Psychiatric Patient Advocate Office

Bureau de l'intervention en faveur des patients des établissements psychiatriques

VIA EMAIL **April 29, 2010**

Pat Hoy, MPP
Chair, Standing Committee on Finance and Economic Affairs
99 Wellesley Street West Room 1405, Whitney Block
Queen's Park Toronto, ON M7A 1A2

Dear Mr. Hoy:

Re: Bill 16, Creating the Foundation for Jobs and Growth Act, 2010
Schedules 9 and 18 amending the *Health Care Consent Act* and the *Mental Health Act*

Introduced on March 25, 2010, Bill 16, *Creating the Foundation for Jobs and Growth Act, 2010*, includes amendments in Schedules 9 and 18 having a significant impact on the rights and civil liberties of patients with mental illness under the *Health Care Consent Act* and the *Mental Health Act*.

As currently proposed, these amendments:

- Reduce Consent and Capacity Board oversight of Community Treatment Orders and may subject patients to a more coercive treatment regime while living in the community;
- Limit the opportunity patients have to receive independent rights advice and assistance in obtaining access to justice;
- Introduce a new patient transfer process with insufficient rights protection mechanisms.

The Psychiatric Patient Advocate Office has over 25 years experience upholding the rights and civil liberties of patients with mental illness. In fiscal 2008-09 alone, we provided rights advice 22,000 times at 54 psychiatric facilities across Ontario, and responded to 3,200 advocacy issues within Ontario’s 10 dedicated former provincial psychiatric facilities. Consumer/survivors of mental health services are counted among the most vulnerable constituents in society. We urge the Standing Committee to carefully consider the effect Bill 16 will have on these constituents, and to uphold all protections required to ensure their equal autonomy and full citizenship.

We would be pleased to speak with you further about any of the recommendations proposed in our attached submission.

Regards,
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Summary of Recommendations

Community Treatment Orders and Rights Advice to the Public Guardian and Trustee
Bill 16 Schedule 18, s. 1, amending Mental Health Act s. 33.1(5)(a)

- The Bill amends the Mental Health Act by waiving rights advice to the Public Guardian and Trustee (PGT) where they act as substitute decision maker on a community treatment order (CTO). To protect the rights of patients, the PPAO proposes that the Bill be amended to ensure that rights advice continues to be provided when a CTO is first issued. We support the proposal that rights advice be waived when a CTO is renewed.

Community Treatment Orders and "Best Efforts" to provide Rights Advice
Bill 16 Schedule 18, s. 1, amending Mental Health Act s. 33.1(5)(b)

- Including a "best efforts" exception accounts for the reality that persons subject to CTOs can not always be located or contacted despite persistent attempts to do so. The PPAO therefore supports the addition of s. 33.1(5)(b) to the MHA.
- The *Mental Health Act* should be additionally amended to include a mechanism allowing sufficient notice, time and adequate care planning prior to the discharge of a person subject to a CTO to ensure that rights advice can be provided. To be clear, this mechanism should not result in the prolonged detention of the person or be a condition of their discharge or provoke their re-admission; instead, it should capture the obligation of the treatment team to ensure that adequate planning is undertaken prior to discharge, at the earliest possible time, to facilitate the provision of rights advice.

Community Treatment Orders and Termination on an Order for Examination
Bill 16 Schedule 18, s. 2, amending Mental Health Act s. 33.3(1.1)

- In our view, an Order for Examination is a drastic intervention of last resort. The PPAO submits that such an Order should have the effect of terminating the existing CTO. The proposed addition of MHA s. 33.3(1.1) should be changed to reflect this.

Transferring Involuntarily Detained Patients
Bill 16 Schedule 18, s. 3 and s.4, amending Mental Health Act s. 38(2-3), 39.2

- The addition of a new MHA s.39.2 would provide a formal mechanism for involuntarily detained patients to seek transfer between facilities. It would also add a new form of rights advice to be provided by designated rights advisers (including the PPAO).
- In principle, the PPAO supports the addition of this mechanism as protecting the right of a patient to seek the best treatment available to support their recovery with the minimum of impact on their civil liberties.
- The PPAO believes this right should be available to the patient every six months and independent of the number of times their involuntary status has been "renewed."

- The PPAO further submits that “material in change in circumstances” should be clarified to account for the existing procedures of finding a patient voluntary and involuntary.
- The PPAO finally submits that the Bill should provide clarity around the criteria to be applied for issuing transfer orders, in particular the availability of resources, the accommodation of disability, and the prior instances of transfer applications.

PSYCHIATRIC PATIENT ADVOCATE OFFICE
SUBMISSION TO THE STANDING COMMITTEE ON FINANCE & ECONOMIC AFFAIRS

Community Treatment Orders and Rights Advice to the Public Guardian and Trustee
Bill 16 Schedule 18, s. 1, amending Mental Health Act s. 33.1(5)(a)

Under the current *Mental Health Act*, s. 33.1, Community Treatment Orders (CTOs) are designed to provide a person who suffers from a serious mental disorder with a comprehensive plan of community-based treatment or care and supervision that is less restrictive than being detained in a psychiatric facility.

