MANITOBA OMBUDSMAN

REPORT ON THE PROTECTION FOR PERSONS IN CARE OFFICE

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BACKGROUND

This investigation was undertaken in response to a number of disclosures to the Ombudsman in June 2010 under *The Public Interest Disclosure (Whistleblower Protection) Act* (PIDA), alleging wrongdoing at the Protection for Persons in Care Office (PPCO).

All disclosers were interviewed to determine whether the allegations made in the disclosures, if substantiated, would amount to wrongdoing as defined by PIDA. Wrongdoing is defined in section 3 of PIDA as follows:

> *This Act applies to the following wrongdoings in or relating to the public service:*
>
> > *(a) an act or omission constituting an offence under an Act of the Legislature or the Parliament of Canada, or a regulation made under an Act;*
> >
> > *(b) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of an employee;*
> >
> > *(c) gross mismanagement, including of public funds or a public asset;*
> >
> > *(d) knowingly directing or counselling a person to commit a wrongdoing described in clauses (a) to (c).*

It was determined that the issues and concerns disclosed would not amount to wrongdoings as defined by PIDA, but could be administrative deficiencies impeding the effective operation of the PPCO and its ability to fulfill its statutory mandate.

Based on that determination, a decision was made to proceed with an investigation under *The Ombudsman Act*, and the Deputy Minister of Health was notified accordingly. The Ombudsman met with the Deputy Minister, who undertook to ensure the department's full cooperation throughout the investigation.

PROTECTION FOR RESIDENTS OF CARE FACILITIES

The Protection for Persons in Care Act (the Act) was introduced in the Manitoba Legislature in April 2000 and proclaimed in force on April 30, 2001.

The Act was described as an "extra safeguard…designed to protect Manitobans in hospitals and personal care homes against physical, sexual, mental, emotional and financial abuse at the hands of family members, acquaintances or caregivers." The Act was intended to "…affirm in law the treatment we expect our loved ones to have, in a safe and secure environment free from the fear or reality of any type of abuse."

The Act establishes a requirement that care providers who have a reasonable basis on which to believe that a patient is, or is likely to be, abused shall promptly report the belief, and the

information on which it is based, to the Minister or the Minister's delegate. Those reports are made to the PPCO.

Primary responsibility for protecting care facility patients from abuse rests with facility operators. Section 2 of *The Protection for Persons in Care Act* imposes a duty on operators of health care facilities to "…protect patients of the facility from abuse and to maintain a reasonable level of safety for them."

The Personal Care Home Standards Regulation (Regulation 30/2005) under *The Health Services Insurance Act* (C.C.S.M. c. H35) requires facility operators to establish safeguards to prevent residents from being abused. They are also required to establish a written policy that sets out those safeguards and the appropriate action to be taken when abuse is alleged.

The definition of abuse in the Regulation is the same as it is in *The Protection for Persons in Care Act*: mistreatment of patients that causes or is reasonably likely to cause serious harm.

A 2010 amendment to the Act expanded the reporting requirements to include adult patients receiving care in emergency departments, urgent-care centres in health-care facilities and geriatric day hospitals.

PROTECTION FOR PERSONS IN CARE OFFICE

The Protection for Persons in Care Office (PPCO) has been in operation since 2001. During our investigation, the PPCO staff consisted of a Manager, four investigators, two intake staff and support staff. The investigators were either social workers or nurses, all of whom received training as investigators. The manager of the PPCO reports to the Director of Corporate Services, who is also directly involved in the management of the PPCO.

The office receives and investigates allegations of abuse in care facilities throughout the entire province. Information about the PPCO can be found on the website of Manitoba Health at http://www.gov.mb.ca/health/protection/index.html, as well as in pamphlets and posters provided to the public.

The vast majority of reports received by the PPCO relate to patient-on-patient abuse, where one care facility resident is alleged to have abused another. We were advised that in many of these cases, the alleged abuser will be a person suffering from some degree of diminished capacity typically associated with dementia.

A small minority of reports received by the PPCO relate to allegations of abuse of patients by staff. While both types of abuse allegations may be investigated by the PPCO, they can require different kinds of investigations involving very different considerations. Patient-on-patient abuse may primarily involve institutional safety planning and patient management. Staff- on-patient abuse can have human resource implications and involve other external agencies such as law enforcement or professional standards bodies.

The statutory framework created by *The Protection for Persons in Care Act* requires that upon receipt of an allegation of abuse, the office conduct an initial inquiry to determine if there are reasonable grounds to believe that a patient is or is likely to be abused. If there are reasonable grounds to believe a patient has been or is likely to be abused, the allegation is investigated by PPCO staff.

PPCO staff investigators have broad investigative powers, including the right to enter facilities at any reasonable time, the right to require people to provide them with information they believe necessary for their investigations, and the right to require the production of documents for examination or copying. Facility operators and staff are required to provide investigators with all reasonable assistance.

Upon completing an investigation, investigators are required to set out their conclusions and the reasons for them in a report to the Minister. The Minister's delegate for the purposes of *The Protection for Persons in Care Act* is the Director of Corporate Services, who reports to the Assistant Deputy Minister of Health, Provincial Programs and Services.

Upon receiving an investigator's report, the Minister (delegate) may give the operator of the health facility involved any directions considered necessary to protect the patient from abuse. The Act is intended not only to facilitate the reporting and investigation of abuse but also to prevent abuse. PPCO staff investigators are also referred to as "abuse prevention consultants," and the Act does not require a finding of abuse as a prerequisite to issuing directions to protect patients from abuse.

Operators of health care facilities who receive directions are required to comply with them within the time the specified, and to provide a written report describing what action has been taken or will be taken to comply with the directions given.

Many people who work in health care facilities are governed by professional licensing and standards bodies. If the Minister believes on reasonable grounds that a person governed by such a body has abused a patient or has failed to comply with the duty to report abuse, the Minister may refer the matter to the body or person that governs the person's profession or that certifies, licenses, or otherwise authorizes or permits the person to carry on his or her work, profession or occupation.

A professional body that receives such a report must investigate the matter to determine whether a professional status review or disciplinary proceedings should be commenced against the person. At the conclusion of such an investigation the professional body must advise the Minister of their determination and, if applicable, the results of any professional status review or disciplinary proceedings.

