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HIV&AIDS legal clinic ONTARIO

halco news

New Privacy Legislation Proposed in Ontario

Privacy of Personal Information Act, 2002

Early in 2002, the provincial government announced that it would be releasing another version of privacy legislation for consultation. Readers of **halco news** may remember that the province has introduced a number of pieces of draft legislation designed to address the handling of personal information. These various drafts have come from a number of different angles and provincial ministries. To date, none has progressed beyond committee hearings in the provincial legislature.

Some previous drafts have been specifically designed to address personal health information. This was the case with the *Personal Health Information Protection Act, 1997 (PHIPA)*, which was introduced by the Ministry of Health as draft legislation for consultation. This draft legislation was intended to specifically address the use, collection and disclosure of health information in Ontario. There were a number of very grave problems with the draft legislation and the Ministry of Health received over 200 submissions on the draft legislation. A copy of the position statement produced by HALCO and other community members can be found on our website at www.halco.org, under "Position Statements".

In September 2000, the Ministry of Health and Long Term Care released a consultation document entitled "Ontario's Proposed Personal Health Information Privacy Legislation for the Health Sector (Health Sector Privacy Rules)", again asking for feedback. This consultation was clearly based on a revised version of the PHIPA 1997 draft legislation, but the legislation itself was not included in the consultation. The approach of this proposal was to create "health sector rules" that would be attached to a broader "Privacy Act" being proposed by the Ministry of Consumer and Commercial Relations. HALCO again responded, and these comments can also be found on our website under "Position Statements". What had changed is that in the meantime, the federal government had introduced new privacy legislation in the fall of 1999, proclaimed in the spring of 2000called the *Personal Information Protection and Electronic Documents Act (PIPEDA)*. This federal legislation required that the provinces had to show that they had "substantially similar" legislation in place by January 1, 2004 or else *PIPEDA* would apply in the provinces.

The third initiative occurred when Bill 159, the *Personal Health Information Privacy Act, 2000* was introduced for first and second reading in the provincial legislature in the December of 2000. This approach moved back away from general privacy legislation for Ontario and regressed to an independent piece of legislation specifically directed at health information. HALCO's detailed response to Bill 159 is also available on our website under "Position Statements". Bill 159 was the first time the legislation was actually introduced to the house. Once referred to committee, many stakeholders presented both written and oral submissions detailing their many concerns with the legislation. In his own oral comments, the federal privacy commissioner indicated that Bill 159 was definitely not substantially similar legislation to the federal *PIPEDA* and was extremely critical of the

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legislation. Bill 159 died on the order paper when the provincial legislature was prorogued in February 2001.

Which brings us to today.

The current draft legislation, the *Privacy of Personal Information Act*, has been released by the Ministry of Consumer and Business Services for comment. The deadline for written responses is March 31, 2002. This draft legislation has not been introduced to the house for first reading. The draft legislation, and a *Guide to Ontario's Consultation on Privacy Protection* can be downloaded from the Ministry website at http://www.cbs.gov.on.ca/mcbs/english/56HK6V.htm .

The current proposal returns us to general privacy legislation for the province of Ontario, and is an attempt to meet the 'substantially similar' criteria set out in the federal *PIPEDA*. This time, there is no separate "health sector privacy rules", though the legislation is designed to address the privacy of health information, in addition to other personal information. The result is a very complicated piece of legislation in which rules about health information are interspersed within the entire draft. The draft legislation would apply to the private sector, the health sector (including agencies and institutions), non-government organizations (like charities), professional associations and religious groups.

HALCO will be undertaking an analysis of this legislation and making a written submission. Watch future issues of halco news, and check our website for updates on this work. If you would like to become involved, or wish more information about this process, please contact Matthew Perry at HALCO.

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HALCO Changes

It wouldn't be a complete issue of **halco news** if we didn't have some changes to report here at HALCO. It is with mixed emotions that we are announcing that Ruth Carey, HALCO's executive director, is taking a one year secondment as a staff lawyer with the Clinic Resource Office. Ruth's leave will run from the February 18 2002 – February 17, 2003.

Ruth has been the Executive Director and staff lawyer of HALCO since May 1996, but her ties to HALCO extend far beyond that. Ruth was a member of the legal issues committee of AIDS Action Now! which initially undertook to create a legal service for PHAs in the early 90s. This led to the establishment of a Project which was first housed at ARCH, the Advocacy Resource Centre for the Handicapped and then moved to the AIDS Committee of Toronto offices. Once incorporated, Ruth sat as a Director on HALCO's board until she stepped down to be considered for the ED position.

