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## Ontario Law and Social Policy: Implications for Screening

*Disclaimer – this information is not legal advice, nor does it represent the views of the government of Ontario or its representatives. This information is a brief summary of current legislation and social policy relevant to screening in Ontario. For complete and up-to-date information, readers should check with appropriate authorities. Readers seeking legal advice should consult with a lawyer.*

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### OVERVIEW

Screening in Ontario is subject to the same criminal, common and constitutional laws that apply in other provinces in Canada. In addition, several provincial laws in Ontario touch on the issue of screening either directly or indirectly. Taken together, these laws form a regulatory regime that is relevant to those organizations and individuals who work with children and other vulnerable persons, and who carry out screening as part of their risk management responsibilities.

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It is well established in common law that organizations providing programs and services to vulnerable persons have an obligation to take reasonable steps to ensure their safety and well-being.

While six or seven years ago discussions about screening revolved around whether or not there was a legal duty to screen, today there is widespread agreement that such a duty exists. In other words, screening has become an element of risk management, and the organization that doesn't carry out some form of screening is likely failing to meet the reasonable standard of care that the law, and the community, expects of them.

Today, discussions about screening focus not on *whether* it should be done, but rather on *how* it

should be done. The initial expectation that all organizations could screen all volunteers through a police records check proved to be unrealistic. As well, it has become apparent that effective screening requires more than simply searching police records. The present challenge to policy makers and the non-profit community is to find the balance between the duty to ensure a safe environment and the practical limits of what organizations can afford to do, given their resources and circumstances.

On the law-making front, there have been interesting developments in the last few years both nationally, and in Ontario. The Supreme Court of Canada recently issued two judgments relating directly to the question of whether an organization should be held responsible for the actions of an employee or volunteer who harms children, even where the organization has not itself been negligent (this type of liability is called “no-fault” or “vicarious” liability). These two decisions have resulted in a new test for determining whether an organization, through its program planning and operations, has significantly increased the risk of harm to participants: if it has, vicarious liability may be found.

In Ontario, there have been several legislative reforms in the past five years that impact on screening in the non-profit sector. Most significant, perhaps, is the enactment of Christopher's Law in 2001, creating Canada's first sex offender registry. The Change of Name Act now requires more detailed information in a name change application, and exempts the government from the notice requirements of provincial privacy laws when sharing information among relevant public institutions. The Child and Family Services Act has expanded the definition of “child in need of protection” and has lowered the threshold for determining and reporting the risk of harm to a child. The provincial government

requires that licensed organizations providing care and treatment to young, elderly, ill or disabled persons under a range of statutes such as the Nursing Home Act and the Long Term Care Act, now carry out screening of staff and volunteers. Changes to the Education Act and two new statutes relating to safety in schools allow for the automatic removal from the classroom of any teacher charged with a sexual offense, require school boards to exchange information about teachers facing discipline, and strengthen procedures for the screening of all persons employed in schools.

Over the next few years there will continue to be changes to privacy laws in Ontario. The federal government will soon extend privacy legislation to the private sector, meaning that private organizations will have to meet the same checks and balances that the government must meet in gathering, storing, using, and disclosing personal information about individuals. Ontario is presently preparing legislation similar to the federal law that create new rules about how organizations manage the information that they obtain through screening.

The provincial statutes having relevance for screening are summarized briefly here.

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## **CHANGE OF NAME ACT**

RSO 1990 Chapter C.7

### ***Purpose***

This legislation sets out the procedures that are used when an individual wishes to change their name. In addition to dealing with routine name changes relating to marriage, divorce and adoption, this statute also contains checks and balances to deal with individuals changing their names to avoid detection by authorities.

Currently, any request for a name change in Ontario must include:

- The particulars of every criminal offence of which the person has been convicted or has been found guilty and been discharged;

- The particulars of every outstanding law enforcement order against the person including warrants, prohibition orders, restraining orders, drivers license suspensions, probationary orders and parole orders; and
- The particulars of any pending criminal charge or court proceeding.

The application must also be accompanied by a police records check issued by an employee of an Ontario police force. This police records check must disclose information on the above particulars.

### ***Implications for Screening***

Initially, this statute focused on detecting individuals who were changing names to evade creditors. Recently, the statute has been amended to deal with individuals trying to disguise records of abuse and other criminal activity.

