

COMMENTARY: LEGAL IMPLICATIONS OF AIDS

*The Hon Mr Justice Wallace
Chairman of the Human Rights Commission*

The Hon Justice Michael Kirby has provided a *tour de force* concerning the legal implications of AIDS. He has outlined all the issues with complete clarity and there is nothing which I would add to his remarks. Rather, I shall endeavour to complement his paper by placing before you views on one specific area which is of major concern to the Human Rights Commission, namely discrimination against those who have developed AIDS or who have tested antibody positive.

I begin by affirming that the Human Rights Commission unequivocally supports the introduction of measures to render it unlawful to discriminate against those who have developed AIDS or have tested antibody positive. The Commission has made a specific recommendation to that effect in its review of the Human Rights Commission Act, carried out late in 1987, which is now before the Government. The reasons which make such legislation essential are all set out in Justice Kirby's paper. Basically they relate to the cruelty and unfairness of discrimination, coupled with the absolute necessity to ensure that those who have contracted AIDS, or suspect they may have done so, are not deterred by fear of discrimination from co-operating in appropriate public health measures to inhibit the spread of the virus.

The Human Rights Commission is, therefore, entirely supportive of measures to prevent discrimination against AIDS sufferers. On the other hand, the Commission also recognises that where necessary others have the right to be protected. Moreover, such is the fear of AIDS, that measures to prevent discrimination must be able to be defended on a sensible, realistic and medically sound basis. Otherwise proposals for legislation will rightly be overwhelmed by a flood of opposition. We must ensure that any legislation is *not* susceptible to reasonable or soundly based objection.

Bearing in mind those matters I would like to discuss what concrete shape we should give to anti-discriminatory legislation in relation to AIDS. I take the approach of outlining the possibilities rather than dictating solutions, though I will indicate my personal views. There are at least five major issues which require consideration:

- 1 The first issue is whether AIDS should be specified as a separate ground of discrimination. In some quarters there is support for the inclusion of AIDS under the head of disability or impairment (both physical and mental). When reviewing the Human Rights Commission Act the Commission recommended that it should be unlawful to discriminate on the ground either of disability or AIDS,

but did not make suggestions as to whether disability and AIDS should be dealt with separately.

- 2 The second issue is the identification of the types of discrimination which should be unlawful. It would seem that the legislation should cover everyone who has developed AIDS as well as those who are antibody positive and those who, while not in either category, may be presumed or suspected to be, eg a parent, partner or friend of a person found to have AIDS, or members of groups such as gay men or intravenous drug users. The inclusion of those presumed or suspected to have AIDS is important because the evidence from overseas shows that people in that category can be the subject of severe discrimination. It should be noted that careful attention to definitions will be required, particularly if AIDS is to be treated as a form of disability or impairment: for example, it can be argued that a person who has tested antibody positive is not yet suffering from any disability or impairment.
- 3 The third issue is the identification of those matters which the legislation should not cover or, put another way, what exceptions should be allowed on grounds such as the protection of the public or the safety of health professionals and other *careers*. Determining those matters involves either creating a list of exceptions (which it is difficult to draft adequately and which I do not favour) or, alternatively, developing the North American concept, little used so far in relation to anti-discriminatory law in New Zealand, of bona fide occupational requirement (which I favour). By way of explanation I mention that the concept of bona fide occupational requirement would enable the Equal Opportunities Tribunal to consider, before holding that there was unlawful discrimination, whether there was a proper reason for the discrimination based on an occupational requirement, eg in relation to a health professional with AIDS who should not be employed to carry out procedures which may put a patient at risk. The reverse case may also require to be covered, eg the need for a health professional to be able to take proper steps for his or her own protection.