The Clinic Resource Office is a central research and support office for all the clinics across the province. In her role as a staff lawyer with the CRO, Ruth will have the opportunity to undertake research and litigation support on a broad range of poverty law issues. Ruth's incredible intelligence, analytical and legal skills will be a great benefit to the CRO, and we wish her well in this work. After almost 7 years at the helm, she certainly has earned a brief respite and change of scenery.

In her absence, there will be some adjustment of staff here at HALCO. Glenn Betteridge, one of our staff lawyers, and Matthew Perry, our Community Legal Worker, will be sharing the Executive Director responsibilities during Ruth's absence (because it takes two of us do what Ruth does!). Glenn will serve as Acting Director of Legal Services and Matthew will serve as Acting Director of Administration for the year. We have also hired a staff lawyer to cover for Ruth's absence during the secondment year. We are pleased to let you know that Ryan Peck, whom many of you will know from his days as an articling student here at HALCO, will be returning as a contract staff lawyer for this year.

We wish Ruth the best of luck. HALCO will miss her. And welcome back Ryan!

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OW Mandatory Drug Testing & Treatment Regulations Released

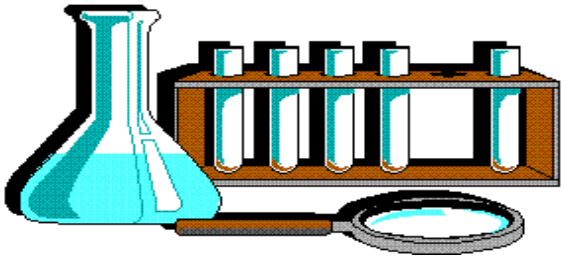
On December 14, 2001 the Ontario government published regulations that will make possible the mandatory drug screening, assessment and treatment for people receiving social assistance through Ontario Works (OW). The "mandatory addiction treatment initiative" regulations are made only under Ontario Works, which means that so far, those receiving benefits under the Ontario Disability Support Program (ODSP) won't be affected.

The new OW regulations, and the policy directives that go with them are in fact effective immediately. However, the policy documents indicate that no mandatory drug screening, assessment or treatment activities will start until the local municipality has put in place a plan, including who will deliver the services, and the plan has been approved by the province. The provincial government has also set out the timeline for putting this program into effect.

Under the province's timeline, the program will first operate in pilot sites. They said that they expect pilot sites to start in early 2002, and that pilots will continue through 2002 and 2003. The pilot projects are supposed to be 'learning' pilots, and the lessons learned will be used to design the final program. The final program is supposed to be ready to be put in place by 2004 and will then be rolled out across the entire province through to December 2005. Municipalities, who deliver OW, have been asked to volunteer as pilot sites for the program. The city of Toronto, the largest deliverer of OW, has clearly stated to the province that they want to be last on the list.

How would the program work?

According to the regulations, this initiative has three stages. They have been added to the list of employment assistance activities that you can be required to agree to do in order to receiving assistance. This also means that if you don't do them, or refuse to do them, your assistance can be cut off. Technically, the cut off period is the same as for other participation requirements – three months for the first time, and six months for the second or more times. The only special difference is that if you are cut off, you can requalify for benefits before the end of the three or six month period if you agree to resume the addiction treatment activity you are required to do.



The program has three main parts: An addiction screening test, a "program for the assessment of substance addiction", and "a program for the treatment of substance addiction". "Substance" includes illicit drugs as well as alcohol and prescription drugs. The screening test is going to be a paper-based test (not a chemical test) to determine whether their might be an addiction issue. We do not yet know which test will be used – only that the test is one that will be approved by the province. The screening test will not be part of a standard application to OW, though the regulations state that anyone who self-discloses an addiction will be immediately referred for screening.

The regulations also set out what would trigger a referral to any of these programs. You would be referred for a screening test if OW has reasonable grounds to suspect that you repeatedly use a substance to the point that:

- You're not successfully doing one of the other employment assistance activities;

Or

- You can't accept or keep a job you're otherwise physically capable of doing.