When a CTO is to be issued or renewed, rights advice must be offered to the person subject to the CTO and must be provided to their Substitute Decision Maker (SDM), if any (MHA s. 33.1(4)(e)). The role of the SDM is of such importance that the Legislature has deemed them unable to refuse rights advice. They must receive rights advice before the CTO is formally issued. This oversight requirement exceeds that afforded to the patient themselves, who may elect to refuse rights advice, once offered (MHA s. 33.1(5)).

Bill 16 would introduce a stratified obligation on SDMs by waiving the provision of rights advice where the Public Guardian and Trustee (PGT) is acting as SDM whenever a CTO is issued or renewed.

In the submission of the Psychiatric Patient Advocate Office (PPAO), the PGT should continue to receive rights advice when a CTO is first issued. The proposed MHA s. 33.1(5)(a) should therefore be amended to differentiate between the provision of rights advice on issuance and renewal.

Statistics gathered by the PPAO indicate that the PGT acts as SDM in about 25% of CTOs issued or renewed. This represents a significant portion of the CTOs issued or renewed in Ontario. Continuing to provide rights advice is the only way to ensure that the concerns and needs of the person subject to the CTO are adequately considered at first instance.

The PGT, like any SDM, plays a host of essential roles. They may review the CTO to ensure that it strikes a fair balance between treatment, autonomy, independence and recovery. They are often called upon to use their “best efforts” to ensure that the terms of the CTO are met (MHA s. 33.1(6)(d)) and that adequate support services are provided in the community. They may withdraw their consent to the CTO or request its early termination, triggering an assessment to involuntarily detain the patient (MHA s. 33.4; 33.2). They may also appeal to the Consent and Capacity Board for a review of the CTO on behalf of the patient (MHA s. 39.1).

This later power is a particularly important one. Persons subject to the issuance of a CTO are not given an automatic review before the CCB to determine if the mandatory criteria are met. Deemed applications for review to the CCB only occur on every second renewal, providing a necessary automatic oversight mechanism at least once every 12 months (MHA s. 39.1(3)). A

visit from a Rights Adviser at first instance helps reinforce the rights of a person subject to a CTO and ensures that the voice of the person is not lost to bureaucratic expediency.

Community Treatment Orders and "Best Efforts" to provide Rights Advice
Bill 16 Schedule 18, s. 1, amending Mental Health Act s. 33.1(5)(b)

There is currently no provision in the *Mental Health Act* that guides the actions of a designated rights adviser (such as the PPAO) when a person subject to a CTO can not be located for the purposes of providing rights advice. This situation may arise where, for example, a patient is discharged from hospital prior to the formal issuance of a CTO, or where a patient is living in the community when a CTO is to be renewed.

Including a "best efforts" exception would account for the reality that persons subject to CTOs can not always be located or contacted. The PPAO therefore supports the addition of s. 33.1(5)(b) to the MHA.

However, the inability to locate a client may indicate a deeper problem with the CTO. It calls into question the stability of the situation into which the client is being placed and the adequacy of the support services being offered to them as they resume living in the community. As the purpose of CTOs is, in part, to stop the "revolving door" of readmission through stabilized community arrangements, it should be of concern that the purpose has become frustrated before the CTO has even been issued.

The PPAO submits therefore that the *Mental Health Act* should be additionally amended to include a mechanism allowing sufficient notice, time and adequate care planning prior to the discharge of a person subject to a CTO to ensure that rights advice can be provided. To be clear, this mechanism should not result in the prolonged detention of the person, exist as a condition of their discharge, or provoke their re-admission; instead, it should capture the obligation of the treatment team to ensure that adequate planning is undertaken prior to discharge, at the earliest possible time, to facilitate the provision of rights advice.

Community Treatment Orders and Termination on an Order for Examination
Bill 16 Schedule 18, s. 2, amending Mental Health Act s. 33.3(1.1)

An integral purpose of CTOs, as defined in the *Mental Health Act* s. 33.1(3), is to provide a plan for a person who, as a result of his or her serious mental disorder, experiences this pattern: The person is admitted to a psychiatric facility where his or her condition is usually stabilized; after being released from the facility, the person often stops the treatment or care and supervision; the person's condition changes and, as a result, the person must be re-admitted to a psychiatric facility.

While on a CTO, a patient is obligated to attend appointments with the physician who issued or renewed the community treatment order, or with any other health practitioner or other person referred to in the community treatment plan, at the times and places scheduled from time to

time (MHA s. 33.1(9)). If a physician who issued or renewed a community treatment order has reasonable cause to believe that the person subject to the order has failed to comply with his or her obligations under subsection 33.1(9), he may issue an order for examination of the person in the prescribed form. This is known as Form 47 Order for Examination.

Upon return, the physician examines the person to determine whether it is appropriate to issue another community treatment order, on consent of the person or their SDM; whether the patient should be involuntarily detained for further assessment; or if the person should be released without being subject to the CTO (33.3(4)).

