



COLLEGE OF PHYSIOTHERAPISTS OF ONTARIO

Response to HPRAC Report Regulation of Health Professions in Ontario: New Directions

Final

June 30, 2006

In response to the Health Professions Regulatory Advisory Council's (HPRAC) newly released report, Regulation of Health Professions in Ontario: New Directions, the College of Physiotherapists of Ontario is attaching a series of suggestions that the College believes would enhance the excellent recommendations already included in the report.

The College must preface any suggestions for improvements to the report with the general comment that HPRAC has done an excellent job of listening to and incorporating the advice provided by colleges and other stakeholders. Given the magnitude of their task and the wide variety of positions provided for consideration and the number of resulting recommendations, the College believes that HPRAC has produced a report that will be met with general approval by most stakeholders. It is in this context that the College offers its suggestions for improvements and clarifications to some of the recommendations.

This submission is structured as follows:

Section One: General policy issues and proposed College positions

Suggestions and clarifications are provided in respect of the recommendations that apply to the RHPA in general. The issue is identified, discussed and a suggestion provided for how the recommendation may be improved or clarified to deal with the identified issue.

Section Two: Issues Identified – Other Health Professional Recommendations

Suggestions and clarifications are provided in respect of the recommendations relating to other professions. The issue is identified, discussed and a suggestion provided for how the recommendation may be improved or clarified to deal with the identified issue.

Summary of College Key Issues and Recommendations

Sections one and two are followed by a brief summation of the College's views and a list of the recommendations proposed by the College.

Appendix One: General Legal Issues

This is a list of some general legal issues that arise out of the current recommendations. This section has been developed by the College's legal counsel and contains brief overviews of issues of significance, as well as recommendations for how these issues could be addressed.

Appendix Two: Technical Drafting Issues

This is a list of very technical legal drafting issues previously identified with the RHPA by the College's legal counsel in prior rounds of consideration of the legislation. These suggestions are intended to assist with any legal drafting to a modified RHPA that may ultimately arise from HPRAC's report. The technical suggestions do not take positions on the issues – rather, they identify wording that HPRAC or Ministry staff may wish to consider when actually making legislative drafting changes.

Section One

General policy issues and proposed College positions

1. Currency of scopes of practice and controlled acts (recommendation 62)

Issue

HPRAC recommends that a consultation program be developed that will enable each profession to assess the validity and currency of its scope and authorized acts, and to report to the Minister with its recommendations.

The College fully supports the direction of this recommendation. However, the College believes that it does not go far enough in terms of defining what must happen in this program, when it should occur, when it should report to the Minister and what controlled acts it should give priority to.

In its background to this recommendation HPRAC notes that there has not been a review of scopes or controlled acts since the RHPA was proclaimed fifteen years ago. They believe that this factor alone suggests that it is time to conduct a review to determine whether modifications are warranted in face of new technologies or other influences such as health human resources needs.

HPRAC also believes that it would be useful to examine whether professionals are practicing to the maximum scope of their practice and, if not, what barriers restrict them from doing so. Another aspect of this review would be to shed light on what new roles might be appropriate within a profession and how best practices in cross-professional scopes can be promoted.

To summarize, HPRAC believes that a review of professions' scopes and controlled acts to review possible modifications to them are needed because:

- They have not been reviewed in 5 years
- They are needed to address new technologies
- They are needed to address health human resource needs
- There are barriers that prevent professions from practicing to the maximum scope of their profession
- There is a need to address best practices in cross-professional scopes.

Discussion

When considered in light of other initiatives that the Ontario government is currently engaged in that are intended to improve access to health care, the need to immediately address issues relating to scope and controlled acts becomes even clearer. For example, some of the projects that Ontario is currently working on include:

- Family Health Teams – a model of health care intended to maximize access to care by using the skills of a number of different health care professionals to their fullest potential
- Wait Time Strategy – an initiative intended to bring down the wait times for a defined basket of services through methods like better coordination of care and the use of the most appropriate health care professionals to assess the needs of patients
- HealthForceOntario – an initiative intended to maximize the potential of the health human resources that are currently working in Ontario by permitting, and indeed encouraging them to work in new and expanded roles in health care.

The government has attached a high degree of priority to these projects and timelines have been proposed for many of the project deliverables.

It is apparent that the success of these and similar initiatives intended to improve patient access to care is in many respects intimately related to some of the very issues that HPRAC identified as driving the need for a review of professions' scopes and controlled acts.

The shortage in many areas of health human resources is a critical issue that can be addressed by encouraging health professionals to work to the full potential of their scopes and even expanding their roles.

For example, in its press release announcing the HealthForceOntario program, the Ontario government stated that establishing new and expanded roles for health professionals is a creative way to meet human resource needs in our health care system. A key component of the program is the development of new training programs so that current health care providers can expand their knowledge and responsibilities while meeting the growing and changing needs of patients. The government has announced that four new roles in areas of high need are to be created, specifically Physician Assistants, Nurse Endoscopists, Surgical First Assists, and Clinical Specialist Radiation Therapist.

This initiative appears to be closely related to HPRAC's own recommendation (discussed later) that calls for extending the role of physiotherapists in relation to orthopedic care, due to the high need in this area.

However, these kinds of initiatives are not fully supported within the existing scope and controlled acts of many professions and thus the need for a priority review of scopes and controlled acts can be seen.

The push toward collaborative practice models such as those that are encouraged through Family Health Teams also drives health professionals to expand their roles within their current scopes and even beyond. However the current model of scopes and controlled acts often means that these additional activities can only be performed through delegation. This means that to enable collaborating health professionals to

perform activities that are well within their scopes but that they are not permitted to perform except through delegation, a significant expenditure of resources on the development of delegation protocols must be made.

Here again we see that evolving practice models cannot be fully supported within the existing scope and controlled acts of many professions and this again demonstrates the need for a priority review of scopes and controlled acts.

Accomplishing the full range of the vision of HPRAC in promoting collaborative practice and of the Minister to improve access to care and reduce wait times is critically dependent on ensuring that the legislation that regulates health professionals does not impose unnecessary barriers to professionals that wish to provide care to the full extent of their education, skills and competencies.

Recommendation

With these considerations in mind, the College suggests that HPRAC's recommendation 62 be amended by making it much more specific in what the review program on scopes of practice and controlled acts must accomplish and when.

Specifically the College is suggesting that recommendation 62 be made more specific in the following areas:

- The review program on professions' scopes of practice and controlled acts needs to occur immediately. The consultative process should be initiated as soon as possible.
- The review program should make specific recommendations for scope and controlled act changes in identified priority areas before the end of 2006.
- The issue of the controlled act of communicating a diagnosis should be deemed as the highest priority issue as it is already identified by a number of professions as the single most important barrier both to professions acting to the full extent of their scopes and engaging in truly collaborative practices.
- Professions should also be asked to consider other profession-specific scope or controlled acts issues that inhibit their ability to practice.

In the context of the suggested changes to recommendation 62, the College also suggests that when HPRAC begins its review of the scopes and controlled acts, in particular the controlled act of communicating a diagnosis, that this controlled act be reviewed *in toto*.

Among the significant questions that should be asked about this particular controlled act are the following:

- It is clear that the professional education of health professionals has continued to evolve over the many years since this act was identified. In this context, how many professions are currently educated in making diagnoses that are within the scopes of practice of their professions but are prevented from informing their

patients about their diagnoses by the restrictions on communication or their out-of-date scopes of practice statements?

- When a patient attends a health professional (now frequently acting as a primary care provider) and is assessed to consider his or her presenting problem, is it reasonable to continue to prevent that patient from being told what the result of this assessment is?
- Why is it apparently permissible to communicate assessment results and not diagnoses? Will patients know the difference and place a different level of reliance on the former? In this context how does one interpret the inconsistent logic in an apparent HPRAC position that suggests that patients can be told about their conditions when it is done on the basis of “communicating clinical impressions” rather than communicating a diagnosis? Should patients place no reliance whatsoever on such communications? If so, how is a patient to rationally consider his or her treatment options? For example, on page 202 of the New Directions report, HPRAC indicates that kinesiologists do not diagnose – rather they “provide clinical impressions based on objective data” and therefore do not need the controlled act of communicating a diagnosis. However, on page 167 in the context of the discussion as to whether homeopaths diagnose, HPRAC notes that homeopaths indicate that they do not make and communicate diagnoses however “it is likely that the consumer is unaware of this distinction”. These kinds of apparent logical inconsistencies respecting what communicating a diagnosis means serves to confuse both health professionals and patients.
- In circumstances where a regulated health professional is proposing a treatment for a condition that he or she has identified but cannot communicate to the patient, how does the professional comply with the requirements of the Health Care Consent Act to obtain informed consent? Can consent be informed if the professional is not permitted to tell the patient what he or she is being treated for?
- Is it reasonable in an evolving model of health care that is intended to foster professionals’ abilities to work to the full extent of their scopes, to promote collaborative practice and to promote efficiency in the use of health human resources to require a patient who has been diagnosed by a health professional, working within their scope of practice to attend another, different and typically more difficult to access health professional to submit to a second assessment process so that that he or she can have his or her diagnosis “communicated”?

The open consideration of these and similar questions would appear to be critical in addressing the need for a clear understanding of what the controlled act of communicating a diagnosis really means, how it is related to scopes of practice and which professions should be permitted to perform it.

Physiotherapists and Diagnosis

In relation to this issue, the College of Physiotherapists submits that making diagnoses that are within the scope of practice of physiotherapy is a core competency of physiotherapists. Physiotherapy educational programs teach their students to diagnose

within the scope of practice of physiotherapy. Research demonstrates that physiotherapists' skills in diagnosing conditions within their scope of practice are equivalent or better than the diagnostic skills of other health professions in diagnosing the same conditions. Physiotherapists who work in collaborative practice environments or in extended roles, especially in musculoskeletal care, are expected by their colleagues to identify the causes of patients' symptoms.

With these considerations in mind, the College believes that both the physiotherapy profession's scope of practice and controlled acts should reflect this competency. As such the College is suggesting that in this round of legislative change the scope of practice of physiotherapy be amended to provide clear authority for physiotherapists to diagnose conditions that are treatable using physiotherapy modalities and that the controlled acts authorized to physiotherapists be amended to include the act of communicating diagnoses that can be made within the scope of practice of physiotherapy.

The College believes that there are a number of authorization mechanisms currently existing in the RHPA that could be used to permit physiotherapists to communicate a diagnosis. These include:

- An amendment to Section 4 of the Physiotherapy Act that would add the additional controlled act of communicating a diagnosis to the authorized acts that physiotherapists are already permitted to perform. Given the clear authority of such a provision and the transparency inherent in a statutory amendment, this option would be the one preferred by the College.
- A Ministry regulation under the authority of Section 27(3) of the RHPA that permits defined persons or activities to be exempted from the prohibitions on the controlled act. This method would be the College's second choice as the Ministry's power to make regulations seem to be able to exercised far more easily than the College's. The minor disadvantage with this approach is that it lacks some of the transparency of a statutory amendment.
- An amendment to the Physiotherapy Act that is similar to Section 5 of the Nursing Act that provides that a member may perform controlled acts as permitted by the College's regulations. While this approach has the advantage of being partially enacted in a statutory change, it would also require the College to have a regulation approved, which is often a difficult process. This method would be the College's least preferred authorization method.

As a final comment on this issue, the College believes that the existing restrictions on the controlled act of communication of a diagnosis are untenable in the current health care environment and that these restrictions will only become more unbearable as health care continues its evolution. As such, this issue must be addressed as a priority issue by HPRAC.

Recommendation

That recommendation 62 be extended as follows:

- A review program on professions' scopes of practice and controlled acts be initiated as soon as possible
- The review program make specific recommendations for scope and controlled act changes in identified priority areas before the end of 2006
- The issue of the controlled act of communicating a diagnosis should be deemed as the highest priority issue.
- Professions should be asked to consider other profession-specific scope or controlled acts issues that inhibit their ability to practice.

That HPRAC make new recommendations specific to physiotherapy as follows:

That in this round of legislative change:

- the scope of practice of physiotherapy be amended to provide clear authority for physiotherapists to diagnose conditions that are treatable using physiotherapy modalities, and
- that the controlled acts authorized to physiotherapists be amended to include the act of communicating diagnoses that can be made within the scope of practice of physiotherapy.

2. Extending the Role of Physiotherapists Providing Orthopaedic Care (recommendation 66)

Issue

HPRAC included a proposal in its recommendations to begin consultations that explore health professions regulatory options for extending the role of physiotherapy orthopaedic providers. They want to make recommendations to the Minister for changes in this area and consider it a priority.

Discussion

HPRAC bases this recommendation on the fact that Ontario is dealing with a shortage of orthopaedic surgeons and that in other jurisdictions physiotherapists have been granted authority to perform activities that extend existing physician resources.

The College is very pleased that HPRAC has recognized this issue in its report. The College fully supports this recommendation, including the need to make this issue a clear priority.

Recommendation

As this initiative moves forward, it will be very important for the College to be involved in these consultations. The College and members of the physiotherapy profession have

gained considerable knowledge of and expertise in the development of extended role models in physiotherapy practice. This knowledge includes:

- an understanding of the current and developing clinical competencies and educational requirements in this area,
- an awareness of where these evolving extended role models are in use and where they are being considered, in Ontario, in Canada and internationally,
- a knowledge of key people who have championed the development of these evolving care models.

The College believes that this kind of knowledge and experience will be critical to the success of a project to assess regulatory options for extending the role of physiotherapy orthopaedic providers. As such the College believes that it should be directly involved in the process.

With this in mind the College suggests that recommendation 66 be amended by clearly indicating that the College is to be involved in these discussions.

Recommendation

That recommendation 66 include within it a clear indication that the College of Physiotherapists of Ontario is to be involved in the development and consultative process.

3. Extension of Mandatory Reporting to Include Professional Misconduct, Incompetence and Incapacity (recommendations 42, 43, 44, 45, 46, 47)

Issue

HPRAC is recommending that the existing provisions for registrants to make mandatory reports of sexual abuse and for facilities or employers to report sexual abuse, employment terminations, privilege restrictions and similar issues be considerably expanded to require registrants and facilities to also report every act of professional misconduct or every circumstance in which a registrant may be incompetent or incapacitated.

HPRAC is justifying these recommendations on the grounds of the grave consequences that can arise to patients when health care professionals continue to provide care when their activities constitute professional misconduct or they are incompetent or incapacitated.

Discussion

While it is clear that this is an excellent suggestion from a public interest point of view, as the recommendations are currently drafted they are somewhat problematic as it is less than clear how someone would know when or what to report.

Since there is not a clear set of indicators that define incompetence or incapacity and the definitions of professional misconduct vary from profession to profession, it will be challenging for practitioners and facilities to know when they are obliged to make reports. It will also be challenging for the colleges that receive reports that have been made in good faith to determine what to do with them especially if the report made does not comport exactly with the receiving college's definition of what constitutes professional misconduct.

