Submission to the Standing Committee

on

Social Policy regarding Bill 283,

Advancing Oversight and Planning

in

Ontario's Health System Act, 2021

from

Ontario Council of Hospital Unions

CUPE

CUPE Ontario

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The Canadian Union of Public Employees is by far the largest union in Ontario, with over 270,000 dues paying members. We represent workers in practically every town, city, county, district social service board, and unincorporated area in the province. With over 75,000 health care members in Ontario, we are also the largest health care union in the province. The Ontario Council of Hospital Unions/CUPE is the bargaining council for 40,000 CUPE hospital workers in the province. CUPE represents approximately 30,000 Personal Support Workers (PSWs) employed by long-term care homes (LTC), home and community care organizations, and hospitals in Ontario. Personal support work is the largest single category of work carried out by CUPE members in Ontario.

For some time, government's have sought to increase provincial oversight of Personal Support Workers. CUPE has had some concerns about this, knowing that such a process may impose a double jeopardy on PSWs – where they can be disciplined and fired by employers, and also made unable to work by a provincial Authority. There are also issues with grandparenting existing staff into the profession, affordability, and achieving due process to ensure fairness.

Such regulation however may also increase the prestige of a profession that deserves much more respect and may allow some professional self-regulation by PSWs.

Unfortunately, the model proposed by Bill 283 does not achieve the potential benefits for the profession, but does impose the problems that we feared. We also find it inappropriate to focus on the regulation of individual PSWs in the midst of a pandemic, when so many systemic issues are negatively affecting PSW work. For years the staffing crisis in LTC has meant that PSWs are frequently forced to work short, without

enough staff to be able to meet the basic needs of residents. These problems have been compounded by, the very slow increase in the time allowed for PSWs to care for LTC residents, problems with recruitment and retention of PSWs, and the use of non-PSWs to perform PSW work.

In June 2012, a PSW registry was set up under the oversight of the Ontario Community Support Association. However, that registry was closed following a review by the British Professional Standards Authority in 2016. In 2017, the Michener Institute was charged by the government with developing a proposal for a PSW registry. As a result, by 2019 some very preliminary steps were taken to set up a second PSW registry. CUPE was consulted on this proposal and we raised our concerns about ensuring due process, double jeopardy, grandparenting of existing PSWs, and the costs that might be imposed on members. Although we had some scepticism about the process, we worked in good faith, investing considerable staff, political and legal resources in these consultations.

We appeared to be making some progress in regard to grandparenting and due process. The Michener Institute certainly also heard our concerns about the affordability for PSWs, but indicated that issue lay within the power of the provincial government alone. These efforts do appear to have found some small reflection in Bill 283 — but overall, this Bill still falls far short of what we need.

While Bill 283 is far from satisfactory in terms of due process protections for workers, it is also important to recognize that without OCHU/CUPE and CUPE Ontario's advocacy, this legislation could have been far worse.

When we first met with the Mitchener Institute, the proposed complaints regime contemplated the registry relying entirely on reports from employers to determine the working fate of PSWs. The registry would automatically de-register PSWs upon notification by an employer that a PSW had engaged in “abuse”. The effect of that determination would have meant the PSWs were ineligible to work for any publicly funded facility.

We pushed for due process safeguards, including independent investigations, hearings by a neutral panel into allegations of alleged misconduct, a range of outcomes proportionate in the circumstances (rather than automatic de-registration) and an appeal process.

Some of these concepts are reflected in Bill 283, though not to the extent we would like. Most significantly, the government has not adopted a model that relies on employers to determine the rights of PSWs to engage in their chosen profession, which would have been disastrous.

The legislation also reflects our advice that there be the appointment of investigators by the oversight Authority, with legislated powers to obtain relevant information. The scheme also contemplates some appeal and oversight mechanisms for the Authority’s decision-making, though these protections do not go far enough.

While these small steps are important many problems have now arisen.

Enabling Legislation: The government has brought in what it refers to as “enabling” legislation – much of the detail will be left to regulation, by-laws, and, policy. We believe this is putting the horse before the cart. For the reasons we have noted, there is very

significant scepticism about the idea of provincial oversight. A better process would be to work with stakeholders to develop a consensus on all key issues – grandparenting, affordability, governance, and, especially, due process. Instead this Bill sets up the structure on the government's own terms – with the government at the centre of control. The proposed legislation hangs over PSWs like the 'Sword of Damocles'. We believe this is not the way to treat the heroes of the pandemic.

