

SUBMISSION

ON

BILL 56 – *EMERGENCY MANAGEMENT STATUTE LAW AMENDMENT  
ACT, 2005*

BY THE

ONTARIO NURSES' ASSOCIATION

TO THE

STANDING COMMITTEE ON JUSTICE POLICY

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## **Introduction**

The Ontario Nurses' Association (ONA) is pleased to have this opportunity to provide our recommendations to the Standing Committee on Justice Policy regarding Bill 56 – *Emergency Management Statute Law Amendment Act, 2005*.

ONA is the union representing 52,500 registered nurses and allied health professionals working in Ontario hospitals, long-term care facilities, public health, the community and industry.

Our members work on the frontlines of health care every day. Ontarians depend on us to care for them in their times of need, and it is a call that our members readily accept – whether it is in routine times or exceptional circumstances.

Many nurses have had first-hand experience with delivering care in times of a health emergency – the most well-known being hospital nurses in Toronto delivering care to the public and colleagues during the SARS outbreak. Our members who are public health nurses are also involved in important ongoing work to ensure compliance with the mandate of the *Health Protection and Promotion Act*, which, in the event of a health care emergency, takes on an additional urgency to prevent the spread of disease and to protect the health of Ontarians.

The health of Ontarians suffers, however, at the best of times, when there are not enough nurses to provide quality care. When you remove a nurse from the bedside or the frontline, people may not get the care they need and are needlessly put at risk. The current shortage of nurses is magnified when a health care emergency hits, particularly as such an emergency generally tends to unfold without notice.

It is against this backdrop of the central role our members play in the delivery of health care that ONA puts forward our recommendations related to emergency management as proposed in Bill 56. We begin by summarizing the current state of nursing in Ontario and the impact staff shortages may have on the ability of nurses to provide care in any future health emergencies.

Next, we put forward our position that effective emergency management requires advanced preparation and clear rules within the health care workplace to guide employment during an emergency and processes to provide for worker health and safety. We believe these considerations are absent from the emergency management structure set out in Bill 56 – this glaring absence despite Justice Campbell, Commissioner of the SARS Commission, clearly recommending such additions in his Second Interim Report. We will argue that our members on the frontlines of the delivery of health care, who undoubtedly will be required to respond in any future health emergency, seek clarity regarding the powers of emergency orders to override the current rules that govern their workplace activities, including structures to protect their health and safety.

When the health and safety of our nurses who provide care, especially in the charged atmosphere of an emergency, is compromised, or when working conditions are inadequately clear to ensure our nurses are able to keep working throughout an emergency, care will suffer. It's our view that Bill 56 must contain clear assurances to nurses and other health workers not only that their employment rights will be enforced during and after an emergency, but that precautions and processes will be in place to protect and to enforce their health and safety.

Finally, we will present recommendations to clarify employment issues regarding compensation for loss of income during an emergency, job protection for those assisting during an emergency, and leaves of absence for nurses and health care workers who are unable to work during an emergency for any number of reasons. We conclude with a brief discussion related to the lessons learned from our experience with SARS.

## **The Current State of Nursing in Ontario**

The government is well past the half way point in its four-year mandate but only about a quarter of the way to meeting its promise of 8,000 more nurses by October 2007. This is the figure that the government believes would provide for sufficient numbers of nurses for Ontario. The Health Minister says the government has created 3,062 full-time nursing positions so far: 1,202 in hospitals; 375 in long-term care *to date*; 485 in home care and 1,000 new graduate positions.<sup>1</sup>

However, we know that at least 1,000 of these positions are temporary three to six month contracts for new nursing graduates to get further clinical experience. In addition, the government has promised full-time jobs for 4,000 new nurses who graduate in 2007.

In our view, the government announcement does next to nothing to address the serious nursing shortage. There are 85,000 practicing registered nurses in Ontario today. Within the next two years, one in three – or more than 30,000 – is eligible to leave the profession.<sup>2</sup>

If these nurses retire, our current nursing shortfall will become a major threat to the delivery of care in routine times in our health care system and will have a very negative impact on our patients.

