



# Psychiatric Patient Advocate Office

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*ADDENDUM*  
*SUBMISSION TO THE SELECT COMMITTEE ON*  
*MENTAL HEALTH & ADDICTIONS*

*The Balanced Role of Rights and Advocacy in Ontario's*  
*Mental Health System*

September 9, 2009

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# Psychiatric Patient Advocate Office

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

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September 9, 2009

Mr. Kevin Flynn  
Chair, Select Committee on Mental Health and Addictions  
Room 1405, Whitney Block/Bureau 1405  
Queen's Park, Toronto ON M7A 1A2  
Fax: 416-325-3505

Dear Mr. Flynn:

We would like to thank you and the Select Committee for the opportunity to share our views on the importance and role of mental health advocacy as an integral component of a comprehensive mental health system.

The question asked at the end of our presentation, namely, "Does upholding the rights of people living with mental illness undermine treatment goals and effectiveness?" is both compelling and complex. It is also a very difficult question to answer in a few minutes time. Therefore, I am writing to call to your attention some considerations, which may assist you in deliberating about the value of advocacy and rights protection in mental health outcomes and the mental health system, in general. We provide the attached to you as an overview of the mental health system and the balanced role of rights protection within it.

Our website testifies to the complexity of mental health law in Ontario. We have produced over 40 InfoGuides outlining common topics like involuntary detention, incapacity to consent to treatment, and the role of substitute decision makers like spouses and parents. We also host public information sessions and are often invited to speak to specialty conferences for police, health care providers, and educators.

If it would benefit the members of the Committee, we would be pleased to expand on the question of balancing effective treatment and rights with an overview of mental health law and then facilitate an open question and answer session.

Sincerely,

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Vahe Kehyayan, Director  
Psychiatric Patient Advocate Office

**ADDENDUM**  
**PSYCHIATRIC PATIENT ADVOCATE OFFICE SUBMISSION TO THE SELECT**  
**COMMITTEE ON MENTAL HEALTH & ADDICTIONS**

**The Balanced Role of Rights and Advocacy in Ontario's Mental Health System**

Ontario's *Mental Health Act (MHA)*, *Health Care Consent Act (HCCA)* and related legislation provide the legal and social context and standard for the delivery of mental health services. Their purpose is to balance the authority of the state against the individual's right to self-determination. These laws also endeavour to strike a balance between the often competing needs of protecting those with mental illness and the public. Core mental health and related health care legislation are critical to developing an enlightened and effective mental health system.

**The Legal Context: Treatment Decision-Making**

All treatment in Ontario is consent-based. That is, under the *HCCA*, a health care provider must obtain the informed consent of an individual. The *HCCA* provides the legal test allowing a doctor to determine that an individual is incapable of making treatment decisions because of their condition. Where an individual is found incapable of making a decision respecting a particular treatment, his or her substitute decision-maker is given the power to do so. The *HCCA* clearly delegates the power to make treatment decisions to a hierarchy of substitute decision makers, beginning with those who have been granted power of attorney and then spouses, parents, siblings and other available relatives. The *HCCA* also clarifies that substitute decision makers are to consider both the prior capable wishes of the incapable person and their best interests.

In this way, mental health legislation defines a clear role for the involvement of substitute decision makers in the treatment and care of persons too ill to direct it themselves.

Our own laws make provision for civil commitment or detention under the Criminal Code of Canada where individuals are at risk for harming themselves or others or where they are not capable of caring for themselves. In the civil context, the *MHA* accounts for individuals who may remain capable of directing their treatment but unwilling to provide consent. While the individual is a danger to themselves or others, the *MHA* gives a doctor the option to involuntarily detain the patient. In some cases, this takes years. Persons receiving treatment in the community under a Community Treatment Order are similarly "detained" subject to the *MHA*. The treatment team monitors their progress closely.

