



COLLEGE OF OPTICIANS OF ONTARIO

SUBMISSION

TO

**THE HEALTH PROFESSIONS REGULATORY
ADVISORY COUNCIL**

**REVIEW OF THE REGULATED HEALTH
PROFESSIONS ACT**

September 27, 2005

INTRODUCTION

The College of Opticians of Ontario (COO) understands that Health Professions Regulatory Advisory Council (HPRAC) has been tasked with providing a review of the *Regulated Health Professions Act, 1991 (RHPA)* in response to the letter from the Honourable George Smitherman, Ontario's Minister of Health and Long-Term Care (Health Minister) dated February 7, 2005. The COO is pleased to be given an opportunity to provide input to HPRAC in the form of the submissions contained in this document.

The COO is a signatory to the Federation of Health Regulatory Colleges of Ontario (FHRCO) submission and supports and endorses its contents. Accordingly there will be issues raised in this submission that reflect those outlined in the FHRCO submission. Additionally, this submission will include comment on areas of the *RHPA* that the COO has identified as problematic or require refining. The submission will also include both profession-specific and eye care-specific concerns.

Weighing the Balance was an extensive review of the *RHPA*; the report that emerged from it, *Adjusting the Balance*, was comprehensive. The 2001 report supported, unequivocally, professional self-regulation and contained a variety of excellent recommendations¹ for amendments to the *RHPA* that would enhance the existing legislation resulting in increased public protection and confidence. Although most of the recommendations contained in this report have not yet been implemented, the COO hopes that the current referral will result in many similar recommendations and anticipates that these recommendations will be implemented by the Ministry of Health and Long Term Care (MOHLTC).

This submission will address the following issues relating to the *RHPA* set out in the February 7th referral letter:

- 1) *The currency of, and any additions to recommendations made by the Council as part of the "5 Year Review" of the "RHPA" contained in its report "Adjusting the Balance"*
- 2) *The currency of and any additions to the Council's recommendations in relation to the Colleges' Quality Assurance Programs and Patient Relations Programs*
- 3) *The currency of and any additions to the Council's recommendations in relation to the Colleges' complaints and discipline procedures*

Harm Clause

Section 30 of the *RHPA*, the "harm clause", is a necessary section of the *RHPA*. The purpose of section 30 was to protect the public against situations in which unregistered persons perform acts that do not fit within one of the controlled acts, but that nevertheless pose a risk of harm. It takes into consideration any health care activity that is not currently contemplated within the controlled acts model. However, the clause is self-limiting in that it only makes provision for "serious physical

¹ Adjusting The Balance Summary List of Recommendations Appendix A

harm”. Recommendations 5 and 6 of *Adjusting the Balance* suggested that section 30(1) of the *RHPA* be amended to remove the word “serious” and add the element of “psychological” harm. The COO supports both of those recommendations and further suggests that the harm statement should not have to meet the ‘serious’ threshold.

Scope of Practice

Each profession-specific Act defines the scope of practice of that profession. The current scope of practice statements were drafted in the late 1980’s and confirmed in the legislation passed in 1991. While every effort was made at the time to establish accurate statements, we believe some updating may be required to ensure their validity and practicality in the current realities. When the *RHPA* was conceived its intention was to be flexible legislation that would adapt to the progression of professions, patient expectations, technological advances and the health care delivery system itself. Unfortunately, the *RHPA* has been more rigid than most expected.

Jeanne Besner, Chair, Health Human Resources working group of the Health Council of Canada remarked at the Health Council’s recent summit on Health Human Resources that currently there is massive underutilization of the existing workforce in health care in Canada. She went on to point out that scopes of practice are defined as a sum of competencies and there often exists an overlap between professions. This leads to confusion on the part of managers over which health care providers can provide which services. The effective utilization of health human resources is really a question of knowledge and under what circumstances services can be provided.

The present system unduly impairs the delivery of quality care by the full range of professionals with the appropriate knowledge, skill and judgment to deliver patient care. As HPRAC articulated in its advice to the Minister of Health and Long-Term Care in 2000 regarding refractometry, the scope of practice defines the “minimum requirements”, as opposed to the “outer boundaries” of Colleges’ activities in relation to governing the professional activities of their members. There should be more flexibility with respect to the performance and delegation of controlled acts. With this in mind, the COO supports professions seeking extended class status to fully utilize the health human resources available.