In the event of a public health emergency, measures that might conceivably be initiated such as extensive quarantine and restrictions on employment in more than one health care facility will magnify the inability of a nursing staff to provide quality care that is already reeling from the ill-effects of heavy workload and mounting overtime.

This was our experience during SARS. The deployment of registered nurses was affected by existing nursing shortages, the casualization of nursing positions with multiple part-time jobs at different sites, and the uncontrolled reliance on agency nursing staff. Existing nursing shortages were magnified when fewer nurses were available to work because of home/work quarantine, additional demands for infection control, and restrictions on employment in more than one health care facility.

We raise these health human resources issues in the context of Bill 56 to heighten awareness of the need to put in place planning now for a health care workforce to be there when an emergency strikes. We believe there is a need to recognize and to support the central role of frontline health care professionals in any emergency. This means that an effective emergency management structure must acknowledge the importance of ensuring that processes are in place to inform, consult and act on the advice of frontline healthcare professionals.

**Recommendation 1:**

Amend Bill 56 to provide that emergency orders/plans set out a process for frontline healthcare workers and their unions to be effectively informed, consulted and able to report their concerns during an emergency.

**Recommendation 2:**

Amend Bill 56 to provide that healthcare workers receive effective whistleblower protection that allows them to raise urgent matters related to public health issues and patient/worker safety without repercussion during an emergency.

**Keeping Nurses Working During an Emergency: Respecting Collective Bargaining Rights**

Bill 56 sets out in section 7.0.2(4) the authorization of any person to render services of the type the person is qualified to render.

Minister Kwinter's parliamentary assistant for community safety, Mr. Bas Balkissoon, has reassured health care stakeholders that the power in this section to authorize does not mean that nurses and others would be forced to work in an emergency. Specifically, during second reading debate on Bill 56, he said:

"We know that the health care sector has expressed concerns about the provision in the legislation regarding authorization authorizing a person or a class of persons to render services. Let me be clear about what the proposed legislation would not do. It would not force any worker, health care or otherwise, to work if they choose not to. Bill 56 would not compel physicians to treat patients during an emergency, nor would it give the province the power to conscript workers -- far from it. In fact, the last thing we want is to make it more difficult for health care workers to do their jobs in an emergency.

What the legislation would do, if passed, is allow for reasonable, qualified persons to provide services where willing. And that is the key: where willing. It does not compel service; it allows service. For example, it would enable Ontario to reach out to Manitoba, Quebec or other jurisdictions to send us qualified physicians to help the province deal with an emergency for the duration of the emergency only. It would also permit licensed drivers to operate vehicles such as full-sized buses even though they're licensed only to operate an ambulance or a small bus. That's not conscription; that's co-operation."<sup>3</sup>

Our concern is that Bill 56 does not clarify that workplace terms and conditions are in effect so that health care workers are able to do their jobs in an emergency. In his Second Interim Report, Justice Campbell recommended that the government amend the override power (previously in Bill 138) now set out in Bill 56 in section 7.0.6(1) to clarify whether the override power affects collective agreements.

The SARS Commission's Second Interim Report noted the need for clarity on this issue:

"This is a convenient place to note that Bill 138 makes no reference to collective agreements. The draft discussion bill provided to the Justice Policy Committee by the Attorney General's Department contained an explicit provision that emergency orders would override collective agreements. That power is strikingly absent from Bill 138. Bill 138 neither expressly overrides collective agreements in the manner proposed in the draft discussion bill, nor expressly preserves them from the general override in s. 7.06(1) as it does with occupational health and safety laws. It may be that Bill 138 leaves collective agreements in limbo. It is a legal question, whether or not the present override in Bill 138 would override collective agreements through the power to override statutes that provide for collective bargaining rights. This is an issue too important to leave to legal debate once an emergency arises. It must be clear to employers and employees whether or not emergency orders override collective agreements."<sup>4</sup>

While we take the view that section 7.0.6(1) as drafted does not override collective agreements, we endorse the Commission's comments that it would be preferable to have express clarity on this point. We wish to avoid any disputes with employers when the next emergency strikes. Moreover, the overriding of collective agreements during SARS caused dissension among nursing staff and undermined morale, not to mention disregarded our union's representation rights.