Professional colleges for health care practitioners set out practice guidelines, which are consistent with the law and which are intended to capture the ethical and legal obligations of their professional members. An important example of this is evident in the medical treatment policy guideline of the College of Physicians and Surgeons of Ontario, which states:

1. The best interests of the patient are central to all physician-patient interactions.
2. Respect for the autonomy and personal dignity of the patient is central to the provision of ethically sound patient care. Through the translation of these ethical principles to law, the Supreme Court of Canada has confirmed the fundamental right of the individual to decide which medical interventions will be accepted and which will not.

3. In order to exercise their autonomy, patients must be capable of making informed decisions about their health care.
4. The goals of the *HCCA* include promoting individual autonomy and decision-making capacity, and facilitating communication between health care practitioners and their patients.
5. Physicians have the obligation to secure consent and patients have the legal right to either consent to or refuse treatment.

This approach is widely accepted in the international community and even developing nations are striving to meet a best practice objective which calls for legislation that guides mental health care and treatment. In 1991 the United Nations' General Assembly adopted Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care articulating the principle that, "Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognized in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and in other relevant instruments, such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment." Our own civil, criminal and human rights laws, which were developed independent of the U.N.'s document, echo this fundamental principle.

History is replete with examples of how the unchecked authority of the state can result in the victimization of vulnerable individuals with mental illness. Thus, the promotion of autonomy and decision-making are fundamental to both the law and sound medical practice. Whether a treatment decision is made by a capable individual or his or her substitute decision-maker there is the fundamental assumption that consent must be informed and given without duress or coercion. Consistent with our democratic society, these laws include procedural safeguards to ensure that individuals with mental illness are not unfairly or unnecessarily deprived of their liberty without due process or opportunity of legal recourse.

### **Avenues of Redress: the Consent and Capacity Board**

Often when individuals with mental illness become patients in psychiatric facilities they experience changes to their legal status which may deprive them of their fundamental rights as citizens. Accordingly, the law provides avenues of redress to challenge the authority of physicians, for example, to detain individuals with mental illness against their will or find them incapable of consenting to treatment or managing their property.

One of the legislated safeguards is provided through rights advice, which is a formal mechanism of explaining to an individual the meaning of changes in their legal status and the legal remedy available to them to challenge these decisions.

The *MHA* and *HCCA* provide a legal mandate for province-wide Rights Advisers to assist individuals in making application to the Consent and Capacity Board (CCB) (if they so wish) for a review of decisions affecting their capacity to make decisions (e.g., treatment and property) and their liberty rights. Rights Advisers also assist their clients in applying for legal aid and in

obtaining legal representation for broader issues related to their illness, such as creating powers of attorney for personal care and property or obtaining social entitlements and services.

The CCB is an administrative tribunal with the authority to hear evidence with regard to legal status changes and to either confirm or revoke these changes. The right to appear before the CCB is a check and balance for the state's authority to deprive an individual of their fundamental legal rights in consideration of their best interests regarding care, treatment and hospitalization. While most individuals receive rights advice, only a small percentage seeks a review before the CCB. In the vast majority of these cases, clinical decisions resulting in the loss of legal rights are upheld. Only a very small percentage of applicants to the CCB are successful in having these decisions revoked.

PPAO Patient Advocates almost never appear before the CCB and do not represent their client in any legal proceeding. Advocates work solely on the basis of trust, integrity and confidential client instruction. Accordingly, we require the CCB to issue a subpoena before we will agree to appear at a hearing in any capacity.

### **Advocacy Supports Legal Safeguards and Entitlements:**

Advocacy supports mental health consumers in exercising and realizing their legal rights. It does not attempt to undermine treatment, but acts on the instructions of its clients to explore potential remedies and to access legal entitlements. It does not support clients in pursuing rights which they do not have. It does not support clients in breaking the law or engaging in vexatious behaviour. Advocates can not over-rule the decision of a health care provider as regards a finding of treatment capacity or voluntariness. However, Advocates often help break through an adversarial relationship and bring the care team and client together in a collaborative relationship. In a very tangible way, advocacy provides the system with a "counter-weight" to balance individual autonomy against the authority of the state.