Delegation

Page 20 of *Adjusting the Balance* recognizes the work being done by the Federation on the development of policies for delegation. HPRAC did not complete an analysis of delegation for this reason. The Federation has formed a sub-committee under the Practice Standards working group to deal specifically with the issue of delegation both to and from health care practitioners in Ontario. The group has developed a project-based framework for their delegation sub-committee which includes the use of a consultant and delineates specific outcomes and timeframes. The ultimate goal of the group is to develop a principle-based template that all Colleges can use to guide their Membership in this particular practice area. This College believes that a health care system that involves such a variety of professionals must have consistency in those practice areas where interaction is a necessary function to provide optimum health care. As we move towards

collaborative care models of health care, this area will become significant particularly in the areas of liability and co-management of patient care. The COO supports the work of the Federation on delegation in principle and financially, and is a participant in the working group.

Complaints and Discipline

Complaints

Amendments should be considered to the *RHPA* that would explicitly permit regulatory Colleges to share complaint (and other) information between one another where appropriate. Section 36 of the *RHPA* should be expanded to ensure that Colleges may provide information to other regulators (health and non-health) and other entities when it is in the public interest to do so. HPRAC should consider what amendments to the *RHPA* would be necessary to explicitly articulate such a change.

The value and benefits of multi-disciplinary care are self-evident; however, individual health professions still have unique elements to their scopes of practice and profession-specific Acts that require profession-specific Regulatory Colleges and profession-specific complaints processes. The regulatory body for the profession must be the gate-keeper for professional discipline.

Alternative Dispute Resolution

An alternative dispute resolution (ADR) process, with appropriate restrictions, enshrined in the legislation would allow the Colleges to resolve many complaints in a more effective manner than the current systems provides. Informal ADR has been already been undertaken by the COO when resolving complaints and has, on many occasions, proven to be more satisfactory to both the complainant and the member than the conventional complaints process.

With respect to ADR, the *Adjusting the Balance* report contained recommendations (numbers 29 and 30) dealing with ADR. The COO supports both of these recommendations and asks that they be reiterated in HPRAC's current work.

Timelines

The current legislated timeline of 120 days is unreasonable, and for most complaints, unattainable. The *RHPA* permits Members 30 days to respond to a complaint. Assuming that the College mailed notification to the member on the same day the College received the complaint, given the mail delivery time and the time allowed for a response, conceivably 40 days could have passed before a Complaints panel would be able to make any decision. ADR has been proven to be an effective way to resolve complaints, both for the complainant and the member. Unfortunately the 120 day timeline does not take into account time for ADR. The 120 day timeline begins when the complaint is received by the College. If the parties embark on an ADR process and then abandon it for some reason, the formal process needs to start, but the 120 day timeline has already begun.

Adjusting the Balance recommended (Recommendation 24) that the timeline for Complaints be amended to 150 days from the current 120 days. The COO supports this recommendation with the

additional suggestion that the timeline under the *HPPC* should be suspended if ADR has been entered into.

Referral to the Quality Assurance Committee

The Complaints process can be a tool to identify deficiencies in an individual's practice or to identify trends within the profession itself. Instead of viewing a complaint that indicates a deficiency in a regulated health professional's practice or abilities as necessarily requiring punitive action such as a Discipline Hearing, Complaints Committees should be given explicit authority to make a referral to the Quality Assurance Committee for practice improvement where appropriate. While the *RHPA* gives the Complaints Committee the authority to refer members to the Quality Assurance Committee (sec. 26 (2) part 4 of the Code), the current legislation does not encourage or permit a transparent process that would be truly beneficial to both the regulated health professional and the member of the public that lodged the complaint. Recommendation 31 in *Adjusting the Balance* addressed this issue and the COO would like to see this recommendation implemented. This type of referral and the requirements under it should be made public.

