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Hon. Dr. Eric Hoskins, Minister
Ministry of Health and Long-Term Care
Hepburn Block, 10th Flr
80 Grosvenor St
Toronto ON M7A 2C4

TRANSMITTED BY FAX AND EMAIL

Dear Minister Hoskins:

Re: Submissions of the Federation of Health Regulatory Colleges of Ontario on Bill 87

The Federation of Health Regulatory Colleges of Ontario welcomes the opportunity to make submissions on the proposed amendments to the *Regulated Health Professions Act* (*RHPA*) found in Schedule 4 of Bill 87, *Protecting Patients Act, 2016*.

Introduction

The Federation is the provincial organization that brings together the 26 health regulatory Colleges for the health professions governed under the *RHPA*. Under the statutory mandate to protect the public interest through regulation, the Colleges govern more than 300,000 health professionals in Ontario.

The members of the Federation are committed to having the strongest legislative framework available to support patients and prevent sexual abuse. The Federation supports the intent and assumed goals of Bill 87; many of the provisions in Bill 87 that pertain to transparency have already been implemented by many *RHPA* Colleges. In some areas, Bill 87 could go further to protect the public and support the effectiveness of College complaints, investigations, and discipline processes.

The Federation's members, with their expertise in regulating health professionals in the public interest, can provide a unique perspective in ensuring that the proposals are effective and able to achieve the outcomes that will protect the public. As such, the Federation is making a number of suggestions, collating the amendments into four substantive topics dealing with:

1. Reducing and Eliminating Sexual Abuse;
2. Enhancing Transparency;
3. Increased Powers of the Minister; and
4. Miscellaneous Amendments.

We have also provided an appendix which addresses drafting issues. The Federation understands and supports the intentions behind these revisions to the *RHPA* and the *Health Professions Procedural Code* (the "*Code")* but there are some matters that we believe are quite significant and need to be carefully considered in order to avoid unintended negative consequences.

While we have provided as much feedback as possible in this early submission, we know that more could be achieved through ongoing discussion as the Bill moves through the legislative process.

1. Reducing and Eliminating Sexual Abuse

a. Minister Prescribed Functions: RHPA s. 43(1)(w). This amendment permits the Minister to make regulations specifying how Colleges are to investigate and prosecute sexual misconduct cases. In addition, the Minister can make regulations providing for further "functions and duties" for Colleges.

Federation member Colleges, with experience in sexual abuse matters, are continually working to improve their procedures for dealing with such cases; many of the proposals relating to sexual abuse in Bill 87 and in the Sexual Abuse Task Force report have already been implemented. Federation members, who operationalize legislation, are offering to work with the Ministry on regulations as they are developed. Federation members also look forward to working with the external advisor who will be appointed. Our suggestions in this area are put forward to strengthen the legislative framework to ensure that the provisions will achieve the desired outcome and avoid unintended negative consequences.

The Federation will have additional comments to make about this amendment and would welcome further information from the Ministry about the intent of the legislative amendments.

b. Funding for Sexual Abuse: RHPA s. 43(1)(y), Code s. 1.1, 85.7, 95(1)(q). The intention of this amendment is to expand funding for individuals who may have been sexually abused. As we understand it, eligibility for funding for a person who makes a complaint, or is the subject of a report that alleges sexual abuse, commences when the complaint or report is made. In addition, the Minister may make regulations expanding the types of expenses for which funding will be provided. The amendments also state that awarding funding will not be taken as a finding that sexual abuse occurred and cannot be considered by any other committee of the College, which reduces the likelihood that an appearance of bias challenge could be successfully made.

While the Federation supports broader access to funding, we note that these amendments may have a contrary effect in some instances.

Under the amendments, Colleges will no longer be able to maintain (or create) alternative criteria for funding by regulation (e.g., criminal findings of sexual assault of a patient; where the patient has not been named in a complaint or report). Accordingly, where Colleges intended to go beyond the criteria established in the Code, it might not be possible to do so. We urge revisions to avoid this.

c. Mandatory Revocation: RHPA s. 43(1)(u) and (v), Code 51(5) and (5.1), 71.1. The criteria for a mandatory revocation (and the corresponding inability to apply for reinstatement for at least five years) will be expanded to include a list of additional sexual acts. Additional grounds can be enacted through a Minister's regulation. The mandatory revocation also applies where a regulator outside of Ontario makes a finding of professional misconduct that involves the expanded list of revocable sexual acts. In addition, the Minister can make a regulation designating certain offences (e.g., sexual assault, fraud) as also requiring mandatory revocation.

