



March 11, 2011

Ontario Human Rights Commission (OHRC)
Human Rights Mental Health Consultation
Policy, Education, Monitoring and Outreach Branch
180 Dundas Street West, 8th Floor
Toronto ON M7A 2R9

By E-mail: consultations@ohrc.on.ca

Dear Sir/Madam,

**Re: ONA Submission on OHRC Human Rights and Mental Health Research and Policy:
Self-Governing Professions and the Duty to Accommodate**

The Ontario Nurses' Association (ONA) is the union representing 56,000 front-line Registered Nurses (RNs) and allied health professionals, and more than 12,000 nursing student affiliates, providing care in Ontario hospitals, long-term care facilities, public health, the community and industry.

ONA represents members with mental health and addiction disabilities in labour relations matters with their employers, in regulatory matters with their governing body the College of Nurses of Ontario (CNO) and in workplace safety matters at the Workplace Safety and Insurance Board (WSIB).

We commend the Ontario Human Rights Commission (OHRC) for developing a human rights and mental health policy focusing on rights and responsibilities under the *Ontario Human Rights Code*, and for conducting specific research on discriminatory barriers to employment for people with mental health disabilities and addictions. We welcome your invitation to identify key areas and themes of discrimination experienced by employees with mental health and addiction disabilities.

Our submission will focus on the experiences of RNs whose registration is subject to CNO's incapacity process because of issues related to a mental health or addiction disability.

We will address systemic barriers our members experience at various stages of CNO's incapacity process as follows:

- when the Inquiries, Complaints and Reports Committee (ICRC) orders our members to submit to medical examinations and when it provides the medical examiner with full disclosure of its investigation; and
- when the Fitness to Practise Committee (FTPC) imposes terms, conditions and limitations (TCLs) on members' Certificates of Registration.

It is our position that the Commission's policy should address systemic barriers by regulatory bodies of self-governing professions, and should be clear that these bodies and their committees must apply the *Code* in their decision-making and utilize an individualized accommodation analysis when determining matters related to incapacity.

Application of the *Ontario Human Rights Code*

Section 6 of the *Code* explicitly confirms the right of every person to equal treatment with respect to membership in any self-regulating profession without discrimination because of disability.

The FTPC's power to impose TCLs on the Certificate of a member who is incapacitated within the meaning of the *Regulated Health Professions Act, 1991* directly affects membership status within the profession, and is therefore subject to Section 6 of the *Code*.

Furthermore, because the imposition of TCLs can negatively affect a member's ability to seek or continue employment within the profession, the Committee's power is also subject to the protections against employment-related discrimination set out in Section 5 of the *Code*.

The application of the *Code* to committees of self-governing colleges was confirmed by the Divisional Court in *Siadat v. Ontario College of Teachers* (2007), 83 O.R. (3d) 401 (Div. Ct.).

***Prima Facie* Discrimination**

The imposition of TCLs, which place restrictions on an incapacitated member's Certificate, constitutes *prima facie* discrimination on the basis of disability.

Courts and adjudicators in several cases have found that an addiction disorder can constitute a disability under the *Code*: *Entrop v. Imperial Oil Limited* (2000), 50 O.R. (3d) 18 (C.A.).

A restriction on a member's Certificate due to her mental illness or addiction is a distinction based on the protected grounds of disability. The restrictions adversely affect a member's status within her profession by limiting her ability to perform all the duties of her profession, and they adversely affect the member's employment opportunities as an RN.

Systemic Barriers for Members with Mental Health and Addiction Disabilities with Respect to CNO Investigations and Proceedings

Orders to Attend Medical Examinations

Pursuant to Section 57 of the *Health Professions Procedural Code*, (Schedule 2 of the *Regulated Health Professions Act*), the CNO Registrar has the authority to launch a health inquiry if she believes a member may be "incapacitated."

Section 1 (1) of the *Code* defines incapacitated as follows:

"Incapacitated" means, in relation to a member, 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 certificate of registration be subject to terms, conditions or limitations, or that the member no longer be permitted to practise."

Many mental health conditions or substance abuse disorders meet the definition of incapacitated.

As part of the health inquiry, the ICRC, if it has reasonable and probable grounds to believe the member is incapacitated, has the authority pursuant to Section 59 (2) of the *Code* to order that a member submit to a medical examination, and the power to order a suspension of the member's certificate to practice nursing if the member refuses. Our experience is that the ICRC routinely orders members to submit to a medical examination if reasonable and probable grounds exist. The ICRC makes this order even when the member fully cooperates with the health inquiry and has submitted extensive medical information from her or his own and/or independent health care providers addressing the issue of the member's capacity.

These medical examinations, as confirmed by the Divisional Court in the case of *Cotton v. College of Nurses of Ontario*, [2008] O.J. No. 2172, involve a gross intrusion on a member's bodily and personal integrity. However, the ICRC orders members to attend a medical examination in each and every case where reasonable and probable grounds exist, seemingly without regard for the other medical information with which it has been provided. There is no assessment by the ICRC of the individual circumstances of each case to determine whether such an examination is necessary, in order for the ICRC to accumulate sufficient information to decide whether a referral to the FTPC is warranted.

This barrier does not exist when a complaint is filed about a member's nursing practice where the member's mental health is not at issue. We routinely submit expert evidence as to whether certain conduct constitutes a breach of the Standards, and the College does not automatically obtain its own expert evidence. That normally only occurs in a complex case where there is real division among the experts. Thus, in many cases, where the ICRC orders a medical examination of a member, the report from her or his medical examiner is similar to the report provided by the member's treating and/or independent health care provider. The member, however, has been required to attend an intrusive medical examination by a physician not of her/his choosing.

