Ontario Health Coalition
Bill 36 LHINs Legislation Analysis
January 3, 2006

Summary

In Bill 36 the Ministry of Health and Long Term Care has given itself major new powers to order health system restructuring and contracting out.

The legislation covers hospitals, certain psychiatric facilities, long term care facilities (public, non & for-profit), homecare, community mental health and addiction agencies, community health service providers, community health centres and others by regulation. It does not include family doctors, chiropodists, dentists, optometrists, independent health facilities, labs, public health and certain corporations of health professionals. If the purpose of the legislation is to create an integrated health system, it is impossible to see how this could be done without the inclusion of the major providers of primary health care.

The legislation centralizes - rather than regionalizes - control over the health system. The Minister shall issue a strategic plan for the health system. The LHINs are appointed by cabinet and will be provided with funding from the Ministry at the Minister's discretion. They will be bound by Accountability Agreement to allocate that funding and find integration opportunities following the direction of the Minister's strategic plan. In turn, in their regions, the LHINs will come to Service Accountability Agreements with the health providers covered in the legislation. These Service Accountability Agreements will be required to comply with the direction of the strategic plan set out by the Minister. They will be backed by court order. The legislation overrides current provisions for democracy and community control over health provider organizations. The legislation mandates the LHINs to seek opportunities to transfer or merge services, to coordinate interactions and create partnerships (between non-profits or for-profits).

The most recent major round of health restructuring through the creation of the Health Restructuring Commission in 1996 covered only hospital services and did not include the extensive powers and scope set out in this legislation.

This is a very complex piece of legislation with many implications that will no doubt lead to much legal wrangling if it is passed. Some of the major issues of interest to patients, caregivers, careworkers, health professionals and providers are covered in our analysis. However, the full implications of the legislation's provisions pertaining to powers to transfer property and services, the funding arrangements and implications for hospitals with deficits, and the amendments to other legislation cannot be covered here.

There are some significant dangers in this legislation. While the legislation specifies how the LHINs, Ministry and cabinet can exercise their powers to order restructuring and indemnifies them from liability for those decisions, it is short on provisions for democratic control, public input, public notice, and principles to guide this health restructuring. For those of us who support an enhanced and strengthened public non-profit health system, this legislation does nothing to extend the public health system or promote non-profit health care. In fact, the legislation promotes privatization in several ways and facilitates the spread of competitive bidding through the hospital system.

Some of the main concerns with the legislation are:

1) The provisions for democratic input and community control are weak or non-existent.
- the legislation supercedes democratic safeguards set out in other pieces of legislation.
- the Minister of Health is not held to any democratic process for his strategic plan or his restructuring decisions.
- the provisions for community input are vague and to be left to regulation.
- all democratic safeguards are inadequate: there are no provisions for community appeal, few requirements for public notice, inadequate protection from conflict of interest, no protection of equality-seeking groups.

2) The legislation facilitates privatization.
- cabinet it expressly given new powers to order wholesale privatization of non-clinical services.
- there is no protection or promotion of non-profit and public delivery of services, in fact the legislation empowers the Minister to order these services to be closed down but does not give him the power to do the same to the for-profits.
- there is no protection against OHIP services being cut. In fact, LHINs may insulate the Minister from the political consequences of such cuts.
- there is no protection against a corporate for-profit bias on LHINs boards or among key LHINs personnel. - the current Ministry strategy of spreading competitive bidding through key acute care services in hospitals will create new opportunities for for-profit corporations to bid on services. There is no protection against this for-profit privatization in the legislation.

3) The principles governing the direction of health restructuring and accountability for the government are inadequate.
- although all health providers covered are made accountable through Service Accountability Agreements to be backed by court order, the Ministry itself is held only to the undefined principle of acting in the public interest in the Preamble (not legally binding) to the legislation.
- Canada Health Act principles of comprehensiveness, universality, accessibility, portability and public administration are not included.
- The lack of clear direction or principles to protect the public interest is of deep concern since recent speeches and interviews by the Health Minister indicate that his strategic direction is to centralize and consolidate hospital services and community mental health agencies. Under the provincial "wait times strategy" the Ministry is implementing a competitive bidding system for hospital services such as cataract surgery or hip and knee replacements. This bidding system is structured to result in fewer hospitals providing such services, thereby worsening inequalities of local access to health services.