Investigation of a Complaint

The COO notes the similarity between Recommendation 27 in *Adjusting the Balance* and Recommendation 20 of HPRAC's report on the *Effectiveness of Colleges' Complaints and Discipline Procedures for Professional Misconduct of a Sexual Nature*. Both recommendations suggest that section 25 of the *HPPC* be amended to state that the Registrar shall investigate a complaint or mandatory report instead of a panel of the Complaints Committee. The COO supports this concept and suggests that in addition to the existing powers of the Complaints Committee, the Committee be given the power to redirect investigations. Any changes in wording of section 25 of the *HPPC* should be broad enough that a College may conduct an investigation in the most efficient and effective manner.

Discipline

The *HPPC* should be flexible to permit appointment of a Judge or experienced lawyer to chair the Discipline Committee. The COO has officially endorsed the recent proposal made by the College of Physicians and Surgeons of Ontario and the Royal College of Dental Surgeons of Ontario. This proposal would allow Colleges to determine the need for and the value in adding to a discipline panel the knowledge and skills of an experienced Judge or lawyer. This addition would allow the panel to focus on technical professional and public interest matters rather than the legality of the proceedings.

Unauthorized Practice

Unauthorized Practice includes improper use of titles, or giving the appearance of being a registered health professional, performing a controlled act in the delivery of health care services when not qualified or permitted to do so and being the employer of such an individual.

In Recommendations 55 through 57 of *Adjusting the Balance*, HPRAC recommended amending the *RHPA* to clearly assign to the Minister of Health and Long-Term Care responsibility for enforcing the *RHPA* as it would apply to non-members.

The COO agrees with HPRAC (as articulated in *Adjusting the Balance*) that the effectiveness of the regulatory system depends on effective enforcement, and that it is clearly in the public interest that the *RHPA* provisions related to performance of controlled acts be enforced. However, it disagrees with HPRAC's statement on page 114 of *Adjusting the Balance* that "it is not clear" whether Colleges' enforcement powers apply to non-members. In the COO's view there is no question that Colleges have the power to investigate and prosecute the performance by non-members of controlled acts that are authorized to their members. The COO has investigated and successfully prosecuted numerous cases of unauthorized dispensing of eyeglasses by non-members. The report of the Schwartz Commission, which was the origin of the *RHPA*, made it clear that the *RHPA* was not intended to modify the then-current practice whereby regulatory bodies enforced prohibitions against non-members by commencing prosecutions under the *Provincial Offences Act*.

The COO does not read *Adjusting the Balance* to be recommending that the Minister should be given the *exclusive* power to enforce the *RHPA* against non-members. While the COO has no objection to the Minister being given responsibility for enforcement of the *RHPA*, it feels strongly that the Minister should not have a monopoly on enforcement. The COO has always been proactive in investigations and prosecuting unauthorized dispensing by individuals. Its vigilance is a significant deterrent against unregistered individuals engaging in the controlled act of dispensing. This enhances public safety. Even if the proposed new enforcement body is given the resources that were recommended in *Adjusting the Balance*, the COO is concerned that the investigation and prosecution of unauthorized dispensing would be a low priority of the new body. Accordingly the COO asks that any amendment to the *RHPA* that implements Recommendations 55, 56 and 57 make it clear that the assignment of enforcement authority to the Minister does not derogate from the existing enforcement power of any other person or body.

Title Protection

The COO supports Recommendation 8 of *Adjusting the Balance* that would amend the *RHPA* to restrict the use of the words "registered", "regulated", "licensed" or "certified" in the course of delivering health care services to members of a regulated health profession. As HPRAC pointed out, all of these words can be used to imply regulation. The public must be protected from unregistered persons that would seek to mislead the public with the use of these terms.