Recognition of a bona fide occupational requirement defence should be coupled with an acknowledgement that the requirement must go no further than whatever is reasonable in all the circumstances. It should also be noted that a similar result can be reached by recognising a reasonable accommodation requirement, ie an obligation to take reasonable steps to accommodate the needs of those who have contracted AIDS. By using the concepts of bona fide occupational requirement or reasonable accommodation, an anti-discriminatory regime can be developed which takes full account of the rights and obligations of all. Such an approach is entirely in line with the United Nations International Covenants on Human Rights, which accept that rights are not absolute and may be restricted by considerations of public order, health or safety or the need to protect the rights

of others. As examples of a typical bona fide occupational requirement approach I have annexed to this paper copies of (a) the AIDS policy recently adopted by the Canadian Human Rights Commission and (b) the City of Los Angeles Ordinance prohibiting AIDS-based discrimination.

- 4 The fourth issue relates to legislation concerning testing and the confidentiality of test results. It is clear that, because of the fear of AIDS, there is a widespread public perception that at least certain categories of people should be required to undergo compulsory testing. In this paper Justice Kirby has referred to Australian poll results and there are similar poll results in New Zealand. Thus the Sunday Star of March 19, 1989 reported a poll conducted by it which showed that:

More than half the people surveyed . . . want compulsory AIDS tests given to everyone entering hospital or getting married.

A third support the mass testing of all New Zealanders over the age of 16. The poll shows widespread concern about the spread of the disease and a hard line attitude to high risk groups.

A sweeping 87% believe every intravenous drug user should be tested for the virus; and 75% support the involuntary screening of homosexuals.

Almost half (49%) say applicants seeking life insurance must have the blood test.

For the reasons given by Justice Kirby it seems clear that all forms of mass testing and most, if not all, forms of group testing should be resisted. What is needed is informed, voluntary and confidential testing, with any exceptions to confidentiality covered by appropriate legislation (which should include an obligation to provide counselling for those who test antibody positive). Some States in the USA now have legislation of that type and I annex a copy of an Act adopted in Illinois in 1988 (c).

- 5 As a fifth and final matter I mention that in the insurance field there are a number of issues which require special consideration. Thus there is debate as to whether insurers should be entitled to require testing: see the commentary by Benjamin Schatz, [1987] Harvard Law Review 1782; and while it may be justifiable for an insurer to ask appropriate questions of people seeking insurance in order to ascertain the extent of the risk the insurer is undertaking, it is highly undesirable that an insurer should ask questions which stereotype or wrongly stigmatise whole groups of people (eg a question concerning sexual orientation asked with a view to excluding all gay men from cover irrespective of whether they have engaged in any conduct placing them at risk). It is encouraging to note that the Life Offices' Association is giving consideration to a code which provides guidelines concerning confidentiality. Such guidelines should emphasise that, while finding out about a person's activities may be permissible, asking about

their sexual orientation and lifestyle is not. There should also be no assumption that people who have at some time voluntarily taken a test are likely to be at risk.

I conclude by indicating that I have dealt with five important issues as briefly as possible in order to enable me to keep my comments within the time limit. I would, however, be grateful to hear any views which participants in the seminar may have. Since the Government is at this time considering what changes should be made to the Human Rights Commission Act there is the opportunity to forward any recommendations or suggestions which may result from this seminar.

(a)

Canadian Human Rights Commission Policy 88-2
July 1988**CHRC AIDS policy to deal with facts, not fears.**

The Canadian Human Rights Commission has adopted the following policy concerning AIDS.

- 1 The Commission will assist in fostering improved public understanding of AIDS.
- 2 The Commission will deal with the complaints that allege discrimination
 - a) as a result of infection with the Human Immunodeficiency Virus (HIV) on the basis of disability; and
 - b) due to stereotypical assumptions that an individual is HIV infected based on that individual's membership in a group associated with the HIV infection. The complaint will be based on the grounds of perceived disability and sex, race, colour or national or ethnic origin.
- 3 The Commission will deal with complaints where the discrimination alleged results from association with a person who suffers from the HIV infection.
- 4 The Commission will consider being HIV infection free a bona fide occupational requirement (BFOR) where an individual assessment has determined no other arrangement of duties is possible and it is an essential requirement of a position that:
 - a) the employee perform invasive procedures; or
 - b) the employee travel to countries which bar entry to those infected with the HIV; or
 - c) the employee perform job duties which impinge on the safety of the public and performs these duties alone.HIV antibody testing should take place only where the above conditions apply.
- 5 The Commission will not consider employer or employee preference as sufficient to establish a BFOR nor will it consider employee preference sufficient to establish a bona fide justification (BFJ).
- 6 The Commission will consider a bona fide justification (BFJ) where the service requires invasive procedures which result in exposure to blood or blood products and the risk is real after all reasonable precautions have been taken.