Recommendation

With this in mind the College suggests an amendment be made to these reporting recommendations (recommendation 42, 43, 44, 45, 46, 47) so that the obligation to make reports is more clearly defined and is triggered in response to clear indicators. In this context it would seem reasonable, given that the RHPA is intended to foster public protection, that the trigger would be a circumstance in which the apparent misconduct, incompetence, incapacity actually places someone at some risk of harm. In these kinds of circumstances it is clear that a report should be made. However in circumstances where the ostensible misconduct, incompetence, incapacity does not place anyone at any risk of harm, it does not seem reasonable to automatically require a report.

Recommendation

That the recommendations respecting the extension of mandatory reporting of all instances of professional misconduct, incompetence and incapacity in recommendations (42, 43, 44, 45, 46, 47) be modified to require mandatory reports to be made when a person has reasonable grounds to believe that:

- a member of a College may have committed an act of professional misconduct, or may be incompetent or incapacitated and
- the act of professional misconduct, or the incompetence or incapacity may expose patients or other people to harm, or injury or economic loss.

4. Extension of the Right to Use the Title “Doctor” in Defined Circumstances (recommendation 51)

Issue

HPRAC is recommending that the broad current restrictions on the use of the title “doctor” be changed. The proposal would change the provisions governing the use of the title “doctor” from a restrictive model in which only those professions that are exempted from the restrictions are able to use the title (currently chiropractors, optometrists, physicians, psychologists, and dentists) to a much more permissive model in which all college registrants who hold an earned doctorate degree in the discipline in which they are registered with their college will be permitted to use the title.

HPRAC justifies this recommendation on the basis that the current rules regarding the title are inconsistent and that Ontario is one of the few jurisdictions that prevent people from using the titles of the degrees that they have earned.

Discussion

The College believes that this is a very interesting proposal that could be a significant step forward to dealing with the patchwork of professional title use in Ontario. It will also be of assistance in permitting those with earned doctorate degrees to use them in the context of providing healthcare.

However, the proposal does not address the problem faced by a number of professions including physiotherapy, where the person registered with the college, in addition to their registration qualification, may also have a doctorate degree in a different discipline. This degree will frequently significantly advance their ability to provide care in their registered discipline but because the discipline of the degree may be different from the in which they are registered, these persons would not be able to use the title “doctor”.

For example, a physiotherapist registered with the College who has a doctorate degree in physical therapy would be able to refer to herself as Dr. Xxxx, PT. However, another physiotherapist registered with the College who has a Masters degree in physical therapy and a doctorate degree in exercise physiology, would not be able to use the title “doctor” in the context of offering health care. This is despite the fact that her doctorate will greatly enhance her ability to provide patient care.

Recommendation

With this problem in mind, the College suggests an amendment to recommendation 51 that would permit college registrants who have a doctorate degree in a discipline different from the profession in which they are registered to use the title doctor when the college in which they are registered has determined that the doctorate is in a discipline directly relevant to the practice of the profession in which they are registered.

Recommendation

51. That Sections 33 and 43(1)(d) of the *RHPA* should be repealed, and the following substituted:

33. (1) No person shall use the title “doctor”, a variation or abbreviation or an equivalent in another language in the course of providing or offering to provide, in Ontario, health care to individuals.

(2) Subsection (1) does not apply to a person who,

(a) is a member of a College; and

(b) holds an earned doctorate degree in the discipline in which the person is registered by the College or

(c) holds an earned doctorate degree in a discipline deemed by the College in which the person is registered to be directly relevant to the practice of the discipline in which the person is registered.

(3) In this section,

“abbreviation” includes an abbreviation of a variation; and

“earned doctorate degree” means a doctorate degree granted by an educational institution that is accredited or approved by a certifying body that is approved by the College.

(4) No person shall, orally or in writing, use the title “doctor”, a variation or abbreviation or an equivalent in another language, under subsection (2) without indicating the discipline in which the person holds the doctorate.

5. Regulation Approval and Administrative Rule Making Authorities for Colleges (recommendations 55, 56 and 73)

Issue

HPRAC recognizes that the current regulation making process at government does not work. It proposes a task force to look into the matter of facilitating the process for the passage of regulations. It is also proposing to examine the need for statutory changes to ensure that college policies and guidelines can be current, reflect best practices and at the same time be legally binding.

They indicate that they hope to identify some options for administrative rulemaking by colleges and ask the Minister to consider these options.

HPRAC bases these proposals on the joint grounds that there is a lack of legal certainty as to whether the “informal” rules of colleges can be enforced and also the existing process for developing regulation does not permit colleges to be timely and responsive in providing clear guidance to their registrants.

Discussion

The College is a strong supporter of these proposals. It is of the view that providing colleges with the authority to make administrative rules would be of enormous benefit in ensuring that the rules intended to guide registrants’ conduct were clear, current and legally binding. This position is consistent with the College’s past submission in which this issue was considered.

However as currently drafted, HPRAC proposals contain very little in the way of specifics. Without more specific direction to government contained in the recommendations, the College believes that the kinds of changes that HPRAC has identified as being needed will be unlikely to move forward due to demands from other competing priorities.

Recommendation

With HPRAC's intent in mind the College suggests amendments to recommendations 55, 56 and 73 that would require much more determined action on the part of government. Specifically, the College proposes that rather than focus on discussion of these important issues, that the RHPA be amended to grant colleges the authority to make legally binding administrative "rules" that would not be subject to government approval. However, due to the clear need for colleges to demonstrate the accountability to the public (as exemplified by government) for the rules that govern the profession, the rule making authority should also define a process of consultation and grant the Minister time-limited authority to veto proposed rules that are not in the public interest.

Recommendation

That the RHPA be amended to give colleges the statutory authority to make legally binding rules that govern the practice of the profession of their own registrants without the need for government approval when the following conditions are met:

- (a) That the existing provisions that require rules that affect registrants directly to be circulated to them be retained,
- (b) That the proposed rules are published in the Ontario Gazette to solicit comments from the Ontario public at least 60 days prior to the date they are approved by the College, and
- (c) That the Minister be given at least 60 days prior notice of any proposed rules and the power to veto all or part of them within this time period.

6. The changes to the renamed Quality Committee's mandate (recommendation 8)

Issue

HPRAC is recommending that the existing Quality Assurance Committee be renamed as the Quality Committee. While this is not an issue, the recommendation also includes a proposed amendment to the Code to specify the components of the quality program that the Committee is to administer. While again, this is not necessarily an issue, the list of program components captures two activities – entry to practise requirements and

standards of practice – that are currently in the College’s broader statutory objects. Also captured in the recommendation is that complaints, reports, assessments and similar materials be monitored and evaluated through the Quality Committee and that the Quality Committee address interprofessional collaboration.

While HPRAC justifies these suggestions based on the existing mandate of the committee to improve competence, there is little background on why entry requirements and standards should be defined as quality program components and thus to be within the purview of the Quality Committee. It is not clear as why entry requirements and standards should be defined as quality program components when they are already captured in colleges’ general objects in Section 3 of the Code. There has been some suggestion that the recommendation pertaining to entry to practise is intended to permit the committee to engage in discussions with academic facilities to help foster an understanding of entry level educational needs however if this is the case, more clarity around this role would be essential.

Discussion

The College is a strong supporter of the recommendation to incorporate a process for addressing interprofessional collaboration into the Quality Committee. While the College has been involved in such projects for a long time, it has always been less than clear as to which committee should have the oversight of this work, so the clear direction in the recommendation is very helpful.

Despite this support for some aspects of recommendation 8, there are certain components of the recommendation that this College views as inherently problematic and potentially disruptive. In particular the proposal to statutorily define entry requirements, standards, and the trending of information that comes to the attention of the College through complaints, reports, etc as components of colleges’ Quality Committees are very problematic.

The College’s concerns rest on the fact that the Council of this College has determined that in order to be publicly accountable for the decisions that it makes, it must maintain an awareness of the issues that the College deals with, it must engage in public debates as to the appropriate content for professional standards and entry to practice requirements and it must provide clear leadership and policy direction for the development of these materials. Therefore, this College believes that its Council has responsibility for the tracking and trending of complaints, discipline and similar practice issues, and for identifying, directing and setting practice standards and entry to practice requirements.

While aspects of these tasks may be appropriately delegated to other committees of the College such as the Registration Committee and the Quality Committee, the College believes that a committee mandate that takes these activities outside the direct purview of the Council does not support public accountability and is therefore inappropriate.

Recommendation

With this in mind, the College suggests an amendment to recommendation 8 that would remove the program components of entry to practise requirements, standards of practice and evaluation of complaint and report data from the quality assurance program. This will still permit the Quality Committee or the Registration Committee to participate in the development of such requirements or standards where the Council believes this is required. This proposed change will also ensure that the Council as a whole retains its authority for standards of practice and entry, and for the tracking and trending of complaints-type information.

Recommendation

That recommendation 8 be amended as follows:

8. That section 80 of Schedule 2, Health Professions Procedural Code should be amended by adding the following subsection:

(2) The quality assurance program shall include the following components:

(a) continuing education and professional development to promote continuing competence among the members and to address changes in practice environments, clinical standards, advances in technology and other emerging issues,

(b) self, peer and practice assessments,

(c) monitoring of members' participation in, and compliance with, the quality assurance program,

(d) interprofessional collaboration concerning the provision of quality care, continuous improvement in care and patient safety, or any matter described in clauses (a) to (g) as it affects the performance of similar or shared controlled acts.

7. Formal Investigations – Complaints, Reports and Incapacity (recommendations 19, 32, 38)

Issue

In the series of recommendations that relate to the proposed setting up of the Inquiries, Complaints and Reports Committee (ICR) and defining its authorities, HPRAC makes it clear that the ICR committee can request the Registrar to appoint an investigator with formal powers if it is looking into a formal complaint or report about misconduct or

incompetence, if it receives a report from the Quality Committee or if it is looking into a formal complaint or report about incapacity. Similar language applies to informal investigations; they are to be initiated by a formal complaint or report.

Discussion

While the College fully supports the direction of these recommendations, the College is concerned that the language proposed by HPRAC would appear to only permit the ICR to act if a formal complaint or a report has been made. The recommendations do not deal with the very common situation where the College receives information that raises concerns about the professional conduct, incompetence or incapacity of a registrant or such concerns arise through the College's own dealings with the registrant.

Recommendation

While the College believes this to be an oversight, it is potentially a very significant one that was not intended as it has the potential to significantly affect the ability of the College to protect the public. The College suggests an amendment to the recommendations around the authority of the ICR be modified to make it clear that it may initiate an investigation without a formal complaint or report.

Recommendation

The ability of the Inquiries, Complaints and Reports Committee to initiate an inquiry or investigation into a concern about a member's professional conduct, incompetence or incapacity without a formal complaint or report should be expressly recognized.

Section Two

Issues Identified – Other Health Professional Recommendations

1. HPRAC Recommendation for Kinesiologists to be Regulated under their own College.

Issue

HPRAC is making a broad recommendation that kinesiologists in Ontario be regulated by their own college under the RHPA. While the College has no opposition to having kinesiologists regulated in Ontario, the College believes that HPRAC's specific recommendation for a College of Kinesiology could benefit from changes.

Discussion

The College is in general agreement with HPRAC's perspective on the advantages to be accrued from either a joint business services model or a college that regulates more than one profession, particularly in circumstances where the activities of the professions are closely aligned.

For example, HPRAC is proposing that the professions of naturopathy and homeopathy be regulated within the same college (New Directions, p. 169, 170). This recommendation is justified for a number of reasons including:

- The close alignment of many of the activities of the two professions
- The benefits that will accrue to the new profession (homeopaths) by regulating it in concert with a currently regulated profession (naturopaths) in terms of developing entry requirements, practice standards, quality programs and initiating complaints and investigations processes.

Similarly, HPRAC is recommending that a new hybrid composite college be created to regulate not only the existing professions of audiology and speech language pathology, but also the group of related professions providing hearing care collectively known as hearing instrument practitioners (New Directions, p. 271). This recommendation is based on similar justifications as that for homeopaths and naturopaths, chief among these reasons being the fact that the professional activities of the professionals are closely aligned.

When discussing the hybrid college model, HPRAC suggests that it would recognize each profession through the election of members to the council and include members of the appropriate profession when statutory committees were considering cases in which a member of that profession was involved.

HPRAC also provided a general justification for the multi-professional college approach on the basis that separate colleges for closely related professions may "entrench professional misunderstandings And would soon result in competing standards"

(New Directions, p. 270). HPRAC further notes that “health care is increasingly provided through multi-disciplinary teams, and it would be counterproductive to create a regulatory scheme that does not support a collaborative approach.”

HPRAC has also determined (New Directions, p. 84, 85) that there are no statutory barriers to the implementation of a model that would permit new professions to enter a shared business service arrangement with another profession. While they note that there are numerous complexities associated with a shared business services model between professions, they recognize that if professions with separate colleges were to join in an administrative agreement, there might be financial, operational and administrative benefits.

In addition to the possibility of shared business services, HPRAC also observes that as professions seek regulation or changes to existing models of regulation, it will be useful to consider opportunities for regulation of related professions in one college. This approach can take into account profession-specific needs, while providing the efficiencies that come with having one council and one set of statutory committees. It can also lead to increased teamwork in the development of practice standards and quality programs, and reduce public confusion about similar services provided by members of different professions.

When the College considers the forgoing in light of HPRAC’s recommendations for kinesiologists to be regulated by their own college, the College is extremely cognizant of the fact that the professional activities of physiotherapists and kinesiologists are closely aligned. While the scope of practice describing kinesiologists’ activities is still evolving, it is abundantly clear that no matter what this scope ultimately ends up being, much of it will exist within the current scope of practice for physiotherapy. In the eloquent words of one of the College’s Councilors, “both professions provide services within the scope of physical function and mobility”.

In addition to intersecting scopes, the activities of physiotherapists and kinesiologists are aligned in other ways including:

- Education – According to information provided by the College’s councilors that represent academic programs in physiotherapy, many current entrants to physiotherapy programs have obtained prior degrees in kinesiology. In some faculties, the proportion of physiotherapy students with prior kinesiology degrees approaches fifty percent.
- Practice – The College is aware that many kinesiologists currently work in a team environment with physiotherapists. This practice model occurs in both publicly and privately funded environments and in these circumstances physiotherapists clearly indicate that kinesiologists’ skills in assisting in the improvement of physical function is of great benefit to patients.

Recommendation

As noted above, the College supports HPRAC's analysis of the benefits that accrue to related professions and to the public when they govern themselves either jointly in one college or in a model that shares business services.

With these benefits in mind and also considering the undeniable fact that the scopes of both kinesiology and physiotherapy have an interest in physical function and mobility, the College is of the view that HPRAC's recommendation that kinesiology be regulated by its own college should be reviewed.

