Registered Nurses' Association of Ontario
L'Association des infirmières et infirmiers autorisés de l'Ontario

RNAO Bill 173 Submission: Preserve Access to Quality of Health Care Information

Speaking Notes:
Standing Committee on Finance and Economic Affairs

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The Registered Nurses' Association of Ontario (RNAO) is the professional association for registered nurses who practise in all roles and sectors across Ontario. RNAO's mission is to speak out for health, health care, and nursing. RNAO appreciates the opportunity to present this submission on Bill 173, the Better Tomorrow for Ontario Act (Budget Measures), 2011, to the Standing Committee on Finance and Economic Affairs.

The 2011 Budget was a cautious budget, and RNAO greeted it with qualified approval.[1] There was limited new spending and no new taxes. The resulting budget deficit was projected to drop to 2.5 per cent of GDP in the coming fiscal year, compared to 3.3 per cent and 2.7 per cent in the previous two years.[2] In those years, the government had responded to the economic crisis by deficit spending in order to help avert a full-blown collapse. There was broad domestic and international consensus on the necessity of deficit spending under the circumstances. However, unemployment in Ontario and Canada remain stubbornly high in spite of some economic recovery (For March 2011, 8.1 per cent in Ontario and 7.7 per cent in Canada, seasonally adjusted),[3] and governments must be careful to avoid tipping their economies back into recession by prematurely cutting deficits.

Accordingly, the government has made some effort to protect program spending, but it is projected to drop from 18.5 per cent to 17.7 per cent of GDP in the coming year. Revenues are also projected to lag, dropping from 17.3 per cent to 16.9 per cent of GDP.[4]

In particular, RNAO applauded the government's decision to fund a mental health and addictions strategy, but we urge the funding be strengthened to cover all Ontarians needing such services and not just children and youth. We ask in particular that Aboriginal people receive needed attention given the extent to which many Aboriginal communities are being devastated by high addiction rates.

There has also been a marginal improvement in social assistance rates, but the cumulative improvement since 2003 of just 13.7 per cent[5] lags inflation (Ontario consumer prices rose 14.7 per cent between October 2003 and February 2011 alone),[6] meaning that recipients will actually be able to buy less in 2011 than they could in 2003 with their social assistance cheques. In addition to more meaningful enhancements to social assistance rates, we urge concerted attention to social determinants of health, such as affordable housing and further increases to the minimum wage. We need to see concrete proof of commitment to the strategy to reduce poverty.

As we stated in our media release on the day the budget was unveiled, instead of investing tax payer dollars by replacing existing jails that had the capacity to serve up to 400 inmates with two new mega-jails and financing these through expensive public-private partnerships, attention must be given to social determinants of health such as investing in affordable housing and increasing the minimum wage. The reason for this is simple: crime in Ontario is decreasing and poverty is not. The minimum wage, affordable housing and social assistance are the principled investments for a government that says it doesn't want to leave anyone behind. Mega jails will only put more people behind bars.

With respect to nursing human resources, RNAO urges the government to meet its commitment of 9,000 additional nursing positions in its 2007-2011 mandate, and to make the outstanding number of positions (an estimated 3,421)[7] all RN positions. As we have shared previously, the number of additional RN positions created in Ontario for the past three years has substantially lagged growth in RPN positions. As a result, the province's own report[8] predicts a shortage of 30,000 RNs, as compared to 1,500 RPNs by 2020, and Ontario has the second lowest proportion of RNs per population in the country. The creation of 60,000 post-secondary spaces, of which 15 per cent are allocated to nursing, is a welcome step in the right direction provided all 9,000 new educational seats are allocated to RN programs, specifically compressed and second entry, as well as bridging programs from RPN to RN.

Our 2011 pre-budget submission[9] details needed spending on social determinants of health, environmental determinants of health, and on health and nursing. Budget 2011 fell short of our expectations, but at least it did not slash social programs in an ill-advised rush to cut deficits.

We do however wish to point to a feature of Bill 173 that alarms us. It is not a budgetary item at all, and we question why it should appear in this Bill, or in any other Bill for that matter. That is Schedule 15, which would allow hospitals to exclude the following material from freedom of information requests under the Freedom of Information and Protection of Privacy Act (FIPPA):

> "information provided to, or records prepared by, a hospital committee for the purpose of assessing or evaluating the quality of health care and directly related programs and services provided by the hospital."

The proposed amendment would be appended to the subsection of exemptions "Economic and other interests of Ontario," rather than the subsections of exemptions for "Personal privacy" or "Danger to safety or health." This does little to alleviate the concerns of critics who fear that the exemption is motivated by a desire to minimize legal liability due to quality issues rather than a desire to improve patient outcomes or enhance quality.

According to the Minister of Health, this exclusion was put in at the request of the hospital sector:

> "We are at a very important time in our health care system because we are now starting to turn our attention to quality improvements. I think the member opposite understands how important it is that we take a good hard look at quality in our hospitals throughout our health care sector. Part of the process of improving quality requires that within hospitals they're able to have very open and frank conversations about where quality was not what it should have been. After consultation with the hospital sector, we have made this change that will allow improvements in quality to continue."[10]

By "the hospital sector", we believe the Minister means the Ontario Hospital Association (OHA), which had this to say about the proposed exclusion:

> "Previous amendments to FIPPA by the *Broader Public Sector Accountability Act* did not go far enough to protect certain classes of quality of care information generated by hospitals from public disclosure. As drafted, only quality of care information covered under the *Quality of Care Information Protection Act* and the *Personal Health Information Protection Act* is excluded from access by the public through FIPPA. Neither law protects the everyday discussions (and records thereof) that healthcare professionals regularly have, and documents developed relating to quality, safety and risk management."[11]

The OHA in its submission on the *Broader Public Sector Accountability Act* (Bill 122) is very explicit about its desire to expand the scope of exemptions to cover all conversations about quality of care:

> "In fact, you may recall that last October, the Ontario Hospital Association invited freedom-of-information legislation to be extended to hospitals because we knew it was one more way to enhance the public's trust and confidence in their health care system. At that time, we stated that any such legislation must take into account the complexity of the work hospitals do every day. While Bill 122, if passed, would accomplish many positive things, it does not, in our opinion, sufficiently protect quality-of-care information that falls outside the Quality of Care Information Protection Act, or, as it's popularly known, QCIPA. For that reason, we request that Bill 122 be amended to specifically exclude that category of quality-of-care information.