A further solution to the question of clarity about working conditions and keeping nurses and other health care workers working during an emergency, but which is also not found in Bill 56, is to require advance planning of such potentially known issues by mandating that principles be determined in collective bargaining by the workplace parties.

It is our position that every emergency plan should provide for the advance collective bargaining of principles related to all employment issues that might affect health care workers. In particular, we suggest a number of principles should be developed in advance and we expect they would anticipate many, if not most, issues that could arise for working conditions during an emergency.<sup>5</sup>

**Recommendation 3:**

Amend Bill 56 to expressly exclude the overriding of collective agreements from section 7.0.6(1).

#### **Recommendation 4:**

Amend Bill 56 to require that all emergency orders/plans (at least affecting the health care sector) provide for the advance collective bargaining of principles related to all employment issues that it is anticipated would impact health care workers in an emergency.

#### **Keeping Nurses Working During an Emergency: Protecting Worker Health and Safety**

Bill 56 does contain in section 7.0.6(5) an override that the *Occupational Health and Safety Act* prevails in the event of a conflict with an emergency order. We commend the government for this acknowledgement of the importance of protecting worker health and safety in an emergency.

However, ensuring occupational health and safety statutory protections, while necessary, is insufficient during an emergency. Justice Campbell in his Second Interim Report said:

"The health and safety of emergency workers is a fundamental element of every emergency response. One of the strongest lessons from SARS is that the health and safety of health care workers and other first responders is paramount in a public health emergency. SARS demonstrated that emergency response can be seriously hampered by high levels of illness or quarantine among health care workers....Emergency orders will not work if they leave workers deep concern for their personal health and safety. The deepest concern for workers in an infectious outbreak is not their own safety but the safety of their families and those that they may infect if not properly protected. Emergency orders that do not meet these concerns cannot be enforced."<sup>6</sup>

Health care workers, while protected under Ontario's *Occupational Health and Safety Act*, are among those workers who have a limited right to refuse unsafe work. Before refusing unsafe work, the law requires most ONA members to consider the impact of such an action on others. Most ONA members have a right to refuse to work only where unsafe conditions exist *and* they are not be adequately protected by equipment, measures and procedures that ought reasonably to be available. Individual circumstances, such as the availability and fit of proper protective equipment (e.g., respirators), has to be addressed in an ongoing and structured way at the workplace level.

This means that the current structures and processes associated with Joint Health and Safety Committees in health care workplaces must continue to be operational and effective in any emergency situation.

Bill 56, in our view, does not provide sufficient clarity around the critical role and responsibilities of Joint Health and Safety Committees, especially during an emergency.

During SARS, health care workers repeatedly reported the shortage of personal protective equipment, including proper respirators, in addition to ongoing issues with proper fit-testing. Joint Health and Safety Committees are set up to deal with just such issues. We believe it is essential that Bill 56 acknowledge the role of these committees in an emergency. So too does the SARS Commission who recommended that "every emergency plan provide for a process to facilitate advance planning to address potential workplace health and safety issues and to work out those issues as they arise."<sup>7</sup>

**Recommendation 5:**

Unions and Joint Health and Safety Committees should be immediately notified, activated and consulted when an emergency is declared.

**Recommendation 6:**

Health emergency orders/plans should address how each facility will obtain adequate supplies of appropriate protective equipment and specify that health care facilities and the Ministry of Labour are required to consult with Joint Health and Safety Committees throughout an emergency.