The College believes that it would be presumptuous on its part to recommend that kinesiology and physiotherapy be jointly regulated within one college. To make a recommendation of this nature without an opportunity for both professions to explore in detail the kinds of regulatory or shared business services models that could conceivably be developed would demean both professions' ability to self regulate and reduce the likelihood that future collaboration would be supported.

However, the College does believe that in this case, there are likely to be significant benefits to both professions and to the public through the use of some model of collaborative regulation and these should be explored prior to defining a statutory model.

As such, the College believes that HPRAC's recommendation that kinesiology be regulated under a separate college should be reconsidered in order to determine if the public interest would be fostered by exploring a model of physiotherapy/kinesiology cooperation based on either joint regulation within one college or a multi college, shared business service model.

Recommendation

That HPRAC reconsider its recommendation that kinesiology be regulated under its own college and instead recommend that a model of physiotherapy/kinesiology cooperation based on either joint regulation within one college or a multi college, shared business service model be explored.

2. HPRAC Recommendations for Scope of Practice for Kinesiology

Issue

HPRAC has proposed a scope of practice statement for kinesiology as follows:

the application of scientifically based principles to enhance the strength, endurance and mobility of individuals with or without functional limitations, and

the administration of musculoskeletal, neurological, biomechanical, physiological, psychological and task-specific tests, assessments, and measures.

This scope statement does not follow the typical model of other professions' scope statements as rather than focus on a description of what is done, it includes a long list of activities that seem to be conducted with no clear purpose or goal defined. This component of the scope statement may be interpreted to mean that kinesiologists are generally competent to perform practically any assessment of pathological conditions.

A second, but no less important issue with the proposed scope statement is the difficulty that a lay person would have in understanding the limits as to what kinesiologists do based on this statement. When the College reviewed this proposed scope statement at its recent Council meeting, a number of comments were made by the College's publicly appointed Councilors as to the difficulty they had in garnering a clear understanding of the limits of kinesiologists' roles based on the scope statement. The difficulty that a group of lay persons who are familiar with regulatory concepts such as scopes of practice statements had in understanding the proposed scope statement militates against the use of such a complex, dense and broad scope statement to describe kinesiologists' activities.

Discussion

The College understands that kinesiologists' typical independent professional activity is centered on improving function in people who are well.

This work involves the administration of physical function tests and measures with a goal to collect objective information that can then be used to develop exercise plans to enhance strength, mobility and other functions in individuals who are generally well.

When kinesiologists provide care to people who are not well, their education and training in enhancing physical function can be of great value, especially in rehabilitation. However, due to the fact that their education is focused on the enhancement of function in well people rather than understanding the physiological and metabolic underpinnings of illness, their role is typically to provide assistance in developing and supervising the exercise programs of people whose health care needs have been identified by other health professionals

Recommendation

With this in mind, the College suggests that the kinesiology scope statement be redrafted to:

- provide more clarity as to kinesiologists' role in the provision of health care. This clarity will be important given the new focus on collaborative care that requires health professionals working in collaborative care environments to have a clear understanding of the activities that their colleagues can, and should be performing. Clarity of the kinesiology scope will also be critical in respect of the

recommendation made above that physiotherapists and kinesiologists explore some model of collaborative regulation.

- Reflect the close and complementary practice of kinesiologists, physiotherapists and other rehabilitation professionals by including similar components within their scope statements.

Recommendation

That the scope of practice of kinesiology be redrafted to clarify their role in the provision of healthcare as follows:

The practice of kinesiology is the administration of physical function tests and measures and the application of scientifically based exercise principles to augment physical function and the maintenance of health.

3. HPRAC recommendation for homeopaths and naturopaths to be regulated under their own college.

HPRAC is recommending that homeopaths and naturopaths be regulated in one college and that the transitional Council for this college be composed of current members of these professions and representatives of the College of Physicians and Surgeons, the College of Chiropractors, and the Ontario College of Pharmacists.

While the College has no opposition to having naturopaths regulated under the RHPA, given that naturopaths have a proposed scope of practice that includes activities in rehabilitative care and that they are also being considered for the controlled act of spinal manipulation, an act that physiotherapists as well as chiropractors are authorized to perform, the College suggests that it should also be represented on the transitional council.

Recommendation

The homeopathy/naturopathy transitional council include at least one representative from the College of Physiotherapists.

Summary of College Key Issues and Recommendations

The College of Physiotherapists of Ontario would like to commend HPRAC for its work on “Regulation of Health Professions in Ontario: New Directions”

This report contains a wide variety of important and thoughtful recommendations that will ultimately improve the way that health care is delivered in Ontario. Their work serves as a model for the way stakeholder input should be incorporated in to such reviews.

While the College does have some suggestions for ways that some of recommendations could be improved, the vast majority of HPRAC’s work is fully supported by the College. What follows is a very brief summary of the College’s key issues and the related recommendations.

1. Currency of scopes of practice and controlled acts (recommendation 62)

The College believes that the evolution of the way that Ontario’s health professionals are educated and provide care requires immediate action to ensure that professions’ scopes of practice and controlled acts do not act as unreasonable barriers to evolving care models. For the physiotherapy profession, review is not sufficient – immediate statutory changes should be made to permit physiotherapists to communicate diagnoses made within the scope of practice of the profession.

As such, the College recommends:

(1) That recommendation 62 be extended as follows:

- A review program on professions’ scopes of practice and controlled acts be initiated as soon as possible
- The review program make specific recommendations for scope and controlled act changes in identified priority areas before the end of 2006
- The issue of the controlled act of communicating a diagnosis should be deemed as the highest priority issue.
- Professions should be asked to consider other profession-specific scope or controlled acts issues that inhibit their ability to practice.

(2) That HPRAC make new recommendations specific to physiotherapy as follows:

That in this round of legislative change:

- the scope of practice of physiotherapy be amended to provide clear authority for physiotherapists to diagnose conditions that are treatable using physiotherapy modalities, and
- that the controlled acts authorized to physiotherapists be amended to include the act of communicating diagnoses that can be made within the scope of practice of physiotherapy.

2. Extending the Role of Physiotherapists Providing Orthopaedic Care (recommendation 66)

The College fully supports HPRAC's recommendation that consultation occur on regulatory options to extend physiotherapists role in providing orthopaedic care. Our only issue is that the recommendation should be clear that the College is to be included in these consultations.

As such, the College recommends:

(1) That recommendation 66 include within it a clear indication that the College of Physiotherapists of Ontario is to be involved in the development and consultative process.

3. Extension of Mandatory Reporting to Include Professional Misconduct, Incompetence and Incapacity (recommendations 42, 43, 44, 45, 46, 47)

The College believes that the proposal to significantly extend current mandatory reporting requirements will be difficult to implement and would benefit from the incorporation of a clearer trigger that would indicate when a report is required.

As such, the College recommends:

(1) That the recommendations respecting the extension of mandatory reporting of all instances of professional misconduct, incompetence and incapacity in recommendations (42, 43, 44, 45, 46, 47) be modified to require mandatory reports to be made when a person has reasonable grounds to believe that:

- a member of a College may have committed an act of professional misconduct, or may be incompetent or incapacitated and
- the act of professional misconduct, or the incompetence or incapacity may expose patients or other people to harm, or injury or economic loss.

4. Extension of the Right to Use the Title “Doctor” in Defined Circumstances (recommendation 51)

The College supports the significant changes HPRAC is proposing in the way that the title “doctor” is to be used. However, the recommendation does not permit the title use in circumstances where a member of a profession has a doctoral degree that furthers their ability to provide care but is not the same as the degree they used to enter the profession. The College believes that a provision to broaden the degrees that qualify a health profession to use the title should be made.

As such, the College recommends:

(1) That recommendation 51, suggesting that Sections 33 and 43(1)(d) of the *RHPA* be repealed, and the following substituted be amended as follows:

33. (1) No person shall use the title “doctor”, a variation or abbreviation or an equivalent in another language in the course of providing or offering to provide, in Ontario, health care to individuals.

(2) Subsection (1) does not apply to a person who,

(a) is a member of a College; and

(b) holds an earned doctorate degree in the discipline in which the person is registered by the College or

(c) holds an earned doctorate degree in a discipline deemed by the College in which the person is registered to be directly relevant to the practice of the discipline in which the person is registered.

(3) In this section,

“abbreviation” includes an abbreviation of a variation; and

“earned doctorate degree” means a doctorate degree granted by an educational institution that is accredited or approved by a certifying body that is approved by the College.

(4) No person shall, orally or in writing, use the title “doctor”, a variation or abbreviation or an equivalent in another language, under subsection (2) without indicating the discipline in which the person holds the doctorate.

5. Regulation Approval and Administrative Rule Making Authorities for Colleges (recommendations 55, 56 and 73)

The College agrees that the current regulation approval process is problematic and as such it should be reviewed. The College also supports the recommendations relating to the use of administrative rule making as an alternative to regulations however it believes that immediate action is needed in this area.

As such, the College recommends:

(1) That the RHPA be amended to give colleges the statutory authority to make legally binding rules that govern the practice of the profession of their own registrants without the need for government approval when the following conditions are met:

(a) That the existing provisions that require rules that affect registrants directly to be circulated to them be retained,

(b) That the proposed rule are published in the Ontario Gazette to solicit comments from the Ontario public at least 60 days prior to the date they are approved by the College, and

(c) That the Minister be given at least 60 days prior notice of any proposed rules and the power to veto all or part of them within this time period.

6. The changes to the renamed Quality Committee's mandate (recommendation 8)

The College believes that some of the recommended changes to the statutory quality assurance program will be problematic as they will not permit the Council to fully engage in appropriate and transparent discussion of matters such as standards of entry, of practice and to assess trends in issues relating to registrant conduct. The College believes that these discussions need to take place at Council and thus does not support their exclusive inclusion in the mandate of the Quality Committee.

As such, the College recommends:

(1) That recommendation 8 be amended as follows:

8. That section 80 of Schedule 2, Health Professions Procedural Code should be amended by adding the following subsection:

(2) The quality assurance program shall include the following components:

(a) continuing education and professional development to promote continuing competence among the members and to address changes in practice environments, clinical standards, advances in technology and other emerging issues,

(b) self, peer and practice assessments,

(c) monitoring of members' participation in, and compliance with, the quality assurance program,

(d) interprofessional collaboration concerning the provision of quality care, continuous improvement in care and patient safety, or any matter described in clauses (a) to (g) as it affects the performance of similar or shared controlled acts.

7. Formal Investigations – Complaints, Reports and Incapacity (recommendations 19, 32, 38,)

While the College fully supports the direction of these recommendations, the College is concerned that the language proposed by HPRAC would appear to only permit the ICR to act if a formal complaint or a report has been made. The recommendations do not deal with the very common situation where the College receives information that raises concerns about the professional conduct, incompetence or incapacity of a registrant or such concerns arise through the College's own dealings with the registrant.

As such, the College recommends

(1) That the ability of the Inquiries, Complaints and Reports Committee to initiate an inquiry or investigation into a concern about a member's professional conduct, incompetence or incapacity without a formal complaint or report should be expressly recognized.

8. HPRAC Recommendation for Kinesiologists to be Regulated under their own College.

HPRAC's report contains numerous arguments that support either joint regulation of professions or the use of shared business services models to increase efficiencies in independent colleges. In fact although HPRAC's recommendations for some new professions suggest they be regulated with other existing professions, it does not follow this model for kinesiology although the use of joint regulation or shared business services would likely assist this new profession.

As such, the College recommends:

(1) That HPRAC reconsider its recommendation that kinesiology be regulated under its own college and instead recommend that a model of physiotherapy/kinesiology cooperation based on either joint regulation within one college or a multi college, shared business service model be explored.

9. HPRAC Recommendations for Scope of Practice for Kinesiology

The proposed scope statement for kinesiology does not follow the typical model of other professions' scope statements. It is also difficult to understand the limits of kinesiology practice based on this scope statement.

As such, the College recommends:

(1) That the scope of practice of kinesiology be redrafted to clarify their role in the provision of healthcare as follows:

The practice of kinesiology is the administration of physical function tests and measures and the application of scientifically based exercise principles to augment physical function and the maintenance of health.

10. HPRAC Recommendation for homeopaths and naturopaths to be regulated under their own college.

Given that naturopaths have a proposed scope of practice that includes activities in rehabilitative care and that they are also being considered for the controlled act of spinal manipulation, an act that physiotherapists as well as chiropractors are authorized to perform, the College suggests that it should also be represented on the transitional council.

As such, the College recommends:

(1) The homeopathy/naturopathy transitional council include at least one representative from the College of Physiotherapists.

As a final comment, the College believes that HPRAC's excellent work will be enhanced if government follows the example that HPRAC has set in carefully considering and incorporating the feedback it receives from its stakeholders. The changes that the College suggests to the recommendations in the report will enhance the ability of colleges to regulate and further the ability of health care professions to provide needed care in a rapidly evolving healthcare environment.

Appendix One

General Legal Issues

College Composition

HPRAC, while recognizing the problems created by the recurring failure to appoint the minimum number of public members of the College Councils, did not recommend any statutory changes. It suggested some government process changes that might make the process more efficient. In fact the problem of not having a properly constituted Council, which has occurred frequently over the last few years, is extremely serious. Composition of a Council is a separate legal requirement to its having a quorum. Not being properly constituted places a College in a position where it cannot properly fulfil its mandate. Committees may not meet quorum requirements and Councils cannot act. If an Executive Committee becomes improperly constituted, the operation of the College can be brought to halt. The problem can occur with professional members of Council too, although this happens less frequently.

Recommendation

That section 6 of the Code be amended to provide that that the Council of the College is deemed to be properly constituted even if it has vacancies and even if it does not have the minimum number of members of any category of Council member.

Accountability to the Minister

HPRAC proposes to greatly expand the mandate of the Minister to require information from the Colleges. Currently Colleges only provide information about its regulatory activities. It is proposed that this obligation be expanded to include information that will assist the Ministry to fund health care services appropriately, monitor delivery of services and facilitate human health resources planning. A task force is proposed to coordinate health human resource planning and health service delivery planning. Not only do the Colleges have to provide the information it possesses, Colleges can be required to obtain the information from their members and members are required to provide the information to their College. The Ministry does not have to pay the expenses for these activities (HPRAC Recommendations No. 14, 63 and 64).

Recommendation:

That the Minister's proposed new powers under s. 6 of the Regulated Health Professions Act be limited to human health resource planning and not OHIP related issues. Regulatory Colleges will lose their ability to effectively regulate their members if they become a tool for furthering Ministry funding priorities. In

addition, the Minister should be required by the Regulated Health Professions Act to pay for the costs of any information gathering and reporting.