Some allegations of abuse of patients in care facilities relate to conduct that may be contrary to the criminal law. Such allegations may be investigated by police.

The PPCO operates within this broader framework of protective measures, with multiple bodies having different responsibilities, mandates, investigative authority, and decision-making capacity.

The PPCO is going through a process of change, which has included an examination of fundamental issues such as the correct interpretation of the statutory provisions that provide its mandate.

It is the process of grappling with these difficult issues, and dealing with the disputes and disagreements that have arisen as a result of this process, that has resulted in this matter being raised with our office.

SCOPE OF INVESTIGATION

During the investigation Ombudsman investigators interviewed all PPCO abuse prevention consultants (staff investigators), the PPCO Manager, the Director of Corporate Services, the Director of the Legislative Unit of Manitoba Health and the Assistant Deputy Minister responsible for the PPCO. As well, a number of former staff and contract investigators were interviewed.

PPCO investigator and policy manuals dating back to 2002 were reviewed, as were other policy documents, correspondence and emails. Based on the concerns raised, a number of PPCO investigation files were reviewed for the purpose of examining how the PPCO interpreted and applied various sections of the Act. Those files were discussed with management and staff and used to inform our conclusions and recommendations, but in order to maintain the privacy of patients no individual files are referred to in this report.

The investigation also included a review of certain provisions from relevant statutes in two other provinces, for comparison purposes.

The investigation was conducted between the end of June and middle of October 2010 by a team of five investigators and the Manager of Systemic Investigations, under the direction of the Ombudsman.

Throughout the investigation our office received full cooperation from all staff and management of the PPCO. Their willingness to share their knowledge, and their thoughts and opinions on complex and sometimes contentious issues has contributed greatly to our understanding of the important work done by the PPCO.

We express our appreciation to everyone involved.

ISSUES AND CONCERNS

The primary concern giving rise to our investigation is an allegation that the PPCO has re-interpreted the statutory definition of abuse in a way that has the effect of raising the threshold for a finding of abuse. This can result in allegations of abuse being assessed and closed at the initial "inquiry" phase incorrectly, rather than proceeding to investigation. It can also result in investigations now concluding that abuse has not occurred, because the alleged abuse does not meet the revised threshold for abuse as set out in PPCO guidelines.

There is also a concern that PPCO operational guidelines have the effect of preventing staff from investigating allegations of abuse made against physicians, and restrict their ability to make necessary referrals to the College of Physicians and Surgeons of Manitoba (the College), whose mandate is to establish professional standards and investigate complaints about a breach of those standards.

There is concern that some reported allegations of abuse that may involve criminal conduct are not also referred to law enforcement agencies for investigation, when they are best equipped to investigate those allegations.

If the statute is not being correctly interpreted and applied, this has the potential to reduce the effectiveness of the PPCO and the level of protection of care facility residents who are predominantly elderly and vulnerable, as contemplated in *The Protection for Persons in Care Act.*

We were advised that the review of PPCO policies and practices was undertaken as part of an ongoing effort to achieve greater consistency and fairness in the treatment of everyone involved with the PPCO. It was hoped that revised policies would assist staff in determining when investigations should be undertaken, by clarifying critical statutory terms such as abuse and reasonable grounds.

The process included a painstaking review of various draft policies and consultation with both the Legislative Unit of Manitoba Health and counsel from Civil Legal Services.

That process occurred at a time when there was also a change in structure at the PPCO, through the creation of a group of staff investigators. Previously, staff had performed a case management role for external contract investigators.

While certain parts of that process is ongoing, we have had the benefit of examining some of the outcomes of that process at the early implementation stage and are in a position to offer suggestions based on the review of an external and impartial body after a review using the extensive investigative powers of *The Ombudsman Act.*

DEFINITION OF ABUSE

Serious Harm

The Protection for Persons in Care Act defines abuse as:

> *... mistreatment, whether physical, sexual, mental, emotional, financial or a combination of any of them, that is **reasonably likely** to cause death or that causes or is reasonably likely to cause **serious** physical or psychological **harm** to a person, or significant loss to the person's property;*

This statutory definition has not changed since the PPCO began operation in 2001, and since its inception the PPCO has had various guidelines to assist staff in assessing allegations to determine whether the conduct complained about amounts to abuse under the Act. These guidelines remained substantially unchanged until late 2008 when the PPCO began the process of revising them, a process that was finalized in November 2009 with the publication of an internal document titled Guidelines for Assessing Allegations of Abuse.

The stated rationale for the review and revision that occurred during 2008 and 2009 was a desire to achieve consistency in the interpretation and application of the statutory definition of abuse. The best evidence offered in support of the decision to revise the long-standing policy guidelines for assessing allegations of abuse was the absence of any clear definition of serious harm, a critical component of the definition of abuse.

Although the statutory definition of abuse has always included the concept of serious harm, earlier policy did not provide guidance on what constitutes serious harm. At issue in this review is whether the PPCO has reached the correct determination of what constitutes serious harm within the meaning of the statutory definition.

Working definitions of abuse from PPCO Administrative Manuals dating back to 2002 describe abuse in terms of the abusive act being reported or investigated, and provides examples of behaviours that constitute abuse. For example, the working definition of physical abuse was:

WORKING DEFINITIONS OF ABUSE (2002)

- ***Physical abuse: includes physical and medical***

  Any act of violence or rough treatment causing injury or physical discomfort to a patient. Such behaviour includes any kind of physical assault such as slapping, pushing, pulling, kicking, punching; injury with any object or weapon; deliberate exposure to severe weather; and the inappropriate use of restraints and/or forcible restraint. Physical abuse also includes misuse of medications and prescriptions, including deliberate withholding of medication and over-medication.

While these earlier guidelines referred specifically to acts of violence, or sexual or emotional exploitation, as abuse, the 2009 Guidelines for Assessing Allegations of Abuse identifies those same acts as examples of mistreatment.

