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### ONTARIO'S NEW REPORTING OBLIGATIONS FOR FACILITY OPERATORS REGARDING INCOMPETENCE AND INCAPACITY

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As of June 4, 2009, new amendments to the *Regulated Health Professions Act* (RHPA) impose obligations on facility operators to report the incompetence and/or incapacity of regulated health professionals working in that facility. For organizations, this presents the new challenge of understanding the meaning of these terms and knowing when an obligation to report is triggered. It is important to determine at the outset and before an incident occurs how the decision to report will be made.

#### When is a report to the College mandatory?

The mandatory obligation to report to a member's professional College arises when there are reasonable grounds to believe that a member is incompetent or incapacitated.

A definition of "incapacitated" is now provided in the RHPA Code which states that "the member is suffering from a physical or mental condition or disorder 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."

"Incompetent" is defined in section 52 of the RHPA Code to mean that "the member's professional care of a patient displayed a lack of knowledge, skill or judgment of a nature or to an extent that demonstrates that the member is unfit to continue to practise or that the member's practice should be restricted."

It is important to note that each of these definitions contains a two part test. First, the member must suffer from a condition or other deficiency. Second, that condition or deficiency must impact on their ability to practice. In applying this two part test, a College will be first and foremost concerned about the public interest and patient safety. The test suggested by the College of Nurses of Ontario, for example, involves the following:

#### Incompetence:

1. Lack of Knowledge, skill or judgment
2. Impacts ability to practise safely

#### Incapacity:

1. Condition or disorder
2. Impacts ability to practise safely

Before a report is mandated, both aspects of the test need to be satisfied based upon the member's *current* condition.

In practice, a facility must have “reasonable grounds”, that is, more than just rumour or conjecture, of either (1) a member’s lack of knowledge, skill or judgment or (2) a member’s mental or physician condition or disorder. In the best case scenario, this will have been confirmed by the member themselves, either through voluntary self-reporting or admission when confronted about their current practice.

Before a report is made, there must also be reasonable grounds to believe that the member’s condition impacts on his or her ability to practise safely. If both conditions are met, a report is mandatory. This may mean that in situations where the member is complying with certain modifications to their practice, such as return to work agreements, there is no impact on patient safety and there is no obligation to report.

By applying the legislation in this way, the emphasis is on whether there is an impact on the public interest and patient safety, and the facility’s role is to alert the College to such concerns. The facility is not required to make a determination with respect to incompetence or incapacity. Instead, the responsibility of making that determination remains with the regulatory body that may or may not take action with respect to the member’s certificate of registration.

If a situation arises in which it is unclear whether the mandatory obligation arises, advice can be sought from legal counsel or even the College on a “no names” basis. Many Colleges have professional advisory services for their members which may be accessed for guidance or advice.

As noted above, a report to the College is based upon a member’s current condition and practice. Where it is learned that a member has a condition that is potentially progressive, such that his or her practice is not currently impacted but may be in the future, it will have to be determined how the member will be assessed and monitored while the organization remains respectful of the member’s situation. It might also be considered whether the College can be engaged proactively in order to provide assistance and guidance. Again, in the best case scenario, this is a collaborative process with the member.

### **Who is obligated under the RHPA to report incompetence or incapacity?**

Pursuant to the amendments to section 85.2(1) of the RHPA, the new obligation to report incompetence or incapacity applies only to facility operators, not to individual members of a regulated health profession. However, like facility operators, individual members continue to be subject to mandatory reporting obligations with respect to sexual abuse of a patient. Professional misconduct regulations for individual Colleges may also have other reporting requirements.

The obligation to report incompetence or incapacity applies to “any person who operates a facility” where one or more regulated health professional is practicing. A facility can be any place, institution, or corporation and the operator is the person or group of persons who are accountable for the operation and administration of the facility.

As a result, it is important to note that the statutory obligation is not restricted by the size of the organization or by an employment relationship; it will apply equally to large hospitals and small private practices. However, the obligation only applies with respect to individuals practicing *in the facility*. Although there may be an ethical duty, there is no statutory obligation to report a member who is not practicing at the facility. On the other hand, there is an obligation to report where a member has been terminated or privileges have been restricted, revoked or suspended due to incompetence or incapacity. There is also an obligation to report where this would have been done except that the member voluntarily resigned.

### **Who has the responsibility of reporting within the facility?**

Generally, the professional Colleges expect that a facility will have a policy in place which designates the specific person or persons who are responsible for the organization's reporting obligations. In a large organization, such a policy should also provide for the flow of information to that designated person, since reporting is ultimately an obligation of the administration or board of directors collectively, not that of any particular individual.

Within an organization, it will be important to determine who holds the responsibility to report to a member's College under section 85. There are a few things that should be considered when making this decision.

First, a report to the College under this provision should not be viewed as punitive. Often the member will have self-reported a condition which the organization and the member will seek to monitor and manage together. The report to the College should be viewed as a part of that collaborative process as the College will see its role as assisting the member for the purpose of protecting the public and it is unlikely that it will take punitive or disciplinary action.

Second, there are many Colleges and each may take a slightly different approach when interpreting the legislation. Therefore, it may be appropriate to have several individuals take responsibility for reporting relative to their role within the organization and the regulated health professionals that fall within their management duties.

Finally, responsibility for reporting to the College for reasons of incompetence or incapacity should generally not be held by Human Resources alone. Since HR departments have disciplinary responsibilities it will be important, as noted above, to make it as clear as possible to individuals within the organization that a report to the College in circumstances of incompetence or incapacity is not a punitive step. It is also important to note that there may be a duty to accommodate and other HR considerations that must be dealt with separately by the organization.

Similarly, the responsibility to report to the College should not be held by an occupational health and safety or quality of care committee despite the fact that they may have relevant information. Such committees have separate and distinct statutory roles and responsibilities which cannot be conflated or confused with obligations under the RHPA.

### **The impact of other duties and obligations of the facility**

Each situation which presents itself to the organization will be different and so a careful review and a considered approach to making the decision to report must be utilized. While making the decision, another important issue to keep in mind, as always, is the other duties the organization has which are likely to intersect with this new obligation under the RHPA.

For example, since a report of incompetence or incapacity is concerned with the public interest and public safety, it is possible that such issues will be discovered during the course of investigations or reviews conducted under the *Occupational Health and Safety Act* (OHSA) or the *Quality of Care Information Protection Act* (QCIPA). In such cases, it will be very important to remember that information learned during the course of those investigations cannot be disclosed except in accordance with those Acts. With respect to the RHPA reporting obligation, s. 2(2) of OHSA and s. 4(1) of QCIPA provide for their primacy over other legislation and so it is likely that the requirements for non-disclosure in OHSA and QCIPA will take precedence and the RHPA reporting obligation to the College will not be triggered when the relevant information is received pursuant to investigations under the other Acts.

Finally, the organization's duties as an employer or with respect to credentialing are also separate and distinct from those under the RHPA and will have to be fully addressed, whether a decision is made to report to the College or not.

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