> "QCIPA is a useful piece of legislation. Its focus, however, is actually quite narrow. QCIPA allows for discussions and review of serious incidents involving the harm or death of a patient, and protects those discussions from ever being used in litigation or other disciplinary proceedings. The legislation is very clear and sets out strict parameters for what information can be protected, extending only to activities of a specifically and specially designated quality-of-care committee."[12]

Certainly, the proposed amendment goes much further than existing exclusions. It would go very far indeed. By virtue of its vague wording, it could be used to exclude from freedom of information (FOI) requests virtually any information on quality of care in a hospital. A hospital committee is not defined, meaning any quality of care discussion involving a group of two or more individuals could be construed as excludable. And indeed, that would appear to be the desire of the OHA, as expressed in the above statement.

As noted above by the OHA, the *Quality of Care Information Protection Act* (QCIPA) will exempt from FIPPA all quality of care information collected or prepared for a quality of care committee.[13] This was done via the already mentioned Bill 122, which inserted that exemption as an amendment to QCIPA (Section 1.1). To us, that is a broad exemption, and the government should consider whether there are less blunt instruments to encourage active review of quality of care, such as suppressing only that information that could serve to identify individual patients and health professionals.

Existing and proposed exclusions of health quality information in Schedule 15 would seem to fly in the face of the stated purposes of Bill 122, the *Broader Public Sector Accountability Act, 2010*.[14] As the government told the media and public upon introduction of Bill 122, "The government is implementing the recommendation of the Auditor General and is taking further initiatives to raise the bar for accountability and transparency whenever taxpayer dollars are spend. Increasing transparency and accountability is a key component of the government's Open Ontario Plan."[15]

Similarly, the public policy underlying the *Freedom of Information and Protection of Privacy Act*:[16]reflects a presumption of democratic transparency and accountability:

> **1.** The purposes of this Act are,
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> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
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> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
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> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
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> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information. R.S.O. 1990, c. F.31, s. 1.

In fact, the proposed exemptions are very broad and not sharply defined.

The provisions in Bill 122 covering hospitals under FIPPA represented a significant step forward in transparency and accountability, although that step was qualified by the simultaneous exemption of information produced by or for the quality of care committees. Moreover, Bill 122 will give a blanket exemption for hospital records prior to January 1, 2007 (Section 69 (2) in FIPPA).

Finally, Bill 122 allowed Cabinet to exempt one or more private hospitals from the provisions of FIPPA. We do not understand the advantage to Ontarians of these exemptions.

Taking away access to the remaining quality of care information would be a further step backward, removing more of the accountability of hospitals under FIPPA. Ontarians legitimately want and need to know about the quality of care in their hospitals, and that has already become more difficult now that the popular Ontario hospital reports are no longer being created.[17] Those reports were a laudable expansion of transparency and accountability, and afforded an excellent opportunity for quality improvement. Finally it should be noted that, unlike other provinces, Ontario already exempts hospitals from the purview of the Ontario Ombudsman,[18] and the proposed amendment to FIPPA in Bill 173, Schedule 15 would give Ontarians even less access to the information that they require about hospitals.

RNAO believes strongly that if you want to take away the right of patients and the public to know about quality of care in a hospital, you must provide very strong justification. Failing that, you must sharpen the language on the exclusion so that it only allows for exclusions in justifiable circumstances. Proponents must demonstrate why on balance the public interest is served by overly-broad exclusions.

In the event that the government wishes to extend exemptions beyond those ample exemptions already provided in the two acts (*Freedom of Information and Protection of Privacy (FIPPA),* and *Quality of Care Information Protection Act (QCIPA)*), then the purposes of the exemptions must be spelled out and written to achieve those ends in a way that minimizes the loss of access by the public to information of legitimate interest to them in the hospital sector. For example, if the government wishes to argue that quality of care conversations could be threatened by the chill of exposure, then an amendment could be written to specifically guarantee the personal privacy of those engaged in quality of care discussions. Any additional exemption in FIPPA concerning quality of care discussions must be written in a way that it only applies to that portion of material which serves to identify individuals. It must not exempt the quality of care information itself. Public access to this information is essential for a transparent, accountable health system.

To be clear, RNAO did not support the amendment that was identical to Schedule 15 when it was originally introduced as Government Motion 48 on November 29, 2010. We remain firm in our position of not supporting this amendment now.

RNAO Recommendations

- Reject Schedule 15 and oppose blanket exemptions of hospital health quality information and records from freedom of information requests.

- Empower the Ontario Ombudsman to investigate individual complaints about hospitals.

The Registered Nurses' Association of Ontario thanks the Standing Committee on Finance and Economic Affairs for the opportunity to present our feedback in support of expenditures and public policies that would enable all Ontarians to live in health and dignity.

References

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[7] Calculations from College of Nurses of Ontario. (2011). RN database.

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[13] Ontario. (2011). *Quality of Care Information Protection Act*. Section 1.1 and definitions of "quality of care committee" and of quality of care information." The quality of care information does not include information in personal health records.

[14] *Broader Public Sector Accountability Act, 2010*, S.O. 2010, c.25.

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