GUIDELINES FOR ASSESSING ALLEGATIONS OF ABUSE (2009)

Examples of physical mistreatment *include, but are not limited to*

- *hitting, pushing, pulling, rough handling, shoving;*
- *use of an object or weapon in a violent manner;*
- *slapping, kicking, beating;*
- *using physical restraint not following policy;*
- *deliberate exposure to extreme weather;*
- *misuse of medication, withholding medication;*
- *chemical restraint (e.g. psychotropic medication for any purpose not ordered by the physician); or*
- *neglect (see below)*

Physical mistreatment constitutes abuse if it:

- *is reasonably likely to cause death;*
- *causes serious physical harm;*
- *is reasonably likely to cause serious physical harm;*
- *causes serious psychological harm; or*
- *is reasonably likely to cause serious psychological harm.*

This approach to defining abuse sets the threshold for a finding of "serious harm". Under this approach, regardless of the mistreatment, there can be no abuse unless there is serious harm. The 2009 Guidelines establish the following definition of "serious harm."

> ***Serious Harm*** *(in situations that involve abuse other than financial abuse)*
> *Under the PPCA, mistreatment that causes or is reasonably likely to cause serious harm (whether physical or psychological) can constitute "abuse".*
>
> *In general, mistreatment that interferes in a substantial way with a person's physical or psychological well-being, health or integrity, and that results in a consequence to him/her such as, disability, injury, unplanned admission to hospital or unusual extension of a hospital stay constitutes serious harm.*

A note in the Guidelines indicates that the definition of serious harm has been "adapted from the Supreme Court of Canada and *The Regional Health Authorities and Manitoba Evidence Amendment Act*."

In fact, the PPCO definition of serious harm combines two separate definitions created for very different purposes. The first part of the definition is:

In general, mistreatment that interferes in a substantial way with a person's physical or psychological well-being, health or integrity;

This part of the definition of serious harm is taken from R. *v.* McCraw, [1991] 3 S.C.R. 72, a criminal law case in which the Supreme Court of Canada examined the words "serious bodily harm" contained in a section of the Criminal Code.

Below is a section of the decision in which the Court addressed this issue:

> *… It is well settled that words contained in a statute are to be given their ordinary meaning. Other principles of statutory interpretation only come into play where the words sought to be defined are ambiguous. The words "serious bodily harm" are not in any way ambiguous.*
>
> *It is true that the phrase is not defined in the Code. However "bodily harm" is defined in s. 267(2). That definition is as follows:*
>
> > *For the purposes of this section [assault with a weapon or causing bodily harm] and sections 269 [unlawfully causing bodily harm] and 272 [sexual assault with a weapon, threats to a third party or causing bodily harm], "bodily harm" means any hurt or injury to the complainant that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.*
> >
> > *That definition of "bodily harm" can I think be properly applied to those words as they appear in s. 264.1(1)(a).*
> >
> > *There remains the question then of how the word "serious" ought to be defined. The Shorter Oxford English Dictionary (3rd ed. 1987) provides the following definition of "serious":*
> >
> > ***Serious** . . . Weighty, important, grave; (of quantity or degree) considerable. **b.** Attended with danger; giving cause for anxiety.*
>
> *Giving the word "serious" its appropriate dictionary meaning, I would interpret "serious bodily harm" as being any hurt or injury that interferes in a grave or substantial way with the physical integrity or well-being of the complainant. Thus "serious bodily harm" does not require proof of the same degree of harm required for aggravated assault described in s. 268 of the Code; that is to say the wounding, disfiguring or endangering of the life of the complainant. Yet it requires greater harm than the mere "bodily harm" described in s. 267; that is hurt or injury that interferes with the health or comfort of the complainant and that is more than merely transient or trifling in nature.*
>
> *Does the phrase encompass psychological harm? I think that it must. The term "bodily harm" referred to in s. 267 is defined as "any hurt or injury". Those words are clearly broad enough to include psychological harm. Since s. 264.1 refers to any "serious" hurt or injury then any serious or substantial psychological harm must come within its purview. So long as the psychological harm substantially interferes with the health or well-being of the complainant, it properly comes within the scope of the phrase "serious bodily harm". There*

> *can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm. I can see no principle of interpretation nor any policy reason for excluding psychological harm from the scope of s. 264.1(1)(a) of the Code.*
> *In summary the meaning of "serious bodily harm" for the purposes of the section is any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant.*

The second part of the PPCO definition is:

> *and that results in a consequence to him/her such as, disability, injury, unplanned admission to hospital or unusual extension of a hospital stay constitutes serious harm.*

This wording comes from the definition of a "critical incident" in *The Regional Health Authorities and Manitoba Evidence Amendment Ac*t. That Act defines a critical incident as:

> *An unintended event that occurs when health services are provided to an individual and results in a consequence to him or her that*
>
> *(a) is serious and undesired, such as death, disability, injury or harm, unplanned admission to hospital or unusual extension of a hospital stay, and*
>
> *(b) does not result from the individual's underlying health condition or from a risk inherent in providing the health services.*

In adopting this conjoined definition of serious harm, the PPCO has gone beyond what was necessary to achieve the goal of providing a practical guideline for assessing when mistreatment amounts to serious harm, as contemplated by the statutory definition of abuse in the Act. The decision of the Supreme Court in R. *v.* McCraw was sufficient for that purpose. It considers the distinction between harm and serious harm, defines its effects, and confirms that bodily harm can include serious or substantial psychological harm.

The PPCO's use of the definition of serious harm arising from critical incidents is inappropriate in light of the difference between critical incidents (unintended events occurring when providing health care) and abuse. Although serious harm can result from circumstances such as accidents, there is no deliberate intent to harm or abuse a person. Abuse can result from neglect or inaction, but it is typically assessed on the basis of a deliberate action and its actual or likely outcome rather than on the basis of an unintended event.

Applying the current working definition of abuse, it is possible to have abusive actions (mistreatment), even criminal conduct, that will not be considered abuse by the PPCO. This is a consequence of the high threshold created by the guideline definition, requiring that in order to find serious harm the abusive action must result in a *"… consequence to him/her such as, disability, injury, unplanned admission to hospital or unusual extension of a hospital stay… ."*

A review of the 2009 Guidelines indicated that there may be other areas where the high threshold definition of serious harm adopted by the PPCO would appear to make it difficult or impossible

to find abuse, even if abusive action had occurred. Our analysis was confirmed by interviews with both staff and management of the PPCO.