Confidentiality Provision

The confidentiality provision has been revised to permit disclosure of information in additional circumstances, including the following:

- explicit reference is made to disclosure of information pursuant to the by-laws or rules of practice and procedure (something that is currently implied),
- disclosure to the Minister for the Minister's purposes,
- expansion of the right to disclose of illegal conduct to police officers so that it is not restricted to concerns about the conduct of members, but of anyone,
- disclosure in the public interest where the member has made public that he or she is under investigation or where criminal charges have been laid.
- as may be authorized by regulation (HPRAC Recommendation No. 70).

These changes are important to permit a College to fulfil its mandate. In fact, the changes probably do not go far enough. For example, disclosure to non-health professional regulators is still not permitted. If a member is a risk to the public, non-health regulators should also be notified where appropriate (e.g., where the member is also a teacher, social worker, lawyer, etc.). Such disclosure will also promote reciprocity in sharing of information and will help Colleges protect the public. Awaiting the possible making of a regulation to permit such disclosure is not sufficient.

In addition, some professions have set up national or North American wide databases for the sharing of information about members to prevent those with conduct concerns from moving from jurisdiction to jurisdiction without detection. However, if such a database is established by an umbrella organization, the sharing of information is not covered by the existing provisions.

Recommendation:

That proposed ss. 36(2)(c) be reworded to remove the word "health" before profession so that non-health professions can be advised of concerns as well. Further, clause 36(2)(c) should be further expanded to include sharing of information with a database used primarily or exclusively by bodies that regulate professions provided that the database has confidentiality policies consistent with the intent of section 36.

The wording of the proposed HPRAC amendments results in the repealing of the current ss. 36(2) and 36(3) of the *Regulated Health Professions Act*. These are important provisions that prevent College staff from being summonsed to court proceedings (e.g., in civil actions against individual members) and from having College processes used in other proceedings (e.g., in a malpractice claim against a practitioner).

These provisions have been frequently relied upon by Colleges to avoid diverting precious resources to court proceedings and even in avoiding being sued themselves. The courts have upheld the importance and value of these provisions: *Forget v. Sutherland* (1999), 188 D.L.R. (4th) 296 (Ont.C.A.) leave to appeal to S.C.C. refused 197 D.L.R. (4th) vii. No explanation is given by HPRAC for deleting these key provisions and one can only assume that the deletion was unintended.

Recommendation:

That the current ss. 36(2) and 36(3) of the Regulated Health Professions Act be retained.

Note: On June 27, 2006, the College received a copy of a letter sent by HPRAC to the Minister of Health and Long-Term Care indicating that a typographical error contained in recommendation 70 resulted in the proposal to repeal the entirety of Section 36. HPRAC indicates that their correct intent was to only repeal subsection 36(1). Given this intent of HPRAC, the College believes that the change recommended above is no longer needed.

College Staff Investigation

The reality that College staff, not panels of the Committee itself, conduct actual investigations is recognized. However, College staff are to act under the direction of a Committee panel appointed for the purpose. The Committee panel is to monitor the investigation. There still appears to be a lack of recognition that College staff conduct inquiries into matters before a Committee panel is actually appointed. All parties would be better served if College staff are expressly authorized to begin inquiries right away (HPRAC Recommendation No. 19).

Recommendation:

Proposed section 28 should recognize that College staff will be initiating inquiries, perhaps under the policies and procedures of the Inquiries, Complaints and Reports Committee, until a panel can be appointed to oversee the matter.

Immediate Notice to Member

The member must be immediately notified of any complaint or report against him or her. While generally appropriate, there are some situations where the notification should be delayed so that certain evidence can be gathered (e.g., charts or billing records where the allegation is of falsification of documents and there is some substantiation of the concern) or so that measures can be taken to protect the safety of certain individuals (HPRAC Recommendation No. 22).

Recommendation:

Proposed subsection 25(5) should permit a brief delay (e.g., 30 days) in notifying the member of a complaint or report where the delay is necessary to protect the integrity of the investigation or to protect the safety of an individual.

Disposition Options

The Committee has a number of new and significant options for disposing of a complaint or report. The Committee can require the member to complete a specified continuing education or remediation program. This is a substitute power to compensate for the Committee being unable to refer the member to the Quality Committee (an option that has now been removed – see below). The requirement would be reviewable before the Health Professions Appeal and Review Board (in complaints matters, at least). The Committee can also require the member to undergo a physical, psychological, practice or other assessment. This option may be appropriate where there is a concern but the cause and extent of that concern is unclear (e.g., incapacity, incompetence). Alternate dispute resolution (ADR) and voluntary undertakings are specifically authorized although it is unclear whether a referral to discipline or fitness to practise is first required. Referrals to the Discipline Committee or the Fitness to Practise Committee (without going to the Executive Committee) and cautions in person remain available. Other, undefined, action also remains possible (HPRAC Recommendations No. 23 and 24). These various disposition options should allow the new Inquiries, Complaints and Reports Committee to be more effective in dealing with concerns that do not need to be referred to discipline.

Recommendation:

That proposed paragraph 26(2).7 be clarified to ensure that it does not imply that ADR is only permitted where a referral to discipline or fitness to practise is otherwise contemplated.

Interim Orders

HPRAC has not maintained its 2001 position that interim orders should be available as soon as the need to protect the public becomes evident. It now recommends that interim orders should remain available only after the matter has been referred to discipline. The Inquiries, Complaints and Reports Committee will handle the issue (HPRAC Recommendation No. 29). While this is a controversial issue, the public interest would appear to be better served by the making of an interim order as soon as it becomes evident that patients are exposed to harm or injury.

Recommendation:

That s. 37 of the Code be amended so that interim orders are available as soon as it becomes evident that patients are exposed to harm or injury, and not just after the matter has been referred to discipline.

Alternate Dispute Resolution

HPRAC proposes that the ADR process be formalized to facilitate fairness and accountability. Rules must be made. ADR can only be conducted if there is informed and voluntary consent by both parties. A facilitator must be used (although he or she can be a member of the Inquiries, Complaints and Reports Committee; it is unclear whether it can be a College employee). It is not available for serious allegations of sexual abuse. Any resolution must be approved by the Inquiries, Complaints and Reports Committee and placed on the non-public portion of the register (HPRAC Recommendations No. 40 and 41). It appears that the proposal may have some technical difficulties to it.

Recommendation:

That the alternate dispute resolution provisions be clarified in the following areas:

- The definition of “alternate resolution process” should be clarified to exclude the negotiation of undertakings and similar resolutions between the College and the member. HPRAC’s recommendations appear to deal only with resolutions between members and complainants or other third parties that result in the withdrawal of the complaint or report before the Inquiries, Complaints and Reports Committee. The recommendations do not, or should not, deal with undertakings and similar dispositions available to the Inquiries, Complaints and Reports Committee.
- Clarify that College staff can serve as facilitators.
- The protection provisions for the facilitator and process do not make sense. To the extent that the protection is against the information being used in non-College processes, such protections already exist in s. 36 of the current Regulated Health Professions Act. Including these provisions here will jeopardize the interpretation of the existing provisions. Further, the provisions would appear to permit the use of the information in College processes. This would be inconsistent with the “without prejudice” nature of the discussions. The information should not be available for use in other College processes.

Interim Orders – Incapacity

Again the Inquiries, Complaints and Reports Committee can only impose an interim order after referring the matter to the Fitness to Practise Committee for a hearing (HPRAC Recommendations No. 36-37).

Recommendation:

That s. 62 of the Code be amended so that interim orders be available as soon as it becomes evident that patients are exposed to harm or injury, and not just after the matter has been referred to the Fitness to Practise Committee.

Quality Committee (Quality Assurance Committee)

The quality assurance program has been modified somewhat. The name of the committee has been changed to the Quality Committee and the program focus has been modified to include continuing evaluation and improvement to its current mandate of continuing competence (HPRAC Recommendations No. 2 and 4).

In addition, the Quality Committee is obliged to monitor compliance by members with the quality assurance program. The remedy for failing to comply is referral to the Inquiries, Complaints and Reports Committee (HPRAC Recommendation No. 10). However, given the broad confidentiality obligations of the program, it is not clear that the Quality Committee can provide sufficient background information to support enforcement action.

Recommendation:

That where the Quality Committee makes a referral of a member to the Inquiries, Complaints and Reports Committee under proposed paragraph 83.1(9).3, that the Quality Committee be given the express power to provide sufficient evidence of the failure to co-operate to enable effective enforcement action. Otherwise the confidentiality obligations in the remainder of s. 83.1 could be used to prevent the Inquiries, Complaints and Reports Committee or the Discipline Committee from dealing effectively with a failure to co-operate.

Technical Amendments

There are a number of technical drafting weaknesses in the current *Regulated Health Professions Act*. These tend to be minor wording issues that are difficult to generate enthusiasm about. Most have minimal policy implications. However, they pose significant practical problems that should be addressed in this round of statutory amendment.

Recommendation:

The following technical drafting problems should be addressed in the new Bill amending the Regulated Health Professions Act and the Health Professions Procedural Code:

- a. Clause 29(1)(b) of the Act, permitting students to perform controlled acts during their training, should be expanded to include post-graduate experience approved by the College.
- b. In respect of the use of the term “civil proceeding” in subsections 36(2) and 36(3) of the Act, clarify or define “civil proceeding” to include proceedings before an administrative tribunal or agency.
- c. In respect of categories of documents protected under subsection 36(3) of the Act, expand the protection to cover all College documents.
- d. In respect of subsection 36(3) of the Act, make an exception to subsection 36(3) for the purposes of permitting a College representative to defend himself or herself.
- e. Expand section 37 of the Act to include injunctive proceedings under section 87 of the Code so that the same rules of evidence apply as exist in prosecutions in provincial offences court.
- f. Section 14 of the Code is unclear and inconsistent. Provide that the College has jurisdiction over the incompetence and incapacity of all former members while registered. Perhaps even provide that the College has jurisdiction over the professional misconduct, incompetence or incapacity of a former member during the period after their membership should the former member reapply for or obtain registration.
- g. The wording setting out the composition of panels of the Registration Committee and the Fitness to Practise Committee can be interpreted as meaning that only one public member can be selected for a panel. Insert the phrase “at least” before the phrase “one of whom” in subsections 17(2) and 64(2) to clarify the point.
- h. In respect of section 31 of the Code, there is no corresponding provision for the Complaints Committee. The implication is that if a complainant dies or becomes incapacitated, the Complaints Committee cannot deal with a personal representative (who must file a fresh complaint). A similar provision for the Complaints Committee, now the Inquiries, Complaints and Reports Committee, would address the issue.
- i. It is unclear as to what point in time the quorum provision for panels of the Discipline Committee applies. This confusion could be remedied by specifying in the quorum provision (subsection 38(5)): “Where a panel has been selected, even if the hearing has not commenced, ...”.

- j. Orders of the Fitness to Practise Committee are varied quite often. That is a natural part of the rehabilitation process as the member's health improves. There is no specific authority for this very common practice. Section 69 of the Code should provide that either party can apply to the same or a new panel of the Fitness to Practise Committee to vary an order made under that section.
- k. In section 75 of the Code, replace the phrase "an act of professional misconduct" with the phrase "engaged in professional misconduct" to ensure that omissions as well as commissions are captured.

Appendix Two

Technical Drafting Issues

An Analysis of the *Regulated Health Professions Act*:

Technical and Drafting Issues

Note:

This documents is an edited version of a series of technical and drafting issues that were identified by the legal counsel of the College of Physiotherapists of Ontario reflecting his experience with the RHPA from its implementation through to 2001.

While HPRAC's recommendations have made some of the original recommendations invalid, and some of the original recommendations have been included in the technical amendments identified by legal counsel in the most recent College submission, many of the original issues identified still have merit.

As such this appendix is being offered to assist HPRAC and the Ministry of Health and Long-Term Care in identifying technical and legal issues that still remain problematic or cumbersome in the RHPA.

Please note that the content of the issues described below has not been edited to reflect all HPRAC's most recent recommendations.

1. *Regulated Health Professions Act* Provisions

Section 29 – Exceptions to the Controlled Acts Scheme

Concerns:

1. Should clause 29(1)(b), permitting students to perform controlled acts during their training, be expanded to include obtaining post-graduate experience?
2. Should clause 29(1)(c), permitting the performance of a controlled act during the course of religious healing, apply to all of the controlled acts?
3. In subsection 29(2), permitting counsellors to communicate a diagnosis, what does the phrase "as long as it is not a communication that a health profession Act authorizes members to make" mean?

Analysis:

In respect of concern 1, clause 29(1)(b), permitting students to perform controlled acts during their training, it likely only applies to training referred to in the registration

regulations for obtaining initial registration. Problems have occurred in the following circumstances:

- students wish to do post-graduate training before becoming registered;
- students who have completed their training wish to obtain additional experience for the purpose of preparing for an entrance examination; or
- students who trained outside of Ontario wish to do an internship or practicum in Ontario for the purposes of obtaining registration in another jurisdiction.

Perhaps expanding the exception to include students completing a course or program approved by the College would provide additional flexibility. Alternatively, working with Colleges to develop appropriate classes of registration to deal with such persons may be indicated.

In respect of concern 2, it is difficult to interpret the boundaries of clause 29(1)(c), permitting the performance of a controlled act during the course of religious healing. For example, does it include a religion established by the person performing the controlled act and to which no one else subscribes? How does one even begin to review the *bona fides* of the religion? Depending on one's interpretation of "spiritual means", the provision might permit the performance of any controlled act, including major surgery. Should some of the controlled acts be excluded from this exception?

In respect of concern 3, subsection 29(2), permitting counsellors to communicate a diagnosis, the phrase "as long as it is not a communication that a health profession Act authorizes members to make" makes no sense. The only controlled act pertaining to communication is the first one, communicating a diagnosis. That controlled act is authorized to a number of professions. The provision appears internally inconsistent. The intent of the provision appears to attempt to provide some protection to clergy and lay counsellors without permitting them to communicate the diagnosis of major psychiatric illnesses. If so, other wording should be found.

One could also question the need for subsection 29(2). Given that there is already an exception for religious healing, that includes the first controlled act, it is not needed for religious counsellors. In respect of lay counsellors, it may be that a clarified rewording of the first controlled act may eliminate the need to permit unregistered persons to do it.

Some Options for Consideration:

- a) Maintain the existing exemptions.
- b) In respect of clause 29(1)(b), permitting students to perform controlled acts during their training, also permit students to complete a course or program approved by the College.
- c) In respect of clause 29(1)(c), permitting the performance of a controlled act during the course of religious healing:
 - Require that the religion be an established or recognized one;
 - Restrict the controlled acts that are exempted by this clause.

- d) In respect of subsection 29(2), permitting counsellors to communicate a diagnosis, clarify or replace the phrase “as long as it is not a communication that a health profession Act authorizes members to make”. Alternatively, reconsider the need for the provision in the first place, particularly if the first controlled act is reworded to make its scope clearer.

Section 30 – Risk of Harm Provision

Concerns:

1. In subsection 30(2), is the word “collaboration” too vague?
2. Why do none of the exemptions by regulation for the controlled acts apply to the risk of harm provision?