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Recent amendments to this legislation improve the flow of information on name change applications among government departments and agencies. More specifically, the Solicitor General may now ask the Registrar General (the office that maintains all name change records and other vital statistics) for all personal information relating to a proposed name change. The Solicitor General may, in turn, disclose this information to any government department, police force, agency or institution that, in the opinion of the Solicitor General, should know about the change of name.

This information disclosure among government departments and agencies is not subject to the notice requirements of the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act. In other words, the individual who is applying for the name change

does not need to be notified that his or her personal information is being shared with other relevant agencies and institutions.

A final element of this legislation that is relevant to screening is that any application to change a name may be refused by the Registrar General, if there are reasonable grounds to believe that the name change is being sought for an improper purpose.

It should be noted that this statute is of no help in finding information on individuals who changed their name outside Ontario, or in finding information on individuals who have not formally or legally changed their names, but rather are using an informal alias. These are serious limitations on the ability to screen individuals solely through a police records check carried out on the basis of a supplied name.

## **CHILD AND FAMILY SERVICES ACT**

RSO 1990 Chapter C.11

### ***Purpose***

The purpose of this legislation is to promote the best interests, protection and well-being of children in Ontario. Under this statute, organizations are licensed to provide a broad range of services to families and children, including children who are, or may be, victims of child abuse or neglect and are in need of protection.

A system of regional child protection organizations known as Children's Aid Societies, or CAS, are among the organizations approved and licensed to provide services under this legislation. In some regions, these Societies may also be known as Family and Children's Services, or FACS. The statute also establishes a Child Abuse Register that is maintained by the network of Children's Aid Societies – however, the data in this Register is not available to the public but rather is used by licensed agencies to assist them in making informed decisions about child protection matters and the placement of children in foster care.

This legislation has recently been reviewed and in March 2000 a number of amendments took effect, representing the most significant reform of Ontario child protection laws in over a decade. From the general perspective of volunteer screening, the following changes are important:

- There is a stronger focus on the paramount objective of the statute -- that is, the protection of children. Formerly, the statute contained a number of secondary objectives that at times conflicted with the statute's primary objective;
- The reasons for finding a child in need of protection have been expanded. As well, the threshold for determining the risk of harm to a child has been lowered, to encourage earlier intervention to protect children at risk; and
- The duty of professionals and members of the general public to report if a child is, or may be, in need of protection has been clarified and expanded.

Other reforms implemented in 2000 improve the ability of child protection agencies to gain access to information about a child, promote improvements in the system for placing children, better control access by relatives and other individuals to children who are wards of the government, and broaden the scope of permissible evidence in child protection court proceedings.

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The amendments also stipulate a mandatory review of the statute every five years, to ensure that its provisions keep pace with public priorities and community standards.

Presently, the Ontario legislature is considering further amendments to the Child and Family

Services Act to allow school boards (in addition to Children's Aid Societies and police departments) to gain access to the Child Abuse Register.

### ***Implications for screening***

Nowhere in the Child and Family Services Act is there an affirmative requirement to screen employees or volunteers. However, the primary purpose of the statute confers on those individuals and organizations governed by the Act an implied duty to protect children, and thus to carry out effective screening. For example, Children's Aid Societies undertake significant screening of all employees and applicants for foster care and adoption using the Child Abuse Register and other information sources. As well, Ministry policy requires that organizations licensed and funded under the Act conduct police record checks on employees and volunteers, as one component of a comprehensive screening policy.

From the perspective of screening, the statute's definition of a child in need of protection, and the duty of professionals to report such a need, are significant. These aspects of the legislation impose important obligations on organizations and individuals who care for, and work with children.

The statute sets out numerous grounds for finding a child in need of protection. These grounds include the child having suffered physical or emotional harm, or being in a situation where there is a risk of physical or emotional harm. Such harm can arise from a failure to care for the child, or from a pattern of neglect in the care that is provided. Additional grounds include the child having been sexually molested or exploited, or being in a situation where there is risk of such harm. Other grounds include the child needing medical treatment, being abandoned by parents, or suffering from a mental, emotional or developmental condition that is not being treated by the child's parents.

Recent amendments to the Child and Family Services Act have clarified the duty of persons to report a child in need of protection to a

Children's Aid Society. Formerly, all persons (including members of the general public) had a duty to report a reasonable *belief* that a child was, or may be, in need of protection. Professionals who provided services to children could be penalized for failing to report a reasonable *suspicion* that a child was being abused.