When the Commission launches a complaint, it is dealt with like any other complaint under the Human Rights Act, and the employer must answer a charge of discrimination, which, if proved, can oblige the organization to mend its ways. Since the Commission cannot pursue every case at once, some employers whose employment-availability gap is only moderately satisfactory will be asked to undertake an analysis of their hiring practices.

CHRC adopts AIDS policy

As society becomes increasingly aware of the importance of the war on AIDS, the Canadian Human Rights Commission is doing its part to protect individuals from acts of discrimination that are based on groundless fears. Chief Commissioner Maxwell Yalden has stressed that we must be guided by the best available scientific information on the disease itself and not by misinformed prejudices against individuals or groups. This is the underlying principle of the Commission's new policy on handling AIDS-related complaints. The Commission's policy opens the door to complaints from two groups — people who are not infected with the HIV (human immunodeficiency virus) but who say they have been discriminated against either because they associate with people who are infected or they belonged to a group of people that is regarded as especially vulnerable to HIV infection.

Three occupational requirements may on occasion and in very specific circumstances justify treating employees who are infected differently from other employees. The particular situations covered by CHRC policy concern:

- employees who carry "invasive" procedures as an unavoidable part of their work.
- those who must travel to countries which refuse entry to people who test positive for HIV antibodies; and
- situations where sudden deterioration of the brain or central nervous system could compromise essential safety requirements.

People in these three categories may be tested for HIV infection where there is a specific reason to do so. But the Commission is opposed to mandatory testing for all employees or prospective employees. Objections by co-workers to associating with people known to be infected with the HIV will not be accepted as an adequate reason on its own for discriminatory treatment on the part of the employee.

"The Canadian Human Rights Commission in no way underestimates the gravity of AIDS," Mr Yalden said. "But it is no less important that we distinguish objectively between what does and does not pose a threat to public health. It is our business at the Commission to make sure that the AIDS scare does not become a pretext for totally unwarranted and discriminatory treatment of individuals or groups."

(b)

**Los Angeles Ordinance No 160289
 ¶20,950A**

The city of Los Angeles, California, has issued Ordinance No 160389, which prohibits discrimination against persons with AIDS or AIDS-related conditions in employment, housing, business establishments, and other public accommodations. This ordinance has been codified in the Los Angeles Municipal Code as Chapter III, Article 5.8., Sections 45.90–45.93, and it went into effect on August 16, 1985.

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[¶20.950A.001]

Sec. 45.80. Statement of Policy: — After public hearings and receipt of testimony the City Council finds and declares:

That the medical condition described as Acquired Immune Deficiency Syndrome and commonly known as AIDS is a deadly disease which has potential to affect every segment of our City’s population.

That AIDS was first recognized in 1981 by the Federal Center for Disease Control based on the study of a pattern of unusual illnesses among young, single men

reported by the medical center associated with UCLA within our City.

That AIDS in the opinion of the scientific and medical community is caused by a virus, known as HTLV-III or LAV, which attacks and cripples the body's immune system, thereby leaving the body vulnerable to opportunistic infections.

That a person afflicted with AIDS suffers a variety of virus and/or fungus-caused illnesses which debilitate the body resulting in a high mortality rate within three years after diagnosis.

That the spread of the virus has occurred through the exchange of blood fluids, ie, blood, blood by-products, or semen, between individuals.

That no evidence exists to indicate the spread of the virus by casual contact.

That medical studies of family groups in which one or more persons have been diagnosed with AIDS show no spread of the virus other than through sexual intimacy or through the exchange of blood (mother to fetus).

That the virus can thrive only in favourable conditions, and cannot exist for a significant period of time outside the body, and can be protected against by the application of hygiene, such as the use of chlorine in swimming pools or spas and the use of household bleach when washing garments or cleaning contaminated surfaces.