Analysis:

The risk of harm provision was added to deal with dangerous procedures that are not captured by the wording of any particular controlled act. To date, the provision appears to have been used primarily in two contexts:

- As an added ground for prosecution of unregistered individuals who have performed a controlled act; and
- In cease and desist letters to unregistered persons.

The provision does not appear to have been the sole basis of a prosecution of an unregistered person to date.

In respect of concern 1, subsection 30(2), uses the word “collaboration”. This word is ambiguous and might include any sort of communication with a registered practitioner. For example, if the registered practitioner simply answers some questions posed by the person performing the risky act, without seeing the patient or taking any responsibility for treatment, is that collaboration? What if the registered practitioner treats the patient and, unknown to him or her, the unregistered person, obtaining information only from the patient, provides supplementary treatment? Even the word “jointly” would be an improvement.

In respect of concern 2, the exemption regulation, Ontario Regulation 107/96, only refers to exemptions from the controlled acts. In order to exempt from the risk of harm clause, the regulation should refer directly to section 30. It does not make sense to exempt individuals from prosecution under one section but leave them vulnerable to prosecution under another provision.

Many of the comments relating to the controlled act provisions, above, (e.g., re exceptions) apply here as well.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) In respect of subsection 30(2), remove or replace the word “collaboration”, perhaps with the word “jointly”.
- c) In respect of the exemption regulation, include in the exempting regulation a reference to section 30 as well as section 27.

Section 37 – Onus of Proof of Registration**Concerns:**

1. Should this evidentiary provision be expanded to include injunctive proceedings under section 87 of the *Health Professions Procedural Code*?

Analysis:

As presently worded, this provision applies only to provincial offences and not injunctive proceedings under section 87 of the *Health Professions Procedural Code*. Because there are 21 Colleges, it is administratively difficult to obtain a certificate of Registrar under section 88 of the *Health Professions Procedural Code* from every College. Colleges are using the injunctive remedy with increasing frequency (in preference to provincial offences prosecutions). It is difficult to conceive of policy reasons for not providing this convenience for injunctive proceedings if it exists for provincial offences prosecutions.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Expand section 37 to include injunctive proceedings under section 87 of the *Health Professions Procedural Code*.

Section 39 – Service by Mail**Concerns:**

1. Should this provision be combined with section 91 of the *Health Professions Procedural Code*, which is similar, but not identical?
2. Should other forms of service be added?
3. Should the rebuttable presumption be removed for members who have changed their mailing address without notifying their College?

Analysis:

In respect of concern 1, this provision is similar but not identical to section 91 of the *Health Professions Procedural Code*. That drafting approach (i.e., overlapping but not

identical provisions) is a prescription for technical challenges. Consideration should be given to having one provision apply to all situations.

In respect of concern 2, consideration should be given to other forms of service that are commonly used today.

In respect of concern 3, many Colleges are experiencing difficulties with members moving or otherwise changing their address without notifying the College. Most Colleges required their members to notify it of any address change. This imposes a heavy administrative burden on Colleges, particularly associated with the renewal of registration, the timely disposal of complaints, and even the initiation of hearings. A member who can rebut the presumption of service could have an entire discipline or incapacity hearing set aside leaving the College in a precarious position because the evidence may no longer be available to rehear the matter. However, the consequence to the member may be quite severe if he or she has no method of having the matter set aside. Perhaps the member should then have to pay the costs and expenses incurred by the College.

Another alternative would be to permit the College to make substituted service in cases where the letter comes back because the address for the member is no longer valid. This option would ease the concern of hearing committees where there was no actual service on the member. However, substituted service (e.g., by newspaper) is expensive and may, in incapacity matters at least, be unfair to the member.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Combine this section and section 91 of the *Health Professions Procedural Code* into one, comprehensive provision.
- c) Insert additional methods of service, including:
 - Facsimile
 - E-mail
 - Registered mail (as it is not entirely clear that this is included in the term pre-paid, first class mail), and, of course,
 - Personal service.
- d) Insert another provision:
 - Eliminating the rebuttable presumption in cases where the member did not notify their College of a change of address (i.e., in those cases, deem service to be valid even though the member did not actually receive it);
 - Requiring the member to pay the costs and expenses incurred by the College as a result of the rebuttable presumption of service if the member did not notify their College of a change of address; or
 - Permitting substituted service.

Health Professions Procedural Code Provisions

Sections 1 and 1.1 – Definitions and Purpose

Concerns:

1. Is “quality assurance” the appropriate term?
2. Should the definition of “incapacitated” be reordered?
3. Does subsection 1(2), dealing with when hearings are required, need to be reworded in light of the amendments to the *Statutory Powers Procedure Act*?
4. Can some of the ambiguities about who is covered by the definition of sexual abuse be clarified?

Analysis:

In respect of concern 1, the term “quality assurance” implies some obligation on the College to guarantee the quality of services provided. In fact the program itself is structured as an attempt to work co-operatively with members to help them improve or enhance their performance. Using a term to describe a committee or program that is slightly inaccurate is a prescription for legal confusion. Terms like “quality management”, “quality improvement” or “quality enhancement” would probably be more descriptive of the actual program.

In respect of concern 2, the definition of incapacitated has worked fairly well over the years. However, some have suggested that the phrase “that makes it desirable in the interest of the public that the member no longer be permitted to practise or that the member’s practice be restricted” is sometimes a barrier upon first reading because the initial focus is on not being permitted to practise. In fact, such orders are rarely made and almost all cases turn upon the proper terms, conditions and limitations to be imposed. Reversing the order of the two clauses would make the provision more accessible to the lay reader. Also, some have suggested that the term “restricted” used here and elsewhere has the potential to create uncertainty because it is unclear whether it refers to terms, conditions and limitations or whether it means something else. These issues could be addressed by using the following phrase: “that makes it desirable in the interest of the public that the member’s practice be subject to terms, conditions or limitations or that the member no longer be permitted to practise”.

In respect of concern 3, subsection 1(2) describing when a hearing is required, was perfectly appropriate at the time it was enacted. However, since then, the *Statutory Powers Procedure Act* has been amended in a manner that may produce an unintended consequence. Section 4.1 of the *Statutory Powers Procedure Act* now provides that a hearing is not required if the parties and the Discipline Committee consent “unless another Act ... that applies to the proceeding provides otherwise”. Inadvertently, this language has introduced an argument that subsection 1(2) requires the Discipline Committee and the Fitness to Practise Committee to always hold hearings.

Consideration should be given to adding a sentence to subsection 1(2) clarifying that it does not prevent a proceeding from being resolved without a hearing.

In respect of concern 4, the definition of sexual abuse, for the most part it is as clear as words can be for such a concept. Some difficulties have arisen, however, as to which persons are covered by the definition:

- Is a spouse of a member, who later becomes a patient of the member, caught by the definition? The wording would suggest yes. However, the Minister has sent a letter to a number of Colleges stating that it was never the intention to include existing spouses. Of course, such a letter has no legal effect and simply provides some political comfort to Colleges who do not investigate such matters.
- If a health practitioner is a patient of another health practitioner, should the definition apply? On the one hand, there could be some exploitative situations here (e.g., a psychologist treating a dental technologist for severe emotional problems). On the other hand, some circumstances are more doubtful (e.g., where two chiropractors treat each other).
- A recurring problem relates to former patients. It is sometimes very difficult to prove when the sex occurred in relation to when the patient-member relationship ended. Currently, former patients are not captured by the definition of sexual abuse. One option is to include former patients in the definition if the therapeutic relationship remains a significant influence. However, this could lead to uncertainty as to how long the couple must wait before engaging in a sexual relationship.
- Parents of young patients are not captured by the current definitions. However, many of them are under the same influences of trust and power as actual patients.
- One situation that is probably very difficult to address is where a staff person of a member has a few, casual treatments by the member (e.g., a short massage). However, the dominant relationship is that of employer and employee. Should a sexual relationship between them in these circumstances be dealt with by the definition of sexual abuse (and thus be subject to the mandatory sanction) or should it be dealt with under other definitions of professional misconduct?

Some Options for Consideration:

- a) Maintain existing provisions.
- b) Replace “quality assurance” with a term like “quality management”, “quality improvement” or “quality enhancement”.
- c) Reword the last portion of the definition of incapacity with the phrase: “that makes it desirable in the interest of the public that the member’s practice be subject to terms, conditions or limitations or that the member no longer be permitted to practise”.
- d) Add a sentence to subsection 1(2) clarifying that it does not prevent a proceeding from being resolved without a hearing.
- e) Clarify whether pre-existing spouses, other registered practitioners, former patients and parents of minor patients ought to be included in the definition of sexual abuse.

Section 2 – Corporate Structure

Concerns:

1. Should Colleges be excluded from the application of the *Corporations Information Act* as well as the *Corporations Act*?

Analysis:

The *Corporations Information Act* is intended to apply to most corporations so that there is a public record of their locations and officers and directors. There would seem to be no need for that statute to apply to Colleges that are created by public statute and that are easily accessible to the public. Some of the requirements of that legislation do not fit well with Colleges (e.g., Ministry of Consumer and Commercial Relations staff have insisted that Colleges must have a Secretary when many do not). More recent regulatory statutes such as the *College of Teachers Act* and the *Social Work and Social Service Work Act* exclude the application of the *Corporations Information Act*. On the other hand, should administrative convenience be determinative of the issue?

Some Options for Consideration:

- a) Maintain existing provision.
- b) Add the *Corporations Information Act* as another corporate statute that does not apply to Colleges.

Section 3 – Objects of the Colleges

Concerns:

1. Should the language used in the objects section reflect the language used elsewhere in the legislation?

Analysis:

The objects section is used by the courts and others to assist in the interpretation of the legislation. As such, it is usually better to use consistent language throughout. Of most concern is that the duties of the Minister set out in section 3 of the *Regulated Health Professions Act* itself refers to ensuring that individuals have access to services provided by the health professions (not practitioner) of their choice and that they are treated with sensitivity and respect by members. However, these matters are not explicitly dealt with in the objects section.

Other language that might be somewhat confusing includes the following:

- In paragraph 3(1)2, the phrase “standards of qualification” for registration might not capture all registration requirements (e.g., lack of previous convictions, insurance requirements).

- In paragraph 3(1)4, quality assurance, or its replacement term (see discussion of section 1, above) should probably be referenced.
- In paragraph 3(1)5, professional ethics is a term rarely used in the legislation whereas professional misconduct, which is a very significant concept in the legislation, is not mentioned at all. This issue could be addressed by replacing the reference with professional misconduct. Alternatively, professional misconduct could be added and “Code of Ethics” be used rather than “standards of professional ethics”.

Some Options for Consideration:

- a) Maintain existing provision.
- b) Reword the objects section so that it is consistent in concept and terminology with the legislation.

Section 4 - Role of Council

Concerns:

1. Are “manage and administer” the appropriate words to use to describe the Council’s role?

Analysis:

Most Colleges have had extensive discussions about governance. Most have reached the conclusion that the role of the Council is to set direction and make policy. The words “manage” and, in particular, “administer” appear to relate more closely with the role of staff such as the Registrar.

Some Options for Consideration:

- a) Maintain existing provision.
- b) Use terms that more accurately depict the direction setting and policy making role of the Councils of the Colleges.

Sections 5-6 – Structure of the Council

Concerns:

1. Should the application of the 9-year maximum term rule to selected members and to members who have served a partial term be clarified?

Analysis:

In respect of concern 1, subsection 5(2) provides that an elected member of Council can serve for a maximum of 9 years. However, many Councils have professional members who are selected, not elected. Typically, this occurs for academic members who are selected by their peers or by their schools. Should they be restricted to a 9-year term as well?

Similarly, there is some uncertainty about an elected Council member who has served a partial term (perhaps through winning a by-election in mid-term). When such a member faces an election for a further 3-year term, but can only serve for a portion of that term, two possibilities exist:

- The person is disqualified from the election because he or she can only serve a portion of the term.
 - The person can be elected but must resign mid-term at the 9-year mark.
- This should probably be clarified.

Some Options for Consideration:

- a) Maintain existing provisions.
- b) Specify how the 9-year rule applies to selected members of Council or to Councillors who have served a partial term.

Section 7 – Access to Council Meetings

Concerns:

1. Should Councils have to give “grounds” rather than “reasons” for their decision to exclude the public?
2. Should this provision be made more consistent with the parallel provision in section 45, relating to discipline hearings?

Analysis:

For the most part, Councils have not had difficulty in closing their sessions when desired. Most of the issues that arise with this provision are policy in nature rather than legal (e.g., should the public receive a copy of the documents before the Council?).

One legal issue relates to the requirement to give “reasons” for excluding the public in the Council minutes. In law, “reasons” generally refer to a detailed explanation of how the body came to the decision it did. Of course, if this were done in detail in this case, the purpose for excluding the public would be defeated in that it would know full well what went on (e.g., the receipt of legal advice on a sensitive matter). Most Colleges simply set out the “grounds” for closing the meeting in their minutes which would generally be appropriate in this context.

In respect of concern 2, section 45 of the *Health Professions Procedural Code*, which is the parallel provision for discipline hearings, permits the Discipline Committee to reconsider an order it has made. The absence of a similar provision in section 7 could imply that there is no power of reconsideration. Perhaps it is simply assumed that, since the Council is not conducting a hearing, it can reconsider its decisions without legal impediment.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Change the word “reasons” to “grounds” in relation to the decision to exclude the public.
- c) Insert a provision making it explicit that the Council can reconsider its decision.

Section 12 – Executive Committee Exercise of Council’s Powers

Concerns:

1. Does subsection 12(2), requiring a report to the Council where the Executive Committee exercises a power of the Council, create some ambiguities?

Analysis:

Most people view subsection 12(1) as quite helpful in that it removes any doubt that the Executive Committee can deal with matters between Council meetings. However, subsection 12(2), while sound in theory, creates some practical problems in that it is not entirely clear what constitutes an exclusive power of the Council. Most things that the Council can do the Executive Committee can also do even without subsection 12(1). It is administratively quite difficult for the Executive Committee to select which of its actions are required to be included in the report and which are not. As a result, many Executive Committees simply copy their entire minutes (except those relating to member-specific matters) to the Council. In some circumstances, it may not be appropriate for Council to receive these entire minutes (e.g., where administrative details are covered). Consideration should be given to deleting subsection 12(2) and leaving the matter to each College’s own governance model.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Delete subsection 12(2) and permit each College to determine for itself what decisions by the Executive Committee should be reported to the Council.

Section 16 – Registration Disclosure

Concerns:

1. Should the provision clarify when the disclosure obligation commences?
2. Should the applicant be informed of this right to disclosure?
3. Should the basis for refusing to make disclosure be expanded beyond matters of personal safety to include circumstances where the information is obtained in confidence?
4. Should the applicant be required to use any such disclosure only for the purposes of his or her application?