Under the current working definition of abuse one of the conditions that makes care facility residents vulnerable and in need of protection, namely, a mental impairment, may inadvertently shield abusers. This may result when the abusive act would normally cause emotional harm but because of the inability of a patient to comprehend the action and indicate what had occurred, the assessment of the consequence to the patient may be that it is difficult or impossible to determine if there has been emotional harm.

This is a particular concern given that this legislation is intended to protect residents of care facilities who are often elderly patients who can be physically frail and also suffering from some type of mentally debilitating condition such as dementia.

Reasonably Likely to Cause Serious Harm

Under the statutory definition of abuse, mistreatment is abuse not only when it causes serious harm but also when it is "reasonably likely" to cause serious harm. Interviews with staff and former staff suggest that the understanding of reasonably likely has also changed significantly with the process that began in the summer of 2008.

A Draft Investigation Manual from September 2008 defines "reasonably likely" in this way:

"Reasonably Likely" means that it is reasonable to assume based on the evidence that abuse is more likely to occur than not ***in the future*** *i.e., reasonably likely to cause death, or reasonably likely to cause serious physical or psychological harm to a person, or significant loss to the person's property. (Emphasis Added.)*

The 2009 Guidelines for Assessing Allegations of Abuse adds this to the discussion of "reasonably likely":

> *Abuse can include mistreatment that has not yet resulted in death, serious harm or significant loss to property, but which, if it continued or repeated, would be "reasonably likely" to cause these kinds of harm.*

Below is an excerpt from a March 2010 document intended to explain the PPCO interpretation of the words "reasonably likely to cause…":

Reasonably Likely: *to Happen …in the Future (founded, but no serious harm)*

- *Used if measures are not taken to prevent a re-occurrence of the event in the future, for example:*
  - *facility not recognizing or admitting that patient safety measures are required;*
  - *no needed patient safety measures are being put into place or none are planned;*

- *staff who caused the event through inappropriate behavior are not dealt with; or*
- *no required related policy change is underway*

Interviews with management and staff confirm that the PPCO currently examines the question of whether something is "reasonably likely" to cause serious harm not on the basis of the abusive action (mistreatment) itself but on the basis of what might happen in the future. One of the stated bases for this position is that abuse cannot be determined from an assessment of the act itself (mistreatment) but on the outcome (serious harm.)

Documentation provided during the review confirms that in assessing allegations of abuse, the focus has shifted from considering the abusive action or behaviour to considering the outcome. This is clearly stated in this excerpt from the same March 2010 document:

"Abuse is the end result of the mistreatment: Serious Harm, or…"

"Under the PPCA, we are looking at the outcome (abuse): the mistreatment (the behaviour) causes the serious harm – cannot have a "founded" based on behaviour."

The difficulty with applying this approach to the determination of whether something is reasonably likely to cause serious harm is that there may not yet be an "outcome." It is the act itself that must be assessed to determine if it is reasonably likely to cause serious harm. The current PPCO Guidelines do not require that this assessment be made.

Upon further inquiry, we were advised that the PPCO interpretation of "reasonably likely" was based on the specific wording of the statutory definition of abuse in section 1 of the Act:

*…that **is** reasonably likely to cause death or that causes or **is** reasonably likely to cause serious physical or psychological harm to a person…*

We were advised that the use of the word "is" in the definition requires the PPCO to look not at the action that has occurred, but what may happen in future. It was asserted that if the legislature had intended the PPCO to look at the action itself, which had already occurred, the wording would have been "**was** reasonably likely…"

Conclusion

The PPCO policy definition of "reasonably likely" leaves open the possibility that a staff person may commit an assault, that has not caused death or disability, and avoid having the PPCO make a finding of abuse simply because the staff person has left that job.

It also raises the possibility that the PPCO may examine an act of mistreatment and conclude that it is not abuse, while either the care facility or the RHA under which it operates concludes that abuse has occurred and legitimately does consider it abuse and decides to take disciplinary action in respect of the abusive employee. In such a case an abuser could rely upon the conclusions of the PPCO to defend against legitimate actions taken by an employer.

The PPCO analysis of "reasonably likely" is correct to the extent that it requires a forward looking analysis, but that analysis has to be of the act of mistreatment that has already taken place and has given rise to the allegation reported to the PPCO. In simple terms the analysis involves asking the question "Is this an act that is likely to result in serious harm?" The forward looking aspect of the analysis must relate to possible the consequence of the act of mistreatment.

WHO SHOULD INVESTIGATE

Referral to Professional Body

Some people, who work in health care facilities, including nurses and doctors, are governed by professional licensing or standards bodies. They are not excluded from the purview of the Act, which permits the PPCO to refer a matter to their professional licensing or standards body for further investigation or review. However, this provision has resulted in disagreement and confusion about whether the PPCO should investigate alleged abuse by physicians.

Subsection 9 (1) of *The Protection for Persons in Care Act* states:

"If the Minister believes on reasonable grounds that a person has abused a patient or has failed to comply with the duty to report under section 3, the Minister may refer the matter to the body or person that governs the person's professional status or that certifies, licenses, or otherwise authorizes or permits the person to carry on his or her work, profession or occupation."

Making referrals under this section is another area where PPCO policy has changed. A PPCO Policy dated October 21, 2002 provided straightforward direction on when such a referral should be made, and the continued role of the PPCO in abuse investigations after a referral.

> *PPCO POLICY 410 Referral to Professional Body October 21, 2002*
>
> ***Policy***
>
> *If, during any phase of the inquiry or investigation process, it is determined that the allegation of abuse actually is exclusively a professional standards of care issue, then the PPCO shall make an immediate referral to the appropriate professional body.*
>
> *A referral to a professional body may not affect the process of an investigation that is determined to involve abuse. The investigation will continue, with the professional referral considered as one outcome of the investigation.*

The following excerpt from the 2008 PPCO Policy and Procedure Manual contains the direction that has resulted in confusion and in an ongoing dispute between some staff and management:

> ***Policy***
>
> *The reason for the PPCO to make a referral of a professional to a professional regulatory body shall be so the professional regulatory body can investigate the matter to*

determine whether a professional status review or disciplinary proceedings should be commenced against the person

Criteria for Referral to a Professional Regulatory Body:

1. *There are reasonable grounds to believe that a person has abused a patient.*

Criteria for "reasonable grounds" that a person has abused a patient:

- *The investigation was founded for abuse, i.e. there was evidence to support the allegation of abuse.*

The November 2009 Guidelines confirm that under current PPCO policy the only "reasonable grounds" for a referral to a professional body is a finding of abuse.