That the public health danger represented by the virus and its subsequent manifestation as AIDS is caused by the lengthy incubation period during which period an apparently healthy individual may spread the disease to other persons through the exchange of blood, blood by-products, or semen.

That AIDS while recognized as a national public health emergency has been concentrated in urban areas with our city representing the third highest number of cases reported within a local public health jurisdiction.

That AIDS in the opinion of the scientific and medical community will continue to increase at a high rate within our city for the foreseeable future.

That AIDS by its nature has created a discrete and insular minority of our citizens who are afflicted with a seriously disabling condition whose ultimate outcome is fatal.

That the persons afflicted with AIDS represent a segment of our population particularly victimized due to the nature of the disease and to the present climate of misinformation, ignorance and fear in the general population.

That discrimination against victims of AIDS and AIDS related conditions exists in the City of Los Angeles.

That persons with AIDS or AIDS related conditions are faced with discrimination in employment, housing, medical and dental services, business establishments, city facilities, city services and other public accommodations.

That such discrimination cuts across all racial, ethnic and economic lines.

That such discrimination poses a substantial threat to the health, safety and welfare of the community.

That existing state and federal restraints on such arbitrary discrimination are inadequate to meet the particular problems of this City.

[¶20.950A.01]

Sec. 45.81. Definitions:— The following words and phrases, whenever used in this Article, shall be construed as defined in this section:

A **AIDS:** shall mean the disease complex which occurs when an important part of the human immune system is destroyed by the action of a virus known as HTLV-III or LAV. Signs and symptoms of this disease complex are manifested in the afflicted person by a series of virus or fungus-caused illnesses of a chronic nature.

B **Condition related thereto:** Shall mean any perception that a person is suffering from the medical condition AIDS where real or imaginary.

C **Business Establishment:** shall mean any entity, however organized, which furnishes goods or services to the general public. An otherwise qualifying establishment which has membership requirements is considered to furnish services to the general public if its membership requirements: (a) consist only of payment of fees; (b) consist of requirements under which a substantial portion of the residents of this City could qualify.

D **Employer:** Shall mean every person, including any public service corporation and the legal representative of any deceased employer which has any natural person in service.

E **Housing Services** [Not reproduced]

F **Rent** [Not reproduced]

G **Rental Units** [Not reproduced]

H **Person:** Shall mean any natural person, firm, corporation, partnership or other organization, association or group of persons however organized.

[¶20.950A.02]

Sec. 45.82 Employment: —

A *Unlawful Employment Practices.*

It shall be an unlawful employment practice for any employer, employment agency or labor organization or any agent or employee thereof to do or attempt to do any of the following:

- 1 Fail or refuse to hire, or to discharge any person, or otherwise to discriminate against any person with respect to compensation, terms, conditions or privileges of employment on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.
- 2 Limit, segregate or classify employees or applications for employment in any manner which would deprive or tend to deprive any person of employment opportunities, or adversely affect his or her employment status on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.
- 3 Fail or refuse to refer for employment any person, or otherwise to discriminate against any person the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.
- 4 Fail or refuse to include in its membership or to otherwise discriminate against

any person; or to limit, segregate or classify its membership; or to classify or fail or refuse to refer for employment any person in any way which would deprive or tend to deprive such person of employment opportunities, or otherwise adversely affect her or his status as an employer or as an applicant for employment on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

- 5 Discriminate against any person in admission to, or employment in, any program established to provide apprenticeship or other training or retraining, including any on-the-job training program on the basis (in whole or in part) of the fact that such person has the medical condition AIDS or any condition related thereto.

B *Bona Fide Occupational Qualification not Prohibited; Burden of Proof.*

- 1 **Bona Fide Occupational Qualification.** Nothing contained in this Section shall be deemed to prohibit selection, rejection or dismissal based on a bona fide occupational qualification.
- 2 **Burden of Proof.** In any action brought under this article, if a party asserts that an otherwise unlawful discriminatory practice is justified as a bona fide occupational qualification, that party shall have the burden of proving: (1) that the discrimination is in fact a necessary result of a bona fide occupational qualification; and (2) that there exists no less discriminatory means of satisfying the occupation qualification.