Now the legislation states that both professionals and members of the general public have a duty to report if there are reasonable grounds to *suspect* a child is in need of protection. Reasonable grounds are what an average person, exercising normal judgment, would suspect. As well, the penalty imposed on professionals who fail to report has been extended to all grounds for protection, not just abuse. Because the threshold for a *reasonable suspicion* is lower than the threshold for a *reasonable belief*, there is a corresponding greater obligation on the part of all persons to be diligent and observant of children, and to report to authorities as appropriate.

### **CHRISTOPHER'S LAW (Sex Offender Registry)**

SO 2000

#### ***Purpose***

This statute creates Canada's first sex offender registry, named after 11-year old Christopher Stephenson, who was murdered in 1988 by a convicted pedophile on statutory release. The Registry is a provincial database of sex offenders who have been released into the community. All sex offenders in Ontario, and sex offenders from elsewhere who take up residence in Ontario, must register with the database and report to police on a regular basis. The collection, retention and disclosure of information contained in the Registry are exempt from the personal protections otherwise afforded to individuals through Ontario's privacy laws.

#### ***Implications for Screening***

Only police have access to the Sex Offender Registry, so it is not available to other

organizations as a screening tool. However, using the Registry local policy may publicly disclose information about an offender who they deem to be a risk in the community. As well, the information in the database will assist policy enormously in compiling information for criminal records checks.

## CONSUMER REPORTING ACT

RSO 1990 Chapter C.33

### *Purpose*

This statute governs the activities of agencies that gather and report financial and other personal information to consumers. It is believed that this legislation may also apply to individuals and organizations who provide references for employment purposes.

*Individuals writing references should be aware that there are important legal issues to consider, and that there are risks of liability.*

In particular, the statute may oblige an Ontario employer who denies employment to an individual as a result of a negative

reference, to advise the individual of that fact. Once advised, the unsuccessful candidate for employment is entitled to ask the employer for the source and general nature of the reference.

### *Implications for screening*

This statute has implications for screening because it affects those who provide employment references. Individuals writing references should be aware that there are important legal issues to consider, and that there are risks of liability. These liabilities include:

**Liability for defamation** – A negative reference may be defamatory if it contains information that is untrue and that cannot be substantiated. The defense against this risk, of course, is that the information is true. As well, defamation law allows the defense of “qualified privilege”, discussed under the section on the Libel and Slander Act.

**Liability for negligent misrepresentation** – A person providing a reference must take care not to misrepresent an employee’s qualifications, skills, performance or history. Negligent misrepresentation occurs when someone unknowingly or unintentionally provides inaccurate information in a reference that later gives rise to harm.

**Liability for fraudulent misrepresentation** – This occurs when the person providing the reference knowingly or intentionally misrepresents an employee and the subsequent employer is harmed as a result. This usually occurs in the context of an employer portraying an employee very positively in order to help the employee secure other employment and the subsequent employer relying upon that information to their detriment.

## CORPORATIONS ACT

RSO 1990 Chapter C.38

### *Purpose*

The Ontario Corporations Act is the statute under which most non-profit organizations and charities in Ontario are incorporated. Other organizations in Ontario may be provincial branches of national corporations created under federal legislation, and yet others may be incorporated under special acts of the provincial or federal legislature. These statutes are all very similar in terms of setting out the requirements for corporate governance and specifying the obligations and entitlements of members, directors and officers.

### *Implications for screening*

*The advantages and protection of this “corporate veil” are well worth the modest effort and expense to obtain and maintain incorporated status.*

Regardless of the method of incorporation, there are two important aspects of incorporation that are relevant to screening. The first is that the personal liability of members and directors of incorporated organizations is limited: in other words, should an incorporated organization be found liable for negligent hiring, screening or supervision, or be found vicariously liable for the harmful actions of an employee or volunteer,

the individual directors, officers and members of the organization will not be personally liable for the consequences. The same cannot be said of unincorporated groups such as small community organizations. The advantages and protection of this “corporate veil” are well worth the modest effort and expense to obtain and maintain incorporated status.

The second aspect of incorporation relevant to screening is that directors of non-profit organizations assume significant legal obligations by virtue of their fiduciary relationship with members. These obligations are no different than the legal obligations that directors of for-profit corporations owe to their shareholders.