The Act requires that before making a referral to a professional body there must be reasonable grounds to believe a patient has been abused. It is the same test to be applied when deciding to move from the inquiry to the investigation stage, that there are reasonable grounds to believe a person has been or is likely to be abused. This does not mean a referral can only be made at the end of an investigation when the alleged abuse has been confirmed.

The primary policy consideration ought to be defining the appropriate basis on which to determine whether there are reasonable grounds for a referral. The key question to be asked is whether the action complained about is causing serious harm or likely to cause serious harm to the patient.

The potential for actions and decisions to be investigated by a professional licensing and standards body exists for all professionals who belong to such bodies. While a referral from the PPCO is a serious matter, it is neither a finding of abuse nor a pre-judgement of an issue. A referral to the College is a preliminary step that should be seen as a means of ensuring that if there is an issue to be investigated, it is investigated by the right body.

9(2) *A body or person that receives a report under subsection (1) shall*
(a) investigate the matter to determine whether a professional status review or disciplinary proceedings should be commenced against the person;

While there is nothing in the Act preventing the PPCO from investigating alleged abuse by physicians, there are important practical considerations such as the capacity to investigate and the ability to direct or enforce an appropriate remedy.

Under the Act the Minister may issue directions to health care facilities and health care facilities must comply with those directions. The Minister does not have the authority to issue directions to individuals. There is no statutory authority for the Minister to discipline a physician, nor to ensure that a physician is complying with a particular standard. Only the College has this authority and therefore it makes sense for the College to investigate most allegations of abuse by physicians. In that regard, physicians are in a different category because they are typically not employees of a facility, unlike nurses and health care aides.

Conclusions

The key issue for the PPCO remains whether or not there are reasonable grounds to believe a person governed by a professional body has abused a patient. Current PPCO policy ties a referral to a professional body to the need for a finding of abuse. However, the Act does not require a finding of abuse; it requires only that there be reasonable grounds to believe abuse has occurred. It is up to the PPCO to determine at the inquiry stage if there are reasonable grounds to believe a patient has been abused, or is likely to be abused. The inquiry process should not be different because the alleged abuse relates to a physician. If reasonable grounds exist for an investigation, the only question should be who is best equipped to conduct that investigation.

The PPCO and the College of Physicians and Surgeons of Manitoba may wish to discuss the distinction between allegations of abuse that involve questions of professional judgment, and situations where the exercise of professional medical judgment is not an issue. In such cases the decision on who should investigate would best be made on the basis of what action or direction is necessary to prevent abuse and who has the power to order and enforce that remedy; the College who has the power to discipline or restrict the practice of physicians, or the PPCO (Minister) who has the power to issue directions to facilities to take the necessary measures to protect the victim.

The PPCO should consult with the College to resolve this issue through an understanding with the College and reflect that understanding in its written policies.

Referral to Police

The PPCO policy on making a referral to police continues to be under review. Early investigator manuals provided direction on what to do after a referral was made to police, rather than direction on when it was appropriate to make such a referral. An example of this kind of direction can be found in a 2004 Manual, as follows:

> **2004 Investigator Manual**
>
> A referral to the Police shall constitute reason for the investigator to stop his/her investigation, to ensure no contamination of evidence.
>
> Should facility policy issues, safety concerns, or daily operational issues be evident to the Investigator by the time of referral to the Police, the matter will be referred to the Manager/Case Manager for discussion with the Police regarding further involvement of the Investigator relative to the facility issues identified by the Investigator.

The 2008/09 policy review produced more specific policies and procedures intended "... to ensure that the appropriate steps are taken in making a referral to law enforcement."

REFERRAL TO LAW ENFORCEMENT DURING AN INVESTIGATION

Background

Anyone may refer matters to law enforcement agencies and no one may prevent anyone else from referring a matter to the law enforcement agency or other relevant authority. The PPCO may make a referral (at any time during the inquiry or investigation process) to any law enforcement agency for investigation if the PPCO has determined that a criminal offence may have been committed.

Policy

Referral for Potential Criminal Matters
If, during any phase of the investigation, it is determined that an allegation of abuse may be a criminal matter, the decision by the PPCO to refer to a law enforcement agency is made collaboratively by the PPCO team. Because a PPCO investigation has been initiated, the PPCO team shall make a decision on whether to continue its own investigation.

Before the law enforcement agency is contacted, the Manager, PPCO, shall advise the Director, Corporate Services, of the pending referral to a law enforcement agency and the PPCO team's decision related to initiating or continuing a PPCO investigation. The APC assigned as the Investigator shall then make a referral to the appropriate law enforcement agency.

A referral to the Police shall constitute reason for the investigator to stop his/her investigation, to ensure no contamination of evidence.

Should facility policy issues, safety concerns, or daily operational issues be evident to the Investigator by the time of referral to the Police, the matter will be referred to the Manager for discussion with the law enforcement agency regarding further involvement of the Investigator relative to the facility issues.

The 2009 Guidelines provide the following direction:

Contact With Law Enforcement

At any time during inquiry or investigation, the PPCO may contact law enforcement for any alleged abuse incident that PPCO staff believes to be criminal in nature to request their involvement in the case.

PPCO May Contact Law Enforcement:

- *to request their involvement in a case;*
- *to provide information for consultation with law enforcement on any matter that may be of a criminal nature;*
- *to provide information on suspected violation of Criminal Code; or*

- *to provide evidence of actual violation of the Criminal Code.*

Interviews with staff and management confirm that when an investigator believes it is appropriate to contact police, that decision must be communicated to the Manager who in turn reports the decision to the Director. The Director believes it is necessary to notify the Assistant Deputy Minister when a referral is made to police.

Interviews confirm that the policy set out in the Guidelines does not clarify the issue of when law enforcement should be contacted and the role of the PPCO beyond that point. The views of both management and staff were obtained, allowing us to clarify the issues involved and relevant considerations that should drive PPCO policy on contact with law enforcement.

The Act provides no direction on contacting the police, a point raised by some to argue against contacting police.

