



Psychiatric Patient Advocate Office

Bureau de l'intervention en faveur des patients des établissements psychiatriques

November 28, 2006

Mr. Bob Delaney, MPP
Chair
Standing Committee on the Legislative Assembly
Room 1405
Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Mr. Delaney:

Re: Bill 28, An Act to require the taking and analyzing of blood samples to protect victims of crime, emergency service workers, good Samaritans and other persons and to make consequential amendments to the Health Care Consent Act, 1996 and the Health Protection and Promotion Act

As a rights protection organization, the Psychiatric Patient Advocate Office (PPAO) is particularly concerned about the protection of vulnerable individuals who are consumers of mental health and other health care services. This submission is in response to the consultation on Bill 28 being conducted by the Standing Committee on the Legislative Assembly.

The PPAO is an arm's length office of the Ministry of Health and Long-Term Care. Since 1983 the PPAO has provided individual advocacy, rights protection and rights advice to clients of tertiary care psychiatric facilities in Ontario. Through our community rights advice service, we also provide rights advice in nearly all psychiatric units of Schedule 1 and 2 hospitals throughout Ontario. For more than two decades the PPAO has advocated strenuously on behalf of consumers of mental health services in an effort to address significant local, regional and provincial systemic issues.

The proposed legislation, which repeals and replaces section 22.1 of the *Health Protection and Promotion Act*, endeavours to safeguard the health of victims of crime, emergency service workers, good Samaritans and members of a prescribed class of individuals performing a prescribed activity under the prescribed circumstance by requiring the taking and analyzing of blood samples where there is a risk of exposure to a "listed communicable disease." Where there has been potential exposure to a bodily substance of another person, testing is intended to determine the presence (or absence) of a virus that causes a listed communicable disease, such as, HIV, Hepatitis B, Hepatitis C, or other prescribed disease.

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Under the proposed legislation, an application may be made to a medical officer of health by any person coming in contact with a bodily substance of another individual where that person:

- is a victim of a crime;
- was providing emergency health services or emergency first aid;
- is a member of a prescribed class and was exposed during the course of his or her duties; or
- was involved in a prescribed circumstance or prescribed activity.

Where the respondent in an application to a medical officer of health does not voluntarily comply with a request for testing or does not provide evidence of seropositivity respecting a listed communicable disease, or cannot be located despite reasonable efforts, the medical officer of health shall make a referral to the Consent and Capacity Board (CCB; the Board) for an order requiring blood taking and analysis. Hearings by the Board must be held and concluded within seven days of referral by the medical officer. The Board must make a decision within one day following the conclusion of a hearing; this deadline is extended where the day following a hearing falls on a Saturday, Sunday or other holiday. Under the proposed legislation, there is no right of appeal from CCB decisions respecting mandatory blood testing and an applicant may apply to the Superior Court of Justice for an order for compliance where a respondent fails to comply with an order made by the CCB.

Bill 28 strives to protect the health of specific occupational groups and victims of crimes who may be at risk of infection with HIV, Hepatitis B and Hepatitis C. By permitting mandatory blood testing under certain circumstances, the proposed legislation potentially abridges the individual's fundamental right to maintain his or her bodily integrity by refusing to submit to venipuncture for the purpose of providing a blood sample and the right to make informed decisions regarding his or her own healthcare and treatment. While the *Health Care Consent Act (HCCA)* guarantees that all treatment decisions in all settings are consent-based, the proposed legislation removes mandatory blood testing from the authority of the *HCCA*. Similarly, though the *Charter of Rights and Freedoms* guarantees security of the person, Bill 28 contemplates the forcible collection of a blood sample under prescribed circumstances through an order of the Board and, further, through court ordered compliance.

Mandated and enforced blood testing for HIV contradicts the current wisdom that such testing should be carried out on a voluntary basis with informed consent and in concert with the provision of counselling and referral, where appropriate. The proposed legislation explicitly states that there is no "physician-patient relationship or other relationship of trust between a medical officer of health and an applicant or respondent," but fails to define or require any mechanism for the provision of counselling or referral to appropriate medical supports or services for those found to be seropositive. Similar considerations apply to testing for Hepatitis B and Hepatitis C. Positive test results for any of these pathogens carry significant consequences for respondents (as well as applicants) and should be addressed in the context of a physician-patient relationship. Additionally, diagnosis with any of these viruses, especially HIV, is potentially stigmatizing and psychologically stressful. While the physical act of taking a blood sample through venipuncture may not in itself "endanger" a respondent's life, mandatory testing and its consequences would likely seriously impact those subjected to such involuntary testing.