The basic responsibility of a director is to represent the interests of the membership in directing the business and affairs of the organization, and to do so within the law. The legal duties of directors are divided into three parts:

- To act reasonably, prudently, in good faith and with a view to the best interests of the organization (also called the *duty of diligence*);
- To not use one’s position as a director to further private interests (also called the *duty of loyalty*);
- To act within the governing bylaws of the organization and within the laws and rules that apply to the organization (also called the *duty of obedience*).

It is this third area of responsibility that is most relevant to screening – or more appropriately, to the failure to screen. Directors of organizations who fail to ensure that the organization complies with statutory and common law obligations to appropriately screen employees and volunteers may be deemed to have failed to fulfill their fiduciary responsibilities under the Ontario Corporations Act, or such other legislation under which they are incorporated.

## **EDUCATION ACT**

RSO 1990 Chapter E.2

## **STUDENT PROTECTION ACT**

SO 2002

## **SAFE SCHOOLS ACT**

SO 2000

### ***Purpose***

The Education Act governs public education in Ontario by setting out provisions for the administration and funding of school boards, for staffing of schools, and for curriculum, classroom and teaching standards. It provides for discipline of students and staff, establishes requirements for record-keeping and information sharing, and allows for the involvement of volunteers in school activities such as extracurricular programs and sports.

The other two statutes listed above promote measures to protect students from abusers and make schools safer.

### ***Implications for screening***

School boards, school administrators, teachers and volunteers in school settings owe to students the standard of care of a “careful and prudent parent”. School boards are responsible for screening employees and volunteers to ensure that this duty is satisfied.

As well, school boards are required to notify the government if they become aware that a currently or previously employed teacher has been convicted of a criminal offence relating to sexual conduct with minors, or any other offence that the board deems might place students at risk.

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As the teaching profession in Ontario takes the position that teachers should focus on academic subjects, many school boards have had to rely upon volunteers to assist

with extracurricular programming. This increases the scope of persons covered by the statute and the extent of school board administrators' responsibilities for screening personnel.

In April 2000, the Ontario government released the "Robins Report", a comprehensive report containing over 100 recommendations on ways to identify and prevent sexual abuse, harassment and violence in Ontario schools. These recommendations are directed towards several provincial ministries, school boards, the courts, the teaching profession and the federal government. The Student Protection Act and Safe Schools Act, as well as recent amendments to the Education Act are the direct result of the recommendations in the Robins Report. These new statutes have implications for screening in the educational sector as they impose strict requirements for reporting sexual abuse, allow criminal background checks of all persons working or volunteering in a school, and give school principals the authority to deny access to anyone who might pose a threat to school safety.

## **FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT**

RS0 1990 Chapter F.31

## **MUNICIPAL FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT**

RS0 1990 Chapter M.56

### ***Purpose***

These two laws relate to the management and disclosure of personal information held by provincial government departments, agencies, boards and commissions as well as municipalities and regional and local agencies, boards and commissions. As a result, the legislation covers a wide range of public and quasi-public institutions including police commissions, school boards, community colleges, health councils, public utilities and Children's Aid Societies.

Like parallel federal legislation and provincial legislation in other provinces, these statutes seek to balance the legitimate need of public institutions to gather personal information and the rights of individuals to privacy and confidentiality. This balancing is achieved through a complex set of rules regarding the collection, retention, use, disclosure and disposal of personal information held and controlled by public institutions.

The purpose of this legislation is to provide a right of access to information under the control of institutions according to the following key principles:

- Information should be available to the public;
- Exceptions to the above principle should be limited and specific;
- Decisions about the disclosure of government information should be reviewed independently of government; and
- The privacy of individuals should be protected.

A large part of this legislation deals with describing the types of information that may or may not be disclosed, and the circumstances under which exceptions may be made. Personal information relating to the educational, medical,

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psychiatric, psychological, criminal, employment or financial history of individuals is carefully protected. On the other hand, the legislation allows limited and controlled disclosure

where the information relates to law enforcement, including policing, inspections or investigations.

### ***Implications for screening***

The main aspect of this legislation relevant to screening is that any personal record may be disclosed if the individual who is the subject of that record consents to such disclosure. Any individual may also obtain access to a record containing information about himself or herself, and may seek to correct any information that is inaccurate. Thus, most screening measures are based upon the consent and voluntary participation of the individuals being screened.