A factor to be considered in a decision to contact police is the wishes of the patient. The Act addresses patient involvement in the PPCO process in a number of ways. Subsection 5(3) of the Act requires the Minister to notify the patient of the report of abuse and the fact that an investigation is to be conducted. Subsection 7(2) specifically addresses the need to consider patient's wishes:

Patient involvement

> 7(2) *When making a report[to the Minister], the investigator shall try, to the fullest practical extent, to involve the patient and to determine and accommodate the patient's wishes.*

This section applies specifically to reports from investigators to the Minister (delegate) at the end of an investigation, but it does speak to the legislative intent of involving patients in the actions and decisions of the PPCO. The PPCO needs to develop clear policy that addresses the wishes of competent patients, or the representatives of incompetent patients in decisions about contacting police, while recognizing other factors such as the safety of other patients in care facilities.

Interviews with staff and management confirm that discussions about when to make a referral to police involve too many considerations beyond the nature of the alleged abuse and whether it may be a matter of criminal conduct, and beyond the patient's wishes. The difficulty with a lengthy list of considerations for making a decision on whether to contact police, including assessments of the credibility of the alleged victim and the alleged accuser, or speculative concern for the reputation of an alleged abuser, is that it requires either an inquiry or investigation that may result in inappropriate delay or the contamination of evidence or witnesses.

As well, there are certain types of allegations the PPCO is simply not equipped to investigate, such as serious sexual assault, because it lacks the necessary forensic tools. There are cases where, if abuse is confirmed, it may require a remedy that is beyond the capacity of the PPCO which is limited to issuing directions to individual care facilities.

Longstanding policy has been to report alleged criminal activity to police. Earlier policy and procedural documents enumerated criminal code violations, the current Guidelines do not.

Conclusion

The PPCO would be well served by adopting a "reasonable grounds" test for referrals to police; addressing issues such as the nature of the allegation, the wishes of the patient, and any prima facie evidence of abuse. It should not engage in a lengthy inquiry or investigation process that would delay a competent and thorough investigation by police of possible criminal conduct, nor wait for a facility to conduct such an internal inquiry or investigation.

PPCO INVESTIGATIVE PROCESS

Two further areas in which PPCO policy requires improvement and clarification are: the transition of files from the inquiry to the investigation stage; and the reporting of its findings to health care facilities.

From Inquiry to Investigation

In describing the reasons behind the decision to revise certain policies and practices, PPCO management raised a concern about the practice of assessing allegations of abuse without adequate investigation at the inquiry stage, at “team meetings.”

The practice of making an initial inquiry before beginning an investigation is based upon section 5 of the Act, set out below:

> **Minister to inquire into report of abuse**
> *5(1) On receiving a report of abuse under this Act, the minister shall inquire into the matter and shall consider whether a more extensive investigation is warranted.*
>
> **Minister to refer matter to investigator**
> *5(2) If, after inquiry, the minister finds there are reasonable grounds to believe that a patient is or is likely to be abused, he or she shall refer the matter to an investigator to carry out a more extensive investigation.*

All inquiries are conducted by an investigator and then discussed with the entire team of investigators and the manager at regular morning meetings. There are concerns about the nature and extent of the initial inquiry, and the basis on which decisions are made to either close files or move them to investigation. The 2009 Guidelines For Assessing Allegations of Abuse contain the following description of these two phases of the PPCO process:

> ***PPCO Processes of Inquiry & Investigation***
>
> ***Inquiry:*** *After receiving an alleged abuse report, the PPCO’s abuse prevention consultant will gather all of the information needed to determine the next course of action. This process includes reviewing and analyzing the report for validity and nature of complaint, assessing the severity of the alleged abuse against the definition of abuse in*

the Act and presenting the information to the PPCO team for review and an outcome decision (see definitions below).

Investigation: *Based on the results of the inquiry, the PPCO team decides whether or not there is evidence to support a case of abuse. If the PPCO team determines that there are reasonable grounds to believe that a patient has been abused or is likely to be abused in the future, the matter is referred to an investigator to carry out a more extensive investigation. The investigation process includes gathering evidence (e.g. personal interviews with appropriate parties and review of pertinent documentation) to determine the validity of the allegation; ongoing communication with stakeholders; determining, from the evidence, whether the allegation is "founded" or "unfounded"; identifying areas to improve patient/resident safety or the facility's practices related to abuse; providing the PPCO with a written report on the investigation; and collaborating with the PPCO team on the final outcome of the investigation.*

The process set out in the Guidelines is not an accurate description of the process followed at the PPCO. As illustrated in the excerpts above, a part of what is described as occurring during the investigation phase actually occurs during the inquiry phase.

Of more concern is the adequacy of the information obtained during the inquiry stage and the manner in which it is obtained. It is critical that at the inquiry stage the PPCO address the correct question - whether there are reasonable grounds to believe a patient may have been abused - and obtain the relevant information necessary to answer that question. A mistake at the inquiry stage can result in abuse not being investigated, or investigative resources being wasted on an investigation when there are no reasonable grounds to proceed.

The 2009 Guidelines contain definitions describing the possible outcomes of an inquiry, the following two of which are relevant to the issues raised:

Outcome Definitions

Inquiry

Below Threshold: *Based on the information gathered, the alleged abuse was determined not to have met the level of harm or financial loss to an alleged victim that would require an investigation to be initiated.*

Unsupported: *Information gathered supports the decision that the abuse allegation was unsubstantiated or there was insufficient information to support the allegation that abuse occurred.*

Reaching either of these outcomes at the inquiry stage suggests that the PPCO is asking the wrong questions at that stage, as the correct questions should be whether there are reasonable grounds to believe a patient has been abused and, if so, whether a more extensive investigation is required.

Decisions reflected in the outcomes described above should not be made, and cannot properly be made, without investigation. Questions about the level of harm and the adequacy and sufficiency of evidence in support of an allegation are matters to be determined through investigation. While the information needed to determine if there are "reasonable grounds" can vary from case to case, the existence of reasonable grounds is a lower threshold test than the test of whether a patient has been abused. It requires asking different questions, and it may require a process that is different from the one currently utilized by the PPCO.