The Federation supports the expansion of mandatory revocation for frank acts of sexual abuse. We are concerned about whether using a prescribed list of sexual acts is too restrictive an approach to take and would welcome the opportunity to discuss other approaches which might afford a higher level of protection without unintentionally excluding some acts that are potentially no less egregious than those on the list.

d. Other Orders by the Discipline Committee in Sexual Abuse Cases: Code s. 51(4.1) and (4.2), 51(5).2, 51(5).3(vi) and (vii). A discipline panel will be prevented from ordering gender-based restrictions in any case (not just sexual abuse cases). Where a discipline panel makes a finding of sexual abuse that requires mandatory revocation and defers the penalty portion of the hearing, it must immediately suspend the member's certificate of registration until the mandatory revocation is ordered. In addition, where a finding of sexual abuse is made and mandatory revocation is not required, a suspension must be ordered.

The Federation supports these changes. In our view, the requirement to suspend a member immediately where there is a finding that requires mandatory revocation is essential to public protection. We note that beyond sexual abuse findings, there are other situations in which mandatory revocation arises and this provision should be expanded to cover all such findings (i.e., offence findings resulting in mandatory revocation discussed in submission 1(c) above). There is no reason to permit a practitioner to keep practising where revocation will inevitably result when the penalty hearing is held. In fact, permitting the practitioner to practise in the interim could encourage attempts by the member to delay the penalty hearing.

e. Definition of Patient for Sexual Abuse Purposes: RHPA s. 43(1)(o), Code s. 1(6). These amendments address the definition of persons who constitute patients in the context of sexual abuse. A "patient" will include former patients for a period of one year after the professional relationship ends (or such longer time as prescribed in a College's regulation). In addition, the Minister can make regulations setting additional criteria for the definition of a "patient".

The Federation supports the intent of these proposed amendments, but urges an approach that will reduce the risk of unintended consequences. The Federation appreciates the need to prevent a practitioner from circumventing the mandatory penalty provisions in this amendment. The ambiguity in the proposed wording could prevent Colleges from fully addressing the goals of this amendment.

Colleges recognize that defining a "patient" is challenging and many have worked on defining a patient as appropriate for professions' practices and practice settings. We concur that there can be

value in consistency across professions but note that the provider/patient interface is highly variable. The nature of a "patient" may even vary considerably within a single profession (e.g., a radiologist viewing an x-ray as compared to a psychiatrist, both of whom are physicians).

In order to recognize this variability, courts show deference to the contextual approach taken by College Discipline Committees (e.g., *College of Physicians and Surgeons of Ontario v. McIntyre*, 2017 ONSC 116, and *Clokie v. Royal College of Dental Surgeons (Ontario)*, 2016 ONSC 4164).

We note, as well, that there are implications to having a different definition of "patient" for sexual abuse purposes and other purposes (e.g., abandonment of patients, billing, record retention, conflicts of interest) and this warrants further exploration.

Instead of a "one size fits all" approach, we believe that there would be value in prescribing criteria for defining "patient" for the purposes of sexual abuse (e.g., sharing of personal health information; circumstances where the person might reasonably rely on the practitioner in making health care decisions; reasonable expectation of being able to obtain additional services).

We also note that the proposed wording is ambiguous as it does not identify when the one-year period begins. It might be anticipated that this ambiguity could lead to unnecessary legal proceedings.

The Federation looks forward to further discussion of these issues.

e. Fines Increased for Failing to Make a Mandatory Report: Code s. 93(2) and (3). The maximum fine on a first offence for an individual who fails to make a mandatory report relating to sexual abuse will be doubled to $50,000. For corporations, it will be quadrupled to $200,000.

The Federation takes the mandatory reporting provisions seriously and supports these amendments.

2. Enhancing Transparency

The Federation believes that increased transparency, including the proposals in Bill 87, will enhance Ontario's health professional regulatory system, which is recognized as having one of the most open professional regulation statutes in the world.

a. Expansion of the Public Register: RHPA s. 43(1)(t), Code s. 23, 94(1)(l.2). The mandatory, universal content of the Colleges' public registers will be expanded. New information would include: the date a former member died if known, cautions, Specified Continuing Education and Remediation Programs (SCERPs), the date and status of referrals to discipline, a copy of the specified allegations, a synopsis of disciplinary and incapacity decisions even where the finding was that the allegations were not proved, acknowledgements and undertakings, and any inspection outcomes. Also, the Minister will be able to make a regulation requiring additional information to be placed on the public register. The Registrar will now have an explicit duty to post all information promptly. The Registrar will also be required to correct information that is incomplete or inaccurate. The "pardon" provision,

permitting the removal of less serious findings after six years, will be amended to prevent the deletion of any findings of sexual abuse, not just those where there has been sexual touching.