Internet Dispensing

An issue related to unauthorized practice is the issue of ophthalmic appliances dispensed to the public through the internet. In Ontario, dispensing eyewear for vision or eye problems is a controlled act that must be performed by a member of the College of Physicians and Surgeons of Ontario, the College of Optometrists of Ontario or the College of Opticians of Ontario. Despite that, it has become alarmingly common for members of the public to order contact lenses through internet sites based outside of Ontario and have their contact lenses delivered through the mail or by courier,

without the involvement of an appropriately registered health care professional. The lack of participation of an authorized health care provider has a substantially negative effect on patient outcomes and risk management. There does not appear to be adequate control contained in the *RHPA*, which sufficiently enables a regulatory body to stop the sale of ophthalmic appliances through the mail. The COO is currently researching legal opportunities to stop this process and encourages HPRAC to identify this as an emerging issue in the health care system that requires further investigation.

Plano Contact Lenses

An issue that has arisen in the eye care field which is of significant concern is the introduction into Ontario of Plano contact lenses for cosmetic wear. The lenses contain no corrective power and are sometimes referred to as “cosmetic lenses”. Their function is purely cosmetic in that they appear to change the colour of the wearer’s eyes without correcting vision. They are sold over the counter at locations such as retail pharmacy outlets and beauty salons, without fitting and without the supervision of a registered health professional. The risks of harm associated with contact lenses are well known and described in detail in the COO’s April 29, 2005 submission to HPRAC². The risk of harm related to plano contact lenses is compounded by the fact that they are sold by non-health professionals in retail or mail-order settings. In the vision care sector, both provincially and nationally, all professionals (Opticians, Optometrists and Ophthalmologists) agree that treating plano contact lenses as cosmetic devices rather than medical devices is not in the public interest. Each of these groups has made significant and regrettably unsuccessful efforts to deal with the issue through Health Canada.

Unfortunately, the *RHPA* as presently drafted does not appear to make the sale of cosmetic contact lenses a controlled act. The controlled act under paragraph 9 of subsection 27(2) of the *RHPA* is prescribing or dispensing “for vision or eye problems”. Plano contact lenses, which contain no corrective power, are not dispensed for vision or eye problems. The harm clause does not assist because the sale of plano contact lenses by an unregistered person does not appear to constitute treating or advising a person “with respect to his or her health”. Therefore, unlike in the case of prescription contact lenses, which can only be dispensed by authorized physicians, opticians and optometrists, plano contact lenses can be sold by any member of the public. From a public safety perspective, this makes no sense. As Health Canada has noted³, “...all contact lenses, whether prescription or non-prescription, might present the same potential health hazards with respect to adverse effects and damage to the eye”. What mitigates against the health hazards of prescription contact lenses is that they are properly fitted and used under professional supervision. The public should expect no less for non-prescription contact lenses.

In the United States, a number of jurisdictions have recently passed legislation regarding plano/cosmetic contact lenses including:

- California, Bill# HB.1382, makes it a deceptive marketing practice to advertise that contact lenses may be obtained without confirmation of a valid prescription

² Relevant portion attached as Appendix B

³ Appendix C

- Connecticut, PUBLIC ACT 05-119, requires consumers to purchase cosmetic contact lenses only from a licensed professional
- New Jersey, bill#, HB3945, prohibits dispensing plano contact lenses without proper licensure; violation is a criminal offence
- Federal (USA), S 172, HR 371, allows the FDA to regulate non-corrective, coloured contact lenses as medical devices

The differential treatment of plano contact lenses is a large gap in the *RHPA*. To protect the public against the serious risk of harm posed by the sale of plano contact lenses, the COO requests that the *RHPA* be amended to prohibit the dispensing of plano contact lenses by anyone other than physicians, optometrists and opticians.

College Governance

Screening Committee

A screening committee that reviewed all complaints, mandatory reports and other information related to the professional practice of members and delivery of health care services within the scope of practice of the profession, would be a more effective use of College resources and ensure an integrated system. This idea was first proposed by the College of Physicians and Surgeons and the College of Nurses. HPRAC explored this concept during its last review of the *RHPA* and made five recommendations in *Adjusting the Balance* that would facilitate change to adopt this concept. The COO supports the FHRCO recommendations in their 2005 submission.