Analysis:

In respect of concern 1, it is not clear when the applicant's right to ask for disclosure arises. On the current wording, it would appear to be anytime after the application is made. However, it would make administrative sense for this right to arise only after the Registrar has given notice under subsection 15(3), that the application has been referred to the Registration Committee. Otherwise, the application process might be disrupted by "fishing expeditions" by individuals.

Similarly, once the Registration Committee has rendered its decision, does this right to full disclosure still exist? It is unclear in reviewing the appeal provisions whether or not that is intended. It would make sense to have the disclosure obligations on any review or hearing before the Board dealt with by those provisions. Unfortunately, those provisions are currently not clear.

In respect of concern 2, it is probably fair to state that only applicants represented by legal counsel are aware of this right and exercise it. Fairness might suggest that the applicant be informed of this right to request disclosure in the subsection 15(3) notice that the application has been referred to the Registration Committee. However, this disclosure is likely unnecessary in the majority of cases. Including this notice would increase the administrative burden on the Colleges and might create problems in cases where the notice was inadvertently omitted.

In respect of concern 3, the College may receive valuable information in confidence. For example, references may be sought from previous employers or from instructors during training. Information may also be obtained from police sources. In order to keep these sources of information available to the College, consideration might be given to restricting the information disclosed to the applicant in cases where the information is obtained in confidence (e.g., a summary of the information only, or perhaps with identifying information removed). On the other hand, many applicants might find it unfair to be unable to fully challenge the information against him or her. The right to a hearing or review might be seriously compromised by further restricting disclosure.

In respect of concern 4, see the discussion of this matter under section 36 of the *Regulated Health Professions Act*.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Specify that the right to request disclosure arises upon a subsection 15(3) notice that the application has been referred to the Registration Committee. Also, specify whether or not the right continues to exist after the Registration Committee has rendered its decision.
- c) Insert a requirement that the applicant be informed of this right to request disclosure in the subsection 15(3) notice that the application has been referred to the Registration Committee.
- d) Expand subsection 16(2) to permit the College to restrict the information disclosed to the applicant in suitable cases where the information was obtained in confidence.
- e) Insert a requirement to use disclosure information only for its intended purpose as discussed under section 36 of the *Regulated Health Professions Act*.

Section 18 – Consideration by the Panel**Concerns:**

1. Should the panel have the power to direct that the registration of an applicant be subject to a satisfactory physical or mental health examination at the applicant's cost?

Analysis:

In respect of concern 1, where there is concern about the capacity of an applicant, a physical or mental examination may be appropriate. However, it is unclear that this would fall within the power of the panel to impose terms, conditions or limitations.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Add a provision giving the panel the power to direct that the registration of an applicant be subject to a satisfactory physical or mental health examination at the applicant's cost.

Section 19 – Variation of Conditional Registration**Concerns:**

1. Should there be an automatic time period for which one has to wait to make an application for variation of a conditional registration, in the absence of a direction to the contrary?

Analysis:

The system set up by the current wording of the statute is that, unless the Registration Committee gives a direction, an applicant can immediately bring an application to vary the decision. The application for variation can be made even though no appeal has been brought. Most Registration Committees forget to address this issue so the practical result is that the application for variation can almost always be brought immediately. On the other hand, the current system is more flexible and it does not appear that an exorbitant number of applications for variation are brought right away.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Set an automatic time period (e.g., six months, one year) before an application for variation can be brought (at least in the absence of the consent of the Registrar – in order to maintain some flexibility).

Sections 20-21 – Notice of Decisions and Initiation of Board Proceedings**Concerns:**

1. Should the applicant be required to set out the grounds of the appeal to the Board and the documentary evidence in support of it with the notice initiating the Board proceedings?

Analysis:

In respect of concern 1, Colleges are frequently learning of the applicant's basis of appeal for the first time on the eve of or at the hearing itself. This is unfair to the College. Also, in a number of cases, if the information had been provided ahead of time, the College would be prepared to reconsider its decision without the expense and delay of the review or hearing before the Board.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Require the notice of appeal to the Board to set out the grounds and documents in support of the appeal.

Section 22 – Procedure and Orders at the Board**Concerns:**

1. Should paragraph 22(2)2 clarify that the applicant, as the lead party, bears the duty of disclosure under this provision?

2. Should the Board be permitted to receive substantial new information during the review or hearing?
3. Should a requirement giving the College an opportunity to make submissions be imposed in registration reviews?
4. Should paragraph 22(6)2 be eliminated?
5. Should the phrase “substantially qualifies for registration” in subsection 22(7) be replaced with something similar to the phrase “meets the requirements for registration”?
6. Should the Board have the obligation to give its decision and reasons to the parties, including the Registration Committee, like it does under section 35 for complaints matters?

Analysis:

Please note that the contents of the provisions of the *Health Professions Procedural Code* cross-referenced in this section are dealt with in their primary location.

In respect of concern 1, an ambiguity arises because paragraph 22(2)2 refers to the provision requiring the College to make disclosure in discipline matters. Presumably the intent is for the applicant to make full disclosure because:

- The applicant is the moving party and carries the burden of proof and thus should make the primary disclosure. It is extremely unfair to require the College to proceed with the review or hearing without knowing the applicant’s case.
- The applicant will already know the College’s concerns and evidence.
- The applicant could, in fact, have had the entire information in the possession of the College during the time of the original application upon request.

However, many applicants upon reading section 42 assume that it applies only to the College.

An alternative is to remove paragraph 22(2)2 and rely upon the rules of the Board under paragraph 22(3.1)2 and the general provisions of the *Statutory Powers Procedure Act*. The *Statutory Powers Procedure Act* permits the Board to make rules relating to disclosure for hearings.

In respect of concern 2, Colleges have frequently had to deal with situations where substantially new evidence is presented for the first time at the Board level. The result is that the decision of the body designed to make it in the first instance, the Registration Committee, becomes moot and it may never have an opportunity to review the information and consider its implications. The first real decision is then made by the Board without any deliberative input by a professional member with expertise in such matters. This possibility undermines the benefits of “self-regulation”. Consideration should be given to requiring the Board to refer a matter back to the Registration Committee if substantial new information is presented to it by the applicant.

Related to the above is concern 3. Frequently when an applicant seeks a review on paper only, the applicant will submit new information and make new arguments. There is no procedural requirement on the Board to give the College this information and to permit it to make submissions. While this is done in some cases, there have been occasions where the College did not know of the information or was not advised that it could make submissions in respect of this new information. (This new information could easily be sent to the College by way of carbon copy and simply filed by clerical staff without consideration as to whether it was significant or should be responded to.) Consideration should be given to formalizing a “disclosure and opportunity to make submissions procedure” on paper reviews.

In respect of concern 4, paragraph 22(6)2 is difficult to comprehend. It appears to permit an order by the Board in the nature of “we think the applicant should be registered but he or she needs some additional testing first – you, Registration Committee, can figure out what test to require of the applicant”. Either the Board should specify the test, if it has the expertise to do so, or more probably, the paragraph should simply be eliminated.

In respect of concern 5, the phrase “substantially qualifies for registration” in subsection 22(7) provides the Board with the right to register an applicant who does not meet the registration requirements (assuming the requirement is not non-exemptible). Some question whether the Board, composed entirely of lay persons, should have this power. However, if it did not, the Board would essentially be excluded from the entire issue of giving exemptions to registration requirements (even where the Registration Committee’s decision may have an inappropriate impact in a particular case).

In respect of concern 6, there is no explicit obligation on the Board to give its decision and reasons to the parties, including the Registration Committee. Section 35 requires this step in complaints matters. It is unclear why the provisions are not uniform. Currently, the Board does so routinely.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Clarify that the applicant, as the lead party, bears the duty of disclosure under paragraph 22(2)2. Alternatively, remove the paragraph and leave the issue of disclosure entirely to the rules made by the Board under the *Statutory Powers Procedure Act* and paragraph 22(3.1)2.
- c) Require the Board to refer a matter back to the Registration Committee if substantial new information is presented to it by the applicant.
- d) Impose a requirement that the College be given a formal opportunity to make submissions in registration reviews.
- e) Eliminate paragraph 22(6)2.
- f) Replace the phrase “substantially qualifies for registration” in subsection 22(7) with something similar to the phrase “meets the requirements for registration”.

- g) Require the Board to give its decision and reasons to the parties, including the Registration Committee, like it does under section 35 for complaints matters.

Section 25 – Receipt of the Complaint

Concerns:

1. Should “complaint” be defined?
2. Should the effect of withdrawing a complaint be specified?

Analysis:

In respect of concern 1, there have been a number of cases interpreting the complaints provisions. For example, there have been a number of cases describing what kind of letter is a complaint and which would simply be notification to the College of a concern. For the most part, these cases depend on their particular facts and it is difficult to see how defining the word “complaint” would be an improvement over the current system of “when in doubt ask”.

One matter that is not clear is whether a complaint includes a letter that does not identify a member by name, but where the College may be able to identify the member through an investigation. This could, perhaps, be clarified.

In respect of concern 2, there is uncertainty as to whether the Complaints Committee can continue to deal with a complaint that has been withdrawn. In most cases, the Complaints Committee will accept the withdrawal of a complaint. However, on some occasions, the complaint raises very serious issues that the public interest requires be dealt with. In some cases, it appears that the withdrawal was achieved by the settlement of a civil action against the member, leaving the concern that the withdrawal was “bought”. On one interpretation, it is the filing of the complaint that gives the Complaints Committee jurisdiction, and its withdrawal has no effect. This interpretation is supported by the existence of subsection 30(1), relating to the Board, which would not be necessary if a withdrawal automatically terminates the process. The other interpretation is that if the complaint is withdrawn there is nothing left for the Complaints Committee to deal with. Given that this concern arises only in serious cases, the matter should be resolved.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Define the word “complaint”, particularly where the member is not identified by name.
- c) Clarify that the withdrawal of a complaint leaves the Complaints Committee with the discretion as to whether it will still investigate. It should also be clarified that a withdrawal of a complaint does not prevent the investigation and referral of the matter through the Executive Committee.

Section 26 – Disposition of Complaints

Concerns:

1. Should the phrase “making reasonable efforts to consider all records and documents it considers relevant to the complaint” in subsection 26(2) be replaced?
2. Should a verbal caution be permitted to be given to a member by a representative of the Complaints Committee rather than a full panel?
3. Should the phrase “frivolous, vexatious, made in bad faith or otherwise an abuse of process” be expanded to a broader phrase such as “does not warrant, in the public interest, a full investigation by the Complaints Committee” or “that may more appropriately be dealt with elsewhere”?
4. Should the phrase “notice that it intends” be replaced with “notice that it is considering” in subsection 26(4)?
5. Should the Complaints Committee have the power to reconsider its decisions if new information arises?

Analysis:

In respect of concern 1, a phrase very similar to “making reasonable efforts to consider all records and documents it considers relevant to the complaint” in subsection 26(2) has been considered by a court in *Persaud v. Society of Management Accountants of Ontario*. While the facts are slightly unusual, in *Persaud*, the court took the view that unless the Complaints Committee conducted a fairly exhaustive investigation, its decision is a nullity. In *Persaud*, the court struck down a referral to discipline on that basis. One could argue that the Complaints Committee ought to be able to exercise some discretion as to the extent of the investigation required in a particular case, particularly since that discretion is reviewable by the Board. Requiring an exhaustive investigation in every case is a waste of resources and makes it even more difficult to achieve the 120-day (or 150-day) deadline. Consideration should be given to requiring the Complaints Committee to make an “appropriate” investigation and to consider the “relevant documents it has obtained”.

In respect of concern 2, some Colleges have experienced administrative difficulties with the requirement that a verbal caution be administered by a full panel. Some panels do not meet very often which results in a delay in administering the caution. For some members, this scheduling inflexibility causes hardship. If cautions could be administered by a representative of the Complaints Committee, these concerns could be avoided. On the other hand, there may be a perception that the caution is less significant and its content less authoritative if it is not administered by a panel of the Complaints Committee.

In respect of concern 3, the phrase “frivolous, vexatious, made in bad faith or otherwise an abuse of process” uses legal terms that traditionally have a very narrow meaning. With a few exceptions, the complaint must be made for an improper purpose to fall within the phrase and, of course, an improper purpose is difficult to prove. Consideration

might be given to including broader phrases such as “does not warrant, in the public interest, a full investigation by the Complaints Committee” or “that may more appropriately be dealt with elsewhere”. On the other hand, these broader phrases may give the impression that the Complaints Committee is evading its obligation to consider all complaints.

In respect of concern 4, throughout the legislation, the phrase “notice that it intends” is used as it is in subsection 26(4). Concern has been expressed that this suggests prejudgment even though submissions have yet to be received and a final decision made. The phrase “notice that it is considering” would be more neutral.

In respect of concern 5, the courts have held that the Complaints Committee does not have the jurisdiction to reconsider a matter once it has rendered its final decision: *Modi v. College of Physicians and Surgeons of Ontario*. However, the power to reconsider a decision might be useful where new information arises. (Currently, some Colleges require a new complaint to be initiated if significant new information arises.) This approach might make the procedure fairer to the member or the complainant if the member later learns that some important information had not been considered by the Complaints Committee. On the other hand, the process might never end if the Complaints Committee is frequently requested to reconsider its decisions.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Replace the phrase “making reasonable efforts to consider all records and documents it considers relevant to the complaint” in subsection 26(2) with something similar to making an “appropriate” investigation and considering the “relevant documents it has obtained”.
- c) Permit a verbal caution to be given to a member by a representative of the Complaints Committee rather than a full panel.
- d) Expand the phrase “frivolous, vexatious, made in bad faith or otherwise an abuse of process” with broader phrases such as “does not warrant, in the public interest, a full investigation by the Complaints Committee” or “that may more appropriately be dealt with elsewhere”.
- e) Replace the phrase “notice that it intends” with “notice that it is considering” in subsection 26(4).
- f) Insert a provision that permits the Complaints Committee to reconsider its decisions (at least where new information arises).

Sections 31-34 – Procedure Before the Board

Concerns:

1. Does section 31 (personal representative for the complainant) have unintended consequences for the Complaints Committee?
2. Should disclosure of the complaints files to the participants be further addressed?

Analysis:

Where provisions elsewhere in the *Health Professions Procedural Code* are cross-referenced, see the discussion of those provisions.

In respect of concern 1 (personal representative for the complainant), there is no corresponding provision for the Complaints Committee. The implication is that if a complainant dies or becomes incapacitated, the Complaints Committee cannot deal with a personal representative (who must file a fresh complaint). A similar provision for the Complaints Committee would address the issue.

In respect of concern 2, the College often obtains highly confidential information that most other people could never obtain through means that include:

- using its stature and moral suasion;
- very powerful statutory powers of investigation including rights of inspection and summonses; and
- through the good offices of public spirited citizens.