The next year will see important changes to Ontario's privacy laws. The Privacy of Personal Information Act is in draft form and is expected to be introduced in the Legislature in the autumn of 2002. This statute will harmonize with the federal Personal Information and Electronic Documents Act that in January 2001 extended privacy protection to the federally-regulated private sector and by 2004, will broaden its reach to all sectors, including the charitable and not-for-profit community. These reforms in privacy legislation will have a significant impact on screening as they will provide all organizations, both public and private, with a set of rules to govern the management and disclosure of personal information.

### **HOMES FOR THE AGED AND REST HOMES ACT**

RSO 1990 Chapter H.13

### **HOMES FOR SPECIAL CARE ACT**

RSO 1990 Chapter H.12

### **CHARITABLE INSTITUTIONS ACT**

RSO 1990 Chapter C.9

### **NURSING HOMES ACT**

RSO 1990 Chapter N.7

### **DAY NURSERIES ACT**

RSO 1990 Chapter D.2

### ***Purpose***

These statutes regulate residential services and facilities for elderly, ill, young and disabled persons. The statutes provide for the approval, licensing and funding of subsidized day cares, nursing homes and other residential facilities, and allow the government to establish and monitor standards for the provision of services and care to vulnerable persons.

### ***Implications for screening***

Several of these statutes establish a comprehensive residents' bill of rights. The administrators and personnel of residential facilities are to respect these rights at all times. Of relevance to screening are the residents' rights to:

- Be treated with courtesy and respect and in a way that fully recognizes the resident's dignity and individuality and to be free from mental and physical abuse;
- Be properly sheltered, fed, clothed, groomed and cared for in a manner consistent with his or her needs;
- Live in a safe and clean environment.

None of these statutes makes explicit reference to screening. However, organizations providing residential care under these statutes must meet high standards as a condition of funding and licensing by the government, and have a legal duty to take all reasonable steps to ensure that the stated rights of residents are respected.

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## LIBEL AND SLANDER ACT

RSO 1990 Chapter L.12

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### **Purpose**

Like negligence, defamation is a matter addressed by common law. This particular statute pertains to certain portions of defamation law in Ontario. More specifically, it deals

with libel that is defined as publication of defamatory information through broadcasting or a newspaper -- a narrower definition than exists in common law. It also deals with slander as it is generally described in common law.

### **Implications for screening**

The law of defamation has great significance to screening. A major disincentive to an organization disclosing or publicizing negative information obtained through a screening process is the fear of a lawsuit for defamation. This concern also underlies the reluctance of many organizations to provide detailed reasons for the dismissal of an employee or volunteer, or to provide truthful references when requested by other prospective employers.

Individuals within organizations who have responsibility for carrying out screening activities need to be aware of the law of defamation as it exists in common law as well as in the Ontario Libel and Slander Act. In particular, two out of a possible four legal defenses to a claim of defamation are relevant to screening. These two defenses are *justification* and *qualified privilege*.

The *defense of justification* occurs when the otherwise defamatory information about an individual can be proved to be true. The onus of such proof is fairly high and a person relying upon this defense must be confident that they have full, factual and well-documented information. The *defense of qualified privilege* occurs when the person furnishing the information about an individual has a legal,

social or ethical duty or interest to do so, and the person to whom this information is provided has a corresponding duty or interest to receive it. The important public policy objectives of volunteer screening will usually support an individual's defense based upon qualified privilege.

The common law of defamation is evolving in response to developments in information technologies, and in particular the widespread use of electronic mail. We all know how easily an e-mail message can circulate to a large audience, whether intended or not. Information obtained through the screening process should be communicated only to those who need to know, using communication channels that are secure.

## LONG TERM CARE ACT

SO 1994 Chapter 26

### **Purpose**

This complex statute creates a community-based system of flexible and integrated health and social services for persons requiring institutional care. Under this statute, non-profit multi-service agencies and other service providers may be established, licensed and funded to provide community services that are alternatives to institutional care. The statute also sets out standards for such licensing and funding.