4) The legislation sets up an expensive extra administrative tier for no clear benefit.
- the 14 LHINs entities will operate like regional ministries with awesome powers, heavy administrative requirements, and little public accountability for improving the health system. Experts agree that the legislation and restructuring is likely to spawn many expensive legal batttles. The added administration and legal fees will be costly. Yet there is no promise of improved comprehensiveness, or accessibility, or extention of public coverage envisioned in this legislation. No rationale is given for setting up the LHINs or for centralizing powers.

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A Health Restructuring Act

The legislation defines integration as the following:

- to coordinate interactions and services
- to create partnerships (for or non-profit)
- to transfer, merge or amalgamate
- to order providers to start or cease provision of services
- to order providers to dissolve or wind up operations

The term integration in health care can mean many things -- from creating a seamless continuum of care to cutting and amalgamating health service providers to contracting out services. **This legislation uses the term "integration" to cover a range of activities that OHC members have come to understand as understand as health "restructuring".**

This legislation centralizes more powers than during any restructuring that has occurred to date in Ontario's health system without any clear explanation as to why and for what purposes this power is to be used.

LHINs Scope and Purpose

Scope:The legislation covers all hospitals, some mental health facilities, charitable homes for the aged, community health centres, and a host of government funded health service agencies. It excludes doctors, dentists, chiropodists, optometrists, and certain corporations of health professionals. *(Part I)*

Main Goal of Legislation: To establish and empower the LHINs, to give the LHINs new powers, and to give the Minister and Cabinet new powers. The legislation sets up and continues the 14 LHINs as per the latest map provided by the Ministry. The size and area covered by the LHINs can be changed by the Ministry. The legislation gives cabinet the power to establish, dissolve or amalgamate LHINs at will. *(Part II: 1,2,3)*

Mandate and Powers of the LHINs

LHINs' plans must follow the direction set out by the Minister. Their mandate includes the following and any additional powers as delegated by the Minister:

- Promoting "integration"
- Planning for health services within their boundaries, including planning for capital
- Allocating and providing funding for health services within their boundaries

What Does This Mean?

Is this the Same as Regionalization or a Fully Public Health System?
No. LHINs are not allowed to acquire property aside from office space and are expressly forbidden to provide health services directly. This makes the LHINs fundamentally different than regional health authorities in other provinces.

Rather than moving decisions closer to communities, the LHINs legislation actually centralizes power to the Health Minister and cabinet by giving them new powers over local health providers.

The LHINs, under this legislation, are made up of government appointees with the purpose of re-organizing the local health system based on targets and goals set out by the LHIN under the direction set by the Minister. The goals for health system reorganization are not set out in the legislation.

Who's Not Covered?
Notably family doctors, private diagnostic clinics and labs are left out of this legislation. If the goal of the legislation was to provide a seamless continuum of care or improved case management, it would be impossible to do so without including the main primary health care providers.

In addition, some new powers apply only to non-profits, not to for-profits.

- Establishing partnerships (these can be non-profit or for-profit)
- Establishing their own channels for input or complaints (no provincial standards for these)
- Evaluating, monitoring and reporting on their area
- Bringing "economic efficiencies" to their area, setting and implementing performance standards, priorities, system management

LHINs cannot acquire property except for an office, borrow or invest, give away its own property, create a subsidiary, or provide health services. *(Part II: 5, 6)*

For example, the minister's power to order the transfer of property, amalgamations and closures applies only to the non-profits and not to the for-profits.

Powers To What End?

The use of the new powers contained in this legislation will likely become clearer when the Minister makes public his strategic plan for the health system. Under this legislation, the LHINs are required to execute their powers following the direction of the strategic plan set out by the Minister. They will be bound by accountability agreement with the Ministry to do so. There is no process of public input or debate to precede the setting of the strategic plan. It will be publicly available once it is set. However, in speeches and interviews, the direction of the Minister has become clearer.

Competitive Bidding in Hospitals

One major concern is that the current direction of the Ministry is to expand a price-based competitive bidding system through acute care hospitals. Thus, for example, the regional hospital that bids under a centrally-set target price for hip and knee replacement surgeries would get the funding for the region and patients would be required to travel further to access health services. Under this legislation, the LHINs would have the power to allocate funding, and therefore services, to hospitals that under-bid others. While many civic-minded community members have been fundraising for generations to improve local access to services, the direction of the ministry is the opposite – to consolidate services into hospitals that specialize.

