



*Submission Regarding
Smoke-Free Ontario Act
Bill 164*

December 2005

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Psychiatric Patient Advocate Office

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

December 5, 2005

Mr. Denis Gertler
Project Director
Smoke-Free Ontario Legislation
Ministry of Health Promotion
250 Yonge Street, 35th Floor
Toronto, Ontario, M5B 2N5

Dear Mr. Gertler:

Re: Smoke-Free Ontario Act - Bill 164

Thank you for the opportunity to provide input into the regulations development process to help ensure that the regulations are clear and enforceable. We trust that the Ministry will take into account the special and unique needs of individuals with mental illness who find themselves in hospital, and who, when admitted for extended or prolonged periods, must consider hospital to be their home or place of residence. This is often the case for individuals who are in a forensic mental health facility. Many of our clients cannot leave their facilities to smoke in non-enclosed areas, given their legal status and restrictions on their freedom of movement. For this reason, we support patients having access to controlled smoking areas.

The Psychiatric Patient Advocate Office provided a submission to the Standing Committee on Finance and Economic Affairs in April 2005 and we hope that many of the issues and concerns highlighted in that submission will be taken into account when drafting the Regulations. While we understand the need to balance the rights of both smokers and non-smokers, we also know that many of our clients have made an informed decision to smoke and wish to exercise their choice to do so.

Should you have any questions or require additional information please contact me at (416) 327-7004. Thank you for your consideration of our submission.

Sincerely,

David Simpson
Director (A)

Background

The Psychiatric Patient Advocate Office (PPAO) is an arm's length rights protection program of the Ontario Ministry of Health and Long-Term Care, with a mandate to protect the rights of patients with mental illness in the current and divested provincial psychiatric hospitals. As partisan advocates for our clients, we are supportive of their right to make informed decisions and choices, including having their decision to smoke respected.

Many of the facilities we provide service to have already gone smoke free, with varying degrees of success and each with its own challenges with respect to patients' rights, enforcement and health and safety issues. In some locations, hospitals allow smoking out-of-doors or on hospital grounds. Other hospitals, however, do not allow this, which appears to reach far beyond the intent of the legislation that patients not smoke in enclosed areas. The motive and intent of such a restrictive policy raises many troubling questions, but is a clear illustration of how policy and legislation can be misinterpreted and misapplied if the Regulations and the law itself are not clear and specific.

We are also aware of many other issues in hospitals across Ontario, including: some patients being routinely strip-searched by health practitioners looking for cigarettes and lighters as they have been deemed "contraband"; patients not being allowed to smoke out-of-doors on hospital grounds, as permitted at most health care facilities in Ontario; the sale of cigarettes by staff to patients; patients leaving hospital to access cigarettes, at times with tragic results; cancellation of privileges and visits due to being denied access to smoking; and patients being placed in restraint or seclusion following denial of or access to smoking.

From a rights perspective, the use of strip searches to enforce policy is troubling and may not meet the legal standard that any search be conducted only if there are "reasonable and probable grounds" for such a search. We know that such a policy, in a hospital, has the potential to damage the therapeutic relationship between patients and their caregivers.

Prohibition of Sale in Designated Places - Section 4(2)3

This section of the *Smoke-Free Ontario Act* states that "no person shall sell tobacco in a designated place...except, in the case of a facility that is designated under the *Mental Hospitals Act*...." The PPAO believes that at minimum, the Regulations should specifically state that any facility currently or formerly designated under the *Mental Hospitals Act* be exempt from this section, as this definition is too narrow and restrictive.

The Regulations should specifically name the ten current and divested provincial psychiatric hospitals as most of these facilities have now been divested and are no longer defined in the *Mental Hospitals Act*.

Controls Relating To Smoking Tobacco - Psychiatric Facility - Section 9

The PPAO believes that the Regulations must specifically name and designate each current and divested provincial psychiatric hospital to ensure that the Act is unambiguous with respect to the exception outlined in this section (See Appendix A). Additionally, we believe that other groups of psychiatric facilities should also be designated including: a scheduled facility under the *Mental Health Act* and forensic mental health facilities that are considered a place of residence for the patient.