C *Exceptions.*

- 1 It shall not be an unlawful discriminatory practice for an employer to observe the conditions of a bona fide employer benefit system, provided such systems or plans are not a subterfuge to evade the purposes of this Article provided further that no such system shall provide an excuse for failure to hire any person.

[¶20.950A.03]

Sec. 45.83. Rental Housing — [Not reproduced]

[¶20.950A.04]

Sec. 45.84 Business Establishments — [Not reproduced]

[¶20.950A.05]

Sec. 45.85 City Facilities and Services — [Not reproduced]

[¶20.950A.06]

Sec. 45.86 Educational Institutions — [Not reproduced]

[¶20.950A.07]

Sec. 45.87 Advertising: — It shall be unlawful for any person to make, print, publish, advertise or disseminate in any way any notice, statement or advertisement with any respect to any of the acts mentioned in this Article, which indicates an intent to engage in any unlawful practice as set forth in this Article.

[¶20.950A.08]

Sec. 45.88 Subterfuge: — It shall be an unlawful discriminatory practice to do any of the acts mentioned in this Article for any reason which would not have been asserted, wholly or partially, but for the fact that the person against whom such

assertions are made has the medical condition AIDS or any condition related thereto.

[¶20.950A.09]

Sec. 45.89 Liability:— Any person who violates any of the provisions of this Article or who aids in the violation of any provisions of this Article shall be liable for and the court shall award to the individual whose rights are violated, actual damages, costs and attorney's fees. In addition, the court may award punitive damages in a proper case.

[¶20.950A.10]

Sec. 45.89 Enforcement:—

A Civil Action.

Any aggrieved person may enforce the provisions of this Article by means of a civil action.

B Injunction

- 1 Any person who commits or proposes to commit an act in violations of this Article may be enjoined therefrom by a court of competent jurisdiction.
- 2 Action for Injunction under this subsection may be brought by any aggrieved person, by the City Attorney, or by any person or entity which will fairly and adequately represent the interests of the protected class.

C Non-Exclusive

Nothing in this article shall preclude any aggrieved person from seeking any other remedy provided by law.

D Exception

Notwithstanding any provision of this code to the contrary, no criminal penalties shall attach for any violation of the provision of this Article.

[¶20.950A.11]

Sec. 45.91. Limitation on Action:— Actions under this Article must be filed within one year of the alleged discriminatory acts.

[¶20.950A.12]

Sec. 45.92 Severability:— If any part or provision of this Article or the application thereof to any person or circumstance is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be effected thereby and shall continue in full force and effect. To this end, provisions of this Article are severable.

[¶20.950A.13]

Sec. 45.93 Exceptions:—

A No part of this Article shall apply to any bona fide religious organization.

B No part of this Article shall apply where a course of conduct is pursued which is necessary to protect the health or safety of the general public.

- 1 **Burden of Proof.** In any action brought under this Article, if a party asserts that an otherwise unlawful discriminatory practice is justified as necessary to protect the health or safety of the general public, that party shall have the burden of proving:

(1) that the discrimination is in fact a necessary result of a necessary course of

- conduct pursued to protect the health or safety of the general public; and
(2) that there exists no less discriminatory means of satisfying the necessary protection of the health or safety of the general public; and

[¶20.950A.990]

Sec. 2. Ordinance No. 160289

Sec. 2. Urgency Clause — The City Council finds and declares that this ordinance is required for the immediate protection of the public peace, health and safety for the following reasons. This ordinance will prevent unlawful discrimination against persons with AIDS or AIDS related conditions in employment, housing, business establishments and other public accommodations. Such discrimination has denied these persons the right to maintain lawful employment, enjoy sanitary housing conditions, seek medical, dental, convalescent and other business services and have equal access to public accommodation, thereby creating condition inimical to the public health and safety. Therefore, this ordinance shall become effective upon publication pursuant to Section 281 of the Los Angeles City Charter.

(c)

Illinois AIDS Confidentiality Act

¶22,577

The Aids Confidentiality Act provides for the confidential use of tests designed to identify any causative agent of AIDS. This law was enacted by PA 85-679, Laws 1987 approved and effective September 21, 1987.

