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Bill 87: Government's Response to Recommendations of Sexual Abuse Task Force

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By Debbie Tarshis

On December 8, 2016, Bill 87, *Protecting Patients Act*, 2016, received first reading. If passed, Bill 87 will amend the *Regulated Health Professions Act, 1991* (the RHPA) and four other health-related Acts. The amendments address a number of the recommendations of the Task Force (Task Force) of the Minister of Health and Long-Term Care (the Minister) on the Prevention of Sexual Abuse of Patients and the *Regulated Health Professions Act*, *1991*.[1] The purpose of this article is to provide the highlights of Bill 87.

This article addresses the following:

- expanded powers of the Minister to make regulations
- definition of patient
- increased information on the register
- interim suspensions
- expanded list of acts constituting sexual abuse that must result in mandatory revocation
- mandatory suspensions as a new minimum penalty for sexual abuse
- elimination of gender-based restrictions
- expanded duty to report
- increased fines for failure to report sexual abuse

Expanded Powers of the Minister to Make Regulations

Bill 87 provides a number of new matters with respect to which the Minister is authorized to make regulations. The most significant of them relate to the governance of the committees required by the *Health Professions Procedural Code* (the Code)[2,3] and the panels of those committees (statutory committees). The statutory committees include those committees that make decisions about registration of applicants (Registration Committee), screen complaints and reports (Inquiries, Complaints and Reports Committee), and hold hearings related to professional misconduct and incompetence (Discipline Committee) and incapacity (Fitness to Practise Committee). Under the proposed legislation, the Minister will have the power to determine the composition of every statutory committee, and the qualification, selection, appointments and terms of office of members of every statutory committee. The Minister will also have the power to determine the composition of panels of the Registration, Inquiries, Complaints and Reports (ICRC), Discipline and Fitness to Practise Committees and the quorum for panels of those committees. Together with other amendments that are being made to the Code, it is clear that the intention is for the Minister's regulations to determine the governance of these statutory committees and their panels. Important policy issues related to the governance of these statutory committees and their panels, such as the role of professional and public members on these committees and panels, are not set out in the Code but will be left to Minister's regulations.

Definition of Patient

"Sexual abuse" of a patient is currently defined in the Code. However, the meaning of "patient" is not defined. Bill 87 proposes to include in the word "patient", in relation to an act of sexual abuse, any individual who was a member's patient within the last year. Health regulatory Colleges will be authorized to make a regulation that would make the period longer than one year. In addition, the Minister may make a regulation to establish criteria that would be used to determine whether an individual was a member's patient in relation to any allegation of sexual abuse. These amendments are intended to provide a time period during which sexual contact between a regulated health professional and a former patient would constitute sexual abuse.

Increased Information on a Health Regulatory College's Register

Each College currently maintains a register about its members and, in some cases, former members on its website. Bill 87 proposes that additional information will be made available on the register of each health regulatory College. This additional information includes:

- the name of each former member of the College, and where known, a former member's date of death
- a notation of every caution[4]
- a notation of any specified continuing education or remediation program (SCERP)[5]
- a copy of the notice of specified allegations for every matter referred to the Discipline Committee
- a notation and synopsis of any acknowledgements or undertakings provided to the College in relation to professional misconduct and incompetence

Bill 87 also proposes that the results of a discipline or incapacity proceeding where no finding was made against the member will be available on a College register. The Minister may also make regulations to require that additional information be added to the register.

Bill 87 does not have any specific provision which permits any of this additional information, such as cautions or SCERPs, or the results of a hearing where no finding was made against the member, to be removed from the register after a certain period of time. Nor does the Bill have a process to allow a member to apply to remove the information.

Interim Suspensions

Currently, the ICRC can make an interim order to suspend or impose terms, conditions or limitations on a member's certificate of registration but only after an allegation of professional misconduct, incompetence or incapacity has been referred for a hearing. Bill 87 provides the ICRC with the power to make such an interim order at any time following the receipt of a complaint or a report. Under Bill 87, the ICRC will be able to make such an order 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 a member's patients to harm or injury.

There is often a delay (sometimes substantial) between the date on which a member is found to have committed professional misconduct and the date upon which the panel determines the appropriate penalty. The Bill provides that a panel of the Discipline Committee must make an interim suspension order after it makes a finding of sexual abuse involving any of the conduct that is on the list of acts requiring a panel to revoke a member's certificate of registration. In other words, in those circumstances, the panel of the Discipline Committee must make an interim suspension order when it makes such a finding of sexual abuse.