In addition to effective processes for health and safety decisions to be made within health care workplaces, it is our view that it must be crystal clear which Ministry has overriding authority on health and safety matters during an emergency. Justice Campbell was exceedingly clear on this point about lines of authority: "in times of emergency it is essential to know who is in charge."<sup>8</sup> The SARS crisis gave us first-hand experience with the types of issues and confusion that arise when two provincial ministries (Health and Labour) have jurisdiction over health and safety issues.

As a result, we believe that it should be clearly specified that it is the Ministry of Labour that is to take the lead and has overriding authority in workplace health and safety matters at all times but particularly in an emergency.

**Recommendation 7:**

Amend Bill 56 to specify in emergency orders that the Ministry of Labour is the government body with the exclusive power and responsibility to investigate workplace health and safety concerns, to establish health and safety guidelines and standards, and to enforce such guidelines and standards.

**Keeping Nurses Working During an Emergency: Additional Employment Issues**

In our view, Bill 56 fails to provide sufficient clarity on a number of additional employment issues. One such issue that Justice Campbell highlighted is the need in “any emergency to compensate those who suffer an unfair burden of personal cost for cooperating in public health measures like quarantine.”<sup>9</sup> One study he cites indicates that fear of loss of income was the top concern from respondents in terms of compliance with emergency orders. The government recognized this issue during SARS with the introduction of a compensation loss fund. According to Justice Campbell, “a lesson from SARS is that advance planning for health emergency compensation is vital.”<sup>10</sup> Because of the extreme importance of voluntary compliance to any emergency response, Justice Campbell made a specific recommendation:

“Emergency legislation require that every government emergency plan provide a basic blueprint for the most predictable types of compensation packages and that they be ready for use, with appropriate tailoring, immediately following any declaration of emergency.”<sup>11</sup>

Bill 56, however, fails to incorporate this advice, even though it does provide compensation for loss of property. We believe this is a mistake not to set out basic commitments to, and a framework for, a compensation program for loss of income in advance.

**Recommendation 8:**

Amend Bill 56 to provide a basic blueprint for the most predictable types of compensation packages, and further provide that the provincial government should be required to consult with unions regarding the details of a compensation program during a health emergency to address the impact of the emergency on health care workers.

Although Bill 56 does not address compensation for loss of income related to voluntary compliance in an emergency, it does amend the *Employment Standards Act* to set out in section 50.1(1) the conditions under which employees are entitled to a leave of absence, without pay, when an emergency is declared if they will not be performing their duties. Such a leave, importantly, can also be accessed to provide care or assistance to specified family members in an emergency.

However, in our opinion, the current construction of this leave is flawed without a commitment to compensation for loss of income and without further specification of the duration of the leave. Under section 50.1(5), it is unclear which limit would apply to the leave if the declared emergency was of a different duration than the additional reason for the leave under 50.1(1) (a) through (d). It is possible to imagine scenarios where an emergency is declared to be over but a leave would continue to be necessary because of extended quarantine or lingering effects from some infectious disease outbreak. These flaws need to be clarified in Bill 56.

**Recommendation 9:**

Amend Bill 56 to clarify the duration of any leave of absence consistent with the specific section under which the leave is allowed.

Related to the provision for a leave of absence during an emergency is the protection from termination set out in section 7.0.2((8) in Bill 56. Just as we believe the provision for a leave of absence is flawed with respect to clarity around the duration of the leave, so it is our view that the employment protection provision fails to specify sufficient protection for persons providing services under an emergency order.

We believe this protection should specify not only protection from termination but also protection for reinstatement to the former position prior to the declaration of the emergency. If the former position, for some unforeseen reason, has been discontinued or reorganized after the emergency, then the employment protection should specify the employee is entitled to a comparable position.

**Recommendation 10:**

Amend Bill 56 to provide reinstatement to an employee's former position, after the declared emergency, or if that position has been discontinued, to a comparable position.