This is an important accommodation to ensure that those with a disability related to mental illness enjoy equal democratic rights and substantive legal protections. It is also consonant with emerging best practices. That is, individuals should be supported in their own autonomous decision-making as much as possible and subjected to the least restrictive environments and interventions. Advocacy does not endeavour to jeopardize a client's safety or the safety of others in pursuit of an advocacy goal. Advocates are ethically obligated to make disclosures respecting risks to client safety or the safety of others.

### **Advocacy Does Not Espouse Any Particular Treatment Approach**

The assumption is often made that advocacy values some treatment and rehabilitative approaches over others. For example, some detractors have voiced the opinion that advocacy does not endorse the bio-medical model and use of medication. Because advocacy is consumer driven and dependent upon client instruction, it does not favour one intervention over another. It does strive to provide consumers with access to information that will assist them in making informed choices, but does not direct the choices that are made. In general, advocacy does not work on best interest and is independent of the delivery of care, treatment and support services. By its very nature, advocacy is intended to strengthen the consumers' voices and facilitate their

decision-making. It is not intended to displace others who may be involved in a consumer's life, treatment and support, such as, treatment team members, family and friends.

**Advocacy May Have a Positive Impact on Outcome:**

As stated in a PPAO manuscript in pre-publication, *Advocacy: Critical Component in a Comprehensive Mental Health System*:

A consumer seeking protection for his or her individual rights and freedoms may be seen as treatment non-compliant, lacking insight or as unable or unwilling to make productive use of professional treatment resources. Yet independent, partisan advocacy may provide a practical and philosophical bridge between the conceptually distinct perspectives of rights protection and treatment. Advocacy, while not a treatment intervention, may have a positive impact on outcome, insofar as it helps reduce some of the formidable barriers to recovery, provides practical solutions to problems encountered through everyday living, helps to overcome stigma and fundamentally empowers individuals to address issues concerning their rights and entitlements.

**Advocacy is Consistent with a Recovery Focus:**

As stated in the above referenced manuscript:

Recovery is an evolving concept at the core of which is the belief that individuals can and do surmount the symptoms and consequences of serious mental illness. It is both a process and a goal where a combination of the necessary skills, supports and personal and external resources contribute to the development of self-sufficiency, community integration and full membership in society at large... The journey toward recovery is unique and highly personal, enabling consumers to retain responsibility for their own wellness and recovery. It is guided by individual client goals and supported through client identified resources, formal and informal helping relationships, and networks of family, friends and peers... Problems such as poverty, homelessness, and the inability to access needed and wanted supports and services may negatively impact rehabilitative efforts and strivings toward recovery.

...Advocacy has much in common with a recovery framework. It places the consumer at the centre of the decision-making process and seeks to return decision-making authority to clients with respect to their treatment, rehabilitation and life choices. It is predicated on client instruction and strives to protect and preserve client rights and entitlements. Consumers are supported in achieving self-identified results and assisted in addressing concerns that often reflect barriers to personal needs or wants. Advocacy is supportive of client choice. In general, it dictates neither the end nor the means in its voicing of client concerns.

In summary, while mental health advocacy and treatment are frequently seen to be in direct opposition, we do not believe that upholding consumer rights and achieving the best interest goals of treatment are incompatible. On the contrary, advocacy provides an important counterweight to the authority of the treatment system. It can improve mental health outcomes by promoting client choice and participation and in supporting the development of a client-

centred system of care and treatment. There is an emerging body of evidence that supports the view that consumer engagement, empowerment and autonomous decision-making promote better clinical outcomes for individuals with mental illness. Coercive approaches to care and treatment which limit consumer choice may only provide short term and unsustainable solutions and may undermine long term goals for recovery and continued wellness.

Advocacy can inform clinical practice and promote systems-level change. In particular, advocacy can help address the social consequences of mental illness and may in turn reduce stigma and marginalization, complementing treatment, rehabilitation and support initiatives. Advocacy can assist consumers in achieving fuller social membership by supporting the realization of their rights as citizens.

Thank you for giving further consideration to our perspective which is based on more than 25 years of experience in supporting mental health consumers and working collaboratively within the system at large.

We would be pleased to discuss the role of mental health advocacy and its critical contribution to a comprehensive mental health system further at the convenience of the Committee.