Colleges already have made by-laws placing most, if not all, of this information on their public registers and we support the provisions related to transparency in Bill 87. These provisions will bring consistency in the details of precisely how this information is posted on the register. We do note, however, that the expansion of the public register does not appear to include items that some Colleges currently post, such as relevant pending charges, bail conditions, and convictions. Those items appear to remain within the discretion of individual Colleges.

We also note that our ability to ensure that information related to criminal proceedings is complete and up-to-date is hampered by our own access to information. It would be a tremendous advance in the protection of the public interest to require the Attorney General to promptly notify Colleges of these events when they relate to registered practitioners.

In relation to this section, the Federation is quite concerned with the inclusion of an explicit requirement to correct information that is incomplete or inaccurate. Colleges already correct information that they learn is inaccurate or is no longer accurate. The current drafting of this section could allow for court challenges by members who might consider it their legal "right" to dilute the content of the wording on the public register, making the usefulness of the information negligible for the public. The outcome will be public register postings that are of less assistance to the public accessing them. This is a prime example of unintended consequences.

The Federation also raises whether the proposal to place a synopsis of incapacity determinations on the public register has been fully analyzed for compliance with the Ontario *Human Rights Code* and section 15 of the *Canadian Charter of Rights and Freedoms*. These determinations relate to whether the member has a disability that interferes with the safe practice of the profession, e.g., mental illnesses or substance abuse disorders that impair judgment. Even if this provision is found to be legal, there needs to be consideration regarding how public protection is enhanced by publishing details of those proceedings or determinations as opposed to the terms, conditions, and limitations that arise from them which are posted on the public register.

The Federation also notes that Bill 87 does not address transitional issues such as whether the posting of additional information applies to the date of the conduct, the date of the referral to discipline, or to the date of the disposition that occurs after the enactment. This lack of clarity is likely to result in legal challenges that will delay implementation and may lead to inconsistency of interpretation amongst Colleges.

b. New Mandatory Self-Reporting Obligations: Code s. 85.6.3, 85.6.4. Two new self-reporting obligations will be created. The first will require members to report all other regulatory bodies they are registered with and any findings of professional misconduct or incompetence (but not incapacity) made by those bodies. The second will require members to report all charges for an offence and any resulting bail conditions.

Many Colleges already require the reporting of this information through their by-laws. While the Federation generally supports the inclusion of these provisions, it would be desirable also to require the Attorney General to notify Colleges of charges for an offence and release conditions of practitioners.

c. Posting Council Meeting Information on the College Website, Code s. 7(1.1) and (1.2). Colleges will be required to post the dates and agendas for upcoming Council meetings on their websites.

Many Colleges already post this information. Currently the wording of the proposed amendments does not require the posting of Council meeting materials, which would enhance this provision. We note, however, that if Council meeting materials are added to the amendments, explicit exceptions should be specifically included for privileged materials (e.g., legal advice) as well as information that relates to any part of the meeting that it is anticipated will be closed to the public.

3. Increased Powers of the Minister

a. Committee Structure: RHPA s. 43(1)(p) to (s), Code s. 10(3), 17(2) and (3), 25(2) and (3), 38(2), (3) and (5), 64(2) and (3), 73(3).3, 94(1)(h.1) to (h.4). The Minister will have the power to make regulations controlling all aspects of the structure of the statutory committees. This authority will place in the hands of the Minister, and beyond the purview of the Legislature, the power to make fundamental changes to the very essence of self-regulation. Further submissions, including submissions from individual Colleges, will be made on this issue. At this point, the Federation believes it is impossible to assess the significance and impact of these broad ranging amendments without first seeing the proposed Minister's regulations. If enacted, the Federation trusts that the Minister will consult with the Colleges before making any regulations.

4. Miscellaneous Amendments

a. Disclosure of Information where there is a Compelling Public Interest: RHPA s. 36(1)(g). There are significant issues with the confidentiality provisions of the *RHPA* beyond the ability to disclose confidential information with regulators of long-term care homes (discussed below). For example, some Colleges have experienced media reports to the effect that someone told the College of a threat to public safety "and the College did nothing". Currently a College is generally not able to say anything other than that the matter is under investigation. This inability to respond to the assertion, particularly where it is incorrect, undermines public confidence in the College. Clause 36(1)(g) of the *RHPA* should be amended to read, "…if, in the opinion of the Registrar, there is a compelling public interest in the disclosure of that information".