Expanded List of Acts that Result in Mandatory Revocation

Currently, the Code provides a list of acts[6] (frank acts of sexual abuse) and mandates that, if a panel of the Discipline Committee finds that a member has engaged in sexual abuse involving any of these acts, the penalty must include revocation. This list will be expanded under Bill 87 to include:

- touching of the patient's genitals, anus, breasts or buttocks
- other conduct prescribed in regulations made by the Minister

Bill 87 also adds other conduct that will result in mandatory revocation:

- if a member is found guilty of an offence relevant to suitability to practise and the offence is prescribed in a Minister's regulation
- if a member is found guilty of professional misconduct by a health regulatory College in another jurisdiction and the conduct includes any of the frank acts of sexual abuse (as expanded by Bill 87)

Mandatory Suspensions as a New Minimum Penalty for Sexual Abuse

Bill 87 provides that a panel of the Discipline Committee must suspend a member's certificate of registration where it makes a finding of sexual abuse unless the penalty ordered was revocation. For example, if the sexual abuse consisted only of behaviour or remarks of a sexual nature, the penalty must include, at a minimum, a suspension.

Elimination of Gender-Based Restrictions

Under Bill 87, the ICRC will no longer be able to make interim orders that impose gender-based terms, conditions or limitations. This limitation on the ICRC's powers relates to all matters being considered and is not limited to sexual abuse. Similarly, a panel of the Discipline Committee will no longer be able to impose gender-based terms, conditions or limitations as a part of its penalty order. Again this is a general limitation and does not apply only to sexual abuse cases. In other words, where there is an allegation or finding of sexual abuse, neither the ICRC nor the Discipline Committee will be able to permit a regulated health professional to continue to practise on patients of one gender, even with supervision.

Expanded Duty to Report

Bill 87 adds a duty to report to the Registrar by a member if the member is charged with an offence and to include all bail conditions in the report.

Bill 87 also adds a requirement for a member to advise the Registrar if they are a member of another regulated profession either in or outside Ontario. If a member is found guilty of professional misconduct or incompetence by the other regulatory body, the member has a duty to report the finding and other information to the Registrar.

Increased Fines for Failure to Report Sexual Abuse

The Code requires a member to file a report with the Registrar if that member has reasonable grounds, obtained in the course of practising the profession, to believe that another member of the same or different health regulatory College has sexually abused a patient. The Code also requires a person who operates a facility to file a report if the person has reasonable grounds to believe that a regulated health professional who practises at the facility has sexually abused a patient (and in other circumstances).

Under Bill 87, the fine for failure for a member to report sexual abuse will increase from not more than $25,000.00 to not more than $50,000.00. In the case of a person who operates a facility, the fine for failure to report sexual abuse will increase from not more than $25,000.00 to not more than $50,000.00, in the case of an individual, and, in the case of a corporation, from not more than $50,000.00 to not more than $200,000.00.

Conclusion

This article is not intended to be a complete list of the amendments proposed by Bill 87 nor an exhaustive description of each amendment. There may be amendments to Bill 87 made through the legislative process after the Ontario legislature resumes sitting (February 21, 2017). A number of important changes will also not be known until the Minister makes regulations. One thing, however, is certain. The health regulatory Colleges will need to consider how best to implement the amendments made by Bill 87, if enacted.

For More Information or Inquiries

For more information or inquiries, please contact Debbie Tarshis at dtarshis@weirfoulds.com.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1]For a description of the recommendations of the Task Force, see article dated October 24, 2016 by the author and published on WeirFoulds website at www.weirfoulds.com
[2]The Code is Schedule 2 to the RHPA
[3]The committees required by the Code are the Executive Committee, Registration Committee, Inquiries, Complaints and Reports Committee, Discipline Committee, Fitness to Practise Committee, Quality Assurance Committee and Patient Relations Committee
[4]A caution is an order of the ICRC requiring the member to attend before a panel of the ICRC to be cautioned.
[5]A SCERP is an order of the ICRC requiring the member to complete a specified continuing education or remediation programs
[6] s. 51(5)2 of the Procedural Code:
51. (5) If a panel finds a member has committed an act of professional misconduct by sexually abusing a patient, the panel shall do the following in addition to anything else the panel may do under subsection (2):
2. Revoke the member's certificate of registration if the sexual abuse consisted of, or included, any of the following,
i. sexual intercourse,
ii. genital to genital, genital to anal, oral to genital, or oral to anal contact,
iii. masturbation of the member by, or in the presence of, the patient,
iv. masturbation of the patient by the member,
v. encouragement of the patient by the member to masturbate in the presence of the member.

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WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035

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