Given the Complaints Committee obligation to obtain all relevant documents, the Colleges have little ability to narrow the scope of the documents they obtain. There is a recurring concern that a few participants in the process, through filing a complaint and seeking a review before the Board, use the process to obtain information they could not otherwise obtain. While the Board does have significant powers to restrict access to the complaints file, it does so very rarely because of its concern to make its own process as fair as possible. One option is to foster the Board to be more discriminating in the information it releases to the parties (perhaps by requiring it to provide a summary of the file rather than the entire file). Alternatively, imposing an “implied undertaking rule”, as discussed under section 36 of the *Regulated Health Professions Act*, might be considered.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Add a provision similar to section 31 for the Complaints Committee (personal representative for the complainant).
- c) Foster the further restriction of access by the participants to the complaints file, or impose an implied undertaking rule, as discussed under section 36 of the *Regulated Health Professions Act*.

Section 35 – Powers of the Board**Concerns:**

1. Should the Board be able to direct the expression of opinion by the Complaints Committee?

Analysis:

The type of order that many Colleges find most difficult to accept is one where the Board directs the Complaints Committee to issue a new decision containing advice or cautions with specific wording. Many find it objectionable to be forced to say something with which one cannot agree. The structure of paragraph 35(1)3, however, requires the Complaints Committee to issue the decision in the wording of the Board. There is some concern that this type of order by the Board is contrary to the freedom of expression contained in the *Charter of Rights and Freedoms*. This concern could be addressed by having the Board make the order directly and not requiring the Complaints Committee to implement it. Alternatively, the Board's powers can be restricted to quashing decisions of the Complaints Committee and giving recommendations, but not requiring the Complaints Committee to make a particular decision.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Amend paragraph 35(1)3 so that it is the Board that makes the decision, not the Complaints Committee.
- c) Restrict the Board's powers to quashing decisions of the Complaints Committee and giving recommendations, but not requiring the Complaints Committee to make a particular decision.

Section 40 – Amending the Notice of Hearing**Concerns:**

1. Should substantive amendments to the notice of hearing be permitted?

Analysis:

Concern about the need for explicit authority to amend the notice of hearing arose because both the Complaints Committee and the Executive Committee must refer specified allegations. Only minor or clerical amendments are permitted, out of a concern that the member not face different allegations than what he or she had anticipated. However, substantial amendments are sometimes required, for example, where a new allegation is discovered after the referral to a hearing has been made or a new witness comes forward. These are now being handled by a new referral by the Executive Committee of the old and the new matters together (although this approach has difficulties of its own; see the discussion of section 36, above). One could argue that the test of fairness is not whether the amendment is substantive or not, but rather whether the amendment would create prejudice to the member. That test of fairness is already included in the wording of section 40.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Remove the words “of a minor or clerical nature” from the provision to allow for both minor and substantive amendments to the notice of hearing where it is just and equitable to do so.

Sections 42 and 42.1 – Disclosure**Concerns:**

1. Should the disclosure provisions be completely re-written, or should this be a matter left to rules made under the *Statutory Powers Procedure Act*?

Analysis:

Since the enactment of these disclosure provisions there has been a “paradigm shift” in the law. Firstly, case law starting with the *Stinchcombe* decision has resulted in the College disclosure obligations in section 42 becoming obsolete. The College is required to make much greater disclosure than is set out there. Secondly, the *Statutory Powers Procedure Act* has been amended permitting tribunals like the Discipline Committee to make their own disclosure rules. In fact, the *Health Professions Procedural Code* might in fact interfere with the ability to make rules under the *Statutory Powers Procedure Act*, because that power is subject to any other Act that applies to the proceedings. As such, for example, there is some concern that requiring additional disclosure of information from other parties is authorized. Also, the enforcement mechanism for non-disclosure, (i.e., the exclusion of evidence) could affect the hearing on the merits and other tools might be more pertinent (e.g., directing the disclosure, payment of the costs thrown away).

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Remove the provision and rely upon case law and each Discipline Committee’s own disclosure rules.
- c) Completely rewrite the provision to require broader disclosure and pertinent enforcement tools for non-disclosure.

Sections 45-48 – Public Access to Hearings**Concerns:**

1. Should the public’s access to the documentary evidence be clarified?
2. Where the panel has excluded the public, should the panel be able to make exceptions for people other than the person for whose benefit the rule was made?

Analysis:

There seems to be a growing acceptance of public hearings despite the obvious damage that it causes to the member's personal and professional life. Based on anecdotal evidence, there does remain some variability of the interpretation of the grounds for closing a hearing listed in subsection (2) by various Discipline Committees. However, this seems to be the result of the philosophy and approach of the particular panel rather than from a lack of clarity in the grounds themselves.

In respect of concern 1, there is not uniform practice or even legal consensus on whether the public should be able to have access to the documentary exhibits introduced at hearings. This could be addressed by a particular provision that either bans public access entirely or permits it on the same grounds as access to the hearing itself.

In respect of concern 2, section 46 permits the admission to the hearing of the person for whose benefit the public was excluded. This provision is inflexible. There may be other persons who should be permitted to attend as well in a particular case (e.g., a member's spouse, College staff for educational purposes). This issue could be addressed by giving the Discipline Committee a discretion to permit others to attend if their attendance would not affect the integrity of the reasons for the exclusion order.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Clarify the right of public access to documentary evidence.
- c) Give the Discipline Committee a discretion to permit others to attend if their attendance would not affect the integrity of the reasons for the exclusion order made under section 46.

Section 51 – Orders in Misconduct Cases**Concerns:**

1. Should administrative penalties be added to possible orders that can be made by the Discipline Committee?
2. Should subsection 51(3) permit the delegation to the Registrar of whether the specified criteria have been met?
3. Should subsection 51(4) be reworded to clearly permit probation orders?
4. Should the impact statement provision prohibit the member from cross-examining the patient?

Analysis:

In respect of concern 1, administrative penalties have recently been accepted by the Ministry of Consumer and Commercial Relations for discipline hearings of real estate

agents. Administrative penalties are much like fines except that they are paid to the College and they have a slightly less punitive connotation.

In respect of concern 2, the original intent of subsection 51(3) was for the Registrar to determine whether the criteria had been met. However, the Nova Scotia Court of Appeal decision of *Dhawan v. College of Physicians and Surgeons of Nova Scotia* cast doubt on the legality of such an approach except where the criteria were quite objective in nature. This concern could be addressed by adding the phrase “and may specify a person to assess whether the criteria have been satisfied” at the end of subsection 51(3).

In respect of concern 3, subsection 51(4) refers to suspending the effect of an order for a “specified period”. The first concern is that the wording suggests that the entire order must be suspended, not just a portion of it. Secondly, Courts tend to be strict on how long a sanction can “hang over” a member’s head and this phrase could be interpreted as meaning a specified chronological period (as opposed to an event, like a subsequent finding of professional misconduct). This concern could be addressed by rewording the phrase to “a specified period or until the happening of a specified event”.

Also, it might be useful if subsection 51(4) permitted the suspension of only part of the order (e.g., half of the suspension). This would give greater flexibility.

In respect of concern 4, the position of many defence counsel is that they have the right to cross-examine a patient on his or her impact statement. For tactical reasons, defence counsel rarely exercise that right but simply use it to pressure the patient to modify portions of the statement. Some would argue that basic fairness requires that counsel be able to cross-examine on any statement going before the Discipline Committee. On the other hand, a statement of impact by the patient used for the purposes of sanction only might be the very type of statement that ought not to be cross-examined upon.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Permit the Discipline Committee to impose administrative penalties as well as, or in addition to, fines.
- c) Add the phrase “and may specify a person to assess whether the criteria have been satisfied” at the end of subsection 51(3) to clarify that the Registrar (or other person) can assess whether any terms, conditions or limitations have been satisfied.
- d) Insert the phrase “a specified period or until the happening of a specified event” in subsection 51(4) for probation-type orders.
- e) Permit the suspension of only part of the order (e.g., serve half of the suspension) in subsection 51(4).
- f) Make corresponding amendments to the register provision if the intention is that the College would not publish the results of a probation order in all cases.
- g) Provide that a patient cannot be cross-examined on an impact statement.

Section 52 - Incompetence

Concerns:

1. Should incompetence apply to administrative or other non-clinical conduct?
2. Should the phrase “for a specified period of time” be inserted in paragraph 52(2)2 so that it corresponds with the provision for professional misconduct?
3. Should incompetence be converted into a sanction enhancement feature (analogous to the dangerous offender procedure in criminal law) rather than a separate ground of discipline?

Analysis:

For the most part, the definition of incompetence has withstood the test of time. However, the courts have held that the definition of incompetence relates to clinical incompetence and does not include other forms of misconduct, including managerial incompetence: *Matheson v. College of Nurses of Ontario*. If non-clinical incompetence is desired to be captured, the definition will have to be revised.

In respect of concern 2, different language should only be used where a different meaning is intended. It is not clear that a different meaning is intended here. So paragraph 52(2)2 should correspond with the provision for professional misconduct.

In respect of concern 3, some have suggested that one cannot really determine that a member is incompetent until the end of the hearing. Essentially, incompetence is not different from professional misconduct, it is professional misconduct caused by a serious, often ingrained, problem with the member. Consideration should be given to treating incompetence as a sanction enhancement feature (analogous to the dangerous offender procedure in criminal law) rather than a separate ground of discipline.

See also the comments on probation under section 51 which also have application here.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Specify that incompetence is not confined to clinical incompetence and covers other forms of incompetence that are relevant to a member’s ability to practise within his or her scope of practice.
- c) Insert the phrase “for a specified period of time” in paragraph 52(2)2 so that it corresponds with the provision for professional misconduct.
- d) Convert incompetence into a sanction enhancement feature (analogous to the dangerous offender procedure in criminal law) rather than a separate ground of discipline.

Sections 53 and 53.1 – Costs

Concerns:

1. Should the criteria for awarding costs be altered?
2. Should the College be able to suspend a member who has not paid a costs order within a reasonable time?

Analysis:

In respect of concern 1, the test for awarding costs against the College is where the commencement of proceedings was not warranted. While there have not been sufficient court cases to obtain a clear perspective on the issue, there is some doubt that the courts agree with the usual interpretation of the criteria for awarding costs against the College: *Kenny v. College of Psychologists of Ontario*. It is uncertain how the statutory provision could be made much clearer, except perhaps by inserting a reference to the material available to the referring committee at the time of the referral.

The phrase “in an appropriate case” for cost awards against the member has been particularly difficult to interpret. Some view it as simply saying costs need not be awarded in every case. Others view it as requiring very exceptional circumstances for costs to be awarded against the member. The few court cases that have dealt with the issue have provided little guidance, but some courts appear to consider “in an appropriate case” to mean an exceptional case.

In respect of concern 2, the costs portion of the hearing usually takes place after sanction has been imposed. Costs are not generally viewed as an additional punishment, but as a matter of compensation. If a member refuses to pay the costs, the College would have to collect the costs by using the courts’ debt collection remedies. Some Colleges have also made the refusal to pay costs professional misconduct. These remedies are often too expensive for the nominal cost orders usually made. This issue could be addressed by providing that if a member does not pay costs within 6 months of the order, or such longer period as specified by the Discipline Committee, that his or her certificate of registration can be suspended.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Amend the criteria for awarding costs. Some options include the following:
 - Specify that the commencement of proceedings was unwarranted based upon the information available to the referring committee at the time.
 - Remove the phrase “in an appropriate case” or replace it with clearer criteria (e.g., if the panel is of the opinion that the profession should not pay for the entire investigation and hearing).

- c) Add a provision that if a member does not pay costs within 6 months of the order, or such longer period as specified by the Discipline Committee, that his or her certificate of registration can be suspended.

Sections 54-56 – Post Hearing Release of Information

Concerns:

1. Should the exhibits under section 55 be released to the most appropriate person rather than the person who produced them? Should the College, rather than the Discipline Committee, deal with this administrative matter?
2. Should the College have the option of publishing the reasons in its annual report or publicly available newsletter in subsection 56(1)?
3. In clause 56(2)(a), should the name of the member be published in the summary whenever a finding is made against the member unless the Discipline Committee directs otherwise?
4. Should the Discipline Committee be able to give a complete set of its reasons to others with a legitimate interest in them?

Analysis:

In respect of concern 1, the College sometimes obtains exhibits from someone who does not own them (sometimes even from someone who stole them). For example, a hospital librarian may produce an exhibit and then leave his or her employment; the exhibits should be returned to the hospital. This issue could be addressed by replacing the phrase “person who produced them” with the phrase “person who owns them or other appropriate person” in section 55. Also, since this is an administrative matter, perhaps the College could do it.

In respect of concern 2, some Colleges publish their decisions in their newsletter, which is widely disseminated, and it seems burdensome to have to reproduce them again in the annual report. However, this is not a significant issue as the newsletters can simply be attached to the annual report as an exhibit.

In respect of concern 3, the current system of deciding whether the name of the member is to be included in the publication of the decision is very complex. If the decision were left up to the Discipline Committee, it would be quite easy to deal with. Also, this might be fairer to the member rather than an entirely objective, inflexible system. However, there is some concern that the Discipline Committee may be too easily swayed by sympathy for the effect of publication upon the member and may be inclined not to order it too readily. That is the rationale for the current provision, which provides a purely objective, inflexible test. Another alternative to simplify the system is to simplify the register requirements (see the discussion of section 23 of the *Health Professions Procedural Code*).

In respect of concern 4, interveners are not considered parties. Also, there may be others who have a legitimate interest in the complete set of reasons rather than being compelled to await a summary of them (which can take months to publish). This concern could be addressed by giving the Discipline Committee the right to release their reasons to others with a legitimate interest in them.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Replace the phrase “person who produced them” with the phrase “person who owns them or other appropriate person” in section 55. Also, let the College, rather than the Discipline Committee do it.
- c) Permit the College to choose which publication the reasons will go in.
- d) To simplify the determination of whether the member’s name is to be published, leave that decision up to the Discipline Committee. Alternatively, simplify the register requirement in section 23 of the *Health Professions Procedural Code*.
- e) Give the Discipline Committee the right to release their reasons to others with a legitimate interest in them.

Section 65 – Parties

Concerns:

1. Should the language used here follow that used for the Discipline Committee in sections 41 and 41.1?

Analysis:

As a general rule, a difference in language in a statute means that there is supposed to be a difference in meaning. It is difficult to anticipate what other person might be specified by the Fitness to Practise Committee as a party. It is also difficult to understand why the intervener provision might not have equal application to incapacity matters as to discipline. Perhaps the assumption is that no one else will know about the hearing so others will not be able to apply to intervene. However, the member might well inform others about the hearing. This issue could be addressed by using similar language to or cross-referencing sections 41 and 41.1.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) In section 65, use similar language to or cross-reference sections 41 and 41.1.

Sections 67 and 68 – Procedure at Incapacity Hearings

Concerns:

1. Should there be a saving provision if the member's request for an open hearing arrives late to the Registrar (see subsection 68(2))?

