements as well. Both the previous legislation and the amendments 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.

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.

The 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.

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OTHER SIGNIFICANT CHANGES

The PPA also amended the Code to include a clause that permits the Registrar of a College to withdraw a complaint at the request of the complainant at any time prior to the ICRC taking any action in respect of the complaint where the Registrar believes it is in the public interest to withdraw the complaint. However, given the power is discretionary, this provision appears to permit the ICRC to continue with an investigation into a complaint, despite a complainant expressing a clear desire to abandon the complaint.

Although there had been recommendations that amendments should be made to encourage the expanded use of the alternative dispute resolution ("ADR") (see Mr. Steven Gouge's February 2016 report: Streamlining the Physician Complaints Process in Ontario), there were minimal changes made to the existing ADR provisions in the HPPC. As a result, Gowling WLG does not anticipate there to be any movement towards a greater use of the ADR provisions under the HPPC.

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