Amalgamation of Community Agencies

The Minister has also mentioned in several speeches and interviews the number of mental health community agencies. This legislation gives the LHINs and the government the power to order the amalgamation or closure of these agencies.

What Does This Mean?

This system of "market competition" that has been so destructive in homecare is already being introduced to the hospital sector under the guise of the "Wait Times Strategy". The Ministry surveyed hospitals to find out prices for cataract surgery. It then set a central price target and funded those hospitals that provide surgery at that price. A reduction in the price target is the next goal. The concerns are these:

1. There is nothing in the LHINs legislation to ensure that services are moved to non-profit entities (while there are some limitations on transfer of charitable property, there are none on transfer of services). It is likely that a future government will not likely be committed to limiting the new health bidding "market" to non-profits. Governments in other jurisdictions that have adopted this "new management" or "market" approach to health care have ultimately allowed for-profit clinics and ever-deepening privatization.

2. The competitive bidding system requires the creation of a pricing system. Once the pricing system is set up, the tools to create a private health insurance system are in place.

3. The evidence is that such pricing and competition systems create the administrative inefficiency of a private health. system, driving up administrative requirements and costs that suck money away from patient care.

4. Competition fragments, rather than integrates providers, turning them from colleagues into competitors.

5. Centralization of services reduces local accessibility, exacerbating inequalities of access.

LHINs Lines of Accountability

Who are the LHINs Accountable To?
Under this legislation, the LHINs are not accountable to their communities: all lines of authority are drawn upwards to the Minister and cabinet.

- the LHINs Boards will be appointed for up to 6 years by order of Lieutenant Governor in Council (cabinet) and can be terminated at any time
- their remuneration is set by cabinet
- the chairs and vice chairs will be appointed by cabinet
- cabinet may exclude any persons or classes of person from LHINs membership
- the minister may step in at any time to change proposed or enacted by laws
- the LHINs board has the power to appoint their own committees subject to guidelines of the minister
- all plans forged by the LHINs must be in keeping with the strategic plan and LHIN accountability agreement set out by or with the minister.

(Part II: 7, 8)

Is there Public Access to Meetings?
Cabinet will determine through regulation which LHINs meetings shall be public and on which items meetings will be held "in camera" (closed sessions). Public notice requirements are minimal, the legislation requires only that public notice of meetings be given "in a manner that is reasonable in the circumstances". *(Part II: 9 (3) and (4))*

Is there Community Input/Accountability to Local Community?
There is no requirement for a public process of consultation on any of these plans. The legislation states only that the community shall be "engaged" and a committee of health professionals without any mandate be set up in each LHIN. The details of these shall be put into regulation by cabinet. *(Part III: 16)*

What Protections are there against Conflict of Interest?
The LHINs are set up as Crown Agencies and are subject to the conflict of interest rules as such. However, there is no "sunset clause" to prevent a revolving door between the for-profit health industry and the LHIN.

What Does This Mean?

How is the LHINs accountability different than other organizations?
The LHINs legislation is a major departure from established democratic regional bodies like schoolboards and municipalities since the legislation contains few or no structures or processes for community input or control (and their size means that they cover areas much bigger than communities, established political boundaries, or established social boundaries). The LHINs are required to engage the community but the definition of this engagement is left to regulation. Even public access to LHINs meetings is left to regulation and requirements for public notice before decisions are negligible. The legislation makes no promises of public consultation on any issues - simply "community engagement". The public cannot appeal LHINs or Ministry restructuring orders, except, presumably by political protest.

LHINs are accountable to the government, not the local community. LHINs board members are political appointments, the chairs and vice chairs are appointed by cabinet, not elected by the boards or memberships. These decision makers owe their positions and remuneration to cabinet and can lose their appointments at cabinet's will. The minister may step in and change by laws at any time.

Is it usual to have the ability to hold meetings "in camera" at the sole discretion of cabinet?
In order to protect public accountability, municipalities and schoolboards are expressly not allowed to meet in closed sessions except under a short list of specified circumstances.