b. Earlier Interim Suspensions: Code s. 25.4, 37, 62, 63(1). The ICRC will now be able to make an interim order prior to a referral to discipline. The criteria for making an interim order is expanded to include situations where the member's physical or mental state places the public at risk even in non-incapacity cases. This amendment will enable the earlier protection of the public in urgent cases, especially where an extensive investigation still needs to be done. Interim orders cannot include

gender-based restrictions. There are a number of significant drafting issues with these provisions which are described in the Appendix.

c. Disclosing Information to Regulators of Long-Term Care Homes: RHPA s. 36(1)(d). The confidentiality provision will be amended to permit disclosure of College information to the regulators of long-term care homes. The Federation recommends that this duty should be expanded to include regulators of other similar facilities and would suggest that a corresponding duty be created for the long-term care home (and related) regulators to disclose information to the Colleges.

Conclusion

The members of the Federation are offering to work with the Ministry to share their experience and expertise in the regulation of healthcare professionals in Ontario. Daily, Federation members operationalize legislation, and we can help to prevent any undesirable implications of legislative amendments before unintended consequences occur.

Generally, the Federation supports the overarching objectives of the proposed amendments contained in Bill 87. In some cases, members have already implemented the changes that would follow through enactment of these legislative amendments and, as has been identified, some of the proposed changes do not go far enough. The Federation has also made a number of suggestions to ensure that the intent of the Bill is achieved. Finally, the Federation has identified a number of drafting issues, some of which are quite significant, and would ask that these be given close scrutiny.

The Federation appreciates the opportunity to be part of the process to ensure that the public is fully protected.

Sincerely,

Shenda Tanchak, President
Federation of Health Regulatory Colleges of Ontario[1]

cc. Dr. Bob Bell, Deputy Minister, Ministry of Health and Long-Term Care
Ms. Denise Cole, Assistant Deputy Minister
Allison Henry, Director, Health System Labour Relations and Regulatory Policy Branch
Stephen Cheng, Manager (Acting), Regulatory Policy Unit
FHRCO Board of Directors

[1] *The College of Naturopaths of Ontario has not approved the letter but has agreed to stand aside and allow the Federation's response to proceed.*

Appendix 1

Drafting Suggestions
(In Sequential Order)

Drafting Suggestions for Amendments to the Act

- S. 5(2) the proposed wording is that the Minister can require Council to disclose the personal or personal health information of a member. It is suggested that the "Council" be replaced with "Registrar" as the current wording would require that Council be informed of the personal or personal health information of a member.
- S. 5(2.2) requires Colleges not to disclose personal information "if other information is sufficient for the purposes set out in subsection (2.1)". It would be difficult for Colleges to determine these purposes since they are so broad. It might be better to rephrase s. 5(2.2) so that the Minister is not permitted to request personal information or personal health information if it is unnecessary for the purpose since the Minister is more familiar with the purposes.
- S. 43(1)(w) it is unclear whether the phrase "functions and duties" relates only to allegations of sexual misconduct or whether it could relate to anything the Colleges do. While the context is about sexual misconduct it would enhance clarity if the phrase "with respect to matters involving allegations of a member's misconduct of a sexual nature" was repeated after the words "functions and duties".

Drafting Suggestions for Amendments to the Code

- S. 7(1.2) indicates that if the Council intends to exclude the public from a Council meeting, the website posting should indicate this and the grounds for doing so. However, we note that decisions to exclude the public must be made by Council at the meeting. Accordingly, before the meeting is held, one can only speculate as to whether portions of the meeting will be closed and why. Council will not have considered the issue yet. The provision should probably begin with: "If the Registrar anticipates that Council will exclude the public from any meeting or part of a meeting under subsection (2), the anticipated grounds for doing so …".
- S. 23(2).2 relates to former members. The phrase "The name of each former member of the College" implies that, without this authorizing provision, information about former members could not be posted on the public register[2]. That undermines the approach taken by most Colleges that information about former members can and should remain on the public register. To eliminate this possible unintended consequence, the provisions should simply begin: "2. Where a member is deceased,…".[3] This drafting concern is potentially of enormous significance.

[2] There is sometimes an inference in law that making a list (here, a list of information about former members that is on the public register) implies that items not on the list are excluded (i.e,. the "*exclusio unius*" rule).

[3] Or, in the alternative, at least separate out the two items so that the names of all former members are one paragraph and the date of death is a separate paragraph. This would reinforce the interpretation that additional items about former members could be added through College by-laws.