Governance: It is in the governance that the second-class nature of this reform is revealed. In stark contrast with self regulation of nurses or other professions, PSWs are completely and explicitly excluded from the governing body. This suggests the government views PSWs as second-class health professionals, not competent or trustworthy enough to be entrusted with their own government, unlike every other regulated health professional, from doctors to denturists to homeopaths. Notably, PSW employers (who may see this reform as a way to discipline and dismiss employees) are not excluded from the Authority's board.

We note that the government has failed to protect during COVID. The government failed to recognise airborne transmission, it failed to ensure appropriate protective equipment, it failed to transfer sick LTC residents to hospital, and it transferred patients from emptying hospitals to overcrowded LTC facilities.

And now the government wants to establish a PSW oversight Authority that it controls, with no voice for PSWs.

PSWs are extremely vulnerable to violence and to being blamed for issues outside of their control, such as the problems during the pandemic noted above. PSWs should not

be made voiceless. So, their exclusion from the Authority's board of directors is very troubling.

Unaffordable: PSWs are not well paid. The largely non-union home care sector is especially hard hit — with low wages, little full-time work, not much in the way of benefits, and even less in the way of pensions. PSWs in community care, LTC, and hospitals are largely unionized and do somewhat better — but they still face low wages and a lack of full-time work.

Despite this reality, it appears that after an initial start up period PSWs will be expected to pay the freight for the proposed oversight Authority.

This is unfortunate. It has become especially clear during the pandemic how much we depend on essential workers — and none more so than PSWs, who were at the very centre of the COVID battle, with many sickened and some dead. So, it is extremely concerning that even before trying to make any permanent improvement in wages and working conditions, the government proposes to add an extra financial burden on PSWs.

The extra costs will not simply be whatever fees the proposed Authority decides to charge. PSWs will also have to purchase insurance to protect themselves in case of an investigation or discipline by the proposed Authority.

Grandparenting: A key issue is, who is eligible to become a PSW registrant under the proposed Authority.

The need for PSWs is growing rapidly with the aging of our society. Since 1980, the median age in Ontario has increase by ten years and the number of elders as a

percentage of the population has almost doubled by 2020 to 17.6%. As the baby boomers become elders, the need for more hospital, long-term care, and health care services will grow very significantly for at least another two decades. The clearest example of this is the promise by the current government to add 30,000 new long-term care beds. This alone will require a massive increase in the number of PSWs. The needed increase in staffing levels at LTC homes will do likewise. Compounding these factors, the current government and the previous government have tried to address aging cost pressures by creating hospital facilities specialising in lower acuity patients. These facilities are staffed with a higher proportion of PSWs, who are paid less than RPNs and RNs. The strenuous work, poor working conditions, and low wages for PSWs also creates significant problems with the retention of PSWs.

All of this generates an urgent need to recruit and retain more PSWs. But new barriers to entry may make this more difficult. Worse, there are no promises in this legislation to ensure that the skills of existing PSWs will be accepted. PSWs with decades of experience have very different education backgrounds than what is required now — or may be in the future. This creates uncertainty.

Grandparenting was a major issue of discussion with the Michener Institute and we thought we had made significant progress. Unfortunately, there has been no significant discussion with the government on this issue, and the issue is left out of the proposed legislation.

Expansion to other professions: It is clear that the government does not see this new Authority as just dealing with PSWs. The government intends to bring other health

occupations under its oversight. The government is contemplating the possibility that some professions may be moved out of the *Regulated Health Professionals Act (RHPA)*/self-regulation framework and placed under the Authority instead. This is a very troubling prospect for those other professions, which we would strongly oppose.

Due process: This is a key issue. Under the proposed legislation, the Board appoints a CEO, an employee of the Authority with extraordinary power to make unilateral decisions about whether to register, deregister, or impose conditions on registrants.

Those decisions are subject to a "written review" by the Health Professions Appeal and Review Board (HPARB), but the details of what that review process will look like are not specified – they have been left to regulation. This is in contrast to the self-regulatory system, where individuals denied registration have the option of appealing that decision and requiring that the HPARB hold a review or full hearing, with specified rules of procedure to ensure a fair testing of the evidence on such a critical issue.