The Health System Under the LHINs:

The Strategic Plan for the Health System
According to this legislation, the Minister shall develop a provincial strategic plan for the health system that includes a vision, priorities and strategic directions for the health system. There is no provision for any public consultation or process for this plan. Copies will be available at Ministry offices when it is done. *(Part III: 14)*

Local Plans
The LHINs will similarly make a local health services plan that is to be consistent with the provincial strategic plan. Copies to be made available when done. *(Part III: 15)*

Funding and Accountability Structure
The Minister will allocate funding to the LHINs "on the terms and conditions that the Minister considers appropriate". *(Part IV: 17)*

Each LHIN will enter into an accountability agreement with the Minister for the local health system. The agreement shall include performance objectives, standards, targets and measures, reporting requirements, budget, performance management process and any other prescribed matters. If there is no agreement on the accountability "agreement", the Minister can set it unilaterally. *(Part III: 15 and Part IV: 18)*

The LHIN then enters into service accountability agreements with all health service providers that receive funding from the LHIN. There is no requirement for public input or notice of these agreements. *(Part IV: 20)*

Existing agreements between the Ministry and health service providers, including those that include third parties, may be assigned to LHINs. All of these agreements will be terminated once either the agreement ends or the LHIN enters into an Accountability Agreement with the service provider. *(Part IV: 19 (4))*

What Does This Mean?

How is this different than established democratic process?
When a major change in policy direction is envisioned in a parliamentary democracy, there is precedent for appropriate consultation processes to be followed. Even the Conservative government, despite its abysmal record on democracy, had a public consultation process before ordering health restructuring. It is a disturbing trend that these processes have been eroded to the point that we now see in this legislation.

Normally, a change in the strategic direction of an entire ministry covering a vital service like health would include some or all of the following processes:

- a White Paper or similar document setting out the intended strategic direction would be issued publicly, or the intention to create a piece of legislation would be announced
- there would be broad consultation which would be on the record and available for public perusal
- the results of the consultation would be used in the drafting of legislation
- the legislation would be sent to committee and go to hearings
- there would be consultation, on the record, in the hearings
- the legislation would be amended, debated in the legislature and passed.

This legislation describes a process in which the Minister, without any consultation process or any public input on the record, will set out the strategic direction for the entire health system and implement it, backed by court order. Existing legislation providing for consultation or compensation is overruled by this legislation.

Restructuring Powers

Integration
The legislation defines integration in the way that we would define "restructuring" as the following:

- to coordinate interactions and services
- to create partnerships
- to transfer, merge or amalgamate
- to order providers to start or cease provision of services
- to order providers to dissolve or wind up operations

Under the legislation, the LHINs, the minister and cabinet are given powers to restructure the health system as follows:

LHINs may

- may change funding levels for providers
- may create partnerships, transfer, merge, or coordinate interactions for persons, entities, or services – these can be between existing providers or third parties (for-profit or non-profit)
- order health providers to do these things or not do these things
- order health providers to which it provides funding to provide or cease providing services or any part of these; transfer services; receive services transferred from another person or entity; transfer or receive property or other activities required to do accomplish this restructuring (this can be between non-profits and for-profits unless prescribed)
- amend or revoke these decisions
- order a health service provider not to proceed with any integration it may want to do on its own

(Part V: 25, 26, 27 and Part I for definition)

LHINs may not

- order "a transfer of services that results in a requirement for an individual to pay for those services, except as otherwise permitted by law"
- do anything contrary to the accountability agreement with the Minister
- make these orders re. services that are not at least in part funded by the Ministry
- close down health providers
- change the structure of the boards or memberships of health providers
- force amalgamations of provider corporations

What Does This Mean?

Power to restructure
This legislation is, at its core, a legislation to empower the Ministry directly, and through LHINs, to execute a new restructuring of the health system. The legislation confers powers that expressly override previous legislation that set out processes for the disbursement of charitable or non-profit property, the guidelines for the civil service, compensation for expropriation of property, or processes for the enactment of statutes.

Privatization
The legislation facilitates privatization in several ways:

- The LHINs may move funding, services, employees and some property from non-profits to for-profits.
- Cabinet may order the wholesale privatization or contracting out of all support services in hospitals.
- Note: There is no definition in any Ontario legislation of what constitutes "non clinical" services. Under this legislation, cabinet is given the power to define these services as broadly or as narrowly as they wish.
- The minister may close or amalgamate non-profits, but not for-profits. It is not difficult to forsee a shrinking set of non-profit providers while the for-profits continue and gain new "market opportunities" as the system is restructured.
- There is nothing to prevent the moving of services out of hospitals - where they are covered by OHIP – into the community or other facilities where the government is allowed by law to make people pay out of pocket for them.