Under the current legislative scheme, debate has arisen as to whether a Form 47 Order for Examination causes an existing CTO to be terminated, or if it should be allowed to continue.

The PPAO submits that a Form 47 should have the effect of terminating the existing CTO. The amendment as currently proposed in Bill 16 adding MHA s. 33.3(1.1) should be changed to reflect this.

In our view, an Order for Examination is a drastic intervention of last resort. It authorizes police to take the person named in the CTO into custody and then promptly to the physician who issued the order (MHA s. 33.3(3)). This colors community mental health recovery with a patina of criminality, results in a mental health police record being generated,[1] effects the dignity of the client, and indicates that the existing CTO is seriously compromised. Under these circumstances, and given the options provided under MHA s. 33.3(4), an Order for Examination should be deemed to terminate an existing CTO.

In addition, allowing a CTO to continue may induce abuses of the Order for Examination process. As CTOs typically include terms for regular physician appointments on a bi-weekly basis, we fear that Orders may be issued routinely as a matter of course without any consequence. In our view this is an unacceptable form of "community treatment" and is more stringent than criminal probation. It also contradicts the purpose of CTOs on the whole to provide care "less restrictive than being detained in a psychiatric facility" (MHA s. 33.1(3)).

Transferring Involuntarily Detained Patients
Bill 16 Schedule 18, s. 3 and s.4, amending Mental Health Act s. 38(2-3), 39.2

The addition of a new MHA s.39.2 would provide a formal mechanism for involuntarily detained patients to seek transfer between facilities. It would also add a new form of rights advice to be provided by designated rights advisers (including the PPAO).

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[1] Since 2007, the Police Records Check Coalition has documented how police records of mental health apprehensions and interventions may discriminate against persons with mental health issues when they apply for employment or volunteer opportunities in their community. The effect denies such persons full participation in society and stability in their life for no other reason than stigmatizing notions of mental illness. More information on the advocacy efforts of the Police Records Check Coalition is available online: http://www.ppao.gov.on.ca/sys-pol.html.

In principle, the PPAO supports the addition of this mechanism as protecting the right of a patient to seek the best treatment available to support their recovery with the minimum of impact on their civil liberties. However, in summary form, we raise the following concerns with the Bill:

- As currently proposed, the opportunity to apply for transfer is linked to the number of times the involuntary status of the patient is renewed (s.39.2(2)). On the first set of renewals, the right of the patient to apply for transfer would not be triggered for 9 months; on the second set of renewals, and for all renewals thereafter, the right would not be triggered for 12 months. In the submission of the PPAO, this approach is flawed because the involuntary status of the patient may change at any time during these periods. It is not uncommon for a physician to change the status of a patient from involuntary to voluntary and back again, or to let a renewal lapse only to re-start the process again later. Either contingency would have the effect of "re-setting the clock" on the right to apply for transfer, severely limiting the opportunities to exercise it and opening it up to procedural abuses. The PPAO therefore submits that:
  - The right of an involuntary patient to apply for a transfer review should be calculated as an absolute period of time beginning with the initial declaration of involuntary status, rather than relative to interim findings of involuntary and voluntary status;
  - The right of an involuntary patient to apply for a transfer review should be 6 months after initially being declared involuntary, and every 6 months thereafter, rather than an interval of 9 or 12 months as proposed.
- As currently proposed, a patient may apply to the CCB for a discretionary early hearing of a transfer review where a "material change in circumstance" has occurred (s. 39.2(4)). However, "material change" is poorly defined in current CCB case law governing discretionary leave on treatment incapacity appeals. It is also undefined in the proposed legislation. The PPAO therefore submits that:
  - To avoid abuses of the process and the right, the amendment should at least clarify how "re-setting the clock" with a new set of in/voluntary Forms will be managed as a "material change in circumstances" or as a continuity of involuntary detention, and what happens when a patient is briefly changed back to voluntary status.
- As currently proposed, the CCB may order the transfer of the patient "if the patient does not object" (s. 39.2(9)). To better protect patient rights and ensure due process, this should be amended to "if the patient consents."
- In determining whether a transfer should be ordered, the CCB is directed to consider, in part, if "an attempt has been made to transfer the patient under s.29" (s.39.2(10)(f)). This suggests that a transfer may not be granted unless a prior attempt has been made to transfer the patient. The PPAO therefore submits that:
  - For interpretive clarity, this section should be amended to indicate that an application for transfer is not exclusively limited to such circumstances, and may be effected where the patient and CCB agree that transfer is appropriate.

- In determining whether a transfer should be ordered, the CCB is directed to consider, in part, if the receiving hospital is "able to provide for the persons care and treatment" (s.39.2(10)(a)). The PPAO therefore submits that:
    - To be clear, and to comply with *Charter of Rights* entitlements, this section should be amended to indicate that resource issues (such as bed availability) and special accommodation needs (such as physical disabilities) should not be barriers in assessing whether a transfer order is appropriate.