In terms of complaints, the CEO may appoint investigators to investigate complaints where the CEO believes a registrant has breached the Act, regulations or code of ethics (note the code of ethics is also yet to be determined). And this is the one area where there is significant detail — Bill 283 gives significant powers to investigators to obtain documents and information relevant to a complaint, though the legislation does not say what happens to those reports, and if the PSW who is the subject of a complaint gets to see it.

The CEO can decide – again seemingly unilaterally – to do a number of things following a complaint – they can try to mediate or resolve the complaint, issue a written warning,

require further training, impose conditions or refer the complaint to the “discipline committee” if there has been a potential breach of the code of ethics. There doesn’t appear to be any ability to challenge the CEO’s determination of how a complaint is dealt with (again, in contrast to the College system, where these decisions are subject to review).

If a complaint is sent to the Discipline Committee – a committee appointed by the Board – that Committee will determine whether there has been a breach of the code of ethics and can impose orders directing the CEO to revoke, suspend or impose conditions, on the registrant’s registration.

OCHU/CUPE and CUPE Ontario have consistently argued that in any such disciplinary process there must be a right to a hearing, with robust rules of evidence and procedures, including knowing the case to be met, the right to cross examine witnesses, the opportunity to be represented by a lawyer or other representative, and the right to written reasons. The legislation is entirely silent on what process the discipline committee will use to come to its decision. Moreover, it specifically excludes legislation – the *Statutory Powers Procedures Act* – which sets out minimum procedures to ensure fairness and natural justice, where a tribunal is required to hold a hearing before making a decision it is statutorily empowered to make.

Again, this is in contrast to the *Health Professions Procedural Code,* enshrined as part of the *Regulated Health Professionals Act,* which sets out very detailed rights of due process applicable to each and every college.

Similarly, while Bill 283 mentions a right to appeal to an “appeals committee”, there is no detail about what an appeal entails. But it is clear that the Appeal Committee is appointed by the Board. Which means there is no independent external review of these critical decisions about the right of PSWs to work in their chosen profession. This is in contrast to the *RHPA,* which contemplates a right of appeal to court.

Finally, we note that in contrast to the *RHPA,* Bill 283 does not contemplate an alternative process to identify where a registrant may be incapacitated — where the individual is suffering from a physical, or mental condition, or disorder that impacts on the individual’s ability to practise safely. In our view, it is important that there be a mechanism to identify where a member is incapacitated for a number of reasons, including that individuals should not be subject to discipline where their actions are outside of their control.

Given these many issues, we cannot support this Bill. Considering the government’s interest in provincial PSW oversight, we would suggest that the government go back and work with all stakeholders to come up with an improved option. Here are our recommendations to be considered in that process.

Recommendations:

1. PSWs need to have a majority role on the Board of Directors, and role in all stages of decision-making through the registration/complaints process. Other professions have this right, and so too should PSWs. No less than half of the positions on the Board of Directors shall be PSWs who are registrants, elected by other registrants.

2. Any of the committees appointed by the Board (i.e., the Registration Committee, Complaints Committee, Discipline Committee etc.) should be comprised by a majority of PSW registrants.
3. The rules of procedure applicable to any proceeding should be specified in the legislation itself and mirror the procedural protections in the *Regulated Health Professions Procedural Code,* not left to regulation/bylaws. These rules of procedure would address the right to disclosure of relevant information and documents as well as written notice of the case to be met, encompass robust rules of evidence, including the right to cross-examine witnesses, provide the right to representation, and the right to a written decision with detailed reasons.
4. The CEO should not make unilateral decisions about registration – instead they should refer registration-related concerns to the Registration Committee for review.
5. Registrants should be entitled to appeal decisions of the Registration Committee to the Health Professions Appeal and Review Board, either by "review" or a "hearing", at their election. These proceedings should be governed by the same procedural rules applicable to the Colleges.
6. The legislation should specify that complaints should only be responded to if they are in writing. The PSW must get a copy of any complaint.
7. The PSW must get a copy of any investigation report and be provided with an opportunity to respond.
8. Complaints should be investigated by a Complaints Committee.

9. There must be a right to a review of a decision of the Complaints Committee by the Health Professions Appeal and Review Board.
10. There should be a right to a full hearing before the Discipline Committee, with a right to appeal any decision of the Discipline Committee to the Divisional Court.
11. Adopt grandparenting provisions that allow all recently working PSWs to be eligible for registration.
12. Pursue increased wages and better working conditions for PSWs.

Thank you considering our submission.