### **Implications for screening**

Two aspects of this legislation are relevant to screening. The first is the inclusion in this legislation of a clients' bill of rights, similar to the residents' bill of rights found in the Nursing Home Act and other legislation governing residential facilities for the elderly, ill or disabled. Two of the statute's clients' rights imply a responsibility to carry out screening of employees and volunteers:

- A person receiving a community service has the right to be dealt with by the service provider in a courteous and respectful manner and to be free from mental, physical or financial abuse by the service provider;

- A person receiving a community service has the right to be dealt with by the service provider in a manner that respects the person's dignity and privacy and that promotes the person's autonomy.

The second aspect of this legislation that has direct relevance to screening is Section 14, which states that "A multi-service agency shall develop and implement a plan for using the services of volunteers in the provision of community services by the agency, and for recruiting, training, supervising, retaining and recognizing such volunteers". As such, the statute imposes a clear and affirmative duty to screen on those organizations that are subject to it.

### **OCCUPIERS LIABILITY ACT**

RSO 1990 Chapter 0.2

#### ***Purpose***

Like defamation, negligence is a matter addressed by common law. This statute pertains to a portion of the common law of negligence dealing with the duties and responsibilities of those who operate premises. Similar statutes exist in all other provinces. These statutes are broad and general in their application, covering all types of organizations, both public and private, and all types of land, property, buildings and other structures.

#### ***Implications for screening***

To understand the relevance of this statute to screening, it is necessary to understand the definition of an occupier and to know specifically what the statute says about the duty of an occupier.

An *occupier* is defined as a person who is in physical possession of a premises, a person who has responsibility for and control over the condition of a premises or the activities carried out on a premises, or a person who has control over persons allowed to enter a premises. *Premises* are defined as land, buildings and other structure erected on land. Occupiers can thus include owners of land or buildings, renters

of land or buildings, and even approved users of land or buildings such as organizations that use a public facility or public park for a one-time event. As well, at any given time there may be more than one occupier of a premises.

Occupiers have an affirmative duty to take reasonable care to ensure the safety of those persons who use their premises. This duty applies to the condition of a premises, the activities being carried out there, and the actions of persons on the premises, whether employees, volunteers, participants or other third parties.

This statute has very broad application for screening. It imposes on occupiers the overall duty to ensure a safe environment through measures to manage risks, including measures to appropriately screen, select and supervise personnel, whether employees or volunteers.

Failure to meet this duty may result in a finding of negligence and liability against an organization. Organizations may also be found to be vicariously liable as

a result of their responsibility for the actions of employees and volunteers, even where the organization itself was not negligent.

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### **ONTARIO HUMAN RIGHTS CODE**

RSO 1990 Chapter H.19

#### ***Purpose***

Human rights legislation in Ontario is similar to human rights legislation in other provinces. The Code asserts the rights of all individuals to equal treatment with respect to services, goods and facilities, accommodation, contracts and employment. Discrimination, whether direct, indirect or constructive (that is, discrimination arising from actions that are not deliberate but nonetheless have a discriminatory effect) is prohibited on a number of specified grounds. These include race, ancestry, place of origin,

colour, ethnicity, citizenship, creed, sex, sexual orientation, age, marital status, same-sex relationship status, family status or disability. In the Ontario Code, as in other provinces, harassment on the basis of sex or any other ground is considered a form of discrimination.

It should be noted that these prohibitions on discrimination are not absolute. For example, it is not discriminatory:

- To deny the sale of tobacco products or liquor to someone who is under 19 years old;
- To restrict certain services or programs to persons of a certain age, such as programs for youth to young people or programs for the aged to those over 65;
- To restrict membership in a private, special interest organization to those persons sharing that special interest; or
- To restrict participation in a program or service to one sex or the other on the basis of public decency.

The Ontario Human Rights Code applies to all government departments and public agencies and institutions, including the provincial government, regional and municipal governments, school boards, colleges, universities and other public and quasi-public boards, agencies and commissions. As well, the Code applies to all organizations providing goods, services, facilities and accommodation to the public and thus applies to the majority of non-profit organizations involved in human and social services, community health services, recreation and sport, and the arts.

### ***Implications for screening***

The Code's provisions relating to discrimination directed towards prospective employees and volunteers are of direct relevance to screening. In many situations, the anti-discrimination provisions of the Code will influence the authority of an organization to make decisions such as whether or not to hire an employee or

engage a volunteer, to alter an employee or volunteer's job duties, or to dismiss an employee or volunteer.