Protection for Home Health-Care Workers - Section 9.1(2)

The Act provides protection for home health-care workers and the PPAO is supportive of such provisions. We would like to see the health-care worker provide a notice to the client, on first contact, of the conditions of their service and the processes that are in place should service be terminated at any time.

The PPAO believes that the Regulations should specifically state that the client be provided with progressively escalating notices with respect to the termination of services before that actually occurs. For example, the client should first be given a verbal warning so that they have an opportunity to comply with the request. A written warning or notice, with reasons for the termination of service should be the second step, if such a warning is required. This would allow the client an opportunity to know in advance the consequences of not complying with the request not to smoke in the presence of the health-care worker and to make informed decisions.

If service is terminated, the Regulations must specify that the termination of services is not permanent but temporary and what the client must do to have services re-instated. Clients must be given an opportunity to have services restored, if in compliance with the Act. The Regulation must also specify the period of time that services will be withdrawn and that the client has access to a transparent complaints and appeal process, should they disagree with the decision of the health service provider to terminate services.

In order for the complaints and appeal process to be effective, the Regulations must state that the review of complaints will be done in a timely manner, with written decisions and a clearly defined and easily navigated appeal process in place. Such a process will protect the rights of clients who have had their health care services terminated and heighten the accountability of all parties.

Conflict with other Legislation - Section 12

The PPAO believes that the Act should be the only piece of legislation that governs smoking in the province and that it supercede all other legislation, regulations and municipal by-laws. This would prescribe one standardized approach and allow for the

provisions of the Act to be in place, including any exceptions that have been deliberated and granted by elected provincial government officials, to psychiatric facilities. Unless this occurs, there will be a patchwork of by-laws, inconsistencies and inequitable application of the law across the province.

Inspectors - Section 14

The PPAO submits that additional items be added to this section. The Regulations must specify that inspectors be required to have a name tag visible at all times so that patients, families and providers know to whom they are speaking. It is also imperative that a complaints process be in place to deal with any issues related to how the inspector provides service, their conduct and professionalism and the manner in which they execute their duties. The Regulations must also specify that the inspector is required to provide information to the patient about the complaints process or to whom a complaint may be made if the client requests such information.

The PPAO would like the Regulations to require training on mental health, mental illness and addictions and patients' rights for those inspectors who will routinely visit mental health facilities. Given the unique and special needs of this population, inspectors would be well served to have specialized training so that they can interact with individuals with mental illness in the most positive, informed and professional way possible. Failure to provide such training to inspectors would be a disservice to all parties. The PPAO would be pleased to design and provide training for inspectors, in collaboration with consumer-survivors and families.

This section also addresses the powers of inspectors. The Regulations, in our opinion should specifically state that if the inspector wants to access, copy or use the record of personal health information in any proceeding, a subpoena is required. Health care staff must not be able to simply turn the record over to the inspector merely because it has been requested. A high standard of rights protection must be maintained due to the confidential nature of the information in question. This will also ensure consistency with other similar legal proceedings. Rules for the collection, use and disclosure of personal health information should be guarded and protected, strenuously, allowing only those inspectors having the patient's consent to access their personal health record.

The removal of a record for "review and copying" by an inspector is problematic given that this will in fact be the record of personal health information in mental health facilities. The record should never be removed for these purposes and the Regulation must specify how the record of personal health information in mental health facilities will be handled. Ideally this will occur through a warrant or subpoena in all circumstances.

If the health care facility is going to grant access to patients' records of personal health information to inspectors, then the Regulations must specify the procedures for doing so. There must also be a complaints process in place if the patient wishes to appeal this decision and time must be allowed for the patient to consult with legal counsel, prior to

the record being disclosed to an inspector. The Regulations must be clear about access to records in psychiatric facilities to protect the rights of all individuals with mental illness.