The next stage is the program for the assessment of substance addiction. In order to be required to do this, OW has to have reasonable grounds to suspect that you met the grounds for a screening test (and had one) AND that:

- You are periodically or chronically intoxicated;
- You have an overwhelming need to use the substance;
- Your use results in substantial physical, psychological, economic or social harm to you;
- You have difficulty in voluntarily stopping or changing your use despite the harm.

If all of these things are true, then you would be referred to an assessment program. It is not clear at this time, based on the regulations or the policy, who exactly would carry out this assessment. The policy indicates that the assessment "may involve others from the addiction treatment community". The regulations also indicate that an assessment program may include "chemical testing and other evaluative measures".

The third stage is treatment. If you met all the criteria for a screening test and an assessment program, and went through these steps and as a result OW is "satisfied" that there is an addiction which meets all the criteria shown above, then you will be required to participate in a program for the treatment of substance addiction. The only criteria is that the program be the "least

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restrictive and least intrusive program that is appropriate in the circumstances".

What if I refuse to participate?
The simple answer is that you will be cut off for the 3 month (first time) or six month (second or more times) period. The regulations say that you will be sanctioned if you "refuse or fail to make reasonable efforts" to participate in one of these activities – the same criteria as for all other employment assistance activities. Before the regulations were changes, you could voluntarily choose to have an addiction treatment program count as your participation requirement. If you didn't go, or failed to "make reasonable efforts", then you would be expected to meet one of the other mandatory requirements (job search; community placement, etc.). The only difference under the new regulations is that you can get back on to OW before the 3 or 6 month period is up if you agree to participate in the mandatory activity again.

The policy, on the other hand, talks about a more graduated approach to sanctions. The policies are **not** the law, but show how the government thinks the law should be read. Under the policy it is clear that it is the "administrator" (worker) who decides if 'reasonable efforts' are being made. The policy also talks about "unexplained absences" from treatment. The first time, the worker is supposed to follow up daily with you. The second time, you and the treatment workers will be contacted to review the treatment plan. The third time, the worker will look at whether or not you are likely to be using your assistance in a way that is "not for the benefit" or you or your dependents. If the worker(s) decide that this is the case, then they may appoint a trustee to receive your OW cheque on your behalf and you'll get a weekly allowance from the trustee. The fourth or more times will cause a formal case conference and might involve sanctions.

These steps relate to absences from treatment programs, but don't say anything about how sanctions would work in relation to the screening test or the assessment program. This means that a refusal to participate or make reasonable efforts would result in the full sanction (3 or 6 months) right away.

Who will do the screening, assessment and treatment?
The regulations don't give us much information about this. The policy documents indicate that each municipality is expected to work with local addiction treatment providers to establish systems for referrals and information and service planning. The policy also indicates that municipalities "must engage" the services of an addictions specialist to work with recipients for whom addiction is a barrier to employment. The policy indicates that "specialized staff" will interview and screen anyone who voluntarily self-discloses an addiction, or who is referred by caseworkers. This person will also be the OW caseworker for the clients who are referred for assessment and treatment. According to policy these "specialized staff" are supposed to have expertise and experience in addictions and "if possible, mental health and other issues which could be barriers to participation or employment" for people on OW.

What happens next?
We do not yet know if or where pilot programs have actually started. Though the province has indicated they would like municipalities to volunteer to be a pilot site, we have not yet heard of any such volunteers. No municipality can start running the program until they have been approved to do so by the province. If you are aware of any pilot sites in your areas, we would be interested in hearing from you.

For more information about mandatory drug programs and welfare, you can visit the Workfare Watch website at http://www.welfarewatch.toronto.on.ca/hot/hot1.htm . You can also find lots of information about problems with similar programs in the U.S. at http://www.lindesmith.org/ .

Volunteers Needed for Pride & Remebrance Run

HALCO is extremely proud to be able to announce that we have been chosen as one of the three beneficiaries of the funds raised by the Pride and Remembrance Association at the 2002 Pride and Remembrance Run. Fife House and the Lesbian Gay Bi Youth Line are the other two beneficiaries. This amazing support will help us to continue to work on the HIV & the Law Advocate's Manual, produce a new poster for the clinic and continue to be able to meet the needs of our clients.

This year's Pride and Remembrance Run will be held on Saturday June 29, 2002 at 10:00 a.m., the day before Pride. It is a 5 kilometer run, starting and ending at Church and Wellesley and this year, organizers are anticipating more than 700 participants. In 2001, the Run was able to raise $50,000 to be distributed among the Beneficiaries. For more information about the run, check out the Pride and Remembrance Association website at http://www.priderun.org.