- S. 23(2).9 refers to the "notice of specified allegations against a member". There is no such document at most, if not all, Colleges. It should be reworded to read: "A copy of the specified allegations …".
- S. 23(2).11 requires acknowledgements and undertakings (A&U's) to be posted if they are "in relation to professional misconduct and incompetence". The intent is probably to differentiate them from A&U's for incapacity and quality assurance. However, the language is unclear as to whether they include ICRC A&U's or apply just discipline A&U's. Perhaps the following phrase might be clearer: "in relation to concerns of professional misconduct or incompetence before the Inquiries, Complaints and Reports Committee or the Discipline Committee".
- S. 23(2) refers to a number of dispositions of the ICRC (e.g., cautions, SCERPs, A&U's) that stay on the public register permanently. However, some Discipline Committee dispositions are eligible to come off the public register after six years (see S. 23(11)). It seems inconsistent to make less serious ICRC dispositions appear on the register permanently while some discipline dispositions are potentially temporary. The two provisions should be reconciled, perhaps by repealing s. 23(11).
- S. 23(14) defines the results of a hearing using the phrase "and where the panel has made no finding, includes the failure to make a finding". This language is confusing as a finding is always made. Preferable language would be similar to the following: "and including any finding that professional misconduct or incompetence has not been proved".
- S. 25.4(1) permits interim orders to be made upon receipt of a complaint or "report". In this context, the "report" refers to the s. 79 report of the Registrar to the ICRC at the conclusion of an investigation. The obvious intent of the amendments is to permit the ICRC to make an interim order immediately upon the concern being identified as urgent, not after a lengthy investigation is undertaken. To achieve this intent, the word "report" should be changed to "the appointment of an investigator under section 75". This drafting concern is potentially of enormous significance.
- S. 25.4(4) deals with the duration of interim orders. There are two drafting issues with this provision:
    - The language in the Bill says that the order ends upon the "disposition" of the matter by the ICRC which, conceivably, could end the interim suspension upon a referral to discipline. To reduce ambiguity, the provision could be worded: "(4) An order under subsection (1) continues in force until the matter is finally determined." An alternative, but less satisfactory, solution would be to change the phrase "otherwise disposed of by a panel of the Inquiries, Complaints and Reports Committee" to read: "otherwise *finally* disposed of by a panel of the Inquiries, Complaints and Reports Committee".
    - It is unclear whether an interim order can be amended if necessary. For example, additional information may come to the attention of the College indicating that a more restrictive interim order is needed to protect the public. On the other hand, the practitioner may propose amendments that would protect the public as much as, or even more than, the original order while having a less severe impact on the member.

  These drafting concerns are potentially of enormous significance.
- S. 51(5.1) requires a mandatory revocation lasting at least five years where a regulatory body outside of Ontario has made a finding of professional misconduct involving revocable sexual acts. However, this provision does not apply to findings made by regulatory bodies inside Ontario. For

example, if a practitioner was also registered with the Ontario College of Social Workers and Social Service Workers or the Ontario College of Teachers and was revoked by one of them for frank sexual acts, the practitioner would not necessarily be revoked by the *RHPA* College. This result could also conceivably occur where a practitioner is registered with two *RHPA* Colleges. The solution would be to amend 51(1)(b) to remove the requirement that the misconduct finding must be for a regulator outside of Ontario. Including other Ontario regulators is also more consistent with the drafting approach taken in s. 85.6.3. This drafting concern is potentially of enormous significance.

- S. 85.6.4 requires members to self-report when they are charged with an offence and every bail condition imposed. There are a number of drafting issues with this provision.
    - Unlike the other self-reporting duties, the provision does not include a requirement to disclose the location of the entity laying the charges or imposing the bail conditions (i.e. the location of the courthouse where any information has been laid or any indictment has been preferred in relation to the member). This omission will make it difficult for Colleges to verify the accuracy and completeness of the self-report (which sometimes minimizes the conduct).
    - S. 85.6.4 requires members to self-report every bail condition. Not all relevant restrictions on conduct flowing from a charge are contained in bail conditions. Other instruments that contain similar restrictions include terms of release and peace bonds, for example. A more precise list of relevant restrictions might read as follows:

        > "A member shall file a report in writing with the Registrar if the member has been charged with an offence, and the report shall include information about every condition of release imposed on the member as a result of the charge including, but not limited to, information regarding any summons, appearance notice, promise to appear, undertaking or recognizance whether with or without sureties. A member shall also file a report in writing with the Registrar if the member has entered into a common law peace bond or a recognizance pursuant to s. 810, s. 810.01, s. 810.011, s. 810.02, s. 810.1, s.810.2 or s. 83.3 of the *Criminal Code*."

      In the alternative a broader provision could be used such as: "every bail condition or other restriction imposed on or agreed to by the member relating to the charge".