Offences - Section 15

Most of the patients in the ten facilities where the PPAO provides service have a very meager annual income. For instance, many patients only receive the Personal Needs Allowance of \$116.00 per month or, some other form of government financial benefit. Any penalties imposed on these individuals should not be disproportionate to their monthly income. For example, a monetary fine of \$110.00 for a first offence under a municipal bylaw would represent a majority of a client's monthly income, creating both financial and emotional hardship. The income source of an individual should be taken into account before any financial penalty is imposed and ideally, those receiving only government financial assistance should either be given a warning or if a fine is imposed, it should be a nominal amount.

Consequently, the Regulations should reduce fines or perhaps even allow for financial fines to be set aside for those receiving social assistance.

If patients are going to be charged under this Act then the Regulations should require that Legal Aid Ontario provide the funding necessary to assist patients in defending themselves before the Court and in any legal proceedings. This would provide both a safety net and a patients' rights perspective to be incorporated into the law, while addressing any power or resource imbalances experienced by those with mental illness.

Other Significant Issues

Requirement for Consultation with Stakeholders

The PPAO believes that the Regulations should require consultation with stakeholders, including inpatients in mental health facilities, before any changes to this Act are permitted. Consultation with stakeholders should become a cornerstone of this legislation to allow for those who are powerless and disenfranchised to participate in a review and consultation process. This will ensure that facilities, professionals and the government listen to the voices and concerns of those who will be directly impacted by any changes to the law or policies with respect to smoking in Ontario.

Monitoring of Complaints and Issues By Government

The PPAO recommends that the Regulations require the Ministry of Health and Long-Term Care to establish a reporting system whereby issues, trends and complaints can be effectively tracked and responded to by the government in an effort to address systemic issues. The status of these complaints should be reported on publicly, on an annual basis.

Creating a timely, effective and transparent complaints process will build public confidence in this legislation. It will also make clear that compliance and enforcement are part of a broader smoking cessation strategy in Ontario.

Conclusion

The PPAO would like to see the Regulations address the above issues and concerns and be very clear and concise. We fear that if this provincial legislation does not supercede municipal bylaws (that may be more or less restrictive), then this will lead to an inconsistent and unenforceable patchwork of rules and standards across the province. The Smoke Free Ontario Act should be the only legislation governing smoking in the province of Ontario, with all municipal by-laws defaulting to this legislation and the provisions contained therein.

In conclusion, we are hopeful that the Regulations will recognize the special circumstance of patients in mental health facilities in Ontario, including those who will reside in these facilities for extended periods of times and who are compelled to consider hospital to be "home". The Regulations must also support patients' choice to smoke, either in controlled smoking areas or out-of-doors in non-enclosed areas. Finally, the PPAO is hopeful that the Regulations will have a rights based focus and require consultation with stakeholders, prior to any further change being made to this legislation.

Appendix A
List of Facilities

Name of PPH	Current/Divested Name
Brockville Psychiatric Hospital	Royal Ottawa Health Care Group - Brockville Psychiatric Hospital
Hamilton Psychiatric Hospital	Centre for Mountain Health Services - St. Joseph's Healthcare Hamilton
Kingston Psychiatric Hospital	Providence Continuing Care Centre - Mental Health Services
London Psychiatric Hospital	Regional Mental Health Care London - St. Joseph's Healthcare London
North Bay Psychiatric Hospital	Northeast Mental Health Centre - North Bay Campus
Mental Health Centre Penetanguishene*	Mental Health Centre Penetanguishene (MOHLTC)*
St. Thomas Psychiatric Hospital	Regional Mental Health Care St. Thomas - St. Joseph Healthcare London
Lakehead Psychiatric Hospital	St. Joseph's Care Group - Lakehead Psychiatric Hospital
Queen Street Mental Health Centre	Centre for Addiction and Mental Health - Queen Street Division
Whitby Mental Health Centre*	Whitby Mental Health Centre (MOHLTC)*

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* hospital not divested, continues to be operated by the MOHLTC