

# RPN Voice

**NURSING**  
RPN DIVISION

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## SPECIAL EDITION



**On June 4, 2009, amendments to the Regulated Health Professions Act (the "RHPA") come into effect. It is important that you be aware of these changes. We have highlighted for you the changes that we believe are of greatest concern to our members who are members of the College of Nurses and our allied health members who are members of other Colleges.**

### 1. Mandatory Reporting by Facility Operators of Incompetence and Incapacity

Presently, facility operators are required to report to a member's college if they have reason to believe a member has sexually abused a client. The amendments will expand the mandatory reporting requirements to all situations where a facility operator has reasonable grounds to believe that a member who practises at the facility may be incompetent or incapacitated.

These amendments to the Code will in future obligate a facility operator to report to the College whenever it has reasonable grounds to believe that a member who practices at that facility is incompetent or incapacitated. The report must be made immediately if the facility operator has reasonable grounds to believe that such incompetence or incapacity is likely to expose a patient to harm or injury and there is an urgent need for intervention.

In our view, the mandatory reporting obligation will place an unnecessary stressor on health care professionals at a time when the focus should be on treatment and health.

We as a union have worked hard over the years to encourage employers to deal with concerns regarding incompetence or incapacity in a non-culpable fashion, if the member suffers from an underlying disability. As a result, in many cases where an employer raises concerns regarding a member's incompetence or incapacity, the matter is resolved by the member acknowledging that there is an underlying disability. The member goes off work on sick leave and undergoes appropriate treatment. A member returns to work upon obtaining medical clearance, in some cases with restrictions, which are accommodated by an employer.

Most of these cases are not reported to the College since the member is acting responsibly, cooperating with the employer and there is no public safety concern. The focus is on the member achieving good health and ensuring a safe return to work at the earliest possible time. This can be done in a direct and expeditious manner since it is a

matter between an employer and the member.

However, in the cases where an employer has chosen to report to the College even though the member is proceeding responsibly and cooperatively, there has usually been a serious delay in returning the member to work after medical clearance has been obtained. This has in turn caused significant emotional and financial stress for the member.

It is not unusual for a member to have to wait over six months after obtaining medical clearance for the College case to be concluded, so the member could return to work. The result of the College case was to impose terms, conditions and limitations on the member's certificate of registration consistent with the medical clearance, so an earlier return to work would not have endangered the public in anyway. Unfortunately, members have endured significant financial hardship while waiting for the College matter to come to a close.

We are also concerned that a mandatory report of all members will negatively impact members' willingness to disclose their health condition to the employer's occupational health department and seek appropriate treatment. It is often very difficult for members when confronted with concerns about incompetence and incapacity to acknowledge an underlying health problem. Most of the underlying health conditions, which precipitate concerns about incompetence and incapacity, are substance dependence or other psychiatric conditions. Unfortunately, there is still a stigma in our society with respect to individuals who suffer from these conditions. This makes it difficult for members to make that first acknowledgment and seek treatment – more difficult if the health care professional must share the intimate details of her or his health with the College as well as an employer's health department.

A report to the College causes significant fear and stress for a healthy member, but for a disabled member who is confronting and dealing with a health condition, the fear and stress is

magnified and detracts from time and energy better spent on treatment and getting well.

While we understand the government's mandatory reporting obligation where the public is at risk, we do not endorse a reporting obligation, which extends to a member who deals with incompetence and incapacity concerns in a responsible fashion by acknowledging an underlying disability, withdrawing from practice, undergoing appropriate treatment and cooperating with the employer. A report to the College in these circumstances is unnecessary to protect the public and flies in the face of humane, prudent and expedient efforts to deal with concerns regarding incompetence or incapacity in a non-culpable fashion, if there is an underlying disability.

In addition, referrals to the Fitness to Practice Committee, as well as the Findings of this Committee, will be posted on the CNO's website. This, too, may impede members from seeking treatment for fear of the indirect disclosure of their health condition that will result from a finding of incapacity or a posting of any terms and conditions on a member's licence.

### 2. Changes to the CNO Website

Currently, employers or members of the public seeking information about a nurse must contact the College by phone or e-mail to access information contained in the College's Register. As of June 4, 2009 the College of Nurses will be required to post on its website all the information it currently keeps in its Registry. Information that although public, required some effort to obtain, is now searchable at the press of a button.