The PPAO recommends, therefore, that the proposed legislation require and define guidelines for the provision of counselling, medical support and referral, where appropriate.

The PPAO believes that giving authority to the CCB, an independent administrative tribunal, to make orders for mandatory blood testing is a positive step in providing objective oversight in a process that has the potential to erode the rights of the individual to make informed choices respecting diagnostic medical testing and to maintain bodily integrity. In consideration of the significant change in legal status for respondents of an application for mandatory testing, the PPAO recommends that rights advice to respondents be mandated by the proposed legislation. In this scheme (see attached figure, “Bill 28: Proposed Inclusion of Rights Advice and Right of Appeal”), medical officers of health would be required to notify the rights adviser where a referral had been made to the Board. Rights advice would be provided by rights advisers, defined and qualified according to regulations of the proposed legislation. Rights advisers would be required to promptly provide rights advice to respondents to:

- apprise them of the significance of the referral to the CCB for mandatory testing;
- on request, assist with retaining legal counsel; and
- on request, assist with an application for legal aid.

Rights advice would be available to applicants upon request and the medical officer of health would be required to inform applicants of their right to receive rights advice on a voluntary basis. Both respondents and applicants would have the right to refuse rights advice.

While it remains unclear as to whether there is a right to legal representation before the Board, the PPAO believes that the proposed legislation should enunciate this right for both respondent and applicant.

Unlike other decisions by the CCB, the proposed legislation does not stipulate a right of appeal from decisions by the Board. In the opinion of the PPAO, this is a serious omission, insofar as it creates a striking inequity within Board process and affords the individual no opportunity to address errors or omissions in fact or law. Moreover, considering that non-compliance with the proposed legislation carries with it significant legal sanction, individuals facing mandatory testing should have the added right of appeal from decisions by the Board with which they may strongly disagree and which abridge their fundamental right to personal security and autonomous decision-making with respect to treatment. For these reasons, the PPAO recommends that the proposed legislation permit appeals from CCB decisions regarding mandatory testing to the Superior Court of Justice.

The proposed legislation defines the circumstances and groups of individuals who may apply for mandatory testing following exposure to bodily substances from other persons. However, no guidelines are provided for identifying the likelihood that potential respondents may be infected with one of the designated viruses. Certain minorities or groups of vulnerable or marginalized individuals may be presumed to be at higher risk for seropositivity due to their apparent lifestyles and may be targeted for involuntary testing more often than those in the mainstream. Thus, group membership may lead to discrimination in the application of the proposed statute. While guidelines are needed to determine the likelihood of seropositivity, it may be difficult to screen respondents in a non-discriminatory manner. Nevertheless, the PPAO recommends that the

proposed legislation provide non-discriminatory guidelines for determining respondent risk of infection.

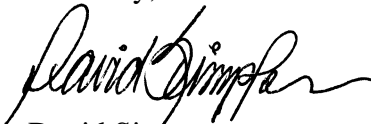
The process for mandatory blood testing outlined in Bill 28 necessarily involves the release of personal health information to the applicant's physician and, ultimately, to the applicant. While there are constraints placed on an analyst regarding the disclosure of blood sample results, there are no restrictions regarding the disclosure of the respondent's personal health information by the applicant or their physician. Restrictions or conditions governing the use and disclosure of any information derived from blood samples obtained pursuant to the proposed legislation are to be included in a regulation. Moreover, where a referral has been made to the CCB, the respondent's personal health information will become part of the public record. The PPAO recommends that stringent guidelines restricting the disclosure of blood analysis test results and respondents' personal health information be included in the proposed statute.

Finally, Bill 28 leaves the definition of "victim of a crime" to a future regulation. Will a conviction be necessary to define who is a victim of a crime or will allegations of a criminal offence suffice? The PPAO believes that this should be defined within the proposed legislation.

We believe that it is of paramount importance that those individuals who may be forced to comply with mandatory blood testing are afforded every protection in law of their fundamental right to make informed choices respecting this form of diagnostic medical testing and their right to maintain bodily integrity.

Please contact me at (416) 327-7004 should you have any questions regarding this submission.

Sincerely,

A handwritten signature in black ink that reads "David Simpson". The signature is written in a cursive, flowing style.

David Simpson
Director (A)

Attachment

Bill 28: Proposed Inclusion of Rights Advice and Right of Appeal