One of the practices raised during the investigation that caused concern was the practice of "monitoring" internal investigations conducted by health care facilities and relying upon those investigations to determine the outcome of files. There were concerns expressed suggesting that it was inappropriate to rely upon such internal investigations, because of questions about the potential for bias or the reasonable apprehension of bias, and the capacity of facilities to conduct the thorough investigations needed and contemplated by the Act.

On the other hand there were practical concerns about the ability of the PPCO to investigate every report where there appeared to be reasonable grounds to believe abuse may have occurred. This is more than a resource issue. Facilities also have a legal obligation to ensure patient safety and should not be expected to rely entirely upon the PPCO to identify the measures that need to be taken in response to abuse.

Our investigation disclosed some of the issues that need to be addressed in order to determine when the PPCO should investigate and when it might be appropriate to monitor the investigation and response of a facility. The most common case presented for a monitoring role was patient-on-patient abuse where one or both of the victim and the alleged abuser suffers from dementia. When such a report is received by the PPCO, it is often on the basis of undisputed facts, documented by the facility, and at a point where the facility has taken or is planning action necessary to prevent a recurrence of the abuse. While the abuse incident itself may not require further investigation, there is a role for PPCO investigators in their capacity as "abuse prevention consultants," a role consistent with the broader statutory mandate of issuing directions intended to protect patients from abuse.

A different scenario, requiring a different response, is a report of abuse of a patient by facility staff. The very existence of the PPCO reflects a public policy decision to have such matters investigated and reported upon by an entity at arm's length from facilities. A further complication arises when such allegations involve possible violations of the criminal law, in which case they may be more appropriately investigated by police.

Another concern identified during our investigation related to limitations on the inquiry process that may impede the ability of staff to determine if there are reasonable grounds to believe a patient has been abused. We were advised that the inquiry stage rarely involves a site visit, and usually relies upon information provided by facilities. We were also told that under no circumstances would an alleged abuser be contacted during the inquiry stage.

While the test for determining whether there are "reasonable grounds" is different from the test for a finding that a patient has been abused, this difference should not limit the investigative tools and options available to the PPCO at the inquiry stage. Whether or not it is appropriate to contact an alleged abuser during the inquiry stage should be a matter left to the investigator to determine on a case by case basis. While there may be cases where there is a risk inherent in contacting an alleged abuser at the inquiry stage, such as tipping off an abuser in a position to alter evidence or influence witnesses, there will be cases where fairness requires considering the position of the alleged abuser before launching an investigation or making a referral that could initiate a more intrusive, costly, and time consuming process.

Conclusions

PPCO policy needs to reflect the appropriate test for the inquiry stage, whether there are reasonable grounds to believe a patient has been abused and whether a more extensive investigation is warranted. It needs to engage stakeholders in the development of a clear policy about when the PPCO will investigate an allegation, when it will monitor an internal facility investigation, and how it will carry out the monitoring function.

Reporting Investigative Findings

The Act requires that on completing an investigation, investigators *"…set out their conclusions and the reasons for them…"* in a report to the Minister (delegate). These reports are the basis on which the Minister determines the directions, if any, to be given to health care facilities pursuant to subsection 8(1) of the Act:

> **Minister may give directions to health facility**
> *8(1) On receiving an investigator's report under section 7, the minister may give the operator of the health facility involved any directions the minister considers necessary to protect the patient from abuse.*

Investigators also provide a de-briefing session for facilities, in which they discuss the results of their investigation. A question has arisen about the extent to which the PPCO can give directions to facilities to prevent patient abuse, because of a policy that limits their options to describing abuse as either "Founded" or "Unfounded."

The 2009 Guidelines contain definitions of the possible outcomes of at the end of an investigation, as follows:

> ***Outcome Definitions***
>
> ***Investigation:***
>
> ***Founded:*** *Objective evidence supports that the alleged abuse met the threshold of abuse.*
>
> ***Unfounded:*** *Objective evidence supports the finding that the alleged abuse did not meet the threshold of abuse or that the abuse allegation was unsubstantiated.*

Only in cases where the outcome is "Founded" does the PPCO issue directions to health care facilities designed to protect patients from abuse pursuant to subsection 8(1) of the Act. This policy prevents the PPCO from issuing ministerial directions in respect of abuse and abusive conduct that is currently described as mistreatment.

Upon inquiry, we were advised that the PPCO can and does on occasion make "recommendations" to facilities, but those recommendations are not binding upon facilities and the PPCO does not audit or monitor them in the way it does "directions" issued pursuant to subsection 8(1) of the Act. The PPCO was unable to provide us with any examples in which recommendations had been made.

Limiting its ability to issue directions to cases where abuse has been "founded" prevents the PPCO from taking the necessary action to protect patients from a wide range of unacceptable "mistreatments," such as the various forms of physical mistreatment detailed in its own 2009 Guidelines.

This concern can be addressed in part through the broader application of an existing policy entitled **Communication/Reporting of Non-Abuse Incidents of Serious Harm,** also found in the 2009 Guidelines. The introduction to this policy acknowledges the broader role of the PPCO in preventing abuse by reporting things that negatively impact patients:

> *As part of the role of the PPCO, the PPCO staff have a responsibility to prevent abuse and promote patient safety. Therefore, staff will communicate/report as appropriate, issues other than abuse, which are noted during investigation, that they deem may negatively impact patient care or safety. This type of report will be made to the appropriate authority.*

Although the policy relates to "Non-Abuse Incidents of Serious Harm," it does appear to be a way to report on matters where patient safety is at risk. The policy establishes priorities based level of risk, and prescribes the communication to be made in each case.

Under this policy staff can communicate:

- *Any concern in the care environment that is perceived to be a risk to the health, safety and well-being of a patient(s). Priorities are:*

Priority 1: Where there is determined an immediate safety risk to patient(s):

Communicate the issue, discuss the concern with facility management and others as appropriate, and document in the case file, (e.g. RSS for standards of care issues, Family Services, Public Health, Age & Opportunity, Law Enforcement).

Priority 2: Where there is deemed no immediate risk to health, safety or well-being of patient(s), case unfounded therefore no directives:

Communicate the issue, discuss the concern with facility management, and document in the case file

Note: If, after notification, management chooses not to remedy the situation, no further action will be taken by the PPCO.

This policy can be used to discuss mistreatment but because it relates to non-abuse it cannot be used to issue directions. As per the note above at the end of the policy, neither can it be used to make the unenforceable recommendations referred to earlier.