HALCO, and the Run, need your help! As part of our commitment, HALCO needs to provide a number of volunteers to help out before on **and** on the day of the run. If you or someone you know would like to lend a hand to make the run another "runaway" success, we need volunteers for the following dates: Saturday May 4, 2002 (starting at noon), Saturday June 22, 2002 and Saturday June 29 2002 (run day). Please contact Matthew Perry at HALCO to let him know if you're willing to help out. We need all the help we can get, and you will have the satisfaction of knowing that you're helping out four organizations at once!

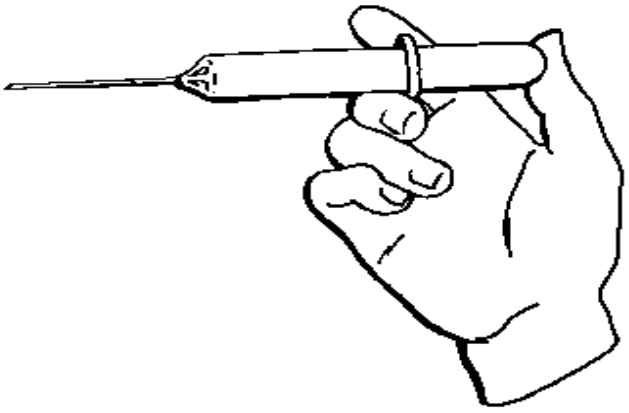
Many individuals over the years have indicated a desire and willingness to volunteer for HALCO – now here's your chance! Help us help the Run be the most successful ever, and help people living with HIV and AIDS at the same time.

Bill 105 Becomes Law & Bill C-217 Withdrawn from the Order Paper

On 1 October 2001 Garfield Dunlop, a Conservative backbencher in Ontario, introduced Bill 105 for first reading. Formally titled "An Act to amend the Health Protection and Promotion Act to require the taking of blood samples to protect victims of crime, emergency service workers, good Samaritans and other persons," Bill 105 unanimously passed second reading on 4 October 2001 and was referred to the Standing Committee on Justice and Social Policy for study.

Bill 105, the text of which is available online at http://www.ontla.on.ca is similar to the federal Canadian Alliance private member's Bill C-217 (the *Blood Samples Act*). It is designed to provide emergency personnel, health care workers, victims of crime, those performing jobs to be defined in future regulations, and "good Samaritans" with the ability to force a person to undergo HIV, HBV, or HCV testing. The rationale is that if an occupational exposure has occurred, and the status of the source person is unknown, non-consensual testing is justified because it will result in peace of mind for the exposed person and allow for timelier and better decisions about post-exposure prophylactic treatment.

Bill 105 amends the *Health Protection and Promotion Act*, the general legislation governing public health departments in Ontario. The person wanting the testing done would have to apply to a local Medical Officer of Health. The applicant would have to establish that he or she is in one of the classes of people who have the right to apply for such an order. The Medical Officer of Health would have to conclude that reasonable grounds exist to believe that the applicant may become infected as a result of an exposure to a prescribed communicable virus. The Medical Officer of Health could then issue an order requiring a person to submit to giving a blood sample for testing. The person ordered to give a blood sample may appeal within fifteen days to the Health Services Appeal Board. The applicant wanting the testing done can appeal to the province's Chief Medical Officer of Health if his or her application is denied at the local level.



On 11 October 2001 the HIV & AIDS Legal Clinic (Ontario) notified caregivers and service providers around the province about Bill 105 and encouraged people to contact the Standing Committee on Justice and Social Policy with their views. Those individuals who contacted the clerk of the Standing Committee to request the opportunity to speak to the Bill were informed that no decision had been made about oral presenters but that people were welcome to send in written submissions. Without any notice to those who had expressed a desire to address the Committee, the Standing

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HIV & AIDS Legal Clinic (Ontario) Donation Form

❑ **Yes! I want to make a charitable donation to help HALCO continue helping low-income PHAs in Ontario.**

Please accept my donation of: ❑ $25 ❑ $50 ❑ $100 Other $_____

❑ **Please charge my VISA or AMEX: Card # _____ Expiry Date _____**

Name on card: _____ Signature _____

❑ **I enclose cheque/money order payable to the HIV & AIDS Legal Clinic (Ontario).**

Name _____ Title _____

Address _____ Postal Code _____

Phone (day) _____ Phone (evening) _____

Fax _____ Email _____

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Committee met to discuss Bill 105 on 4 December 2001.