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[¶22,577.01]

Sec. 1 [Title] — This Act shall be known and may be cited as the “AIDS Confidentiality Act”.

[¶22,577.02]

Sec. 2. [Findings of General Assembly] — The General Assembly finds that:

- (1) The use of tests designed to reveal a condition indicative of Human Immunodeficiency Virus (HIV) infection can be a valuable tool in protecting the public health.
- (2) Despite existing laws, regulations and professional standards which require or promote the informed, voluntary and confidential use of tests designed to reveal HIV infection, many members of the public are deterred from seeking such testing because they misunderstand the nature of the test or fear that test results will be disclosed without their consent.
- (3) The public health will be served by facilitating informed, voluntary and confidential use of tests designed to reveal HIV infection.

[¶22,577.03]

Sec. 3. [Definitions] — When used in this Act:

- (a) “Department” means the Illinois Department of Public Health.
- (b) “AIDS” means acquired immunodeficiency syndrome.
- (c) “HIV” means the Human Immunodeficiency Virus or any other identified causative agent of AIDS.
- (d) “Written informed consent” means an agreement in writing executed by the subject of a test or the subject’s legally authorized representative without undue inducement or any element of force, fraud, deceit, duress or other form of constraint or coercion, which entails at least the following:
 - (1) a fair explanation of the test, including its purpose, potential uses, limitations and the meaning of its results; and
 - (2) a fair explanation of the procedures to be followed, including the voluntary nature of the test, the right to withdraw consent to the testing process at any time, the right to anonymity to the extent provided by law with respect to participation in the test and disclosure of test results, and the right to confidential treatment of information identifying the subject of the test and the results of the test, to the extent provided by law.
- (e) “Health facility” means a hospital, nursing home, blood bank, blood center, sperm bank, or other health care institution, including any “health facility” as that term is defined in the Illinois Health Facilities Authority Act.
- (f) “Health care provider” means any physician, nurse, paramedic, psychologist or other person providing medical, nursing, psychological, or other health care services of any kind.
- (g) “Test” or “HIV test” means a test to determine the presence of the antibody or antigen to HIV, or of HIV infection.
- (h) “Person” includes any natural person, partnership, association, joint venture, trust, government entity, public or private corporation, health facility or other legal entity.

[¶22,577.04]

Sec. 4. [Consent for Test Required] — No person may perform an HIV test without first receiving the written, informed consent of the subject of the test or the subject’s legally authorized representative.

[¶22,577.05]

Sec. 5 [Physicians’ Obligations] — No physician may order an HIV test without making available to the person tested information about the meaning of the test results, the availability of additional or confirmatory testing, if appropriate, and the availability of referrals for further information or counselling.

[¶22,77.06]

Sec. 6. [Anonymity of Subject] — A subject of a test who wishes to remain anonymous shall have the right to do so, and to provide written, informed consent by using a coded system that does not link individual identity with the request or result. The Department may, if it deems necessary, promulgate regulations exempt-

ing blood banks, as defined in the Illinois Blood Bank Act, from the requirements of this Section.

[¶22,577.07]

Sec. 7. [Organ or Semen Donations] — Notwithstanding the provisions of Section 4 of this Act, written informed consent is not required for a health care provider or health facility to perform a test when the health care provider or health facility procures, processes, distributes or uses a human body part donated for a purpose specified under the Uniform Anatomical Gift Act, or semen provided prior to the effective date of this Act for the purpose of artificial insemination, and such a test is necessary to assure medical acceptability of such gift or semen for the purposes intended.

[¶22,577.08]

Sec. 8. [Research] — Notwithstanding the provisions of Sections 4 and 5 of this Act, written informed consent, information and counselling are not required for the performance of an HIV test for the purpose of research, if the testing is performed in such a way that the identity of the test subject is not known and may not be retrieved by the researcher, and in such a way that the test subject is not informed of the results of the testing.