Conclusions

Limiting directions to situation where there is a "Founded" conclusion of abuse is a policy choice. Interviews with senior management confirm that the Act does not require a finding of abuse as a pre-condition to issuing directions.

This policy choice impedes the ability of the PPCO to give full effect to the mandate of protecting elderly and vulnerable patients in care facilities, because it restricts their ability to provide the guidance to care facilities necessary to prevent abuse from happening, as mandated by subsection 8 (1) of the Act.

Any reported mistreatment of patients in care facilities, or any situation that could put them at risk of abuse, should be reported to care facilities regardless of the policy interpreting the definition of abuse.

The PPCO does not bear sole responsibility for protecting patients from abuse, but to fulfill its part of that broader responsibility it should ensure that those who share in the responsibility are informed of situations they have the power to address.

If, in response to a report of abuse, the PPCO identifies a course of action that can protect patients from abuse, care facilities should be advised of that action. If that course of action is not followed by a facility it can and should be issued as a direction so that implementation can be monitored by the PPCO.

MANAGEMENT/STAFF ISSUES

There were a number of issues disclosed initially and raised during the investigation that reflect conflict between PPCO management and staff. In our view a source of these issues is the significant changes that have occurred in how the PPCO interprets and applies a few critical sections of the Act, as described above. These issues have been referred back to the department as they are not matters of administration about which the Ombudsman would make recommendations.

We have been advised that the department has initiated action to address conflict within the PPCO.

RECOMMENDATIONS

Pursuant to section 36 of *The Ombudsman Act* I make the following recommendations:

1. The PPCO working definition of abuse should be revised to include both acts of abuse, and the outcomes of those acts. It also should also be revised to lower the threshold for serious harm to make it consistent with the case law on which it is based. The PPCO working definition of "reasonable likely" to cause harm should be revised to consider whether acts of mistreatment are reasonably likely to cause serious harm, rather than whether, if repeated, those acts would cause serious harm.

2. The PPCO policy on referral to professional bodies should be revised to reflect the test prescribed by the Act. The basis for such a referral should not be whether an investigation has determined that abuse has occurred, but whether there are reasonable grounds to believe a patient has been abused. Further, at the inquiry phase preceding such decisions staff should take whatever investigative steps are needed to gather the information necessary to answer these questions.

3. The PPCO policy on referrals to law enforcement should: set out the basis for an immediate referral to law enforcement as “reasonable grounds to believe a criminal act has been committed”; require the termination or suspension of a PPCO investigation at the request of police so as not to contaminate evidence; and clearly state the factors to be considered when making a referral to law enforcement contrary to the wishes of a patient.

4. The PPCO inquiry phase should be redesigned to require a determination of whether there are reasonable grounds to believe that a patient is or is likely to be abused, and whether it is necessary to carry out a more extensive investigation, rather than attempting to answer questions about the level of harm resulting from mistreatment and the adequacy and sufficiency of evidence, before the investigation is conducted.

5. The PPCO should issue necessary directions to facilities to ensure patient safety when there is mistreatment of patients or a need for measures to ensure that patients are not abused, even though there has not been a finding of abuse.

DEPARTMENT RESPONSE

A draft report was prepared for discussion with departmental officials at the end of November 2010 and submitted to the Deputy Minister of Health on February 7, 2011. On March 3, 2011 the Deputy Minister provided the attached response, accepting the recommendations for administrative improvement to the PPCO processes.

> *"Thank you for your letter of February 7, 2011 regarding the draft Manitoba Ombudsman Report on The Protection for Persons in Care Office (PPCO).*
>
> *I am pleased to advise you that Manitoba Health accepts the 5 recommendations that you have made that will improve the effective operation of the PPCO and its ability to fulfill its statutory mandate. The plan for implementing the recommendations is as follows:*
>
> ***Recommendation 1 on Working Definitions of Abuse:***
>
> *The PPCO working definition of abuse will be revised to include both acts of abuse and the outcomes of those acts, and to lower the threshold for serious harm, in accordance with case law.*
>
> *In addition, the definition of "reasonably likely" to cause harm will be revised to consider whether acts of mistreatment are reasonably likely to cause serious harm, rather than whether, if repeated, those acts would cause serious harm.*
>
> *The plan is to revise these definitions and implement them immediately.*
>
> ***Recommendation 2 on Referral to Professional Bodies:***
>
> *The PPCO policy on referral to professional bodies will be revised so that the basis for referral will be whether there are reasonable grounds to believe that a patient has been abused, not whether an investigation has determined that abuse has occurred. In addition, the inquiry process will be reviewed/revised as appropriate, to include appropriate steps needed to gather the information necessary to determine this.*
>
> *Work on this policy revision has already begun, and after consultation with the College of Physicians & Surgeons of Manitoba and other professional bodies, we anticipate it will be completed in the summer.*
>
> ***Recommendation 3 on Referral to Law Enforcement:***
>
> *The PPCO policy on referral to law enforcement will be revised to include the basis for an immediate referral as reasonable grounds to believe a criminal act has been committed, to require termination or suspension of a PPCO investigation at the request of police, and to include the factors to be considered when making a referral contrary to the wishes of a patient.*
>
> *Work on a revised policy has already begun with a target for completion by summer.*

Recommendation 4 on the PPCO Inquiry Phase:

The PPCO will review/revise as appropriate, the process of receiving alleged abuse reports, to include in the process, a determination of whether there are reasonable grounds to believe that a patient is or is likely to be abused, on which to decide whether a more extensive investigation should be carried out.

Work on revision of the inquiry phase and related policy will begin immediately and will be completed within the next six months.

Recommendation 5 on Issuing Directions:

The PPCO will revise the policy on issuing directions to facilities to ensure patient safety when there is mistreatment of patients or a need for measures to prevent abuse, regardless of whether there is a finding of abuse.

This policy will be revised and implemented immediately.

The PPCO will be working diligently to promote best practices in these policy areas, in order to improve protection from abuse for Manitoba patients in care.

I am satisfied that the department's proposed action will give effect to the recommendations in a timely manner and contribute to the effectiveness of the important work done by the PPCO.

A copy of this report is also available on our website www.ombudsman.mb.ca/oreports.htm