Public Members

The COO recognizes the valuable role public members serve within the self-regulatory scheme. In addition to supporting the suggested legislative changes recommended by the Federation that would permit greater flexibility in the constitution of Council and an increased commitment by the MOHLTC for more timely appointments and funded training of public members, the COO recommends changes to the policies of the MOHLTC that would provided flexibility for Colleges to pay expenses of public members not covered by the government. The policies for reimbursement of public members should encourage greater participation of public members by permitting public members to serve on non-statutory committees and working groups established by the COO and to participate in appropriate training programs to enhance their education.

Professional self-regulation is at the heart of the *RHPA* and stricter measures should be included in the legislation to ensure its preservation. The *Opticianry Act* sets out the minimum and maximum number of professional and public members that compose the Council of the COO. However, it does not include stipulations that would guarantee a majority of professional members on the Council. Recommendation 10 contained in *Adjusting the Balance* suggested a provision be included in the profession-specific acts that would mandate that professional members have a majority of at least one and no more than two over public members. This recommendation would maximize the advantages of public member contributions while ensuring self-governance within the regulated health professions.

The COO understands that the remuneration for public members has not changed since 1994. HPRAC's analysis of public member's compensation in *Adjusting the Balance* indicates that the per diem rate of public appointees to the Health Care Colleges is significantly lower than other public appointees on boards with similar responsibilities. This disparity should be addressed and rectified.

Education and training of public members prior to commencing their term with a College Council should be provided and funded by the MOHLTC. *Adjusting the Balance* Recommendation 20 made this recommendation and Recommendation 21 outlined what resources should be available for public members. The COO supports the implementation of this recommendation.

Quality Assurance

The RHPA was intended to have strong enforcement and that it was intended to apply to members as well as health care providers who are not members of any of the health profession regulatory colleges. In its report *Adjusting the Balance*, in their analysis (page 98) HPRAC noted "A number of mechanisms currently in place allow or oblige health professionals to report unsafe conditions, harm to patients or quality of care issues, for the most part, these mechanisms apply to publicly funded institutions/facilities and pharmacies. There are no comparable safeguards in place in private facilities (rehabilitation and physiotherapy clinics, optical dispensaries etc.)." Recommendation 50 of *Adjusting the Balance* stated "That the Minister establish a task force to develop a system for reporting and dealing with the health care delivery errors that result in significant adverse patient/client outcomes and prevention of future errors." In HPRAC's October 2000 report to the Minister of Health and Long-Term Care on the Effectiveness of Colleges' Quality Assurance Programs, it was noted that

"Workplace QA issues often involve the actions and responsibilities of people not regulated under the RHPA, such as facility owners, other employers and unregulated health care providers in both private and publicly funded services outside the jurisdiction of any one College."

The COO supports the implementation of Recommendation 50 but suggests that a task force should include in any system it develops, a required protocol for private facilities. Currently facilities owned by non-regulated health professionals are not compelled to cooperate with Colleges on Quality Assurance requirements for members nor are they required to have Quality Assurance programs in place for non-regulated employees.

Patient Relations

The current requirements within the *RHPA* take a narrow view of the patient relations program that mandates sexual abuse prevention and funding for therapy only. A complete patient relations program that ensures protection of the public cannot be accomplished effectively with such a narrow mandate. A fulsome patient relations program would encompass sexual abuse prevention, practice improvement and public education. A wide-ranging program that would be comprehensive cannot

be administered by a single committee; it requires the coordination of a multitude of existing college committees and administrative functions. It is the responsibility of the entire college not just one statutory committee.

Adjusting the Balance stated:

“Given the breadth of Patient Relations activities that must either influence or directly involve all college functions; it is questionable whether a dedicated committee is needed to carry out the statutory requirements. As an alternative, the various responsibilities that are currently assigned to the Patient Relations Committee may be best handled by different college committees. What is of utmost importance, however, is for all college activities to be planned, coordinated and evaluated to achieve the broad patient relations objectives. This coordination may be a unique role for a Patient Relations Committee, but HPRAC is of the view that colleges need flexibility to assign such functions. For the reason, HPRAC supports maintaining the statutory requirements for patient relations functions but giving the colleges flexibility to assign these within the college organization.” (pg 50)

Recommendation 17 in *Adjusting the Balance* was to do away with the mandatory patient relations committee on the basis that patient relations is a multi-faceted program that for some Colleges is best designed and carried out by other committees and the College itself. HPRAC recommended that College be given flexibility as to who should perform the tasks, including whether to have a patient relations committee. The COO supports Recommendation 17 within the review as it clearly articulates the necessary amendments to the *HPPC* to facilitate this vision of a more effective patient relations program.