**Conclusion**

ONA welcomes this opportunity to provide our recommendations relating to effective emergency management to the Standing Committee. Our members will never forget their experiences during SARS. It is our sincere hope that the hard lessons learned will also not be forgotten.

From our vantage point on the frontlines, it is critical that advance planning take into consideration the central role our members play in the delivery of care at all times. During an emergency, planning must be in place to ensure that our members keep working so that care can be delivered without confusion and within the familiar framework of our collective agreements and our workplace health and safety committee structures and processes.

For this reason, we have strongly recommended that the Ministry of Labour be the exclusive authority on issues related to investigating workplace health and safety concerns that are raised, and establishing and enforcing health and safety guidelines and standards. Most importantly, particularly during a health emergency, it is our firm belief that adequate supplies of proper protective equipment must be secured and the precautionary principle approach should be adopted. These points are essential in order to offer our members and all health care workers greater workplace protection when determining measures to protect workers from infectious diseases with uncertain routes of transmission.

Voluntary compliance with emergency orders is also contingent on advance planning. Loss of income during an emergency is a serious issue that must be contemplated in Bill 56. In addition, it is important to clarify in Bill 56 the duration of leaves of absence and protection to return to your job held prior to the emergency.

Nurses and other health professionals advocate on behalf of their patients to ensure they receive the care that is needed. This responsibility is heightened in an emergency situation. Let us take particular care now so that the care will be there for those who need it in the future.

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## Endnotes

<sup>1</sup> Hansard, Standing Committee on Estimates, September 28, 2005.

<sup>2</sup> See Linda O'Brien-Pallas et al. *Stepping to Success and Sustainability*. University of Toronto, Nursing Effectiveness Unit, October 2003, pp. 95-96.

<sup>3</sup> Hansard, March 29, 2006.

<sup>4</sup> The SARS Commission, *Second Interim Report*, April 5, 2005, pp. 378-379.

<sup>5</sup> Issues to be collectively bargained and included in any health emergency plan include:

- a) Deployment of staff, including voluntary staffing initiatives;
- b) Scheduling and hours of work;
- c) Pay, including any entitlement to emergency premiums and protection from financial disadvantage caused by the emergency;
- d) Staffing plans and entitlement to premium pay;
- e) Training health care workers for the implementation of emergency plans, both in advance of and during an emergency;
- f) Training health-care workers for additional health and safety issues arising during an emergency;
- g) Management of health care worker stress;
- h) Protection of occupational health and safety standards;
- i) Impact of restrictions on health care workers' employment (e.g. restrictions placed on those who work in more than one facility);
- j) Impact on health care workers caused by the shut-down of facilities, including compensation;
- k) Accommodation that workers require: for example, pregnant workers or immuno-suppressed workers;
- l) Workers required to be placed in quarantine;
- m) Long-term impact on health-care workers caused by the emergency;
- n) Vacation entitlement during an emergency.

<sup>6</sup> The SARS Commission, *Second Interim Report*, April 5, 2005, pp. 393-394.

<sup>7</sup> The SARS Commission, *Second Interim Report*, April 5, 2005, p. 398. See also Lawrence Gostin regarding the importance lessons learned about hospital infection control: "Since hospital infection control is inconsistent, it is vital to train and monitor health care workers. Policy makers will also have to address the problem of critical shortages in infection control and patient care equipment (N95 respirators, ventilators, intensive care beds.)" In "Public Health Strategies for Pandemic Influenza: Ethics and the Law." *JAMA* 295(14), April 12, 2006, p. 1702.

<sup>8</sup> The SARS Commission, *Second Interim Report*, April 5, 2005, p. 322.

<sup>9</sup> The SARS Commission, *Second Interim Report*, April 5, 2005, p. 308.

<sup>10</sup> The SARS Commission, *Second Interim Report*, April 5, 2005, p. 309.

<sup>11</sup> The SARS Commission, *Second Interim Report*, April 5, 2005, p. 309.