The only witness called by the Standing Committee was Dr. Colin D'Cunha, the Chief Medical Officer of Health for Ontario. Dr. D'Cunha stated:

> I am uncertain as to whether the purpose of Bill 105 justifies the intrusion on the rights of the subject of an Order under the bill. I say this bearing in mind the risk assessment and statistics respecting reports of disease transmission involving these applicants and other, less intrusive, more effective means available to achieve the goal of protecting the applicant's health… I am not convinced that Bill 105, with its focus on the subject instead of the at risk person, assists the emergency services worker in the objective of reducing or preventing the spread of disease.

The Standing Committee subsequently passed two minor amendments. One dealt with a structural and grammatical concern. The second was to include a regulation making power for the Minister of Health and Long-Term Care to make regulations to protect the privacy of people involved in the issuance of orders under the bill. Bill 105 was then unanimously passed by the Standing Committee and referred back to the legislature for Third Reading.

The unanimous support of the Standing Committee for Bill 105 took interested stakeholders by surprise as private member's bills seldom become law. Concerned individuals, doctors, lawyers and AIDS activists, wrote letters and e-mails to their MPPs and the Minister. As a result, the government of Ontario proposed sending Bill 105 back to the Standing Committee to consider amendments that it had drafted.

On 13 December 2001 the Standing Committee met again to consider Bill 105. Garfield Dunlop, the author of the bill, moved seven amendments that all subsequently passed. The primary purpose of the amendments was to answer some of the criticisms of Dr. D'Cunha. Before a person can make an application for forced testing of a potential source, that person must undergo a medical examination and submit a physician's report. The physician performing the examination has the power to order the applicant to undergo baseline testing, counseling and treatment. The physician's report must be filed with the Medical Officer of Health when an application for an order is made and the report must be considered by the Medical Officer of Health before an order will issue.

Late on 13 December 2001 Bill 105 was called for Third Reading in the Ontario Legislature. Only two opposition members voted against it. On 14 December 2001, Bill 105 received Royal Assent and became law in Ontario.

At the federal level, Bill C-217, the *Blood Samples Act*, was referred to the Uniform Law Conference after hearings before the Standing Committee on Justice and Human Rights. Bill 217 is set within the Criminal Code but was intended to have the same effect as Bill 205. There is a more detailed discussion of Bill 217 in the Fall 2001 issue of halco news, available at www.halco.org. After a number of presentations to the committee which were very critical of the proposed legislation, including serious concerns presented by the federal Privacy Commissioner, the Canadian HIV/AIDS Legal Network, HALCO, the BC People with AIDS Foundation and others,the Standing Committee referred the bill to the Uniform Law Conference and the Council of Justice Ministers for further consideration. In addition, Health Canada will be asked to undertake more research (ie, collect more statistics) on the occupational exposure of health care workers and others to risks of infection with HIV, HCV and HBV.

ODSP Update

In mid December, a number of changes were made under the Ontario Disability Support Program (ODSP) regulations.

Medical Transportation: Under the ODSP, people are able to get additional money if they have certain costs which are not reimbursed by anyone else. These are called "mandatory special necessities". These costs include the cost of diabetic supplies, surgical supplies and medical transportation. In the past, ODSP has used a number of different ways for people to get their medical transportation covered. As recently as a year ago, they required people to carry around a log sheet of all their medical appointments and get signatures to confirm that they actually showed up so that they could count that trip towards their allowance. This practice was eventually discontinued because of the privacy concerns it created when people had to show a sheet to health care providers which listed all the other appointments they go to.

Effective December 14, 2001, however, there is a new wrinkle – no one is eligible for any medical transportation money unless their medical transportation costs exceed $15.00 in a month. Once you have passed the $15.00 threshold, you are eligible for coverage for all the eligible medical transportation costs. But if your costs are less than $15.00, you won't get any reimbursement, even if the costs are valid costs.

ODSP Forms Completion: The other significant change made to the ODSP regulations also occurred on December 14, 2001. Effective then, Nurse Practitioners (Registered Nurses in the Extended Class) have been added to the list of people who are qualified to complete the Health Status Report part of the ODSP application. Before this change, only a medical doctor, psychologist or optometrist could complete this part of the ODSP application package.