Mandatory Reporting

The COO believes the obligations set out under subsection 85.1(1) to report any other member of a College, if one has reasonable grounds to believe that the member has sexually abused a patient, are necessary and designed to provide public protection. The COO is concerned with its ability to act on information received where the victims name is not provided. In its December 2000 report concerning the effectiveness of Colleges’ complaints and discipline procedures for professional misconduct of a sexual nature, HPRAC made a series of recommendations which would address this concern. They appear at pages 26 and 27 of the Report under the heading Recommendation 3. They include:

- requiring Colleges and members dealing with mandatory reports to actively encourage patients to consent to their names being included in the mandatory report;
- amending the Code to require members to inform patients of their obligation to file their report rather than just make “best efforts” to do so;
- requiring members to seek informed consent from their patients to name them; and

- allowing a patient's name to be added to a mandatory report after the report has been filed if consent has subsequently been obtained.

Moreover, in Recommendation 4, HPRAC recommended that the Registrar be required to appoint an investigator if he or she believes on reasonable and probable grounds that a member has committed sexual abuse of a patient. The COO supports these recommendations as it believes they would increase the value of mandatory reports and increase the level of protection of the public. The COO requests that these recommendations be implemented.

Collaboration

There is an opportunity for greater collaboration and shared services among the Colleges. Colleges are more efficient when they work together. The Federation is proof of this. Some recent initiatives undertaken by the Federation that prove this are the implementation tools for Privacy Legislation and the templates developed for Professional Incorporation. The Federation allows Colleges to share best practices, pool resources and ensure consistency across professions while taking into account the inherent differences between the multitude of health professions.

Regulations that are common to all professions such as Registration, for example, should have common basic standards that must be met by all the Colleges. However, the unique nature of treatments, services and care offered by the multitude of regulated health professions in Ontario dictate that regulations must also be profession-specific

Public Awareness

Adjusting the Balance Recommendation 53 recommended that the *RHPA* be amended to require the Minister to design, implement and fund ongoing public education. Recommendation 54 specified the minimum elements that should be included in a public education program. The COO supports both these recommendations. Promotion of the Colleges would inform the public and increase their confidence in the regulatory system.

Earlier in this submission reference is made to a section dealing with unauthorized practice. Amending the legislation to restrict the use of titles and to prescribe stricter requirements for the use of the words "registered", "certified" etc. will only be effective if the public understands what those terms and titles mean. Any public awareness campaign should include education regarding the appropriate use of titles and how a member of the public can identify a registered health professional. It should, at a minimum, specify the protected titles for registered health professionals in Ontario as set out in the *RHPA*.

Accreditation of Dispensaries

One segment of awareness lies largely with those employers/managers and owners that are not health care providers regulated by a College, but who have significant input into the daily

operations/processes in the health care delivery setting. A critical part of regulation must include a framework that ensures clear communication between the regulatory body, the member and the non-health care provider directing or managing the practice setting. It is imperative that those who are not held accountable by a regulatory body, but can have impact on patient care be required to comply with the legislation governing College members.

The COO recognizes that health care services are provided in a variety of settings and submits that all parties involved in the delivery of health care have responsibilities and should be required to develop protocols for accountability while providing those services. The COO believes the *RHPA* does not go far enough to ensure that employers are accountable and assist in the protection of the public with respect to their facilities. The COO recommends that HPRAC makes this an area for study as an emerging issue.

CONCLUSION

Adjusting the Balance presented an opportunity to effect change within the self-regulatory system. With so many progressive recommendations that would strengthen public protection in the province of Ontario the COO would like to see implementation of the recommendations highlighted in this submission and is prepared to support the MOHLTC in their efforts to do so.

The COO appreciates the opportunity to present this submission to the HPRAC. The COO would be pleased to provide any further information, which the Council feels, would be of assistance.