Another barrier for members is that the ICRC provides its medical examiners with full disclosure of its investigation, including witness statements from colleagues detailing the colleagues' perceptions of the member's behaviour. The ICRC does not and will not provide the member full disclosure prior to attending the medical examination, so members are questioned during a medical examination about events and matters of which they have no knowledge. These medical examiners are not lawyers and often accept these untested statements as "fact," and this leads to confrontation during the medical examinations that reflects badly on members. In addition, a physician may use these untested statements as evidence of a medical condition that incapacitates the member.

Imposition of TCLs

Pursuant to Section 62 of the *Health Professions Procedural Code*, once the ICRC has completed its inquiry, it may refer the matter to the FTPC for a hearing to determine if the member is incapacitated. If a member is found to be incapacitated, the FTPC has the power to order the member's Certificate be suspended until she or he is well enough to safely practise nursing. The FTPC also has the power to impose TCLs on a member's Certificate, if the member is well enough to practise nursing with restrictions in place. The imposition of TCLs constitutes *prima facie* discrimination as they seriously limit the member's employment opportunities.

In cases where members suffer from an addiction or a mental health problem, we have to work very hard to ensure the FTPC does not impose boiler plate TCLs, and that the TCLs are only the minimal restrictions necessary to protect the public. It is interesting to note that when a member is ordered to attend for a medical examination, the medical examiner is sent a checklist, which resembles the boiler plate TCLs that are often proposed or argued by the College before the FTPC. The boiler plate TCLs include: no access to or administration of controlled substances; the requirement to have a workplace monitor; advising the employer and prospective employers of the TCLs; ongoing treatment with a specialist; and urine testing.

Our members have legal representation in the incapacity process and we insist on an individual assessment of each case to determine whether a particular TCL is absolutely necessary to protect the public. This takes time, money and creativity in order to obtain expert evidence, which supports that a different way of monitoring can provide public protection and impinge less

on a member's right to practise. We do not know how well unrepresented members fare since FTPC hearings are closed.

Barriers to Finding Employment After Imposition of TCLs

Many RNs are terminated from their employment when they disclose an addiction or mental health illness in the context of alleged misconduct or a performance issue in the workplace; others resign, often out of shame of the discovery of their illness. ONA enforces its members' rights under the collective agreement and the *Code* through the grievance procedure, and it can take some time, often a year or two, before a grievance is resolved either by the re-instatement of the member or by the resignation of the member with or without compensation and damages.

Members who find themselves unemployed after TCLs are imposed face increasingly insurmountable barriers in their attempts to secure new employment. They may be called in for job interviews, and the job interview often goes very well until the prospective employer is informed of the TCLs. Subsequently, members are provided with various excuses for the employer's decision not to hire them; for example, they are told the employer is still interviewing other candidates or the employer has decided not to hire at this time.

In the last several years, since the *Regulated Health Professions Act, 1991* was amended to place the finding of incapacity and the TCLs on the College's public website, we are aware of only one member with TCLs who has been able to find new employment as an RN.

Our experience is that employers are not willing to hire members who require accommodation in the workplace in order to comply with the TCLs imposed by the FTPC. This unwillingness may be due to one or more factors in any given case, including discriminatory reasons linked to the stigma associated with mental illness and addiction, and/or unfounded concerns about risks to patient safety and the costs associated with providing the necessary accommodation.

We do know this unwillingness on the part of employers to hire nurses with restricted practice is becoming an increasingly greater problem for our members. In the past, our members with TCLs seeking new employment may have found a nursing job for an insurance company or in a doctor's office. But as we stated above, since the legislation was amended to place the finding of incapacity and TCLs on the College's public web site, we are aware of only one nurse who has been able to find new employment as an RN. In addition, we are told by members that this problem is taking up an increasing amount of time in group aftercare meetings as members relay stories of their inability to find nursing work with TCLs imposed on their Certificates.

Barriers in the Workplace for Members with TCLs

Members who are not terminated by their employer prior to or during FTPC proceedings, too often face barriers once they are deemed fit to return to work. Two of the common boiler plate TCLs that create the greatest barriers for these members are: (1) the requirement to have a workplace monitor; and (2) the restriction of access to narcotics.

Although ONA has brought about positive changes in the attitudes and awareness of our members through membership education on addictions and mental health, many of our members find they do not have the support of their nursing colleagues when they return to work. In the case of addictions, there is a persistent culture of "shame and blame," based on the common perception in our society that addiction is a matter of choice rather than an illness or disability. Members who require a workplace monitor as part of the TCLs often face resistance from their colleagues who are unwilling to take on the responsibilities of this role.

Many members who are ready to return to work are delayed in doing so because of the employer's insistence that they are not able to accommodate the TCLs, particularly the restriction on access to narcotics. If the nurse's regular nursing position is on a unit with access to narcotics, the employer may hold the nurse out of work for months and months, often without any income, until a position becomes vacant on a unit where there is little or no access to narcotics.

Conclusion

In order to remove or minimize systemic barriers experienced by RNs, and to ensure the human rights of other professional employees in Ontario, the Commission's policies must set standards for how the regulatory bodies of self-governing professions should act to ensure compliance with the *Code*. The Commission's human rights and mental health policy must address the requirement of these bodies and their committees to apply the *Code* in their decision-making, and to utilize an individualized accommodation analysis when determining matters related to the incapacity of their members.

Thank you for your consideration of our submission.

Sincerely,

ONTARIO NURSES' ASSOCIATION



Linda Haslam-Stroud, RN
President

C. Lesley Bell, RN, CEO, ONA
ONA Board of Directors