In matters of employment, the Code prohibits discrimination on the grounds of "record of offences". Record of offence is defined as "a conviction for an offence in respect of which a pardon has been granted and has not been revoked, or a conviction for an offence in respect of any provincial enactment". As a result, organizations may not discriminate against a prospective or current employee if he or she has been convicted of an offence under a provincial statute, or if he or she has received a pardon for a criminal offence.

However, there is an important exception to this prohibition. Where an employer can demonstrate a *bona fide occupational requirement* -- in other words, a legitimate requirement that an employee not have a record of offences at all, or not have a record of certain types of criminal offences -- the employer may discriminate. Demonstrating this exception depends on the nature of the job and the nature and timing of the criminal offence.

It should be noted that the prohibition on discrimination on the basis of a record of offenses and the above-noted exception apply only to employees. In recruiting volunteers organizations may, as a matter of policy, discriminate on the basis of prior criminal record.

It is not entirely clear how much of the Ontario Human Rights Code applies to volunteers. The general interpretation is that where a section of the Code specifically uses the terms "employment", "employee" or "workplace", that particular section applies only to employment and not to volunteer situations. Where the Code is silent (as it is in many sections), it is generally taken to mean that the relevant section may also apply to volunteers.

It should be noted that volunteer opportunities within organizations covered by the Ontario Human Rights Code have been viewed as a

service available to the public. Thus, in their volunteer recruitment and screening activities organizations may not discriminate on prohibited grounds. However, keeping in mind that the prohibition on discrimination is not absolute, organizations may discriminate on the basis of age, sex or other ground, depending on the nature of the volunteer position and responsibilities. For example, an organization may want to recruit only youth volunteers for a youth-oriented program, or may seek only male volunteers to work in a residential facility for boys and young men. Exceptions such as these are permitted under the Code.

### **REGULATED HEALTH PROFESSIONS ACT**

SO 1991 Chapter 18

#### ***Purpose***

This statute establishes a number of self-governing colleges for the health professions, including doctors, dentists, nurses, psychologists, physiotherapists and pharmacists. The statute also contains a Health Professions Procedural Code to serve as an overall guide to the disciplinary procedures of each college.

To be employed in one of the regulated health professions, an individual must be a member of the relevant college. As such, these individuals are subject to codes of conduct, must maintain certain standards of practice and professional training, in many cases must carry professional liability insurance, and may be subject to disciplinary procedures for failing to comply with professional or ethical codes and standards. Several colleges also have provisions for public disclosure of the outcomes of disciplinary proceedings against their members.

#### ***Implications for screening***

Although this statute does not contain provisions relating to screening, any organization that is considering hiring or using the services of a regulated health professional, or referring clients to such a professional should, at a minimum, confirm that the

individual is a member in good standing of his or her professional college.

Employers of regulated health professionals also have an obligation to report to the appropriate college any dismissal of a professional for reasons of incompetence, incapacity, professional misconduct or criminal convictions involving sexual misconduct.

### **SOCIAL WORK AND SOCIAL SERVICES WORK ACT**

SO 1998 Chapter 31

#### ***Purpose***

This is recent legislation in Ontario that establishes a professional college of social workers and social services workers. Until this law was passed, Ontario was the only province in Canada without legislation covering the profession of social work. The purpose of this statute is to protect the public by improving professional standards and ensuring better quality services from social workers and social services workers.

Similar to the professional colleges established under the Regulated Health Professions Act, this statute creates a self-governing college having responsibility and authority to:

- Certify social work and social services work practitioners;
- Set and enforce professional and ethical standards;
- Establish procedures for dealing with complaints and discipline of members;
- Promote ongoing professional development of members; and
- Maintain a register of members available to the public.

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### ***Implications for screening***

Any organization hiring or contracting with professionals calling themselves a social worker or social services worker should, as part of their screening procedures, confirm the individual's good standing as a member of the College of Social Workers and Social Services Workers. Keep in mind, however, that this legislation does not cover individuals who might perform social work duties but not call themselves social workers, such as counselors, youth workers, community development workers or child care workers.

This statute imposes significant obligations on social work professionals and also imposes responsibilities on employers. As with other professions, employers have a duty to report to the College any dismissal of a social worker or social service worker for incompetence, incapacity, professional misconduct, or criminal convictions involving sexual offences.



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The views and opinions expressed in this publication do not necessarily reflect those of the Government of Ontario.

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