This information includes:

- the name, business address and business telephone number of each member;
- any terms, conditions and limitations that are in effect on a member's certificate of registration, the effective date of those terms and the Committee imposing such terms (including the Fitness to Practice Committee);
- a notation of every matter that has

been referred to the Discipline Committee and has yet to be finally resolved;

- the result and a synopsis of every disciplinary and incapacity proceeding unless no finding was made;
- a notation of every finding of professional negligence or malpractice made against a member, which may or may not relate to the member's suitability to practice, unless the finding is reversed on appeal. Where there is an appeal, the appeal will be noted until it is disposed of;
- a notation of every revocation or suspension of a certificate of authorization, the effective date of the revocation or suspension, and the basis for the revocation or suspension;
- any information that a panel of the Registration, Discipline or Fitness to Practice Committee specifies shall be included;
- outstanding allegations of professional misconduct or incompetence which have been referred to the discipline committee, including the date of the referral, a summary of each allegation, the date of the hearing, if the hearing has been set;

It is particularly troubling that mere referrals to the Fitness to Practice Committee, not merely the Findings of this Committee, will be posted on the College's website. As stated above, this may impede members from seeking treatment for fear of the indirect disclosure of their health condition that will result from a finding of incapacity and from the posting of any terms and conditions on the member's licence.

This may also impede members from finding alternate work while they are awaiting the outcome of their case before the Fitness to Practice Committee, since information concerning referrals will be posted on the College's website.

### 3. Inquiries Complaints and Reports ("ICR") Committee Power to Impose Interim Order without Notice to Member

The third problematic amendment will allow the ICR Committee, if it decides to refer a matter to either the Discipline Committee or the Fitness to Practise Committee for a hearing, to make an interim order directing the Registrar to suspend or impose terms, conditions or limitations on a member's certificate of registration without notice to the member. The Committee can exercise this new authority if the Committee is of the opinion, on reasonable and probable grounds, that the conduct of the member exposes or is likely

to expose his or her patients to harm or injury and urgent intervention is needed. The member will also have a right to make submissions while the suspension or the terms, conditions or limitations are in place.

This authority is unprecedented and is a serious breach of the fundamental principles of natural justice and procedural fairness. There was no demonstrated need for such a radical departure from due process for members.

In our view, Members should have been allowed to continue to be given notice of an intention by the Committee to direct to the Registrar to make an interim order and a reasonable opportunity to make a submission before the order is made.

### 4. ICR Committee Must Consider Prior Decisions

The fourth problematic amendment will require that the ICR Committee in deliberating about a complaint or report, consider all available prior decisions regarding a member unless the prior decision was to take no action with respect to a matter that was frivolous, vexatious, made in bad faith, moot or otherwise an abuse of process.

Again, it is a serious breach of the fundamental principles of natural justice and procedural fairness to allow the ICR Committee to consider all prior decisions in disposing of a complaint or report. It is extremely prejudicial to members since it may lead to the disposition of a current matter not on its own merits, but because of a previous matter. In the criminal and civil context, similar fact is only considered where the party advancing the evidence establishes (1) that it is relevant, (2) that it is probative, and (3) that its probative value is so high as to outweigh its prejudicial value. While we understand that the ICR Committee is a screening committee where the strict rules of evidence do not apply, there still ought to be some constraints placed on the use of prior decisions by the Committee in order to provide fairness to members.

While the ICR Committee is considered to be a screening committee, in that it screens very serious cases for a referral to the Discipline or Fitness to Practice Committee for a full hearing, it will also be empowered to make many decisions itself, without a hearing, which are of a final and very serious nature. This will include the ability to require a member to appear for an oral caution.

Currently, only about ten per cent

of the decisions made by the Complaints and Executive Committee would be considered preliminary in nature since this is approximately the percentage of cases which are referred by the Complaints and Executive Committee to the Discipline or Fitness to Practice Committee for a hearing of the matter. The vast majority of dispositions made by the Complaints and Executive Committee are final in nature and this will likely be the same for the ICR Committee.

In addition, the decisions of the College screening committees often have and will have very serious consequences. The ICR Committee will in future have the authority to require a member to attend for an oral caution, to require that a member engage in specified continuing education or remediation programs and to require that a member submit to a physical or mental examination. These decisions will have a direct impact on a member's livelihood, fundamental privacy rights and professional status and thus a member should be accorded due process to ensure these decisions are made fairly.

The College of Nurses of Ontario has historically struck a reasonable balance between the competing interests of the probative versus the prejudicial value of considering information regarding past conduct with its existing policy on the use of prior decisions by the screening committees. In essence, only those prior decisions which involve strikingly similar matters are considered by the screening committee in determining how to dispose of a current matter. However, if there is a prior decision regarding an unrelated matter, it is also provided to the screening committee, only if the committee first makes the determination that there is support for the current allegations.

There ought to have been constraints placed on the use of prior decisions by the ICR Committee similar to the current policy in use at the College of Nurses. This is necessary to redress the fundamental unfairness and great prejudice to members in allowing the ICR Committee to consider of all prior decisions in disposing of a current matter.

A complete summary of the changes to the RHPA can be found in the Fall 2008 issue of the CNO's publication, *The Standard*, which can be found at the College's website: [www.cno.org](http://www.cno.org). A full text of the amendments to the RHPA can be found at [www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&BillID=519](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=519)

MISSION: To enhance, promote and protect the role of the Registered Practical Nurse in all practice settings.

VISION: We envision a workplace free of professional discrimination, where RPNs are fully utilized, valued and adequately compensated for their knowledge, skill, judgment and their vital contribution to health care.



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