Analysis:

A small point is that the wording of subsection 68(2) suggests that if the member is late in delivering the request for an open hearing to the Registrar, the hearing will remain closed. This could be addressed with a saving provision permitting the waiver of the notice in suitable cases.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Insert a saving provision permitting the waiver of the notice in suitable cases.

Sections 72-74 – Reinstatement

Concerns:

1. Should some of the other procedural provisions be cross-referenced to the reinstatement hearing process?
2. Should the timing of repetitive applications in subsection 72(2) be clarified?
3. Should there be an explicit provision stating that the former member bears the burden of proof on a reinstatement application?
4. Should the reference to the Council in section 74 be removed?

Analysis:

In respect of concern 1, a number of procedural provisions for discipline or incapacity hearings are not incorporated into reinstatement hearings. It is not always clear why they are not. These include the following:

- 39 (panel members deemed to continue)
- 40 (amendment of notice of hearing)
- 41 (parties)
- 41.1 (non-parties participation in hearings)
- 42 (disclosure of evidence)
- 42.1 (disclosure of evidence)
- 46 (exception to closed hearings)
- 53.1 (College costs)
- 54 (decision to complainant)
- 56 (publication of decisions)

- 66 (report of health professionals in incapacity matters).

In addition, some additional procedural requirements might be considered such as:

- notification of the complainant before the hearing so he or she could attend,
- requiring the applicant to order the transcript and copy the exhibits from the original hearing and all previous reinstatement applications.

In respect of concern 2, clause 72(2)(b) appears to permit repetitive motions six months from the time the previous application was commenced. As an application could take close to six months to be heard, this means that an applicant can reapply immediately after being rejected by a hearing panel. Consideration should be given to making the period run from the determination of the previous application. Alternatively, the hearing panel could fix a time for which the former member would have to wait.

In respect of concern 3, the provisions do not state that the former member bears the burden of proof. This is the usual assumption, with the support of some case law, because the former member is applying for a privilege that was lost for improper conduct. Also, the former member has primary access to the information about his or her circumstances since he or she lost his or her registration. This approach is also in the public interest.

In respect of concern 4, the Council is not involved in any other discipline or incapacity matter so it is somewhat incongruous to have Council involved here. Section 74 is basically reserved for “political” reinstatements, (e.g., reinstatement for physicians revoked for performing abortions while they were still illegal) and for this reason Council may be involved as it is the primary political body of the College.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Cross-reference some or all of the existing procedural provisions that may be useful.
- c) Clarify how frequent reapplications for reinstatement can be brought under clause 72(2)(b).
- d) Confirm that the burden of proof on a reapplication is upon the former member.
- e) Delete “Council” from section 74.

Sections 76-79 – Investigative Powers and Procedures

Concerns:

1. Should the phrase “business premises of the member” in subsection 76(2) be clarified?
2. Should the member be required to co-operate with the investigation?
3. Should the power to conduct investigations after a referral has been made to discipline be clarified?

Analysis:

In respect of concern 1, the phrase “business premises of the member” in subsection 76(2) has been very difficult to interpret. It is simple where the member operates a private office. However, many practitioners work in institutional settings and may not even have a designated space in that setting. Many members work out of their homes or vehicles. Electronic commuting further complicates matters. This concern could be addressed by inserting the phrase “and the place where the member’s records or equipment are kept”. These concerns apply to section 83 of the *Health Professions Procedural Code* as well. These two provisions should probably be co-ordinated because any difference in wording may be deemed to be intentional. For example, subsections 76(3) and 82(2) and 82(3) should probably be identical.

In respect of concern 2, there is a divergence of case law. Most cases have held that members of a profession have a duty to co-operate with their regulator during an investigation, including giving a statement to investigators. Many Colleges have made it an explicit heading of professional misconduct not to do so. However, a comment made in the *Caughell* case suggests that the *Health Professions Procedural Code* does not require a member to “incriminate” himself or herself in the course of an investigation. This comment was based upon a very “criminal” type presumption about the disciplinary process. Some have argued that the *Charter of Rights and Freedoms* prohibits the College from compelling a member to give a statement during an investigation (although the decided case law goes the other way and entitles the College to summons the member to testify against himself or herself).

The duty of members to co-operate with assessors under section 82 of the *Health Professions Procedural Code* provides a useful point of comparison.

In respect of concern 3, Colleges have an ongoing duty of disclosure. Also, important investigative leads sometimes present themselves after a referral to discipline has been made. These considerations suggest that Colleges should be able to take investigative steps after a referral to discipline has been made. Many Colleges routinely do so. However, sometimes this practice has been challenged and the case law on point, while favourable, is not conclusive. Expressly permitting investigative steps after referral would clarify the matter.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Add to the phrase “business premises of the member” the phrase “and the place where the member’s records or equipment are kept” in subsection 76(2). In general, the wording of these provisions and section 83 ought to be co-ordinated.
- c) Add to subsection 76(3) a requirement for members to cooperate with an investigation by the College.
- d) Clarify that investigations can continue after a referral to discipline has been made, perhaps by adding a clause to section 79 stating: “Where a referral to discipline has

already been made, the results of any additional investigation shall be reported to the Executive Committee.”

Sections 80-82 – Assessment Powers

Concerns:

1. Should this provision and section 76 of the *Health Professions Procedural Code* be coordinated?
2. Should the assessor and the Quality Assurance Committee be given broader investigative powers?
3. Should there be an enforcement mechanism for those who do not co-operate with an assessor?
4. Should the power to impose terms, conditions and limitations, and the procedure for doing so be set out in statute?

Analysis:

See also the discussion of the term “quality assurance” under section 1, above.

In respect of concern 1, different language between investigators’ powers under section 76 and assessors’ powers under section 82 will often be held to imply different meaning. The language between the provisions should probably be coordinated. See the discussion under section 76, above, for some examples.

In respect of concern 2, section 82 seems to be confined to information gathering powers. Remedial powers are set out in the regulation authorizing provision (see section 95, below). However, there are some implicit or additional information gathering powers that should be considered:

- Express authority to copy documents or things.
- Express authority to speak to staff, co-workers and patients.
- Authority to summons information from third parties, such as insurers, to assist in gathering outcome data. Having the powers of a commissioner under the *Public Inquiries Act* would address this issue.

In clause (e), the word “program” might be replaced with “process” so that it is sufficiently flexible.

Many of the above powers are contained in the assessment provisions of the *Independent Health Facilities Act*, which is a comparable process.

There are no clear enforcement mechanisms for members (or others) who do not co-operate with assessors. Discipline is available as is a provincial offences prosecution under subsection 93(3) and the compliance order mechanism in section 87, but those processes are slow, expensive and considered by some to be heavy handed. Some options for consideration include:

- Permitting the Quality Assurance Committee to impose terms, conditions and limitations until compliance is obtained (this power does not currently exist).
- Permitting a summary process for suspension of registration similar to that the board of inquiry can impose under subsection 59(2) for members who fail to attend a specialist assessment.
- Permitting a summary process for the imposition of an administrative penalty (e.g., up to \$500/day) as long as the member fails to co-operate.

In respect of concern 4, some have expressed concerns that a summary procedure for imposing terms, conditions or limitations should be set out in statute rather than regulation. This has been suggested for both legal (to ensure validity of the provisions) and policy (fairness to the member) reasons. However, to date, there have been very few expressions of concern in this regard.

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Coordinate the language between section 82 and section 76 for consistent interpretation.
- c) Provide additional powers to assessors to gather information as discussed in the analysis section above.
- d) Provide an effective enforcement mechanism for members who fail to co-operate with assessors as discussed in the analysis section above.
- e) Set out the power to impose terms, conditions and limitations, and the procedure for doing so in statute.

Sections 85.1-85.4 – Mandatory Reports

Concerns:

1. Should the phrase “obtained in the course of practising the profession” be deleted from subsection 85.1(1)?
2. Should the phrase “a person who operates a facility” in subsection 85.2 be clarified by a phrase similar to “a person who manages or supervises a setting”?
3. Should the contents of the report to the Registrar include a copy of all pertinent documents and the names, addresses and telephone numbers of persons who may be able to provide information about the alleged abuse?
4. Should the word “psychotherapy” be replaced with “counselling”?

Analysis:

In respect of concern 1, the phrase “obtained in the course of practising the profession” has been difficult to interpret. Obviously it includes information obtained from a patient during a clinical visit. But does it include information learned at the water cooler? During lunch break? Observed while travelling down the hall to a meeting? Speaking with a colleague at a conference? This issue could be addressed by removing the requirement

altogether so that the context of learning the information becomes irrelevant. However, then information learned in one's private life would have to be disclosed, which might be intrusive to some.

In respect of concern 2, the phrase "a person who operates a facility" in subsection 85.2 is unclear. Does this apply just to institutions like hospitals and nursing homes? What about a walk-in clinic? What about a landlord or manager of a multi-disciplinary health centre? What about a private office where one practitioner employs another? This issue could be addressed by using a phrase similar to "a person who manages or supervises a setting".

In respect of concern 3, many Colleges have received reports with insufficient information. Requiring more information to be included in the report can assist the College to determine whether there are reasonable and probable grounds for a more complete investigation in which the statutory powers to obtain information on a compulsory basis can be used.

In respect of concern 4, there is some uncertainty as to what constitutes psychotherapy. The term "counselling", while broader and the subject of some uncertainty as well, is probably better understood.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Delete the phrase "obtained in the course of practising the profession" from subsection 85.1(1).
- c) Replace the phrase "a person who operates a facility" in subsection 85.2 with a phrase similar to "a person who manages or supervises a setting".
- d) Require that the contents of the report to the Registrar include a copy of all pertinent documents and the names, addresses and telephone numbers of persons who may be able to provide information about the alleged abuse.
- e) Replace the word "psychotherapy" with "counselling".

Section 85.5 – Mandatory Reports by Employers and Others

Concerns:

1. Should the word "privileges" be clarified to state "privileges or employment" to clarify what disciplinary action requires a mandatory report by employers?
2. Should the word "intended" be expanded to include objective actions like "communicated the possibility of" respecting persons who voluntarily resign to avoid a mandatory report?

Analysis:

In respect of concern 1, perhaps one of the most significant uncertainties in interpretation of the *Health Professions Procedural Code* rests with whether disciplinary action short of termination by an employer requires a mandatory report. Some Colleges have publicly taken the position that it does. However, another legal interpretation is that employment is explicitly dealt with only in terms of termination and “privileges” is generally understood in the health context as referring to institutional privileges (e.g., a hospital). This issue could be addressed by rewording the phrase “privileges” to “privileges or employment”. On the other hand, this expansion of the mandatory reporting requirements may be too intrusive and may result in too many reports being made for minor matters.

In respect of concern 2, there has been a perception by some Colleges that compliance with this provision is incomplete. Enforcement of any breach is not easy because it is difficult to prove intent. Adding a phrase like “communicated the possibility of” adds an objective, and thus more easily enforced, component to the test.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Expand the word “privileges” to the phrase “privileges or employment”.
- c) Expand the word “intended” to include objective actions like “communicated the possibility of”.

Sections 87-88 – Injunctions and Evidence**Concerns:**

1. Should the provision make it clear that it applies to members as well as unregistered persons?

Analysis:

The provision appears to be relatively straightforward.

While it probably is clear, there has been some concern expressed that the provision may be available only against unregistered persons, not members. This could be addressed by inserting the phrase “including a member” after the word “person”.

The name of the court should be updated.

Some Options for Consideration:

- a) Maintain the existing provision.

- b) Insert the phrase “including a member” after the word “person”.

Section 94 – By-laws

Concerns:

1. How does clause 94(1)(n) relate to the form-making powers in section 93.1?
2. Should subsection 94(2) omit the duty to notify members where a draft by-law is being amended in accordance with the information obtained from a previous consultation?

Analysis:

In respect of concern 1, the presumption is that section 93.1 eliminates the need to specify in a regulation or a by-law the forms that will be used. The existence of clause 94(1)(n), however, raises a suggestion that forms and their use must be set out in by-laws. This issue can be addressed by deleting clause 94(1)(n).

In respect of concern 2, a College Council may wish to amend a proposed by-law as a result of information obtained from the consultation process with members. Valid comments that may improve the by-law may be ignored if the result will be a further delay caused by an additional consultation. Alternatively, Colleges may inadvertently omit to conduct a further notification or may incorrectly believe that the amendment to the proposed by-law is not “substantive”.

Some Options for Consideration:

- a) Maintain the existing provision.
- b) Delete clause 94(1)(n).
- c) In subsection 94(2), remove the duty to notify members where a draft by-law is being amended in accordance with the information obtained from a previous notification.

Section 95 – Regulations

Concerns:

1. Should the phrase “continuing education programs” be replaced with a phrase similar to “a process that will enhance or remediate the member’s knowledge, skills, judgment or performance including continuing education programs” throughout subsections 95(2) and 95(2.1)?
2. Should the phrase “knowledge, skills and judgment” be expanded to include “performance”?
3. As discussed under section 82, should the Quality Assurance Committee have the power to enforce compliance with the assessment process?

4. Should the Quality Assurance Committee have the power to impose terms, conditions or limitations on a repetitive basis?

Analysis:

In respect of concern 1, the scope of the quality assurance program has been artificially restricted by the use of language like “continuing education programs”. A phrase like “a process that will enhance or remediate the member’s knowledge, skills, judgment or performance including continuing education programs” will create numerous options for the Quality Assurance Committee. Under subsection 95(2), the Quality Assurance Committee could then, with a proper regulation, require members to participate in any “process that will enhance or remediate the member’s knowledge, skills, judgment or performance including continuing education programs”. Maintaining the phrase “including continuing education programs” would ensure that Colleges that have regulations using that language are not adversely affected.

In respect of concern 2, adding the word “performance” to the phrase “knowledge, skills and judgment” could more clearly expand the scope of the program to outcomes.

In respect of concern 3, see the discussion under section 82, above, about tools requiring members to comply with assessments. A precedent already exists in clause 95(2.1)(f) for imposing terms, conditions or limitations for non-compliance with an assessment for sexual abuse concerns.

In respect of concern 4, an interpretation has developed that this regulation only authorizes one imposition of terms, conditions or limitations for any one ground. An argument could be made that repetitive impositions might be required if insufficient progress was made the first time. On the other hand, a member should not have to continually go through the process with no hope of it terminating (what one counsel calls a “black hole”).

Some Options for Consideration:

- a) Maintain the existing provisions.
- b) Replace the phrase “continuing education programs” with a phrase similar to “a process that will enhance or remediate the member’s knowledge, skills, judgment or performance including continuing education programs” throughout subsections 95(2) and 95(2.1).
- c) Expand the phrase “knowledge, skills and judgment” to include “performance”.
- d) As discussed under section 82, give the Quality Assurance Committee the direct power to enforce compliance with the assessment process.
- e) Give the Quality Assurance Committee the power to impose terms, conditions or limitations on a repetitive basis.