- "unjustifiably" force a religious institution to provide a service contrary to their religion
- require the transfer or property held for "charitable purpose" to a person or entity that is not a charity (this relates only to property not to services or employees)
- require a non-charity to receive charitable property and hold it for a charitable purpose.
- apply to the Superior Court to enforce these orders.
- LHINs can be forbidden to do anything that is prescribed by the minister. (i)

(Part V: 25, 26)

Minister may

- order any non-profit health service provider that receives funding from a LHIN to close down (this does not apply to for-profits)
- amalgamate non-profit health service providers (they cannot amalgamate for-profits)
- transfer all of the operations of any non-profit health service providers to other non-profits (this does not apply to for-profits)
- transfer property of non-profits or any other actions necessary to carry out these things (this does not apply to for-profits)
- these orders overrule the Corporations Act, Business Corporations Act, any other act or regulation, letters patent, supplementary letters patent, and by laws of local health providers.
- apply to the Superior Court to enforce these orders
- make regulations specifying additional goals of the LHINs
- make regulations specifying the committees of the LHINs, their composition, qualifications and operating requirements

(Part V: 28, 29)

What Does This Mean?

Privatization continued....

- There is nothing to prevent the cutting of services so that people must pay out of pocket for them.

No process for funding or restructuring

- There is no process set out upon which to decide funding or restructuring and no accountability for the LHINs or the Ministry for these.
- Patients cannot appeal. Community members cannot appeal. Service providers are given one request for reconsideration with the LHIN as the final arbiter.
- Community agencies that grew out of a need to service marginalized or equality-seeking populations are not protected by any provisions for diversity. Further, there is no diversity provision for the boards or any structure or accountability mechanism that would reduce the risk that these populations will be marginalized in the funding and restructuring process.

Cabinet may by regulation:

- order public hospitals to transfer all or any non-clinical services to any for-profit or non-profit entity or person *(Part V: 33)*
- devolve cabinet's and the minister's powers to the LHINs
- change the definition of health service providers covered by this legislation
- make any exemptions to this Act or its regulations
- specify which provisions of the Corporations Act apply to the LHINs
- exclude any person or class of persons from LHINs membership
- decide how the community is to be engaged, how often and who can be engaged, and on what matters
- decide on the function and membership of the health professionals advisory committees of the LHINs
- regulate the funding LHINs provide to health service providers

- order health service providers to return excess funding
- regulate matters that result from the transfers of property
- govern compensation paid out as a result of restructuring orders
- define anything not expressly defined in the legislation

(Part V: 33,34, Part VI:36)

Appeals

A health service provider that is party to a decision by a LHIN may request a reconsideration. The LHIN has the power to make the final decision. Patients, community members and anyone that is not a party to the decision may not appeal.
(Part V: 26, 27)

Specified Purpose Transfer of Property

If an order of transfer of property by the Minister relates to property given for a specified purpose, it must be used for that specified purpose. *(Part V: 30)*

Labour Relations

This section states that Bill 136 applies to transfers under these integration decisions. Please see your union, professional association or other relevant organization for details. *(Part V: 32, 33)*

Notice to Public

The public does not have to be notified of any restructuring orders by the LHINs prior to decisions being made or after decisions are made. The legislation specifies that these transfers etc. are not regulations and therefore are not subject to the public notice and regulation procedures set out in the Regulations Act. The only provision for public access is that after-the-fact the decisions must be made available at the LHINs office. *(Part V: 25(8))*

Ammendments to Other Legislation

The legislation amends many other Acts. Two significant changes:

CCACs

Under Part VII (Complementary Ammendments) the legislation will extinguish the letters patent of the CCACs and they will be incorporated as non profits. The boards will continue until replaced. Boards will have the power to appoint their own chairs and vice-chairs and their Executive Directors. The CCACs may be required by the LHINs to provide additional services. Ironically, while the legislation reinstates some democracy in the CCACs, it does the opposite for the LHINs.

Public Hospitals Act

The definition of hospital has been amended to include hospitals that have only outpatients. We are researching the implications of this.