[¶22,577.09]

Sec. 9. [Exceptions to Nondisclosure] — No person may disclose or be compelled to disclose the identity of any person upon whom a test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except to the following persons:

- (a) The subject of the test or the subject's legally authorized representative.
- (b) Any person designated in a legally effective release of the test results executed by the subject of the test or the subject's legally authorized representative.
- (c) An authorized agent or employee of a health facility or health care provider if the health facility or health care provider itself is authorized to obtain the test results, the agent or employee provides patient care or handles or processes specimens or body fluids or tissues, and the agent or employee has a need to know such information.
- (d) The Department, in accordance with rules for reporting and controlling the spread of disease, as otherwise provided by State law.
- (e) A health facility or health care provided which procures, processes, distributes or uses:
 - (i) a human body part from a deceased person with respect to medical information regarding that person or
 - (ii) semen provided prior to the effective date of this Act for the purpose of artificial insemination.
- (f) Health facility staff committees for the purposes of conducting program monitoring, program evaluation or service reviews.
- (g) A person allowed access to said record by a court order which is issued in compliance with the following provisions:

- (i) No court of this State shall issue such order unless the court finds that the person seeking the test results has demonstrated a compelling need for the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest which may be disserved by disclosure which deters blood, organ and semen donation and future HIV related testing.
- (ii) Pleading pertaining to disclosure of test results shall substitute a pseudonym for the true name of the subject of the test. The disclosure to the parties of the subject's true name shall be communicated confidentially, in documents not filed with the court.
- (iii) Before granting any such order, the court shall provide the individual whose test results is in question with notice and a reasonable opportunity to participate in the proceedings if he or she is not already a party.
- (iv) Court proceedings as to disclosure of test results shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that a public hearing is necessary to the public interest and the proper administration of justice.
- (v) Upon the issuance of an order to disclose test results, the court shall impose appropriate safeguards against unauthorized disclosure, which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

[¶22,577.10]

Sec. 10 [General Ban on Nondisclosure]— No person to whom the results of a test have been disclosed may disclose the test results to another person except as authorized by Section 9.

[¶22,577.11]

Sec. 11 [Testing Required by Law]— Notwithstanding the provisions of Section 4 of this Act, written informed consent is not required for the performance of an HIV test upon a person who is specifically required by law to be so tested.

[¶22,577.12]

Sec. 12 [Violation as Misdemeanor]— Intentional or reckless violation of this Act or any regulation issued hereunder shall constitute a Class B misdemeanor.

[¶22,577.13]

Sec. 13. [Court Action, Remedies Under this Act]— Any person aggrieved by a violation of this Act or of a regulation promulgated hereunder shall have a right of action in the circuit court and may recover for each violation:

- (1) Against any person who negligently violates a provision of this Act or the regulations promulgated hereunder, liquidated damages of \$1000 or actual damages, whichever is greater.
- (2) Against any person who intentionally or recklessly violates a provision of this Act or the regulations promulgated hereunder, liquidated damages of \$5000 or

actual damages, whichever is greater.

(3) Reasonable attorney fees.

(4) Such other relief, including an injunction, as the court may deem appropriate.

[¶22,577.14]

Sec. 14. [Recovery of Damages Under Department Rules]— Nothing in this Act shall be construed to impose civil liability or criminal sanction for disclosure of a test result in accordance with any reporting requirement of the Department for a diagnosed case of HIV infection, AIDS or a related condition.

[¶22,577.15A]

Sec. 15.1 [Health Insurers Excepted]— Sections 1 through 15 of this Act shall not apply to a health maintenance organization, nor to any insurance company, fraternal benefit society, or other insurer regulated under the “Illinois Insurance Code”, approved June 29, 1937, as amended.

[¶22,577.16]

Sec. 16. [Promulgation of Rules]— The Department shall promulgate rules and regulations concerning implementation and enforcement of this Act. The rules and regulations promulgated by the Department pursuant to this Act may include procedures for taking appropriate action with regard to health care facilities or health care providers which violate this Act or the regulations promulgated hereunder. The provisions of The Illinois Administrative Procedure Act shall apply to all administrative rules and procedures of the Department pursuant to this Act, except that in case of conflict between The Illinois Administrative Procedure Act and this Act, the provisions of this Act shall control.