

# Alberta Doctors' Digest

## Quality assurance protection

Alberta physicians should understand the impact of proposed changes to the *Alberta Evidence Act*. On April 8, 2021, *Bill 65*, the *Health Statutes Amendment Act*, was introduced in the Alberta Legislature, proposing amendments to five different pieces of health-related legislation.

One of those was section 9 of the *Evidence Act*. This section provides a statutory bar to witnesses in an action when being asked questions or producing records arising from proceedings before a “quality assurance committee” or QAC.

In other words, s. 9 keeps information and documents obtained by a QAC protected from disclosure in a legal action. The intention of such restriction is to allow health care providers and others the safety to speak freely, without fear of reprisal, in the course of a quality assurance review.

For clarity, a QAC is defined in the *Evidence Act* as:

“... a committee, commission, council or other body that has as its primary purpose the carrying out of quality assurance activities...”

which, in turn, are defined as:

“... a planned or systemic activity the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of

(i) the quality of health care or health services, or

(ii) the level of skill, knowledge and competence of health care providers.”

As of the date of submission of this article, *Bill 65* had not yet been passed in the Legislature, so we provide this information in anticipation of upcoming debate and proclamation of the Bill.

### Important considerations of s. 9

Before moving to discuss the amendments created by *Bill 65*, it is helpful be clear on some critical elements of s. 9.

First, s. 9 does not provide blanket protection from all disclosure of information. Specifically, it prevents a witness from being asked questions about participation in a quality assurance activity or from producing any quality assurance record in that witness’s possession or control in the course of an action. The scope of a quality assurance record extends to all material produced during the committee’s investigation. An “action” is a proceeding such as an arbitration, reference, investigation, inquiry or a proceeding before a court, so the protection extended is purely related to producing evidence in such a proceeding (hence the inclusion in the *Evidence Act*).

Second, s. 9 relates to witnesses who participated in or have knowledge of the quality assurance activity. So a witness may have heard of the proceedings second-hand or have received the report from an actual participant in the quality assurance activity. That witness is nevertheless prevented from speaking of the activity or producing records in the context of the action.

Third, s. 9 does not excuse a witness from answering other questions that do not relate to the quality assurance activity. In fact, medical and hospital records pertaining to a patient are expressly excluded from the protections afforded by s. 9 of the *Act*.

Finally, in order to be considered a quality assurance committee, a committee must be appointed by either a regional health authority, the operator of a nursing home, the board of an approved hospital; established under a different piece of legislation; or designated as such by order of the Minister of Health. The committee must have standard terms of reference and regularly scheduled meetings with defined membership. Alberta Health Services, for example, has [specific regulations pertaining to its quality assurance committees](#).

### **Amendments to s. 9**

*Bill 65* amends the protections that are afforded by allowing witnesses in an action to produce a quality assurance record, or a portion of such a record, in the context of a public fatality inquiry as that body is defined in the *Fatality Inquiries Act*.

Clearly, a public fatality inquiry falls into the category of a proceeding that is an action as described in s. 9. So, prior to these amendments, a witness in a public fatality inquiry could not be asked, or answer, questions relating to that proceeding, nor could that individual produce any quality assurance record in the witnesses' possession or control. This apparently was a source of frustration for judges who were leading public fatality inquiries. Those expressions of concern led the Minister of Justice to introduce these amendments.

The amendments essentially incorporate new definitions for “individually identifying,” “patient,” “personal representative,” and “public fatality inquiry” in order to create an exception to s. 9 protection in the course of a fatality inquiry. (These amendments, therefore, only have application following a death for which a fatality inquiry is undertaken.)

As a result of these amendments, a witness in a public fatality inquiry *may* produce certain aspects of a quality assurance record, as follows:

- the fact that a quality assurance committee conducted a quality assurance activity
- the date or time of the proceeding
- the terms of reference of the committee
- any information that had otherwise been disclosed to the family of the patient
- facts relating to the incident being investigated
- recommendations arising from the report

- any steps taken by an owner or operator of a facility where the incident occurred to avoid the risk of a similar incident in the future.

However, the information cannot include opinions expressed during the proceeding, nor can it disclose any individually identifying information for any person involved in the review other than the deceased patient.

## **Conclusions**

These proposed changes to s. 9 make sense; clearly, a public fatality inquiry into a patient death would be aided by obtaining certain findings arising from a quality assurance proceeding. As well, access to findings and recommendations could have the effect of shortening, or at least streamlining, the public fatality inquiry.

The concern, however, is that there is no single model or template for the creation of a report arising from a quality assurance activity, so the words used to arrive at recommendations or describing steps taken to avoid the risk of similar incidents can have the unintended consequence of pointing fingers of blame or finding fault. As a result, it will be critical that the portions of quality assurance reports that may come to be disclosed are carefully vetted to ensure that the spirit and intent of these amendments are not circumvented.

In summary, *Bill 65* seems to uphold the spirit of protection of s. 9 while allowing further flexibility to assist in public fatality inquiries. For further information, readers are encouraged to consult with their quality and safety specialists.

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Editor's note: The views, perspectives and opinions in this article are solely the author's and do not necessarily represent those of the AMA.

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